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The 1965 Amendments to the Wisconsin Business Corporation Law

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THE 1965 AMENDMENTS TO THE WISCONSIN BUSINESS CORPORATION LAW

I. INTRODUCTION

The 1965 Wisconsin legislature made a number of revisions in the Wisconsin Business Corporation Law, Chapter 180 of the Wisconsin statutes.[1] The changes were the result of a continuing study by the Corporation Law Committee of the Wisconsin State Bar, conducted over the twelve years since the amendments of 1953.

While a complete examination of the changes recently made is beyond the scope of this paper, it will be the purpose of this article to examine some of the changes which are of general interest to attorneys.

II. SUBSTANTIVE CHANGES

A. Pooling of Earned Surplus

Under the provisions of former section 180.02(11), no mention was made in the definition of "earned surplus" of surplus which was allocated to the earned surplus of the surviving corporation when it acquired the assets of another corporation, which then went out of existence. Section 180.67(7) provided that in the event of merger or consolidation the earned surplus of the merged corporation shall continue to be available for payment of dividends. However, this section did not mention the earned surplus of a corporation which sells all of its assets to another and thereafter dissolves. By the rule of construction applicable to Chapter 180, *viz.*, those things not expressly provided or necessarily implied are prohibited,[2] the conclusion was that in the event of an acquisition of a corporation's assets, and a dissolution of the acquired corporation, its earned surplus could not be pooled with that of the acquiring corporation.

The result of this was that the accounting balance sheet might show a large earned surplus figure, the result of the accepted accounting practice of carrying the accounts of the acquired corporation into the balance sheet of the acquiring corporation. On the corporate law balance sheet, however, there would be no earned surplus effect as a result of the acquisition. In the event a corporation wished to change its state of incorporation to Wisconsin, and did so by a transfer of all its assets to a Wisconsin corporation formed for that purpose, after the transfer the earned surplus of the transferring corporation would, by former provisions of Chapter 180, be eliminated. No dividends could be paid, therefore, until a new earned surplus had been generated by operations after the date of the move to Wisconsin.[3]

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[1] Wis. Laws 1965, ch. 53.

[2] Kappers v. Cast Stone Const. Co., 184 Wis. 627, 200 N.W. 376 (1924).

[3] WIS. STAT. §180.38(2)(a) (1963): "Dividends may be declared and paid in cash or property only out of the unreserved and unrestricted earned surplus of the corporation [except as provided in sections relating to stock dividends]."

This created an unrealistic and undesirable situation. To remedy this problem, the definition of "earned surplus" contained in section 180.02 (11) has been expanded to include:

> any portion of earned surplus allocated to earned surplus in mergers, consolidations *or acquisitions of all or substantially all of the outstanding shares or of the property and assets of another corporation,* domestic or foreign, in accordance with s. 180.16 (4).[4] (Emphasis added.)

This expanded definition of earned surplus refers to the newly created section 180.16(4)[5] which provides for the pooling of the earned surplus accounts of the acquired and acquiring corporations. This section contains the proviso, however, that the new earned surplus account shall not exceed the sum of the earned surplus acounts of the corporations before their combination. Section 180.67(7) has been repealed,[6] since its provisions have been replaced by the new section 180.16(4).

B. Voting Rights of "Non-voting" Shares

By former provisions of section 180.64(2), a shareholder was entitled to vote on a proposed plan of merger or consolidation regardless of whether his shares were, under the provisions of the articles of incorporation, entitled to a vote on other corporate matters. This right in the non-voting shareholder has been removed from section 180.64(2).[7] Two-thirds of the shares *entitled to vote* on the proposed merger or consolidation are now required to approve the plan.

Despite this lost voting right on merger or consolidation, however, non-voting shareholders have retained the right to be paid in cash in the event they object to the proposed plan of merger or consolidation, as provided in section 180.69.

Furthermore, section 180.52 provides a vote for non-voting shares if holders of these shares as a class will be adversely affected by a proposed amendment to the articles of incorporation. A similar right was recognized in section 180.64(2), and this right has been retained. The effect of the revision would appear to be to require non-voting shareholders to show that a proposed plan of merger or consolidation would affect them in one of the ways enumerated in subsections 180.52(1)(a)-(k) in order that they be entitled to vote on the plan, rather than being entitled to vote as a matter of right. However, non-voting shares may expressly be given a vote on a merger or consolidation without such showing, by express provision in the articles of incorporation.

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[4] Wis. Laws 1965, ch. 53 §1. This conforms Wisconsin law on this point to the model act. MODEL BUS. CORP. ACT §(2)(1) (1962).
[5] Wis. Laws 1965, ch. 53 §10.
[6] Wis. Laws 1965, ch. 53 §31.
[7] Wis. Laws 1965, ch. 53 §27. This makes Wisconsin law on this point uniform with the model act. MODEL BUS. CORP. ANN. §67 (1962).

C. *Transfer of Stock Held in Fiduciary Name*

Sections 180.85 and 180.851 have been repealed, since their substantive provisions have been duplicated and altered by sections 112.06 (uniform act for simplification of fiduciary transfers), 319.75 (uniform securities ownership by minors act) and the Uniform Commercial Code.[8]

III. Changes in Corporate Practice

A. *Reserve of Former Corporate Name*

Under former practice, a corporation wishing to change its name, and desiring to prevent the use of its former corporate name by others, had to file an application with the secretary of state every sixty days, thus periodically renewing the reservation.[9] As an alternative, it was possible to form a subsidiary for the purpose of bearing, and thus preserving, the former corporate name.[10] The periodic filing of the application under the first technique, and the annual filing of reports and tax returns under the latter, were inconvenient and cumbersome. However, one of these techniques had to be chosen, since there is no provision in Chapter 180 under which articles of incorporation can contain an alternative or second corporate name.[11]

Section 180.08(3) has been created to remove this problem, at least in part.[12] Under its provisions, a ten-year reserve of a corporate name is allowed upon application to the secretary of state.[13] The new section is silent, however, as to the fate of the corporate name after expiration of the ten-year period. No right of renewal is provided under section 180.08(3), so the old techniques may still have some application after the ten-year period (provided for in the section) has expired, if it is felt that the reserved name may still be subject to misuse by others.

It should also be noted that section 180.08(3) is by its terms applicable to reservations upon "merger, consolidation, change of name or dissolution." Therefore, the provisions of section 180.08(2) will still be used by the attorney desiring to reserve a corporate name for a client contemplating incorporation in the first instance.

B. *Shares Convertible into Shares With Greater Rights*

Under the former section 180.12(2)(e), it was not permissible to issue shares of stock which were convertible into shares having "prior or superior rights and preferences as to dividends or distribution of

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[8] Wis. Stat. ch. 408 (1963).
[9] Wis. Stat. §180.08(2) (1963).
[10] There is some doubt as to whether "holding a corporate name which it is wished to preserve" is a proper purpose for the formation of a corporation under Chapter 180.
[11] 8 Op. Atty. Gen. 658 (1919) indicates that this cannot be done.
[12] Wis. Laws 1965, ch. 53 §7.
[13] Wis. Stat. §180.87(1)(f) has been amended to set out the fees which must accompany such application. Wis. Laws 1965, ch. 53 §52.

assets upon liquidation. . . ."[14] This language has in the past caused doubt and confusion in several situations:

1. A corporation, in offering its shares for sale, might restrict the dividend rights of the shares of existing majority shareholders, thus making the offered shares more attractive to investors. After the period of dividend restriction ended, however, there was a question as to whether restoration of dividend rights would "convert" the shares of majority shareholders into shares with "prior or superior rights and preferences" in violation of section 180.12(2)(e).

2. A separate class of shares may be established for employee or management-held shares. There was a question, however, whether a provision for conversion of these shares into preferred stock upon the death or retirement of the employee would violate the prohibition by making the employee or management class one convertible into shares with greater rights. If so, the issuance of the employee shares would be unauthorized.

There would seem to be no reason why shares should not be convertible into shares with greater rights and preferences unless the rights of shareholders of the "higher" class would thereby be prejudiced, their superior rights being somehow diluted. By the amended section 180.52(1)(d),[15] however, shareholders of the class which would be potentially prejudiced have a right to vote as a class upon the amendment to the articles creating such shares pursuant to the new authorization of section 180.12(2)(e).[16] This would protect shareholders with an interest at the time of the creation of the convertible shares, and any subsequent shareholder potentially affected by conversion would take his shares with notice of this possibility from the amendment to the articles of incorporation.

C. Elimination of Need for First Meeting of Subscribers

It is permissible, under the amended section 180.32(1),[17] to name the first board of directors in the articles of incorporation. This conforms Wisconsin law on this point to the Model Business Corporation Act.[18]

Furthermore, under the amended section 180.22,[19] the board of directors, if named in the articles of incorporation, are authorized to adopt by-laws. These provisions, therefore, eliminate the need for the first meeting of subscribers. The amendments are, however, permissive, and merely establish an alternative to the practice of naming only the

[14] WIS. STAT. §180.12(2)(e) (1963).
[15] Wis. Laws 1965, ch. 53 §25.
[16] Wis. Laws 1965, ch. 53 §17.
[17] MODEL BUS. CORP. ACT ANN. §34 (1960). The Model Act, however, is mandatory: ". . . The names and addresses of the members of the first board of directors *shall* be stated in the articles of incorporation. . . ." (Emphasis added.)
[18] Wis. Laws 1965, ch. 53 §14.
[19] Wis. Laws 1965, ch. 53 §8.

number of directors in the articles and holding a meeting of subscribers for the purpose of selecting the directors and adopting by-laws.

D. Minimum Size of Classes of Directors Abolished

The provision of section 180.33, providing that if directors are classified, the two or three classes of directors shall not be of less than three directors each, has been eliminated as serving no purpose.

The only apparent purpose of such a requirement is to protect cumulative voting in those states recognizing this device. If three classes should be established, each class having one member, and one class being elected each year for a three-year term, the multiplier for a shareholder's votes would be "1", thus effectively eliminating any benefit which cumulative voting might give the minority shareholders. Since there is no provision in Chapter 180 for cumulative voting, and cumulative voting has been repeatedly rejected by the Wisconsin legislature,[20] there was no good reason for requiring classes of directors to be of any minimum size, and the restriction was accordingly removed.

E. Abandonment of Merger

Under prior law, a merger or consolidation could be abandoned only before the filing and recording of the articles of merger or consolidation.[21] This practice has been changed, however, to permit the articles of merger or consolidation to contain an "effective date" which may be any date within thirty-one days after recording of the articles.

Section 180.64(3) has been amended to permit abandonment of the merger *after* the recording of the articles and at any time before the effective date.[22] A certificate of abandonment for this purpose is provided for in amended section 180.66,[23] and is filed with the secretary of state and "recorded in each office in which such articles of merger or consolidation were recorded," thus completing the public records.[24]

F. Pay-out Rights of Objecting Shareholders

The shareholder objecting to certain types of planned corporate action requiring shareholder approval has had his statutory remedy to demand the fair value of his shares.[25] The provision for such pay-out is contained in sections 180.69 (dissenting shareholders on merger or

[20] A bill to introduce cumulative voting in Wisconsin was introduced in 1951 after the Wisconsin legislature adopted the Wisconsin Business Corporation Law. This bill was defeated. Since that time, similar bills have been introduced periodically, including one defeated by the 1965 legislature which enacted the amendments under discussion. Some of the bills failed to be reported out of committee.

[21] WIS. STAT. §180.64(3) (1963).

[22] Wis. Laws 1965, ch. 53 §27.

[23] Wis. Laws 1965, ch. 53 §29.

[24] Wis. Laws 1965, ch. 53 §28: "The certificate of merger or consolidation shall be issued by the secretary of state upon expiration of the period for filing a certificate of abandonment, and after receipt of the requisite certificates from the registers of deeds."

[25] WIS. STAT. §180.69(1) (1963).

consolidation) and 180.71 (dissenting upon sale, lease or exchange of assets). The amendments to Chapter 180 have made several clarifications and changes in the sections relating to this right.

1. Pay-out as to part of the shares held by the shareholder is now permitted. Shares are often held in the names of brokers and nominees for their various customers, who are the real parties in interest. The interests of all of a broker's customers would most likely not be the same, however, and on any given planned corporate action the broker would be faced with a conflict among the shares he held. No distinction between legal and equitable ownership would help the broker in his dilemma, since it would appear that the legal owner, *i.e.*, "shareholder," for purposes of the statute would be the nominee or broker.[26] For this reason, sections 180.69(1)[27] and 180.72(1)[28] have been amended to permit a shareholder to dissent as to part of his shares and concur in the action as to the remainder.

> . . . a shareholder may file a written objection, dissent or refrain from voting and make such demand as to less than all of the shares registered in his name and in such event his rights shall be determined as if the shares as to which he makes such demand and his other shares were registered in the names of different shareholders. . . .[29]

2. The definition of "fair value" has been clarified[30] by stating expressly that any "appreciation or depreciation in anticipation of such sale, lease, exchange or merger" is *not* to be considered in arriving at such value.[31]

Furthermore, if the shareholder and corporation are unable to agree upon the fair value of the shares, the shareholder may petition the circuit court to make such determination. By amendments to sections 180.69(3) and 180.72(4) this has been designated a "special proceeding." This clarification eliminates the doubt as to the nature of such an action. Since the action is commenced by petition, rather than summons and complaint, there was a question as to whether it was properly a "civil action." However, sections 180.69(3) and 180.72(4) provide for a "judgment," which is not ordinarily characteristic of a special proceeding.[32] While the "judgment" language still may be technically in-

[26] 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §5085 pp. 48-53 (1958); 1 OLECK, MODERN CORPORATION LAW §13 p. 13 (1958).
[27] Wis. Laws 1965, ch. 53 §34.
[28] Wis. Laws 1965, ch. 53 §36.
[29] Wis. Laws 1965, ch. 53 §34.
[30] *Ibid.*, amending WIS. STAT. §180.69(1): ". . . the fair value of shares shall be determined as of the day prior to the date on which the vote of shareholders approving the merger or consolidation . . . was taken or on which the resolution of the board of directors approving the plan of merger . . . was adopted. . . ." A similar provision is contained in Wis. Laws 1965, ch. 53 §36, amending WIS. STAT. §180.72(1).
[31] Wis. Laws 1965, ch. 53 §§34, 36.
[32] Isaksen v. Chesapeake Inst. Corp., 19 Wis. 2d 282, 286 n. 6, 120 N.W. 2d 151, 154 (1963).

consistent with the designation of "special proceeding," the doubt as to the nature of the proceeding has been removed.

3. The former language of sections 180.69(3m) and 180.72(4m) has been expanded to make it clear that selecting the remedy of dissent and pay-out is in addition to the alternative common law right to enjoin or set aside a reorganization because illegal or fraudulent.

4. As noted above, the provisions of sections 180.69 and 180.72 have, in the past, given shareholders the right to be paid out in cash if they objected to a planned merger or consolidation, or sale, exchange or lease of assets.

There were instances, however, where the same result as that reached through a statutory merger could be obtained without the shareholder having a pay-out right. For example, Corporation *B* might acquire all of the assets of Corporation *A*, giving shares of Corporation *B* stock in return. Corporation *A* would then distribute these shares to its stockholders and dissolve and go out of existence. A "de facto" merger would then have taken place, and yet no pay-out right would have at any time existed for shareholders of Corporation *A*, since section 180.72(1) provides that there is no pay-out right in the event of a sale, lease or exchange of assets if the sale is "in connection with the dissolution and liquidation of the corporation. . . ."[33] The shareholder in Corporation *A*, therefore, would find himself in precisely the same position he would occupy had Corporations *A* and *B* merged, except that he would have had no opportunity to dissent and demand a pay-out.

The "dissolution and liquidation" language has been removed from sections 180.71 and 180.72[34] and inserted is a more limited exception to the rule which makes Wisconsin law on this point consistent with the model act, in which:

> there is . . . no provision for dissent and payment where there is a sale for cash to be followed by distribution of the proceeds within one year after the date of sale. There is no reason in such case, nor upon dissolution, to permit any shareholder to attempt to realize more than he is to receive in the normal course, nor more than his fellow shareholders who do not dissent.[35]

Under this limited exception to the pay-out right, therefore, it makes little difference to shareholders today whether the merger is statutory or de facto, the pay-out right existing in either event if there is no plan to distribute the proceeds of a sale within one year.

G. Power to Make Guarantees and Establish Pension Plans

Two amendments to section 180.04 have clarified the powers of the corporation. Subsection 180.04(7) has been amended[36] to expressly re-

[33] WIS. STAT. §180.72(1) (1963).
[34] Wis. Laws 1965, ch. 53 §§35-36.
[35] MODEL BUS. CORP. ACT ANN. §73 ¶4 (1960).
[36] Wis. Laws 1965, ch. 53 §3.

fer to the power to make "guarantees" along with the corporation's power to make contracts. This change does not affect the stability of contracts, since the defense of ultra vires was substantially eliminated with the enactment of section 180.06. However, unless it could be shown that a contract by which the corporation became an accommodation party on the contract of another benefited the corporation in some way, and thus came within the corporation's implied powers,[37] an action against the corporation or directors by the shareholders or attorney general was possible.[38]

A further clarification has been made by the creation of subsection 180.04(16), which expressly empowers the corporation to "pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans, stock option plans and other incentive plans for any or all of the directors, officers and employees of the corporation and its subsidiaries."[39] This merely empowers the corporation to do what the board of directors was empowered to do under section 180.31, thus making the statutes uniform on this point.

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[37] May Tire & Service v. Sinclair Refining Co., 240 Wis. 260, 263, 3 N.W. 2d 347, 349 (1942): "[The] . . . doctrine of implied powers permits a corporation to enter into a guaranty contract if such contract is reasonably expected to increase the corporation's business. . . ."

[38] WIS. STAT. §180.06(2), (3), (4) (1963).

[39] Wis. Laws 1965, ch. 53 §5. Former subsection (16) has been renumbered (17).