1-4-1987

Title 16: Corporations Chapter 10 Article 2 Mergers - 1987 Replacement Volume

Utah Code Annotated

History: L. 1961, ch. 28, § 65; 1984, ch. 66, § 97; 1985, ch. 178, § 44.

Amendment Notes. — The 1984 amendment substituted references to Division of Corporations and Commercial Code for references to secretary of state in Subsection (3).

The 1985 amendment substituted references to an original and one copy of the articles of incorporation for references to duplicate originals throughout the section; divided Subsection (1) into two sentences by deleting "and in such" after "redeemed or purchased"; inserted "In this" before "event" to form the second sentence of Subsection (1); substituted "signed" near the beginning of Subsection (2) for "executed in duplicate"; substituted "prescribed in this title" at the end of Subsection (3) for "in this act prescribed"; deleted "thereof" at the end of Subsection (3)(a); substituted "is" near the beginning of Subsection (4) for "shall be deemed to be"; substituted "This section does not prohibit" at the beginning of Subsection (5) for "Nothing contained in this section shall be construed to forbid"; and made minor changes in phraseology.

ARTICLE 2

MERGER, CONSOLIDATION AND SALE OF ASSETS

16-10-66. Procedure for merger.

Any two or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this act.

The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of merger setting forth:

(a) The names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the surviving corporation.

(b) The terms and conditions of the proposed merger.

(c) The manner and basis of converting each class of shares, in whole or in part, of each corporation into shares, obligations or other securities of the surviving corporation or of any other corporation or, in whole or in part, into cash or other property.

(d) A statement of any changes in the articles of incorporation of the surviving corporation to be affected by such merger.

(e) Such other provisions with respect to the proposed merger as are deemed necessary or desirable.

History: L. 1961, ch. 28, § 66; 1971, ch. 22, § 5.

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1961, Chapter 28, which appears as §§ 16-10-1 to 16-10-51, 16-10-52 to 16-10-76, 16-10-77 to 16-10-88, 16-10-89 to 16-10-141.

Cross-References. — Building and loan corporations, § 7-7-40.

Effect of 1971 amendment, § 16-10-144.

Railroads, competitors not to consolidate, Utah Const. Art. XII, Sec. 13.

Railroads, merger in general, § 56-1-5(8).

Utilities, consent of public utilities commission, § 54-4-28.

COLLATERAL REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations § 2503 et seq.

C.J.S. — 19 C.J.S. Corporations §§ 1603 to 1637.

Key Numbers. — Corporations ⇐ 581 to 591.

16-10-67. Procedure for consolidation.

Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this act.

The board of directors of each corporation shall, by a resolution adopted by each such board, approve a plan of consolidation setting forth:

(a) The names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation.

(b) The terms and conditions of the proposed consolidation.

(c) The manner and basis of converting each class of shares, in whole or in part, of each corporation into shares, obligations or other securities of the new corporation or of any other corporation or, in whole or in part, into cash or other property.

(d) With respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under this act.

(e) Such other provisions with respect to the proposed consolidation as are deemed necessary or desirable.

History: L. 1961, ch. 28, § 67; 1971, ch. 22, § 6.

Meaning of "this act". — See the note under the same catchline following § 16-10-66.

Cross-References. — Effect of 1971 amendment, § 16-10-144.

NOTES TO DECISIONS

ANALYSIS

Liability of consolidated company.
What constitutes "new corporation."

Liability of consolidated company.

Street railroad company, sued for personal injuries, was not relieved from liability because of the statutory provision that constituent companies were not relieved from their respective debts and liabilities, though the consolidated corporation was made equally responsible therefor. Thomas v. Ogden Rapid Transit Co., 47 Utah 595, 155 P. 436 (1916).

Reorganized or new corporation was liable for indebtedness and obligations of companies out of which it was formed. The constituent companies were not necessary or indispensable parties to an action against the new company. Evered v. St. Croix Mines Corp., 75 Utah 411, 285 P. 1008 (1930).

What constitutes "new corporation."

For purpose of running of the ten-year period within which a railroad company was required to finish its road and put it in full operation, the corporation resulting from consolidation of Utah and Colorado railroad corporations was a new corporation. Rio Grande W. Ry. v. Telluride Power-Transmission Co., 16 Utah 125, 51 P. 146 (1897), writ of error dismissed, 175 U.S. 639, 20 S. Ct. 245, 44 L. Ed. 305 (1900).

16-10-68. Approval of plan by shareholders.

The board of directors of each corporation, upon approving such plan of merger or plan of consolidation, shall, by resolution, direct that the plan be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. Written or printed notice shall be given to each shareholder of record entitled to vote at such meeting, not less than twenty days before such meeting, in the manner provided in this act for the giving of notice of meetings of shareholders, and shall state the purpose of the meeting, whether the meeting be an annual or a special meeting. A copy or a summary of the plan of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice.

At each such meeting, a vote of the shareholders shall be taken on the proposed plan of merger or consolidation. Each outstanding share of each such corporation shall be entitled to vote on the proposed plan of merger or consolidation, whether or not such share has voting rights under the provisions of the articles of incorporation of such corporation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least a majority of the outstanding shares of each such corporation, unless any class of shares of any such corporation is entitled to vote as a class thereon, in which event, as to such corporation, the plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least a majority of the outstanding shares of each class of shares entitled to vote as a class thereon and of the total outstanding shares. Any class of shares of any such corporation shall be entitled to vote as a class if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle such class of shares to vote as a class.

After such approval by a vote of the shareholders of each corporation, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation.

History: L. 1961, ch. 28, § 68.

Meaning of "this act". — See the note under the same catchline following § 16-10-66.

Cross-References. — Notice of shareholders' meetings, § 16-10-27.

Voting of shares, § 16-10-31.

COLLATERAL REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations §§ 2612, 2618.

C.J.S. — 19 C.J.S. Corporations § 1611.

Key Numbers. — Corporations ⇐ 583.

16-10-69. Articles of merger or consolidation.

(1) Upon approval, articles of merger or articles of consolidation shall be signed by each corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of the officers of each corporation signing such articles, and shall set forth:

(a) the plan of merger or the plan of consolidation;

(b) as to each corporation, the number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each class; and

(c) as to each corporation, the number of shares voted for and against such plan, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each class which voted for and against such plan.

(2) An original and one copy of the articles of merger or articles of consolidation shall be delivered to the Division of Corporations and Commercial Code. If that division finds that such articles conform to law, it shall, when all fees have been paid as prescribed in this title:

(a) endorse on the original and one copy the word "filed" and the month, day, and year of the filing;

(b) file the original in its office; and

(c) issue a certificate of merger or a certificate of consolidation to which it shall attach the copy.

(3) The certificate of merger or certificate of consolidation, together with the attached copy of the articles of merger or articles of consolidation shall be returned to the surviving or new corporation, as the case may be, or its representative.

History: L. 1961, ch. 28, § 69; 1984, ch. 66, § 98; 1985, ch. 178, § 45.

Amendment Notes. — The 1984 amendment substituted references to Division of Corporations and Commercial Code for references to secretary of state in Subsections (2) and (3).

The 1985 amendment substituted references to an original and one copy of the articles of incorporation for references to duplicate originals throughout the section; substituted "signed" near the beginning of Subsection (1) for "executed in duplicate"; substituted "prescribed in this title" at the end of Subsection (2) for "in this act prescribed"; deleted "thereof" at the end of Subsection (2)(a); deleted "affixed thereto by the Division of Corporations and Commercial Code" near the middle of Subsection (3) after "articles of consolidation"; and made minor changes in phraseology.

16-10-70. Merger of subsidiary corporation.

(1) Any corporation owning at least 90% of the outstanding shares of each class of another corporation may merge such other corporation into itself without approval by a vote of the shareholders of either corporation. Its board of directors shall, by resolution, approve a plan of merger setting forth:

(a) the name of the subsidiary corporation and the name of the corporation owning at least 90% of its shares, which is hereinafter designated as the surviving corporation; and

(b) the manner and basis of converting each class of shares, in whole or in part, of the subsidiary corporation into shares, obligations, or other securities of the surviving corporation, or of any other corporation, or in whole or in part into cash or other property.

(2) A copy of the plan of merger shall be mailed to each shareholder of record of the subsidiary corporation.

(3) Articles of merger shall be signed by the surviving corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such articles, and shall set forth:

(a) the plan of merger;

(b) the number of outstanding shares of each class of the subsidiary corporation and the number of such shares of each class owned by the surviving corporation; and

(c) the date of the mailing to shareholders of the subsidiary corporation of a copy of the plan of merger.

(4) On or after the 30th day after the mailing of a copy of the plan of merger to shareholders of the subsidiary corporation, an original and one copy of the articles of merger shall be delivered to the Division of Corporations and Commercial Code. If that division finds that such articles conform to law, it shall, when all fees have been paid as prescribed in this title:

(a) endorse on the original and one copy the word "filed" the month, date, and year of the filing;

(b) file the original in its office; and

(c) issue a certificate of merger to which it shall attach the copy.

(5) The certificate of merger, together with the attached copy of the articles of merger shall be returned to the surviving corporation or its representative.

History: L. 1961, ch. 28, § 70; 1971, ch. 22, § 7; 1984, ch. 66, § 99; 1985, ch. 178, § 46.

Cross-References. — Effect of 1971 amendment, § 16-10-144.

Amendment Notes. — The 1984 amendment substituted references to Division of Corporations and Commercial Code for references to secretary of state in Subsections (4) and (5).

The 1985 amendment substituted references to an original and one copy of the articles of incorporation for references to duplicate originals throughout the section; substituted "shall be signed" near the beginning of Subsection (3) for "shall be executed in duplicate"; substituted "prescribed in this title" at the end of Subsection (4) for "in this act prescribed"; deleted "affixed thereto by the Division of Corporations and Commercial Code" after "articles of merger" in Subsection (5); and made minor changes in phraseology.

COLLATERAL REFERENCES

Utah Law Review. — Minority Shareholder in a Short Form Merger Held a "Seller" Within Section 10 (b) and Rule 10b-5, 1968 Utah L. Rev. 170.

16-10-71. Effect of merger or consolidation.

(1) Upon the issuance of the certificate of merger or the certificate of consolidation by the Division of Corporations and Commercial Code, the merger or consolidation shall be effected.

(2) When such merger or consolidation has been effected:

(a) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be the corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation.

(b) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

(c) Such surviving or new corporation shall have all the rights, privileges, immunities, and powers and shall be subject to all duties and liabilities of a corporation organized under this act.

(d) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a

public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, including subscriptions to shares and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

(e) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation.

(f) In the case of a merger, the articles of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger; and, in the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles of incorporation of corporations organized under this act shall be deemed to be the original articles of incorporation of the new corporation.

(g) The net surplus of the merging or consolidating corporations which was available for the payment of dividends immediately prior to such merger or consolidation, to the extent that such surplus is not transferred to stated capital or capital surplus by the issuance of shares or otherwise, shall continue to be available for the payment of dividends by such surviving or new corporation.

History: L. 1961, ch. 28, § 71; 1984, ch. 66, § 100.

Amendment Notes. — The 1984 amendment substituted "Division of Corporations and Commercial Code" for "secretary of state" in Subsection (1).

Meaning of "this act". — See the note under the same catchline following § 16-10-66.

NOTES TO DECISIONS

ANALYSIS

Insurance coverage.

Surviving corporation held liable for a tort committed by a merged corporation prior to the merger is entitled to the benefit of insurance coverage for that tort that the merged corporation had. Aetna Life & Cas. v. United Pac. Reliance Ins. Cos., 580 P.2d 230 (Utah 1978).

Prior lien.

The merger of four corporations into one single corporation does not extend a prior existing lien against the property of one of the merging corporations to the property of the other merging corporations, since such an extension would impair the rights of the creditors of the other merging corporations. Inter Mt. Ass'n of Credit Men v. Villager, Inc., 527 P.2d 664 (Utah 1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations §§ 2624 to 2636.

C.J.S. — 19 C.J.S. Corporations §§ 1626 to 1630.

A.L.R. — Merger or consolidation of corporation as terminating charitable trust of which corporation is beneficiary, 34 A.L.R.3d 749.

Key Numbers. — Corporations ⇐ 586 to 590.

16-10-72. Merger or consolidation of domestic and foreign corporations.

(1) One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized.

(a) Each domestic corporation shall comply with the provision of this act with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(b) If the surviving or new corporation, as the case may be, is to be governed by the laws of any state other than this state, it shall comply with the provisions of this act with respect to foreign corporations if it is to transact business in this state, and in every case it shall file with the Division of Corporations and Commercial Code:

(i) an agreement that it may be served with process in this state in any proceeding for the enforcement of any obligation of any domestic corporation which is a party to such merger or consolidation and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such domestic corporation against the surviving or new corporation;

(ii) an irrevocable appointment of the director of the Division of Corporations and Commercial Code as its agent to accept service of process in any such proceeding; and

(iii) an agreement that it will promptly pay to the dissenting shareholders of any such domestic corporation the amount, if any, to which they shall be entitled under the provisions of this act with respect to the rights of dissenting shareholders.

(2) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be governed by the laws of this state. If the surviving or new corporation is to be governed by the laws of any state other than this state, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise.

History: L. 1961, ch. 28, § 72; 1984, ch. 66, § 101.

Amendment Notes. — The 1984 amendment substituted "Division of Corporations and Commercial Code" for "secretary of state of this state" in Subsection (1)(b); and substituted "director of the Division of Corporations and Commercial Code" for "secretary of state of this state" in Subsection (1)(b)(ii).

Meaning of "this act". — See the note under the same catchline following § 16-10-66.

COLLATERAL REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations §§ 2642 to 2653.

16-10-73. Sale or mortgage of assets in regular course of business.

The sale, lease, exchange, mortgage, pledge, or other disposition of all, or substantially all, the property and assets of a corporation, when made in the usual and regular course of the business of the corporation, may be made upon such terms and conditions and for such considerations, which may consist in whole or in part of money or property, real or personal, including shares of any other corporation, domestic or foreign, as shall be authorized by its board of directors; and in such case no authorization or consent of the shareholders shall be required. When the articles of incorporation provide for the mortgage or pledge of the property of the corporation by its directors, then the mortgage or pledge of all or substantially all of the property or assets, with or without the good will, of a corporation is deemed to be made in the usual and regular course of its business.

History: L. 1961, ch. 28, § 73.

COLLATERAL REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations § 2654 et seq.

16-10-74. Sale or mortgage of assets other than in regular course of business.

A sale, lease, exchange, mortgage, pledge, or other disposition of all, or substantially all, the property and assets, with or without the good will, of a corporation, if not made in the usual and regular course of 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 property, real or personal, including shares of any other corporation, domestic or foreign, as may be authorized in the following manner:

(a) The board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge, or other disposition and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(b) Written or printed notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this act for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or a special meeting, shall state that the purpose, or one of the purposes, of such meeting is to consider the proposed sale, lease, exchange, mortgage, pledge, or other disposition.

(c) At such meeting the shareholders may authorize such sale, lease, exchange, mortgage, pledge, or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and condi-

tions thereof and the consideration to be received by the corporation therefor. Each outstanding share of the corporation shall be entitled to vote thereon, whether or not entitled to vote thereon by the provisions of the articles of incorporation. Such authorization shall require the affirmative vote of the holders of at least a majority of the outstanding shares of the corporation, unless any class of shares is entitled to vote as a class thereon, in which event authorization shall require the affirmative vote of the holders of at least a majority of the outstanding shares of each class of shares entitled to vote as a class thereon and of the total outstanding shares.

(d) After such authorization by a vote of shareholders, the board of directors nevertheless, in its discretion, may abandon such sale, lease, exchange, mortgage, pledge, or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders.

History: L. 1961, ch. 28, § 74.

NOTES TO DECISIONS

ANALYSIS

Noncompliance with statute.
Sale by majority stockholders.
Sale without stockholders' authorization.

Noncompliance with statute.

Contract for sale, not in regular course of business, of all corporate property, made without attempt at compliance with terms of this section, was unenforceable. Davis v. Heath Dev. Co., 558 P.2d 594 (Utah 1976).

Sale by majority stockholders.

Contract for sale of "dry farm" executed by owners of substantially all of the stock of a corporation was binding upon the corporation notwithstanding the fact that sellers had not complied with the procedure set forth in this section. Grover v. Garn, 23 Utah 2d 441, 464 P.2d 598 (1970).

Sale without stockholders' authorization.

Lease with an option to purchase was not rendered void by fact that it was not authorized or ratified by stockholders pursuant to this section where the lessee had no reason to believe that authorization was required and the absence of authorization was not claimed until four years after the lease was executed. U-Beva Mines v. Toledo Mining Co., 24 Utah 2d 351, 471 P.2d 867 (1970).

Lessor corporation itself could not assert that a lease with an option to purchase was void because it had not been authorized or ratified by stockholders, since this section inures to the benefit of shareholders and must be asserted by them. U-Beva Mines v. Toledo Mining Co., 24 Utah 2d 351, 471 P.2d 867 (1970).

16-10-75. Rights of dissenting shareholders upon merger or consolidation or sale or exchange of assets — Right to dissent — Exception.

Any shareholder of a corporation shall have the right to dissent from any of the following corporate actions:

(a) any plan of merger or consolidation to which the corporation is a party; or

(b) any sale or exchange of all or substantially all of the property and assets of the corporation, otherwise than in the usual and regular course

of its business and other than a sale for cash where the shareholders' approval thereof is conditional upon the distribution of all or substantially all of the net proceeds of the sale to the shareholders in accordance with their respective interests within one year after the date of sale. This section shall not apply to the shareholders of the surviving corporation in a merger if a vote of the shareholders of such corporation is not necessary to authorize such merger; nor shall it apply to the holders of shares of any class or series if the shares of such class or series were registered on the New York Stock Exchange or the American Stock Exchange on the date fixed to determine the shareholders entitled to vote at the meeting of shareholders at which a plan of merger or consolidation or a proposed sale or exchange of property and assets is to be acted upon unless the articles of incorporation of the corporation shall otherwise provide.

History: L. 1961, ch. 28, § 75; 1971, ch. 22, § 8.

Cross-References. — Effect of 1971 amendment, § 16-10-144.

COLLATERAL REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d Corporations § 836; 19 Am. Jur. 2d Corporations §§ 2574, 2582 to 2586.

C.J.S. — 19 C.J.S. Corporations §§ 1612 to 1616.

Key Numbers. — Corporations ⇐ 584.

16-10-76. Rights of dissenting shareholders upon merger or consolidation or sale or exchange of assets — Filing objections — Payment of fair value for shares — Procedure.

Any shareholder electing to exercise such right of dissent shall file with the corporation, prior to or at the meeting of shareholders at which time such proposed corporate action is submitted to a vote, a written objection to such proposed corporation action. If such proposed corporation action be approved by the required vote and such shareholder shall not have voted in favor thereof, such shareholder may, within ten days after the date on which the vote was taken or if a corporation is to be merged without a vote of its shareholders into another corporation, any of its shareholders may, within fifteen days after the plan of such merger shall have been mailed to such shareholders, make written demand on the corporation, or, in the case of a merger or consolidation, on the surviving or new corporation, domestic or foreign, for payment of the fair value of such shareholder's shares, and, if such proposed corporate action is effected, such corporation shall pay to such shareholder, upon surrender of the certificate or certificates representing such shares, the fair value thereof as of the day prior to the date on which the vote was taken approving the proposed corporate action, excluding any appreciation or depreciation in anticipation of such corporate action. Any shareholder failing to make demand within the applicable ten-day or fifteen-day period shall be bound by the terms of the proposed corporate action. Any shareholder making such demand shall thereafter be entitled only to payment as in this section provided and shall not be entitled to vote or to exercise any other rights of a shareholder.

No such demand may be withdrawn unless the corporation shall consent thereto. If, however, such demand shall be withdrawn upon consent, or if the proposed corporation action shall be abandoned or rescinded or the shareholders shall revoke the authority to effect such action, or if, in the case of a merger, on the date of the filing of the articles of merger the surviving corporation is the owner of all the outstanding shares of the other corporations, domestic and foreign, that are parties to the merger, or if no demand or petition for the determination of fair value by a court shall have been made or filed within the time provided in this section, or if a court of competent jurisdiction shall determine that such shareholder is not entitled to the relief provided by this section, then the right of such shareholder to be paid the fair value of his shares shall cease and his status as a shareholder shall be restored, without prejudice to any corporate proceedings which may have been taken during the interim.

Within ten days after such corporate action is effected, the corporation, or in the case of a merger or consolidation, the surviving or new corporation, domestic or foreign, shall give written notice thereof to each dissenting shareholder who has made demand as herein provided, and shall make a written offer to each such shareholder to pay for such shares at a specified price deemed by such corporation to be the fair value thereof. Such notice and offer shall be accompanied by a balance sheet of the corporation the shares of which the dissenting shareholder holds, as of the latest available date and not more than twelve months prior to the making of such offer, and a profit and loss statement of such corporation for the twelve months' period ended on the date of such balance sheet.

If within thirty days after the date on which such corporate action was effected the fair value of such shares is agreed upon between any such dissenting shareholder and the corporation, payment therefor shall be made within ninety days after the date on which such corporate action was effected, upon surrender of the certificate or certificates representing such shares. Upon payment of the agreed value the dissenting shareholder shall cease to have any interest in such shares.

If within such period of thirty days a dissenting shareholder and the corporation do not so agree, then the corporation, within thirty days after receipt of written demand from any dissenting shareholder given within sixty days after the date on which such corporate action was effected, shall, or at its election at any time within such period of sixty days may, file a petition in any court of competent jurisdiction in the county in this state where the registered office of the corporation is located praying that the fair value of such shares be found and determined. If, in the case of a merger or consolidation, the surviving or new corporation is a foreign corporation without a registered office in this state, such petition shall be filed in the county where the registered office of the domestic corporation was last located. If the corporation shall fail to institute the proceeding as herein provided, any dissenting shareholder may do so in the name of the corporation. All dissenting shareholders, wherever residing, shall be made parties to the proceeding as an action against their shares quasi in rem. A copy of the petition shall be served on each dissenting shareholder who is a resident of this state and shall be served by registered or certified mail on each dissenting shareholder who is a nonresident. Service on nonresidents shall also be made by publication as provided by law. The jurisdiction of the court shall be plenary and exclusive. All shareholders who are

parties to the proceeding shall be entitled to judgment against the corporation for the amount of the fair value of their shares. The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommended a decision on the question of fair value. The appraisers shall have such power and authority as shall be specified in order of their appointment or an amendment thereof. The judgment shall be payable only upon and concurrently with the surrender to the corporation of the certificate or certificates representing such shares. Upon payment of the judgment, the dissenting shareholders shall cease to have any interest in such shares.

The judgment shall include an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances, from the date on which the vote was taken on the proposed corporate action to the date of payment.

The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of such costs and expenses may be apportioned and assessed as the court may deem equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation shall have made an offer to pay for the shares if the court shall find that the action of such shareholders in failing to accept such offer was arbitrary or vexatious or not in good faith. Such expenses shall include reasonable compensation for the reasonable expenses of the appraisers, but shall exclude the fee and expenses of counsel for and experts employed by any party; but if the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court may determine to be reasonable compensation to any expert or experts employed by the shareholder in the proceeding.

Within twenty days after demanding payment for his shares, each shareholder demanding payment shall submit the certificate or certificates representing his shares to the corporation for notation thereon that such demand has been made. His failure to do so shall, at the option of the corporation, terminate his rights under this section unless a court of competent jurisdiction, for good and sufficient cause shown, shall otherwise direct. If shares represented by a certificate on which notation has been so made shall be transferred, each new certificate issued therefor shall bear similar notation, together with the name of the original dissenting holder of such shares, and a transferee of such shares shall acquire by such transfer no rights in the corporation other than those which the original dissenting shareholder had after making demand for payment of the fair value thereof.

Shares acquired by a corporation pursuant to payment of the agreed value therefor or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by such corporation as in the case of other treasury shares, except that, in the case of a merger or consolidation, they may be held disposed of as the plan of merger or consolidation may otherwise provide.

History: L. 1961, ch. 28, § 76; 1971, ch. 22, § 9.

COLLATERAL REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d Corporations § 836; 19 Am. Jur. 2d Corporations §§ 2574 to 2586.

A.L.R. — Timeliness and sufficiency of dissenting stockholder's notice of his objection to consolidation or merger and of his demand for payment for his shares, 40 A.L.R. 3d 260.

16-10-76.5. Rights and remedies of objecting shareholder to a control share acquisition — Notice — Demand for payment — Payment — Exceptions.

(1) Unless (a) the bylaws, adopted by amendment within 90 days of the date of enactment of this section and not subsequently rescinded by an amendment to the articles of incorporation, or (b) the articles of incorporation, as originally adopted or by amendment approved by the affirmative vote of the holders of at least $^2/_3$ of the outstanding shares of the issuing public corporation entitled to vote, explicitly provide that this section shall not be applicable to an issuing public corporation, a holder of record of voting shares of an issuing public corporation that becomes the subject of a control share acquisition who objects to the transaction is entitled to the rights and remedies provided in this section.

(2) Prompt notice that a control share acquisition has occurred shall be given by the acquiring person to each holder of record of voting shares of the issuing public corporation on the date of the control share acquisition. If the acquiring person requests, the issuing public corporation shall, at the option of that corporation and at the expense of the acquiring person, either furnish a list of those shareholders to the person or mail the notice to those shareholders. The notice shall include a copy of this section and the fourth through the eighth paragraphs of § 16-10-76.

(3) After the occurrence of the control share acquisition, an owner of record of voting shares of the issuing public corporation may, within 30 days after the notice required by Subsection (2) is given, which time period shall be specified in the notice, make written demand on the acquiring person for payment of the amount provided in Subsection (4) with respect to the voting shares of the issuing public corporation held by the shareholder. The acquiring person shall agree to pay that amount to the shareholder upon surrender of the share certificate or certificates representing the shares. The demand of the shareholder shall state the number and class or series, if any, of the shares owned by him with respect to which the demand is made.

Nothing contained in this section precludes an acquiring person subject to this section from offering, whether in the notice or otherwise, to purchase voting shares of the issuing public corporation at a price other than that provided in Subsection (4). Nothing contained in this section precludes a shareholder from agreeing to sell his voting shares at that or any other price to any person.

(4) A shareholder making written demand under Subsection (3) is entitled to receive cash for each of his shares in an amount equal to the fair value of each voting share as of the day prior to the date on which the control share acquisition occurs, taking into account all relevant factors, including an incre-

ment representing a proportion of any value payable for acquisition of control of the issuing public corporation. Either the acquiring person or the shareholder may proceed under the fourth through the eighth paragraphs of § 16-10-76 for a determination of the fair value of the share as defined in this subsection. For the purposes of those paragraphs:

(a) the date of notice of the occurrence of the control share acquisition, or if no notice is given, the date of written demand made by the shareholder, is the date the corporation action was effected and the date on which the vote was taken on proposed corporation actions;

(b) the shareholders who make written demand are the dissenting shareholders; and

(c) the acquiring person is the corporation, except that the registered office of the issuing public corporation is considered the registered office of the corporation in the first sentence of the fifth paragraph.

(5) An acquiring person that proposes to engage in a control share acquisition may comply with the requirements of this section in connection with the control share acquisition. The effectiveness of the rights afforded to shareholders may be conditioned upon the consummation of the control share acquisition. The acquiring person shall give prompt written notice of the satisfaction of that condition to each shareholder who had made demand as provided in this section.

(6) Subsections (1) through (5) do not apply to the following situations:

(a) a control share acquisition which has received the prior approval of a majority of the continuing directors of the issuing public corporation;

(b) an acquiring person that inadvertently becomes an acquiring person if that person, as soon as practicable, divests itself of a sufficient amount of its voting shares so that it is no longer an acquiring person;

(c) a control share acquisition with respect to a corporation that on the effective date of this section is a subsidiary of the acquiring person which is a domestic or foreign corporation so long as it remains a subsidiary of the acquiring person. A subsidiary does not cease being a subsidiary so long as the corporation remains an acquiring person with respect to the subsidiary; or

(d) a person or group which would otherwise be an acquiring person unless, subsequent to the enactment of this section, that person or group increases the percentage of outstanding voting shares of the issuing public corporation that it beneficially owns to in excess of the percentage of outstanding voting shares of the corporation which that person or group beneficially owned on the date of enactment of this section and to at least the amount specified in the definition of acquiring person in § 16-10-2 as the result of forming or enlarging a group, or acquiring by purchase beneficial ownership of voting shares of the corporation.

(7) The adoption of an amendment to the bylaws as permitted by Subsection 16-10-76.5(1)(a) is not void or voidable by reason of the participation of a director affiliated with a shareholder. A director may not be held liable for taking or omitting to take such action.

(8) This section applies to shares issued before or after the effective date of this section.

History: C. 1953, 16-10-76.5, enacted by L. 1986, ch. 193, § 3.

Compiler's Notes. — The "effective date of this section," referred to in Subsection (8), is April 28, 1986.

ARTICLE 3

DISSOLUTION

16-10-77. Voluntary dissolution by incorporators.

(1) A corporation which has not commenced business and which has not issued any shares, may be voluntarily dissolved by its incorporators at any time within two years after the date of the issuance of its certificate of incorporation, in the following manner:

(a) articles of dissolution shall be signed by a majority of the incorporators, and verified by them, and shall set forth:

(i) the name of the corporation;

(ii) the date of issuance of its certificate of incorporation;

(iii) that none of its shares have been issued;

(iv) that the corporation has not commenced business;

(v) that the amount, if any, actually paid on subscriptions for its shares, less any part disbursed for necessary expenses, has been returned to those entitled;

(vi) that no debts of the corporation remain unpaid; and

(vii) that a majority of the incorporators voted to dissolve the corporation.

(b) An original and one copy of the articles of dissolution shall be delivered to the Division of Corporations and Commercial Code. If that division finds that the articles of dissolution conform to law, it shall, when all fees have been paid as prescribed in this title and a tax clearance from the State Tax Commission has been obtained and filed with the division:

(i) endorse on the original and a copy of the articles of dissolution the word "filed" and the month, day, and year of the filing;

(ii) file the original in its office; and

(iii) issue a certificate of dissolution and attach it to a copy of the articles of dissolution.

(2) The certificate of dissolution, together with the attached copy of the articles of dissolution, shall be returned to the incorporators or their representative. When the certificate of dissolution is issued by the Division of Corporations and Commercial Code, the existence of the corporation ceases.

History: L. 1961, ch. 28, § 77; 1984, ch. 66, § 102; 1985, ch. 178, § 47.

Amendment Notes. — The 1984 amendment substituted references to Division of Corporations and Commercial Code for references to secretary of state throughout the section.

The 1985 amendment substituted references to an original and one copy of the articles of incorporation for references to duplicate originals throughout the section; substituted "shall be signed" in Subsection (1)(a) for "shall be executed in duplicate"; substituted "voted to dissolve the corporation" at the end of Subsection (1)(a)(vii) for "elect that the corporation be dissolved"; deleted "affixed thereto by the Division of Corporations and Commercial Code" after "articles of dissolution" in Subsection (2); substituted "when the certificate of dissolution is issued" near the end of Subsection (2) for "upon the issuance of such certificate of disso-