ORIGINAL

No. 2011-0024

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO
CASE NO. 2009-T-0061

MURRAY A. MILLER, et al.,
Plaintiffs-Appellees,

v.

SAM M. MILLER, et al.,
Defendant-Appellants.

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I. INTRODUCTION

This appeal is the fourth[1] spawned by the protracted litigation between two sets of family members who are officers, directors, and shareholders of a closely held corporation with a deadlocked board. At the heart of the dispute is one officer/director/shareholder's usurpation of a corporate business opportunity, while acting as the corporation's Vice President of Sales and Marketing, then, after being sued, attempting to bill the corporation into submission by claiming that the corporation must advance all legal fees he incurred as a result of his own misconduct. Specifically, after years of litigation and shortly before the scheduled trial, the usurper signed an "undertaking" to "cooperate" with the corporation in connection with the litigation, purportedly in compliance with a statute that requires corporations to advance legal expenses to directors *who are sued in that capacity* (R.C. 1701.13(E)(5)(a), Appx. 25). He then proceeded to misappropriate corporate checks in order to pay hundreds of thousands of dollars to the two law firms representing his interests (as well as those of his partners in the usurped business opportunity). The Eleventh District Court of Appeals correctly concluded that neither the statute nor its purpose supported the gambit.

Appellant and his amicus now cite the salutary purpose of R.C. 1701.13(E)(5)(a) (to encourage participation on corporate boards) to attack the appellate court's refusal to

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[1] See *Miller v. Miller*, 11th Dist. No. 2004-T-0150, 2005-Ohio-5120 ("*Miller I*"), Appx. 14-17; *Miller v. Miller*, 11th Dist. No. 2007-T-0065, 2007-Ohio-5212 ("*Miller II*"), Appx. 18-19; *Miller v. Miller*, 11th Dist. No. 2008-T-0076, 2009-Ohio-2092 ("*Miller III*"), Appx. 20-23; *Miller v. Miller*, 190 Ohio App.3d 458, 2010-Ohio-5662 ("*Miller IV*"). In addition, related proceedings in the United States District Court, District of South Carolina, are referenced in *Miller III*, ¶5, and *Miller IV*, ¶7.

condone Appellant's perversion of the statute for personal gain. But the majority adopted the "only logical interpretation" of R.C. 1701.13(E)(5)(a) under the facts presented — i.e., that the statute does not require a corporation to "advance" legal defense fees to the usurper where "the alleged actions at issue were not taken in [the usurper's] capacity as a director * * *." *Miller IV*, ¶¶50, 58, Sam M. Merit Br. Appx. 17, 19.

Clear guidance on statutory interpretation generally cannot, and does not, result from a party's attempt to create a "loophole" for litigation and financial gain. Appellees believe that once this Court reviews the facts supported by the voluminous record, it will conclude that the cause should be dismissed as having been improvidently accepted, with or without the additional qualifier that the opinion not be cited as authority except by the parties *inter se*. Any decision on the merits, however, should affirm the appellate court's conclusion that the mandatory advancement of legal fees to directors in R.C. 1701.13(E)(5)(a) applies only to directors who have been sued as a result of acts taken in their capacity as directors, which is not the case here.

II. COUNTERSTATEMENT OF THE CASE AND FACTS

Appellant's Statement of Facts leaves out facts essential to an understanding of the Eleventh District's decision. The true facts underlying this dispute reveal a pattern by Appellant of invoking perceived "reimbursement" obligations on multiple occasions as a sword to cripple Appellees' ability to pursue their claim that he breached his duties to the corporation when he pursued and then usurped a business opportunity while acting as a corporate officer.

A. The Parties

1. Trumbull Industries.

Founded in 1945, Plaintiff-Appellee Trumbull is a closely held corporation and distributor of vitreous china plumbing fixtures that it purchases from manufacturers such as Jacuzzi and sells to plumbing contractors and entities such as Lowe's. (6th Am. Compl., at ¶7, Supp. 4; Tr. of 4/29/03 Cross of Sam M. at 4-7, Supp. 40-43.) Vitreous china is china that has been treated to remove moisture, resulting in a glassy, non-porous finish. (Tr. of 4/29/03 Cross of Sam M. at 6, Supp. 42.) It is commonly used in toilets and other bathroom fixtures. (Id.)

Part of Trumbull's marketing and sales activities include the "private branding" of certain plumbing products. (Tr. of 4/29/03 Cross of Sam M. at 19, 175-76, Supp. 50, 110-111.) "Private branding" is a concept used in many industries, and refers to the practice of a manufacturer selling product in bulk to another manufacturer or distributor, which places its own name on the product for re-distribution. (Id. at 40-41, 45-46, Supp. 65-66, 70-71.) For instance, Trumbull has sold vitreous china products, such as toilets and lavatories, which are manufactured — or "sourced" — through another entity and sold by Trumbull under the private brand name "Samson." (10/3/05 Aff. of Murray A. Miller at ¶2(D), Supp. 158; Tr. of 4/29/03 Cross of Sam M. at 18-19, Supp. 49-50.)

2. The owners/officers/directors of Trumbull.

Trumbull is owned by two sets of cousins. The cousins' stewardship of Trumbull manifested in a contentious relationship that spawned numerous lawsuits. (Tr. of 4/29/03 Cross of Sam M. at 9-10, 147-50, Supp. 45-46, 105-08.) As a result, "the Board has

effectively been deadlocked since the mid to late 1990s, when the sole outside director of Trumbull Industries, Richard Mueller, left the Board." *Miller I*, 2005-Ohio-5120, at ¶2, Appx. 14. The four owners/officers/directors of Trumbull are:

Plaintiff-Appellee Murray A. Miller ("Murray"): Murray owns a 25% interest in Trumbull and serves as Trumbull's President. (Tr. of 4/29/03 Cross of Sam M. at 11, Supp. 47; Sam M. 6/29/06 Dep. at 6-10, Supp. 184-85; Murray 6/30/06 Dep. at 5-6, Supp. 175.) In the absence of an active Board, and as part of his duties as President, Murray routinely engages outside counsel to protect Trumbull's interests. (Murray 6/30/06 Dep. at 17-19, Supp. 176; Sam H. 6/29/06 Dep. at 29-31, Supp. 181.)

Plaintiff-Appellee Samuel H. Miller ("Sam H."): Sam H. is Murray's brother and also owns a 25% interest in Trumbull; he is a Vice President of Trumbull. (Tr. of 4/29/03 Cross of Sam M. at 10-11, Supp. 46-47; Sam M. 6/29/06 Dep. at 6-10, Supp. 184-85.)

Defendant-Appellant Samuel M. Miller ("Sam M."): Sam M. is Murray's cousin, a 25% owner of Trumbull, and Trumbull's Vice President of Sales and Marketing; in that capacity, he manages Trumbull's plumbing-industry product lines and has extensive contact with Trumbull's major suppliers and customers in the plumbing industry. (Tr. of 4/29/03 Cross of Sam M. at 4-5, 38, Supp. 40-41, 63.) He was "brought up in [the] family * * * plumbing business," and has worked at Trumbull as a full time employee for over 25 years. (Id. at 3, Supp. 39.)

Non-Party Kenneth Miller ("Ken"): Ken is Sam M.'s brother; he also owns a 25% interest in Trumbull and serves as a Vice President of Trumbull. (Tr. of 4/29/03 Cross of Sam M. at 10-11, Supp. 46-47; Sam M. 6/29/06 Dep. at 6-10, Supp. 184-85.)

One of the lawsuits between the cousins, otherwise irrelevant to this appeal, reached a tentative settlement referred to by the parties as the "Miller Agreement" before Trumbull County Magistrate Anthony Cornicelli on June 14, 2002. (Tr. of 4/29/03 Cross of Sam M. at 147-50, Supp. 105-08.) During the remainder of 2002, the cousins met seven times in their capacity as Trumbull shareholders in an attempt to finalize the Miller Agreement. (Id.) There were no Trumbull board meetings during this time; in fact, the Trumbull board did not meet at all for at least two years prior to the filing of this action in 2003. (Id. at 12, Supp. 48.) Yet it was during the final six months of 2002 that Sam M. pursued the business opportunity that spawned this litigation. (See infra, pp. 6-11.)

3. Parties related to the usurped corporate opportunity.

Defendant Daniel R. Umbs served as President of non-party Briggs Plumbing Products, Inc. ("Briggs Plumbing"), before stepping down from that position in March 2002; he became the business partner of Sam M. in the business opportunity at issue in this lawsuit. (Tr. of 4/29/03 Cross of Sam M. at 32, 39, Supp. 57, 64; Umbs 4/13/07 Dep. at 6-10, Supp. 205-06; Umbs 4/13/07 Dep. Exh. 14, Supp. 213-16.) Sam M. had known Umbs through their participation in the vitreous china business for at least 15 years before pursuing and usurping that business opportunity. (Tr. of 4/29/03 Cross of Sam M. at 31-32, Supp. 56-57.)

Defendant Private Brand Organization, LLC ("Private Brand") is the "operating entity" Sam M. and Umbs created for the usurped business opportunity; Private Brand sources and sells plumbing-related products. (Umbs 4/13/07 Dep. at 9-13, Supp. 206-07.)

Defendants United States Private Brand Company, Inc., Ameribath Ceramics, LLC, Ameribath of Delaware, Inc., U.S. Sanitary Ceramics, LLC, Cerapro America, Ameribath Ceramic and Ameribath Ceramic Services are additional entities related to the usurped business opportunity that Sam M. and Umbs created, purportedly for "financial taxing purposes." (6th Am. Compl., at ¶¶ 11-17, Supp. 5-7; Umbs 4/13/07 Dep. at 9-15, Supp. 206-07.) Sam M. and Umbs have an interest in all of these entities; the last four are jointly owned with three Mexican investors. (Umbs 4/13/07 Dep. at 14-15, Supp. 207.) There is substantial overlap between the various entities; for instance, Private Brand and the Ameribath entities share employees. (Id. at 29, Supp. 208.)

Defendant David Miller Trust is an irrevocable trust created for the benefit of Sam M. and his wife; it has been named as a defendant because it has an ownership interest in some or all of the defendant-entities named above. (6th Am. Compl., at ¶19, Supp. 7-8.)

B. The Usurped Opportunity.

1. Sam M. solidifies a partnership in September 2002

Around July 2002, Sam M. began exploring a business opportunity with Umbs. (Umbs 4/13/07 Dep. at 72, Supp. 211; Umbs 4/13/07 Dep. Exh. 14, Supp. 213.) That opportunity coalesced into a partnership called Private Brand, the goal of which was to source and sell "private brand" plumbing and related products to manufacturers and

wholesalers — such as Jacuzzi, Zurn, and others — with whom Trumbull had established business relationships as either a customer or distributor. (Id.; Tr. of 4/29/03 Cross of Sam M. at 45-46, Supp. 70-71; 6th Am. Compl., at ¶7, Supp. 4.) Sam M. previously engaged in similar private branding efforts on behalf of Trumbull with Umbs, and he has admitted that this opportunity was a "Trumbull opportunity." (Tr. of 4/29/03 Cross of Sam M. at 18-19, 148, Supp. 49-50, 106; 10/3/05 Aff. of Murray A. Miller at ¶21(D), Supp. 158.)

Sam M. began meeting with potential sources for vitreous china products and potential Private Brand customers, including Jacuzzi, almost immediately. (Tr. of 4/29/03 Cross of Sam M. at 23, 27-29, Supp. 52, 53-55; Umbs 4/13/07 Dep. at 72, Supp. 210; Umbs 4/13/07 Dep. Exh. 14, Supp. 213-16.) Trumbull had been a distributor of Jacuzzi products for almost 20 years. (Tr. of 4/29/03 Cross of Sam M. at 19, Supp. 50; Weeks Dep. at 8-9, Supp. 218.) It distributed Jacuzzi's entire vitreous china product line, which was manufactured by Eljer at that time. (Weeks Dep. at 8-9, Supp. 218.) While meeting with Jacuzzi as the Vice President of Sales and Marketing and manager of Trumbull's plumbing product lines, Sam M. told Jacuzzi he thought the vitreous china manufactured by Eljer was "a miserable product" — it was "high priced and under valued." (Tr. of 4/29/03 Cross of Sam M. at 20, 45, Supp. 51, 70.) Sam M. then suggested a "solution" to Jacuzzi: He and Umbs could approach manufacturers and convince them to manufacture a unique, improved product that could be sold under the Jacuzzi name. (Id. at 45-47, Supp. 70-72.)

In September 2002, Umbs and Sam M. confirmed to Jacuzzi that the business opportunity would not involve Trumbull. During a September 2002 dinner meeting with Phillip J. Weeks (the President of Jacuzzi Whirlpool Bath at the time), Umbs and Sam M. told Weeks they had formed a "partnership to do the sourcing, marketing and/or distribution of china products." (Weeks Dep. at 46, Supp. 219.) They also told Mr. Weeks that "they were talking about their own venture, that it would be separate from Trumbull, an independent company." (Id. at 47-48, Supp. 219.) The remainder of the dinner meeting focused on "Jacuzzi and vitreous china," and whether the Private Brand partnership could "perform[] not only the sourcing, but distribution of the china, particularly in the eastern part of the country." (Id. at 50-51, Supp. 220.) By the end of the discussion, everyone at the dinner meeting understood that any ongoing discussion would be with the Private Brand partnership, not Trumbull. (Id. at 53, Supp. 220.)

2. And acquires a firm commitment from a customer in November 2002

After the September 2002 dinner meeting, Sam M. and Umbs continued to take business trips related to Private Brand. (See, generally, Umbs 4/13/07 Dep. Exh. 14, Supp. 213-14; Weeks Dep. at 60-67, Supp. 221-23.) Sam M. traveled to: Miami to meet with ColCeramica in search of a vitreous china source; Atlanta to meet with another potential vitreous china source, Vitra; South America for another visit with ColCeramica; Turkey to meet with Vitra and two other potential vitreous china sources, Serel and Ege Seramik; and Thailand to meet with Star Ceramic. (Tr. of 4/29/03 Cross of Sam M. at 34-35, 56-57, 80-83, Supp. 59-60, 76-77, 89-92.) To make room for at least some of

these meetings on his schedule, Sam M. pushed back meetings relating to the Miller Agreement with his fellow Trumbull shareholders. (E.g., id. at 63-67, 75-77, Supp. 81-85, 86-88.) And even though all of these trips were primarily for Private Brand business, Sam M. submitted expenses incurred by him and Umbs to Trumbull for reimbursement. (Id. at 83, 121-24, Supp. 92, 94-97.)

By November 2002, Sam M. and Umbs had secured Jacuzzi's business for Private Brand. (Tr. of 4/29/03 Cross of Sam M. at 39, 49-50, Supp. 64, 74-75.) As Umbs later wrote in a January 27, 2003 letter to Kent Baker (Weeks' successor as President of Jacuzzi Whirlpool Bath) that would become known in this litigation as the "Dear Kent" letter, Jacuzzi tentatively agreed to use Private Brand as a china supplier in late October and confirmed its intention to use Private Brand in a November 12 meeting in Chicago:

> We met again in late October at the [American Supply Association] show at which time [Weeks] gave us a tentative go-ahead on becoming Jacuzzi's china supplier. We had a follow-up meeting in Chicago on November 12th and it was a go for us being the china supplier.

(Umbs 4/13/07 Dep. Exh. 14, Supp. 214.) The "Dear Kent" letter also noted that the Private Brand partnership had spent "in excess of $100,000 in time, travel, tooling, samples and graphic arts in establishing the new china line for Jacuzzi," claimed that Private Brand was "instrumental in gaining" business with Lowe's for Jacuzzi, and explained that both Sam M. and Umbs had "put in nearly 1,000 hours" in the last two months of 2002 and January 2003 pursuing Private Brand. (Id., Supp. 215.)

3. Without the knowledge of Trumbull's shareholders.

There is no dispute that Sam M., despite attending numerous shareholder meetings relating to the Miller Agreement, did not inform his fellow shareholders of the Private Brand business opportunity before December 2002. (Tr. of 4/29/03 Cross of Sam M. at 56, Supp. 76.) Indeed, Sam M. waited until *after* a two-day shareholder meeting on December 3rd and 4th relating to the Miller Agreement, to inform the other Trumbull shareholders of Private Brand. (Id. at 87, 169, Supp. 93, 109.) And when Sam M. finally "presented" the Private Brand business opportunity to Trumbull, he did so in a manner intended to assure they would reject it. (6th Am. Compl. at ¶31, Supp. 11-12.)

The Complaint alleges that the memorandum through which Sam M. "presented" the Private Brand opportunity to Trumbull contained numerous material misrepresentations and omissions: among other things, it failed to inform Trumbull that Sam M. had already formed a partnership with Umbs, that Umbs already had an ownership interest in the partnership, that the partnership had already secured a business commitment from Jacuzzi, and that a viable relationship between Jacuzzi and Lowes was a probability and, if it occurred, Private Brand would provide all of the vitreous china Jacuzzi sold to Lowes. (6th Am. Compl. at ¶¶31(A)-(I), Supp. 11-12.) The Complaint further alleges that Sam M. misrepresented the alleged need to form a new entity in which Umbs held a 10% equity interest, which would have resulted in Sam M., Ken, and Umbs gaining control of the opportunity. (Id.) Finally, the Complaint alleges that Sam

M. misrepresented the risks posed to Trumbull by the Private Brand opportunity. (Id., Supp. 11-12.)

Sam M.'s memorandum gave the other shareholders less than two weeks to decide whether they were willing to participate in a business opportunity he had been secretly working on for nearly six months. (6th Am. Compl. at ¶32, Supp. 12-13.)) Murray responded to Sam M. by email within a few days. He did not "explicit[ly] reject[]" the opportunity. (Sam M. Merit Br. at 2.) Rather, Murray explained that action on the Private Brand opportunity would be premature since the Miller Agreement had not yet been finalized, and asked Sam M. to cease any involvement with Private Brand until its implications for Trumbull could be assessed. (Tr. of 4/29/03 Cross of Sam M. at 139-42, Supp. 98-101.) Sam M. understood that his cousin's response was not a rejection of the Private Brand opportunity, but he did not stop working on Private Brand and did not inform his fellow shareholders of his ongoing activities. (Id. at 144, 146, Supp. 102, 104; 6th Am. Compl. at ¶¶33-34, Supp. 13.)

C. The Proceedings Below.

1. A South Carolina lawsuit triggers the protective filing of this action on behalf of Trumbull.

While attempting to finalize the Miller Agreement, Murray and Sam H. learned of a lawsuit filed in February 2003 by Briggs Plumbing against Umbs in the United States District Court for the District of South Carolina, Case No. 2 03 0456 12, for misappropriation of trade secrets and tortious interference with contract. (Umbs 4/13/07 Dep. Exh. 9; 2/24/03 Verified Compl., at ¶17.) Briggs alleged that Jacuzzi had

announced its intention to breach a contract for the supply of plumbing products by Briggs to Jacuzzi, and claimed this breach was procured by Umbs' use of Briggs' confidential pricing and marketing strategies "through his future employer." (Umbs 4/13/07 Dep. at Exh. 9, at ¶¶15-18, 30-37.) A February 12, 2003 Amended Motion by Briggs Plumbing Products, Inc. for a Preliminary Injunction filed in that case identified Trumbull as the "future employer," asserting that "Umbs is currently acting on behalf of Trumbull Industries, Inc., an Ohio corporation that manufactures, sells and distributes plumbing products similar to those sold by Briggs[.]" (2/24/03 Verified Compl., at Exh. A.)

Murray and Sam H. became aware of the South Carolina lawsuit and the allegation that Umbs had been acting on behalf of Trumbull one week later. (2/24/03 Verified Compl., at ¶20.) Upon learning of the South Carolina lawsuit and its potential implications for Trumbull, Murray and Sam H. promptly filed this action to protect the company. (Id.; Sam H. 6/29/06 Dep. at 23, Supp. 179.) Murray and Sam H. did not ask the deadlocked Trumbull Board to authorize the filing of the lawsuit, because it was pointless to ask Sam M. to sue himself, or ask Ken to sue his brother. (Sam H. 6/29/06 Dep. at 25, Supp. 180.)

2. An injunction hearing starts to reveal the true nature of Sam M.'s misconduct . . .

This action proceeded quickly to an April 2003 "trial" on Murray and Sam H.'s request for preliminary and permanent injunctive relief against Sam M.'s further participation in what was then understood as an endeavor that exposed Trumbull to

liability. (Tr. of 4/29/03 Cross of Sam M. at 60-61, Supp. 78-79.) During and after this abbreviated "trial," however, counsel for Murray and Sam H. began to uncover the true nature of Sam M.'s misconduct — including the many meetings with Jacuzzi and others on Private Brand business in the summer and fall of 2002, the submission of expenses relating to those meetings to Trumbull for reimbursement, and Sam M.'s misstatement of the risks to Trumbull associated with the Private Brand opportunity in his December 2002 memorandum. As a result, Murray and Sam H. requested permission to re-open their case-in-chief and to amend their verified complaint to conform to the evidence — including claims of breach of the duty of loyalty that Sam M. owed to Trumbull, fraudulent and negligent misrepresentation of the Private Brand opportunity, and breach of the duty of good faith that Sam M. owed to his fellow shareholders. (6/16/03 Mot. to Am. Verified Compl.; 6/17/03 Mot. to Re-Open Pls.' Case in Chief.) The Trial Court granted both motions in a June 20, 2003 Journal Entry (JE). (6/20/03 JE, Appx. 2).

3. And Sam M. responds by asking the Trial Court to force Trumbull to pay his fees.

The first time Sam M. attempted to manipulate the payment of attorneys' fees in this action occurred when Murray and Sam H. sought to amend their verified complaint and re-open their case-in-chief. In June 2003, Sam M. filed two terse, one-paragraph motions seeking: 1) to compel Trumbull to "reimburse" Sam M. for his defense costs; and 2) to compel Murray and Sam H. to "reimburse" Trumbull for all attorneys' fees that Trumbull had paid on their behalf. (6/17/03 Mot. to Compel Trumbull, Supp. 37; 6/17/03 Mot. to Compel Murray and Sam H., Supp. 36.) Neither motion cited any authorities

supportive of the relief sought (id.); and both were denied by the Trial Court's June 20, 2003 JE as "premature." (6/20/03 JE, Appx. 2.) The Trial Court explained that it would "deal with each of these matters in a separate hearing, upon proper application, after the conclusion of the hearing on the merits." (Id., Appx. 2-3.)

Apparently unsatisfied with this entry, Sam M.'s brother Ken filed a separate lawsuit in the Trumbull County Court of Common Pleas in May 2004, seeking injunctive relief relating to Trumbull's payment of legal fees incurred by Murray and Sam H. in this action. See *Miller I*, 2005-Ohio-5120, at ¶¶3-4, Appx. 14-15. In that action, "the trial court rendered judgment in favor of Murray and Sam H., finding, in relevant part, that while there was no corporate authorization for the payment of legal fees, such authorization was impossible, due to the hopelessly deadlocked nature of the board." Id., at ¶5, Appx. 15. The Eleventh District "affirm[ed] the judgment of the Trumbull County Court of Common Pleas," id. at ¶19, Appx. 17, and Ken did not attempt an appeal to this Court.

4. Sam M. then belatedly produces the "Dear Kent" letter . . .

The litigation continued at a snail's pace, due to difficulties with discovery. Following the amendment of the verified complaint and the June 2003 denial of Sam M.'s request for "reimbursement," the parties engaged in discovery concerning the additional allegations relating to the usurpation of Private Brand. These efforts were marred by Sam M.'s repeated failure to produce relevant documents — including

numerous emails and the "smoking gun" "Dear Kent" letter, which, as explained above, recited many of the particulars relating to the usurpation of Private Brand.

While the Trial Court ordered Sam M. to produce all relevant documents in an April 2004 Journal Entry (see 4/15/04 JE), Sam M. did not produce the "Dear Kent" letter until *after* the filing of a motion for sanctions in November 2004. (See 11/5/04 Pls.' Mot. for Sanctions (Default Judgment); 3/22/05 Pls.' Final Argument, at 7; 3/23/05 Defs.' Closing Argument on Mot. for Sanctions at 16.) The Trial Court ultimately concluded that the "Dear Kent" letter and certain other documents were wrongfully withheld and ordered Sam M. and Umbs to "reimburse Plaintiffs for their reasonable and necessary attorneys' fees and expenses which Plaintiffs incur relative to duplicating depositions or other discovery concerning issues relating to same." (12/19/05 JE.)

5. And "reimburses" his lawyers with Trumbull's money . . .

In September 2005, while the motion for sanctions relating to his failure to produce the "Dear Kent" letter was pending, Sam M.: 1) took Trumbull checks from a lower-level Trumbull safe without the knowledge of Murray or Sam H.; 2) wrote checks to his two law firms, Manchester, Bennett ($171,000) and Guarnieri & Secrest ($98,000), which he personally delivered to their respective offices on September 13, 2005; and 3) executed an "undertaking," which he did not forward to Murray and Sam H. until September 26, 2005 — nearly two weeks after he wrote the checks.[2] The "undertaking"

[2] See Detec Dep. at 67-68, 70, 76, Supp. 166, 167, 168; Rudloff Dep. at 23-24, Supp. 200; Sam M. 6/29/06 Dep. at 20-24, 29-35, 45, Supp. 186-87, 188-89, 190; Sam M. 6/29/06 Dep. at Exhs. 1-A, 1-B, Supp. 196-97.

signed by Sam M. included his promise to: a) repay the "advance payment" of his expenses if it were proved that his conduct involved acts undertaken with the deliberate intent to injure Trumbull, or with reckless disregard of the best interests of Trumbull; and b) reasonably cooperate with Trumbull "concerning the action, suit or proceeding[.]" (Sam M. 6/29/06 Dep. at Exh. 1-B, Supp. 197.)

6. Resulting in a delay of the trial . . .

Sam M.'s improper use of Trumbull checks derailed the scheduled January 2006 trial. On what was to be the first day of trial, counsel for Murray and Sam H. explained that the Trial Court had recently ordered production of invoices by the two law firms concerning the legal fees paid by the Trumbull checks, and he had not yet received copies of the invoices. (See 1/3/06 Tr. at 4-12, Supp. 116-24.) Following extensive voir dire of defense counsel and Umbs, defense counsel represented to the trial court that they were unable to continue at that time for reasons they could not discuss on the record, the Trial Court continued the trial and ordered discovery on the check incident. (Id. at 45-47, Supp. 125-27.)

The ensuing discovery revealed that neither check could reasonably have been considered an "advance" of Sam M.'s defense costs under any interpretation of R.C. 1701.13(E)(5)(a), Appx. 25. Rather, the checks were used primarily to reimburse *Private Brand* for payments *it* had made on Sam M. *and* Umbs' behalf in the past; Umbs had never paid any legal fees relating to this action, and Sam M. only paid for his own

defense for a portion of 2003.[3] Accordingly, instead of keeping the funds as payment for services rendered, Manchester, Bennett forwarded: 1) a payment of $119,283.85 to Private Brand as "reimbursement" for legal fees that Private Brand had paid on Defendants' behalf; and 2) a payment of $36,422 to Sam M. as "reimbursement" for fees that Sam M. had paid on Defendants' behalf. (Detec Dep. at 64, 78-80, Supp. 165, 169; Umbs 4/13/07 Dep. at 67-68, Supp. 210; Sam M. 6/29/06 Dep. at 57-60, Supp. 192.) Guarnieri & Secrest also forwarded a payment of $68,693.75 to Private Brand, based on the instructions of Sam M. (Rudloff Dep. at 28-29, Supp. 201-02; Sam M. 6/29/06 Dep. at 67, 82-83, Supp. 193, 194.) Further, both law firms held substantial sums of money from the Trumbull checks as "retainers": Manchester, Bennett kept approximately $16,000 of Trumbull money as a retainer, while Guarnieri & Secrest kept approximately $20,000 as a retainer. (Detec Dep. at 70-73, 78-80, 102-03, Supp. 167-68, 169, 172; Rudloff Dep. at 27, 30-32, Supp. 201, 202.)

But that was not all the discovery on legal fees revealed. Sam M.'s June 2006 deposition on the improper payment of attorneys' fees also revealed that the promise in his September 2005 "undertaking" to cooperate with Trumbull in this litigation was a sham. Against the backdrop of a Trumbull Board that had been deadlocked since the mid to late 1990s, see *Miller I*, 2005-Ohio-5120, at ¶2, Appx. 14, Sam M. testified that he

[3] See Detec Dep. at 64, 78-80, 88-89, Supp. 165, 169, 170-71; Rudloff Dep. at 20-22, Supp. 199-200; Sam M. 6/29/06 Dep. at 57-60, 67, 82-83, Supp. 192, 193, 194; Umbs 4/13/07 Dep. at 30-36, Supp. 208-09.

would not cooperate with Trumbull in this litigation unless ordered to do so by a majority of the Trumbull Board:

> Q. Show me some language in the undertaking that you've signed that excludes Murray Miller or Sam H. Miller from making requests of you in their corporate capacity for cooperation.
>
> * * *
>
> A. *This undertaking requires that the company, which would mean a majority of the board of directors, make a request of me* * * *.

(Sam M. 6/29/06 Dep. at 55-56, Supp. 191.) Sam M. then clarified that he did not "believe that Murray or Sam H. represent a majority of the board of directors." (Id.) In short, since the Trumbull Board is incapable of acting in this case, Sam M.'s belief that only a majority of the board can make a request of him renders the cooperation promise contained in his undertaking illusory.

In addition, a review of the invoices eventually produced by the two law firms representing Defendants also demonstrated that Sam M. and Umbs had not revealed all of the Private Brand-related entities, a fact Umbs reluctantly admitted in his April 2007 deposition. (See Umbs 4/13/07 Dep. at 10 ("Q. Are you and Sam M. Miller involved together in any other business entity that I have not discussed so far? A. I don't know how far I want to go down that line of discussion."), Supp. 206.) As additional entities came to light, the complaint was amended several times to add those entities as Defendants, resulting in the current operative pleading, the Sixth Amended Complaint, which was filed August 13, 2007. (See 6th Am. Compl., Supp. 1-35.)

7. And further briefing on the payment of attorneys' fees.

While the parties were engaged in discovery concerning Sam M.'s misuse of Trumbull funds, the case was reassigned to visiting Judge Thomas Curran. In an attempt to resolve the escalating dispute regarding attorneys' fees, Judge Curran set a schedule for the filing of cross motions for summary judgment. (10/3/06 CMO.) The parties filed their respective dispositive motions in December 2006, addressing: a) whether Sam M. was entitled to advancement of his attorney fees from Trumbull; and b) whether Murray and Sam H. were entitled to payment of their attorney fees by Trumbull. (12/15/06 Pls.' Mot. for Decl. Judgment; 12/15/06 Defs.' Mot. for Decl. Judgment.) Following the submission of briefing, the Trial Court issued a January 22, 2007 JE that ruled that, of the four Defendants in the lawsuit at that time, only Sam M. was entitled to have his fees paid by Trumbull. (1/22/07 JE, Sam M. Merit Br. Appx. 29.) Therefore, Sam M. was required to return $240,068.29 to Trumbull (75% of the aggregate sum of $320,091.05 in defense costs that had been "reimbursed" by Trumbull over the preceding two years). (Id.) Finally, the Trial Court confirmed that Murray and Sam H. were entitled to have their attorney fees paid by Trumbull, subject to "the risk of reimbursement" to Trumbull at the conclusion of the proceedings, if Trumbull did not derive a benefit in the case. (Id.)

Dissatisfied with the order, Sam M. sought reconsideration, filed a motion for a 60-day extension of time to comply with his obligation to repay Trumbull, and persisted in paying for his legal fees using Trumbull money. In multiple hearings relating to these

motions, the Trial Court clarified that it was attempting to act as a court of equity in its 1/22/07 JE and acknowledged that its analysis may not have been "exquisitely correct," since there was a strong argument that R.C. 1701.13(E)(5)(a) was inapplicable under the facts of this case. (See 4/13/07 Tr. at 8, Supp. 136 ("And just a word about judging, * * * I never, never for once felt that I was being exquisitely correct down to the farthing on the issue. What I'm looking at is, $320,000 in legal bills which, which under, one might say more, more exquisite legal analysis all should be returned because the statute * * * arguably doesn't apply to this factual setting."); id. at 12, Supp. 138 (Sam M. "is getting a break from the Court on this ruling because he's not allowed to be reimbursed arguably."); 5/18/07 Tr. at 20, Supp. 143 ("So I'm trying to act like a court of equity here on an equity point.").)

The Trial Court's 5/18/07 JE denied Sam M.'s first motion, declared the second moot and "ordered Defendant Samuel M. Miller to cease and desist from the practice of taking Trumbull Industry funds to pay his legal fees[.]" (5/18/07 JE, Appx. 5.) Sam M. attempted to appeal both rulings to the Eleventh District Court of Appeals, but the court of appeals dismissed the appeal due to lack of a final, appealable order. *Miller II*, 2007-Ohio-5212, Appx. 19-23.

8. **Sam M. retains new counsel.**

Sam M. then proceeded to hire new counsel, Ulmer & Berne LLP, for all Defendants. Upon the return of this case to the Trial Court, Murray and Sam H. filed a motion to confirm that Trumbull was not required to advance fees generated by Sam M.'s decision to retain new counsel five years into the litigation. (2/12/08 Mot. for Recon. and Clarification.) The motion also sought confirmation that Trumbull was only required to advance the defense costs of Sam M., not the other seven Defendants. (Id.) Finally, the motion sought an accounting of Defendants' legal fees, since the invoices submitted to Trumbull for advancement of Sam M.'s fees over a representative six month period of time exceeded the total fees charged to Murray and Sam H. over that same period by a substantial margin.[4] (Id.)

After the motion to clarify was filed, Ulmer & Berne withdrew as counsel for all Defendants except Sam M. and the David Miller Trust. Sam M. then promptly requested "clarification" of the Trial Court's 1/22/07 JE on attorney's fees, arguing that he was now entitled to "full indemnity" because the other Defendants were "represented by separate counsel," and requesting that the Trial Court find that 85% of the fees paid to Ulmer & Berne prior to the appearance of new counsel were for his benefit and should be reimbursed. (4/17/08 Req. for Clarif.)

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[4] From June 2007 to November 2007, Plaintiffs' counsel had billed $33,609.90 for services rendered in connection with this action. (2/12/08 Mot. for Recon. and Clarification at 6.) During that same time period, Sam M. submitted invoices from Manchester, Bennett to Trumbull for reimbursement in the amount of $49,197.35 that purportedly reflected services rendered only on his behalf. (Id.)

9. The appealed order.

The Trial Court resolved both motions, as well as several other matters, in its June 30, 2008 Order Regarding the April 18, 2008 Hearing. (See 6/30/08 Order, Appx. 6-8.) The Trial Court acknowledged that, since its 1/22/07 JE, "various disputes have arisen regarding the allocation of defendants' attorneys fees to Sam M. Miller." (Id., Appx. 7-8.) The Trial Court then held "that as of March 25, 2008, Ulmer & Berne LLP only represents the interests of Sam M. Miller and the David Miller Trust, which is for the benefit of Sam M. Miller and for which he is the Trustee, and thus, all of Ulmer & Berne's fees and costs beginning on March 25, 2008, shall be promptly paid by Trumbull Industries, Inc." (Id.) With respect to "fees incurred before March 25, 2008," the Court determined that such fees were to be "paid in accordance with the January 22, 200[7] Order." (Id.)

Counsel for Murray and Sam M. submitted a letter to the Court a little over two weeks later, explaining that "the worst fears of plaintiffs and their counsel have been realized" and reporting that "Ulmer & Berne has generated $216,756.00 in attorney fees" over a three-month period, including a bill for services rendered in April of $92,295.00. (See 7/24/08 JE at Exh. A, Appx. 12.) The letter further explained that the net effect of the 100% reimbursement obligation imposed by the 6/30/08 Order was to prevent plaintiffs from continuing with the litigation:

> While Trumbull has, to date, complied with the judgment entry on indemnification, even though it believes the decision to be fundamentally flawed under Ohio law, it can no longer do so, without putting the company at risk in meeting its

> financial obligations during these economically challenging times. The court's ruling on indemnification of Mr. Miller's attorney fees effectively prevents the company from pursuing this case and protecting its rights and assets. With no other acceptable alternative available, Trumbull reluctantly finds it must now refuse continued compliance with the court's judgment entry on indemnification.

(Id.)

The Trial Court held a hearing on the subject matter of the letter on July 24, 2008; it also heard Sam M.'s July 24, 2008, motion to hold plaintiffs in contempt the same day. Following the hearing, the Trial Court issued its July 24, 2008 JE, finding Trumbull in contempt, permitting Trumbull to purge itself of contempt "by paying all amounts due for the legal bills incurred on behalf of Samuel M. Miller in this action, in the amount of $138,972.51 by 3 o'clock P.M. on July 24, 2008," and holding that Trumbull would be sanctioned in the amount of $5 per day if it failed to purge the contempt. (7/24/08 JE, Appx. 9-10.) The parties attempted to appeal the rulings to the Eleventh District Court of Appeals, but the court of appeals dismissed the appeal due to lack of a final, appealable order — concluding that the requisite "finding by the trial court that the contemnor has failed to purge itself and an actual imposition of a penalty or sanction" had not been made. *Miller III*, 2009-Ohio-2092, Appx. 22.

When the parties returned to the Trial Court, Plaintiffs filed a motion to impose sanctions and the Trial Court sustained the motion to impose sanctions, found that Trumbull had not purged itself of contempt, and imposed sanctions for contempt upon Trumbull in the amount of $5.00 per business day. (5/29/09 JE, Sam M. Merit Br. Appx.

26.) Plaintiffs timely appealed the 5/29/09 JE, and the Eleventh District Court of Appeals reversed. The lead opinion authored by Judge Cannon explained that "the alleged actions at issue were not taken in Sam M.'s capacity as a director of Trumbull Industries" and, as a result, the advancement obligation imposed by R.C. 1701.13(E)(5)(a) was inapplicable. *Miller IV*, 2010-Ohio-5662, at ¶¶58-59, Sam M. Merit Br. Appx. 19.

III. ARGUMENT

Proposition of Law No. 1

R.C. 1701.13(E)(5)(a) does not require advancement of defense costs to persons sued for acts taken outside their capacity as a director of a corporation.

The Propositions of Law proffered by Sam M. and amicus curiae the Ohio State Bar Association ("OSBA") fail to address the fundamental question presented in this appeal — whether Ohio law *requires* Trumbull to advance defense costs for Sam M. where he was sued for usurping a business opportunity he became aware of and pursued as the Vice President of Sales and Marketing outside the corporate boardroom. Sam M. pursued Private Brand by taking advantage of vitreous china industry contacts he cultivated as Trumbull's Vice President of Sales and Marketing, at a time when Trumbull's Board held no meetings. Murray and Sam H. agree with the OSBA that "[a]dvancement for officers is governed solely by [R.C. 1701.13](E)(5)(b), which unlike (E)(5)(a) is a *permissive, optional* advancement statute with no bearing on mandatory advancement for directors." (OSBA Merit Br. at 22.) Thus, the critical question becomes whether Sam M. was sued for conduct undertaken in his official capacity as a director — as opposed to his capacity as Trumbull's Vice President of Sales and

Marketing. Because the answer to that question is plainly "no," the Eleventh District's judgment should be affirmed.

Instead of addressing this critical question, Sam M. and the OSBA proffer overbroad propositions of law that attack peripheral reasoning in the lead opinion and concurrence that are not necessary for affirmance of the judgment. For instance, it is irrelevant whether the lead opinion was correct in positing that R.C. 1701.13(E)(2) is inapplicable to the facts of this case because it "relates to reimbursement for a director who seeks to procure a judgment in favor of the corporation." (Sam M. Merit Br. at 13, quoting *Miller IV*, 2010-Ohio-5662, at ¶52.) Since the Eleventh District correctly concluded that Sam M. was not entitled to an *advancement* of fees to defend conduct taken outside of his capacity as a director, see id. at ¶58, Appx. 15, the scope of a corporation's authority to *indemnify* directors for their official acts has no bearing on Sam M.'s advancement request. For the same reason, even if Sam M. is correct in characterizing the lead opinion as suggesting that a director's official acts or omissions "must have been 'on behalf of the corporation'" for a duty to indemnify or advance to attach (Sam M. Merit Br. at 15), the accuracy of that suggestion is irrelevant to Sam M.'s advancement request.

Finally, Murray and Sam H. agree that the "opt out" language of R.C. 1701.13(E)(5)(a) requires a "specific statement" in a corporation's articles of incorporation or code of regulations indicating that the provisions of (E)(5)(a) do not apply (see Sam M. Merit Br. Prop. of Law No. 3; OSBA Merit Br. Prop. of Law No. 3),

and that the advancement obligation imposed by (E)(5)(a) is not vitiated by an allegation that a director's official conduct breached the business-judgment rule (see Sam M. Merit Br. Prop. of Law No. 4; OSBA Merit Br. Prop. of Law No. 4). Once again, however, these legal propositions are irrelevant to Sam M.'s advancement request. Since Sam M. was not sued for conduct taken in his capacity as a director, and the advancement obligation imposed by R.C. 1701.13(E)(5)(a) only applies to suits challenging a director's conduct as a director, it does not matter whether Trumbull "opted out" of that statute, or whether a corporation would be required to advance legal fees where a lawsuit characterized a director's official acts as a breach of the business-judgment rule.

A. The Advancement Obligations Imposed by R.C. 1701.13(E)(5)(a) are Unique to Ohio and Apply Only to Directors.

The parties agree that the provisions of R.C. 1701.13(E)(5)(a) are unique vis-à-vis similar statutes in other states. (See Sam M. Merit Br. at 10 (explaining that, "unlike the indemnification provisions of divisions (1), (2) and (3), * * * division (5) is not duplicative of any Delaware statute").) They further agree that, while R.C. 1701.13(E)(2) authorizes indemnification for expenses "actually and reasonably incurred" by any person sued "by reason of the fact that he is or was a director, officer, employee, or agent of the corporation," (E)(5)(a) "is **limited to directors**." (Sam M. Merit Br. at 9; emphasis sic.) But because Sam M. wrongly assumes that the "thrust of the lawsuit is that Sam M. Miller breached his 'fiduciary duty' *as a director*" (id. at 1; emphasis added), his Merit Brief does not address whether the advancement obligation of R.C. 1701.13(E)(5)(a) applies to conduct taken by a director outside of his or her capacity as a director. As

explained below, a careful reading of R.C. 1701.13(E)(5)(a) (Appx. 25) against the backdrop of its legislative history and in pari materia with the other amendments to Ohio corporate law adopted in 1986 reveals that the answer to this question is "no."

1. The 1986 amendments to Ohio's corporate law were designed to encourage service as a director by altering the legal principles applicable to lawsuits challenging a director's official acts.

Two familiar principles of statutory construction that are not in dispute govern this Court's analysis of R.C. 1701.13(E)(5)(a). First, this Court's "paramount concern" in construing a statute is "the legislative intent." *State ex rel. Knowlton v. Noble County Bd. of Elections*, 126 Ohio St.3d 483, 2010-Ohio-4450, at ¶49, quoting *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, at ¶21. "Courts review several factors in order to glean the General Assembly's intent, including the circumstances surrounding the legislative enactment, the history of the statute, the spirit of the statute (the ultimate results intended by adherence to the statutory scheme), and the public policy that induced the statute's enactment." *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513-514, 1996-Ohio-376.

Second, related statutory provisions "must be read in pari materia," and "[a]ll provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously unless they are irreconcilable." *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, at ¶25.

Prior to the 1986 amendments, corporate advancement of defense costs in Ohio was only permissive — never mandatory — and coextensive with the scope of statutory

indemnity. See R.C. 1701.13(E)(5) (Am.Sub.S.B. No. 155, eff. 9/30/74, Appx. 35-36) (stating that "[e]xpenses, including attorneys' fees incurred in defending any action, suit, or proceeding referred to in divisions (E)(1) and (E)(2) of this section, may be paid by the corporation in advance of the final disposition of such action"). But, in the 1980s, "[w]ell publicized settlements of lawsuits commenced against directors reinforce[d] the perception that directors [were] not only running a risk of incurring personal liability, but also that the potential magnitude of that liability, together with defense costs, may be devastating." Edward A. Schrag, Jr., et al., Director and Officer Liability and Indemnification: The Ohio Approach (1988), 20 U. Tol. L. Rev. 1, 2-3. One byproduct of this publicity was that "the willingness of directors, particularly outside directors, to serve on corporate boards sharply declined." Deborah Cahalane, Comment, 1986 Ohio Corporation Amendments: Expanding the Scope of Director Immunity (1987), 56 U. Cin. L. Rev. 663, 664.

Accordingly, when the OSBA's Corporation Law Committee examined the "problem of attracting and keeping qualified directors for Ohio corporations" in 1986, it concluded "that it is extremely dangerous for anyone to serve as a director in today's litigious climate, given the erosion of the business judgment rule, dramatic increases in claims and in the variety of claims against directors, rapidly escalating costs of defense and the current lack of affordable, comprehensive insurance protection." Edward A. Schrag, Jr., Report of the Corporation Law Committee (1986), 59 Ohio St. B. Assn. Rep. 1694. As a result, the Corporation Law Committee recommended at the time "changes

focus[ed] on director indemnification and liability and upon transactions in which a director may be deemed to have an interest." Id.

Thus, contrary to the implication of the OSBA's Merit Brief, the 1986 amendments to Ohio corporate law did not begin or end with the mandatory advancement provision at issue in this appeal. Rather, the OSBA suggested, and the General Assembly adopted, multiple changes to the legal framework applicable to lawsuits challenging a director's official acts, for the purpose of encouraging service as a director. Specifically, the General Assembly: 1) raised the monetary liability standard, see R.C. 1701.59(D) (Am.Sub.H.B. No. 902, Appx. 51); 2) amended R.C. 1701.60 "to confirm that a director is not to be deemed self-interested merely because the subject matter upon which he is acting may result in the loss of his office as a director or because a change or potential change in control is involved";[5] and 3) modified the law concerning advancement of defense costs to make advancement mandatory where a director is sued for his conduct *as a director*, see R.C. 1701.13(E)(5)(a) (Am.Sub.H.B. No. 902, Appx. 48-49).

2. R.C. 1701.13(E)(5)(a) furthered this goal by requiring advancement of defense costs in lawsuits challenging a director's conduct as a director.

As the portions emphasized below make clear, R.C. 1701.13(E)(5)(a) and (a)(i) modify Ohio law concerning the advancement of defense costs to require advancement *solely* for lawsuits challenging the official acts of a director:

[5] Edward A. Schrag, Jr., Report of the Corporation Law Committee (1986), 59 Ohio St. B. Assn. Rep. 1694.

> Unless at the time of **a director's act or omission that is the subject of an action, suit, or proceeding** referred to in division (E)(1) or (2) of this section, the articles or the regulations of a corporation state, by specific reference to this division, that the provisions of this division do not apply to the corporation and unless the only liability asserted against a director in an action, suit, or proceeding referred to in division (E)(1) or (2) of this section is pursuant to section 1701.95 of the Revised Code, expenses, including attorney's fees, incurred by a director in defending the action, suit, or proceeding shall be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit or proceeding, upon receipt of an undertaking by or on behalf of the director in which he agrees to do both of the following:
>
> (i) Repay such amount if it is proved by clear and convincing evidence in a court of competent jurisdiction that his action or failure to act **involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation**;
>
> (ii) Reasonably cooperate with the corporation concerning the action, suit, or proceeding.

R.C. 1701.13(E)(5)(a), Appx. 25.

The requirement that the "subject of the action" must be "a director's act or omission" strongly supports an interpretation that R.C. 1701.13(E)(5)(a) only applies to lawsuits challenging a director's conduct as a director.

Further, when read in pari materia with R.C. 1701.59, the scope of the repayment obligation imposed by the undertaking required in R.C. 1701.13(E)(5)(a)(i) further reveals the General Assembly's intent to require advancement of defense costs only where a lawsuit challenges a director's conduct as a director. The undertaking specified in R.C. 1701.13(E)(5)(a)(i) requires repayment of advanced fees where the director's

official acts were "*undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation.*" Appx. 25. This repayment standard is identical to the heightened standard for imposing monetary liability on a director *for acts that a director takes or fails to take as a director* in R.C. 1701.59:

> A director shall be liable in damages for any action that the director takes or fails to take as a director only if it is proved by clear and convincing evidence * * * *that the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation.*

R.C. 1701.59(D) (emphasis added), Appx. 31.

This congruence between the repayment obligation for defense costs advanced to a director and the heightened standard for imposing monetary liability on a director was intentional, as the 1986 OSBA Report of the Corporation Law Committee makes plain:

> It is proposed that Section 1701.13 be amended to require the corporation to advance a director's legal expenses if it receives an undertaking by him (1) *to repay if it is proved by clear and convincing evidence that he has breached or failed to perform his duties that this breach or failure was consciously undertaken with the deliberate intent to cause injury to the corporation or with reckless disregard for its interests ("1701.59 test")* and (2) to cooperate reasonably with the corporation.

Edward A. Schrag, Jr., Report of the Corporation Law Committee (1986), 59 Ohio St. B. Assn. Rep. 1694.

Moreover, the General Assembly clarified in R.C. 1701.59(D) that the heightened standard for imposing monetary liability on a director adopted in the 1986 amendments does not affect the duties of "[a] director *who acts in any capacity other than the director's capacity as a director.*" R.C. 1701.59(F)(1). Accordingly, interpreting R.C. 1701.13(E)(5)(a) in pari materia with R.C. 1701.59 strongly supports the conclusion that the advancement statute is similarly confined to lawsuits focused on the conduct of a director that acts in his or her capacity as a director. Indeed, any other interpretation of R.C. 1701.13(E)(5)(a) would result in a repayment obligation under R.C. 1701.13(E)(5)(a)(i) that, when applied to cases involving lawsuits against a director acting in a capacity other than as a director, would conflict with the underlying liability standard. In other words, the General Assembly could not have intended to limit a corporation's ability to demand repayment of fees advanced to corporate officers or other employees through the use of a liability standard that has never applied to them. No authority is offered by Sam M. or the OSBA that would support such a nonsensical result.

Finally, confining the application of R.C. 1701.13(E)(5)(a) to lawsuits challenging a director's conduct as a director harmonizes that provision with the permissive advancement authorized by R.C. 1701.13(E)(5)(b). The 1986 amendments to R.C. 1701.13 retained the permissive advancement provision now found in R.C. 1701.13(E)(5)(b), and clarified that such optional advancement may be granted with respect to expenses "incurred by a director, officer, employee or agent[.]" (Am.Sub.H.B. No. 902, Appx. 49). The fact that the General Assembly elected to include the phrase

"officer, employee or agent" only in the statute authorizing optional advancement of defense costs strongly supports the observation in the OSBA's Merit Brief that "[a]dvancement for officers is * * * permissive [and] optional," not mandatory. (OSBA Merit Br. at 22.)

In short, the text, structure and legislative history of R.C. 1701.13(E)(5)(a) all support the conclusion that the statute only requires advancement of defense costs with respect to conduct taken by a director in his or her capacity as director.

B. Trumbull Is Not Obligated to Advance Defense Costs for Sam M.'s Misconduct as An Officer of Trumbull.

Because the mandatory advancement obligation of R.C. 1701.13(E)(5)(a) applies only to conduct taken by a director in his or her capacity as director, the dispositive question is whether the "subject of [the] action, suit or proceeding" is Sam M.'s conduct as a director. It plainly is not.

As explained above, Sam M.'s pursuit of the Private Brand opportunity resulted from his decision to take advantage of contacts he developed in his capacity as Vice President of Sales and Marketing and manager of Trumbull's plumbing-industry product lines — a role that placed him in constant contact with Trumbull's major suppliers and customers in the plumbing industry. (E.g., Tr. of 4/29/03 Cross of Sam M. at 4-5, 38, Supp. 40-41, 63.) Indeed, he became aware of and pursued the Private Brand opportunity during a time where there were no Trumbull Board meetings. (Id. at 12, Supp. 48.) In sum, Sam M. did not learn of the Private Brand business opportunity in his capacity as a director of Trumbull, and did not act on that opportunity as a director of Trumbull.

Accordingly, he is not entitled to advancement of defense costs because, as the OSBA correctly recognizes, Sam M.'s conduct as a Trumbull corporate officer is not subject to the mandatory advancement regime of R.C. 1701.13(E)(5)(a). (OSBA Merit Br. at 22.)

Thus, Sam M.'s suggestion at pages 16-17 of his Merit Brief that the "allegation of breach of fiduciary duty is what triggered the applicability of the advancement statute" in this case is incomplete because it fails to account for the possibility that Sam M. can be held liable for breaching his fiduciary duty while acting as the Vice President of Sales and Marketing of Trumbull. Both officers *and* directors owe a fiduciary duty of loyalty to the corporation, and either may be held liable for breaching that duty by usurping a business opportunity. This principle is confirmed by the only Ohio case addressing the usurpation of a business opportunity cited by Sam M., *Prodan v. Hemeyer* (1992), 80 Ohio App.3d 735. (Sam M. Merit Br. at 17, n.3.)

Prodan teaches that a breach of fiduciary duty claim based on the "doctrine of corporate opportunity" is not limited to directors. Rather, as a "corollary of the undivided loyalty rule," it applies to conduct undertaken *either* as a director *or* an officer. See id. at 743-44 ("The usurpation of a corporate opportunity is established when the corporation shows that (1) *the officer or director* acquired information about the opportunity while acting for the corporation; and (2) the opportunity is in the corporation's line of business.") (emphasis added), citing *Hubbard v. Pape* (1964), 2 Ohio App.2d 326.

Sam M. also suggests in his Merit Brief that "a corporation's advancement obligations under division (E)(5) are triggered by the allegations of the complaint, not by

the final result of the lawsuit." (See Sam M. Merit Br. at 22, citing *U.S. v. Stein* (S.D.N.Y. 2006), 452 F. Supp. 2d 230, vacated on other grounds (C.A.2, 2007), 486 F.3d 753.) But *Stein* actually held only that "the scope of an advancement proceeding 'is limited to determining "the issue of entitlement [to advancement under applicable law.]"'" 452 F. Supp. 2d at 271. In determining the issue of entitlement, *Stein* observes that a claim for advancement of defense costs may be disposed of by a "summary process" that includes "expedited discovery to the extent that discovery is appropriate and a prompt trial of any genuine issues of material fact." Id. at 269. Nothing about this process suggests that it is inappropriate to review the factual record to determine the issue of entitlement. Indeed, a review of the factual record is particularly appropriate here, because Sam M. elected to proceed in this litigation for more than two years prior to executing the "undertaking" on which his advancement request is based. During that two-year period, many of the facts relating to the capacity in which he was acting and his misconduct were developed in depositions and testimony at the preliminary injunction hearing. See pp. 6-11, supra.

* * *

Failing to recognize an advancement obligation in the context of the unique facts of this case is entirely consistent with the salutary purpose underlying the enactment of the 1986 amendments to Ohio corporate law, including R.C. 1701.13(E)(5)(a). It will not discourage service as an *outside director* to recognize that *an inside director* of a

corporation with a deadlocked board who acts *in a capacity other than as a director* is not entitled to mandatory advancement of defense costs.

Indeed, this case illustrates the pitfalls of an overly broad interpretation of R.C. 1701.13(E)(5)(a). The "cooperation" requirement of R.C. 1701.13(E)(5)(a)(ii) has already been reduced to a dead letter in this action; Sam M.'s position that only a "majority" of the deadlocked Trumbull Board may request cooperation from him in connection with these proceedings means that the promise to cooperate contained in his September 2005 "undertaking" is illusory. (Sam M. 6/29/06 Dep. at 55-56, Supp. 191.) And, if the court of appeals' judgment is reversed, Sam M. will succeed — after years of attempting to hide critical documents in discovery, including the "Dear Kent" letter — in avoiding an adjudication of the merits of this dispute by imposing a ruinous obligation on Trumbull to pay hundreds of thousands of dollars in legal fees to defend against the claim asserted on its behalf that Sam M. usurped Trumbull's business opportunity.

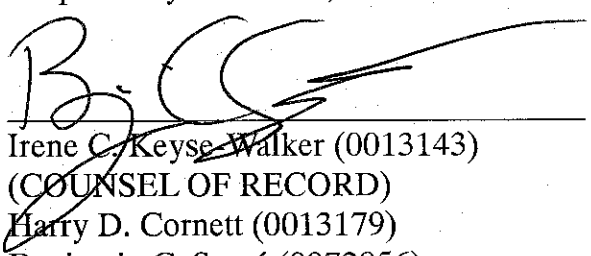
The Eleventh District correctly recognized that this result was unsupportable. That certain of the peripheral statements in its opinion attacked by Sam M. and his amicus may be in error does not detract from the correctness of this central conclusion. The *sui generis* nature of Sam M.'s misconduct as demonstrated in the voluminous record supports dismissal of this appeal as having been improvidently accepted, with or without the additional qualifier that the opinion not be cited as authority except by the parties *inter se*. But any decision on the merits should affirm the appellate court's conclusion that the mandatory advancement of legal fees to directors in R.C. 1701.13(E)(5)(a)

applies only to directors who have been sued as a result of acts taken in their capacity as directors, which is not the case here.

IV. CONCLUSION

For all of the above reasons, Plaintiffs- Appellees respectfully request that the judgment of the Eleventh District Court of Appeals be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellees** has been served this 14th day of July, 2011, by U.S. Mail, postage prepaid, upon the following:

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APPENDIX

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, et al.	)	CASE NO. 2003-CV-433
Plaintiffs	)	JUDGE ANDREW D. LOGAN
vs.	)	MAGISTRATE: ANTHONY M. CORNICELLI
SAMUEL M. MILLER, et al.	)	JUDGMENT ENTRY
Defendants	)	

This matter came before this Court on the following motions:

1. Plaintiffs' Motion to Amend the Pleadings to Conform to the Evidence (filed June 16, 2003);
2. Plaintiffs' Motion to Re-open Plaintiffs' Case in Chief (filed June 17, 2003);
3. Defendants' Motion to require Trumbull Industries, Inc. to reimburse Defendant Sam M. Miller for attorney's fees and costs incurred in defending this action (filed June 17, 2003);
4. Defendants' Motion to award judgment against Plaintiffs for damages incurred by Defendants and the Private Brand Organization as a result of the Temporary Restraining Order vacated by the Court on or about June 22, 2003 (filed June 17, 2003);
5. Defendants' Motion to compel Plaintiffs to reimburse Trumbull Industries, Inc. for attorney's fees and costs paid by Trumbull Industries, Inc. on behalf of Plaintiffs

in pursuit of this litigation (filed June 17, 2003); and

6. Defendants' oral motion to conduct discovery.

All parties and their counsel were present. The Court heard oral arguments of counsel for Plaintiffs and Defendants on all motions in open court. The Court rules as follows:

A. Defendants' Motion to Amend the Pleadings to Conform to the Evidence is granted. Plaintiffs shall file the Amendments to the Verified Complaint; and Plaintiffs shall thereafter file one amended complaint with the current amendments appropriately incorporated.

B. Plaintiffs' Motion to Reopen Plaintiffs' Case in Chief is granted. The hearing on all issues in the Amended Complaint, and the defenses thereto, will proceed on August 18, 2003 and each day that week, if necessary.

C. Defendants' motion for permission to conduct further discovery is granted. The parties may conduct such discovery as they deem necessary under the circumstances.

D. Plaintiffs' Motions for orders relating to reimbursement of attorney's fees and costs incurred by Defendants; for an award of judgment for damages arising from the Temporary Restraining Order vacated on or about June 2, 2003; and for refunding of attorneys fees and costs paid by Trumbull Industries, Inc. to Plaintiffs counsel, are denied without prejudice as premature. The Court will deal with each of these matters in a separate hearing, upon

proper application, after the conclusion of the hearing on the merits.

MAGISTRATE ANTHONY M. CORNICELLI

SEEN:

RANDIL J. RUDLOFF
ATTORNEY FOR DEFENDANTS

ROBERT C. MAYNARD
ATTORNEY FOR PLAINTIFFS

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, et al. and SAM H. MILLER and TRUMBULL INDUSTRIES, INC. 400 Dietz Road Warren, Ohio 44483	)	CASE NO. 2003-CV-433
Plaintiffs	)	JUDGE THOMAS P. CURRAN
vs. SAMUEL M. MILLER, et al. and DANIEL R. UMBS and PRIVATE BRAND ORGANIZATION, LLC and UNITED STATES PRIVATE BRAND COMPANY, INC.	)	JUDGMENT ENTRY

This matter came before the Court for a status conference on April 13, 2007. Attorneys Charles Richards and Marshall Buck appeared on behalf of the Plaintiffs and Attorneys Thomas Lipka and Randil Rudloff appeared on behalf of the Defendants.

The first issue before the Court was the Defendants' Motion to Reconsider this Court's Judgment Entry of January 22, 2007. Upon careful review of the briefs filed by the parties and the arguments presented in open Court, the Court finds that the Defendants' Motion is not well taken and it is hereby denied.

The next issue before the Court was the practice of Defendant Sam M. Miller taking funds from Trumbull Industries to pay his attorneys fees. The Court hereby orders Defendant Samuel M. Miller to cease and desist from the practice of taking Trumbull Industry funds to pay his legal fees. From this date forward, both the Plaintiffs and the Defendant Samuel M. Miller shall submit their monthly invoices for attorney fees to the opposing side for review. Defendant Sam M. Miller's attorney fees shall be paid by Trumbull Industries by check issued from the corporate comptroller in accordance with this Court's entry of January 22, 2007.

The next issue before the court was the Plaintiff's Motion to Show Cause. Based upon representations made by the Defendant in open court, which were satisfactory to Plaintiffs, this Court finds the Motion is now moot and is therefore denied. The Court finds that there is no just reason for delay.

IT IS SO ORDERED.

JUDGE THOMAS P. CURRAN

Dated: May 18, 2007

In Accordance
Art IV Sec 6
Ohio Constitution

COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, *et al.*	)	CASE NO. 03 CV 433
	)	
Plaintiffs	)	JUDGE THOMAS P. CURRAN
	)	
v.	)	
	)	**ORDER REGARDING THE**
SAMUEL M. MILLER, *et al.*	)	**APRIL 18, 2008 HEARING**
	)	
Defendants.	)	

These matters came before the Court for a hearing on April 18, 2008. Upon careful review of the arguments presented in open court, the Court orders as follows:

A. On the issue of production of tax returns.

1. Plaintiffs are not entitled to copies of the tax returns of Defendants Samuel M. Miller, Daniel R. Umbs, and The David Miller Trust.

2. Defendants Samuel M. Miller, Daniel R. Umbs, and The David Miller Trust will submit copies of their respective federal tax returns for 2002-2006 to a certified public accountant of Defendants' choosing ("The CPA"). Defendants Samuel M. Miller, Daniel R. Umbs, and The David Miller Trust will also submit copies of their respective federal tax returns for 2007 to The CPA when such returns are finalized.

3. The CPA will be instructed to review the tax returns provided to him or her in order to identify entities related to the Private Brand business opportunity that is the subject of this lawsuit. The CPA will also be instructed to determine any income that Samuel M. Miller, Daniel R. Umbs, and The David Miller Trust derived from Cerapro America, Ameribath Ceramic, Ameribath Ceramic Services, and any other entity that was formed in Mexico or is located in Mexico and which is related to the Private Brand business opportunity that is the

subject of this lawsuit ("Mexican Entities"). The results of the CPA's review and investigation will be reported to the Court.

4. Defendants Samuel M. Miller, Daniel R. Umbs, and The David Miller Trust will each submit a sworn statement to the Court listing all privately held companies and/or closely held companies in which the respective Defendants have or had an ownership interest between January 1, 2002 and the present ("Sworn Statements"). Publicly held companies need not be listed in the Sworn Statements. In the Sworn Statements, the Defendants should identify those companies that are unrelated to the Private Brand business opportunity that is the subject of this lawsuit.

5. Defendants Samuel M. Miller and Daniel R. Umbs shall each file under seal with the Court for the Court's *in camera* review two net worth statements that they provided to lending institutions within the last five years ("Net Worth Statements"). After the trial of this matter, the jury may receive interrogatories related to Plaintiffs' punitive damages claims. If the jury's responses to these interrogatories indicate that Plaintiffs are entitled to punitive damages against Samuel M. Miller, Daniel R. Umbs, and/or The David Miller Trust, then the Net Worth Statements may be disclosed to the Plaintiffs.

B. Records for the Mexican Entities.

Defendants Samuel M. Miller, Daniel R. Umbs, and The David Miller Trust will each produce financial records in their respective possession, custody, or control for the Mexican Entities.

C. Attorneys' fees.

On January 22, 2007 this Court ordered that Samuel M. Miller was entitled to have his attorneys fees paid by Trumbull Industries, Inc. Since that Order, various disputes have

arisen regarding the allocation of defendants' attorneys fees to Sam M. Miller. This Court finds that as of March 25, 2008, Ulmer & Berne LLP only represents the interests of Sam M. Miller and the David Miller Trust, which is for the benefit of Sam M. Miller and for which he is the Trustee, and thus, all of Ulmer & Berne's fees and costs incurred beginning on March 25, 2008, shall be promptly paid by Trumbull Industries, Inc. All of Sam M. Miller's attorneys' fees incurred before March 25, 2008 shall be paid in accordance with the January 22, 2002 Order.

D. Dispositive motions.

The deadline for all parties to file dispositive motions is hereby changed to August 1, 2008. Oppositions to these motions must be filed by August 31, 2008. Reply briefs must be filed by September 15, 2008. The Court will hear argument on the motions at 1:~~00~~ 30 p.m. on September 26, 2008.

June 25 2008
Date

Hon. Thomas P. Curran

Judge Thomas Patrick Curran
Sitting by Assignment
Ohio Const. Art. IV, Sec. 6

32611.1 \1702825

KAREN INFANTE ALLEN
CLERK OF COURTS
TRUMBULL COUNTY
2008 JUN 30 AM 9:59
TRUMBULL COUNTY
CLERK OF COURTS

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTHWITH BY ORDINARY MAIL.

JUDGE

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, et al.	)	CASE NO. 2003-CV-433
	)	
Plaintiffs	)	JUDGE THOMAS P. CURRAN
	)	
vs.	)	
	)	**JUDGMENT ENTRY**
SAMUEL M. MILLER, et al.	)	**(CONTEMPT)**
	)	
Defendants	)	

This matter came before court pursuant to a letter addressed to the court dated July 17, 2008 from counsel for the plaintiffs, attorneys Charles L. Richards and Marshall D. Buck.* A copy of the letter is attached to this entry and marked as Exhibit A.

Based on the representation of plaintiffs' counsel and the request by defendant's counsel that a hearing be set on this matter at the earliest available date, due to non-payment of legal fees incurred on behalf of defendant, Samuel M. Miller, the court hereby finds that the defendant, Trumbull Industries, is in contempt of this court's Judgment Entry of January 22, 2007. At the hearing held on July 24, 2008, the plaintiff acknowledged that it is in contempt of this court's Order and further asserted that if given an opportunity to purge itself of contempt, it would not do so.

WHEREFORE, it is ORDERED, ADJUDGED, AND DECREED that the plaintiff, Trumbull Industries, is found to be in contempt of this court's Judgment of January 22, 2007. The court shall allow the plaintiff to purge itself of contempt by paying all amounts due for

* Pursuant also to Defendant Sam M. Miller's Motion to Enforce Etc filed July 24, 2008.

the legal bills incurred on behalf of Samuel M. Miller in this action, in the amount of $138,972.51 by 3'oclock P.M. on July 24, 2008. In the event the plaintiff, Trumbull Industries, fails to purge itself of contempt by the date and time set forth above, this court shall impose a sanction against the plaintiff of a fine in the amount of $ five dollars per business day starting

IT IS SO ORDERED. July 25, 2008

JUDGE THOMAS P. CURRAN

DATE July 24, 2008

Judge Thomas Patrick Curran
Sitting by Assignment
Ohio Const. Art. IV, Sec. 6

KAREN INFANTE ALLEN
CLERK OF COURTS
TRUMBULL COUNTY

2008 JUL 24 PM 3:37

TRUMBULL COUNTY
CLERK OF COURTS

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTHWITH BY ORDINARY MAIL.

7-25-08
Copies to.
B. Sobolewski
M. Ungar
R. Rudloff
L. Pollack
M. Buck
C. Richards
Ameribath (2)
Grace America

COPY

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July 17, 2008

Judge Thomas P. Curran
via Email judgetpc@aol.com, hardcopy to follow
Trumbull County Common Pleas Court
161 High Street NW
Warren, OH 44481

RE: Murray A. Miller, et al. v. Samuel M. Miller, et al.
Case No. 2003 CV 433 (Trumbull)
Our File No. 100-3637

Dear Judge Curran:

In this litigation, defendant Sam M. Miller has sought to have his legal fees indemnified by Trumbull Industries, the plaintiff. He relies on R.C. 1701.13 and or Article Sixth of the Articles of Incorporation.

On January 22, 2007, the court issued its "Opinion and Judgment Entry" regarding Right to Indemnification of Attorneys fees. In paragraph 2, the Court ordered that:

> The separate defendant Samuel M. Miller is entitled to have his, and only his, attorneys' fees reimbursed from time to time by TII, subject, however, to his reimbursement obligations under the corporate charter.

At the time of the January 22, 2007 judgment entry, there were only four defendants in this case, and the two law firms represented all the defendants. However, defendants' legal fees were not segregated by defendant. This created the problem of identifying those fees which relate only to Sam M. Miller and no other defendant.

EXHIBIT
tabbies
A

The January 22, 2007 ruling was clarified on April 13, 2007, when the court ruled that 25% of the defense fees would be attributable to defendant Sam M. Miller, and subject to indemnification by Trumbull Industries, simply because Sam M. Miller was one of four defendants.

At a subsequent hearing, the defendants expressed continued dissatisfaction with the 25% indemnity ruling. The court, in response, suggested a higher percentage to be subject to indemnification (40%), but the defendants would accept no less than 100% indemnification. Defendants then appealed the court's 25% ruling to the Eleventh District Court of Appeals, who ruled that the decision was interlocutory and not a final appealable order (Miller v Miller, 11th Dist. App. No. 2007-Ohio-5212, at paragraph 15).

Defendants, still seeking greater indemnification, changed strategy, and on March 25, 2008, announced that Ulmer & Berne, who previously represented all the defendants, would henceforth represent only defendant Sam M. Miller, and the David Miller Trust (of which Sam M. Miller is a beneficiary). Under this new plan, the remaining defendants would be represented by Guarnieri & Secrest, who had previously withdrawn from the case.

The court has accepted defendants' new approach, but the worst fears of plaintiffs and their counsel have been realized. In the period from February through April 2008, Ulmer & Berne has generated $216,756.00 in attorney fees. Ulmer & Berne's recent bill for services in April, for representation of Sam M. Miller only, is in the amount of $92,295.00

This staggering amount in fees to be paid by Trumbull Industries to indemnify a non-cooperating defendant who has stolen a business opportunity, puts the company in a precarious position. No reasonable officer or director would allow the company to incur these fees which, by the time of trial, will easily exceed $1 Million.

While Trumbull has, to date, complied with the judgment entry on indemnification, even though it believes the decision to be fundamentally flawed under Ohio law, it can no longer do so, without putting the company at risk in meeting its financial obligations during these economically challenging times. The court's ruling on indemnification of Mr. Miller's attorney fees effectively prevents the company from pursuing this case and protecting its rights and assets. With no other acceptable alternative available, Trumbull reluctantly finds it must now refuse continued compliance with the court's judgment entry on indemnification.

This decision has been reached with the utmost respect for the court, and only after a very detailed analysis of all aspects of the matter. It is a decision made out of business necessity and is in no way a personal challenge to the court's authority.

Trumbull understands that its refusal to obey the judgment entry constitutes contempt under R.C. 2705.02(A) and that such an act is punishable by a fine of not more than $250.00. R.C. 2705.05(A)(1). Trumbull Industries has no intention of purging its contempt, and therefore respectfully requests that this court issue an order holding Trumbull Industries in contempt of the indemnification judgment entry, impose a penalty against Trumbull Industries of $250.00 and set a hearing on this matter, as required by law.

Trumbull plans to appeal the order of contempt to the Eleventh District Court of Appeals.

Very truly yours,

CHARLES L. RICHARDS

MARSHALL D. BUCK

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Michael Ungar, Esq. at mungar@ulmer.com
Brad Sobolewski at bsobolewski@ulmer.com
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Murray Miller, at mmiller41@neo.rr.com
Sam Miller, at smiller25@neo.rr.com

2005 WL 2372835

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.

Kenneth MILLER on Behalf of Trumbull Industries, Inc., Plaintiff-Appellant,

v.

Samuel. H. MILLER, et al., Defendants-Appellees.

No. 2004-T-0150. Sept. 23, 2005.

Synopsis

Background: Officer, on behalf of closely-held corporation, filed a shareholder's derivative action, seeking "injunction and monetary relief," alleging that two other officers breached their fiduciary duty to the corporation. The Court of Common Pleas, Trumbull County, No. 04 CV 1119, denied officer's request for injunctive relief. Officer appealed.

Holding: The Court of Appeals, Grendell, J., held that officer failed to demonstrate that he did not have an adequate remedy at law, and thus, the trial court did not abuse its discretion in denying injunctive relief.

Affirmed.

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 04 CV 1119. Affirmed.

Attorneys and Law Firms

Edwin Romero and Thomas J. Lipka, Manchester, Bennett, Powers & Ullman, Youngstown, OH, for Plaintiff-Appellant.

Charles L. Richards, Law Office of Charles L. Richards, Warren, OH, for Defendants-Appellees.

Opinion

OPINION

GRENDELL, J.

*1 {¶ 1} In this accelerated calendar appeal, submitted on the record and briefs of the parties, plaintiff-appellant, Kenneth Miller, on behalf of Trumbull Industries, appeals from the judgment of the Trumbull County Court of Common Pleas denying his motion for injunctive relief. We affirm the judgment of the trial court.

{¶ 2} This case is the latest in a series of lawsuits between the ownership families of Trumbull Industries, Inc. Trumbull Industries is a closely-held Ohio corporation engaged in the distribution of wholesale plumbing supplies. The officers and directors of Trumbull Industries are two sets of brothers. Murray Miller is President of Trumbull Industries, a director, and a 25% shareholder of the corporation. Murray's brother, Samuel H. Miller ("Sam H."), is a Vice-President, director, and a 25% shareholder. On the other side of this dispute is Kenneth Miller, Murray's and Sam H.'s cousin, who is Vice-President and Secretary of Trumbull Industries, a director, and a 25% shareholder. His brother, Samuel M. Miller ("Sam M."), is also a director and 25% shareholder in Trumbull Industries. The aforementioned individuals hold their shares either individually or through their individual trusts. There are no other owners, officers, or directors of Trumbull Industries, other than the aforementioned individuals. It is generally agreed among the parties that the two sets of brothers do not communicate with one another with respect to managing the business, have not held board meetings on a regular basis for a number of years, and that the Board has effectively been deadlocked since the mid to late 1990's, when the sole outside director of Trumbull Industries, Richard Mueller, left the Board.

{¶ 3} Sam M. is not a party to the instant matter, but is involved as a defendant in related litigation pending in the Trumbull County Court of Common Pleas. [1] In that case, Murray and Sam H. filed suit against Sam M. and another individual both as individuals and as officers on behalf of Trumbull Industries, alleging that Sam M. breached his fiduciary duty to Trumbull Industries by denying it a business opportunity which Murray and Sam H. alleged rightfully belonged to the corporation. The parties to this action stipulated that Murray and Sam H. have spent approximately $142,000 in corporate funds in pursuit of the PBO litigation.

{¶ 4} On May 11, 2004, after learning that Murray and Sam H. had used corporate funds to bring the suit against Sam M., Kenneth Miller filed the instant shareholder's derivative action, seeking "injunction and monetary relief," alleging that, Murray and Sam H. breached their fiduciary duty to the corporation by incurring and authorizing payment of legal fees in the PBO litigation "without seeking or obtaining approval" of the other shareholders and directors, in violation

of Trumbull Industries' corporate regulations. In his prayer for relief, Kenneth demanded a judgment and accounting for all sums paid pursuant to the PBO litigation, and an order from the court enjoining defendants from paying additional legal fees "unless and until a majority of shareholders approves such payment." On May 28, 2004, Murray and Sam H. filed a motion to dismiss Kenneth's complaint, arguing that injunctive relief is improper, since the request for money damages contained in Kenneth's complaint is an adequate remedy at law.

*2 {¶ 5} On July 15, 2004, a hearing on Kenneth's request for preliminary and permanent injunction was held, in which Murray, Sam H. and Kenneth testified. [2] On August 17, 2004, the trial court rendered judgment in favor of Murray and Sam H., finding, in relevant part, that while there was no corporate authorization for the payment of the legal fees, such authorization was impossible, due to the hopelessly deadlocked nature of the board. The court further found that there was no irreparable harm to the corporation or Kenneth as a shareholder and that Kenneth's claim for money damages is an adequate remedy at law, therefore, injunctive relief was not appropriate.

{¶ 6} Kenneth timely appealed, asserting a single assignment of error:

{¶ 7} "The trial court entry [sic] erred in failing to grant plaintiff-appellant a preliminary injunction and/or a permanent injunction against defendants'-appellees' actions.

{¶ 8} In his sole assignment of error, Ken argues that injunctive relief should have been granted, since his request satisfied the four-factor test for granting injunctive relief, and he has no other adequate remedy at law. We disagree.

{¶ 9} The issuance of an injunction is a matter of judicial discretion and "absent an abuse of discretion by the trial court, an appellate court is not permitted to question the trial court's decision to deny or grant such relief." *Control Data Corp. v. Controlling Bd. of Ohio* (1983), 16 Ohio App.3d 30, 35, 474 N.E.2d 336 (citations omitted); *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496; *Perkins v. Quaker City* (1956), 165 Ohio St. 120, 125, 133 N.E.2d 595 (unless there is a plain abuse of discretion, reviewing courts will not disturb judgments to grant or refuse injunctions). An abuse of discretion consists of more than an error of law or judgment. Rather, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (citation omitted).

{¶ 10} In determining whether to grant an injunction, a court must look at the specific facts and circumstances of the case. *Keefer v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 03AP-391, 2003-Ohio-6557, at ¶ 14 (citation omitted). Furthermore, a party seeking a preliminary injunction bears the burden of establishing, by clear and convincing evidence, that "(1) there is a substantial likelihood that the plaintiff will prevail on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction." Id. citing *Procter & Gamble v. Stoneham* (2000) 140 Ohio App.3d 260, 267, 747 N.E.2d 268. No one factor in the analysis is dispositive, but the four factors must be balanced as is characteristic of the law of equity. Id. (citation omitted).

{¶ 11} The test for the granting or denial of a permanent injunction is substantially the same as that for a preliminary injunction, except instead of the plaintiff proving a "substantial likelihood" of prevailing on the merits, the plaintiff must prove that he *has* prevailed on the merits. *Ellinos, Inc. v. Austintown Twp.* (N.D.Ohio 2002), 203 F.Supp.2d 875, 886; *Edinburg Restaurant, Inc. v. Edinburg Twp.* (N.D.Ohio 2002), 203 F.Supp.2d 865, 873.

*3 {¶ 12} However, it is axiomatic that "[a]n injunction is an extraordinary remedy in equity where there is *no adequate remedy available at law.* It is not available as a right, but may be granted by a court if it is necessary to prevent a future wrong that the law cannot." *Garono,* 37 Ohio St.3d, at 173, 524 N.E.2d 496; *Haig v. Ohio State Bd. of Ed.* (1992), 62 Ohio St.3d 507, 510, 584 N.E.2d 704 (emphasis added). Thus, even if the plaintiff can meet all of the aforementioned factors, an injunction must be denied where those claims "may be asserted and determined in another and different form of action." *Multi Channel TV Cable Co. v. Madison City, Inc.* (Jan. 23, 1989), 5th Dist. No. CA-2549, 1989 Ohio App. LEXIS 464, at *5 (citation omitted).

{¶ 13} Ken argues that he satisfied the first element of prevailing on the merits, because appellees are not entitled to reimbursement for attorney fees incurred while the action is pending, as a matter of law.

{¶ 14} In Ohio, it is generally accepted that, the authority to bring a lawsuit on behalf of a corporation, or to forego bringing a lawsuit, resides primarily in the Board of Directors. *Drage v. Procter & Gamble* (1997), 119 Ohio App.3d 19, 24, 694 N.E.2d 479; *Flarey v. Youngstown Osteopathic Hosp.*, 151 Ohio App.3d 92, 783 N.E.2d 582, 2002-Ohio-6899, at ¶

11 (citation omitted); *Doe v. Malkov* 10th Dist. No. 02AP-90, 2002-Ohio-7358, at ¶ 23 (citation omitted). However, a corporate shareholder may bring a derivative action on behalf of the corporation, where "the board refuses to do so *and* that refusal is wrongful, fraudulent, or arbitrary, or is the result of bad faith or bias on the part of the directors." *Malkov,* 2002-Ohio-7358, at ¶ 23, (citation omitted).

{¶ 15} Viewing the evidence in the light most favorable to the appellant, it appears likely that appellees acted without authority to bring the lawsuit on behalf of the company without approval from the Board of Directors, and, therefore, did not have authority to use company funds. However, contrary to appellant's argument, it does not necessarily follow that appellant is "substantially likely" to prevail on the merits, let alone that he has prevailed on the merits, without resolution of the underlying PBO litigation. Although the recovery of attorney fees is at the discretion of the trial court, *McLaughlin v. Beeghly* (1992), 84 Ohio App.3d 502, 508, 617 N.E.2d 703, and the party seeking recovery of attorney fees has the burden of convincingly demonstrating the benefit of the derivative action to the corporation before fees can be awarded, *Mlinarcik v. E.E. Wehrung Parking, Inc.* (1993), 86 Ohio App.3d 134, 146, 620 N.E.2d 181, it is not beyond the realm of possibility that attorney fees *may* be awarded to appellees at the conclusion of the PBO litigation, once the merits have been determined. Thus, the logical flaw in appellant's argument is that without resolution of the PBO litigation, it is impossible to determine whether appellees would be entitled to recover attorney fees or not. As long as a possibility exists that appellees will prevail in the PBO litigation, appellant can no more prove that appellees would not be entitled to the recovery of attorney fees than appellees could prove that they *would* be entitled to them. Since "[d]irectors may be required to return to the corporate treasury money expended by them * * * which did not affect the corporation's rights, * * * " *Griesse v. Lang* (1931), 37 Ohio App. 553, 558, 175 N.E. 222 (citation omitted), we cannot accept, as a matter of law, the illegality of appellees' actions absent proof that the PBO litigation is of no benefit to the corporation. At this point in time, that issue is not ripe for consideration.

*4 {¶ 16} For the same reason, we reject appellant's argument that he will suffer irreparable harm if injunctive relief is not granted. "Irreparable harm is an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *Lee v. Barber* (July 2, 2001), 12 Dist. No. CA2000-02-014, 2001 Ohio App. LEXIS 2980, at *10, citing *Cleveland v. Cleveland Elec. Illuminating. Co.* (1996), 115 Ohio App.3d 1, 12, 684 N.E.2d 343. Our review of the record informs us that appellant has offered no evidence that he will be irreparably harmed. Appellant merely makes the allegation that he "will continue to be deprived of his role as a director and the Corporation eventually could be driven to bankruptcy or seriously injured," if injunctive relief is not granted. Such allegations, without some proof that appellees' actions have placed the corporation in imminent danger of bankruptcy, or proof that appellees are incapable of reimbursing the corporation for the unauthorized expenditures of corporate funds, render such harm speculative. Both parties stipulate that, as of the date of the hearing, Trumbull Industries paid $142,309.64 on behalf of appellees in pursuit of the PBO litigation. The law makes it clear that an "injunction is not a form of punishment, but an equitable remedy designed to alleviate *a specific, prospective harm* for which money damages will not compensate an injured plaintiff." *Reuben H. Donnelly Corp. v. Mark I Marketing Corp.* (S.D.N.Y.1995), 893 F.Supp. 285, 294 (citation omitted) (emphasis added). Here, no such specific prospective harm is alleged. There is no evidence that appellant is incapable of being made whole through money damages, should appellees ultimately prove to be unsuccessful in the PBO litigation.

{¶ 17} As for appellant's argument that he will be irreparably injured through appellees' actions depriving him of his role as a director, we note that this argument was not raised in the trial court. As a general rule, "issues not raised in the trial court cannot be raised for the first time on appeal." *Fifth Third Bank v. Ducru Ltd. Partnership,* 157 Ohio App.3d 463, 811 N.E.2d 1165, 2004-Ohio-1801, at ¶ 20 (citation omitted). However, we also note, that in cases such as this one, where the Board of Directors appears to be hopelessly deadlocked, R.C. 1701.911(A) allows for the appointment of a provisional director for the corporation "[u]pon the complaint of not less than one-fourth of the directors * * * [to] the court of common pleas of the county in which the corporation maintains its principal office." Appellant himself cites to this code section in support of his argument that appellees acted outside the ambit of Ohio Law by failing to bring the PBO litigation issue before the board for a vote, yet appellant fails to explain why he could not likewise avail himself of the same remedy.

{¶ 18} While we agree with appellant that had the court issued the injunction, no third parties would be harmed, we do not find this dispositive of the issue. Likewise, we reject appellant's argument that an injunction would serve the public interest by "sending a message to other corporate directors, officers, and shareholders" that "proper corporate

procedures" must be followed. As noted earlier, injunctive relief is an equitable remedy and is not to be used for punitive purposes.

*5 {¶ 19} Since appellant has failed to demonstrate, by clear and convincing evidence, that he did not have an adequate remedy at law, the trial court did not abuse its discretion in denying injunctive relief. Appellant's sole assignment of error is without merit. Accordingly, we affirm the judgment of the Trumbull County Court of Common Pleas.

CYNTHIA WESTCOTT RICE, J., COLLEEN MARY O'TOOLE, J., concur.

Parallel Citations

2005 -Ohio- 5120

Footnotes

1 In the instant matter, the court took judicial notice of the lawsuit styled *Murray A. Miller, et.al. v. Samuel M. Miller, et al.*, Trumbull County, Case No.2003 CV 433, also known among the parties as the Private Brands or "PBO litigation." This case was filed on or about Feburary 24, 2003 and appears to have been filed as a derivative action. The PBO litigation is still pending. Evidence adduced at the hearing for injunctive relief shows that Sam M. started a company with an outside partner called Private Brands Ltd., which was described in the hearing for injunctive relief as a company that "private brands" plumbing materials, primarily toilets, for sale to other wholesalers, distributors and retailers. The crux of the PBO litigation, as this court understands it, is whether Private Brands is a direct competitor of Trumbull Industries and whether Sam M. offered this opportunity to the Board before forming Private Brands with an outside partner.

2 By agreement of the parties, the hearing on Ken's motion for temporary and permanent injunction was consolidated with the hearing on Murray and Sam H.'s motion to dismiss.

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2007 WL 2822611

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Trumbull County.

Murray A. MILLER, et al., Plaintiffs-Appellees/Cross-Appellants,
v.
Samuel M. MILLER, et al.,
Defendant-Appellant/Cross-Appellee.

No. 2007-T-0065. Decided Sept. 28, 2007.

Civil Appeal from the Court of Common Pleas, Case No.2003 CV 433.

Attorneys and Law Firms

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Randil J. Rudloff, Guarnieri & Secrest, P.L.L., Warren, OH, and Edwin Romero and Thomas J. Lipka, Manchester, Bennett, Powers & Ullman, Youngstown, OH, for Defendant-Appellant/Cross-Appellee.

Opinion

MARY JANE TRAPP, J.

*1 {¶ 1} On June 13, 2007, appellant/cross-appellee, Samuel M. Miller, filed a notice of appeal from a May 18, 2007 judgment entry of the Trumbull County Court of Common Pleas.

{¶ 2} In the May 18, 2007 entry, the trial court denied appellant's motion to reconsider the court's January 22, 2007 entry. In that entry, the trial court also ordered appellant to cease and desist from the practice of taking Trumbull Industry funds to pay his legal fees. Lastly, in the May 18, 2007 entry, the trial court denied the motion to show cause as moot of appellees/cross-appellants, Murray A. Miller, Sam H. Miller, and Trumbull Industries, Inc. [1]

{¶ 3} On July 13, 2007, appellees filed a motion to dismiss the appeal for lack of a final appealable order. In their motion, appellees argue that under R.C. 2505.02(B)(1), there is no final appealable order because the May 18, 2007 entry merely denies appellant's motion for reconsideration of the January 22, 2007 entry. Appellant filed a brief in opposition to the motion to dismiss on July 23, 2007. In his brief, appellant alleges that both the May 18 and January 22 entries are final orders because they were made in a special proceeding and affect a substantial right. Appellant further contends that the May 18 entry included the requisite Civ.R. 54(B) language that there is no just reason for delay. Thereafter, on August 1, 2007, appellees filed a motion for leave to file their reply memorandum in support of the motion to dismiss along with their reply memorandum. In their reply memorandum, appellees assert that the January 22 decision was interlocutory in nature and that the mere inclusion of Civ.R. 54(B) in the May 18 entry could not transform the January 22 entry into a final appealable order.

{¶ 4} A final order is statutorily defined by R.C. 2505.02(B), which provides as follows:

{¶ 5} "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶ 6} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶ 7} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶ 8} "(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶ 9} "(4) An order that grants or denies a provisional remedy * * *;

{¶ 10} "(5) An order that determines that an action may or may not be maintained as a class action * * *."

{¶ 11} An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B) are met. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus.

{¶ 12} Civ.R. 54(B) provides, as follows:

{¶ 13} "When more than one claim for relief is presented in an action * * * whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all

of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

*2 {¶ 14} However, an order that is not final cannot be rendered final, merely by the addition of Civ.R. 54(B) language. *Fireman's Fund Ins. Co. v. BPS Co.* (1982), 4 Ohio App.3d 3, 4.

{¶ 15} Here, appellant is attempting to appeal a May 18, 2007 judgment denying his motion to reconsider the January 22, 2007 entry. However, the January 22, 2007 entry is not a final order since it only addresses one claim in a multi-claim complaint, and it is interlocutory since the trial court indicates that it plans on "revisiting" the issue when the "business opportunity" verdict is rendered.

{¶ 16} Furthermore, the inclusion of Civ.R. 54(B) language in the May 18 order does not transform that entry or the January 22 judgment into a final and appealable order.

{¶ 17} Accordingly, for the foregoing reasons, appellees' motion to dismiss this appeal is hereby granted for lack of a final appealable order. Also, appellees' cross-appeal is dismissed for the same reasons stated in this opinion.

{¶ 18} Appeal and cross-appeal are dismissed.

CYNTHIA WESTCOTT RICE, P.J., and TIMOTHY P. CANNON, J., concur.

Parallel Citations

2007 -Ohio- 5212

Footnotes

1 For purposes of this opinion, appellant/cross-appellee will be referred to as appellant, and appellees/cross-appellants will be referred to as appellees.

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2009 WL 1176916
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Trumbull County.

Murray A. MILLER, et al., Plaintiffs-Appellants,
v.
Samuel M. MILLER, et al., Defendants-Appellees.

No. 2008-T-0076. Decided May 1, 2009.

Synopsis

Background: Corporation vice president filed motion to find corporation in contempt in violation of prior order requiring corporation to reimburse him for attorney fees and costs incurred in defending corporation in another action. The Court of Common Pleas, No.2003 CV 433, entered order, finding corporation in civil contempt. Corporation appealed.

Holding: The Court of Appeals, Trumbull County, Colleen Mary O'Toole, J., held that trial court's order did not rise to one of finality, and, thus, was not ripe for appellate review.

Appeal dismissed.

Timothy P. Cannon, J., dissented, and filed appeal.

Civil Appeal from the Court of Common Pleas, Case No.2003 CV 433.

Attorneys and Law Firms

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Randil J. Rudloff, Guarnieri & Secrest, P.L.L., Warren, OH, for defendant-appellee, Daniel R. Umbs.

Opinion

COLLEEN MARY O'TOOLE, J.

*1 {¶ 1} Appellants, Murray A. Miller ("Murray"), Sam H. Miller ("Sam H."), and Trumbull Industries, Inc. ("Trumbull Industries"), appeal from the July 24, 2008 judgment entry of the Trumbull County Court of Common Pleas, finding Trumbull Industries in contempt.

{¶ 2} On February 24, 2003, appellants, Murray and Sam H., as shareholders, directors, and/or officers of Trumbull Industries, filed a complaint for injunctive relief and damages against appellees, Sam M. Miller ("Sam M.") and Daniel R. Umbs ("Umbs"). [1]

{¶ 3} According to the complaint, Jacuzzi, Inc. ("Jacuzzi") entered into a contract with Briggs in 2002, in which Briggs would supply plumbing products to Jacuzzi. Umbs negotiated the Jacuzzi contract on behalf of Briggs. Sometime later in 2002, Umbs negotiated a contract to sell plumbing products to Jacuzzi on terms more favorable than those in the contract between Briggs and Jacuzzi.

{¶ 4} Sam M. became involved with Umbs in his efforts to sell plumbing products to Jacuzzi, which came to be known as "Private Brand." It was alleged that this involvement was not disclosed to appellants until December 4, 2002. Apparently, Sam M. informed appellants and shareholders of Trumbull Industries, by memo, of a "business opportunity" involving the operation of a business that would private brand plumbing and related products for sale to manufacturers and possibly other wholesalers, including Jacuzzi. Sam M. called this business opportunity the "Brand Company" project. Appellants immediately objected and demanded that Sam M. cease and desist his involvement. However, appellants allege in their complaint that Sam M. did not comply but rather has been actively involved with Umbs in the Brand Company project.

{¶ 5} On February 10, 2003, Briggs filed a lawsuit in the United States District Court, District of South Carolina, against Umbs. At that time, appellants allege that they discovered that Umbs had purportedly been acting on behalf of Trumbull in his dealings with Jacuzzi.

{¶ 6} On April 28, 2003, appellees filed an answer to the complaint. [2]

{¶ 7} On June 17, 2003, Sam M. filed a motion to compel appellants to repay and reimburse to Trumbull Industries all attorney fees and expenses.

{¶ 8} On March 1, 2004, appellants filed a motion for default judgment and/or sanctions. Appellees filed a response on March 19, 2004. The trial court denied appellants' motion for default judgment on April 15, 2004.

{¶ 9} Appellants filed a motion for sanctions on April 19, 2004. Appellants filed another motion, entitled "Motion for Sanctions (Default Judgment)," on November 5, 2004. On December 6, 2004, appellees filed a memorandum in opposition to appellants' motion for sanctions.

{¶ 10} A hearing commenced before the magistrate on December 6, 2004.

{¶ 11} Appellees filed a motion for summary judgment on September 7, 2005. On October 3, 2005, appellants filed a memorandum in opposition. Appellees filed a reply on October 18, 2005.

*2 {¶ 12} A hearing was held on appellants' "Motion for Sanctions (Default Judgment)" on December 19, 2005.

{¶ 13} Pursuant to his decision, the magistrate determined that appellants' motion was well-taken in part. The magistrate indicated that appellees shall reimburse appellants for their reasonable and necessary attorney fees and expenses. Also, the magistrate determined that Umbs is entitled to summary judgment in his favor as a matter of law on those claims by appellants for usurpation of a business opportunity and breach of fiduciary duty. As to all other claims, the magistrate indicated that appellees' motion for summary judgment is denied.

{¶ 14} On December 15, 2006, appellees filed a motion for declaratory judgment on the issue of legal fees. Also on that date, appellants filed a motion for declaratory judgment on the issue of appellees' right to indemnification of attorney fees.

{¶ 15} Pursuant to its January 22, 2007 judgment entry, the trial court determined that Sam M. is entitled to have his attorney fees reimbursed from time to time by Trumbull Industries subject to his reimbursement obligations under the corporate charter. The trial court further ordered that appellants are entitled to have their attorney fees funded by Trumbull Industries subject to the risk of reimbursement to Trumbull Industries under the law.

{¶ 16} On February 6, 2007, Sam M. filed a motion for reconsideration and request for clarification of the trial court's January 22, 2007 judgment entry, which was denied by the trial court on May 18, 2007. It was from that judgment that Sam M. filed a notice of appeal with this court, Case No.2007-T-0065, to which appellants filed a cross-appeal. On October 1, 2007, this court dismissed the appeal and cross-appeal due to lack of a final appealable order. *Miller v. Miller,* 11th Dist. No.2007-T-0065, 2007-Ohio-5212.

{¶ 17} On February 12, 2008, appellants filed a motion for reconsideration and request for clarification with respect to the trial court's judgment entry regarding the right to indemnification of attorney fees entered January 22, 2007 and its May 18, 2007 judgment entry. On April 18, 2008, Sam M. filed an opposition to appellants' motion for reconsideration, as well as a motion for the trial court to clarify its January 27, 2007 judgment entry.

{¶ 18} Pursuant to its June 30, 2008 judgment entry, the trial court ordered Trumbull Industries to pay Sam M.'s attorney fees and costs incurred from March 25, 2008. It indicated that all of Sam M.'s attorney fees incurred before March 25, 2008 shall be paid in accordance with the January 22, 2007 order.

{¶ 19} On July 17, 2008, appellants' counsel sent the trial court a letter, indicating its refusal to abide by the court's June 30, 2008 order to pay Ulmer and Berne's invoices.

{¶ 20} On July 24, 2008, Sam M. filed a motion for the trial court to reconsider or clarify its January 22, 2007 order as it applies to the $240,000 that he was required to pay back to Trumbull Industries and to Ulmer and Berne's invoices through March 24, 2008.

*3 {¶ 21} A hearing was held on July 24, 2008.

{¶ 22} Pursuant to its July 24, 2008 judgment entry, the trial court found Trumbull Industries in contempt of its January 22, 2007 judgment. The trial court allowed Trumbull Industries to purge itself of contempt by paying all amounts due for the legal bills incurred on behalf of Sam M. in the amount of $138,972.51 by 3:00 p.m. on July 24, 2008. In the event that Trumbull Industries failed to purge itself of contempt by the specified date and time, the trial court indicated that it would impose a sanction against Trumbull Industries in the amount of $5.00 per business day commencing July 25, 2008. It is from that judgment that appellants filed a timely notice of appeal and make the following assignment of error for our review: [3]

{¶ 23} "The trial court abused its discretion when it ruled that Trumbull Industries must indemnify Sam M. Miller for his attorney fees."

{¶ 24} In their sole assignment of error, appellants argue that the trial court abused its discretion when it ruled that Trumbull Industries must indemnify Sam M. for his attorney fees.

{¶ 25} Before we address appellants' assignment of error, we must determine whether the July 24, 2008 judgment entry is a final appealable order.

{¶ 26} "In *Boltauzer v. Boltauzer* (Feb. 3, 1995), 11th Dist. No. 94-L-155, 1995 Ohio App. LEXIS 6119, 1995 WL 1692963 * * *, at 1, this court stated:

{¶ 27} " 'Ohio courts have repeatedly held that contempt of court consists of two elements. The first is a finding of contempt, and the second is the imposition of a penalty or sanction. Until both have been made, there is no final order. *Chain Bike v. Spoke 'N Wheel, Inc.* (1979), 64 Ohio App.2d 62 * * *; *Cooper v. Cooper* (1984), 14 Ohio App.3d 327 * * *; *State ex rel. Doe v. Tracy* (1988), 51 Ohio App.3d 198 * * *.' " *Machnics v. Sloe,* 11th Dist. No.2006-G-2739, 2007-Ohio-121, at ¶ 5-6. (Parallel citations omitted.) See, also, *Nelson v. Nelson,* 11 th Dist. No.2006-G-2696, 2006-Ohio-4944; *Green v. Green,* 11 th Dist. No.2007-P-0024, 2007-Ohio-3476; *Moser v. Moser,* 11th Dist. No.2008-P-0071, 2008-Ohio-5860.

{¶ 28} In the case at bar, the trial court found Trumbull Industries to be in contempt of court. In the July 24, 2008 judgment entry, Trumbull Industries was given the opportunity to purge itself of contempt by paying all amounts due for the legal bills incurred on behalf of Sam M. in the amount of $138,972.51 by 3:00 p.m. on July 24, 2008. However, the entry reveals a time stamp of 3:37 p.m. Thus, it is illogical that a citation for contempt can properly be predicated on the failure to perform due to the fact that the order was journalized thirty-seven minutes after the 3:00 p .m. cut-off purge opportunity.

{¶ 29} The trial court went on to state in its judgment entry that *in the event* Trumbull Industries fails to purge itself of contempt, it would impose a sanction of a fine in the amount of $5. per business day beginning on July 25, 2008. Here, the second element of contempt has not occurred; namely, a *finding* by the trial court that the contemnor has failed to purge itself and an actual imposition of a penalty or sanction. The manner in which the July 24, 2008 entry is written improperly makes the judgment go into perpetuity.

*4 {¶ 30} Thus, because there is another order to be entered on the contempt issue, the original citation is not yet final. Until that second order is made by the trial court, the issue of contempt is not ripe for review. *Machnics,* supra, at ¶ 8, citing *Welch v. Welch,* 11th Dist. No.2004-L-178, 2005-Ohio-560, at ¶ 5. The contemnor may only appeal after the second order has been entered. *Machnics,* supra, at ¶ 8, citing *In re Stevens* (Mar. 19, 1999), 11th Dist. No. 98-T-0002, 1999 Ohio App. LEXIS 1076, at 2, 1999 WL 1483440.

{¶ 31} In addition, we note that at oral argument, counsel for Trumbull Industries made reference to and relied upon *Smith v. Chester Twp. Bd. of Trustees* (1979), 60 Ohio St.2d 13, 396 N.E.2d 743, and *People ex rel. Hawthorne v. Hamilton* (1973), 9 Ill.App.3d 551, 292 N.E.2d 563, for the proposition that where a non-appealable interlocutory order results in a judgment of contempt, including fine or imprisonment, such a judgment is final and appealable.

{¶ 32} The contempt entry in the instant matter, however, does not rise to one of finality. Pursuant to the record before us, again, there has been no finding by the trial court that the contemnor has failed to purge itself and an actual imposition of a penalty or sanction.

{¶ 33} Based upon the foregoing analysis, the July 24, 2008 judgment is not final and appealable.

{¶ 34} Appeal dismissed.

DIANE V. GRENDELL, J., concurs.

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

TIMOTHY P. CANNON, J., dissenting.

*4 {¶ 35} I respectfully dissent from the opinion of the majority.

{¶ 36} This is not a case where the issue of contempt is in dispute. The parties met and agreed that appellant was not going to comply with the trial court's order. They essentially stipulated to a finding of contempt. The order is self-executing. If the payment was not made, imposition of the fine went into effect. It is clear that it was the desire of the parties to move on to this court for a resolution of the dispute.

{¶ 37} This court posed the question concerning a final, appealable order to the parties for the first time at oral argument. Both parties argued that the order in question is, in fact, a final, appealable order. This court has given neither party an opportunity to brief the issue. App.R. 12(A)(2) allows an appellate court to consider issues not briefed by the parties. *State v. Peagler* (1996), 76 Ohio St.3d 496, 499, 668 N.E.2d 489. However, " * * *, when a court of appeals chooses to consider an issue not briefed by the parties, the court should notify the parties and give them an opportunity to brief the issue." *State v. Blackburn,* 11th Dist. No.2001-T-0052, 2003-Ohio-605, at ¶ 45. (Citation omitted.)

{¶ 38} Nevertheless, since it is beyond question that the parties agree that there is contempt, no compliance by appellant, and a penalty imposed, we should proceed to a determination of the assignment of error in the interest of judicial economy and expense.

Parallel Citations

2009 -Ohio- 2092

Footnotes

1 Trumbull Industries sells plumbing supplies, including vitreous china. Two sets of cousins own Trumbull Industries' common stock: brothers Murray and Sam H. comprise one set and brothers Sam M. and Ken Miller comprise the other set. Sam M. is the sole trustee of the Samuel M. Miller Revocable Living Trust, which owns twenty-five percent of the outstanding voting shares of Trumbull Industries. Sam M. is Vice President of Sales and Marketing of Trumbull Industries and serves as the company's plumbing products manager. Umbs is the former president of Briggs Plumbing Products, Inc. ("Briggs"), a supplier to Trumbull Industries.

2 Appellants later filed numerous amended complaints.

3 The matter was stayed by the trial court pending appellate review of the contempt citation.

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Baldwin's Ohio Revised Code Annotated

Title XVII. Corporations--Partnerships (Refs & Annos)

Chapter 1701. General Corporation Law (Refs & Annos)

Formation and Authority of Corporation

R.C. § 1701.13

1701.13 Authority of corporation

Currentness

(A) A corporation may sue and be sued.

(B) A corporation may adopt and alter a corporate seal and use the same or a facsimile of the corporate seal, but failure to affix the corporate seal shall not affect the validity of any instrument.

(C) At the request or direction of the United States government or any agency of the United States government, a corporation may transact any lawful business in aid of national defense or in the prosecution of any war in which the nation is engaged.

(D) Unless otherwise provided in the articles, a corporation may take property of any description, or any interest in property, by gift, devise, or bequest, and may make donations for the public welfare or for charitable, scientific, or educational purposes.

(E)(1) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, other than an action by or in the right of the corporation, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or proceeding, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, if he had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, he had reasonable cause to believe that his conduct was unlawful.

(2) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect of any of the following:

(a) Any claim, issue, or matter as to which such person is adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless, and only to the extent that, the court of common pleas or the court in which such action or suit was brought determines, upon application, that, despite the adjudication of liability, but in view of all the circumstances

of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the court of common pleas or such other court shall deem proper;

(b) Any action or suit in which the only liability asserted against a director is pursuant to section 1701.95 of the Revised Code.

(3) To the extent that a director, trustee, officer, employee, member, manager, or agent has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in division (E)(1) or (2) of this section, or in defense of any claim, issue, or matter therein, he shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the action, suit, or proceeding.

(4) Any indemnification under division (E)(1) or (2) of this section, unless ordered by a court, shall be made by the corporation only as authorized in the specific case, upon a determination that indemnification of the director, trustee, officer, employee, member, manager, or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in division (E)(1) or (2) of this section. Such determination shall be made as follows:

(a) By a majority vote of a quorum consisting of directors of the indemnifying corporation who were not and are not parties to or threatened with the action, suit, or proceeding referred to in division (E)(1) or (2) of this section;

(b) If the quorum described in division (E)(4)(a) of this section is not obtainable or if a majority vote of a quorum of disinterested directors so directs, in a written opinion by independent legal counsel other than an attorney, or a firm having associated with it an attorney, who has been retained by or who has performed services for the corporation or any person to be indemnified within the past five years;

(c) By the shareholders;

(d) By the court of common pleas or the court in which the action, suit, or proceeding referred to in division (E)(1) or (2) of this section was brought.

Any determination made by the disinterested directors under division (E)(4)(a) or by independent legal counsel under division (E)(4)(b) of this section shall be promptly communicated to the person who threatened or brought the action or suit by or in the right of the corporation under division (E)(2) of this section, and, within ten days after receipt of such notification, such person shall have the right to petition the court of common pleas or the court in which such action or suit was brought to review the reasonableness of such determination.

(5)(a) Unless at the time of a director's act or omission that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section, the articles or the regulations of a corporation state, by specific reference to this division, that the provisions of this division do not apply to the corporation and unless the only liability asserted against a director in an action, suit, or proceeding referred to in division (E)(1) or (2) of this section is pursuant to section 1701.95 of the Revised Code, expenses, including attorney's fees, incurred by a director in defending the action, suit, or proceeding shall be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, upon receipt of an undertaking by or on behalf of the director in which he agrees to do both of the following:

(i) Repay such amount if it is proved by clear and convincing evidence in a court of competent jurisdiction that his action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation;

(ii) Reasonably cooperate with the corporation concerning the action, suit, or proceeding.

(b) Expenses, including attorney's fees, incurred by a director, trustee, officer, employee, member, manager, or agent in defending any action, suit, or proceeding referred to in division (E)(1) or (2) of this section, may be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, as authorized by the directors in the specific case, upon receipt of an undertaking by or on behalf of the director, trustee, officer, employee, member, manager, or agent to repay such amount, if it ultimately is determined that he is not entitled to be indemnified by the corporation.

(6) The indemnification authorized by this section shall not be exclusive of, and shall be in addition to, any other rights granted to those seeking indemnification under the articles, the regulations, any agreement, a vote of shareholders or disinterested directors, or otherwise, both as to action in their official capacities and as to action in another capacity while holding their offices or positions, and shall continue as to a person who has ceased to be a director, trustee, officer, employee, member, manager, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person.

(7) A corporation may purchase and maintain insurance or furnish similar protection, including, but not limited to, trust funds, letters of credit, or self-insurance, on behalf of or for any person who is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under this section. Insurance may be purchased from or maintained with a person in which the corporation has a financial interest.

(8) The authority of a corporation to indemnify persons pursuant to division (E)(1) or (2) of this section does not limit the payment of expenses as they are incurred, indemnification, insurance, or other protection that may be provided pursuant to divisions (E)(5), (6), and (7) of this section. Divisions (E)(1) and (2) of this section do not create any obligation to repay or return payments made by the corporation pursuant to division (E)(5), (6), or (7).

(9) As used in division (E) of this section, "corporation" includes all constituent entities in a consolidation or merger and the new or surviving corporation, so that any person who is or was a director, officer, employee, trustee, member, manager, or agent of such a constituent entity, or is or was serving at the request of such constituent entity as a director, trustee, officer, employee, member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, shall stand in the same position under this section with respect to the new or surviving corporation as he would if he had served the new or surviving corporation in the same capacity.

(F) In carrying out the purposes stated in its articles and subject to limitations prescribed by law or in its articles, a corporation may:

(1) Purchase or otherwise acquire, lease as lessee, invest in, hold, use, lease as lessor, encumber, sell, exchange, transfer, and dispose of property of any description or any interest in such property;

(2) Make contracts;

(3) Form or acquire the control of other corporations, domestic or foreign, whether nonprofit or for profit;

(4) Be a partner, member, associate, or participant in other enterprises or ventures, whether profit or nonprofit;

(5) Conduct its affairs in this state and elsewhere;

(6) Borrow money, and issue, sell, and pledge its notes, bonds, and other evidences of indebtedness, and secure any of its obligations by mortgage, pledge, or deed of trust of all or any of its property, and guarantee or secure obligations of any person;

(7) Resist a change or potential change in control of the corporation if the directors by a majority vote of a quorum determine that the change or potential change is opposed to or not in the best interests of the corporation:

(a) Upon consideration of the interests of the corporation's shareholders and any of the matters set forth in division (E) of section 1701.59 of the Revised Code; or

(b) Because the amount or nature of the indebtedness and other obligations to which the corporation or any successor or the property of either may become subject in connection with the change or potential change in control provides reasonable grounds to believe that, within a reasonable period of time, any of the following would apply:

(i) The assets of the corporation or any successor would be or become less than its liabilities plus its stated capital, if any;

(ii) The corporation or any successor would be or become insolvent;

(iii) Any voluntary or involuntary proceeding under the federal bankruptcy laws concerning the corporation or any successor would be commenced by any person.

(8) Do all things permitted by law and exercise all authority within the purposes stated in its articles or incidental to its articles.

(G) Irrespective of the purposes stated in its articles, but subject to limitations stated in its articles, a corporation, in addition to the authority conferred by division (F) of this section, may invest its funds not currently needed in its business in any shares or other securities, to such extent that as a result of the investment the corporation shall not acquire control of another corporation, business, or undertaking the activities and operations of which are not incidental to the purposes stated in its articles.

(H) No lack of, or limitation upon, the authority of a corporation shall be asserted in any action except (1) by the state in an action by it against the corporation, (2) by or on behalf of the corporation against a director, an officer, or any shareholder as such, (3) by a shareholder as such or by or on behalf of the holders of shares of any class against the corporation, a director, an officer, or any shareholder as such, or (4) in an action involving an alleged overissue of shares. This division shall apply to any action brought in this state upon any contract made in this state by a foreign corporation.

Credits
(1994 S 74, eff. 7-1-94; 1990 S 321, eff. 4-11-90; 1986 H 902; 1974 S 155; 132 v S 75; 130 v S 121; 126 v 432)

Editors' Notes

OSBA CORPORATION LAW COMMITTEE

1986:

Unless the corporation's articles or regulations specify that division (E)(5)(a) does not apply to the corporation, the amendment to this division requires the advancement of a director's expenses upon receipt of an undertaking by him (1) to repay if it is determined that his conduct was such that monetary damages would have been recoverable under section 1701.59 and (2) to cooperate with the corporation. The provision for the permissive advancement of expenses preserves the substance of present law except that the prescribed undertaking requires repayment only if it is held that the indemnitee is not entitled to be indemnified.

The changes in division (E)(6) and the addition of division (E)(8) are designed to make it clear that indemnification is not limited to that authorized by divisions (E)(1) and (E)(2). No change in present law is intended.

The language of the first sentence of division (E)(7) has been expanded to clarify what is believed to have been the law prior to the amendment. The amended language expressly states that less traditional forms of insurance and other arrangements providing similar protection are permitted.

1974:

Sections 1701.13(E) and 1702.12(E):

(a) make clear that not only must there be a quorum of disinterested directors present when indemnification is authorized, but such authorization must be by a majority of such quorum;

(b) provide that for counsel to be deemed "independent counsel" for the purpose of determining whether indemnification should be made such counsel and those associated with him must not have been employed by or have rendered services to the corporation or any person to be indemnified for five years prior to the determination;

(c) provide that a determination to indemnify by a disinterested quorum of directors or independent counsel shall be communicated to the person who has brought or threatened to bring an action against officers, directors, or others and such person shall have the right to seek review of the reasonableness of such determination by the common pleas court or the court in which the action was brought or threatened to be brought; and

(d) provide that if a person serves as trustee of a non-profit corporation at the request of another corporation, the latter may indemnify him in appropriate circumstances, and that if a person serves as director of a profit corporation at the request of a non-profit or other corporation, the latter may indemnify him in appropriate circumstances.

The amendments incorporate a number of the changes recently made by Delaware.

1967:

The purpose of the amendment of division (E) is to clarify the authority and circumstances under which a corporation may indemnify directors, officers, and employees. Division (E) is divided into three paragraphs.

Division (E) (1) sets forth a statutory basis for indemnifying directors, officers, and employees whether or not there is an indemnification provision in the articles or the regulations, but it only permits indemnification for expenses actually and necessarily incurred in the defense of any pending or threatened action, suit, or proceeding and, in the absence of an adjudication, only if the three affirmative determinations are made by a disinterested quorum of directors. Any interested director is disqualified as to both voting and determination of a quorum. If a disinterested quorum of directors cannot be obtained, indemnification under division (E) (1) is not permitted.

Division (E) (2) permits indemnification pursuant to provisions contained in the articles, the regulations, or any agreement authorized or resolution adopted by the shareholders if indemnification for expenses under division (E) (1) is unavailable because of the absence of a disinterested quorum of directors or if indemnification is desired against judgments, decrees, fines, penalties and amounts paid in settlement in connection with the defense of any threatened as well as any pending action, suit, or proceeding. The shareholder vote is the same as that specified for the adoption of regulations under RC 1701.11. The same affirmative determinations are required under division (E) (1) as under division (E) (2) except that such determinations may be made by or in accordance with any other method which may be established by the articles, the regulations, or the agreement authorized or resolution adopted by the shareholders.

Division (E) (3) retains the present statutory provision that the statute shall not be deemed exclusive of other rights to indemnification which such persons may have from the corporation and recognizes the purchase of insurance as a method the corporation may employ in providing indemnification.

The amendment contains the limitation to the effect that indemnification is not permitted if the person has been adjudicated negligent or guilty of misconduct in the performance of his duties to the corporation and adds the additional limitations that he must have acted in good faith in what he reasonably believed to be the best interests of the corporation and that, in the case of any criminal action, suit, or proceeding, he had no reasonable cause to believe that his conduct was unlawful.

The words "civil or criminal" are added by way of description of the actions, suits, or proceedings in order to make clear that indemnification is permitted not only for civil actions but also for criminal actions, as, for example, criminal actions under antitrust or securities laws.

The amendment also makes it clear that employees may be indemnified as well as directors and officers.

Paragraph (F) (4) makes it clear that a corporation may enter into partnerships, joint ventures, and similar associations.

1963:

The purpose of the amendment is to clarify that an Ohio corporation may acquire control of foreign as well as domestic corporations.

1955:

Based on present Sec. 1701.11 and, as to division (C), on present Sec. 1701.05. Also based in part on present Sec. 1702.26.

The material has been rearranged and condensed.

The provision in division (D) with respect to donations for the public welfare or for charitable, scientific, or educational purposes is new in this section. At present this subject is covered by Sec. 1702.26, which section is defective in many particulars. For example, it provides that a corporation may co-operate with other corporations in making contributions. This is too narrow, because many corporations have caused foundations or charitable corporations to be formed to which they make donations without co-operating with any other corporations. It is not clear under the present section whether gifts may be made to a political subdivision, as, for example, a municipal hospital or airport. Moreover, under present Sec. 1702.26 contributions are limited on the basis of the annual net income of a calendar year before federal taxes, whereas many corporations have a fiscal year other than a calendar year. Also, this limitation is difficult to apply in the middle or sometimes even at the end of a year before the books have been audited for the year. Other states that have legislated on this subject have not found it necessary to limit the power of corporations to make donations so specifically as in Sec. 1702.26. Typical statutory provisions are along the lines proposed in above division (D). This is the case in Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Washington, West Virginia, and Wisconsin. Of course, as in other cases of exercise of corporate powers, the directors must act in this matter with reason and prudence.

Division (E) is new. Many states have statutes permitting a corporation to indemnify its directors and officers who are sued by reason of serving the corporation as a director or officer against the expenses incurred by them in defending themselves, unless they are found to have been guilty of misconduct or wrongdoing. The right to indemnify against expenses is particularly appropriate where lawyers, executors, or family or business friends serve as directors on the boards of corporations in which they have no interest themselves, but serve at the request of, or for the convenience of, other persons. Many Ohio corporations now have provisions in the articles or regulations on the subject of indemnification. Such provisions are almost a commonplace. It is believed that the implied powers of a corporation permit it to include such provisions in the articles or regulations but, in line with modern legislation in other states, the matter should be definitely settled in Ohio by statute. It is specifically provided that the statutory provisions shall not be deemed exclusive of other rights to indemnification.

Notes of Decisions (245)

Current through 2011 Files 1 - 19, of the 129th GA (2011-2012), apv. by 5/24/11, and filed with the Secretary of State by 5/27/11.

End of Document

Baldwin's Ohio Revised Code Annotated

Title XVII. Corporations--Partnerships (Refs & Annos)

Chapter 1701. General Corporation Law (Refs & Annos)

Board of Directors

R.C. § 1701.59

1701.59 Authority of directors; liability; standard of care

Currentness

(A) Except where the law, the articles, or the regulations require action to be authorized or taken by shareholders, all of the authority of a corporation shall be exercised by or under the direction of its directors. For their own government, the directors may adopt bylaws that are not inconsistent with the articles or the regulations. The selection of a time frame for the achievement of corporate goals shall be the responsibility of the directors.

(B) A director shall perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. In performing a director's duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, that are prepared or presented by any of the following:

(1) One or more directors, officers, or employees of the corporation who the director reasonably believes are reliable and competent in the matters prepared or presented;

(2) Counsel, public accountants, or other persons as to matters that the director reasonably believes are within the person's professional or expert competence;

(3) A committee of the directors upon which the director does not serve, duly established in accordance with a provision of the articles or the regulations, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

(C) For purposes of division (B) of this section, the following apply:

(1) A director shall not be found to have violated the director's duties under division (B) of this section unless it is proved by clear and convincing evidence that the director has not acted in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances, in any action brought against a director, including actions involving or affecting any of the following:

(a) A change or potential change in control of the corporation, including a determination to resist a change or potential change in control made pursuant to division (F)(7) of section 1701.13 of the Revised Code;

(b) A termination or potential termination of the director's service to the corporation as a director;

(c) The director's service in any other position or relationship with the corporation.

(2) A director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by the persons described in divisions (B)(1) to (3) of this section to be unwarranted.

(3) Nothing contained in this division limits relief available under section 1701.60 of the Revised Code.

(D) A director shall be liable in damages for any action that the director takes or fails to take as a director only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation. Nothing contained in this division affects the liability of directors under section 1701.95 of the Revised Code or limits relief available under section 1701.60 of the Revised Code. This division does not apply if, and only to the extent that, at the time of a director's act or omission that is the subject of complaint, the articles or the regulations of the corporation state by specific reference to this division that the provisions of this division do not apply to the corporation.

(E) For purposes of this section, a director, in determining what the director reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in the director's discretion, may consider any of the following:

(1) The interests of the corporation's employees, suppliers, creditors, and customers;

(2) The economy of the state and nation;

(3) Community and societal considerations;

(4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(F) Nothing contained in division (C) or (D) of this section affects the duties of either of the following:

(1) A director who acts in any capacity other than the director's capacity as a director;

(2) A director of a corporation that does not have issued and outstanding shares that are listed on a national securities exchange or are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association, who votes for or assents to any action taken by the directors of the corporation that, in connection with a change in control of the corporation, directly results in the holder or holders of a majority of the outstanding shares of the corporation receiving a greater consideration for their shares than other shareholders.

Credits

(1999 H 78, eff. 3-17-00; 1990 S 321, eff. 4-11-90; 1988 H 708; 1986 H 428, H 902; 1984 H 607, H 262; 1981 H 455; 1980 S 174; 132 v S 75; 130 v S 264; 126 v 432)

Editors' Notes

OSBA CORPORATION LAW COMMITTEE

1986:

The addition to division (B) conforms it to division (E) of Sec. 1701.13, which, among other things, provides for director indemnification.

The changes in division (C) are intended to make it clear that a director has the benefit of a presumption that he is acting in good faith and in a manner he reasonably believes is in (or not opposed to) the best interests of the corporation in all cases, including those affecting or involving a change in control or a termination of his services. It is believed that the changes are necessary

because of the adoption by some courts, notably those of Delaware, of the view that, in such cases, the director becomes an interested party and, as a result, loses the benefit of the business judgment rule.

Division (D) is new. It is designed to relieve the director of responsibility for money damages except when it is proven by clear and convincing evidence that the director has breached or failed to perform his duties and that his act or omission in so doing was consciously undertaken with deliberate intent to cause injury to the corporation or with reckless disregard for the interests of the corporation. The amendment frees the director from monetary liability for negligence in any degree. The amendment does not affect other forms of relief and the directors remain liable for violations of Sec. 1701.95.

It is believed to be important for corporations to be able to obtain and retain those persons who can best serve as directors. It is also important that the directors of corporations feel free to use their best judgment in making business decisions that are in the best interest of the corporation and its shareholders without undue concern for personal liability. It is also believed that it is important for corporations to be able to attract and retain "outside" (non-management) directors who are in a position to provide independent judgment. The amendments to Sec. 1701.59 are designed to help achieve these goals.

1984:

The purpose of the amendment adding division (D) is to make clear that, in determining what is in the best interest of the corporation, a director, in addition to considering the interests of the corporation's shareholders, may take into account the interest of others specified in the amendment on whom directors' decisions may have an effect.

The Committee believes that Ohio law presently permits a director to take into account interests other than those of shareholders; however, the Committee believes that it is desirable to specify and clarify the breadth of the interests which a director may consider.

See the first paragraph of the 1984 comment following Sec. 1701.591.

1980:

The amendments are based upon § 35 of the Model Business Corporation Act, as revised in 1974. It adopts for the first time in Ohio a statutory statement of the standard of care for directors derived from the common law, "Business Judgment Rule" and restates the reliance test to include reliance upon material furnished by a committee of directors. A detailed analysis of the amending language is contained in the comments drafted by the ABA Committee On Corporate Laws for use with the Model Act. These are noted in the *Business Lawyer*; Vol 30, January, 1975.

The opening language of the present section is retained. This language has furnished the basis under existing practice for the validation of shareholder agreements reserving special powers to the shareholders, a matter of particular significance in close corporations.

1967:

The purpose of the amendment adding division (B) is to establish a good faith reliance test for determining the responsibility of directors in the discharge of their duties. Reference is made to 1701.37(A) for a statement of the obligation of a corporation to maintain books and records of account and to 1701.95 for a statement of the director's right to rely upon financial statements of the corporation in the defense of liabilities which may be inserted under divisions (A)(1) or (2) thereof.

See the comment following 1701.11 respecting the deletion of the former last sentence of division (A).

1955:

The first sentence is taken from present Sec. 1701.63, except that the provisions in the present section as to the number of directors and their qualifications are left out, as being more appropriately covered in other sections. The second sentence is taken from present Sec. 1701.70.

Notes of Decisions (206)

Current through 2011 Files 1 - 19, of the 129th GA (2011-2012), apv. by 5/24/11, and filed with the Secretary of State by 5/27/11.

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therefor as required by sections 4517.01 to 4517.18 [~~, inclusive,~~] of the Revised Code.

4517.19 Maintenance of records

Sec. 4517.19. No manufacturer [~~of~~] OR DISTRIBUTOR OF MOTOR VEHICLES or dealer in motor vehicles, nor any owner, proprietor, person in control, or keeper of any garage, stable, shop, or other place of business, shall fail to keep or cause to be kept any record required by law.

AM. SUB. SENATE BILL 155

Eff. 9-30-74

Passed 6-6-74 Approved by Governor 6-29-74
Filed 7-1-74 File No. 369

To amend sections 1701.07, 1701.13, 1701.15, 1701.18, 1701.30, 1701.35, 1701.39, 1701.60, 1701.61, 1701.73, 1701.81, 1701.84, 1701.85, 1701.86 1702.06, 1702.12, 1702.16, 1702.31, 1702.38, 1702.41, 1702.43, 1702.47, 1703.11, and 5733.22 of the Revised Code relative to the conduct, franchise, and taxation of corporations.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 1701.07, 1701.13, 1701.15, 1701.18, 1701.30, 1701.35, 1701.39, 1701.60, 1701.61, 1701.73, 1701.81, 1701.84, 1701.85, 1701.86, 1702.06, 1702.12, 1702.16, 1702.31, 1702.38, 1702.41, 1702.43, 1702.47, 1703.11, and 5733.22 of the Revised Code be amended to read as follows:

1701.07 Statutory agent

Sec. 1701.07. (A) Every corporation shall have and maintain an agent (sometimes referred to as the "statutory agent"), upon whom any process, notice, or demand required or permitted by statute to be served upon a corporation may be served. Such agent may be a natural person who is a resident of the county in this state in which the principal office of the corporation is located, or may be a domestic corporation or a foreign corporation holding a license as such under the laws of this state which is authorized by its articles of incorporation to act as such agent, and which has a business address in the county in this state in which is located the principal office of the corporation designating such agent.

(B) The secretary of state shall not accept original articles for filing unless there is filed with the articles a written appointment of an agent, signed by the incorporators or a majority of them. In all other cases the corporation shall appoint the agent and shall file in the office of the secretary of state a written appointment of such agent.

(C) The written appointment of an agent shall set forth the name and address in such county of the agent, including the street and number or other particular description, and shall otherwise be in such form as the secretary of state prescribes. The secretary of state shall keep a record of the names of corporations, and the names and addresses of their respective agents.

(D) If any agent dies, removes from the county, or resigns, the corporation shall forthwith appoint another agent and file [~~in the office of~~] WITH the secretary of state a written appointment of such agent. If an amendment to the articles changes the principal office of the corporation in this state to another county, the corporation shall forthwith appoint another agent and file [~~in the office of~~] WITH the secretary of state a written appointment of such agent unless the agent is a corporate agent and has a business address in such other county, in which event the corporation shall forthwith file with the secretary of state a written statement setting forth the business address of such corporate agent in such other county.

(E) If the agent changes his or its address from that appearing upon the record in the office of the secretary of state, the corporation shall forthwith file with the secretary of state a written statement setting forth the new address in such county.

(F) An agent may resign by filing with the secretary of state a signed statement to that effect. The secretary of state shall forthwith mail a copy of such statement to the corporation at its principal office. Upon the expiration of sixty days after such filing, the authority of the agent shall terminate.

(G) A corporation may revoke the appointment of an agent by filing with the secretary of state a written appointment of another agent and a statement that the appointment of the former agent is revoked.

(H) Any process, notice, or demand required or permitted by statute to be served upon a corporation may be served upon such corporation by delivering a copy thereof to its agent, if a natural person, or by delivering a copy thereof at the address of its agent in the county in this state in which the principal office of the corporation is located, as such address appears upon the record in the office of the secretary of state. If (1) the agent cannot be found, or (2) the agent no longer has said address, or (3) the corporation has failed to maintain an agent as required by this section, and if in any such case the party desiring that such process, notice, or demand be served, or the agent or representative of said party, shall have filed with the secretary of state an affidavit stating that one of the foregoing conditions exists and stating the most recent address of said corporation which said party after diligent search has been able to ascertain, then service of process, notice, or demand upon the secretary of state, as the agent of the corporation, may be initiated by delivering to him or at his office quadruplicate copies of such process, notice, or demand and by paying to him a fee of five dollars. The secretary of state shall forthwith give telegraphic notice of such delivery to the corporation at its principal office as shown upon the record in his office and also to the corporation at any different address shown on its last franchise tax report filed in this state, and also to the corporation at any different address set forth in the above mentioned affidavit, and shall forward to the corporation at each of said addresses, by registered mail, with request for return receipt, a copy of such process, notice, or demand; and thereupon service upon the corporation shall be deemed to have been made.

(I) The secretary of state shall keep a record of each process, notice, and demand delivered to him or at his office under this section or any other law of this state which authorizes service upon him, and shall record the time of such delivery and his action thereafter with respect thereto.

(J) This section does not limit or affect the right to serve any process, notice, or demand upon a corporation in any other manner permitted by law.

(K) Every corporation shall state in each annual report filed by it with the department of taxation the name and address of its statutory agent.

(L) Except when an original appointment of an agent is filed with the original articles, a written appointment of an agent or a written statement filed by a corporation [~~in the office of~~] WITH the secretary of state shall be signed by THE CHAIRMAN OF THE BOARD, the president, a vice-president, [~~or~~] the secretary, OR AN ASSISTANT SECRETARY [~~of the corporation~~].

(M) For filing a written appointment of an agent other than one filed with original articles, and for filing a statement of change of address of an agent or a statement of the business address of a corporate agent in another county or a written resignation of an agent, the secretary of state shall charge and collect a fee of one dollar.

(N) Upon the failure of any corporation to appoint another agent or to file a statement of change of address of an agent or a statement of the business address of a corporate agent in another county when required by this section, the secretary of state shall give notice thereof by registered mail to such corporation and unless such default is cured within thirty days after the mailing of such notice or within such further period as the secretary of state grants, the secretary of state may, upon the expiration of such period, cancel the articles of such corporation, give notice of such cancellation to the corporation by registered mail, and make a notation of such cancellation on his records.

A corporation whose articles have been cancelled may be reinstated by filing an application for reinstatement and the required appointment of agent or required statement, and by paying a filing fee of ten dollars. The secretary of state shall furnish the tax commissioner a monthly list of all corporations cancelled and reinstated under [~~the provision of~~] this division.

(O) This section does not apply to banks, trust companies, insurance companies, or any corporation defined under the laws of this state as a public utility for taxation purposes.

1701.13 Authority of corporation

Sec. 1701.13. (A) A corporation may sue and be sued.

(B) A corporation may adopt and alter a corporate seal and use the same or a facsimile thereof, but failure to affix the corporate seal shall not affect the validity of any instrument.

(C) At the request or direction of the United States government or any agency thereof, a corporation may transact any lawful business in aid of national defense or in the prosecution of any war in which the nation is engaged.

(D) Unless otherwise provided in the articles, a corporation may take property of any description, or any interest therein, by gift, devise, or bequest, and may make donations for the public welfare or for charitable, scientific, or educational purposes.

~~[(E) (1)]~~ [~~A corporation may indemnify or agree to indemnify a director, officer, or employee, or a former director, officer, or employee, or any person who is serving or has served at its request as a director, officer, or employee of another corporation against expenses actually and necessarily incurred by him in connection with the defense of any pending or threatened action, suit, or proceeding, criminal or civil, to which he is or may be made a party by reason of being or having been such director, officer, or employee, provided (a) he is adjudicated or determined not to have been negligent or guilty of misconduct in the performance of his duty to the corporation of which he is a director, officer, or employee, (b) he is determined to have acted in good faith in what he reasonably believed to be the best interest of such corporation, and (c), in any matter the subject of a criminal action, suit, or proceeding, he is determined to have had no reasonable cause to believe that his conduct was unlawful. The determination as to (b) and (c) and, in the absence of an adjudication as to (a) by a court of competent jurisdiction, the determination as to (a) shall be made by the directors of the indemnifying corporation acting at a meeting at which a quorum consisting of directors who are not parties to or threatened with any such action, suit, or proceeding is present. Any director who is a party to or threatened with any such action, suit, or proceeding shall not be qualified to vote and, if for this reason a quorum of directors cannot be obtained to vote on such indemnification, no indemnification shall be made except in accordance with division (E) (2) or (E) (3) of this section.~~

~~(2) A corporation, pursuant to its articles, its regulations, or any agreement authorized or a resolution adopted by the shareholders at a meeting held for such purpose by the affirmative vote of the holders of shares entitling them to exercise a majority of the voting power of the corporation on such proposal or authorized or adopted without a meeting by the written consent of the holders of shares entitling them to exercise two-thirds of the voting power on such proposal, may indemnify or agree to indemnify such director, officer, or employee against expenses, judgments, decrees, fines, penalties, or amounts paid in settlement in connection with the defense of any pending or threatened action, suit, or proceeding, criminal or civil, to which he is or may be made a party by reason of being or having been such director, officer, or employee provided a determination is made by the directors in the manner set forth in division (E) (1) of this section or is made by or in accordance with a method established by the articles, the regulations, such agreement, or such resolution (a) that such director, officer, or employee was not, and has not been adjudicated to have been, negligent or guilty of misconduct in the performance of his duty to the corporation of which he is a director, officer, or employee, (b) that he acted in good faith in what he reasonably believed to be the best interest of such corporation, and (c) that, in any matter the subject of a criminal action, suit, or proceeding, he had no reasonable cause to believe that his conduct was unlawful.~~

~~(3) Such indemnification shall not be deemed exclusive of any other rights to which such director, officer, or employee may be entitled under the articles, the regulations, any agreement, any insurance purchased by the corporation, vote of shareholders, or otherwise.]~~

(E) (1) A CORPORATION MAY INDEMNIFY OR AGREE TO INDEMNIFY ANY PERSON WHO WAS OR IS A PARTY OR IS THREATENED TO BE MADE A PARTY, TO ANY THREATENED, PENDING, OR COMPLETED ACTION, SUIT, OR PROCEEDING, WHETHER CIVIL, CRIMINAL, ADMINISTRATIVE, OR INVESTIGATIVE, OTHER THAN AN ACTION BY OR IN THE RIGHT OF THE CORPORATION, BY REASON OF THE FACT THAT HE IS OR WAS A DIRECTOR, OFFICER, EMPLOYEE, OR AGENT OF THE CORPORATION, OR IS OR WAS SERVING AT THE REQUEST OF THE CORPORATION AS A DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT OF ANOTHER CORPORATION, DOMESTIC OR FOREIGN, NONPROFIT OR FOR PROFIT, PARTNERSHIP, JOINT VENTURE, TRUST, OR OTHER ENTERPRISE, AGAINST EXPENSES, INCLUDING ATTORNEYS' FEES, JUDGMENTS, FINES, AND AMOUNTS PAID IN SETTLEMENT ACTUALLY AND REASONABLY INCURRED BY HIM IN CONNECTION WITH SUCH ACTION, SUIT, OR PROCEEDING IF HE ACTED IN GOOD FAITH AND IN A MANNER HE REASONABLY BELIEVED TO BE IN OR NOT OPPOSED TO THE BEST INTERESTS OF THE CORPORATION, AND WITH RESPECT TO ANY CRIMINAL ACTION OR PROCEEDING, HAD NO REASONABLE CAUSE TO BELIEVE HIS CONDUCT WAS UNLAWFUL. THE TERMINATION OF ANY ACTION, SUIT, OR PROCEEDING BY JUDGMENT, ORDER, SETTLEMENT, CONVICTION, OR UPON A PLEA OF NOLO CONTENDERE OR ITS EQUIVALENT, SHALL NOT, OF ITSELF, CREATE A PRESUMPTION THAT THE PERSON DID NOT ACT IN GOOD FAITH AND IN A MANNER WHICH HE REASONABLY BELIEVED TO BE IN OR NOT OPPOSED TO THE BEST INTERESTS OF THE CORPORATION, AND WITH RESPECT TO ANY CRIMINAL ACTION OR PROCEEDING, HE HAD REASONABLE CAUSE TO BELIEVE THAT HIS CONDUCT WAS UNLAWFUL.

(2) A CORPORATION MAY INDEMNIFY OR AGREE TO INDEMNIFY ANY PERSON WHO WAS OR IS A PARTY, OR IS THREATENED TO BE MADE A PARTY TO ANY THREATENED, PENDING, OR COMPLETED ACTION OR SUIT BY OR IN THE RIGHT OF THE CORPORATION TO PROCURE A JUDGMENT IN ITS FAVOR BY REASON OF THE FACT THAT HE IS OR WAS A DIRECTOR, OFFICER, EMPLOYEE, OR AGENT OF THE CORPORATION, OR IS OR WAS SERVING AT THE REQUEST OF THE CORPORATION AS A DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT OF ANOTHER CORPORATION, DOMESTIC OR FOREIGN, NONPROFIT OR FOR PROFIT, PARTNERSHIP, JOINT VENTURE, TRUST, OR OTHER ENTERPRISE AGAINST EXPENSES, INCLUDING ATTORNEYS' FEES, ACTUALLY AND REASONABLY INCURRED BY HIM IN CONNECTION WITH THE DEFENSE OR SETTLEMENT OF SUCH ACTION OR SUIT IF HE ACTED IN GOOD FAITH AND IN A MANNER HE REASONABLY BELIEVED TO BE IN OR NOT OPPOSED TO THE BEST INTERESTS OF THE CORPORATION, EXCEPT THAT NO INDEMNIFICATION SHALL BE MADE IN RESPECT OF ANY CLAIM, ISSUE, OR MATTER AS TO WHICH SUCH PERSON SHALL HAVE BEEN ADJUDGED TO BE LIABLE FOR NEGLIGENCE OR MISCONDUCT IN THE PERFORMANCE OF HIS DUTY TO THE CORPORATION UNLESS, AND ONLY TO THE EXTENT THAT THE COURT OF COMMON PLEAS, OR THE COURT IN WHICH SUCH ACTION OR SUIT WAS BROUGHT SHALL DETERMINE UPON APPLICATION THAT, DESPITE THE ADJUDICATION OF LIABILITY, BUT IN VIEW OF ALL THE CIRCUMSTANCES OF THE CASE, SUCH PERSON IS FAIRLY AND REASONABLY ENTITLED TO INDEMNITY FOR SUCH EXPENSES AS THE COURT OF COMMON PLEAS OR SUCH OTHER COURT SHALL DEEM PROPER.

(3) TO THE EXTENT THAT A DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT HAS BEEN SUCCESSFUL ON THE MERITS OR OTHERWISE IN DEFENSE OF ANY ACTION, SUIT, OR PROCEEDING REFERRED TO IN DIVISIONS (E) (1) AND (E) (2) OF THIS SECTION, OR IN DEFENSE OF ANY CLAIM, ISSUE, OR MATTER THEREIN, HE SHALL BE INDEMNIFIED AGAINST EXPENSES, INCLUDING ATTORNEYS' FEES, ACTUALLY AND REASONABLY INCURRED BY HIM IN CONNECTION THEREWITH.

(4) ANY INDEMNIFICATION UNDER DIVISIONS (E) (1) AND (E) (2) OF THIS SECTION, UNLESS ORDERED BY A COURT, SHALL BE MADE BY THE CORPORATION ONLY AS AUTHORIZED IN THE SPECIFIC CASE UPON A DETERMINATION THAT INDEMNIFICATION OF THE DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT IS PROPER IN THE CIRCUMSTANCES BECAUSE HE HAS MET THE APPLICABLE STANDARD OF CONDUCT SET FORTH IN DIVISIONS (E) (1) AND (E) (2) OF THIS SECTION. SUCH DETERMINATION SHALL BE MADE (a) BY A MAJORITY VOTE OF A QUORUM CONSISTING OF DIRECTORS OF THE INDEMNIFYING CORPORATION WHO WERE NOT AND ARE NOT PARTIES TO OR THREATENED WITH ANY SUCH ACTION, SUIT, OR PROCEEDING, OR (b), IF SUCH A QUORUM IS NOT OBTAINABLE OR IF A MAJORITY VOTE OF A QUORUM OF DISINTERESTED DIRECTORS SO DIRECTS, IN A WRITTEN OPINION BY INDEPENDENT LEGAL COUNSEL OTHER THAN AN ATTORNEY, OR A FIRM HAVING ASSOCIATED WITH IT AN ATTORNEY, WHO HAS BEEN RETAINED BY OR WHO HAS PERFORMED SERVICES FOR THE CORPORATION, OR ANY PERSON TO BE INDEMNIFIED WITHIN THE PAST FIVE YEARS, OR (c) BY THE SHAREHOLDERS, OR (d) BY THE COURT OF COMMON PLEAS OR THE COURT IN WHICH SUCH ACTION, SUIT, OR PROCEEDING WAS BROUGHT. ANY DETERMINATION MADE BY THE DISINTERESTED DIRECTORS UNDER DIVISION (E) (4) (a) OR BY INDEPENDENT LEGAL COUNSEL UNDER DIVISION (E) (4) (b) OF THIS SUBDIVISION SHALL BE PROMPTLY COMMUNICATED TO THE PERSON WHO THREATENED OR BROUGHT THE ACTION OR SUIT, BY OR IN THE RIGHT OF THE CORPORATION UNDER DIVISION (E) (2) OF THIS SECTION, AND WITHIN TEN DAYS AFTER RECEIPT OF SUCH NOTIFICATION, SUCH PERSON SHALL HAVE THE RIGHT TO PETITION THE COURT OF COMMON PLEAS OR THE COURT IN WHICH SUCH ACTION OR SUIT WAS BROUGHT TO REVIEW THE REASONABLENESS OF SUCH DETERMINATION.

(5) EXPENSES, INCLUDING ATTORNEYS' FEES, INCURRED IN DEFENDING ANY ACTION, SUIT, OR PROCEEDING REFERRED TO IN DIVISIONS (E) (1) AND (E) (2) OF

THIS SECTION, MAY BE PAID BY THE CORPORATION IN ADVANCE OF THE FINAL DISPOSITION OF SUCH ACTION, SUIT, OR PROCEEDING AS AUTHORIZED BY THE DIRECTORS IN THE SPECIFIC CASE UPON RECEIPT OF AN UNDERTAKING BY OR ON BEHALF OF THE DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT TO REPAY SUCH AMOUNT, UNLESS IT SHALL ULTIMATELY BE DETERMINED THAT HE IS ENTITLED TO BE INDEMNIFIED BY THE CORPORATION AS AUTHORIZED IN THIS SECTION.

(6) THE INDEMNIFICATION PROVIDED BY THIS SECTION SHALL NOT BE DEEMED EXCLUSIVE OF ANY OTHER RIGHTS TO WHICH THOSE SEEKING INDEMNIFICATION MAY BE ENTITLED UNDER THE ARTICLES OR THE REGULATIONS OR ANY AGREEMENT, VOTE OF SHAREHOLDERS OR DISINTERESTED DIRECTORS, OR OTHERWISE, BOTH AS TO ACTION IN HIS OFFICIAL CAPACITY AND AS TO ACTION IN ANOTHER CAPACITY WHILE HOLDING SUCH OFFICE, AND SHALL CONTINUE AS TO A PERSON WHO HAS CEASED TO BE A DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT AND SHALL INURE TO THE BENEFIT OF THE HEIRS, EXECUTORS, AND ADMINISTRATORS OF SUCH A PERSON.

(7) A CORPORATION MAY PURCHASE AND MAINTAIN INSURANCE ON BEHALF OF ANY PERSON WHO IS OR WAS A DIRECTOR, OFFICER, EMPLOYEE, OR AGENT OF THE CORPORATION, OR IS OR WAS SERVING AT THE REQUEST OF THE CORPORATION AS A DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT OF ANOTHER CORPORATION, DOMESTIC OR FOREIGN, NONPROFIT OR FOR PROFIT, PARTNERSHIP, JOINT VENTURE, TRUST, OR OTHER ENTERPRISE AGAINST ANY LIABILITY ASSERTED AGAINST HIM AND INCURRED BY HIM IN ANY SUCH CAPACITY, OR ARISING OUT OF HIS STATUS AS SUCH, WHETHER OR NOT THE CORPORATION WOULD HAVE THE POWER TO INDEMNIFY HIM AGAINST SUCH LIABILITY UNDER THIS SECTION.

(8) AS USED IN THIS DIVISION, REFERENCES TO "CORPORATION" INCLUDES ALL CONSTITUENT CORPORATIONS IN A CONSOLIDATION OR MERGER AND THE NEW OR SURVIVING CORPORATION, SO THAT ANY PERSON WHO IS OR WAS A DIRECTOR, OFFICER, EMPLOYEE, OR AGENT OF SUCH A CONSTITUENT CORPORATION, OR IS OR WAS SERVING AT THE REQUEST OF SUCH CONSTITUENT CORPORATION AS A DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT OF ANOTHER CORPORATION, DOMESTIC OR FOREIGN, NONPROFIT OR FOR PROFIT, PARTNERSHIP, JOINT VENTURE, TRUST, OR OTHER ENTERPRISE SHALL STAND IN THE SAME POSITION UNDER THIS SECTION WITH RESPECT TO THE NEW OR SURVIVING CORPORATION AS HE WOULD IF HE HAD SERVED THE NEW OR SURVIVING CORPORATION IN THE SAME CAPACITY.

(F) In carrying out the purposes stated in its articles and subject to limitations prescribed by law or in its articles, a corporation may:

(1) Purchase or otherwise acquire, lease as lessee, invest in, hold, use, lease as lessor, encumber, sell, exchange, transfer, and dispose of property of any description or any interest therein;

(2) Make contracts;

(3) Form or acquire the control of other corporations, domestic or foreign, whether non-profit or for profit;

(4) Be a partner, member, associate, or participant in other enterprises or ventures, whether profit or non-profit;

(5) Conduct its affairs in this state and elsewhere;

(6) Borrow money, and issue, sell, and pledge its notes, bonds, and other evidences of indebtedness, and secure any of its obligations by mortgage, pledge, or deed of trust of all or any of its property, and guarantee or secure obligations of any person;

(7) Do all things permitted by law and exercise all authority within the purposes stated in its articles or incidental thereto.

(G) Irrespective of the purposes stated in its articles, but subject to limitations stated therein, a corporation, in addition to the authority conferred by division (F) of this section, may invest its funds not currently needed in its business in any shares or other securities to such extent that as a result thereof the corporation shall not acquire control of another corporation, business, or undertaking the activities and operations of which are not incidental to the purposes stated in its articles.

(H) No lack of, or limitation upon, the authority of a corporation shall be asserted in any action except (1) by the state in an action by it against the corporation, (2) by or on behalf of the corporation against a director, an officer, or any shareholder as such, (3) by a shareholder as such or by or on behalf of the holders of shares of any class against the corporation, a director, an officer, or any shareholder as such, or (4) in an action involving an alleged overissue of shares. This division shall apply to any action brought in this state upon any contract made in this state by a foreign corporation.

1701.15 Pre-emptive rights

Sec. 1701.15. (A) Unless otherwise provided in the articles, the holders of the shares of any class other than shares which are limited as to dividend rate and liquidation price shall, upon the offering or sale for cash of shares of the same class, have the right, during a reasonable time and on reasonable terms fixed by the directors, to purchase such shares in proportion to their respective holdings of shares of such class, at a price fixed as provided in sections 1701.01 to 1701.98 [~~, inclusive,~~] of the Revised Code, unless the shares offered or sold are:

[~~(A)~~] (1) Treasury shares;

[~~(B)~~] (2) Issued as a share dividend;

[~~(C)~~] (3) Issued or agreed to be issued for considerations other than money;

[~~(D)~~] (4) Issued or agreed to be issued upon exercise of options granted and authorized in accordance with section 1701.16 of the Revised Code;

[~~(E)~~] (5) Issued or agreed to be issued upon conversion of convertible shares authorized in the articles, or upon exercise of conversion rights conferred and authorized in accordance with section 1701.22 of the Revised Code;

[~~(F)~~] (6) Offered to shareholders in satisfaction of their pre-emptive rights and not purchased by such shareholders, and thereupon issued or agreed to be issued for a consideration not less than that at which such shares were so offered to such shareholders, less reasonable expenses, compensation, or discount paid or allowed for the sale, underwriting, or purchase of such shares, unless by the affirmative vote or written order of the holders of two-thirds of the shares otherwise entitled to such pre-emptive rights, the pre-emptive rights are restored as to any of such shares not theretofore issued or agreed to be issued;

[~~(G)~~] (7) Released from pre-emptive rights by the affirmative vote or written consent of the holders of two-thirds of the shares entitled to such pre-emptive rights. Any such vote or consent shall be entered in the records of the corporation and shall be binding on all shareholders and their transferees for the time specified in such vote or consent up to but not exceeding one year, and shall protect all persons who within such time acquire the shares or options on or conversion or other rights with respect to the shares so released;

[~~(H)~~] (8) Released from pre-emptive rights by the affirmative vote or written consent of the holders of a majority of the shares entitled to such pre-emptive rights, for offering and sale, or the grant of options with respect thereto, to any or all employees of the corporation or of subsidiary corporations or to a trustee on their behalf, under a plan adopted or to be adopted by the directors for that purpose.

(B) NO ACTION SHALL BE BROUGHT UPON ANY CAUSE OF ACTION ARISING UNDER DIVISION (A) OF THIS SECTION AT ANY TIME AFTER TWO YEARS FROM THE DAY ON WHICH A WRITTEN NOTICE OR OTHER COMMUNICATION IS GIVEN OR MAILED TO EACH SHAREHOLDER HAVING SUCH A CAUSE OF ACTION INFORMING THE SHAREHOLDER OF THE TRANSACTION GIVING RISE THERETO, AND NO ACTION SHALL IN ANY EVENT BE BROUGHT UPON ANY SUCH CAUSE OF ACTION AT ANY TIME AFTER FOUR YEARS FROM THE DAY ON WHICH SUCH CAUSE OF ACTION AROSE, OR FROM THE EFFECTIVE DATE OF THIS PROVISION, WHICHEVER IS THE LATER.

1701.18 Consideration for shares and liability of shareholders therefor

Sec. 1701.18. (A) Except as provided in the case of change of shares, share dividends, reorganization, merger, consolidation, combination, or conversion of shares or obligations into shares:

(1) Payment for shares shall be made with money or other property of any description, or any interest therein, actually transferred to the corporation, or labor or services actually rendered to the corporation.

(2) In the case of shares with par value, other than treasury shares, said consideration shall be not less than the par value thereof, provided that such shares may be sold and paid for at such a discount from the par value thereof as would amount to or not exceed reasonable compensation for the sale, underwriting, or purchase of such shares, and regardless of such discount such shares shall be deemed to be fully paid.

(3) In the case of treasury shares with par value, the consideration may be less than the par value thereof.

(B) Promissory notes, drafts, or other obligations of a subscriber or purchaser do not constitute payment for shares.

(C) An agreement by a person to perform services as the consideration for shares does not, OF ITSELF, constitute such person a shareholder OR PAYMENT FOR SUCH SHARES prior to the performance of such services.

(D) Except in the case of convertible shares or obligations, shares with par value shall not be issued or disposed of upon change of shares, share dividends, reorganization, merger, consolidation, exchange of shares for other shares or securities, or otherwise, if as a result thereof the aggregate liabilities of the corporation plus its stated capital would exceed its aggregate assets or any such existing excess would be increased.

(E) When shares have been issued as provided in sections 1701.01 to 1701.98 [, ~~inclusive,~~] of the Revised Code, in the case of change of shares, share dividends, reorganization, merger, consolidation, or conversion of shares or obligations into shares, or when shares have been paid for in conformity with this section, such shares shall be deemed fully paid and nonassessable.

(F) Every person who subscribes for or purchases shares of a corporation is liable to the corporation to pay or deliver to the corporation the consideration agreed upon, and, except as provided in division (A) of this section, if such shares are with par value, such person is obligated to pay to the corporation therefor in money or other property or services the full par value thereof.

(G) Every holder, whether the original or a transferee, of shares not paid for as provided in this section, who has acquired them with actual knowledge of that fact, is personally liable to the corporation for the amount unpaid on said shares, and his liability shall continue notwithstanding any transfer of such shares, until such shares are paid in full; but no holder who has acquired such shares without actual knowledge of the fact that said shares are not paid for is under any liability in respect thereof.

(H) No pledgee or other holder of shares as collateral security is personally liable as a shareholder.

(I) No person who in fact, whether disclosed on the records of the corporation or otherwise, holds shares as executor, administrator, guardian, trustee, trustee of a voting trust, receiver, or in any other fiduciary capacity is personally liable as a shareholder, but the estate or property in the hands of such fiduciary is liable or the real or beneficial owner is liable under this section as equity may require. This section does not relieve a fiduciary from liability for a breach of trust.

1701.30 Stated capital; exception

Sec. 1701.30. (A) Every corporation shall have and shall carry upon its books a stated capital for each class of outstanding shares. The stated capital of each outstanding share with par value shall be not less than its par value. The stated capital of the corporation shall be the aggregate stated capital of all classes of outstanding shares, which at no time shall be less than five hundred dollars. The stated capital of every share of a particular class outstanding at a particular time shall be identical.

(B) Subject to division (A) of this section:

(1) The stated capital of shares issued or disposed of otherwise than upon conversion, change, exchange, merger, consolidation, or reorganization is the amount of consideration for such shares, unless prior to the execution and delivery of the certificates for such shares the incorporators, directors, or shareholders, as the case may be, who fix the consideration or otherwise determine the value of any consideration for such shares, specify the portion of the consideration that constitutes stated capital, whereupon any excess over such portion (except to the extent entered on the books of a transferee corporation as earned surplus in the manner provided in division [~~(B)~~] **(H) (3)** of section [~~1701.84~~] **1701.32** of the Revised Code upon a combination) is capital surplus; provided that in the case of shares having preference in the event of involuntary liquidation of the corporation, the portion of the consideration that constitutes stated capital shall be not less than the lesser of the entire consideration for such shares or the amount of such preference.

(2) Unless the express terms of convertible shares provide that upon the exercise of conversion rights the stated capital of the corporation shall be increased or reduced, the stated capital of the shares issued upon the exercise of such conversion rights shall be the stated capital of the convertible shares so converted.

(3) Unless the terms of convertible obligations provide that upon the exercise of conversion rights the stated capital of the corporation shall be increased otherwise than as provided in this section, the stated capital of the shares issued upon the exercise of such conversion rights shall be an amount equal to the principal amount of the convertible obligations so converted.

(4) Unless the amendment to the articles which effects any change in outstanding shares provides that upon such change the stated capital of the corporation shall be increased or reduced, the stated capital of the shares issued upon such change shall be the stated capital of the shares so changed.

(5) Unless the terms of an exchange of shares provide that upon such exchange the stated capital of the corporation shall be increased, the stated capital of the shares issued upon such exchange shall be the stated capital of the shares so exchanged.

(6) The stated capital of each class of shares to be outstanding at the time a merger, consolidation, or reorganization becomes effective shall be the amount set forth or provided for in the agreement of merger, agreement of consolidation, or plan of reorganization.

(C) The stated capital of a class of outstanding shares with or without par value may be increased by a transfer from any surplus however created to stated capital by order of the directors for the purpose of increasing such stated capital or upon payment of dividends in shares of such class, and may be reduced in any way provided for in section 1701.31 of the Revised Code.

(D) When a corporation having outstanding shares of more than one class has a stated capital applicable to two or more of the classes and the amount of stated capital of a particular class cannot otherwise be readily determined, the directors of the corporation may make such determination, subject to division (A) of this section.

1701.35 Purchase of own shares by corporation

Sec. 1701.35. (A) A corporation by its directors may purchase shares of any class issued by it, in any of the following instances:

(1) When the articles authorize the redemption of such shares and do not prohibit such purchase;

(2) To collect or compromise a debt, claim, or controversy in good faith;

(3) From a subscriber whose shares have not been paid for in full, or in settlement or compromise of a subscription;

(4) For offering and sale, or the grant of options with respect thereto, to any or all of the employees of the corporation or of subsidiary corporations or to a trustee on their behalf, under any plan adopted or to be adopted by the directors for that purpose;

(5) From a person who has purchased such shares from the corporation under an agreement reserving to the corporation the right to repurchase or obligating it to repurchase;

(6) To avoid the issuance of or to eliminate fractional shares;

(7) When the articles in substance provide that the corporation shall have a right to repurchase if and when any shareholder desires to, or on the happening of any event is required to, sell such shares;

(8) From a shareholder who by reason of dissent is entitled to be paid the fair cash value of his shares;

(9) When authorized by the shareholders at a meeting called for such purpose, by the affirmative vote of the holders of two-thirds of the shares of each class, regardless of limitations or restrictions in the articles on the voting rights of the shares of any such class, or if the articles so provide or permit, a greater or lesser proportion, but not less than a majority, of the shares of any class;

(10) When authorized by the articles or by such vote or consent of holders of such proportion of shares, though less than a majority, of any one or more classes as is provided in the articles.

(B) A corporation shall not purchase its own shares except as provided in this section, nor shall a corporation purchase or redeem its own shares if immediately thereafter its assets would be less than its liabilities plus stated capital, or if the corporation is insolvent, or if there is reasonable ground to believe that by such purchase or redemption it would be rendered insolvent.

(C) Shares issued by a corporation which owns or controls shares entitling it to elect a majority of the directors of another corporation may be purchased by such last mentioned corporation only when and if such shares could be purchased by the issuing corporation pursuant to [~~paragraph~~] DIVISION (A) (9) [~~of division~~] OR (A) **(10)** of this section.

1701.39 Annual meeting

Sec. 1701.39. An annual meeting of shareholders for the election of directors and the consideration of reports to be laid before

such meeting shall be held [~~on the first Monday of the fourth month following the close of each fiscal year of the corporation, unless another date is provided for in the articles or the regulations~~] ON A DATE DESIGNATED BY, OR IN THE MANNER PROVIDED FOR IN, THE ARTICLES OR IN THE REGULATIONS. IN THE ABSENCE OF SUCH DESIGNATION, THE ANNUAL MEETING SHALL BE HELD ON THE FIRST MONDAY OF THE FOURTH MONTH FOLLOWING THE CLOSE OF EACH FISCAL YEAR OF THE CORPORATION. When the annual meeting is not held or directors are not elected thereat, they may be elected at a special meeting called for that purpose.

1701.60 Transactions between the corporation and its directors or officers

Sec. 1701.60. (A) Unless otherwise provided in the articles or the regulations [~~, the~~] :

(1) NO CONTRACT OR TRANSACTION SHALL BE VOID OR VOIDABLE WITH RESPECT TO A CORPORATION FOR THE REASON THAT IT IS BETWEEN THE CORPORATION AND ONE OR MORE OF ITS DIRECTORS OR OFFICERS, OR BETWEEN THE CORPORATION AND ANY OTHER PERSON IN WHICH ONE OR MORE OF ITS DIRECTORS OR OFFICERS ARE DIRECTORS, TRUSTEES, OR OFFICERS, OR HAVE A FINANCIAL OR PERSONAL INTEREST, OR FOR THE REASON THAT ONE OR MORE INTERESTED DIRECTORS OR OFFICERS PARTICIPATE IN OR VOTE AT THE MEETING OF THE DIRECTORS OR A COMMITTEE THEREOF WHICH AUTHORIZES SUCH CONTRACT OR TRANSACTION, IF IN ANY SUCH CASE (a) THE MATERIAL FACTS AS TO HIS OR THEIR RELATIONSHIP OR INTEREST AND AS TO THE CONTRACT OR TRANSACTION ARE DISCLOSED OR ARE KNOWN TO THE DIRECTORS OR THE COMMITTEE AND THE DIRECTORS OR COMMITTEE, IN GOOD FAITH REASONABLY JUSTIFIED BY SUCH FACTS, AUTHORIZE THE CONTRACT OR TRANSACTION BY THE AFFIRMATIVE VOTE OF A MAJORITY OF THE DISINTERESTED DIRECTORS, EVEN THOUGH THE DISINTERESTED DIRECTORS CONSTITUTE LESS THAN A QUORUM; OR (b) THE MATERIAL FACTS AS TO HIS OR THEIR RELATIONSHIP OR INTEREST AND AS TO THE CONTRACT OR TRANSACTION ARE DISCLOSED OR ARE KNOWN TO THE SHAREHOLDERS ENTITLED TO VOTE THEREON AND THE CONTRACT OR TRANSACTION IS SPECIFICALLY APPROVED AT A MEETING OF THE SHAREHOLDERS HELD FOR SUCH PURPOSE BY THE AFFIRMATIVE VOTE OF THE HOLDERS OF SHARES ENTITLING THEM TO EXERCISE A MAJORITY OF THE VOTING POWER OF THE CORPORATION HELD BY PERSONS NOT INTERESTED IN THE CONTRACT OR TRANSACTION; OR (c) THE CONTRACT OR TRANSACTION IS FAIR AS TO THE CORPORATION AS OF THE TIME IT IS AUTHORIZED OR APPROVED BY THE DIRECTORS, A COMMITTEE THEREOF, OR THE SHAREHOLDERS;

(2) COMMON OR INTERESTED DIRECTORS MAY BE COUNTED IN DETERMINING THE PRESENCE OF A QUORUM AT A MEETING OF THE DIRECTORS, OR OF A COMMITTEE THEREOF WHICH AUTHORIZES THE CONTRACT OR TRANSACTION;

(3) THE directors, by the affirmative vote of a majority of those in office, and irrespective of any FINANCIAL OR personal interest of any of them, shall have authority to establish reasonable compensation, which may include pension, disability, and death benefits, for services to the corporation by directors and officers, or to delegate such authority to one or more officers or directors.

(B) NOTHING CONTAINED IN SUBDIVISIONS (1) AND (2) OF DIVISION (A) OF THIS SECTION SHALL LIMIT OR OTHERWISE AFFECT THE LIABILITY OF DIRECTORS UNDER SECTION 1701.95 OF THE REVISED CODE.

1701.61 Meetings of directors; call, place and notice; communications equipment

Sec. 1701.61. Unless otherwise provided in the articles, the regulations, or the bylaws, and subject to the exceptions, applicable during an emergency as that term is defined in section 1701.01 of the Revised Code, for which provision is made in division (F) of section 1701.11 of the Revised Code:

(A) Meetings of the directors may be called by the chairman of the board, the president, any vice-president, or any two directors;

(B) Meetings of the directors may be held at any place within or without the state AND, UNLESS THE ARTICLES OR THE REGULATIONS PROHIBIT PARTICIPATION BY DIRECTORS AT A MEETING BY MEANS OF COMMUNICATIONS EQUIPMENT, MEETINGS OF THE DIRECTORS MAY BE HELD THROUGH ANY COMMUNICATIONS EQUIPMENT IF ALL PERSONS PARTICIPATING CAN HEAR EACH OTHER AND PARTICIPATION IN A MEETING PURSUANT TO THIS DIVISION SHALL CONSTITUTE PRESENCE AT SUCH MEETING;

(C) Written notice of the time and place of each meeting of the directors shall be given to each director either by personal delivery or by mail, telegram, or cablegram at least two days before the meeting, which notice need not specify the purposes of the meeting;

(D) Notice of adjournment of a meeting need not be given if the time and place to which it is adjourned are fixed and announced at such meeting.

1701..73 Signing and filing

Sec. 1701.73. (A) Upon the adoption of any amendment or amended articles, a certificate containing a copy of the resolution adopting the amendment or amended articles, a statement of the manner of its adoption, and, in the case of adoption of the resolution by the incorporators or directors, a statement of the basis for such adoption, shall be filed [~~in the office~~] WITH the secretary of state, and thereupon the articles shall be amended accordingly, any change of shares provided for in the amendment or amended articles shall become effective, and the amended articles shall supersede the existing articles.

(B) When an amendment or amended articles are adopted by the incorporators, the certificate shall be signed by each of them.

(C) When an amendment or amended articles are adopted by the directors or by the shareholders, the certificate shall be signed by THE CHAIRMAN OF THE BOARD, the president or a vice-president and by the secretary or an assistant secretary.

(D) A copy of an amendment or amended articles changing the name of a corporation or its principal office in this state, certified by the secretary of state, may be filed for record in the office of the county recorder of any county in this state, and for such recording the county recorder shall charge and collect a fee of five dollars. Such copy shall be recorded in the records of deeds.

1701.81 Certificate of merger or consolidation; filing; effect

Sec. 1701.81. (A) Upon adoption by each constituent corporation of an agreement of merger or consolidation pursuant to section 1701.78, 1701.79, or 1701.80 of the Revised Code, there shall be filed [~~in the office of~~] WITH the secretary of state a certificate signed by the chairman of the board, THE president, or a vice-president [,] and by the secretary [,] OR an assistant secretary, [~~the treasurer, or an assistant treasurer,~~] of each constituent corporation. Such certificate shall contain a signed agreement of merger or consolidation, or a copy thereof, and shall set forth in respect of each constituent corporation the manner in which the agreement was approved by the directors and, if voting by the shareholders or by the holders of any particular class of shares is required, the manner in which the agreement was approved by the shareholders.

(B) If any constituent corporation in a merger or consolidation is a foreign corporation, there shall also be filed in the proper office in the state under the laws of which such foreign corporation exists a copy of the agreement of merger or consolidation and such other documents as are required by the laws of that state.

(C) Upon such filing, or at such later date as the agreement of merger or consolidation specifies, the merger or consolidation shall become effective.

(D) The secretary of state shall furnish upon request and payment of a fee of five dollars his certificate setting forth the name of each constituent corporation, the name of the surviving or new corporation, the states under the laws of which the surviving or new corporation and each other constituent corporation existed prior to the merger or consolidation, the date of filing the certificate of merger or consolidation [~~in the office of~~] WITH the secretary of state, and the effective date of the merger or consolidation. Such certificate of the secretary of state, or a copy of the agreement of merger or consolidation certified by the secretary of state, may be filed for record in the office of the recorder of any county in this state and, if filed, shall be recorded in the records of deeds for such county. For such recording the county recorder shall charge and collect the same fee as in the case of deeds.

1701.84 Dissenting shareholders entitled to relief

Sec. 1701.84. The following are entitled to relief as dissenting shareholders under section 1701.85 of the Revised Code:

(A) Shareholders of a domestic corporation which is being merged or consolidated into a surviving or new corporation, domestic or foreign, pursuant to section 1701.78 or 1701.79 of the Revised Code;

(B) In the case of a merger into a domestic corporation, shareholders of the surviving corporation who under section 1701.78 of the Revised Code are entitled to vote on the adoption of an agreement of merger, BUT ONLY AS TO THE SHARES SO ENTITLING THEM TO VOTE;

(C) Shareholders, OTHER THAN THE PARENT CORPORATION, of a domestic subsidiary corporation which is being merged into the domestic or foreign parent corporation pursuant to section 1701.80 of the Revised Code;

(D) In the case of a combination or a majority share acquisition, shareholders of the acquiring corporation who under section 1701.83 of the Revised Code are entitled to vote on such transaction, BUT ONLY AS TO THE SHARES SO ENTITLING THEM TO VOTE.

1701.85 Relief for dissenting shareholders; qualifications; procedures

Sec. 1701.85. (A) (1) A shareholder of a domestic corporation is entitled to relief as a dissenting shareholder in respect of the proposals in sections 1701.74, 1701.76, and 1701.84 of the Revised Code, only in compliance with this section.

(2) In the case where the proposal must be submitted to the shareholders of the corporation involved, the dissenting shareholder must be a record holder of THE shares of the corporation AS TO WHICH HE SEEKS RELIEF as of the date fixed for the determination of shareholders entitled to notice of a meeting of the shareholders at which the proposal is to be submitted, and [~~the~~] SUCH shares [~~as to which the shareholder seeks relief~~] must not have been voted in favor of the proposal. Not later than ten days after the date on which the vote on such proposal was taken at the meeting of the shareholders, the shareholder must deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief, stating his address, the number and class of such shares, and the amount claimed by him as the fair cash value thereof.

(3) In the case of a merger pursuant to section 1701.80 of the Revised Code, the dissenting shareholder must be a record holder of THE shares of the corporation AS TO WHICH HE SEEKS RELIEF as of the date on which the agreement of merger was adopted by the directors of that corporation. Within twenty days after [~~sending to him~~] THERE HAS BEEN SENT TO HIM the notice provided in said section, the shareholder must deliver to the corporation a written demand for payment with the same information as that provided for in division (A) (2) of this section.

(4) In the case of a merger or consolidation, a demand served on the constituent corporation involved constitutes service on the surviving or the new corporation, whether served before, on, or after the effective date of the merger or consolidation.

(5) If the corporation sends to the dissenting shareholder, at the address specified in his demand, a request for the certificates representing the shares [~~he holds of record~~] AS TO WHICH HE SEEKS RELIEF, he shall, within fifteen days from the date of THE sending OF such request, deliver to the corporation the certificates requested, in order that the corporation may forthwith endorse thereon a legend to the effect that demand for the fair cash value of such shares has been made. The corporation shall promptly return such endorsed certificates to the shareholder. Failure on the part of the shareholder to deliver such certificates terminates his rights as a dissenting shareholder, at the option of the corporation, exercised by written notice sent to him within twenty days after the lapse of the fifteen day period above mentioned, unless a court for good cause shown otherwise directs. If shares represented by a certificate on which such [~~notation~~] A LEGEND has been [~~made~~] ENDORSED are transferred, each new certificate issued therefor shall bear a similar [~~notation~~] LEGEND, together with the name of the original dissenting holder of such shares. A transferee of [~~such~~] THE shares SO ENDORSED acquires only such rights in the corporation as the original dissenting holder of such shares had [~~upon the service of his demand~~] IMMEDIATELY AFTER THE SERVICE OF A DEMAND FOR PAYMENT OF THE FAIR CASH VALUE THEREOF. Such request by the corporation is not an admission by the corporation that the shareholder is entitled to relief under this section.

(B) Unless the corporation and the dissenting shareholder shall have come to an agreement on the fair cash value per share of [~~his~~] THE shares AS TO WHICH HE SEEKS RELIEF, the shareholder or the corporation, which in case of a merger or consolidation may be the surviving or the new corporation, may, within three months after the service of the demand by the shareholder, file a petition in the court of common pleas of the county in which the principal office of the corporation which issues such shares is located, or was located at the time when the proposal was adopted by the shareholders of the corporation, or, if the same was not required to be submitted to the shareholders, was approved by the directors. Other dissenting shareholders, WITHIN THE PERIOD OF THREE MONTHS, may join as plaintiffs, or may be joined as defendants in any such proceeding, and any two or more such proceedings may be consolidated. The petition shall contain a brief statement of the facts, including the vote and the facts entitling the dissenting shareholder to the relief demanded. No answer to such petition is required. Upon the filing of the petition, the court, on motion of the petitioner, shall enter an order fixing a date for hearing the petition, and requiring that a copy of the petition and a notice of the filing and of the date for hearing be given to the respondent or defendant in the manner in which summons is required to be served or substituted service is required to be made in other cases. On the day fixed for hearing on the petition or any adjournment thereof, the court shall determine from the petition and from such evidence as is submitted by either party whether the shareholder is entitled to be paid the fair cash value of any shares and, if so, the number and class of such shares. If the court finds that the shareholder is so entitled, the court may appoint one or more persons as appraisers to receive evidence and to recommend a decision on the amount of the fair cash value. The appraisers have such power and authority AS IS specified in the order of their appointment. The court shall thereupon make a finding as to the fair cash value of a share, and shall render judgment against the corporation for the payment thereof, with interest at such rate and from such date as the court considers equitable. The costs of the proceeding, including reasonable compensation to the appraisers to be fixed by the court, shall be assessed or apportioned as the court considers equitable. Such a proceeding shall be a special proceeding within the meaning of section 2505.02 of the Revised Code, and final orders therein may be vacated, modified, or reversed as provided in sections 2505.01 to 2505.45 [~~, inclusive,~~] of the Revised Code. If during the pendency of any proceeding instituted under this section [,] a suit or proceeding is or has been instituted to enjoin or otherwise to prevent the carrying out of the action as to which the shareholder has dissented, the proceeding instituted under this section shall be stayed until the final determination of the other suit or proceeding. Unless any provision in division (D) of this section is applicable, the fair cash value of said shares as agreed upon by the parties or as fixed under this section shall be paid within thirty days after the date of final determination of such value under this division or the effective date of the amendment to the articles [~~of~~] OR the consummation of the other action involved, whichever occurs last. Such payment shall be made only upon and simultaneously with the surrender to the corporation of the certificates representing the shares for which such payment is made.

(C) In the case where the proposal was required to be submitted to the shareholders of the corporation, fair cash value shall be determined as of the day prior to that on which the vote by the shareholders was taken, or, in the case of a merger pursuant to section 1701.80 of the Revised Code, the day before the adoption of the agreement of merger by the directors of the PARTICULAR subsidiary corporation. The fair cash value of a share FOR THE PURPOSES OF THIS SECTION, is the amount which a willing seller, under no compulsion to sell, would be willing to accept, and which a willing buyer, under no compulsion to purchase, would be willing to pay, but in no event shall the amount thereof exceed the amount specified in the demand of the particular shareholder. In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded.

(D) The right AND OBLIGATION of a dissenting shareholder to receive SUCH FAIR CASH VALUE AND TO SELL SUCH SHARES AS TO WHICH HE SEEKS RELIEF, and the RIGHT AND obligation of the corporation to PURCHASE SUCH SHARES AND TO pay [~~such~~] THE fair cash value THEREOF terminates if:

(1) Such shareholder has not complied with this section, unless the corporation by its directors waives such failure;

(2) The corporation abandons, or is finally enjoined or prevented from carrying out, or the shareholders rescind their adoption of the action involved;

(3) The shareholder withdraws his demand, with the consent of the corporation by its directors;

(4) The corporation and the dissenting shareholder shall not have come to an agreement as to the fair cash value per share, and neither the shareholder nor the corporation shall have filed OR JOINED IN a petition under division (B) of this section within the period provided.

(E) From the time of giving said demand, until either the

termination of the [~~right~~] RIGHTS AND OBLIGATIONS arising therefrom or the purchase of the shares by the corporation, all other rights accruing from such shares, including voting and dividend rights, are suspended. If during suspension, any dividend is paid in money upon shares of such class, OR ANY DIVIDEND OR INTEREST IS PAID IN MONEY UPON ANY SECURITIES ISSUED IN EXTINGUISHMENT OF OR IN SUBSTITUTION FOR SUCH SHARES, an amount equal to the dividend OR INTEREST which, except for said suspension, would have been payable upon [~~the~~] SUCH shares OR SECURITIES, shall be paid to the holder of record as a credit upon the fair cash value of the shares. If the right to receive fair cash value is terminated otherwise than by the purchase of the shares by the corporation, all rights of the holder shall be restored and all distributions which, except for said suspension, would have been made shall be made to the holder of record of said shares at the time of termination.

1701.86 Voluntary dissolution

Sec. 1701.86. (A) A corporation may be dissolved voluntarily in the manner provided in this section.

(B) A resolution of dissolution for a corporation shall set forth:

(1) That the corporation elects to be dissolved;

(2) Any additional provision deemed necessary with respect to the proposed dissolution and winding up.

(C) Before subscriptions to shares shall have been received in such amount that the stated capital of such shares is at least equal to the stated capital set forth in the articles as that with which the corporation will begin business, the incorporators or a majority of them may adopt, by a writing signed by them, a resolution of dissolution.

(D) The directors may adopt a resolution of dissolution in the following cases:

(1) When the corporation has been adjudged bankrupt or has made a general assignment for the benefit of creditors;

(2) By leave of the court, when a receiver has been appointed in a general creditors' suit or in any suit in which the affairs of the corporation are to be wound up;

(3) When substantially all of the assets have been sold at judicial sale or otherwise;

(4) When the articles have been cancelled for failure to file annual franchise or excise tax returns or for failure to pay franchise or excise taxes and the corporation has not been reinstated or does not desire to be reinstated;

(5) When the period of existence of the corporation specified in its articles has expired.

(E) The shareholders at a meeting held for such purpose may adopt a resolution of dissolution by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on such proposal or, if the articles provide or permit, by the affirmative vote of a greater or lesser proportion, though less than a majority, of such voting power, and by such affirmative vote of the holders of shares of any particular class as is required by the articles. Notice of the meeting of the shareholders shall be given to all the shareholders whether or not entitled to vote thereat.

(F) Upon the adoption of a resolution of dissolution, a certificate shall be prepared setting forth the following:

(1) The name of the corporation;

(2) A statement that a resolution of dissolution has been adopted;

(3) A statement of the manner of adoption of such resolution, and, in the case of its adoption by the incorporators or directors, a statement of the basis for such adoption;

(4) The place in this state where its principal office is or is to be located;

(5) The names and addresses of its directors and officers, unless the resolution of dissolution is adopted by the incorporators, in which event the names and addresses of the incorporators shall be set forth in the certificate;

(6) The name and address of its statutory agent.

(G) Such certificate shall be signed as follows:

(1) When the resolution of dissolution is adopted by the incorporators or a majority of them, the certificate shall be signed by not less than a majority of them;

(2) When the resolution is adopted by the directors or by the shareholders, the certificate shall be signed by THE CHAIRMAN OF THE BOARD, the president, or a vice-president and by the secretary or an assistant secretary, unless the officers fail to execute and file such certificate within thirty days after the adoption of the resolution or upon any date specified in the resolution as the date upon which such certificate is to be filed or upon the expiration of any period specified in the resolution as the period within which such certificate is to be filed, whichever is latest, in which event the certificate of dissolution may be signed by any three shareholders and shall set forth a statement that the persons signing the certificate are shareholders and are filing the certificate because of the failure of the officers to do so.

(H) A certificate of dissolution, filed [~~in the office of~~] WITH the secretary of state, shall be accompanied by:

(1) An affidavit of one or more of the persons executing the certificate of dissolution or of an officer of the corporation containing a statement of the counties, if any, in this state in which the corporation has personal property or a statement that the corporation is of a type required to pay personal property taxes to state authorities only;

(2) A receipt, certificate, or other evidence showing the payment of all franchise, sales, use, and highway use taxes accruing up to the date of such filing, or that such payment has been adequately guaranteed;

(3) A receipt, certificate, or other evidence showing the payment of all personal property taxes accruing up to the date of such filing;

(4) A receipt, certificate, or other evidence from the bureau of employment services showing that all contributions due from the corporation as an employer have been paid, or that such payment has been adequately guaranteed, or that the corporation is not subject to such contributions;

(5) A receipt, certificate, or other evidence from the industrial commission showing that all premiums due from the corporation as an employer have been paid, or that such payment has been adequately guaranteed, or that the corporation is not subject to such premium payments.

(I) Upon the filing of a certificate of dissolution and such accompanying documents, the corporation shall be dissolved.

1702.06 Statutory agent

Sec. 1702.06. (A) Every corporation shall have and maintain an agent (sometimes referred to as the "statutory agent"), upon whom any process, notice, or demand required or permitted by statute to be served upon a corporation may be served. Such agent may be a natural person who is a resident of the county in this state in which the principal office of the corporation is located, or may be a domestic corporation for profit or a foreign corporation for profit holding a license as such under the laws of this state which is authorized by its articles of incorporation to act as such agent, and which has a business address in the county in this state in which is located the principal office of the corporation designating such agent.

(B) The secretary of state shall not accept original articles for filing unless there is filed with the articles a written appointment of an agent, signed by the incorporators or a majority of them. In all other cases the corporation shall appoint the agent and shall file in the office of the secretary of state a written appointment of such agent.

(C) The written appointment of an agent shall set forth the name and address in such county of the agent, including the street and number or other particular description, and shall otherwise be in such form as the secretary of state prescribes. The secretary of state shall keep a record of the names of corporations and the names and addresses of their respective agents.

(D) If any agent dies, removes from the county, or resigns, the corporation shall forthwith appoint another agent and file [~~in the office of~~] WITH the secretary of state a written appointment of such agent. If an amendment to the articles changes the principal office of the corporation in this state to another county, the corporation shall forthwith appoint another agent and file [~~in the office of~~] WITH the secretary of state a written appointment of such agent unless the agent is a corporate agent and has a business address in such other county, in which event the corporation shall forthwith file with the secretary of state a written statement setting forth the business address of such corporate agent in such other county.

(E) If the agent changes his or its address from that appearing upon the record in the office of the secretary of state, the corporation shall forthwith file with the secretary of state a written statement setting forth the new address in such county.

(F) An agent may resign by filing with the secretary of state a signed statement to that effect. The secretary of state shall forthwith mail a copy of such statement to the corporation at its principal office. Upon the expiration of sixty days after such filing, the authority of the agent shall terminate.

(G) A corporation may revoke the appointment of an agent by filing with the secretary of state a written appointment of

another agent and a statement that the appointment of the former agent is revoked.

(H) Any process, notice, or demand required or permitted by statute to be served upon a corporation may be served upon such corporation by delivering a copy thereof to its agent, if a natural person, or by delivering a copy thereof at the address of its agent in the county in this state in which the principal office of the corporation is located, as such address appears upon the record in the office of the secretary of state. If (1) the agent cannot be found, or (2) the agent no longer has said address, or (3) the corporation has failed to maintain an agent as required by this section, and if in any such case the party desiring that such process, notice, or demand be served, or the agent or representative of said party, shall have filed with the secretary of state an affidavit stating that one of the foregoing conditions exists and stating the most recent address of said corporation which said party after diligent search has been able to ascertain, then service of process, notice, or demand upon the secretary of state, as the agent of the corporation, may be initiated by delivering to him or at his office triplicate copies of such process, notice, or demand and by paying to him a fee of five dollars. The secretary of state shall forthwith give telegraphic notice of such delivery to the corporation at its principal office as shown upon the record in his office and also to the corporation at any different address set forth in the above mentioned affidavit, and shall forward to the corporation at each of said addresses, by registered mail, with request for return receipt, a copy of such process, notice, or demand; and thereupon service upon the corporation shall be deemed to have been made.

(I) The secretary of state shall keep a record of each process, notice, and demand delivered to him or at his office under this section or any other law of this state which authorizes service upon him, and shall record the time of such delivery and his action thereafter with respect thereto.

(J) This section does not limit or affect the right to serve any process, notice, or demand upon a corporation in any other manner permitted by law.

(K) Except when an original appointment of an agent is filed with the original articles, a written appointment of an agent or a written statement filed by a corporation [~~in the office of~~] WITH the secretary of state shall be signed by the CHAIRMAN OF THE BOARD, THE president, a vice-president, [~~or~~] the secretary [~~of the corporation~~] OR AN ASSISTANT SECRETARY.

(L) For filing a written appointment of an agent other than one filed with original articles, and for filing a statement of change of address of an agent or a statement of the business address of a corporate agent in another county or a written resignation of an agent, the secretary of state shall charge and collect a fee of one dollar.

(M) Upon the failure of any corporation to appoint another agent or to file a statement of change of address of an agent or a statement of the business address of a corporate agent in another county when required by this section, the secretary of state shall give notice thereof by registered mail to such corporation and unless such default is cured within thirty days after the mailing of such notice or within such further period as the secretary of state grants, the secretary of state may, upon the expiration of such period, cancel the articles of such corporation, give notice of such cancellation to the corporation by registered mail, and make a notation of such cancellation on his records. A corporation whose articles have been cancelled may be reinstated by filing an application for reinstatement and the required appointment of agent or required statement, and by paying a filing fee of ten dollars. The secretary of state shall furnish the tax commissioner a monthly list of all corporations cancelled and reinstated under the provisions of this division.

(N) This section does not apply to banks, trust companies, insurance companies, or any corporation defined under the laws of this state as a public utility for taxation purposes.

1702.12 Authority of nonprofit corporation

Sec. 1702.12. (A) A corporation may sue and be sued.

(B) A corporation may adopt and alter a corporate seal and use the same or a facsimile thereof, but failure to affix the corporate seal shall not affect the validity of any instrument.

(C) Unless otherwise provided in the articles, a corporation may take property of any description, or any interest therein, by gift, devise, or bequest.

(D) Subject to limitations prescribed by law or in its articles, a corporation may make donations for the public welfare or for religious, charitable, scientific, literary, or educational purposes, or in furtherance of any of its purposes.

[~~(E) (1) A corporation may indemnify or agree to indemnify a trustee, officer, or employee, or a former trustee, officer, or employee, or any person who is serving or has served at its request as a trustee, officer, or employee of another corporation (whether non-profit or for profit) against expenses actually and necessarily incurred by him in connection with the defense of any pending or threatened action, suit, or proceeding, criminal or civil, to which he is or may be made a party by reason of being or having been such trustee, officer, or employee, provided (a) he is adjudicated or determined not to have been negligent or guilty of misconduct in the performance of his duty to the corporation of which he is a trustee, officer, or employee, (b) he is determined to have acted in good faith in what he reasonably believed to be the best interest of such corporation, and (c), in any matter the subject of a criminal action, suit, or proceeding, he is determined to have had no reasonable cause to believe that his conduct was unlawful. The determination as to (b) and (c) and, in the absence of an adjudication as to (a) by a court of competent jurisdiction, the determination as to (a) shall be made by the trustees of the indemnifying corporation acting at a meeting at which a quorum consisting of trustees who are not parties to or threatened with any such action, suit, or proceeding is present. Any trustee who is a party to or threatened with any such action, suit, or proceeding shall not be qualified to vote and, if for this reason a quorum of trustees cannot be obtained to vote on such indemnification, no indemnification shall be made except in accordance with division (E) (2) or (E) (3) of this section.

(2) A corporation, pursuant to its articles, its regulations, or any agreement authorized or a resolution adopted by the voting members at a meeting held for such purpose by the affirmative vote of a majority of the voting members present if a quorum is present, may indemnify or agree to indemnify such trustee, officer, or employee against expenses, judgments, decrees, fines, penalties, or amounts paid in settlement in connection with the defense of any pending or threatened action, suit, or proceeding, criminal or civil, to which he is or may be made a party by reason of being or having been such trustee, officer, or employee, provided a determination is made by the trustees in the manner set forth in division (E) (1) of this section or is made by or in accordance with a method established by the articles, the regulations, such agreement, or such resolution (a) that such trustee, officer, or employee was not, and has not been adjudicated to have been, negligent or guilty of misconduct in the performance of his duty to the corporation of which he is a trustee, officer, or employee, (b) that he acted in good faith in what he reasonably believed to be the best interest of such corporation, and (c) that, in any matter the subject of a criminal action, suit, or proceeding, he had no reasonable cause to believe that his conduct was unlawful.

(3) Such indemnification shall not be deemed exclusive of any other rights to which such trustee, officer, or employee may be entitled under the articles, the regulations, any agreement, any insurance purchased by the corporation, vote of members, or otherwise.]

(E) (1) A CORPORATION MAY INDEMNIFY OR AGREE TO INDEMNIFY ANY PERSON WHO WAS OR IS A PARTY OR IS THREATENED TO BE MADE A PARTY TO ANY THREATENED, PENDING, OR COMPLETED ACTION, SUIT, OR PROCEEDING, WHETHER CIVIL, CRIMINAL, ADMINISTRATIVE, OR INVESTIGATIVE, OTHER THAN AN ACTION BY OR IN THE RIGHT OF THE CORPORATION, BY REASON OF THE FACT THAT HE IS OR WAS A TRUSTEE, OFFICER, EMPLOYEE, OR AGENT OF THE CORPORATION, OR IS OR WAS SERVING AT THE REQUEST OF THE CORPORATION AS A TRUSTEE, DIRECTOR, OFFICER, EMPLOYEE, OR AGENT OF ANOTHER CORPORATION, DOMESTIC OR FOREIGN, NONPROFIT OR FOR PROFIT, PARTNERSHIP, JOINT VENTURE, TRUST, OR OTHER ENTERPRISE, AGAINST EXPENSES, INCLUDING ATTORNEYS' FEES, JUDGMENTS, FINES, AND AMOUNTS PAID IN SETTLEMENT ACTUALLY AND REASONABLY INCURRED BY HIM IN CONNECTION WITH SUCH ACTION, SUIT, OR PROCEEDING IF HE ACTED IN GOOD FAITH AND IN A MANNER HE REASONABLY BELIEVED TO BE IN OR NOT OPPOSED TO THE BEST INTERESTS OF THE CORPORATION, AND WITH RESPECT TO ANY CRIMINAL ACTION OR PROCEEDING, HE HAD NO REASONABLE CAUSE TO BELIEVE HIS CONDUCT WAS UNLAWFUL. THE TERMINATION OF ANY ACTION, SUIT, OR PROCEEDING BY JUDGMENT, ORDER, SETTLEMENT, CONVICTION, OR UPON A PLEA OF NOLO CONTENDERE OR ITS EQUIVALENT, SHALL NOT, OF ITSELF, CREATE A PRESUMPTION THAT THE PERSON DID NOT ACT IN GOOD FAITH AND IN A MANNER WHICH HE REASONABLY BELIEVED TO BE IN OR NOT OPPOSED TO THE BEST INTERESTS OF THE CORPORATION, AND WITH RESPECT TO ANY CRIMINAL ACTION OR PROCEEDING, HAD REASONABLE CAUSE TO BELIEVE THAT HIS CONDUCT WAS UNLAWFUL.

(2) A CORPORATION MAY INDEMNIFY OR AGREE TO INDEMNIFY ANY PERSON WHO WAS OR IS A PARTY OR IS THREATEND TO BE MADE A PARTY TO ANY THREATENED, PENDING, OR COMPLETED ACTION OR SUIT BY OR IN THE RIGHT OF THE CORPORATION TO PROCURE A JUDGMENT IN ITS FAVOR BY REASON OF THE FACT THAT HE IS OR WAS A TRUSTEE, OFFICER, EMPLOYEE, OR AGENT OF THE CORPORATION, OR IS OR WAS SERVING AT THE REQUEST OF THE CORPORATION AS A TRUSTEE, DIRECTOR, OFFICER, EMPLOYEE, OR AGENT OF ANOTHER CORPORATION, DOMESTIC OR FOREIGN, NONPROFIT OR

FOR PROFIT, PARTNERSHIP, JOINT VENTURE, TRUST, OR OTHER ENTERPRISE AGAINST EXPENSES, INCLUDING ATTORNEYS' FEES, ACTUALLY AND REASONABLY INCURRED BY HIM IN CONNECTION WITH THE DEFENSE OR SETTLEMENT OF SUCH ACTION OR SUIT IF HE ACTED IN GOOD FAITH AND IN A MANNER HE REASONABLY BELIEVED TO BE IN OR NOT OPPOSED TO THE BEST INTERESTS OF THE CORPORATION, EXCEPT THAT NO INDEMNIFICATION SHALL BE MADE IN RESPECT OF ANY CLAIM, ISSUE, OR MATTER AS TO WHICH SUCH PERSON SHALL HAVE BEEN ADJUDGED TO BE LIABLE FOR NEGLIGENCE OR MISCONDUCT IN THE PERFORMANCE OF HIS DUTY TO THE CORPORATION UNLESS AND ONLY TO THE EXTENT THAT THE COURT OF COMMON PLEAS OR THE COURT IN WHICH SUCH ACTION OR SUIT WAS BROUGHT SHALL DETERMINE UPON APPLICATION THAT, DESPITE THE ADJUDICATION OF LIABILITY BUT IN VIEW OF ALL THE CIRCUMSTANCES OF THE CASE, SUCH PERSON IS FAIRLY AND REASONABLY ENTITLED TO INDEMNITY FOR SUCH EXPENSES AS THE COURT OF COMMON PLEAS OR SUCH OTHER COURT SHALL DEEM PROPER.

(3) TO THE EXTENT THAT A TRUSTEE, DIRECTOR, OFFICER, EMPLOYEE, OR AGENT HAS BEEN SUCCESSFUL ON THE MERITS OR OTHERWISE IN DEFENSE OF ANY ACTION, SUIT, OR PROCEEDING REFERRED TO IN DIVISIONS (E) (1) AND (E) (2) OF THIS SECTION, OR IN DEFENSE OF ANY CLAIM, ISSUE, OR MATTER THEREIN, HE SHALL BE INDEMNIFIED AGAINST EXPENSES, INCLUDING ATTORNEYS' FEES, ACTUALLY AND REASONABLY INCURRED BY HIM IN CONNECTION THEREWITH.

(4) ANY INDEMNIFICATIONS UNDER DIVISIONS (E) (1) AND (E) (2) OF THIS SECTION, UNLESS ORDERED BY A COURT, SHALL BE MADE BY THE CORPORATION ONLY AS AUTHORIZED IN THE SPECIFIC CASE UPON A DETERMINATION THAT INDEMNIFICATION OF THE DIRECTOR, TRUSTEE, EMPLOYEE, OR AGENT IS PROPER IN THE CIRCUMSTANCES BECAUSE HE HAS MET THE APPLICABLE STANDARD OF CONDUCT SET FORTH IN DIVISIONS (E) (1) AND (E) (2) OF THIS SECTION, SUCH DETERMINATION SHALL BE MADE (a) BY A MAJORITY VOTE OF A QUORUM CONSISTING OF TRUSTEES OF THE INDEMNIFYING CORPORATION WHO WERE NOT AND ARE NOT PARTIES TO OR THREATENED WITH ANY SUCH ACTION, SUIT, OR PROCEEDING, OR (b) IF SUCH A QUORUM IS NOT OBTAINABLE, OR IF A MAJORITY OF A QUORUM OF DISINTERESTED TRUSTEES SO DIRECTS, IN A WRITTEN OPINION BY INDEPENDENT LEGAL COUNSEL OTHER THAN ATTORNEY, OR A FIRM HAVING ASSOCIATED WITH IT AN ATTORNEY, WHO HAS BEEN RETAINED BY OR WHO HAS PERFORMED SERVICES FOR THE CORPORATION OR ANY PERSON TO BE INDEMNIFIED WITHIN THE PAST FIVE YEARS, OR (c) BY THE MEMBERS, OR (d) BY THE COURT OF COMMON PLEAS OR THE COURT IN WHICH SUCH ACTION, SUIT, OR PROCEEDING WAS BROUGHT. ANY DETERMINATION MADE BY THE DISINTERESTED TRUSTEES UNDER DIVISION (E) (4) (a) OR BY INDEPENDENT LEGAL COUNSEL UNDER DIVISION (E) (4) (b) OF THIS DIVISION SHALL BE PROMPTLY COMMUNICATED TO THE PERSON WHO THREATENED OR BROUGHT THE ACTION OR SUIT BY OR IN THE RIGHT OF THE CORPORATION UNDER DIVISIONS (E) (1) AND (E) (2) OF THIS SECTION, AND WITHIN TEN DAYS AFTER RECEIPT OF SUCH NOTIFICATION, SUCH PERSON SHALL HAVE THE RIGHT TO PETITION THE COURT OF COMMON PLEAS OR THE COURT IN WHICH SUCH ACTION OR SUIT WAS BROUGHT TO REVIEW THE REASONABLENESS OF SUCH DETERMINATION.

(5) EXPENSES, INCLUDING ATTORNEYS' FEES, INCURRED IN DEFENDING ANY ACTION, SUIT, OR PROCEEDING REFERRED TO IN DIVISIONS (E) (1) AND (E) (2) OF THIS SECTION, MAY BE PAID BY THE CORPORATION IN ADVANCE OF THE FINAL DISPOSITION OF SUCH ACTION, SUIT, OR PROCEEDING AS AUTHORIZED BY THE TRUSTEES IN THE SPECIFIC CASE UPON RECEIPT OF AN UNDERTAKING BY OR ON BEHALF OF THE TRUSTEE, DIRECTOR, OFFICER, EMPLOYEE, OR AGENT TO REPAY SUCH AMOUNT UNLESS IT SHALL ULTIMATELY BE DETERMINED THAT HE IS ENTITLED TO BE INDEMNIFIED BY THE CORPORATION AS AUTHORIZED BY THIS SECTION.

(6) THE INDEMNIFICATION PROVIDED BY THIS SECTION SHALL NOT BE DEEMED EXCLUSIVE OF ANY OTHER RIGHTS TO WHICH THOSE SEEKING INDEMNIFICATION MAY BE ENTITLED UNDER THE ARTICLES OR THE REGULATIONS OR ANY AGREEMENT, VOTE OF MEMBERS OR DISINTERESTED TRUSTEES, OR OTHERWISE, BOTH AS TO ACTION IN HIS OFFICIAL CAPACITY AND AS TO ACTION IN ANOTHER CAPACITY WHILE HOLDING SUCH OFFICE, AND SHALL CONTINUE AS TO A PERSON WHO HAS CEASED TO BE A TRUSTEE, DIRECTOR, OFFICER, EMPLOYEE, OR AGENT AND SHALL INURE TO THE BENEFIT OF THE HEIRS, EXECUTORS, AND ADMINISTRATORS OF SUCH A PERSON.

(7) A CORPORATION MAY PURCHASE AND MAINTAIN INSURANCE ON BEHALF OF ANY PERSON WHO IS OR WAS A TRUSTEE, OFFICER, EMPLOYEE, OR AGENT OF THE CORPORATION, OR IS OR WAS SERVING AT THE REQUEST OF THE CORPORATION AS A TRUSTEE, DIRECTOR, OFFICER, EMPLOYEE, OR AGENT OF ANOTHER CORPORATION, DOMESTIC OR FOREIGN, NONPROFIT OR FOR PROFIT, PARTNERSHIP, JOINT VENTURE, TRUST, OR OTHER ENTERPRISE AGAINST ANY LIABILITY ASSERTED AGAINST HIM AND INCURRED BY HIM IN ANY SUCH CAPACITY, OR ARISING OUT OF HIS STATUS AS SUCH, WHETHER OR NOT THE CORPORATION WOULD HAVE THE POWER TO INDEMNIFY HIM AGAINST SUCH LIABILITY UNDER THIS SECTION.

(8) AS USED IN THIS DIVISION, "CORPORATION" INCLUDES ALL CONSTITUENT CORPORATIONS IN A CONSOLIDATION OR MERGER, AND THE NEW OR SURVIVING CORPORATION SO THAT ANY PERSON WHO IS OR WAS A TRUSTEE, OFFICER, EMPLOYEE, OR AGENT OF SUCH A CONSTITUENT CORPORATION OR IS OR WAS SERVING AT THE REQUEST OF SUCH CONSTITUENT CORPORATION AS A TRUSTEE, DIRECTOR, OFFICER, EMPLOYEE, OR AGENT OF ANOTHER CORPORATION, DOMESTIC OR FOREIGN, NONPROFIT OR FOR PROFIT, PARTNERSHIP, JOINT VENTURE, TRUST, OR OTHER ENTERPRISE SHALL STAND IN THE SAME POSITION UNDER THIS SECTION WITH RESPECT TO THE NEW OR SURVIVING CORPORATION AS HE WOULD IF HE HAD SERVED THE NEW OR SURVIVING CORPORATION IN THE SAME CAPACITY.

(F) In carrying out the purposes stated in its articles and subject to limitations prescribed by law or in its articles, a corporation may:

(1) Purchase or otherwise acquire, lease as lessee, invest in, hold, use, lease as lessor, encumber, sell, exchange, transfer, and dispose of property of any description or any interest therein;

(2) Make contracts;

(3) Form or acquire the control of other corporations, domestic or foreign, whether [~~non profit~~] NONPROFIT or for profit;

(4) Be a partner, member, associate, or participant in other enterprises or ventures, whether profit or [~~non profit~~] NONPROFIT;

(5) Borrow money, and issue, sell, and pledge its notes, bonds, and other evidences of indebtedness, and secure any of its obligations by mortgage, pledge, or deed of trust, of all or any of its property, and guarantee or secure obligations of any person;

(6) Become a member of another corporation;

(7) Conduct its affairs in this state and elsewhere;

(8) Do all things permitted by law and exercise all authority within the purposes stated in its articles or incidental thereto.

(G) Irrespective of the purposes stated in its articles, but subject to limitations or prohibitions stated therein, a corporation, in addition to the authority conferred by division (F) of this section, may invest its funds not currently needed in carrying out its purposes in any shares or other securities of another corporation (whether [~~non profit~~] NONPROFIT or for profit), business, or undertaking.

(H) (1) No corporation which is a "private foundation" as defined in section 509 of the internal revenue code of 1954 shall:

(a) Engage in any act of "self-dealing," as defined in section 4941 (d) of the internal revenue code of 1954, which would give rise to any liability for any tax imposed by section 4941 of the internal revenue code of 1954;

(b) Retain any "excess business holdings," as defined in section 4943 (c) of the internal revenue code of 1954, which would give rise to any liability for any tax imposed by section 4943 of the internal revenue code of 1954;

(c) Make any investment which would jeopardize the carrying out of any of its exempt purposes, within the meaning of section 4944 of the internal revenue code of 1954, so as to give rise to any liability for any tax imposed by section 4944 of the internal revenue code of 1954; or

(d) Make any "taxable expenditures," as defined in section 4945 (d) of the internal revenue code of 1954, which would give rise to any liability for any tax imposed by section 4945 of the internal revenue code of 1954.

(2) Each corporation which is a "private foundation" as defined in section 509 of the internal revenue code of 1954 shall, for the purposes specified in its articles, distribute at such time and in such manner, for each taxable year, amounts at least sufficient to avoid liability for any tax imposed by section 4942 of the internal revenue code of 1954.

(3) Divisions (H) (1) and (2) of this section apply to all corporations described therein, whether or not contrary to the provisions of the articles or regulations of such a corporation, provided that divisions (H) (1) and (2) of this section do not apply to a corporation in existence on the effective date of this section to the extent that such corporation provides to the contrary

by amendment to its articles adopted after the effective date of this section.

(4) Violation of a provision of division (H) (1) or (2) of this section by a corporation to which said provisions are applicable is not cause for cancellation of its articles. No trustee or officer of a corporation to which the provisions of division (H) (1) or (2) of this section are applicable is personally liable for a violation of a prohibition or requirement of said provisions, unless he participated in such violation knowing that it was a violation, nor shall such trustee or officer be personally liable if such violation was not willful and was due to reasonable cause, provided that this division does not exonerate a trustee or officer from any responsibility or liability to which he is subject under any other rule of law whether or not duplicated in division (H) (1) or (2) of this section.

(5) Except as provided in division (H) (4) of this section, nothing in this division impairs the rights and powers of the courts or the attorney general of this state with respect to any corporation.

(6) All references to sections of the internal revenue code of 1954 include all amendments or reenactments thereof.

(I) No lack of, or limitation upon, the authority of a corporation shall be asserted in any action except (1) by the state in an action by it against the corporation, (2) by or on behalf of the corporation against a trustee, an officer, or a member as such, or (3) by a member as such or by or on behalf of the members against the corporation, a trustee, an officer, or a member as such. This division shall apply to any action brought in this state upon any contract made in this state by a foreign corporation.

1702.16 Annual meeting

Sec. 1702.16. An annual meeting of voting members for the election of trustees and the consideration of reports to be laid before such meeting shall be held on [~~the first Monday of the fourth month following the close of each fiscal year of the corporation, unless another date is provided for in the articles or the regulations~~] A DATE DESIGNATED BY OR IN THE MANNER PROVIDED FOR IN THE ARTICLES OR THE REGULATIONS. IN THE ABSENCE OF SUCH A DESIGNATION, THE ANNUAL MEETING SHALL BE HELD ON THE FIRST MONDAY OF THE FOURTH MONTH FOLLOWING THE CLOSE OF EACH FISCAL YEAR OF THE CORPORATION. When the annual meeting is not held or trustees are not elected thereat, they may be elected at a special meeting called for that purpose.

1702.31 Trustees meetings; notice

Sec. 1702.31. Unless otherwise provided in the articles, regulations, or bylaws, and subject to the exceptions applicable during an emergency for which provision is made in division (G) of section 1702.11 of the Revised Code:

(A) Meetings of the trustees may be called by the chairman of the board, the president, any vice-president, or any two trustees;

(B) Meetings of the trustees may be held at any place within or without the state AND, UNLESS THE ARTICLES OR REGULATIONS PROHIBIT PARTICIPATION BY TRUSTEES AT A MEETING BY MEANS OF COMMUNICATIONS EQUIPMENT, MEETINGS OF THE TRUSTEES MAY BE HELD THROUGH ANY COMMUNICATIONS EQUIPMENT IF ALL PERSONS PARTICIPATING CAN HEAR EACH OTHER AND PARTICIPATION IN A MEETING PURSUANT TO THIS DIVISION SHALL CONSTITUTE PRESENCE AT SUCH MEETING;

(C) Written notice of the time and place of each meeting of the trustees shall be given to each trustee either by personal delivery or by mail, telegram, or cablegram at least two days before the meeting, which notice need not specify the purposes of the meeting;

(D) Notice of adjournment of a meeting need not be given if the time and place to which it is adjourned are fixed and announced at such meeting.

1702.38 Amendments to articles

Sec. 1702.38. (A) The articles may be amended from time to time in any respect if the articles as amended set forth all such provisions as are required in, and only such provisions as may properly be in, original articles filed at the time of adopting the amendment, other than with respect to the initial trustees; provided that a charitable corporation shall not amend its articles in such manner that it will cease to be a charitable corporation.

(B) Without limiting the generality of such authority, the articles may be amended to:

(1) Change the name of the corporation;

(2) Change the place in this state where its principal office is to be located;

(3) Change, enlarge, or diminish its purpose or purposes;

(4) Change any provision of the articles or add any provision that may properly be included therein.

(C) The voting members at a meeting held for such purpose may adopt an amendment by the affirmative vote of a majority of the voting members present if a quorum is present, or, if the articles or the regulations provide or permit, by the affirmative vote of a greater or lesser proportion or number of the voting members, and by such affirmative vote of the voting members of any particular class as is required by the articles or the regulations.

(D) In addition to or in lieu of adopting an amendment to the articles, the voting members may adopt amended articles by the same action or vote as that required to adopt the amendment.

(E) The trustees may adopt amended articles to consolidate the original articles and all previously adopted amendments to the articles that are in force at the time, or the voting members at a meeting held for such purpose may adopt such amended articles by the same vote as that required to adopt an amendment.

(F) Amended articles shall set forth all such provisions as are required in, and only such provisions as may properly be in, original articles filed at the time of adopting the amended articles, other than with respect to the initial trustees, and shall contain a statement that they supersede the existing articles.

(G) Upon the adoption of any amendment or amended articles, a certificate containing a copy of the resolution adopting the amendment or amended articles, a statement of the manner of its adoption, and, in the case of adoption of the resolution by the trustees, a statement of the basis for such adoption, shall be filed [~~in the office of~~] WITH the secretary of state, and thereupon the articles shall be amended accordingly, and the amended articles shall supersede the existing articles. The certificate shall be signed by THE CHAIRMAN OF THE BOARD, the president, or a vice-president, and by the secretary or an assistant secretary.

(H) A copy of an amendment or amended articles changing the name of a corporation or its principal office in this state, certified by the secretary of state, may be filed for record in the office of the county recorder of any county in this state, and for such recording the county recorder shall charge and collect a fee of five dollars. Such copy shall be recorded in the records of deeds.

1702.41 Merger and consolidation procedure

Sec. 1702.41. (A) Any two or more corporations may merge into a single corporation which shall be one of the constituent corporations, or may consolidate into a single corporation which shall be a new corporation to be formed by the consolidation; except that a charitable corporation may merge into or may consolidate with other charitable corporations only, and the surviving or new corporation, as the case may be, must be a charitable corporation.

(B) To effect such merger or consolidation, the trustees of each constituent corporation shall approve an agreement of merger or consolidation to be signed by the CHAIRMAN OF THE BOARD, president, or a vice-president, and by the secretary or an assistant secretary [~~of such corporation~~], which agreement shall set forth:

(1) That the named constituent corporations have agreed to merge into a specified constituent corporation, herein designated the surviving corporation, or that the named constituent corporations have agreed to consolidate into a new corporation to be formed by the consolidation, herein designated the new corporation;

(2) The name of the surviving or new corporation, which may be the same as or similar to that of any constituent corporation;

(3) The place in this state where the principal office of the surviving or new corporation is to be located;

(4) The purpose or purposes of the surviving or new corporation which, in case the constituent corporations are charitable corporations, must be such that the surviving or new corporation will also be a charitable corporation;

(5) The names and addresses of the first trustees and officers of the surviving or new corporation, and, if desired, their term or terms of office;

(6) The name and address of the statutory agent upon whom

any process, notice, or demand against any constituent corporation or the surviving or new corporation may be served;

(7) The terms of the merger or consolidation and the mode of carrying the same into effect;

(8) The regulations of the surviving or new corporation or a provision to the effect that the regulations of one of the constituent corporations shall be the regulations of the surviving or new corporation or to the effect that the voting members or the trustees of the surviving or new corporation may adopt regulations, or any combination thereof.

(C) The agreement may also set forth:

(1) The specification of a date, which may be the date of the filing of the agreement or a date subsequent thereto, upon which the merger or consolidation shall become effective;

(2) A provision conferring upon the trustees of one or more of the constituent corporations the power to abandon the merger or consolidation prior to the filing of the agreement;

(3) Any additional provision permitted to be included in the articles of a newly formed corporation;

(4) Any additional provision deemed necessary or desirable with respect to the proposed merger or consolidation.

1702.43 Certificate of merger

Sec. 1702.43. (A) Upon such adoption, a certificate, signed by THE CHAIRMAN OF THE BOARD, the president, or vice-president, and by the secretary or an assistant secretary of each constituent corporation and containing either a signed agreement or a copy thereof and a statement by such officers of each constituent corporation of the manner of its adoption by such corporation, shall be filed [~~in the office~~] WITH the secretary of state.

(B) Upon such filing or at such later date as the agreement specifies, the merger or consolidation shall become effective.

(C) A copy of such agreement, certified by the secretary of state, may be filed for record in the office of the county recorder of any county in this state, and for such recording the county recorder shall charge and collect the same fee as in the case of deeds. Such copy shall be recorded in the records of deeds.

1702.47 Voluntary dissolution

Sec. 1702.47. (A) A corporation may be dissolved voluntarily in the manner provided in this section.

(B) A resolution of dissolution for a corporation shall set forth:

(1) That the corporation elects to be dissolved;

(2) Any additional provision deemed necessary with respect to the proposed dissolution and winding up.

(C) The trustees may adopt a resolution of dissolution in the following cases:

(1) When the corporation has been adjudged bankrupt or has made a general assignment for the benefit of creditors;

(2) By leave of the court, when a receiver has been appointed in a general creditors' suit or in any suit in which the affairs of the corporation are to be wound up;

(3) When substantially all of the assets have been sold at judicial sale or otherwise;

(4) When the period of existence of the corporation specified in its articles has expired.

(D) The voting members at a meeting held for such purpose may adopt a resolution of dissolution by the affirmative vote of a majority of the voting members present if a quorum is present or, if the articles or the regulations provide or permit, by the affirmative vote of a greater or lesser proportion or number of the voting members, and by such affirmative vote of the voting members of any particular class as is required by the articles or the regulations. Notice of the meeting of the members shall be given to all the members whether or not entitled to vote thereat.

(E) Upon the adoption of a resolution of dissolution, a certificate shall be prepared setting forth the following:

(1) The name of the corporation;

(2) A statement that a resolution of dissolution has been adopted;

(3) A statement of the manner of adoption of such resolution, and, in the case of its adoption by the trustees, a statement of the basis for such adoption;

(4) The place in this state where its principal office is or is to be located;

(5) The names and addresses of its trustees and officers;

(6) The name and address of its statutory agent.

(F) Such certificate shall be signed by THE CHAIRMAN OF THE BOARD, the president, or a vice-president, and by the secretary or an assistant secretary, unless the officers fail to execute and file such certificate within thirty days after the adoption of the resolution, or upon any date specified in the resolution as the date upon which such certificate is to be filed, or upon the expiration of any period specified in the resolution as the period within which such certificate is to be filed, whichever is latest, in which event the certificate of dissolution may be signed by any three voting members and shall set forth a statement that the persons signing the certificate are voting members and are filing the certificate because of the failure of the officers to do so.

(G) A certificate of dissolution, filed [~~in the office of~~] WITH the secretary of state, shall be accompanied by:

(1) An affidavit of one or more of the persons executing the certificate of dissolution or of an officer of the corporation containing a statement of the counties, if any, in this state in which the corporation has personal property subject to personal property taxes or a statement that the corporation is of a type required to pay personal property taxes to state authorities only;

(2) A receipt, certificate, or other evidence showing the payment of all personal property taxes accruing up to the date of such filing, unless the affidavit provided for in division (G) (1) of this section states that the corporation has in this state no personal property subject to personal property taxes;

(3) A receipt, certificate, or other evidence from the bureau of employment services showing that all contributions due from the corporation as an employer have been paid, or that such payment has been adequately guaranteed, or that the corporation is not subject to such contributions;

(4) A receipt, certificate, or other evidence showing the payment of all sales, use, and highway use taxes accruing up to the date of such filing, or that such payment has been adequately guaranteed.

(H) Upon the filing of a certificate of dissolution and such accompanying documents, the corporation shall be dissolved.

1703.11 Additional installments of license fee

Sec. 1703.11. In the event that any report filed by a foreign corporation under sections 1703.01 to 1703.31 [, ~~inclusive,~~] of the Revised Code, subsequent to its first report discloses that such foreign corporation has represented in this state a number of issued shares in excess of the number theretofore determined to be so represented, the corporation shall pay to the secretary of state an additional installment of the license fee based upon such additional number of shares and computed as follows:

The secretary of state shall first compute a fee upon the entire number of issued shares of such corporation represented in this state, as shown by such report, on the basis set forth in section 1703.09 of the Revised Code. He shall then compute a fee, on the same basis, upon the number of issued shares which such corporation has been authorized theretofore to have represented in this state. The fee payable shall be the difference between such two fees, LESS A CREDIT ON SAID BASIS FOR THE NUMBER OF SHARES PREVIOUSLY AUTHORIZED TO BE ISSUED BY THE CORPORATION OR BY THE FOREIGN CORPORATIONS, A CONSOLIDATION OR MERGER OF WHICH IS EFFECTED BY A CERTIFICATE OF REORGANIZATION OR AN AGREEMENT OF MERGER OR CONSOLIDATION.

When any report filed under sections 1703.01 to 1703.31 [, ~~inclusive,~~] of the Revised Code, or any other facts coming to the knowledge of the secretary of state, disclose a liability for the payment of an installment of the license fee, the secretary of state shall mail to the corporation a statement of the installment of the license fee then due, together with a statement showing the number of shares of said corporation represented in this state, the number of shares which the corporation has theretofore been authorized to have so represented, and the additional number of shares in respect of which an installment of the license fee is payable. Such installment shall be paid to the secretary of state on or before a date thirty days from the date of such mailing unless an appeal is taken under section 1703.26 of the Revised Code.

5733.22 Reinstatement of a corporation

Sec. 5733.22. Any corporation whose articles of incorporation or license certificate to do or transact business in this state has expired or has been canceled or revoked by the secretary of state as provided by law for failure to make any report or return or to pay any tax or fee, upon payment to the secretary of state of any additional fees and penalties required to be paid to him, and

upon the filing with the secretary of state of a certificate from the tax commissioner that it has complied with all the requirements of law as to franchise or excise tax reports and paid all franchise or excise taxes, fees, or penalties due thereon for every year of its delinquency, and upon the payment to the secretary of state of an additional fee of ten dollars, shall be reinstated and again entitled to exercise its rights, privileges, and franchises in this state, and the secretary of state shall cancel the entry of cancellation or expiration to exercise its rights, privileges, and franchises. If the reinstatement is not made within [~~two years~~] ONE YEAR from the date of the cancellation of its articles of incorporation or date of the cancellation or expiration of its license to do business, and it appears that the articles of incorporation or a license certificate has been issued to a corporation of the same or similar name, the applicant for reinstatement shall be required by the secretary of state, as a condition prerequisite to such reinstatement, to amend its articles by changing its name. A certificate of reinstatement may be filed in the recorder's office of any county in the state, for which the recorder shall charge and collect one dollar.

If a domestic corporation applying for reinstatement has not previously designated an agent upon whom process may be served as required by section 1701.07 of the Revised Code, such corporation shall at the time of reinstatement and as a prerequisite thereto designate an agent in accordance with such section.

Any officer, shareholder, creditor, or receiver of any such corporation may at any time take all steps required by this section to effect such reinstatement, and in such case the designation of an agent upon whom process may be served shall not be a prerequisite to the reinstatement of the corporation.

SECTION 2. That existing sections 1701.07, 1701.13, 1701.15, 1701.18, 1701.30, 1701.35, 1701.39, 1701.60, 1701.61, 1701.73, 1701.81, 1701.84, 1701.85, 1701.86, 1702.06, 1702.12, 1702.16, 1702.31, 1702.38, 1702.41, 1702.43, 1702.47, 1703.11, and 5733.22 of the Revised Code are hereby repealed.

AM. SUB. HOUSE BILL 995

Act Eff. 10-2-74; Revised Code provisions (Act §§ 1 & 2) eff. 1-1-75

Passed 6-12-74 Approved by Governor 7-3-74

Filed 7-3-74 File No. 388

To amend sections 4511.01, 4511.07, 4511.15, 4511.19, 4511.24, 4511.25, 4511.28, 4511.29, 4511.30, 4511.33, 4511.39, 4511.42, 4511.44, 4511.48, 4511.49, 4511.51, 4511.53, 4511.55, 4511.62, 4511.70, 4511.75, 4511.76, 4513.11, and 5501.03, to enact sections 4511.431, 4511.441, 4511.452, 4511.481, 4511.511, 4511.661, 4511.711, 4511.712, and 4511.771, to enact new sections 4511.41, 4511.43, 4511.46, 4511.50, and 4511.56, and to repeal sections 4511.41, 4511.43, 4511.46, 4511.50, and 4511.56 of the Revised Code to meet certain requirements of the Federal Highway Safety Act of 1966.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 4511.01, 4511.07, 4511.15, 4511.19, 4511.24, 4511.25, 4511.28, 4511.29, 4511.30, 4511.33, 4511.39, 4511.42, 4511.44, 4511.48, 4511.49, 4511.51, 4511.53, 4511.55, 4511.62, 4511.70, 4511.75, 4511.76, 4513.11, and 5501.03 be amended, sections 4511.431, 4511.441, 4511.452, 4511.481, 4511.511, 4511.661, 4511.711, 4511.712, and 4511.771, and new sections 4511.41, 4511.43, 4511.46, 4511.50, and 4511.56 of the Revised Code be enacted to read as follows:

4511.01 Definitions

Sec. 4511.01. As used in sections 4511.01 to 4511.80 and 4511.99 of the Revised Code:

(A) "Vehicle" means every device in, upon, or by which any person or property may be transported or drawn upon a highway, except devices moved by power collected from overhead electric trolley wires, or used exclusively upon stationary rails or tracks, and except devices other than bicycles moved by human power.

(B) "Motor vehicle" means every vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires, except road rollers, traction engines, power shovels, power cranes, and other equipment used in construction work and not designed for or employed in general highway transportation, hole-digging machinery, well-drilling machinery, ditch-digging machinery, farm machinery, trailers used to transport agricultural produce or agricultural production materials between a local place of storage or supply and the farm when drawn or towed on a public road or highway at a speed of twenty-five miles per hour, or less, threshing machinery, hay-baling machinery, and agricultural tractors and machinery used in the production of horticultural, floricultural, agricultural, and vegetable products.

(C) "Motorcycle" means every motor vehicle, other than a bicycle with a motor as provided in division (G) of this section or a tractor, having a saddle for the use of the operator and designed to travel on not more than three wheels in contact with the ground, including, but not limited to, motor vehicles known as "motor-driven cycle," "motor bicycle," "motor scooter," "bicycle with motor attached," or "motorcycle" without regard to weight or brake horsepower.

(D) "Emergency vehicle" means vehicles of salvage corporations organized under sections 1709.01 to 1709.07 of the Revised Code, emergency vehicles of municipal or county departments or public utility corporations when identified as such as required by law, the director of highway safety, or local authorities, and motor vehicles when commandeered by a police officer.

(E) "Public safety vehicle" means ambulances, motor vehicles used by public law enforcement officers or other persons sworn to enforce the criminal and traffic laws of the state, and the vehicles used by fire departments, including motor vehicles when used by volunteer firemen responding to emergency calls in the fire department service when identified as required by the director of highway safety.

(F) "School bus" means every bus designed for carrying more than nine passengers which is owned by a public, private, or governmental agency or institution of learning and operated for the transportation of children to or from a school session or a school function, or owned by a private person and operated for compensation for the transportation of children to or from a school session or a school function; provided "school bus" does not include a bus operated by a municipally owned transportation system, a mass transit company operating exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous to such municipal corporation, nor a common passenger carrier certified by the public utilities commission unless such bus is devoted exclusively to the transportation of children to and from a school session or a school function.

(G) "Bicycle" means ~~a two wheel vehicle~~ EVERY DEVICE propelled by human power, UPON WHICH ANY PERSON MAY RIDE having ~~a~~ EITHER TWO tandem ~~arrangement of~~ wheels ~~equipped with tires either~~, OR ONE WHEEL IN THE FRONT AND TWO WHEELS IN THE REAR, ANY of which is ~~over twenty~~ MORE THAN FOURTEEN inches in diameter; and includes any such ~~vehicle~~ DEVICE fitted with a helper motor rated less than one brake horsepower transmitted by friction and not by gear or chain, which produces only ordinary pedaling speeds up to a maximum of twenty miles per hour.

(H) "Commercial tractor" means every motor vehicle having motive power designed or used for drawing other vehicles and not so constructed as to carry any load thereon, or designed or used for drawing other vehicles while carrying a portion of such other vehicles, or the load thereon, or both.

(I) "Agricultural tractor" means every self-propelling vehicle designed or used for drawing other vehicles or wheeled machinery but having no provision for carrying loads independently of such other vehicles, and used principally for agricultural purposes.

(J) "Truck" means every motor vehicle, except trailers and semitrailers, designed and used to carry property.

(K) "Bus" means every motor vehicle designed for carrying more than nine passengers and used for the transportation of persons, and every motor vehicle, automobile for hire, or funeral

previous four years on a question or questions specified in section 4301.35, 4301.351, or 4305.14 of the Revised Code, upon presentation of a petition to the appropriate board of elections signed by qualified electors in the election precinct equal in number to at least sixty per cent of the total number of votes cast in the precinct for the office of Governor at the preceding general election for that office. If the petition is sufficient, the board to which the petition has been presented shall order the holding of a special election in the election precinct for the submission of the question or questions specified in section 4301.35, 4301.351, or 4305.14 of the Revised Code as designated on the petition, on a day designated in the petition which shall be on the same day as the primary or general election. The time deadlines and petitioning procedure established in section 4301.33 of the Revised Code apply to any election held under this section. Except as otherwise provided in this section, an election held under this section shall be governed by sections 4301.32 to 4301.41 of the Revised Code. An election held under this section may be held only once in the same election precinct during the period in which this section is in effect.

SECTION 4. Section 3 of this act applies to every local option election held pursuant to that section for a period ending one year after the effective date of this act.

SECTION 5. That Sections 3 and 4 of Amended Substitute House Bill 627 of the 116th General Assembly are hereby repealed.

AMENDED SUBSTITUTE HOUSE BILL NO. 902

Act Effective Date:	11-22-86
Date Passed:	11-20-86
Date Approved by Governor:	11-22-86
Date Filed:	11-24-86
File Number:	278
Chief Sponsor:	SUSTER

General and Permanent Nature: Per the Director of the Ohio Legislative Service Commission, this Act's section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code; however, LSC's certification required removing RC 1701.81 and 1701.82 from the title, amending or enacting clause, and the repealing clause, and adding RC 1701.95 to the title. These adjustments were made to make the title, amending or enacting clause, and the repealing clause accurately recite the numbers of the Revised Code sections that are in fact amended by this Act.

Emergency: Pursuant to O Const, Art II, § 1d, this Act was declared to be an emergency measure necessary for the preservation of the public peace, health, and safety. See Act section 10.

Section Effective Date(s): This Act contains provisions which take effect on dates different from the effective date of the Act itself. See Act section(s) 3 and 8.

Editor's Note: An LSC Analysis is printed at the end of this bill.

To amend sections 1701.01, 1701.13, 1701.16, 1701.19, 1701.32, 1701.59, 1701.60, 1701.76, 1701.78, 1701.79, 1701.80, 1701.84, 1701.85, 1701.95, 4967.04, and 4967.10, to enact section 1701.801, and to repeal sections 4967.05, 4967.06, 4967.07, 4967.08, 4967.09, and 4967.11 of the Revised Code to make changes in the general corporation law relative to mergers and consolidations, to require railroad companies to follow that law's procedures when they merge or consolidate, to make certain changes in the law governing corporate directors, to make other changes in the general corporate law, to amend sections 1701.32 and 1701.95 of the Revised Code, effective July 1, 1987, to amend section 1701.16 of the Revised Code, effective March 1, 1987, and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 1701.01, 1701.13, 1701.16, 1701.19, 1701.32, 1701.59, 1701.60, 1701.76, 1701.78, 1701.79, 1701.80, 1701.84, 1701.85, 1701.95, 4967.04, and 4967.10 be amended and section 1701.801 of the Revised Code be enacted to read as follows:

1701.01 Definitions [Eff. 11-22-86]

As used in sections 1701.01 to 1701.98 of the Revised Code, unless the context otherwise requires:

(A) "Corporation" or "domestic corporation" means a corporation for profit formed under the laws of this state.

(B) "Foreign corporation" means a corporation for profit formed under the laws of another state.

(C) "State" means the United States; any state, territory, insular possession, or other political subdivision of the United States, including the District of Columbia; any foreign country or nation; and any province, territory, or other political subdivision of such foreign country or nation.

(D) "Articles" includes original articles of incorporation, agreements of merger or consolidation IF AND ONLY TO THE EXTENT THAT ARTICLES OF INCORPORATION ARE ADOPTED OR AMENDED IN THE AGREEMENTS AS PROVIDED IN THIS CHAPTER, certificates of reorganization, amended articles, and amendments to any of these, and, in the case of a corporation created before September 1, 1851, the special charter and any amendments to it made by special act of the general assembly or pursuant to general law.

(E) "Incorporator" means a person who signed the original articles of incorporation.

(F) "Shareholder" means a person whose name appears on the books of the corporation as the owner of shares of such corporation. Unless the articles, the regulations, or the contract of subscription otherwise provides, "shareholder" includes a subscriber to shares, whether the subscription is received by the incorporators or pursuant to authorization by the directors, and such shares shall be deemed to be outstanding shares.

(G) "Person" includes, without limitation, a corporation, whether nonprofit or for profit, a partnership, an unincorporated society or association, and two or more persons having a joint or common interest.

(H) The location of the "principal office" of a corporation is the place named as such in its articles.

(I) The "express terms" of shares of a class are the statements expressed in the articles with respect to such shares.

(J) Shares of a class are "junior" to shares of another class when any of their dividend or distribution rights are subordinate to, or dependent or contingent upon, any right of, or dividend on, or distribution to, shares of such other class.

(K) "Treasury shares" means shares belonging to the corporation and not retired, that have been either issued and thereafter acquired by the corporation, or paid as a dividend or distribution in shares of the corporation on treasury shares of the same class; such shares shall be deemed to be issued, but they shall not be considered as an asset or a liability of the corporation, or as outstanding for dividend or distribution, quorum, voting, or other purposes, except, when authorized by the directors, for dividends or distributions in authorized but unissued shares of the corporation of the same class.

(L) To "retire" a share means to restore it to the status of an authorized but unissued share.

(M) "Redemption price of shares" means the amount required by the articles to be paid on redemption of shares.

(N) "Liquidation price" means the amount or portion of assets required by the articles to be distributed to the holders of shares of any class upon dissolution, liquidation, merger, or consolidation of the corporation, or upon sale of all or substantially all of its assets.

(O) "Insolvent" means that the corporation is unable to pay its obligations as they become due in the usual course of its affairs.

(P) "Parent corporation" or "parent" means a domestic or foreign corporation which owns and holds of record shares of another corporation, domestic or foreign, entitling the holder of the shares at the time to exercise a majority of the voting power in the election of the directors of the other corporation without regard to voting power which may thereafter exist upon a default, failure, or other contingency; "subsidiary corporation" or "subsidiary" means a domestic or foreign corporation of which another corporation, domestic or foreign, is the parent.

(Q) "Combination" means a transaction, other than a merger or consolidation, wherein either OF THE FOLLOWING APPLY:

(1) Voting shares of a domestic corporation are issued or transferred in consideration in whole or in part for the transfer to itself or to one or more of its subsidiaries, domestic or foreign, of all or substantially all the assets of one or more corporations, domestic or foreign, with or without good will or the assumption of liabilities;

(2) Voting shares of a foreign parent corporation are issued or transferred in consideration in whole or in part for the transfer of such assets to one or more of its domestic subsidiaries.

"Transferee corporation" in a combination means the corporation, domestic or foreign, to which the assets are transferred, and "transferor corporation" in a combination means the corporation, domestic or foreign, transferring such assets and to which, or to the shareholders of which, the voting shares of the domestic or foreign corporation are issued or transferred.

(R) "Majority share acquisition" means the acquisition of shares of a corporation, domestic or foreign, entitling the holder of the shares to exercise a majority of the voting power in the election of directors of such corporation without regard to voting power which may thereafter exist upon a default, failure, or other contingency, BY either OF THE FOLLOWING:

(1) ~~By a~~ A domestic corporation in consideration in whole or in part, for the issuance or transfer of its voting shares;

(2) ~~By a~~ A domestic or foreign subsidiary in consideration in whole or in part for the issuance or transfer of voting shares of its domestic parent.

(S) "Acquiring corporation" in a combination means the domestic corporation whose voting shares are issued or transferred by it or its subsidiary or subsidiaries to the transferor corporation or corporations or the shareholders ~~thereof~~ OF THE TRANSFEROR CORPORATION OR CORPORATIONS; and "acquiring corporation" in a majority share acquisition means the domestic corporation whose voting shares are issued or transferred by it or its subsidiary in consideration for shares of a domestic or foreign corporation entitling the holder ~~thereof~~ OF THE SHARES to exercise a majority of the voting power in the election of directors of such corporation.

(T) When used in connection with a combination or a majority share acquisition, "voting shares" means shares of a corporation, domestic or foreign, entitling the holder of the shares to vote at the time in the election of directors of such corporation without regard to voting power which may thereafter exist upon a default, failure, or other contingency.

(U) "An emergency" exists when the governor, or any other person lawfully exercising the power and discharging the duties of the office of governor, proclaims that an attack on the United States or any nuclear, atomic, or other disaster has caused an emergency for corporations, and such an emergency shall continue until terminated by proclamation of the governor or any other person lawfully exercising the powers and discharging the duties of the office of governor.

(V) "Constituent corporation" means an existing corporation ~~that is participating with~~ MERGING INTO OR INTO WHICH IS BEING MERGED one or more other corporations in a merger, or ~~is~~ AN EXISTING CORPORATION being consolidated with one or more other corporations into a new corporation IN A CONSOLIDATION, whether any such corporations are domestic or foreign.

(W) "Surviving corporation" means the constituent corporation, domestic or foreign, which is specified as the corporation into which one or more other constituent corporations are to be or have been merged.

(X) "Close corporation agreement" means an agreement that satisfies the three requirements of division (A) of section 1701.591 of the Revised Code.

(Y) "Issuing public corporation" means a domestic corporation with fifty or more shareholders that has its principal place of business, principal executive offices, or substantial assets within this state, and as to which no valid close corporation agreement exists under division (H) of section 1701.591 of the Revised Code.

(Z)(1) "Control share acquisition" means the acquisition, directly or indirectly, by any person of shares of an issuing public corporation that, when added to all other shares of the issuing public corporation in respect of which such person may exercise or direct the exercise of voting power as provided in this division, would entitle such person, immediately after such acquisition, directly or indirectly, alone or with others, to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of such voting power:

(a) One-fifth or more but less than one-third of such voting power;

(b) One-third or more but less than a majority of such voting power;

(c) A majority or more of such voting power.

A bank, broker, nominee, trustee, or other person, however, who acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code shall be deemed to have voting power only of shares in respect of which such person would be able to exercise or direct the exercise of votes without further instruction from others at a meeting of shareholders called under section 1701.831 of the Revised Code.

(2) The acquisition of any shares of an issuing public corporation does not constitute a control share acquisition for the purpose of section 1701.831 of the Revised Code if the acquisition is consummated in any of the following circumstances:

(a) Prior to November 19, 1982;

(b) Pursuant to a contract existing prior to November 19, 1982;

(c) Pursuant to the laws of descent and distribution;

(d) Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code;

(e) Pursuant to a merger or consolidation effected in compliance with section 1701.78 or 1701.79 of the Revised Code if the issuing public corporation is a party to the agreement of merger or consolidation.

The acquisition by any person of shares of an issuing public corporation in a manner described under this division shall be deemed to be a control share acquisition authorized pursuant to section 1701.831 of the Revised Code within the range of voting power under division (Z)(1)(a), (b), or (c) of this section that such person is entitled to exercise after such acquisition, provided that, in the case of an acquisition in a manner described under division (Z)(2)(c) or (d) of this section, the transferor of shares to such person had previously obtained any authorization of shareholders required under section 1701.831 of the Revised Code in connection with such transferor's acquisition of shares of the issuing public corporation.

(3) The acquisition of shares of an issuing public corporation in good faith and not for the purpose of circumventing section

1701.831 of the Revised Code from any person~~,~~ whose control share acquisition ~~had~~ previously HAD been authorized by shareholders in compliance with section 1701.831 of the Revised Code, or FROM any person whose previous acquisition of shares of an issuing public corporation would have constituted a control share acquisition but for division (Z)(2) of this section, does not constitute a control share acquisition for the purpose of section 1701.831 of the Revised Code~~,~~ unless such acquisition entitles any person, directly or indirectly, alone or with others, to exercise or direct the exercise of voting power of the corporation in the election of directors in excess of the range of such voting power authorized pursuant to section 1701.831 of the Revised Code, or deemed to be so authorized under division (Z)(2) of this section.

(AA) "Acquiring person" means any person~~, as defined in division (G) of this section,~~ who has delivered an acquiring person statement to an issuing public corporation pursuant to section 1701.831 of the Revised Code.

(BB) "Acquiring person statement" means a written statement that complies with division (B) of section 1701.831 of the Revised Code.

(CC) "Interested shares" means the shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise of the voting power of the corporation in the election of directors:

(1) An acquiring person;

(2) Any officer of the issuing public corporation elected or appointed by the directors of the issuing public corporation;

(3) Any employee of the issuing public corporation who is also a director of such corporation.

(DD) "Certificated security" and "uncertificated security" have the same ~~meaning~~ MEANINGS as ~~defined~~ in section 1308.01 of the Revised Code.

1701.13 Authority of corporation [Eff. 11-22-86]

(A) A corporation may sue and be sued.

(B) A corporation may adopt and alter a corporate seal and use the same or a fascimile ~~thereof~~ OF THE CORPORATE SEAL, but failure to affix the corporate seal shall not affect the validity of any instrument.

(C) At the request or direction of the United States government or any agency ~~thereof~~ OF THE UNITED STATES GOVERNMENT, a corporation may transact any lawful business in aid of national defense or in the prosecution of any war in which the nation is engaged.

(D) Unless otherwise provided in the articles, a corporation may take property of any description, or any interest ~~therein~~ IN PROPERTY, by gift, devise, or bequest, and may make donations for the public welfare or for charitable, scientific, or educational purposes.

(E)(1) A corporation may indemnify or agree to indemnify any person who was or is a party or is threatened to be made a party, to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, other than an action by or in the right of the corporation, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, or agent of another corporation, domestic or foreign, nonprofit or for profit, partnership, joint venture, trust, or other enterprise, against expenses, including ~~attorneys'~~ ATTORNEY'S fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, OR conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner ~~which~~ he reasonably believed to be in or not opposed to the best interests of the corporation~~,~~ and, with respect to any criminal action or proceeding, he had reasonable cause to believe that his conduct was unlawful.

(2) A corporation may indemnify or agree to indemnify any person who was or is a party~~,~~ or is threatened to be made a party, to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, or agent of another corporation, domestic or foreign, nonprofit or for profit, partnership, joint venture, trust, or other enterprise, against expenses, including ~~attorneys'~~ ATTORNEY'S fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect of any OF THE FOLLOWING:

(a) ANY claim, issue, or matter as to which such person ~~shall have been~~ IS adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless, and only to ~~the extent that the court of common pleas, or the court in which~~ such action or suit was brought ~~shall determine~~ DETERMINES upon application that, despite the adjudication of liability, but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the court of common pleas or such other court shall deem proper;

(b) ANY ACTION OR SUIT IN WHICH THE ONLY LIABILITY ASSERTED AGAINST A DIRECTOR IS PURSUANT TO SECTION 1701.95 OF THE REVISED CODE.

(3) To the extent that a director, trustee, officer, employee, or agent has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in divisions (E)(1) and ~~(E)~~(2) of this section, or in defense of any claim, issue, or matter therein, he shall be indemnified against expenses, including ~~attorneys'~~ ATTORNEY'S fees, actually and reasonably incurred by him in connection ~~therewith~~ WITH THE ACTION, SUIT, OR PROCEEDING.

(4) Any indemnification under divisions (E)(1) and ~~(E)~~(2) of this section, unless ordered by a court, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, trustee, officer, employee, or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in divisions (E)(1) and ~~(E)~~(2) of this section. Such determination shall be made AS FOLLOWS:

(a) ~~by~~ BY a majority vote of a quorum consisting of directors of the indemnifying corporation who were not and are not parties to or threatened with any such action, suit, or proceeding~~, or;~~

(b)~~, if such a~~ IF THE quorum DESCRIBED IN DIVISION (E)(4)(a) OF THIS SECTION is not obtainable or if a majority vote of a quorum of disinterested directors so directs, in a written opinion by independent legal counsel other than an attorney, or a firm having associated with it an attorney, who has been retained by or who has performed services for the corporation~~,~~ or any person to be indemnified within the past five years~~, or;~~

(c) ~~by~~ BY the shareholders~~;~~ or;

(d) ~~by~~ BY the court of common pleas or the court in which such action, suit, or proceeding was brought.

Any determination made by the disinterested directors under division (E)(4)(a) or by independent legal counsel under division (E)(4)(b) of this ~~subdivision~~ SECTION shall be promptly communicated to the person who threatened or brought the action or suit~~;~~ by or in the right of the corporation under division (E)(2) of this section, and within ten days after receipt of such notification, such person shall have the right to petition the court of common pleas or the court in which such action or suit was brought to review the reasonableness of such determination.

(5)(a) UNLESS AT THE TIME OF A DIRECTOR'S ACT OR OMISSION THAT IS THE SUBJECT OF AN ACTION, SUIT, OR PROCEEDING REFERRED TO IN DIVISIONS (E)(1) AND (2) OF THIS SECTION, THE ARTICLES OR

THE REGULATIONS OF A CORPORATION STATE BY SPECIFIC REFERENCE TO THIS DIVISION THAT THE PROVISIONS OF THIS DIVISION DO NOT APPLY TO THE CORPORATION AND UNLESS THE ONLY LIABILITY ASSERTED AGAINST A DIRECTOR IN AN ACTION, SUIT, OR PROCEEDING REFERRED TO IN DIVISIONS (E)(1) AND (2) OF THIS SECTION IS PURSUANT TO SECTION 1701.95 OF THE REVISED CODE, EXPENSES, INCLUDING ATTORNEY'S FEES, INCURRED BY A DIRECTOR IN DEFENDING THE ACTION, SUIT, OR PROCEEDING SHALL BE PAID BY THE CORPORATION AS THEY ARE INCURRED, IN ADVANCE OF THE FINAL DISPOSITION OF THE ACTION, SUIT, OR PROCEEDING UPON RECEIPT OF AN UNDERTAKING BY OR ON BEHALF OF THE DIRECTOR IN WHICH HE AGREES TO DO BOTH OF THE FOLLOWING:

(i) REPAY SUCH AMOUNT IF IT IS PROVED BY CLEAR AND CONVINCING EVIDENCE IN A COURT OF COMPETENT JURISDICTION THAT HIS ACTION OR FAILURE TO ACT INVOLVED AN ACT OR OMISSION UNDERTAKEN WITH DELIBERATE INTENT TO CAUSE INJURY TO THE CORPORATION OR UNDERTAKEN WITH RECKLESS DISREGARD FOR THE BEST INTERESTS OF THE CORPORATION;

(ii) REASONABLY COOPERATE WITH THE CORPORATION CONCERNING THE ACTION, SUIT, OR PROCEEDING.

(b) Expenses, including ~~attorneys'~~ ATTORNEY'S fees, incurred BY A DIRECTOR, TRUSTEE, OFFICER, EMPLOYEE, OR AGENT in defending any action, suit, or proceeding referred to in divisions (E)(1) and ~~(E)~~(2) of this section, may be paid by the corporation AS THEY ARE INCURRED, in advance of the final disposition of ~~such~~ THE action, suit, or proceeding as authorized by the directors in the specific case upon receipt of an undertaking by or on behalf of the director, trustee, officer, employee, or agent to repay such amount, ~~unless~~ IF it ~~shall~~ ultimately ~~be~~ IS determined that he is NOT entitled to be indemnified by the corporation ~~as authorized in this section~~.

(6) The indemnification ~~provided~~ AUTHORIZED by this section shall not be ~~deemed~~ exclusive of, AND SHALL BE IN ADDITION TO, any other rights GRANTED to ~~which~~ those seeking indemnification ~~may be entitled~~ under the articles or the regulations or any agreement, vote of shareholders or disinterested directors, or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, trustee, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person.

(7) A corporation may purchase and maintain insurance OR FURNISH SIMILAR PROTECTION, INCLUDING BUT NOT LIMITED TO TRUST FUNDS, LETTERS OF CREDIT, OR SELF-INSURANCE, on behalf of OR FOR any person who is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, or agent of another corporation, domestic or foreign, nonprofit or for profit, partnership, joint venture, trust, or other enterprise, against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under this section. INSURANCE MAY BE PURCHASED FROM OR MAINTAINED WITH A PERSON IN WHICH THE CORPORATION HAS A FINANCIAL INTEREST.

(8) THE AUTHORITY OF A CORPORATION TO INDEMNIFY PERSONS PURSUANT TO DIVISIONS (E)(1) AND (2) OF THIS SECTION DOES NOT LIMIT THE PAYMENT OF EXPENSES AS THEY ARE INCURRED, INDEMNIFICATION, INSURANCE, OR OTHER PROTECTION THAT MAY BE PROVIDED PURSUANT TO DIVISIONS (E)(5), (6), AND (7) OF THIS SECTION. DIVISIONS (E)(1) AND (2) OF THIS SECTION DO NOT CREATE ANY OBLIGATION TO REPAY OR RETURN PAYMENTS MADE BY THE CORPORATION PURSUANT TO DIVISIONS (E)(5), (6), OR (7).

(9) As used in this division, references to "corporation" includes all constituent corporations in a consolidation or merger and the new or surviving corporation, so that any person who is or was a director, officer, employee, or agent of such a constituent corporation, or is or was serving at the request of such constituent corporation as a director, trustee, officer, employee, or agent of another corporation, domestic or foreign, nonprofit or for profit, partnership, joint venture, trust, or other enterprise, shall stand in the same position under this section with respect to the new or surviving corporation as he would if he had served the new or surviving corporation in the same capacity.

(F) In carrying out the purposes stated in its articles and subject to limitations prescribed by law or in its articles, a corporation may:

(1) Purchase or otherwise acquire, lease as lessee, invest in, hold, use, lease as lessor, encumber, sell, exchange, transfer, and dispose of property of any description or any interest ~~therein~~ IN SUCH PROPERTY;

(2) Make contracts;

(3) Form or acquire the control of other corporations, domestic or foreign, whether ~~non-profit~~ NONPROFIT or for profit;

(4) Be a partner, member, associate, or participant in other enterprises or ventures, whether profit or ~~non-profit~~ NONPROFIT;

(5) Conduct its affairs in this state and elsewhere;

(6) Borrow money, and issue, sell, and pledge its notes, bonds, and other evidences of indebtedness, and secure any of its obligations by mortgage, pledge, or deed of trust of all or any of its property, and guarantee or secure obligations of any person;

(7) RESIST A CHANGE OR POTENTIAL CHANGE IN CONTROL OF THE CORPORATION IF THE DIRECTORS BY A MAJORITY VOTE OF A QUORUM DETERMINE THAT THE CHANGE OR POTENTIAL CHANGE IS OPPOSED TO OR NOT IN THE BEST INTERESTS OF THE CORPORATION UPON CONSIDERATION OF THE INTERESTS OF THE CORPORATION'S SHAREHOLDERS AND ANY OF THE MATTERS SET FORTH IN DIVISION (E) OF SECTION 1701.59 OF THE REVISED CODE.

(8) Do all things permitted by law and exercise all authority within the purposes stated in its articles or incidental ~~thereto~~ TO ITS ARTICLES.

(G) Irrespective of the purposes stated in its articles, but subject to limitations stated ~~therein~~ IN ITS ARTICLES, a corporation, in addition to the authority conferred by division (F) of this section, may invest its funds not currently needed in its business in any shares or other securities to such extent that as a result ~~thereof~~ OF THE INVESTMENT the corporation shall not acquire control of another corporation, business, or undertaking the activities and operations of which are not incidental to the purposes stated in its articles.

(H) No lack of, or limitation upon, the authority of a corporation shall be asserted in any action except (1) by the state in an action by it against the corporation, (2) by or on behalf of the corporation against a director, an officer, or any shareholder as such, (3) by a shareholder as such or by or on behalf of the holders of shares of any class against the corporation, a director, an officer, or any shareholder as such, or (4) in an action involving an alleged overissue of shares. This division shall apply to any action brought in this state upon any contract made in this state by a foreign corporation.

1701.16 Options to subscribe for or to purchase shares; terms of instruments evidencing options [Eff. 11-22-86]

(A) Unless the articles otherwise provide, a corporation by its directors may grant options to subscribe for or to purchase shares of any authorized class at such times and on such terms as are set forth in the securities or in the contracts, warrants, or instruments (which may be transferable or nontransferable, and separable or

inseparable from securities) evidencing such options, upon the following conditions:

(1) If such shares are subject to ~~pre-emptive~~ PREEMPTIVE rights, and if the options are not granted to shareholders in satisfaction of their ~~pre-emptive~~ PREEMPTIVE rights, then the granting of such options must be authorized by such vote or consent of the shareholders or holders of shares of particular classes as would then be required to waive or release such ~~pre-emptive~~ PREEMPTIVE rights; and such vote or consent shall release the ~~pre-emptive~~ PREEMPTIVE rights to the shares required to satisfy such options if and when exercised;

(2) If at the time of granting such options the corporation does not have authorized and unissued shares sufficient to satisfy such options if and when exercised, the granting of such options must be authorized by such vote of the shareholders or holders of shares of particular classes as would then be required to adopt an amendment to the articles for the purpose of increasing the authorized number of such shares, and the shares required to be issued upon the exercise of such options shall be provided by an amendment concurrently or thereafter adopted by the shareholders or the directors.

(B) The securities, contracts, warrants, or instruments evidencing such options may contain any terms not repugnant to law for the protection of the holders of such options, including, without limiting the generality of such authority: restrictions upon the authorization or issuance of additional shares; provisions for the adjustment of the option price; provisions concerning rights in the event of reorganization, merger, consolidation, or sale of the entire assets of the corporation; provisions for the reservation of authorized but unissued shares to satisfy such options; ~~and~~ restrictions upon the declaration or payment of dividends or distributions; AND IN THE CASE OF A CORPORATION THAT HAS ISSUED AND OUTSTANDING SHARES THAT ARE LISTED ON A NATIONAL SECURITIES EXCHANGE, CONDITIONS ON THE EXERCISE OF SUCH OPTIONS, INCLUDING CONDITIONS THAT PRECLUDE THE HOLDER OR HOLDERS OF A SPECIFIED NUMBER OR PERCENTAGE OF THE OUTSTANDING COMMON SHARES OF SUCH A CORPORATION FROM EXERCISING SUCH OPTIONS.

(C) "Securities," as used in this section, includes obligations and shares of the corporation.

THIS SECTION IS AN INTERIM SECTION EFFECTIVE UNTIL MARCH 1, 1987.

1701.19 Valuation of property or services [Eff. 11-22-86]

(A) When a determination of the fair value to a corporation of property other than money or of services is:

~~(1) Made~~ MADE by the incorporators, directors, or shareholders with respect to property transferred or to be transferred, or services rendered or to be rendered, to the corporation as consideration for shares;

~~(2) Made~~ OR MADE by the directors with respect to property voluntarily contributed to the corporation;

~~(3) Made~~ OR MADE by the directors with respect to physical assets of the corporation which are reckoned by the directors to have a fair value to the corporation in excess of the amount at which they are carried on its books;

~~(4) Provided~~ OR PROVIDED for in a plan of reorganization confirmed as provided in section 1701.75 of the Revised Code or set forth in an agreement of merger or consolidation adopted as provided in section 1701.78, 1701.79 ~~or 1701.82~~, 1701.80, OR 1701.801 of the Revised Code;, THEN such determination shall be conclusive in any action or proceeding in which it is claimed that the fair value to the corporation of such property or of such services is or was less than the value so determined, unless the party asserting such claim affirmatively proves by clear and convincing evidence, and otherwise than by proving the difference between the value of such property, or of such services, and the fair value so determined, that such determination was knowingly and intentionally made, by the persons making the ~~same~~ DETERMINATION, at a value greater than the fair value of such property or of such services to the corporation.

(B) The making of an agreement to issue or dispose of shares for property other than money or for services or the issuance or disposition of shares in consummation of any agreement or transaction referred to in division (A) of this section shall be held to be a determination that the property, or the services, involved have a fair value to the corporation not less than the value required to justify the issuance or disposition of such shares.

1701.32 Surplus [Eff. 11-22-86]

(A) The surplus of a corporation is the excess of its assets over its liabilities plus stated capital, if any. The earned surplus of a corporation is the net balance of its net profits, income, gains, and losses from the date of incorporation, except as otherwise provided in this section, or from the latest date on which a deficit in earned surplus was eliminated by application of capital surplus or otherwise, after deducting distributions to shareholders and transfers to stated capital and capital surplus to the extent that such distributions and transfers are made out of earned surplus. Surplus other than earned surplus is capital surplus.

Determinations under this section may be based upon financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, and may make use of the equity method of accounting.

(B) Capital surplus shall be classified according to its derivation and so shown on the books of the corporation, and each balance sheet shall show separately any capital surplus arising from unrealized appreciation of assets, other capital surplus, and earned surplus.

(C) If a corporation accepts a voluntary contribution of property other than its own issued shares, the directors may order all or a part of the fair value of such property to the corporation, as determined by the directors, to be entered on its books, and thereby create or add to capital surplus.

(D) In addition to any determination permitted under division (A) of this section, if the directors of a corporation determine that ~~physical~~ TANGIBLE OR INTANGIBLE assets of the corporation have a fair value to it in excess of the amount at which they are carried on its books, they may order all or a part of such excess so determined to be entered on its books, and thereby create or add to capital surplus.

(E) In addition to any determination permitted under division (A) of this section, the directors of a corporation that owns shares in another domestic or foreign corporation may, if they believe in good faith that the books of the issuing corporation are kept according to generally accepted accounting principles, order such shares to be carried on the books of the corporation owning them at the value shown on the books of the issuing corporation, and thereby create or add to the capital surplus of the corporation owning such shares. When shares are carried on such basis, the balance sheets of the corporation owning them shall contain a statement to that effect.

(F) The directors may order transfers from any surplus however created to stated capital of shares with or without par value, and from earned surplus to capital surplus.

(G) Pursuant to A resolution adopted by the affirmative vote of the holders of two-thirds of the shares of each class, regardless of limitations or restrictions in the articles on the voting rights of the shares of any such class or, if the articles so provide or permit, a greater or lesser proportion, but not less than a majority, of the shares of any class, a corporation may apply all or any part of capital surplus to the reduction or writing off of any deficit in earned surplus, or to the creation of a reserve for any proper purpose, and thereby make available for dividends or distributions, without notice to the shareholders as to the source of such dividends or distributions, any earned surplus remaining, or thereafter arising, but in case such action is taken, a record ~~thereof~~ OF IT shall be

made on the books of the corporation and shall appear on each balance sheet of the corporation for a period of not less than five years thereafter.

(H)(1) In the case of a merger of one or more domestic or foreign corporations into a ~~surviving~~ domestic SURVIVING corporation, the directors of the surviving corporation may order entered on its books all or part of the earned surplus of the other constituent corporations, diminished by any deficit in earned surplus of any constituent corporation, and thereby create, add to, or diminish the earned surplus of the surviving corporation.

(2) In the case of a consolidation of a domestic corporation with one or more domestic or foreign corporations into a new domestic corporation, the directors of the new corporation may order entered on its books all or part of the earned surplus of each of the constituent corporations, diminished by any deficit in earned surplus of any constituent corporation, and thereby create earned surplus of the new corporation.

(3) In the case of a combination, the directors of the acquiring corporation may order entered on its books all or part of the earned surplus of the transferor corporations, diminished by any deficit in earned surplus of any such corporation, and thereby create, add to, or diminish the earned surplus of the acquiring corporation.

(4) In the case of a dissolution of a domestic or foreign subsidiary corporation, all shares of which are owned by a domestic corporation, the directors of the parent corporation may order entered on its books all or part of the earned surplus of the subsidiary and thereby create or add to the earned surplus of the parent.

(5) The action of the directors of a corporation in creating or adding to earned surplus, as provided in this division, must be taken, if at all, not later than ninety days after the end of the fiscal year of such corporation in which the merger, consolidation, combination, or dissolution becomes effective.

1701.59 Authority of directors; bylaws; standard of care; reliance on reports and statements [Eff. 11-22-86]

(A) Except where the law, the articles, or the regulations require action to be authorized or taken by shareholders, all of the authority of a corporation shall be exercised by or under the direction of its directors. For their own government, the directors may adopt bylaws that are not inconsistent with the articles or the regulations.

(B) A director shall perform his duties as a director, including his duties as a member of any committee of the directors upon which he may serve, in good faith, in a manner he reasonably believes to be in OR NOT OPPOSED TO the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. In performing his duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, that are prepared or presented by:

(1) One or more directors, officers, or employees of the corporation who the director reasonably believes are reliable and competent in the matters prepared or presented;

(2) Counsel, public accountants, or other persons as to matters that the director reasonably believes are within the person's professional or expert competence;

(3) A committee of the directors upon which he does not serve, duly established in accordance with a provision of the articles or the regulations, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

(C) For purposes of division (B) of this section, ~~a~~:

(1) A DIRECTOR SHALL NOT BE FOUND TO HAVE VIOLATED HIS DUTIES UNDER DIVISION (B) OF THIS SECTION UNLESS IT IS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE DIRECTOR HAS NOT ACTED IN GOOD FAITH, IN A MANNER HE REASONABLY BELIEVES TO BE IN OR NOT OPPOSED TO THE BEST INTERESTS OF THE CORPORATION, OR WITH THE CARE THAT AN ORDINARILY PRUDENT PERSON IN A LIKE POSITION WOULD USE UNDER SIMILAR CIRCUMSTANCES, IN ANY ACTION BROUGHT AGAINST A DIRECTOR, INCLUDING ACTIONS INVOLVING OR AFFECTING ANY OF THE FOLLOWING:

(a) A CHANGE OR POTENTIAL CHANGE IN CONTROL OF THE CORPORATION;

(b) A TERMINATION OR POTENTIAL TERMINATION OF HIS SERVICE TO THE CORPORATION AS A DIRECTOR;

(c) HIS SERVICE IN ANY OTHER POSITION OR RELATIONSHIP WITH THE CORPORATION.

(2) A director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by the persons described in divisions (B)(1) to (3) of this section to be unwarranted. ~~A person who, as a director of a corporation, performs his duties in accordance with division (B) of this section shall have no liability because he is or has been a director of the corporation.~~

(3) NOTHING CONTAINED IN THIS DIVISION LIMITS RELIEF AVAILABLE UNDER SECTION 1701.60 OF THE REVISED CODE.

(D) A DIRECTOR SHALL BE LIABLE IN DAMAGES ~~FOR ANY ACTION HE TAKES OR FAILS TO TAKE AS A~~ DIRECTOR ONLY IF IT IS PROVED BY CLEAR AND CONVINCING EVIDENCE IN A COURT OF COMPETENT JURISDICTION THAT HIS ACTION OR FAILURE TO ACT INVOLVED AN ACT OR OMISSION UNDERTAKEN WITH DELIBERATE INTENT TO CAUSE INJURY TO THE CORPORATION OR UNDERTAKEN WITH RECKLESS DISREGARD FOR THE BEST INTERESTS OF THE CORPORATION. NOTHING CONTAINED IN THIS DIVISION AFFECTS THE LIABILITY OF DIRECTORS UNDER SECTION 1701.95 OF THE REVISED CODE OR LIMITS RELIEF AVAILABLE UNDER SECTION 1701.60 OF THE REVISED CODE. THIS DIVISION DOES NOT APPLY IF, AND ONLY TO THE EXTENT THAT, AT THE TIME OF A DIRECTOR'S ACT OR OMISSION THAT IS THE SUBJECT OF COMPLAINT, THE ARTICLES OR THE REGULATIONS OF THE CORPORATION STATE BY SPECIFIC REFERENCE TO THIS DIVISION THAT THE PROVISIONS OF THIS DIVISION DO NOT APPLY TO THE CORPORATION.

(E) For purposes of ~~division (B) of~~ this section, a director, in determining what he reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following:

(1) The interests of the corporation's employees, suppliers, creditors, and customers;

(2) The economy of the state and nation;

(3) Community and societal considerations;

(4) THE LONG-TERM AS WELL AS SHORT-TERM INTERESTS OF THE CORPORATION AND ITS SHAREHOLDERS, INCLUDING THE POSSIBILITY THAT THESE INTERESTS MAY BE BEST SERVED BY THE CONTINUED INDEPENDENCE OF THE CORPORATION.

~~(E) The amendments to this section that are effective April 1, 1985, are remedial in nature and apply to all close corporations created on or after November 17, 1981.~~

(F) NOTHING CONTAINED IN DIVISION (C) OR (D) OF THIS SECTION AFFECTS THE DUTIES OF EITHER OF THE FOLLOWING:

(1) A DIRECTOR WHO ACTS IN ANY CAPACITY OTHER THAN HIS CAPACITY AS A DIRECTOR;

(2) A DIRECTOR OF A CORPORATION THAT DOES NOT HAVE ISSUED AND OUTSTANDING SHARES THAT ARE LISTED ON A NATIONAL SECURITIES EXCHANGE OR ARE REGULARLY QUOTED IN AN OVER-THE-COUNTER MARKET BY ONE OR MORE MEMBERS OF A NATIONAL OR AFFILIATED SECURITIES ASSOCIATION, WHO VOTES FOR OR ASSENTS TO ANY ACTION

TAKEN BY THE DIRECTORS OF THE CORPORATION THAT, IN CONNECTION WITH A CHANGE IN CONTROL OF THE CORPORATION, DIRECTLY RESULTS IN THE HOLDER OR HOLDERS OF A MAJORITY OF THE OUTSTANDING SHARES OF THE CORPORATION RECEIVING A GREATER CONSIDERATION FOR THEIR SHARES THAN OTHER SHAREHOLDERS.

1701.60 Transactions between the corporation and its directors or officers; disclosures; compensation [Eff. 11-22-86]

(A) Unless otherwise provided in the articles or the regulations:

(1) No contract, ACTION, or transaction shall be void or voidable with respect to a corporation for the reason that it is between OR AFFECTS the corporation and one or more of its directors or officers, or between OR AFFECTS the corporation and any other person in which one or more of its directors or officers are directors, trustees, or officers, or have a financial or personal interest, or for the reason that one or more interested directors or officers participate in or vote at the meeting of the directors or a committee ~~thereof which~~ OF THE DIRECTORS THAT authorizes such contract, ACTION, or transaction, if in any such case ANY OF THE FOLLOWING APPLY:

(a) The material facts as to his or their relationship or interest and as to the contract, ACTION, or transaction are disclosed or are known to the directors or the committee and the directors or committee, in good faith reasonably justified by such facts, ~~authorize~~ AUTHORIZES the contract, ACTION, or transaction by the affirmative vote of a majority of the disinterested directors, even though the disinterested directors constitute less than a quorum OF THE DIRECTORS OR THE COMMITTEE; ~~or~~

(b) The material facts as to his or their relationship or interest and as to the contract, ACTION, or transaction are disclosed or are known to the shareholders entitled to vote thereon and the contract, ACTION, or transaction is specifically approved at a meeting of the shareholders held for such purpose by the affirmative vote of the holders of shares entitling them to exercise a majority of the voting power of the corporation held by persons not interested in the contract, ACTION, or transaction; or

(c) The contract, ACTION, or transaction is fair as to the corporation as of the time it is authorized or approved by the directors, a committee ~~thereof~~ OF THE DIRECTORS, or the shareholders;

(2) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the directors, or of a committee ~~thereof which~~ OF THE DIRECTORS THAT authorizes the contract, ACTION, or transaction;

(3) The directors, by the affirmative vote of a majority of those in office, and irrespective of any financial or personal interest of any of them, shall have authority to establish reasonable compensation, ~~which~~ THAT may include pension, disability, and death benefits, for services to the corporation by directors and officers, or to delegate such authority to one or more officers or directors.

(B) Nothing contained in ~~subdivisions (1) and (2) of division~~ DIVISIONS (A)(1) AND (2) of this section shall limit or otherwise affect the liability of directors under section 1701.95 of the Revised Code.

(C) FOR PURPOSES OF DIVISION (A) OF THIS SECTION, A DIRECTOR IS NOT AN INTERESTED DIRECTOR SOLELY BECAUSE THE SUBJECT OF THE CONTRACT, ACTION, OR TRANSACTION MAY INVOLVE OR AFFECT A CHANGE IN CONTROL OF THE CORPORATION OR HIS CONTINUATION IN OFFICE AS A DIRECTOR OF THAT CORPORATION.

(D) FOR PURPOSES OF THIS SECTION, "ACTION" MEANS A RESOLUTION ADOPTED BY THE DIRECTORS OR A COMMITTEE OF THE DIRECTORS OF A CORPORATION.

1701.76 Sale or other disposition of assets [Eff. 11-22-86]

(A)(1) A lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets, with or without the good will, of a corporation, if not made in the usual and regular course of ~~it~~ ITS business, may be made upon such terms AND CONDITIONS and for such consideration, which may consist, in whole or in part, of money or other property of any description, including shares or other securities or promissory obligations of any other corporation, domestic or foreign, as may be authorized AS FOLLOWS: ~~(1) by~~

(a) BY the directors, either before or after authorization by the shareholders as required in this section; and ~~(2) at~~

(b) AT a meeting of the shareholders held for such purpose, by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on such proposal, or, if the articles so provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of such voting power, and by such affirmative vote of the holders of shares of any particular class as is required by the articles.

~~(2) AT THE SHAREHOLDER MEETING~~ DESCRIBED IN DIVISION (A)(1)(b) OF THIS SECTION OR AT ANY SUBSEQUENT SHAREHOLDER MEETING, SHAREHOLDERS, BY THE SAME VOTE THAT IS REQUIRED TO AUTHORIZE THE LEASE, SALE, EXCHANGE, TRANSFER, OR OTHER DISPOSITION OF ALL, OR SUBSTANTIALLY ALL, OR THE ASSETS, WITH OR WITHOUT THE GOOD WILL, OF THE CORPORATION, MAY GRANT AUTHORITY TO THE DIRECTORS TO ESTABLISH OR AMEND ANY OF THE TERMS AND CONDITIONS OF THE TRANSACTION, EXCEPT THAT SHAREHOLDERS SHALL NOT AUTHORIZE THE DIRECTORS TO DO ANY OF THE FOLLOWING:

(a) ALTER OR CHANGE THE AMOUNT OR KIND OF SHARES, SECURITIES, MONEY, PROPERTY, OR RIGHTS TO BE RECEIVED IN EXCHANGE FOR THE ASSETS;

(b) ALTER OR CHANGE TO ANY MATERIAL EXTENT THE AMOUNT OR KIND OF LIABILITIES TO BE ASSUMED IN EXCHANGE FOR THE ASSETS;

(c) ALTER OR CHANGE ANY OTHER TERMS AND CONDITIONS OF THE TRANSACTION IF ANY OF THE ALTERATIONS OR CHANGES, ALONE OR IN THE AGGREGATE, WOULD MATERIALLY ADVERSELY AFFECT THE SHAREHOLDERS OR THE CORPORATION.

(3) Notice of the meeting of the shareholders DESCRIBED IN DIVISION (A)(1)(b) OF THIS SECTION shall be given to all shareholders whether or not entitled to vote at the meeting. ~~Such notice~~ AND shall be accompanied by a copy or summary of the terms of ~~such~~ THE transaction.

(B) The corporation by its directors may abandon such transaction, subject to the contract rights of other persons, if ~~such~~ THE power of abandonment is conferred upon the directors either by the terms of the transaction or by the same vote of shareholders and at the same meeting of shareholders as that referred to in division (A)(1)(b) OF THIS SECTION OR AT ANY SUBSEQUENT MEETING.

(C) Dissenting holders of shares of any class, whether or not entitled to vote, shall be entitled to relief under section 1701.85 of the Revised Code.

(D) An action to set aside a conveyance by a corporation, on the ground that any section of the Revised Code applicable to the lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets of such corporation has not been complied with, shall be brought within ninety days after such transaction, or such action shall be forever barred.

(E) If a resolution of dissolution is adopted pursuant to section 1701.86 of the Revised Code, the directors may dispose of all, or substantially all, of the corporation's assets without the necessity of a shareholders' authorization under this section.

1701.78 Merger or consolidation into domestic corporation [Eff. 11-22-86]

(A) Pursuant to an agreement of merger or consolidation between the constituent corporations as provided in this section, a domestic or foreign corporation and, if so provided, one or more additional domestic or foreign corporations, may be merged into a DOMESTIC surviving ~~domestic~~ corporation, or a domestic corporation together with one or more additional domestic or foreign corporations may be consolidated into a new domestic corporation formed by such consolidation. If any constituent corporation is a foreign corporation, the merger or consolidation ~~must~~ also MUST be permitted by the laws of each state under the laws of which any FOREIGN constituent ~~foreign~~ corporation exists.

(B) The agreement of merger or consolidation shall set forth:

(1) The state under the laws of which each constituent corporation exists;

(2) In the case of a merger, that one or more specified constituent corporations shall be merged into a specified DOMESTIC surviving ~~domestic~~ corporation, and, in the case of a consolidation, that the constituent corporations shall be consolidated into a new domestic corporation. The name of the surviving or new corporation may be the same as or similar to that of any constituent corporation;

(3) ~~All other provisions with respect to the surviving or new corporation which would be required in original articles of a domestic corporation filed at the time of adoption of the agreement, other than the statement with respect to initial stated capital. Such provisions may vary from those in the articles of any constituent corporation;~~

~~(4)~~ All statements and matters required to be set forth IN AN AGREEMENT OF MERGER OR CONSOLIDATION by the laws of each state under the laws of which any FOREIGN constituent ~~foreign~~ corporation exists;

~~(5) In the case of a merger, a statement that the directors of the surviving corporation shall continue as such or, if there are to be any changes on or before the effective date of the merger, the names of the directors. In the case of a consolidation, the names of the first directors of the new corporation;~~

~~(6) The regulations of the surviving or new corporation, or a provision that the regulations of a specified constituent corporation shall be the regulations of the surviving or new corporation, with such amendments as may be set forth in the agreement;~~

~~(7) The~~ (4) IN THE CASE OF A CONSOLIDATION, THE ARTICLES OF THE NEW CORPORATION, OR A PROVISION THAT THE ARTICLES OF A SPECIFIED DOMESTIC CONSTITUENT CORPORATION WITH SUCH AMENDMENTS AS MAY BE SET FORTH IN THE AGREEMENT SHALL BE THE ARTICLES OF THE NEW CORPORATION;

(5) IN THE CASE OF A CONSOLIDATION, THE name and address of the statutory agent upon whom any process, notice, or demand against any constituent corporation or the ~~surviving or~~ new corporation may be served;

~~(8)~~(6) The terms of the merger or consolidation~~;~~ the mode of carrying them into effect~~;~~ and the manner and basis of ~~making distributions to shareholders of the constituent corporations in extinguishment of or in substitution for their shares. Such distribution may be by way of shares of any class or classes of the surviving or new corporation, cash, securities, evidences of indebtedness, other property, or any combination thereof~~ CONVERTING THE SHARES OF THE CONSTITUENT CORPORATIONS INTO, OR SUBSTITUTING THE SHARES OF THE CONSTITUENT CORPORATIONS FOR, SHARES, EVIDENCES OF INDEBTEDNESS, OTHER SECURITIES, CASH, RIGHTS, OR ANY OTHER PROPERTY, OR ANY COMBINATION OF SHARES, EVIDENCES OF INDEBTEDNESS, SECURITIES, CASH, RIGHTS, OR ANY OTHER PROPERTY OF THE SURVIVING CORPORATION, OF THE NEW CORPORATION, OR OF ANY OTHER CORPORATION, INCLUDING THE PARENT OF ANY CONSTITUENT CORPORATION, OR ANY OTHER PERSON. No such ~~distribution~~ CONVERSION OR SUBSTITUTION shall be effected if there ~~is~~ ARE reasonable ~~ground~~ GROUNDS to believe that the surviving or new corporation would be rendered insolvent ~~thereby~~ BY THE CONVERSION OR SUBSTITUTION.

(C) The agreement of merger or consolidation ALSO may ~~also~~ set forth:

(1) The effective date of the merger or consolidation, which may be on or after the date of filing the certificate;

(2) A provision authorizing the directors of one or more of the constituent corporations to abandon the proposed merger or consolidation prior to filing the certificate;

(3) ~~The terms and classifications of the directors~~ IN THE CASE OF A MERGER, ANY AMENDMENTS TO THE ARTICLES OF THE SURVIVING CORPORATION, OR A PROVISION THAT THE ARTICLES OF A SPECIFIED DOMESTIC CONSTITUENT CORPORATION OTHER THAN THE SURVIVING CORPORATION WITH SUCH AMENDMENTS AS MAY BE SET FORTH IN THE AGREEMENT SHALL BE THE ARTICLES OF THE SURVIVING CORPORATION;

(4) A statement of, or a statement of the method of determining, the fair value of the assets to be owned by the surviving or new ~~corporations~~ CORPORATION;

~~(5) Any additional provision permitted to be included in the articles of a newly formed domestic corporation;~~

~~(6)~~ THE REGULATIONS OF THE SURVIVING OR NEW CORPORATION, OR A PROVISION THAT THE REGULATIONS OF A SPECIFIED DOMESTIC CONSTITUENT CORPORATION WITH SUCH AMENDMENTS AS MAY BE SET FORTH IN THE AGREEMENT SHALL BE THE REGULATIONS OF THE SURVIVING OR NEW CORPORATION;

(6) IN THE CASE OF A CONSOLIDATION, THE INITIAL DIRECTORS OF THE NEW CORPORATION, OR A PROVISION THAT ALL THE DIRECTORS OF ONE OR MORE SPECIFIED CONSTITUENT CORPORATIONS SHALL CONSTITUTE THE INITIAL DIRECTORS OF THE NEW CORPORATION, AND, IN THE CASE OF A MERGER, ANY CHANGES IN THE DIRECTORS OF THE SURVIVING CORPORATION;

(7) THE PARTIES TO THE AGREEMENT IN ADDITION TO THE CONSTITUENT CORPORATIONS;

(8) THE STATED CAPITAL OF EACH CLASS OF SHARES OF THE SURVIVING OR NEW CORPORATION TO BE OUTSTANDING AT THE TIME THE MERGER OR CONSOLIDATION BECOMES EFFECTIVE;

(9) Any additional provision necessary or desirable with respect to the proposed merger or consolidation.

(D) To effect the merger or consolidation, the agreement ~~must~~ SHALL be approved by the directors of each DOMESTIC constituent corporation, ~~and~~ adopted by the shareholders of each DOMESTIC constituent ~~domestic~~ corporation, other than the surviving corporation IN THE CASE OF A MERGER, at a meeting of the shareholders of each such corporation held for the purpose, AND APPROVED OR OTHERWISE AUTHORIZED BY OR ON BEHALF OF EACH FOREIGN CONSTITUENT CORPORATION IN ACCORDANCE WITH THE LAWS OF THE STATE UNDER WHICH IT EXISTS. In the case of a merger, the agreement ~~must~~ also SHALL be adopted by the shareholders of the surviving corporation at a meeting held for the purpose, if one or more of the following conditions exist:

(1) The articles or regulations of the surviving corporation then in effect require that the agreement be adopted by the shareholders or by the holders of a particular class of shares of that corporation;

(2) The agreement conflicts with the articles or regulations of the surviving corporation then in effect, or changes the articles or regulations, or authorizes any action which, if it were being made or authorized apart from the merger, would otherwise require adoption by the shareholders or by the holders of a particular class of shares of that corporation;

(3) The merger involves the issuance or transfer by the surviving corporation to the shareholders of the other constituent corpora-

tion or corporations of such number of shares of the surviving corporation as will entitle the holders ~~thereof~~ OF THE SHARES immediately after the consummation of the merger to exercise one-sixth or more of the voting power of that corporation in the election of directors;

(4) The agreement of merger makes such change in the directors of the surviving corporation as would otherwise require action by the shareholders or by the holders of a particular class of shares of that corporation.

(E) Notice of each meeting of shareholders of a DOMESTIC constituent ~~domestic~~ corporation at which an agreement of merger or consolidation is to be submitted shall be given to all shareholders of that corporation, whether or not they are entitled to vote, and shall be accompanied by a copy or a summary of the material provisions of the agreement.

(F) The vote required to adopt an agreement of merger or consolidation at a meeting of the shareholders of a DOMESTIC constituent ~~domestic~~ corporation is the affirmative vote of the holders of shares of that corporation entitling them to exercise at least two-thirds of the voting power of the corporation on such proposal or such different proportion as the articles may provide, but not less than a majority, and such affirmative vote of the holders of shares of any particular class as is required by the articles of that corporation. If the agreement would have an effect which, if accomplished through an amendment to the articles, would entitle the holders of shares of any particular class OF A DOMESTIC CONSTITUENT CORPORATION to vote AS A CLASS on the adoption of such amendment AS PROVIDED IN DIVISION (B) OF SECTION 1701.71 OF THE REVISED CODE, the agreement ALSO must ~~also~~ be adopted by the affirmative vote of the holders of at least two-thirds of the shares of such class, or such different proportion as the articles may provide, but not less than a majority. HOWEVER, IF THE AGREEMENT WOULD HAVE AN EFFECT WHICH, IF ACCOMPLISHED THROUGH AN AMENDMENT TO THE ARTICLES, WOULD ENTITLE THE HOLDERS OF SHARES OF ANY PARTICULAR CLASS OF A DOMESTIC CONSTITUENT CORPORATION TO VOTE AS A CLASS ON THE ADOPTION OF SUCH AMENDMENT PURSUANT TO DIVISION (B)(2) OR (4) OF SECTION 1701.71 OF THE REVISED CODE SOLELY BECAUSE THOSE SHARES ARE TO BE CONVERTED INTO OR SUBSTITUTED FOR THE SAME NUMBER OF SHARES OF A CLASS OF A DIFFERENT CORPORATION THAT HAVE EXPRESS TERMS IDENTICAL IN ALL MATERIAL RESPECTS TO THOSE OF THE CLASS OF SHARES SO CONVERTED OR SUBSTITUTED, THE AGREEMENT NEED NOT BE ADOPTED BY THE AFFIRMATIVE VOTE OF THE HOLDERS OF SHARES OF THAT PARTICULAR CLASS VOTING AS A CLASS. If the agreement would authorize any particular corporate action ~~which~~ THAT under any applicable provision of law or the articles could be authorized only by or pursuant to a specified vote of shareholders, the agreement ALSO must ~~also~~ be adopted by the same affirmative vote as would be required for such action.

(G) At any time prior to the filing of the certificate of merger or consolidation, the merger or consolidation may be abandoned by the directors of any of the constituent corporations if THE DIRECTORS ARE authorized to do so by the agreement or by the same vote of shareholders as is required to adopt the agreement. THE AGREEMENT OF MERGER OR CONSOLIDATION MAY CONTAIN A PROVISION AUTHORIZING THE DIRECTORS OF THE CONSTITUENT CORPORATIONS TO AMEND THE AGREEMENT AT ANY TIME PRIOR TO THE FILING OF THE CERTIFICATE OF MERGER OR CONSOLIDATION, EXCEPT THAT, AFTER THE ADOPTION OF THE AGREEMENT BY THE SHAREHOLDERS OF ANY DOMESTIC CONSTITUENT CORPORATION, THE DIRECTORS SHALL NOT BE AUTHORIZED TO AMEND THE AGREEMENT TO DO ANY OF THE FOLLOWING:

(1) ALTER OR CHANGE THE AMOUNT OR KIND OF SHARES, EVIDENCES OF INDEBTEDNESS, OTHER SECURITIES, CASH, RIGHTS, OR ANY OTHER PROPERTY TO BE RECEIVED BY SHAREHOLDERS OF THE DOMESTIC CONSTITUENT CORPORATION IN CONVERSION OF OR IN SUBSTITUTION FOR THEIR SHARES;

(2) ALTER OR CHANGE ANY TERM OF THE ARTICLES OF THE SURVIVING OR NEW DOMESTIC CORPORATION, EXCEPT FOR ALTERATIONS OR CHANGES THAT COULD OTHERWISE BE ADOPTED BY THE DIRECTORS OF THE SURVIVING OR NEW DOMESTIC CORPORATION;

(3) ALTER OR CHANGE ANY OTHER TERMS AND CONDITIONS OF THE AGREEMENT IF ANY OF THE ALTERATIONS OR CHANGES, ALONE OR IN THE AGGREGATE, WOULD MATERIALLY ADVERSELY AFFECT THE HOLDERS OF ANY CLASS OR SERIES OF SHARES OF THE DOMESTIC CONSTITUENT CORPORATION.

(H) If division (D) of this section does not require adoption of the agreement of merger by the shareholders of the surviving corporation, the approval of the agreement by the directors of that corporation constitutes adoption by that corporation.

~~(I) If any constituent corporation is a foreign corporation, it shall comply with the applicable laws of the state under the laws of which it exists.~~

1701.79 Merger and consolidation into foreign corporation [Eff. 11-22-86]

(A) Pursuant to an agreement of merger or consolidation between the constituent corporations as provided in this section, a domestic corporation and, if so provided, one or more additional domestic or foreign corporations, may be merged into a FOREIGN surviving ~~foreign~~ corporation, or a domestic corporation together with one or more additional domestic or foreign corporations may be consolidated into a new foreign corporation to be formed by such consolidation in a state under the laws of which a FOREIGN constituent ~~foreign~~ corporation exists. The merger or consolidation must be permitted by the laws of each state under the laws of which any FOREIGN constituent ~~foreign~~ corporation exists.

(B) The agreement of merger or consolidation shall set forth:

(1) The states under the laws of which each constituent corporation exists, and, in the case of a consolidation, the state under the laws of which the new corporation is to exist;

(2) In the case of a merger, that one or more specified constituent corporations shall be merged into a specified FOREIGN surviving ~~foreign~~ corporation, and, in the case of a consolidation, that the constituent corporations shall be consolidated into a new foreign corporation. The name of the surviving or new corporation may be the same as or similar to that of any constituent corporation;

(3) All additional statements and matters ~~with regard to the surviving or the new corporation~~, other than the name and address of the statutory agent, which would be required by section 1701.78 of the Revised Code if the surviving or new corporation were a domestic corporation;

(4) The location of the principal office of the surviving or new corporation in the state under the laws of which the surviving corporation exists or the new corporation is to exist;

(5) All additional statements and matters required to be set forth in such an agreement of merger or consolidation by the laws of each state under the laws of which any FOREIGN constituent ~~foreign~~ corporation exists and, in the case of a consolidation, the new corporation is to exist;

(6) The consent of the surviving or the new corporation to be sued and served with process in this state, and the irrevocable appointment of the secretary of state as its agent to accept service of process in any proceeding in this state to enforce against the surviving or ~~the~~ new corporation any obligation of any DOMESTIC constituent ~~domestic~~ corporation, or to enforce the rights of a

dissenting shareholder of any DOMESTIC constituent ~~domestic~~ corporation;

(7) If it is desired that the surviving or ~~the~~ new corporation transact business in this state as a foreign corporation, a statement to that effect, together with a statement on the appointment of a statutory agent and with respect to service of any process, notice, or demand upon such statutory agent or the secretary of state, as required when a foreign corporation applies for a license to transact business in this state.

(C) The agreement ALSO may ~~also~~ set forth any additional provision permitted by the laws of any state under the laws of which any constituent corporation exists, consistent with the laws of the state under the laws of which the surviving corporation exists or the new corporation is to exist.

(D) To effect the merger or consolidation, the agreement ~~must~~ SHALL be approved by the directors of each DOMESTIC constituent corporation, and adopted by the shareholders of each DOMESTIC constituent ~~domestic~~ corporation, in the same manner and with the same notice to and vote of shareholders or of holders of a particular class of shares~~;~~ as is required by section 1701.78 of the Revised Code. THE AGREEMENT ALSO SHALL BE APPROVED OR OTHERWISE AUTHORIZED BY OR ON BEHALF OF EACH FOREIGN CONSTITUENT CORPORATION IN ACCORDANCE WITH THE LAWS OF THE STATE UNDER WHICH IT EXISTS.

(E) At any time prior to filing the certificate of merger or consolidation, the merger or consolidation may be abandoned by the directors of any of the constituent corporations if THE DIRECTORS ARE authorized to do so by the agreement.

THE AGREEMENT OF MERGER OR CONSOLIDATION MAY CONTAIN A PROVISION AUTHORIZING THE DIRECTORS OF THE CONSTITUENT CORPORATIONS TO AMEND THE AGREEMENT AT ANY TIME PRIOR TO THE FILING OF THE CERTIFICATE OF MERGER OR CONSOLIDATION, EXCEPT THAT, AFTER THE ADOPTION OF THE AGREEMENT BY THE SHAREHOLDERS OF ANY DOMESTIC CONSTITUENT CORPORATION, THE DIRECTORS SHALL NOT BE AUTHORIZED TO AMEND THE AGREEMENT TO DO ANY OF THE FOLLOWING:

(1) ALTER OR CHANGE THE AMOUNT OR KIND OF SHARES, EVIDENCES OF INDEBTEDNESS, OTHER SECURITIES, CASH, RIGHTS, OR ANY OTHER PROPERTY TO BE RECEIVED BY SHAREHOLDERS OF THE DOMESTIC CONSTITUENT CORPORATION IN CONVERSION OF OR IN SUBSTITUTION FOR THEIR SHARES;

(2) ALTER OR CHANGE ANY TERM OF THE ARTICLES OF THE SURVIVING OR NEW DOMESTIC CORPORATION, EXCEPT FOR ALTERATIONS OR CHANGES THAT COULD OTHERWISE BE ADOPTED BY THE DIRECTORS OF THE SURVIVING OR NEW DOMESTIC CORPORATION;

(3) ALTER OR CHANGE ANY OTHER TERMS AND CONDITIONS OF THE AGREEMENT IF ANY OF THE ALTERATIONS OR CHANGES, ALONE OR IN THE AGGREGATE, WOULD MATERIALLY ADVERSLY AFFECT THE HOLDERS OF ANY CLASS OR SERIES OF SHARES OF THE DOMESTIC CONSTITUENT CORPORATION.

(F) ~~Each constituent foreign corporation shall comply with the applicable provisions of the laws of the state under the laws~~ of which it exists.

~~(G)~~ If the surviving or new corporation does not desire to be licensed to transact business in Ohio, the agreement shall be accompanied by the affidavits, receipts, certificates, or other evidence required by division (H) of section 1701.86 of the Revised Code with respect to each DOMESTIC constituent ~~domestic~~ corporation and, with respect to each FOREIGN constituent ~~foreign~~ corporation licensed to transact business in Ohio, the affidavits, receipts, certificates, or other evidence required by division (C) or (D) of section 1703.17 of the Revised Code.

1701.80 Merger of subsidiary into parent corporation [Eff. 11-22-86]

(A) Pursuant to an agreement of merger between the constituent corporations as provided in this section, one or more domestic or foreign subsidiaries may be merged into a domestic or foreign parent corporation~~;~~ provided~~,~~ that the parent owns ninety per cent or more of each class of the outstanding shares of each subsidiary, that at least one constituent corporation is a domestic corporation, and, in the case of a domestic parent, that the conditions set forth in divisions (D)(1), (2), (3), and (4) of section 1701.78 of the Revised Code do not exist.

(B) The agreement of merger shall set forth:

~~(1) The states under the laws of which each constituent corporation exists;~~

~~(2) That one or more specified constituent corporations shall be merged into a specified surviving corporation;~~

~~(3)~~ The THE designation and the number of the outstanding shares of each class of each SUBSIDIARY constituent ~~subsidiary~~ corporation~~,~~ and the number of shares of each such class owned by the surviving corporation;

~~(4) The terms of the merger, the mode of carrying them into effect, and the manner and basis of making distributions to shareholders of each constituent subsidiary corporation in extinguishment of or in substitution for their shares. Such distribution may be by way of shares of any class or classes of the surviving corporation, cash, securities, evidences of indebtedness, other property, or any combination thereof;~~

~~(5) If any constituent corporation is a foreign corporation, all statements and matters required to be set forth in such an agreement of merger by the laws of the state under the laws of which such corporation exists.~~

~~(6) If desired, the effective date of the merger, which may be on or after the date of filing the certificate.~~ IT ALSO SHALL SET FORTH ANY STATEMENTS AND MATTERS THAT ARE REQUIRED, AND MAY SET FORTH ANY PROVISION THAT IS PERMITTED, IN A MERGER UNDER SECTION 1701.78 OF THE REVISED CODE IF THE SURVIVING CORPORATION IS A DOMESTIC CORPORATION OR UNDER SECTION 1701.79 OF THE REVISED CODE IF THE SURVIVING CORPORATION IS A FOREIGN CORPORATION.

(C)(1) To effect the merger, the agreement ~~must~~ SHALL be approved by the directors of each DOMESTIC constituent corporation, but it need not be adopted by the shareholders of any DOMESTIC constituent ~~domestic~~ corporation. If any constituent corporation is a foreign corporation, the agreement ~~must~~ SHALL be approved ~~as required by the laws of the state under the laws of which such constituent corporation exists~~ OR OTHERWISE AUTHORIZED BY OR ON BEHALF OF EACH FOREIGN CONSTITUENT CORPORATION IN ACCORDANCE WITH THE LAWS OF THE STATE UNDER WHICH IT EXISTS.

(2) Within twenty days after the approval of the agreement of merger by the directors of each DOMESTIC constituent corporation, the surviving corporation shall deliver or send written notice of such approval and a copy or summary of the agreement to each shareholder of each domestic constituent corporation other than the surviving corporation of record as of the date on which the directors of the surviving corporation approved the agreement.

(D) The approval of the agreement of merger by the directors of a DOMESTIC constituent corporation under this section constitutes adoption by that corporation.

1701.801 Merger into domestic subsidiary corporation [Eff. 11-22-86]

(A) PURSUANT TO AN AGREEMENT OF MERGER BETWEEN THE CONSTITUENT CORPORATIONS AS PROVIDED IN THIS SECTION, ONE OR MORE DOMESTIC OR FOREIGN CORPORATIONS MAY BE MERGED

dissenting shareholder of any DOMESTIC constituent ~~domestic~~ corporation;

(7) If it is desired that the surviving or ~~the~~ new corporation transact business in this state as a foreign corporation, a statement to that effect, together with a statement on the appointment of a statutory agent and with respect to service of any process, notice, or demand upon such statutory agent or the secretary of state, as required when a foreign corporation applies for a license to transact business in this state.

(C) The agreement ALSO may ~~also~~ set forth any additional provision permitted by the laws of any state under the laws of which any constituent corporation exists, consistent with the laws of the state under the laws of which the surviving corporation exists or the new corporation is to exist.

(D) To effect the merger or consolidation, the agreement ~~must~~ SHALL be approved by the directors of each DOMESTIC constituent corporation, and adopted by the shareholders of each DOMESTIC constituent ~~domestic~~ corporation, in the same manner and with the same notice to and vote of shareholders or of holders of a particular class of shares, as is required by section 1701.78 of the Revised Code. THE AGREEMENT ALSO SHALL BE APPROVED OR OTHERWISE AUTHORIZED BY OR ON BEHALF OF EACH FOREIGN CONSTITUENT CORPORATION IN ACCORDANCE WITH THE LAWS OF THE STATE UNDER WHICH IT EXISTS.

(E) At any time prior to filing the certificate of merger or consolidation, the merger or consolidation may be abandoned by the directors of any of the constituent corporations if THE DIRECTORS ARE authorized to do so by the agreement.

THE AGREEMENT OF MERGER OR CONSOLIDATION MAY CONTAIN A PROVISION AUTHORIZING THE DIRECTORS OF THE CONSTITUENT CORPORATIONS TO AMEND THE AGREEMENT AT ANY TIME PRIOR TO THE FILING OF THE CERTIFICATE OF MERGER OR CONSOLIDATION, EXCEPT THAT, AFTER THE ADOPTION OF THE AGREEMENT BY THE SHAREHOLDERS OF ANY DOMESTIC CONSTITUENT CORPORATION, THE DIRECTORS SHALL NOT BE AUTHORIZED TO AMEND THE AGREEMENT TO DO ANY OF THE FOLLOWING:

(1) ALTER OR CHANGE THE AMOUNT OR KIND OF SHARES, EVIDENCES OF INDEBTEDNESS, OTHER SECURITIES, CASH, RIGHTS, OR ANY OTHER PROPERTY TO BE RECEIVED BY SHAREHOLDERS OF THE DOMESTIC CONSTITUENT CORPORATION IN CONVERSION OF OR IN SUBSTITUTION FOR THEIR SHARES;

(2) ALTER OR CHANGE ANY TERM OF THE ARTICLES OF THE SURVIVING OR NEW DOMESTIC CORPORATION, EXCEPT FOR ALTERATIONS OR CHANGES THAT COULD OTHERWISE BE ADOPTED BY THE DIRECTORS OF THE SURVIVING OR NEW DOMESTIC CORPORATION;

(3) ALTER OR CHANGE ANY OTHER TERMS AND CONDITIONS OF THE AGREEMENT IF ANY OF THE ALTERATIONS OR CHANGES, ALONE OR IN THE AGGREGATE, WOULD MATERIALLY ADVERSELY AFFECT THE HOLDERS OF ANY CLASS OR SERIES OF SHARES OF THE DOMESTIC CONSTITUENT CORPORATION.

(F) ~~Each constituent foreign corporation shall comply with the applicable provisions of the laws of the state under the laws~~ of which it exists.

~~(G)~~ If the surviving or new corporation does not desire to be licensed to transact business in Ohio, the agreement shall be accompanied by the affidavits, receipts, certificates, or other evidence required by division (H) of section 1701.86 of the Revised Code with respect to each DOMESTIC constituent ~~domestic~~ corporation and, with respect to each FOREIGN constituent ~~foreign~~ corporation licensed to transact business in Ohio, the affidavits, receipts, certificates, or other evidence required by division (C) or (D) of section 1703.17 of the Revised Code.

1701.80 Merger of subsidiary into parent corporation [Eff. 11-22-86]

(A) Pursuant to an agreement of merger between the constituent corporations as provided in this section, one or more domestic or foreign subsidiaries may be merged into a domestic or foreign parent corporation, provided that the parent owns ninety per cent or more of each class of the outstanding shares of each subsidiary, that at least one constituent corporation is a domestic corporation, and, in the case of a domestic parent, that the conditions set forth in divisions (D)(1), (2), (3), and (4) of section 1701.78 of the Revised Code do not exist.

(B) The agreement of merger shall set forth:

~~(1) The states under the laws of which each constituent corporation exists;~~

~~(2) That one or more specified constituent corporations shall be merged into a specified surviving corporation;~~

~~(3)~~ ~~The~~ THE designation and the number of the outstanding shares of each class of each SUBSIDIARY constituent ~~subsidiary~~ corporation, and the number of shares of each such class owned by the surviving corporation;

~~(4) The terms of the merger, the mode of carrying them into effect, and the manner and basis of making distributions to shareholders of each constituent subsidiary corporation in extinguishment of or in substitution for their shares. Such distribution may be by way of shares of any class or classes of the surviving corporation, cash, securities, evidences of indebtedness, other property, or any combination thereof;~~

~~(5) If any constituent corporation is a foreign corporation, all statements and matters required to be set forth in such an agreement of merger by the laws of the state under the laws of which such corporation exists.~~

~~(6) If desired, the effective date of the merger, which may be on or after the date of filing the certificate.~~ IT ALSO SHALL SET FORTH ANY STATEMENTS AND MATTERS THAT ARE REQUIRED, AND MAY SET FORTH ANY PROVISION THAT IS PERMITTED, IN A MERGER UNDER SECTION 1701.78 OF THE REVISED CODE IF THE SURVIVING CORPORATION IS A DOMESTIC CORPORATION OR UNDER SECTION 1701.79 OF THE REVISED CODE IF THE SURVIVING CORPORATION IS A FOREIGN CORPORATION.

(C)(1) To effect the merger, the agreement ~~must~~ SHALL be approved by the directors of each DOMESTIC constituent corporation, but it need not be adopted by the shareholders of any DOMESTIC constituent ~~domestic~~ corporation. If any constituent corporation is a foreign corporation, the agreement ~~must~~ SHALL be approved ~~as required by the laws of the state under the laws of which such constituent corporation exists~~ OR OTHERWISE AUTHORIZED BY OR ON BEHALF OF EACH FOREIGN CONSTITUENT CORPORATION IN ACCORDANCE WITH THE LAWS OF THE STATE UNDER WHICH IT EXISTS.

(2) Within twenty days after the approval of the agreement of merger by the directors of each DOMESTIC constituent corporation, the surviving corporation shall deliver or send written notice of such approval and a copy or summary of the agreement to each shareholder of each domestic constituent corporation other than the surviving corporation of record as of the date on which the directors of the surviving corporation approved the agreement.

(D) The approval of the agreement of merger by the directors of a DOMESTIC constituent corporation under this section constitutes adoption by that corporation.

1701.801 Merger into domestic subsidiary corporation [Eff. 11-22-86]

(A) PURSUANT TO AN AGREEMENT OF MERGER BETWEEN THE CONSTITUENT CORPORATIONS AS PROVIDED IN THIS SECTION, ONE OR MORE DOMESTIC OR FOREIGN CORPORATIONS MAY BE MERGED

INTO A DOMESTIC CORPORATION PROVIDED THAT THE DOMESTIC SURVIVING CORPORATION IS A SUBSIDIARY OF ONE OF THE CONSTITUENT CORPORATIONS AND THAT THE PARENT CONSTITUENT CORPORATION OWNS NINETY PER CENT OR MORE OF EACH CLASS OF THE OUTSTANDING SHARES OF THE SURVIVING SUBSIDIARY CORPORATION.

(B) THE AGREEMENT OF MERGER SHALL SET FORTH THE DESIGNATION AND THE NUMBER OF THE OUTSTANDING SHARES OF EACH CLASS OF THE SURVIVING SUBSIDIARY CORPORATION AND THE NUMBER OF SHARES OF EACH SUCH CLASS OWNED BY THE PARENT CONSTITUENT CORPORATION. IT ALSO SHALL SET FORTH ANY STATEMENTS AND MATTERS THAT ARE REQUIRED, AND MAY SET FORTH ANY PROVISION THAT IS PERMITTED, IN A MERGER UNDER SECTION 1701.78 OF THE REVISED CODE.

(C)(1) TO EFFECT THE MERGER, THE AGREEMENT SHALL BE APPROVED BY THE DIRECTORS OF EACH DOMESTIC CONSTITUENT CORPORATION, AND SHALL BE ADOPTED BY THE SHAREHOLDERS OF EACH DOMESTIC CONSTITUENT CORPORATION IN THE SAME MANNER AND WITH THE SAME NOTICE TO AND VOTE OF SHAREHOLDERS OR HOLDERS OF A PARTICULAR CLASS OF SHARES AS IS REQUIRED BY SECTION 1701.78 OF THE REVISED CODE, EXCEPT THAT THE AGREEMENT NEED NOT BE ADOPTED BY THE SHAREHOLDERS OF THE SURVIVING SUBSIDIARY CORPORATION. IF ANY CONSTITUENT CORPORATION IS A FOREIGN CORPORATION, THE AGREEMENT SHALL BE APPROVED OR OTHERWISE AUTHORIZED BY OR ON BEHALF OF EACH FOREIGN CONSTITUENT CORPORATION IN ACCORDANCE WITH THE LAWS OF THE STATE UNDER WHICH IT EXISTS.

(2) WITHIN TWENTY DAYS AFTER THE APPROVAL OF THE AGREEMENT OF MERGER BY THE DIRECTORS OF THE SURVIVING SUBSIDIARY CORPORATION, THE SURVIVING CORPORATION SHALL DELIVER OR SEND WRITTEN NOTICE OF SUCH APPROVAL AND A COPY OR SUMMARY OF THE AGREEMENT TO EACH SHAREHOLDER OF THE SURVIVING CORPORATION, OTHER THAN THE PARENT OF THE SURVIVING CORPORATION, OF RECORD AS OF THE DATE ON WHICH THE DIRECTORS OF THE SURVIVING CORPORATION APPROVED THE AGREEMENT.

(D) THE APPROVAL OF THE AGREEMENT OF MERGER BY THE DIRECTORS OF THE SURVIVING SUBSIDIARY CORPORATION UNDER THIS SECTION CONSTITUTES ADOPTION BY THE CORPORATION.

1701.84 Dissenting shareholders entitled to relief [Eff. 11-22-86]

The following are entitled to relief as dissenting shareholders under section 1701.85 of the Revised Code:

(A) Shareholders of a domestic corporation which is being merged or consolidated into a surviving or new corporation, domestic or foreign, pursuant to section 1701.78 ~~or~~, 1701.79, OR **1701.801** of the Revised Code;

(B) In the case of a merger into a domestic corporation, shareholders of the surviving corporation who under section 1701.78 of the Revised Code are entitled to vote on the adoption of an agreement of merger, but only as to the shares so entitling them to vote;

(C) Shareholders, other than the parent corporation, of a domestic subsidiary corporation which is being merged into the domestic or foreign parent corporation pursuant to section 1701.80 of the Revised Code;

(D) In the case of a combination or a majority share acquisition, shareholders of the acquiring corporation who under section 1701.83 of the Revised Code are entitled to vote on such transaction, but only as to the shares so entitling them to vote.

(E) SHAREHOLDERS OF A DOMESTIC SUBSIDIARY CORPORATION INTO WHICH IS BEING MERGED ONE OR MORE DOMESTIC OR FOREIGN CORPORATIONS PURSUANT TO SECTION 1701.801 OF THE REVISED CODE.

1701.85 Qualifications of and procedures for dissenting shareholders [Eff. 11-22-86]

(A)(1) A shareholder of a domestic corporation is entitled to relief as a dissenting shareholder in respect of the proposals in sections 1701.74, 1701.76, and 1701.84 of the Revised Code, only in compliance with this section.

(2) ~~In the case where~~ IF the proposal must be submitted to the shareholders of the corporation involved, the dissenting shareholder must be a record holder of the shares of the corporation as to which he seeks relief as of the date fixed for the determination of shareholders entitled to notice of a meeting of the shareholders at which the proposal is to be submitted, and such shares must not have been voted in favor of the proposal. Not later than ten days after the date on which the vote on such proposal was taken at the meeting of the shareholders, the shareholder must deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief, stating his address, the number and class of such shares, and the amount claimed by him as the fair cash value of the shares.

(3) ~~In the case of a merger pursuant to section 1701.80 of the Revised Code, the~~ THE dissenting shareholder ENTITLED TO RELIEF UNDER DIVISION (C) OF SECTION 1701.84 OF THE REVISED CODE IN THE CASE OF A MERGER PURSUANT TO SECTION 1701.80 OF THE REVISED CODE AND A DISSENTING SHAREHOLDER ENTITLED TO RELIEF UNDER DIVISION (E) OF SECTION 1701.84 OF THE REVISED CODE IN THE CASE OF A MERGER PURSUANT TO SECTION 1701.801 OF THE REVISED CODE must be a record holder of the shares of the corporation as to which he seeks relief as of the date on which the agreement of merger was adopted by the directors of that corporation. Within twenty days after ~~there~~ HE has been sent ~~to him~~ the notice provided in ~~that~~ section **1701.80** OR 1701.801 OF THE REVISED CODE, the shareholder must deliver to the corporation a written demand for payment with the same information as that provided for in division (A)(2) of this section.

(4) In the case of a merger or consolidation, a demand served on the constituent corporation involved constitutes service on the surviving or the new corporation, whether served before, on, or after the effective date of the merger or consolidation.

(5) If the corporation sends to the dissenting shareholder, at the address specified in his demand, a request for the certificates representing the shares as to which he seeks relief, he shall, within fifteen days from the date of the sending of such request, deliver to the corporation the certificates requested, in order that the corporation may forthwith endorse on them a legend to the effect that demand for the fair cash value of such shares has been made. The corporation shall promptly return such endorsed certificates to the shareholder. Failure on the part of the shareholder to deliver such certificates terminates his rights as a dissenting shareholder, at the option of the corporation, exercised by written notice sent to him within twenty days after the lapse of the fifteen day period above mentioned, unless a court for good cause shown otherwise directs. If shares represented by a certificate on which such a legend has been endorsed are transferred, each new certificate issued for them shall bear a similar legend, together with the name of the original dissenting holder of such shares. Upon receiving a demand for payment from a dissenting shareholder who is the record holder of uncertificated securities, the corporation shall make an appropriate notation thereof in its shareholder records. If uncertificated shares for which payment has been demanded are to be transferred, any new certificate issued therefor shall bear the legend required for certificated securities as provided in this paragraph. A transferee of the shares so endorsed, or of uncertificated securities where such

notation has been made, acquires only such rights in the corporation as the original dissenting holder of such shares had immediately after the service of a demand for payment of the fair cash value of the shares. Such request by the corporation is not an admission by the corporation that the shareholder is entitled to relief under this section.

(B) Unless the corporation and the dissenting shareholder shall have come to an agreement on the fair cash value per share of the shares as to which he seeks relief, the shareholder or the corporation, which in case of a merger or consolidation may be the surviving or the new corporation, may, within three months after the service of the demand by the shareholder, file a petition in the court of common pleas of the county in which the principal office of the corporation which issued such shares is located, or was located at the time when the proposal was adopted by the shareholders of the corporation, or, if the same was not required to be submitted to the shareholders, was approved by the directors. Other dissenting shareholders, within the period of three months, may join as plaintiffs, or may be joined as defendants in any such proceeding, and any two or more such proceedings may be consolidated. The petition shall contain a brief statement of the facts, including the vote and the facts entitling the dissenting shareholder to the relief demanded. No answer to such petition is required. Upon the filing of the petition, the court, on motion of the petitioner, shall enter an order fixing a date for hearing the petition, and requiring that a copy of the petition and a notice of the filing and of the date for hearing be given to the respondent or defendant in the manner in which summons is required to be served or substituted service is required to be made in other cases. On the day fixed for hearing on the petition or any adjournment thereof, the court shall determine from the petition and from such evidence as is submitted by either party whether the shareholder is entitled to be paid the fair cash value of any shares and, if so, the number and class of such shares. If the court finds that the shareholder is so entitled, the court may appoint one or more persons as appraisers to receive evidence and to recommend a decision on the amount of the fair cash value. The appraisers have such power and authority as is specified in the order of their appointment. The court shall thereupon make a finding as to the fair cash value of a share, and shall render judgment against the corporation for the payment of it, with interest at such rate and from such date as the court considers equitable. The costs of the proceeding, including reasonable compensation to the appraisers to be fixed by the court, shall be assessed or apportioned as the court considers equitable. Such a proceeding shall be a special proceeding within the meaning of section 2505.02 of the Revised Code, and final orders in it may be vacated, modified, or reversed as provided in sections 2505.01 to 2505.45 of the Revised Code. If during the pendency of any proceeding instituted under this section a suit or proceeding is or has been instituted to enjoin or otherwise to prevent the carrying out of the action as to which the shareholder has dissented, the proceeding instituted under this section shall be stayed until the final determination of the other suit or proceeding. Unless any provision in division (D) of this section is applicable, the fair cash value of the shares as agreed upon by the parties or as fixed under this section shall be paid within thirty days after the date of final determination of such value under this division or the effective date of the amendment to the articles or the consummation of the other action involved, whichever occurs last. Upon the occurrence of the last such event, payment shall be made immediately to a holder of uncertificated securities entitled to such payment. In the case of holders of shares represented by certificates, payment shall be made only upon and simultaneously with the surrender to the corporation of the certificates representing the shares for which such payment is made.

(C) ~~In the case where~~ IF the proposal was required to be submitted to the shareholders of the corporation, fair cash value AS TO THOSE SHAREHOLDERS shall be determined as of the day prior to that on which the vote by the shareholders was taken, ~~or~~ AND, in the case of a merger pursuant to section 1701.80 OR **1701.801** of the Revised Code, FAIR CASH VALUE AS TO SHAREHOLDERS OF A CONSTITUENT SUBSIDIARY CORPORATION SHALL BE DETERMINED AS OF the day before the adoption of the agreement of merger by the directors of the particular subsidiary corporation. The fair cash value of a share for the purposes of this section, is the amount ~~which~~ THAT a willing seller, under no compulsion to sell, would be willing to accept, and ~~which~~ THAT a willing buyer, under no compulsion to purchase, would be willing to pay, but in no event shall the ~~amount thereof~~ FAIR CASH VALUE exceed the amount specified in the demand of the particular shareholder. In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded.

(D) The right and obligation of a dissenting shareholder to receive such fair cash value and to sell such shares as to which he seeks relief, and the right and obligation of the corporation to purchase such shares and to pay the fair cash value of them terminates if:

(1) Such shareholder has not complied with this section, unless the corporation by its directors waives such failure;

(2) The corporation abandons, or is finally enjoined or prevented from carrying out, or the shareholders rescind their adoption, of the action involved;

(3) The shareholder withdraws his demand, with the consent of the corporation by its directors;

(4) The corporation and the dissenting shareholder shall not have come to an agreement as to the fair cash value per share, and neither the shareholder nor the corporation shall have filed or joined in a petition under division (B) of this section within the period provided.

(E) From the time of giving the demand, until either the termination of the rights and obligations arising therefrom or the purchase of the shares by the corporation, all other rights accruing from such shares, including voting and dividend or distribution rights, are suspended. If during suspension, any dividend or distribution is paid in money upon shares of such class, or any dividend, distribution, or interest is paid in money upon any securities issued in extinguishment of or in substitution for such shares, an amount equal to the dividend, distribution, or interest which, except for said suspension, would have been payable upon such shares or securities, shall be paid to the holder of record as a credit upon the fair cash value of the shares. If the right to receive fair cash value is terminated otherwise than by the purchase of the shares by the corporation, all rights of the holder shall be restored and all distributions which, except for suspension, would have been made shall be made to the holder of record of the shares at the time of termination.

1701.95 Liability of directors and shareholders for unlawful loans, dividends, or distributions [Eff. 11-22-86]

(A) In addition to any other liabilities imposed by law upon directors of a corporation AND EXCEPT AS PROVIDED IN DIVISION (B) OF THIS SECTION, directors who vote for or assent to ANY OF THE FOLLOWING:

(1) The payment of a dividend or distribution, or the making of a distribution of assets to shareholders, or the purchase or redemption of its own shares, contrary in any such case to law or the articles;

(2) A distribution of assets to shareholders during the winding up of the affairs of the corporation, on dissolution or otherwise, without the payment of all known obligations of the corporation, or without making adequate provision therefor;

(3) The making of loans, other than in the usual course of business, to an officer, director, or shareholder of the corporation (except in the case of a building and loan association, or a corporation engaged in banking or in the making of loans generally);

shall be jointly and severally liable to the corporation as follows: in cases under division (A)(1) of this section up to the amount of such dividend, distribution, or other payment, in excess of the amount that could have been paid or distributed without violation of law or the articles but not in excess of the amount that would inure to the

benefit of the creditors of the corporation if it was insolvent at the time of the payment or distribution or there was reasonable ground to believe that by such action it would be rendered insolvent, plus the amount that was paid or distributed to holders of shares of any class in violation of the rights of holders of shares of any other class; and in cases under division (A)(2) of this section, to the extent that such obligations (not otherwise barred by statute) are not paid, or for the payment of which adequate provision has not been made; and in cases under division (A)(3) of this section, for the amount of the loan with interest on it at the rate of six per cent per annum until such amount has been paid~~; provided, that a~~.

(B)(1) A director shall not be liable under division (A)(1) or (2) of this section if in determining the amount available for any such dividend, purchase, redemption, or distribution to shareholders, he in good faith relied on a financial statement of the corporation prepared by an officer or employee of the corporation in charge of its accounts or certified by a public accountant or firm of public accountants, or in good faith he considered the assets to be of their book value, or he followed what he believed to be sound accounting and business practice.

(2) A DIRECTOR IS NOT LIABLE UNDER DIVISION (A)(3) OF THIS SECTION FOR MAKING ANY LOAN TO, OR GUARANTEEING ANY LOAN TO OR OTHER OBLIGATION OF, AN EMPLOYEE STOCK OWNERSHIP PLAN, AS DEFINED IN SECTION 4975(e)(7) OF THE INTERNAL REVENUE CODE OF 1954, 68A STAT. 3, 26 U.S.C. 1, AS AMENDED.

~~(B)~~**(C)** A director who is present at a meeting of the directors or a committee thereof at which action on any matter is authorized or taken and who has not voted for or against such action shall be presumed to have voted for the action unless his written dissent therefrom is filed either during the meeting or within a reasonable time after the adjournment thereof, with the person acting as secretary of the meeting or with the secretary of the corporation.

~~(C)~~**(D)** A shareholder who knowingly receives any dividend, distribution, or payment made contrary to law or the articles shall be liable to the corporation for the amount received by him which is in excess of the amount which could have been paid or distributed without violation of law or the articles.

~~(D)~~**(E)** A director against whom a claim is asserted under or pursuant to this section and who is held liable thereon shall be entitled to contribution, on equitable principles, from other directors who also are liable~~; and in~~. IN addition, any director against whom a claim is asserted under or pursuant to this section or who is held liable shall have a right of contribution from the shareholders who knowingly received any dividend, distribution, or payment made contrary to law or the articles, and such shareholders as among themselves ALSO shall be ~~also~~ entitled to contribution in proportion to the amounts received by them respectively.

~~(E)~~**(F)** No action shall be brought by or on behalf of a corporation upon any cause of action arising under division (A)(1) or (2) of this section at any time after two years from the day on which the violation occurs~~; provided~~ EXCEPT that no such action shall be barred by this division ~~(E)~~ prior to January 1, 1956.

~~(F)~~**(G)** Nothing contained in this section shall preclude any creditor whose claim is unpaid from exercising such rights as he otherwise would have by law to enforce his claim against assets of the corporation paid or distributed to shareholders.

THIS SECTION IS AN INTERIM SECTION EFFECTIVE UNTIL JULY 1, 1987.

4967.04 Agreement of consolidation or merger [Eff. 11-22-86]

~~Consolidation~~ A CONSOLIDATION or merger of railroad companies shall be ~~made under the following conditions and restrictions:~~

~~(A) The directors of the several railroad companies may enter into a joint agreement, under the corporate seal of each company, for the consolidation or merger of the companies, prescribing the terms and conditions thereof, the mode of carrying it into effect, the name of the new company in the case of a consolidation or of the company that is to survive in the case of a merger, the number of directors and other principal officers thereof, and who shall be the first such directors and officers and their respective places of residence, and either the amount of the authorized capital stock of the new or surviving company and the number and par value of the shares of which it is to consist or, if the new or surviving company is to issue shares without par value or shares of more than one class, the statements required by paragraph (4) of division (A) of section 1701.04 of the Revised Code. In case of a merger such joint agreement need not contain the provisions in this division specified with regard to the directors, officers, and capital stock of the surviving corporation unless, and then only to the extent that, changes in respect to such matters are to be made by such merger agreement, and the manner of converting into the capital stock of the new or surviving company, or of otherwise disposing of the capital stock of each company, the capital stock of which is to be so converted or disposed of, with such other details as they deem necessary to perfect such consolidation or merger.~~

~~(B) The agreement shall be submitted to the stockholders of each of the companies, at a meeting thereof called separately for the purpose of taking it into consideration. Due notice of the time and place of holding such meeting of stockholders of each company, and the object thereof, shall be given by written or printed notices addressed to each of the persons in whose names the capital stock of such company stands on the books thereof, if their post-office address is known to the company, at least thirty days before the time of holding such meeting, and by a like notice published at least thirty days before the time of holding such meeting in some newspaper in the municipal corporation where such company has its principal office or place of business. But if all the stockholders are present at such meeting, in person or by proxy notice may be waived in writing. At the meeting of stockholders the agreement of the directors shall be considered, and a vote by ballot taken for its adoption or rejection. Each share of stock entitles the holder thereof to one vote, except as is otherwise provided in the articles of incorporation, consolidation, or merger under which such company was formed. Ballots may be cast in person or by proxy. If the holders of outstanding shares of stock of such company representing at least two thirds, or such greater proportion as said articles of incorporation, consolidation, or merger requires, of the voting power of all the stock of such company represented at such meeting entitled to vote and voted on the question, are for the adoption of the agreement, that fact shall be certified thereon by the secretary or assistant secretary of each of the companies. The agreement so adopted, or a certified copy thereof, shall be filed in the office of the secretary of state. All consolidation agreements prior to April 22, 1885 entered into and ratified by such companies, substantially in the manner as in this section prescribed, shall be as valid as if entered into and ratified by virtue of this section~~ EFFECTED BY EACH RAILROAD COMPANY ADOPTING AN AGREEMENT OF MERGER OR CONSOLIDATION PURSUANT TO SECTION 1701.78, 1701.79, 1701.80, OR 1701.801 OF THE REVISED CODE AND MAKING THE FILINGS REQUIRED BY SECTION 1701.81 OF THE REVISED CODE.

4967.10 Relief for dissenting shareholders [Eff. 11-22-86]

A stockholder who ~~refuses to convert his stock into that of the consolidated railroad company or, in case of a merger, a stockholder of any company proposed to be merged into another who refuses to convert his stock into that of the company that is to survive, shall be paid, in accordance with this section, either the full market value thereof at the date of the making of the agreement of consolidation or merger by the directors, without regard to any depreciation or appreciation in consequence of such consolidation or merger, or damages to him because of the proposed consolidation or merger, if he voted for the rejection of the agreement, and if previous to such consolidation or merger he so requires~~ DISSENTS IN A CONSOLIDATION OR MERGER OF RAILROAD

COMPANIES PURSUANT TO SECTION 4967.04 OF THE REVISED CODE IS ENTITLED TO RELIEF AS A DISSENTING SHAREHOLDER UNDER SECTION 1701.85 OF THE REVISED CODE. ~~If the market price of the date of the making of the agreement by the board of directors is abnormally enhanced or depressed by unfair combinations, by an illegal monopoly, or by any other wrongful act, other evidence than the market sales at that time may be resorted to for the purpose of showing the fair value of the stock. If a stockholder, so refusing to consolidate or merge, and the directors of the company, desiring to consolidate or merge, cannot agree as to the value of such stock or the amount of such damages, the parties, or either of them, may at any time within thirty days after the adoption of the agreement by the stockholders as provided in section 4967.04 of the Revised Code or at any time before completion of the consolidation or merger if said completion be effected after said period of thirty days, apply by petition to the public utilities commission for submission of the questions to arbitration by said commission. Upon reasonable notice to the parties, the commission shall thereupon proceed to arbitrate the questions and shall appraise said stock and ascertain the full market value thereof at the date of the making of the agreement by the board, and shall also estimate and determine the damage, if any, to such stockholder by the proposed consolidation or merger if he is required to convert his stock. After notice, hearing, and determination, the commission shall make an order directing the company to pay to such stockholder, on or before a day named, either the full market value of such stock as so appraised and ascertained, or the amount of damages so estimated and determined. Said company may, at its election, pay to the stockholder either the amount of damages so found and awarded or the value of the stock so ascertained and determined, or may deposit the amount with the court of common pleas of the county in which it has its principal place of business. No right to payment for the value of his stock or for damages because of the proposed consolidation or merger shall be claimed by or accrue to any stockholder who has not voted for the rejection of the agreement at the meeting of stockholders held for that purpose pursuant to section 4967.04 of the Revised Code and who does not in addition thereto, previous to such consolidation or merger, notify, in writing, the company of his refusal to convert his stock and of his demand for payment of the full market value thereof, or for damages, and who does not, in the event of failure to agree with the directors of the company in respect to the value of the stock or the amount of damages to be paid, apply to the commission. No action affecting a railroad consolidation or merger shall be brought by or on behalf of any private person except in accordance with this section. After application or petition to the commission the dissenting stockholder may not recant his action in this regard nor insist upon conversion of his stock or the payment of damages, except pursuant to the order of the commission or to the judgment of the court. But if such conditions as to voting, notice, and application to the commission are observed, the stockholder's rights shall not affect the completion of the consolidation or merger, and shall not be affected by such completion except that the right to payment for the value of the stock, or of damages, shall not accrue until the completion of the consolidation or merger by filing the agreement or a certified copy thereof in the office of the secretary of state as provided in section 4967.04 of the Revised Code, and such right, subject to this section, shall continue after the completion of the consolidation or merger, shall not be defeated by such event, and shall be enforceable either against the consolidated or surviving company or against the constituent or merged company against which claim is made, and the existence of such constituent or merged company shall be continued after consolidation or merger so far as may be necessary to give effect to this section. Upon the payment or deposit of the value of the stock so appraised and ascertained, the stockholder shall transfer the said stock to the company making the payment, to be disposed of by the directors of said company or of the consolidated or surviving company, or to be retained for the benefit of the remaining stockholders. Upon the payment or deposit of the amount of the damages so estimated and determined, the stockholder shall be required to convert his stock as provided in the agreement for consolidation or merger approved by the stockholders. If said company does not comply with said order within the time limit in such order, or if any stockholder is dissatisfied with the order, said stockholder or any person for whose benefit such order was made, may at any time within thirty days after expiration of the time limit in such order, file in the court of common pleas of the county in which the principal office of said company is located, or in the court of common pleas of Franklin county, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the court of common pleas shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima-facie evidence of the facts therein stated. Due credit shall be allowed for all amounts paid or deposited by the company and the company shall have the right to recover all amounts paid or deposited in excess of final judgment.~~

~~As used in this section, "stockholder" means a bona fide holder of record at the time of the agreement for the consolidation or merger by the directors.~~

SECTION 2. That existing sections 1701.01, 1701.13, 1701.16, 1701.19, 1701.32, 1701.59, 1701.60, 1701.76, 1701.78, 1701.79, 1701.80, 1701.84, 1701.85, 1701.95, 4967.04, and 4967.10, and sections 4967.05, 4967.06, 4967.07, 4967.08, 4967.09, and 4967.11 of the Revised Code are hereby repealed.

SECTION 3. That sections 1701.32 and 1701.95 of the Revised Code be amended to read as follows, effective July 1, 1987:

1701.32 Surplus [Eff. 7-1-87]

(A) The surplus of a corporation is the excess of its assets over its liabilities plus stated capital, if any. The earned surplus of a corporation is the net balance of its net profits, income, gains, and losses from the date of incorporation, except as otherwise provided in this section, or from the latest date on which a deficit in earned surplus was eliminated by application of capital surplus or otherwise, after deducting distributions to shareholders and transfers to stated capital and capital surplus to the extent that such distributions and transfers are made out of earned surplus. Surplus other than earned surplus is capital surplus.

Determinations under this section may be based upon financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, and may make use of the equity method of accounting.

(B) Capital surplus shall be classified according to its derivation and so shown on the books of the corporation, and each balance sheet shall show separately any capital surplus arising from unrealized appreciation of assets, other capital surplus, and earned surplus.

(C) If a corporation accepts a voluntary contribution of property other than its own issued shares, the directors may order all or a part of the fair value of such property to the corporation, as determined by the directors, to be entered on its books, and thereby create or add to capital surplus.

(D) In addition to any determination permitted under division (A) of this section, if the directors of a corporation determine that ~~tangible or intangible~~ PHYSICAL assets of the corporation have a fair value to it in excess of the amount at which they are carried on its books, they may order all or a part of such excess so determined to be entered on its books, and thereby create or add to capital surplus.

(E) In addition to any determination permitted under division (A) of this section, the directors of a corporation that owns shares in another domestic or foreign corporation may, if they believe in good faith that the books of the issuing corporation are kept according to generally accepted accounting principles, order such shares to be carried on the books of the corporation owning them at the value shown on the books of the issuing corporation, and thereby create or add to the capital surplus of the corporation owning such

shares. When shares are carried on such basis, the balance sheets of the corporation owning them shall contain a statement to that effect.

(F) The directors may order transfers from any surplus however created to stated capital of shares with or without par value, and from earned surplus to capital surplus.

(G) Pursuant to resolution adopted by the affirmative vote of the holders of two-thirds of the shares of each class, regardless of limitations or restrictions in the articles on the voting rights of the shares of any such class or, if the articles so provide or permit, a greater or lesser proportion, but not less than a majority, of the shares of any class, a corporation may apply all or any part of capital surplus to the reduction or writing off of any deficit in earned surplus, or to the creation of a reserve for any proper purpose, and thereby make available for dividends or distributions, without notice to the shareholders as to the source of such dividends or distributions, any earned surplus remaining, or thereafter arising, but in case such action is taken, a record of it shall be made on the books of the corporation and shall appear on each balance sheet of the corporation for a period of not less than five years thereafter.

(H)(1) In the case of a merger of one or more domestic or foreign corporations into a domestic surviving corporation, the directors of the surviving corporation may order entered on its books all or part of the earned surplus of the other constituent corporations, diminished by any deficit in earned surplus of any constituent corporation, and thereby create, add to, or diminish the earned surplus of the surviving corporation.

(2) In the case of a consolidation of a domestic corporation with one or more domestic or foreign corporations into a new domestic corporation, the directors of the new corporation may order entered on its books all or part of the earned surplus of each of the constituent corporations, diminished by any deficit in earned surplus of any constituent corporation, and thereby create earned surplus of the new corporation.

(3) In the case of a combination, the directors of the acquiring corporation may order entered on its books all or part of the earned surplus of the transferor corporations, diminished by any deficit in earned surplus of any such corporation, and thereby create, add to, or diminish the earned surplus of the acquiring corporation.

(4) In the case of a dissolution of a domestic or foreign subsidiary corporation, all shares of which are owned by a domestic corporation, the directors of the parent corporation may order entered on its books all or part of the earned surplus of the subsidiary and thereby create or add to the earned surplus of the parent.

(5) The action of the directors of a corporation in creating or adding to earned surplus, as provided in this division, must be taken, if at all, not later than ninety days after the end of the fiscal year of such corporation in which the merger, consolidation, combination, or dissolution becomes effective.

~~This section is an interim section effective until July 1, 1987.~~

1701.95 Liability of directors and shareholders for unlawful loans, dividends, or distributions [Eff. 7-1-87]

(A) In addition to any other liabilities imposed by law upon directors of a corporation ~~and except as provided in division (B) of this section~~, directors who vote for or assent to any of the following:

(1) The payment of a dividend or distribution, or the making of a distribution of assets to shareholders, or the purchase or redemption of its own shares, contrary in any such case to law or the articles;

(2) A distribution of assets to shareholders during the winding up of the affairs of the corporation, on dissolution or otherwise, without the payment of all known obligations of the corporation, or without making adequate provision therefor;

(3) The making of loans, other than in the usual course of business, to an officer, director, or shareholder of the corporation (except in the case of a building and loan association, or a corporation engaged in banking or in the making of loans generally);

shall be jointly and severally liable to the corporation as follows: in cases under division (A)(1) of this section up to the amount of such dividend, distribution, or other payment, in excess of the amount that could have been paid or distributed without violation of law or the articles but not in excess of the amount that would inure to the benefit of the creditors of the corporation if it was insolvent at the time of the payment or distribution or there was reasonable ground to believe that by such action it would be rendered insolvent, plus the amount that was paid or distributed to holders of shares of any class in violation of the rights of holders of shares of any other class; and in cases under division (A)(2) of this section, to the extent that such obligations (not otherwise barred by statute) are not paid, or for the payment of which adequate provision has not been made; and in cases under division (A)(3) of this section, for the amount of the loan with interest on it at the rate of six per cent per annum until such amount has been paid.; PROVIDED, THAT A

~~(B)(1) A~~ director shall not be liable under division (A)(1) or (2) of this section if in determining the amount available for any such dividend, purchase, redemption, or distribution to shareholders, he in good faith relied on a financial statement of the corporation prepared by an officer or employee of the corporation in charge of its accounts or certified by a public accountant or firm of public accountants, or in good faith he considered the assets to be of their book value, or he followed what he believed to be sound accounting and business practice.

~~(2) A director is not liable under division (A)(3) of this section for making any loan to, or guaranteeing any loan to or other obligation of, an employee stock ownership plan, as defined in section 4975(e)(7) of the Internal Revenue Code of 1954, 68A Stat. 3, 26 U.S.C. 1, as amended.~~

~~(C)~~**(B)** A director who is present at a meeting of the directors or a committee thereof at which action on any matter is authorized or taken and who has not voted for or against such action shall be presumed to have voted for the action unless his written dissent therefrom is filed either during the meeting or within a reasonable time after the adjournment thereof, with the person acting as secretary of the meeting or with the secretary of the corporation.

~~(D)~~**(C)** A shareholder who knowingly receives any dividend, distribution, or payment made contrary to law or the articles shall be liable to the corporation for the amount received by him which is in excess of the amount which could have been paid or distributed without violation of law or the articles.

~~(E)~~**(D)** A director against whom a claim is asserted under or pursuant to this section and who is held liable thereon shall be entitled to contribution, on equitable principles, from other directors who also are liable. In addition, any director against whom a claim is asserted under or pursuant to this section or who is held liable shall have a right of contribution from the shareholders who knowingly received any dividend, distribution, or payment made contrary to law or the articles, and such shareholders as among themselves also shall be entitled to contribution in proportion to the amounts received by them respectively.

~~(F)~~**(E)** No action shall be brought by or on behalf of a corporation upon any cause of action arising under division (A)(1) or (2) of this section at any time after two years from the day on which the violation occurs except that no such action shall be barred by this division prior to January 1, 1956.

~~(G)~~**(F)** Nothing contained in this section shall preclude any creditor whose claim is unpaid from exercising such rights as he otherwise would have by law to enforce his claim against assets of the corporation paid or distributed to shareholders.

~~This section is an interim section effective until July 1, 1987.~~

SECTION 4. That existing sections 1701.32 and 1701.95 of the Revised Code are hereby repealed, effective July 1, 1987.

SECTION 5. The Senate Judiciary Committee shall study the effect on the Corporation Law of Ohio and on corporations incorporated in Ohio of the changes made to sections 1701.32 and 1701.95 of the Revised Code by Section 1 of this act.

SECTION 6. Sections 1701.01 and 1701.85 of the Revised Code are presented in this act as a composite of each section as amended by both Sub. S.B. 283 and Sub. H.B. 250 of the 115th

General Assembly, with the new language of neither of the acts shown in capital letters. This is in recognition of the principle stated in division (B) of section 1.52 of the Revised Code that such amendments are to be harmonized where not substantively irreconcilable and constitutes a legislative finding that such are the resulting versions in effect prior to the effective date of this act.

SECTION 7. The amendment of section 1701.16 and division (E)(4) of section 1701.59 of the Revised Code as results from the amendment of section 1701.59 of the Revised Code and notwithstanding Sections 3 and 4 of this act, the amendment of section 1701.95 of the Revised Code, shall not be construed to expand, impair, or otherwise affect any power, authority, duty, right, obligation, remedy, or liability contained in those sections prior to the effective date of this act.

SECTION 8. That section 1701.16 of the Revised Code be amended to read as follows, effective March 1, 1987:

1701.16 Options to subscribe for or to purchase shares; terms of instruments evidencing options [Eff. 3-1-87]

(A) Unless the articles otherwise provide, a corporation by its directors may grant options to subscribe for or to purchase shares of any authorized class at such times and on such terms as are set forth in the securities or in the contracts, warrants, or instruments (which may be transferable or nontransferable, and separable or inseparable from securities) evidencing such options, upon the following conditions:

(1) If such shares are subject to preemptive rights, and if the options are not granted to shareholders in satisfaction of their preemptive rights, then the granting of such options must be authorized by such vote or consent of the shareholders or holders of shares of particular classes as would then be required to waive or release such preemptive rights; and such vote or consent shall release the preemptive rights to the shares required to satisfy such options if and when exercised;

(2) If at the time of granting such options the corporation does not have authorized and unissued shares sufficient to satisfy such options if and when exercised, the granting of such options must be authorized by such vote of the shareholders or holders of shares of particular classes as would then be required to adopt an amendment to the articles for the purpose of increasing the authorized number of such shares, and the shares required to be issued upon the exercise of such options shall be provided by an amendment concurrently or thereafter adopted by the shareholders or the directors.

(B) The securities, contracts, warrants, or instruments evidencing such options may contain any terms not repugnant to law for the protection of the holders of such options, including, without limiting the generality of such authority: restrictions upon the authorization or issuance of additional shares; provisions for the adjustment of the option price; provisions concerning rights in the event of reorganization, merger, consolidation, or sale of the entire assets of the corporation; provisions for the reservation of authorized but unissued shares to satisfy such options; AND restrictions upon the declaration or payment of dividends or distributions~~; and in the case of a corporation that has issued and outstanding shares that are listed on a national securities exchange, conditions on the exercise of such options, including conditions that preclude the holder or holders of a specified number or percentage of the outstanding common shares of such a corporation from exercising such options~~.

(C) "Securities," as used in this section, includes obligations and shares of the corporation.

~~This section is an interim section effective until March 1, 1987.~~

SECTION 9. That existing section 1701.16 of the Revised Code is hereby repealed, effective March 1, 1987.

SECTION 10. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that there is an urgent need to attract qualified individuals to serve as directors of corporations and to assure that corporations remain incorporated in this state rather than reincorporate in states with laws providing more favorable treatment of directors and therefore it is critical that public corporations that are beginning to prepare their proxy materials providing for the election of corporate directors be able to rely upon the provisions of this act. Therefore, this act shall go into immediate effect.

LSC Analysis of Sub. H.B. 902[1]
(As Reported by S. Judiciary)

Editor's Note: The following analysis, by the staff of Ohio's Legislative Service Commission, is printed to assist subscribers. CAUTION: because bills are subject to possible floor amendments and conference committee changes *following* preparation of the analyses, the text of an analysis may not reflect all of the provisions of the Bill as signed into law.

Summary:

Revises the required and permissive provisions of merger and consolidation agreements under the General Corporation Law (GCL).

Revises the provisions of the GCL relating to the approval of such agreements and to the form of certificates of merger or consolidation.

Clarifies what constitutes the articles of incorporation of new corporations arising from consolidations and surviving corporations arising from mergers.

Clarifies that fair value of property or services provisions of the GCL apply to domestic surviving or new corporations arising from mergers and consolidations, and to subsidiary and parent corporations involved in mergers.

Requires that mergers and consolidations of railroad companies comply with the GCL, instead of procedures in the Railroad Law that the bill would repeal.

Requires that directors in certain circumstances be advanced expenses incurred in defending against certain suits.

Stipulates that a director is not liable for failing to act in good faith unless it is proved by clear and convincing evidence in any action brought against a director, including actions that involve or affect a change or potential change in corporation control.

Provides that in certain circumstances a director may be held liable for damages only if it is proved by clear and convincing evidence that his act or omission was undertaken with deliberate intent to cause injury to the corporation or with reckless disregard for the corporation's best interests.

Stipulates that no resolution adopted by the directors or a committee of the directors and no contract or transaction is void or voidable because it affects the corporation and specified parties who may have an interest in the contract, action, or transaction.

Makes other miscellaneous changes to the GCL.

Declares an emergency.

[1]This analysis was prepared before the report of the Senate Judiciary Committee appeared in the Senate Journal.

CONTENT AND OPERATION

The bill would make changes in the General Corporation Law (GCL) that would affect merger and consolidation agreements (I. to VI. below), directors' indemnification (VII. below), directors' liability (VIII. below), when contracts and transactions are voidable (IX. below), and other miscellaneous sections in the GCL (X. below).

I. Merger and consolidation agreements

(a) Existing law.

Under current law, domestic corporations, which are corporations for profit formed under Ohio law (sec. 1701.01(A)), and foreign corporations, which are corporations for profit formed under the laws of another state, U.S. territory, district, or possession, or another country or its political subdivisions (sec. 1701.01(B) and (C)) can enter into a merger or consolidation agreement. The merging or consolidating corporations are denoted constituent corporations (sec. 1701.01(V)), and the corporation resulting from a merger or consolidation is denoted a surviving corporation (merger—sec. 1701.01(W)) or new corporation (consolidation). A surviving or new corporation may be either a domestic corporation (sec. 1701.78) or a foreign corporation (sec. 1701.79). Finally, one type of merger is a merger of subsidiary corporations with their parent corporations (sec. 1701.80).

Constituent corporations that want to merge or consolidate must enter into an agreement that sets forth certain statutorily specified matters and, except in the case of a subsidiary merging with a parent corporation, can set forth other statutorily specified matters (secs. 1701.78, 1701.79(B) and (C), and 1701.80(B)).

(b) Changes proposed by the bill.

The bill would revise the definition of a *constituent corporation* to refer to, in the case of a merger, an existing corporation "merging into or into which is being merged" one or more other corporations; this language would replace the reference to an existing corporation "that is participating with one or more corporations in a merger" (sec. 1701.01(V)). The bill also would amend the following sections of the Revised Code dealing with mergers and consolidations to refer to the defined terms "surviving corporation" and "constituent corporation": sections 1701.32, 1701.78, 1701.79, 1701.80, and 1701.82.

Domestic surviving or new corporations. With respect to domestic surviving or new corporations resulting from a merger or consolidation, the agreement would not be required to set forth the following matters that *currently* are mandated (sec. 1701.78(B)):

(1) Provisions with respect to the surviving or new corporation that would be required in original articles of a domestic corporation (current sec. 1701.78(B)(3)). But see below for proposed mandatory consolidation-related and permissive merger-related articles provisions.

(2) In a merger, a statement that the directors of the surviving corporation will continue as such or, if there will be changes on or before the merger, the directors' names; and in a consolidation, the names of the initial directors of the new corporation (current sec. 1701.78(B)(5)). But see below for proposed permissive merger and consolidation/director-related provisions.

(3) The regulations of the surviving or new corporation, or a provision that the regulations of a specified constituent corporation as amended will be the regulations of the surviving or new corporation (current sec. 1701.78(B)(6)). But see below for proposed permissive merger and consolidation/regulations-related provisions.

(4) In a merger, the name and address of the surviving corporation's statutory agent (current sec. 1701.78(B)(7)). The bill would retain this requirement for a new corporation resulting from a consolidation (proposed sec. 1701.78(B)(5)).

The bill would require that the following *mandatory provisions* be set forth in all merger or consolidation agreements (sec. 1701.78(B)):

(1) In a consolidation, the articles of the new corporation or a provision indicating that the articles of a specified domestic constituent corporation as amended will be the articles of the new corporation (proposed sec. 1701.78(B)(4)). As indicated above, current law requires somewhat different articles-related provisions in a consolidation agreement.

(2) As under current law, the state under the laws of which each constituent corporation exists, the names of the constituent corporations and the new or surviving corporation, statements and matters required to be set forth in a merger or consolidation agreement by other states' laws in connection with foreign constituent corporations, the terms of the merger or consolidation, and the mode of carrying the terms into effect (sec. 1701.78(B)(1) and (2) and proposed sec. 1701.78(B)(3) and (6)).

(3) Instead of, as under current law, the manner and basis of making distributions to shareholders of constituent corporations in extinguishment of or in substitution for their shares (current sec. 1701.78(B)(8)), the manner and basis of converting the shares of the constituent corporations into, or substituting the shares for, shares, evidences of indebtedness, other securities, cash, rights, or any other property, or any combination of any of the foregoing of the surviving or new corporation or of any other corporation (including the parent corporation of a constituent corporation) or any other person (proposed sec. 1701.78(B)(6)). Currently, distributions to shareholders are limited to shares of the surviving or new corporation, cash, securities, evidences of indebtedness, and/or other property.

With respect to the *permissive* provisions in a merger or consolidation agreement, the following provisions would be permitted or would no longer be permitted (sec. 1701.78(C)):

(1) Permitted, as under current law, would be the effective date of the merger or consolidation, a provision authorizing the directors of one or more constituent corporations to abandon the proposed merger or consolidation, a statement of the fair value of the assets of the surviving or new corporation, and any additional provision necessary or desirable for the merger or consolidation (current sec. 1701.78(C)(1), (2), and (4) and proposed sec. 1701.78(C)(9)).

(2) No longer specifically permitted (repealed by the bill) would be the terms and classifications of the directors, and any additional provision permitted in articles of newly formed domestic corporations (current sec. 1701.78(C)(3) and (5)). But see above for mandatory articles-related provisions in consolidation agreements and see below for permissive articles-related provisions in merger agreements.

(3) Also permitted by the bill would be: in a merger, any amendments to the articles of the surviving corporation or a provision that the articles of a specified domestic constituent corporation as amended will be the articles of the surviving corporation; the regulations of the surviving or new corporation or a provision that the regulations of a specified domestic constituent corporation as amended will be the regulations of the surviving or new corporation; in a consolidation, the initial directors of the new corporation or a provision that all the directors of one or more constituent corporations will be the initial directors of the new corporation; in a merger, any changes in the directors of the surviving corporation; the parties to the agreement in addition to the constituent corporations; and the stated capital of each class of shares of the surviving or new corporation that will be outstanding on the effective date of the merger or consolidation (proposed sec. 1701.78(C)(3), (5), (6), (7), and (8)).

Foreign surviving or new corporations. Because a merger or consolidation agreement that results in a foreign surviving or new corporation must set forth, in addition to certain specified information, all statements and matters (other than statutory agent information) required in a merger or consolidation that results in a domestic surviving or new corporation, the bill's above-described *mandatory* provisions of agreements also would apply to foreign surviving or new corporations (sec. 1701.79(B)(3)). Additionally, the bill's above-described *permissive* provisions of agreements also would

exist for mergers or consolidations resulting in foreign surviving or new corporations (sec. 1701.79(C)).

Subsidiary corporations merging into parent corporations. Under the bill, an agreement of merger involving merging subsidiary corporations into their parent corporation would be required to set forth the following (sec. 1701.80(B)):

(1) The designation and the number of the outstanding shares of each class of each subsidiary constituent corporation and the number of shares of each class owned by the surviving corporation (sec. 1701.80(B)(3) of existing law);

(2) Any statements and matters required in a merger resulting in a foreign or domestic surviving corporation, whichever is applicable (proposed sec. 1701.80(B)).

The bill would eliminate as *specified mandatory* agreement provisions the following: the states under the laws of which each corporation exists; that one or more specified subsidiary corporations will be merged into a parent corporation; the terms of the merger, the mode of carrying them into effect, and the manner and basis of making distributions to the shareholders of each subsidiary corporation in extinguishment of or in substitution for their shares; and statements and matters required by other states' laws for foreign corporations (current sec. 1701.80(B)(1), (2), (4), and (5)). As indicated above, these subjects must be contained in merger agreements resulting in a foreign or domestic surviving corporation and, thus, will be required by the virtue of the bill's requirement mentioned in (2) above.

The bill would permit the merger agreement to set forth *any permissive* provision allowed in connection with an agreement resulting in a foreign or domestic surviving corporation (sec. 1701.80(B)). Therefore, the bill would eliminate the current authorization permitting merger agreements to specify their effective date (current sec. 1701.80(B)(6)).

Parent corporations merging into subsidiary corporations. The bill would expressly permit one or more domestic or foreign corporations to be merged into a domestic corporation pursuant to an agreement of merger between the constituent corporations if the domestic surviving corporation is a subsidiary of one of the constituent corporations and if the parent constituent corporation owns 90% or more of each class of the outstanding shares of the surviving subsidiary corporation (proposed sec. 1701.801(A)).

The agreement of merger would be required to set forth the following (sec. 1701.801(B)):

(1) The designation and the number of the outstanding shares of each class of the surviving subsidiary corporation and the number of shares of each class owned by the parent constituent corporation;

(2) Any statements and matters that are required in a merger resulting in a foreign or domestic surviving corporation, whichever is applicable.

In addition, the bill would permit the merger agreement to set forth any provision that is permitted to be set forth in a merger that results in a foreign or domestic surviving corporation (sec. 1701.801(B), second sentence).

For the approval of merger or consolidation agreements in which a parent is merging into a subsidiary see II. below. Within 20 days after the directors of the surviving subsidiary corporation approve the agreement of merger, the surviving corporation would be required to deliver or send written notice of the approval and a copy or summary of the agreement to each shareholder of record of the surviving corporation on the date on which the directors of the surviving corporation approved the agreement other than the parent of the surviving corporation (sec. 1701.801(C)(2)). The bill would state that approval of the agreement of merger by the directors of the surviving subsidiary corporation would constitute adoption by the corporation (sec. 1701.801(D)).

The effect of these changes is to codify provisions governing the merger of parent corporations into subsidiary corporations that are parallel to the provisions in section 1701.80 governing the merger of subsidiary corporations into their parent corporations. The bill would require that a certificate be filed with the Secretary of State after each constituent corporation has adopted the agreement of merger (sec. 1701.81(H)). Similarly, the bill would amend the dissenting shareholder statutes to specify that shareholders of a domestic parent corporation that is being merged into a surviving subsidiary corporation and shareholders of a domestic subsidiary corporation into which is being merged one or more domestic or foreign corporations are entitled to relief as dissenting shareholders (sec. 1701.84(A) and (E)). The bill would make conforming changes in the section that sets forth the procedure for enforcing rights of a dissenting shareholder (sec. 1701.85(A)(3)).

II. Approval of merger or consolidation agreements

Current law indicates the manner in which a merger or consolidation agreement must be approved (secs. 1701.78, 1701.79, and 1701.80). The bill would change the approval processes as follows:

Domestic surviving or new corporations

(a) Existing law.

The agreement must be approved by the directors of each *foreign and domestic* constituent corporation and be adopted by the shareholders of each domestic constituent corporation, other than "generally" the shareholders of the surviving corporation in a merger (sec. 1701.78(D)).

In order to adopt an agreement of merger or consolidation at a meeting of the shareholders of a domestic constituent corporation, the affirmative vote of the holders of shares entitled to exercise at least two-thirds of the voting power on such a proposal or a different proportion of the voting power as the corporate articles provide, but not less than a majority, and the affirmative vote of the holders of any particular class that is required by the articles. In addition, if the agreement would have an effect which, if accomplished through an amendment to the articles, would entitle holders of shares of any particular class to vote on the adoption of such an amendment to the articles, then the agreement also must be adopted by the affirmative vote of the holders of two-thirds of the shares of that particular class, or a difficult proportion not less than a majority as the articles provide. (Sec. 1701.78(F).)

(b) Changes proposed by the bill.

The bill would require that only directors of *domestic* constituent corporations approve the agreement (a change in the law); that shareholders of each domestic constituent corporation adopt the agreement, other than "generally" shareholders of the surviving corporation in a merger (existing law); and that the agreement be approved or otherwise authorized by or on behalf of each foreign constituent corporation in accordance with the laws of the state under which it exists (a change in the law) (sec. 1701.78(D)).

The bill also would eliminate a current provision that requires any foreign constituent corporation to comply with the laws of the state under which it exists (sec. 1701.78(I)).

The bill would enact an exception to current law that requires an agreement of merger or consolidation to be adopted by a class vote in certain circumstances. An agreement would not need to be adopted by the affirmative vote of the holders of shares of a particular class voting as a class if the agreement would have an effect which, if accomplished through an amendment to the articles, would entitle the holders of shares of any particular class of a domestic constituent corporation to vote as a class in the adoption of such an amendment pursuant to division (B)(2) or (4) of section 1701.71 solely because those shares are to be converted into or substituted for the same number of shares of a class of a different corporation that have express terms identical in all material respects to those of the class of shares converted or substituted (sec. 1701.71(F)).

The bill would enact a provision to permit an agreement of merger or consolidation to contain a provision authorizing the directors of the constituent corporations to amend the agreement any time before the certificate of merger or consolidation is filed with the Secretary of State, except that after shareholders of any domestic constituent corporation have adopted the agreement, the

directors could not be authorized to amend the agreement to do any of the following:

(1) Alter or change the amount or kind of shares, evidences of indebtedness, other securities, cash, rights, or any other property to be received by shareholders of the domestic constituent corporation in conversion of or in substitution for their shares;

(2) Alter or change any term of the articles of the surviving or new domestic corporation, except for alterations or changes that could otherwise be adopted by the directors of the surviving or new domestic corporation;

(3) Alter or change any other terms and conditions of the agreement of any of the alterations or changes would materially affect the holders of any class or series of shares of the domestic constituent corporation.

Foreign surviving or new corporations

(a) Existing law.

Under current law, to effect a merger or consolidation that results in a foreign surviving or new corporation, the agreement must be approved by the directors of each *foreign or domestic* constituent corporation and be adopted by the shareholders of each domestic constituent corporation (sec. 1701.79(D)).

(b) Changes proposed by the bill.

The bill would limit the directors' approval to directors of *domestic* constituent corporations and additionally would require approval or other authorization of the agreement by or on behalf of each foreign constituent corporation in accordance with the laws of the state under which it exists (sec. 1701.79(D)). It also would enact a provision to permit an agreement of merger or consolidation to authorize directors to amend the agreement in the specified manner described above (sec. 1701.79(E)) and would eliminate a requirement that each foreign constituent corporation comply with such laws (current sec. 1701.79(F)).

Subsidiaries merging into parent corporations

(a) Existing law.

To effect a merger of a subsidiary corporation into a parent corporation, the agreement must be approved by the directors of each *foreign or domestic* constituent corporation. Shareholders of domestic constituent corporations do not have to adopt the agreement. In the case of foreign constituent corporations, the agreement must be approved as required by the laws of the states under which they exist. (Sec. 1701.80(C)(1).)

(b) Changes proposed by the bill.

The bill would require that only directors of *domestic* constituent corporations approve the agreement and would alter the foreign constituent corporation provisions to require the approval "or other authorization" of the agreement by or on behalf of such a corporation in accordance with the laws of the state under which it exists (sec. 1701.80(C)(1)).

Parents merging into subsidiary corporations

The bill would enact section 1701.801 that contains provisions governing the procedure for when a parent corporation may enter into a merger agreement to effect a merger with one or more of its subsidiary corporations (see above). The bill would require such an agreement to be approved by the directors of each domestic constituent corporation and adopted by the shareholders of each domestic constituent corporation in the same manner and with the same notice to and vote of shareholders or holders of a particular class of shares as is required by section 1701.78, except that the shareholders of the surviving subsidiary corporation need not adopt the agreement. The agreement also must be approved or otherwise authorized by or on behalf of each foreign constituent corporation in accordance with the laws of the state under which it exists. (Sec. 1701.801(C)(1).)

III. Certificate of merger or consolidation

(a) Existing law.

Upon adoption of a merger or consolidation agreement by constituent corporations, a specified certificate must be filed with the Ohio Secretary of State. This certificate must contain a signed agreement of the merger or consolidation or a copy of such an agreement, and it must set forth for each constituent corporation the manner in which the agreement was approved by its directors and, if required, by the shareholders involved. Foreign constituent corporations additionally are required to file a copy of the agreement and other required documents with the appropriate office in the states under the laws of which they exist. (Sec. 1701.81(A) and (B).)

(b) Changes proposed by the bill.

The bill would continue the requirement that the certificate contain a signed merger or consolidation agreement or a copy of it. However, it would require that the certificate set forth the manner in which the agreement was approved (current law), "adopted," or "otherwise authorized" (added by the bill) by the directors and the shareholders of each constituent corporation involved *or*, if their adoption, approval, or authorization was not required, set forth the facts relied upon in establishing the absence of such a requirement. (Sec. 1701.81(A).) Additionally, the requirement that foreign constituent corporations file a copy of an agreement with officials of other states would be eliminated; these corporations instead would have to file with such officials whatever documents are required by other states' laws (sec. 1701.81(B)).

IV. Articles upon a merger or consolidation

(a) Existing law.

Current law specifies that, upon a consolidation, if the new corporation is a domestic corporation, the consolidation agreement operates as its articles of incorporation (sec. 1701.82(A)(2)). It also specifies, for purposes of the entire GCL, that articles include agreements of merger or consolidation (sec. 1701.01(D)).

(b) Changes proposed by the bill.

The bill would specify, in light of its merger and consolidation agreement changes, that the articles contained in or provided for in an agreement of *consolidation* that results in a domestic new corporation would be its original articles, and that the articles of a domestic surviving corporation in a *merger* would continue as its articles unless the merger agreement otherwise provides (sec. 1701.82(A)(2)). Additionally, the general definition of "articles" for the entire GCL would be revised to refer to agreements of merger or consolidation "if and only to the extent that articles of incorporation are adopted or amended in the agreements as provided in" the GCL (sec. 1701.01(D)).

V. Fair value determinations

(a) Existing law.

Under current law, subject to specified exceptional circumstances, when a determination of the fair value to a corporation of property other than money, or of services, is set forth in an agreement of merger or consolidation resulting in a *foreign* surviving or new corporation (sec. 1701.79), the determination is conclusive in any action or proceeding in which it is claimed that the fair value to the corporation of the property or services is or was less than the value so determined. (Sec. 1701.19.) This law does not expressly extend to mergers or consolidations resulting in a *domestic* surviving or new corporation (sec. 1701.78) or to mergers of *subsidiary* corporations with parent corporations (sec. 1701.80), but it contains an ambiguous reference to the statute that generally deals with the consequences of a merger or consolidation (sec. 1701.82).

(b) Changes proposed by the bill.

The bill would extend the fair value provisions to mergers and consolidations that result in domestic surviving or new corporations and to mergers of subsidiary corporations with parent corporations. It also would eliminate the ambiguous reference mentioned above. (Sec. 1701.19(A).)

VI. Railroads

(a) Existing law.

Chapter 4967. of the Revised Code governs mergers and consolidations of railroad companies. Sections 4967.01, 4967.02, and 4967.03 authorize certain railroad companies to consolidate or to merge with one another (not affected by the bill). Section 4967.04 sets forth conditions and restrictions governing mergers or consolidations by the railroad companies—including the nature of a "joint agreement" of merger or consolidation (division (A)), stockholder approval of the agreement (division (B)), and filing of the adopted agreement or a copy of it with the Secretary of State (division (B)). Sections 4967.05 to 4967.09 concern the effect of a merger or consolidation agreement, its use as prima facie evidence in Ohio courts, and defects or omissions in a consolidation agreement and how they may be cured. Sections 4967.10 and 4967.11 contain a procedure for the payment of the full market value of shares or of damages to a "dissenting" stockholder in an Ohio railroad company who refuses to convert his stock into that of a "new" consolidated railroad company or a "surviving" railroad company in a merger. Finally, sections 4967.12 to 4967.26 (not affected by the bill) deal with the consequences of mergers or consolidations of railroad companies, the powers, duties, and principal offices of new or surviving railroad companies, the taxation of their properties, their liability to suit in Ohio courts, and other matters.

(b) Changes proposed by the bill.

The bill would change the Consolidation and Merger of Railroad Companies Law as follows:

(1) It would eliminate the provisions of current law that set forth conditions and restrictions governing the merger or consolidation of railroad companies and instead require that any such merger or consolidation be effected by each railroad company adopting an agreement of merger or consolidation pursuant to the appropriate merger or consolidation provisions of the GCL, and by filing a certificate of the merger or consolidation with the Ohio Secretary of State and making other filings in accordance with the GCL (sec. 4967.04).

(2) It would repeal the provisions dealing with the effect of a merger or consolidation agreement (sec. 4967.05), its use as prima facie evidence in Ohio courts (sec. 4967.06), and defects or omissions in a consolidation agreement and their cure (secs. 4967.07, 4967.08, and 4967.09). (Section 2 of the bill.)

(3) It would eliminate the procedure for the payment of the full market value of shares or of damages to "dissenting" shareholders in an Ohio railroad company who refuse to convert their stock into that of the new or surviving railroad company. (Amendments to sec. 4967.10 and repeal of section 4967.11—Section 2 of the bill.) Instead, the bill would specify that shareholders who dissent in a consolidation or merger of railroad companies pursuant to section 4967.04 (see (1), above) as amended by the bill are entitled to relief as dissenting shareholders under section 1701.85 of the GCL. (Sec. 4967.10.)

VII. Directors' indemnification

(a) Existing law.

Present law specifies the circumstances under which a corporation *must* indemnify a director and also specifies the circumstances under which a corporation *may* indemnify a director (sec. 1701.13(E)(1), (2), and (3)). A corporation may purchase and maintain insurance on behalf of any person whom the corporation may indemnify (sec. 1701.13(E)(7)).

(b) Changes proposed by the bill.

The bill would expressly provide that a corporation may not indemnify a director for any expenses incurred in any action or suit in which the only liability asserted against him is pursuant to section 1701.95 (sec. 1701.13(E)(2)(b)). That section prohibits directors from voting for or assenting to unlawful loans, dividends, or distributions of assets and sets forth specific procedures and remedies that govern claims brought against a director for violating these prohibitions.

The bill would require a corporation to advance a director his expenses as they are incurred in advance of final disposition of the action, suit, or proceeding brought against him, if the director enters into an undertaking and agrees to both: (1) repay the corporation if it is proved by clear and convincing evidence that his act or omission was consciously undertaken with deliberate intent to cause injury to the corporation or with reckless disregard for the best interests of the corporation; and (2) reasonably cooperate with the corporation concerning the action, suit, or proceeding (sec. 1701.13(E)(5)(a)). The bill would stipulate that in the following two instances the foregoing provision mandating the advancement of expenses would not apply: (1) if by the time of the director's act or omission complained of the articles or the regulations of the corporation state by specific reference to this section that its provisions do not apply to the corporation; or (2) if the only liability asserted against a director in an action, suit, or proceeding for which he seeks indemnification is pursuant to section 1701.95, that prohibits directors from voting for or assenting to unlawful loans, dividends, or distributions of assets.

The bill would authorize corporations to furnish protection similar to insurance, including but not limited to trust funds, letters of credit, or self-insurance on behalf of, *or for*, any person whom the corporation may indemnify and would permit insurance to be purchased from or maintained with a person in which the corporation has a financial interest (sec. 1701.13(E)(7)).

The bill would expressly state that a corporation's authority to indemnify persons pursuant to divisions (E)(1) and (2) of section 1701.13 does not limit the payment of expenses as they are incurred, indemnification, insurance, or other protection that may be provided pursuant to divisions (E)(5), (6), and (7). In addition, the bill would expressly state that divisions (E)(1) and (2) do not create any obligation to repay or return payments made by the corporation pursuant to divisions (E)(5), (6), and (7). (Sec. 1701.13(E)(8).)

VIII. Directors' liability

(a) Existing law.

A director must perform his duties as a director, including his duties as a member of any committee of the directors upon which he serves, in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. In performing his duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data prepared and presented by certain specified persons. However, a director is not considered to be acting in good faith if he has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements prepared or presented by specified persons to be unwarranted. Current law provides that a person, who as a director, performs his duties in accordance with the foregoing statutory provisions, will have no liability because he is or has been a director of the corporation. (Sec. 1701.59(B).)

(b) Changes proposed by the bill.

The bill would amend director liability provisions of the GCL as follows:

(1) It would require a director to perform his duties in a manner he reasonably believes to be in "or not opposed to" the best interests of the corporation (sec. 1701.59(B)).

(2) It would repeal the immunity in existing law for directors who perform their duties in accordance with the statutory provision permitting them to rely on information, opinions, reports, or statements prepared or presented by others.

(3) It would codify a *presumption* that, unless it is proved by clear and convincing evidence to the contrary, a director is acting in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the corporation, and with the care an ordinarily prudent person in a like position would use under similar circumstances, *in every case*, including cases involving or affecting a change or potential change in control of the corporation,

a termination or potential termination of his service to the corporation as a director, or his service in any other position or relationship with the corporation (sec. 1701.59(C)). The bill also would stipulate that for purposes of the standard of care a director must follow in performing his duties, nothing contained in the presumption or division (C)(2) would limit relief available under section 1701.60 (see IX, below) (sec. 1701.59(C)(3)).

(4) It would enact a provision holding a director liable in *damages* for any action he takes or fails to take as a director *only if* it is proved by clear and convincing evidence that his action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation (sec. 1701.59(D)). This provision would not apply if, and only to the extent that, at the time of a director's act or omission that is the subject of complaint, the articles or the regulations of the corporation state by specific reference to this statutory provision that its provisions do not apply to the corporation.

The bill would expressly state that nothing contained in this newly enacted division would affect the liability of a director pursuant to section 1701.95 for voting for or assenting to unlawful loans, dividends, or distributions, or would limit relief available under section 1701.60 for void or voidable transactions.

(5) It would also specify that the provisions described in (3) and (4) above, would not affect the duties of either of the following (sec. 1701.59(F)):

(a) A director who acts in any capacity other than his capacity as a director;

(b) A director of a corporation that does not have issued and outstanding shares that are listed on a national securities exchange or are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association, who votes for or assents to any action taken by the directors of the corporation that, in connection with a change in control of the corporation, directly results in the holder or holders of a majority of the outstanding shares of the corporation receiving a greater consideration for their shares than other shareholders.

IX. Contracts or transactions not void or voidable

(a) Existing law.

Under current law, unless the articles or the regulations of a corporation otherwise provide, no contract or transaction is void or voidable for the reason that it is between the corporation and one or more of its directors or officers, or between the corporation and any other person in which one or more of its directors or officers are directors, trustees, or officers, or have a financial or personal interest, or for the reason that one or more interested directors or officers participate in or vote at the meeting of the directors or a committee of the directors that authorizes such contract or transaction if certain specified disclosures are made and the transaction is fair to the corporation (sec. 1701.60).

(b) Changes proposed by the bill.

The bill would provide that no contract, *action*, or transaction would be void or voidable with respect to a corporation (unless the articles or the regulations of the corporation otherwise provide) because (1) it is between *or affects* the corporation and one or more of its directors or officers; (2) it is between *or affects* the corporation and any other person in which one or more of its directors or officers are directors, trustees, or officers, or have a financial or personal interest; and (3) one or more interested directors or officers participate in or vote at the meeting of the directors or of a committee of directors that authorized the contract, *action*, or transaction, if material facts are disclosed and the transaction is fair to the corporation (sec. 1701.60).

The bill would enact a definition of "action" for purposes of this section that would mean a resolution adopted by the directors or a committee of the directors of a corporation (sec. 1701.60(D)). The bill would state that a director is not an interested director solely because the subject of the contract, action, or transaction may involve or affect a change in control of the corporation or his continuation in office as a director of that corporation (sec. 1701.60(C)).

X. Miscellaneous changes in the General Corporate Law

(a) The bill would permit a corporation subject to limitations prescribed by law or in its articles to resist a change or potential change in control of the corporation if the directors by a majority vote determine that such change is opposed to or not in the best interests of the corporation upon considering the interests of the corporation's shareholders and any other matters current law permits directors to consider in determining what is in the best interests of the corporation (sec. 1701.13(F)(7)).

(b) Current law permits a lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets, with or without good will, of a corporation, to be made upon such terms and for such consideration as the directors or shareholders determine (sec. 1701.76(A)). The bill would permit shareholders meeting to determine the above or at any subsequent shareholder meeting, by the same vote as required to authorize the lease, sale, or other disposition of assets, to grant authority to directors to establish or amend any of the terms and conditions of the transaction, except shareholders would not be permitted to authorize directors to do any of the following (sec. 1701.76(A)(2)):

(1) Alter or change the amount or kind of shares, securities, money, property, or rights to be received in exchange for assets;

(2) Alter or change to any material extent the amount or kind of liabilities to be assumed in exchange for assets;

(3) Alter or change any other terms and conditions of the transaction if any of the alterations or changes, alone or in the aggregate, would materially adversely affect the shareholders or the corporation.

(c) Current law requires a director to perform his duties as a director in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with the care than an ordinarily prudent person in a like position would use under similar circumstances (sec. 1701.59(B)). Current law specifies that for purposes of this requirement, a director, in determining what he reasonably believes to be in the best interests of the corporation, has to consider the interests of the corporation's shareholders and, in his discretion, may consider the interests of the corporation's employees, suppliers, creditors, and customers, the economy of the state and nation, and community and societal considerations (sec. 1701.59(D)). The bill would add a new factor that a director could consider in determining what he reasonably believed to be in the corporation's best interest: the long-term as well as the short-term interests of the corporation and its shareholders, including the possibility that those interests could be best served by the continued independence of the corporation (sec. 1701.59(D)(4)). The bill also would eliminate a reference to the retroactive effect of certain prior changes to the close corporation law (sec. 1701.59(E)).

(d) Current law imposes specific liability upon directors of a corporation who vote for or assent to certain things, including the making of loans, other than in the usual course of business, to an officer, director, or shareholder of the corporation, except in the case of a building and loan association or a corporation engaged in banking or in the making of loans generally (sec. 1701.95(A)(3)). The bill would specify that a director would not be liable under the provision pertaining to the making of a loan for making any loan to, or guaranteeing any loan to or other obligation of, an employee stock ownership plan, as defined in sec. 4975 (e)(7) of the Internal Revenue Code of 1954, as amended (sec. 1701.95(B)(2)). This director immunity provision of the bill would be eliminated on July 1, 1987 (Secs. 3 and 4 of the bill).

(e) Current law defines the surplus of a corporation as the excess of its assets over its liabilities plus stated capital, if any, indicates what part of surplus is considered to be earned surplus and what part is to be considered capital surplus, and indicates that determinations made under the section pertaining to surplus are to be based upon financial statements prepared on the basis of accounting practices and principals that are reasonable in the circumstances and may make use of the equity method of accounting

(sec. 1701.32(A)). Current law also provides that in addition to any determination permitted under the provisions described in the preceding sentence, if the directors of a corporation determine that the *physical* assets of the corporation have a fair value to it in excess of the amount at which they are carried on the books, the directors may order all or a part of that excess to be entered on its books, and thereby create or add to capital surplus (sec. 1701.32(D)). The bill would change the reference to *physical* assets that is highlighted in the preceding sentence to a reference to *tangible or intangible* assets (sec. 1701.32(D)); the change would be eliminated and the provision would revert back to the language of existing law on July 1, 1987 (Secs. 3 and 4 of the bill).

COMMENT

Currently, telegraph companies, street railway companies, and electric light and power companies can consolidate in the manner provided for railroad companies in Chapter 4967. of the Revised Code (secs. 4931.19, 4933.14, and 4951.19). Thus, the bill's proposed changes to the law regulating railroad company mergers and consolidations also would affect these other types of utilities.

~~AMENDED SUBSTITUTE~~ HOUSE BILL NO. 1

Act Effective Date:	3-13-87
Date Passed:	11-21-86
Date Approved by Governor:	12-12-86
Date Filed:	12-12-86
File Number:	312
Chief Sponsor:	SHEERER

General and Permanent Nature: Per the Director of the Ohio Legislative Service Commission, this Act's section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

To amend section 5104.02 and to enact section 5747.054 of the Revised Code to allow an income tax credit for child and dependent care services necessary for gainful employment and to modify an exemption from the child day-care licensure law.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 5104.02 be amended and section 5747.054 of the Revised Code be enacted to read as follows:

5104.02 Prohibition against operating child day-care center without a license [Eff. 3-13-87]

(A) The director of human services is responsible for the licensing of child day-care centers and type A family day-care homes, and for the enforcement of Chapter 5104., and of rules promulgated pursuant to ~~Chapeter~~ CHAPTER 5104. of the Revised Code. No person, firm, organization, institution, or agency shall operate, establish, manage, conduct, or maintain a child day-care center or type A family day-care home without a license issued under section 5104.03 of the Revised Code. The current license shall be posted in a conspicuous place in the center or type A home that is accessible to parents, custodians, or guardians and employees of the center or type A home at all times when the center or type A home is in operation.

(B) A person, firm, institution, organization, or agency operating any of the following programs is exempt from the provisions of Chapter 5104. of the Revised Code:

(1) A program of child day-care that operates for two or less consecutive weeks;

(2) Child day-care in places of worship during religious activities during which children are cared for while at least one parent, guardian, or custodian of each child is participating in such activities and is readily available;

(3) Religious activities which do not provide child day-care;

(4) Supervised training, instruction, or activities of children in specific areas, including, but not limited to: art; drama; dance; music; gymnastics, swimming, or another athletic skill or sport; computers; or an educational subject conducted on an organized or periodic basis no more than one day a week and for no more than ~~three~~ SIX hours duration;

(5) Programs in which the director determines that at least one parent, custodian, or guardian of each child is on the premises of the facility offering child day-care and is readily accessible at all times, except that child day-care provided on the premises of a parent's, custodian's, or guardian's place of employment shall be licensed in accordance with division (A) of this section;

(6)(a) Child day-care programs funded and regulated or operated and regulated by state departments other than the department of human services when the director of human services has determined that the rules governing the program are equivalent to or exceed the rules promulgated pursuant to Chapter 5104. of the Revised Code, except as otherwise provided in division (B)(6)(b) of this section for state board of education programs. Each state department shall provide to the director of human services a copy of the rules of the department that govern the child day-care programs funded and regulated or operated and regulated by the department. Annually, each state department shall submit to the director a report for each child day-care program it funds and regulates or operates and regulates that includes the following information:

(i) The site location of the program;

(ii) The maximum number of infants, toddlers, pre-school children, or school children served by the program at one time;

(iii) The number of adults providing child day-care for the number of infants, toddlers, pre-school children, or school children;

(iv) Any changes in the rules made subsequent to the initial copy of rules governing the child day-care programs funded and regulated or operated and regulated by the department that was submitted to the director.

The director shall maintain a record of the child day-care information submitted by other state departments and shall provide this information upon request to the general assembly or the public.

(b)(i) Child day-care programs conducted by boards of education or by chartered nonpublic schools that are conducted in school buildings and that provide child day-care to school children only shall be exempt from meeting or exceeding rules promulgated pursuant to Chapter 5104. of the Revised Code;

(ii) Child day-care programs conducted by boards of education or by chartered nonpublic schools that are conducted in school buildings and that provide child day-care for infants, toddlers, or pre-school children shall be exempt from meeting or exceeding rules promulgated pursuant to Chapter 5104. of the Revised Code except that the director of human services shall determine that the maximum number of children per adult is no greater than the maximum number of infants, toddlers, or pre-school children per child-care staff member required under division (B)(3) of section 5104.011 of the Revised Code.

(C) A person, firm, organization, institution, or agency operating a child day-care center or type A family day-care home that is exempt under division (B) of this section from licensure under division (A) of this section may apply for a license under division (A) of this section. All requirements of Chapter 5104. of the Revised Code and of rules promulgated pursuant to Chapter 5104. of the Revised Code shall apply to any exempt child day-care center or type A home that applies for a license under division (A) of this section. Licensure pursuant to this division constitutes an