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Quorum Requirements for Shareholders' Meetings Under Florida Statutes Section 607.094

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BRIEF NOTE

Quorum Requirements for Shareholders' Meetings Under Florida Statutes Section 607.094

In 1975 the Florida Legislature enacted the General Corporation Act,[1] chapter 607 of the Florida Statutes.[2] The legislature patterned the new corporation statutes after the Model Business Corporation Act ("M.B.C.A."), which the American Bar Association first presented in 1950.[3] The M.B.C.A. had formed the basis for portions of the prior Florida corporation statutes.[4] Thus, the passage of chapter 607 was expected to make few substantive changes in Florida law.[5] Section 607.094 was a notable exception, with possibly unforeseen consequences.

Both the M.B.C.A. and chapter 607 contain provisions that govern quorum requirements at shareholders' meetings. The first two subsections of section 607.094 of the Florida Statutes are identical to section 32 of the M.B.C.A.[6] Subsection (1) establishes the minimum number of shareholders necessary to constitute a quorum.[7] If a quorum is present, then subsection (2) provides that the affirmative vote of a majority of the shareholders "represented at the meeting and entitled to vote on the subject matter" will be

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1. 1975 Fla. Laws ch. 75-250.

2. FLA. STAT. ch. 607 (1981).

3. MODEL BUSINESS CORP. ACT ANN. 2D ix (Supp. 1977) [hereinafter cited as M.B.C.A. ANN. 2D].

4. Chambers & Cochran, *Florida's Corporation Law—Problems and Proposed Revisions*, 27 U. FLA. L. REV. 58, 60 (1974).

5. Edwards, *Twelfth Survey of Florida Law: Corporate Law and Securities Regulation*, 30 U. MIAMI L. REV. 401, 402 (1976).

6. *Compare* FLA. STAT. § 607.094(1)-(2) (1981) *with* MODEL BUSINESS CORP. ACT ANN. 2D § 32 (1971).

7. FLA. STAT. § 607.094(1) (1981) provides:

> Unless otherwise provided in the articles of incorporation, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting. When a specified item of business is required to be voted on by a class or series of stock, a majority of the shares of such class or series shall constitute a quorum for the transaction of such item of business by that class or series.

considered as "the act of the shareholders."[8] In contrast, section 607.094(3), dealing with shareholder withdrawals from annual meetings, has no analogous provision in the M.B.C.A. Subsection (3) provides:

> **607.094 Shareholder quorum and voting.—**
> . . . .
> (3) After a quorum has been established at a shareholders' meeting, the subsequent withdrawal of shareholders, so as to reduce the number of shares entitled to vote at the meeting below the number required for a quorum, shall not affect the validity of any action taken at the meeting or any adjournment thereof.[9]

As presently drafted, the statute is ambiguous. It fails to define "withdrawal" or distinguish among the various circumstances under which shareholders leave a meeting. Moreover, subsection (3) does not specify the number of votes necessary to carry a motion after shareholders have withdrawn. The statute seemingly would tolerate a situation in which a handful of shareholders could continue to transact business, although they constitute only a small fraction of the original quorum.

According to one authority, statutory provisions such as section 607.094(3), which preserve a quorum after shareholder withdrawals, embody "the modern and better view."[10] Florida is one of five states that have codified the withdrawal rule. The other four states are Arizona,[11] California,[12] Oregon,[13] and Pennsylvania.[14] The American Bar Foundation-American Bar Association ("ABF-ABA") commentators interpret these statutes as

> provid[ing] that shareholders present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough shareholders to leave less than a quorum if a majority of

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8. FLA. STAT. § 607.094(2) (1981) provides:

> If a quorum is present, the affirmative vote of a majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number or voting by classes is required by this chapter or the articles of incorporation or bylaws.

9. *Id.* § 607.094(3).

10. 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2013.1 (rev. perm. ed. 1976).

11. ARIZ. REV. STAT. ANN. § 10-032 (1977).

12. CAL. CORP. CODE § 602(b) (West Supp. 1981).

13. OR. REV. STAT. § 57.165 (1979). For a discussion of the statute's legislative history, see Jones v. Wallace, 291 Or. 11, 628 P.2d 388 (1981).

14. 15 PA. CONS. STAT. ANN. § 1503(A)(2) (Purdon 1967).

> the shares required to constitute a quorum approves any action taken.[15]

This analysis of the statutory withdrawal provisions is reasonable, but the commentators offer no authority or reasoning in support of their interpretation. A body of case law that addresses some of the issues raised by the statutes does tend to comport with the ABF-ABA's analysis, but it is by no means conclusive.

The Florida corporation statute lacks a provision that requires the adjournment of a shareholders' meeting following the loss of a quorum. Although Robert's Rules of Order and parliamentary law are not the legally binding procedure governing shareholders' meetings,[16] most courts agree that the only possible legal action is to adjourn once a quorum no longer exists.[17] The withdrawal rule, then, in both its common-law and codified forms, is an exception to the general requirement that a quorum be present at all times while shareholders transact business at their annual meeting.

Significantly, the cases and statutes deal with shareholder withdrawals from meetings, not mere "departures." The courts that have dealt with the problem of shareholder withdrawals were considering situations in which shareholders had left a meeting with the intention of breaking the quorum, not situations in which they departed because of boredom, other commitments, and the like. The Supreme Court of Pennsylvania, in *Commonwealth ex rel. Sheip v. Vandergrift*,[18] was one of the first courts to formulate the withdrawal rule.

In *Vandergrift* the shareholders of the Philadelphia Veneer & Lumber Company convened their annual meeting with 1,887 of 2,081 shares represented. The corporation's bylaws provided that a majority of the shares issued and represented constituted a quorum.[19] A number of shareholders who were present objected to the election of the chairman of the shareholders' meeting. When advised that the election was final, the objectors withdrew.[20] As a result, of the original 1,887 shares represented at the opening of the meeting, only 992 remained to transact business.[21] The objectors

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15. M.B.C.A. ANN. 2D, *supra* note 3, § 32, 2d sentence, ¶ 3.02.

16. Abbey Properties Co. v. Presidential Ins. Co., 119 So. 2d 74, 77 (Fla. 2d DCA 1960).

17. *See, e.g.*, Hexter v. Columbia Baking Co., 16 Del. Ch. 263, 267, 145 A. 115, 116 (1929).

18. 232 Pa. 53, 81 A. 153 (1911).

19. *Id.* at 58, 81 A. at 153. The bylaws in *Vandergrift* closely parallel the quorum requirement in FLA. STAT. § 607.094(1) (1981). *See supra* note 7.

20. 232 Pa. at 60, 81 A. at 154.

21. *Id.* at 60-61, 81 A. at 154.

subsequently commenced a quo warranto proceeding to challenge the actions taken at the shareholders' meeting following their withdrawal.

The Pennsylvania court stated that "[s]tockholders who attend a meeting, and then without cause voluntarily *withdraw*, are in no better position than those who voluntarily absent themselves in the first instance."[22] The court then proceeded to hold:

> In our opinion the sounder and safer rule, as above indicated, is that even a majority cannot capriciously withdraw after the meeting is legally organized for the very purpose of breaking a quorum, and then ask the courts for relief on the ground that a quorum was not present when the act complained of was done. Where there is a legally constituted meeting, the acts of a majority of those present are the acts of the corporation, though such majority is less than a majority of the total number of stockholders or shares.[23]

In other words, shareholder withdrawals for the purpose of breaking a quorum will be unavailing.

Apart from the equitable considerations, the *Vandergrift* court based its holding on the corporation's statutory duty to conduct annual meetings, which the court would not allow the tactics of shareholder factions to defeat.[24] Delaware bases its withdrawal rule on similar policy considerations: "[R]easonable rules should prevail in aid of the accomplishment of the statutory purpose that meetings be held for the election of directors at the time fixed by the by-laws."[25] In Delaware, "a shareholder or proxy holder, once having attended a meeting, should be deemed present for quorum purposes . . . ."[26]

Not all courts, however, have viewed the withdrawal rule this favorably. Virginia has criticized and rejected the rule.[27] A federal court in Massachusetts has limited the rule by holding that shareholders can withdraw their proxies before the resumption of an ad-

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22. *Id.* at 61, 81 A. at 155-56 (emphasis added).

23. *Id.* at 63, 81 A. at 156 (citation omitted). The court's observation about the majority needed to carry a motion comports with FLA. STAT. § 607.094(2) (1981). *See supra* note 8.

24. 232 Pa. at 62, 81 A. at 156; *accord* Perry v. Bank of Commerce, 116 Miss. 838, 77 So. 812 (1918); Lutz v. Webster, 249 Pa. 226, 94 A. 834 (1915).

25. Atterbury v. Consolidated Coppermines Corp., 26 Del. Ch. 1, 15, 20 A.2d 743, 749 (1941); *see* Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 A. 223 (Ch.), *aff'd*, 17 Del. Ch. 376, 152 A. 849 (Sup. Ct. 1930); Hexter v. Columbia Baking Co., 16 Del. Ch. 263, 145 A. 115 (1929).

26. Atterbury v. Consolidated Coppermines Corp., 26 Del. Ch. at 15, 20 A.2d at 749-50.

27. Levisa Oil Corp. v. Quigley, 217 Va. 898, 903-04, 234 S.E.2d 257, 261 (1977) (unsophisticated majority shareholders withdrew in face of directors' parliamentary maneuvers).

journed meeting.[28] Nevertheless, the rule does deter dissidents from intentionally disrupting lawfully held and orderly meetings "because of whim, caprice or chagrin."[29] This formulation of the rule, however, creates the difficult problem of establishing whether the shareholders' motivation for leaving the meeting was to "withdraw" for the purpose of breaking the quorum, or merely to "depart."[30] Thus, once enough shareholders have left a meeting so that a quorum is no longer present, the remaining shareholders must ascertain whether those who left withdrew or merely departed. Only if it is clear that the shareholders "withdrew" can subsequent actions at the meeting withstand a later challenge in court.[31]

The purpose of the withdrawal rule codified in section 607.094(3) is to preserve quorums and enable the remaining shareholders to continue to conduct business. But subsection (2) fails to specify whether the majority needed to transact business is that of the original quorum, the legal minimum quorum, or the remaining shares represented after a withdrawal. Only one court has confronted the ambiguous voting requirements of section 607.094, but it opted to evade the issue entirely.[32] That court did, however, note that "[s]ection 607.094(2) of the Florida Corporation Act *appears* to require that a director receive the affirmative vote of a majority of the shares represented at a meeting and entitled to vote . . . ."[33]

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28. Textron, Inc. v. American Woolen Co., 122 F. Supp. 305, 311 (D. Mass. 1954). Noting the decisions in Hexter v. Columbia Baking Co., 16 Del. Ch. 263, 145 A. 115 (1929), and Commonwealth *ex rel.* Sheip v. Vandergrift, 232 Pa. 53, 81 A. 153 (1911), the court observed:

> I have grave doubts as to the soundness of those decisions. Those courts themselves admit that under ordinary parliamentary law a quorum must remain present throughout. They proceed on the basis that stockholders' meetings are required, and that accordingly more lenient principles should apply. This seems a questionable doctrine, and one difficult of delineation. It would seem preferable to lower the quota requirement itself than to propose artificial means of circumventing it.

Id. at 311; *see also* Leamy v. Sinaloa Exploration & Dev. Co., 15 Del. Ch. 28, 130 A.2d 282 (1925) (shareholder with proxies, present solely to protest legality of meeting from which he was removed, was not present for quorum purposes).

29. Hexter v. Columbia Baking Co., 16 Del. Ch. 263, 268, 145 A. 115, 117 (1929).

30. 69 HARV. L. REV. 920, 922 (1955).

31. Because adjourned meetings are effectively part of the original meeting, withdrawn shares are counted for quorum purposes at the subsequent sessions. FLA. STAT. §§ 607.084(5), .094(3) (1981); *see* Atterbury v. Consolidated Coppermines Corp., 26 Del. Ch. 1, 15, 20 A.2d 743, 749 (1941).

32. Malhas v. Shinn, 597 F.2d 28 (2d Cir. 1979).

33. *Id.* at 31 (emphasis added).

Former section 608.08(1) of the Florida Statutes required that directors be chosen at an annual meeting "by a plurality *of the votes cast* at such election."[34] This provision was consistent with the Delaware decisions: "Outstanding among the democratic processes concerning corporate elections is the general rule that a majority *of the votes cast* at a stockholders' meeting, providing a quorum is present, is sufficient to elect Directors."[35]

The drafters of section 32 of the M.B.C.A. had intended only to adopt the position of the court in *Vandergrift* that "the majority in question" is not to be "a majority of the voting shares outstanding."[36] The seemingly deliberate omission of the votes cast requirement in the M.B.C.A. as adopted in Florida and other jurisdictions has the effect of voiding any action of a shareholders' meeting not approved by a majority of the shares "represented in person or by proxy" and constituting a legal minimum quorum.[37] An emphasis on the actual votes cast would have avoided these ambiguities because voting was not linked to the quorum. Under Florida's present law, however, the one-third absolute minimum requirement to constitute a quorum contained in section 607.094(1) would permit an affirmative vote of one-sixth plus one of the shares "entitled to vote" to validate actions taken at a shareholders' meeting.[38] The following example illustrates this result.

For purposes of analysis, assume that ABC Corporation has one hundred shares outstanding and entitled to vote at a shareholders' meeting and that all one hundred shares attend either in person or by proxy. If only fifty-one ballots are cast[39] on a particular issue, with twenty-six in favor, the election will be invalid if the

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34. FLA. STAT. § 608.08(1) (1975) (emphasis added); *see* Gentry-Futch Co. v. Gentry, 90 Fla. 595, 106 So. 473 (1925); Berkowitz v. Firestone, 192 So. 2d 298 (Fla. 3d DCA 1966).

35. Standard Power & Light Corp. v. Investment Assocs., 29 Del. Ch. 593, 600, 51 A.2d 572, 576 (Sup. Ct. 1947) (emphasis added); *accord* Hinckley v. Swaner, 13 Utah 2d 93, 94, 368 P.2d 709, 710 (1962); Strong v. Fromm Laboratories, 273 Wis. 159, 167, 77 N.W.2d 389, 393 (1956); *see also* W. FLETCHER, *supra* note 10, § 2020, at 102 ("By the weight of authority, a majority of the votes actually cast will decide," even if this majority is less than a majority of those represented.).

36. M.B.C.A. ANN. 2D, *supra* note 3, § 32, 2d sentence, ¶ 2.

37. State *ex rel.* Theard v. Briede, 52 So. 2d 568, 570 (La. Ct. App. 1951) (construction of charter amendment).

38. FLA. STAT. § 607.094(1) (1981) read in *pari materia* with FLA. STAT. § 607.094(2) (1981) provides this result. *See supra* notes 7-8.

39. "[A] majority of the shares entitled to vote, *represented* in person or by proxy, shall constitute a quorum at a meeting of shareholders . . . ." FLA. STAT. § 607.094(1) (1981) (emphasis added). Because 51 shares is a majority of all the shares entitled to vote, and the 51 shares are represented at the meeting, the minimum quorum requirement is satisfied.

other forty-nine shares remain *represented* but merely refrain from voting.[40] Section 607.094(2) compels this result. This section requires the affirmative vote of the majority of the shares "represented" to constitute an act of the shareholders. Under the preceding facts, the abstaining "represented" shares are included in the figure used to determine a majority under section 607.094(2); thus, the vote cannot be valid unless the fifty-one voted shares are unanimous.[41]

If the quorum requirement is fifty-one, however, the departure of the forty-nine voting shares, rather than their mere abstention, would allow twenty-six affirmative votes to bind the corporation. This is so because a quorum would still be present. The result differs from the preceding example because the departed shares are no longer "represented." The question remains whether shareholders who *withdraw* are to be treated for quorum purposes in the manner of abstentions or departures.

As noted earlier, subsection (3) of section 607.094 is intended to preserve the quorum. Although still present for quorum purposes, the critical question is whether the withdrawn shares are still "represented" for voting purposes under subsection (2). An anomaly would exist if withdrawals were treated as abstentions, because those who withdrew would enjoy the power to impede the business of the meeting not possessed by those who merely departed. Therefore, if forty-nine of the original one hundred shares withdrew and were no longer "represented," then only twenty-six votes should be necessary to approve the ensuing business of the meeting. Similarly, if sixty shareholders withdrew, preserving the quorum at fifty-one for *voting purposes* under subsection (2) would effectuate the purpose of the statute because the continued validity of the meeting would frustrate the objective of the with-

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40. 5 W. FLETCHER, *supra* note 10, § 2020, at 102.

41. This example illustrates the distinction between the quorum requirement of subsection (1) and the majority of represented shares requirement of subsection (2). The shareholders must meet the requirements of subsection (1) before the meeting may be lawfully conducted. The requirements of subsection (2) assume that a quorum is present and provide the standard against which the validity of action taken at the meeting is measured: a majority vote of those represented. For example, assume a corporation with 300 shares entitled to vote at meetings had exercised its option to reduce its quorum requirement to the statutory minimum of 100 (i.e., ⅓ of all shares entitled to vote at the shareholders meeting). FLA. STAT. § 607.094(1) (1981). At a shareholders' meeting, 200 shares are represented in person or by proxy. If 100 shares vote in favor of a measure, it will not pass, because 101 votes are needed to constitute a majority of those represented. This result occurs because, although the 100 voting shares satisfy the minimum quorum, the quorum requirement is irrelevant beyond the threshold question of the meeting's validity.

drawing shareholders. Under the latter hypothetical, as long as twenty-six shareholders are prepared to approve matters brought to a vote, the meeting can continue.[42] Thus, the statute envisions the creation of an artificial quorum designed to permit the meeting to continue transacting business. This result conforms with that advanced by the ABF-ABA commentators.[43]

In sum, section 607.094(3) of the Florida Statutes should be construed to distinguish between shareholder departures and withdrawals. Corporate officials and counsel should note that the statute confers the power on abstainers to control the conduct of meetings. As a result, dissident shareholders may still effectively influence a meeting by attending and refusing to vote. But, if dissident shareholders withdraw, the quorum will be preserved for voting purposes, albeit at the minimum level prescribed by statute or the bylaws. As long as a majority of the remaining represented shares is prepared to approve matters brought to a vote, and that majority also constitutes a majority of the minimum legal quorum, any action taken at the meeting will be valid. Finally, the withdrawn shares will be counted as part of the quorum if the meeting adjourns and then subsequently reconvenes.

For the purposes of clarity, however, Florida should consider replacing section 607.094(3) of the Florida Statutes with a provision similar to section 602(b) of the California Corporation Code, which provides:

> The shareholders present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough shareholders to leave less than a quorum, if any action taken (other than adjournment) is approved by at least a majority of the shares required to constitute a quorum.[44]

This statute more nearly approximates the ABF-ABA interpretation. The shareholders' meeting may continue after a withdrawal despite the loss of a quorum. Significantly, the California statute also specifies the number of votes required to validate shareholder action. The anomaly caused by the omission of the votes cast requirement in the M.B.C.A. as adopted in Florida and

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42. Thus, once established, the quorum is deemed to "legally" continue throughout the duration of the meeting. The subsequent withdrawal of shares will not vitiate it. FLA. STAT. § 607.094(3) (1981).

43. *See supra* text accompanying note 15.

44. CAL. CORP. CODE § 602(b) (West Supp. 1981).

other states that confers the additional power on abstainers, however, remains.

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