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Mississippi Business Corporation Law: A Proposal for Progress

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I. INTRODUCTION

Mississippi's corporation law needs reform. Many of the provisions in the corporation statute are peculiar, outdated or meaningless. The problems, however, are not limited to the statute: several obsolete provisions of Mississippi corporation law may be traced to the Mississippi Constitution.[1] Unusual and outdated provisions of Mississippi law create problems for lawyers attempting to plan for corporate clients and impede economic development in Mississippi.

Nationally, corporation law has developed and changed rapidly for some time, but Mississippi has not kept pace. Many provisions in the Mississippi Act and Constitution are peculiar to Mississippi or have been updated in other jurisdictions.[2] When the Mississippi Legislature adopted the Mississippi Business Corporation Law[3] in 1962,[4] it used as a guide the Model Business Corporation Act[5] as it existed at the time of the Mississippi Law.[6] Since its enactment, the Model Act has undergone changes, but unfortunately the Mississippi Legislature has ignored most of the revisions made since 1962.[7] Some of the deviations from the Model Act were caused by provisions in the Mississippi Constitution; others developed from legislative preferences which apparently existed at the time. Unfortunately, many perceive Mississippi to

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1. MISS. CONST. art. VII, §§ 178 to 198-A.

2. *See infra* text accompanying notes 13-50.

3. 1962 Miss. Laws ch. 235, § 1; MISS. CODE ANN. §§ 79-3-1 to -293 (1972 & Supp. 1986). When the statute was enacted in 1962, § 1 of the law provided: "This chapter shall be known and may be cited as the Mississippi Business Corporation Act." When a new code was adopted by the Mississippi Legislature in 1972, the name of the act was apparently changed editorially to the "Mississippi Business Corporation Law." In this article, the Mississippi Business Corporation Law may be referred to as the "Mississippi Statute" or the "Mississippi Act." The text of the sections cited herein is reprinted in Appendix A.

4. MISS. CODE ANN. §§ 79-3-1 to -293 (1972 & Supp. 1986).

5. The Model Business Corporation Act is referred to herein as the "MBCA" or the "Model Act."

6. *Proceedings of the Fifty-Sixth Annual Meeting of the Mississippi State Bar*, 32 MISS. L. J. 339, App. A at 405-06 (1961); *Proceedings of the Fifty-Seventh Annual Meeting of the Mississippi State Bar*, 33 MISS. L.J. 407, App. A at 457-58 (1962).

7. *See infra* text following note 55.

be "backward" or "out-of-step"[8] with the rest of the nation.[9] This perception is increased by legal peculiarities that cause lawyers from other jurisdictions to respond unfavorably to Mississippi because of the unusual nature of Mississippi's corporation law.[10] When this occurs, Mississippi appears unattractive as a place to conduct business, and lawyers representing out-of-state investors or corporations considering business activities in Mississippi may advise their clients to merely qualify to do business in Mississippi while forming corporations in other jurisdictions.[11] Worse yet, lawyers may persuade clients simply to do business in other jurisdictions. The purpose of this Article is to explain the need for reform, highlight the obsolete portions of the Mississippi Act and the Mississippi Constitution, and propose a plan for revision based on the Revised Model Business Corporation Act.[12]

II. THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CORPORATE LAW

There is a growing sentiment for constitutional reform in Mississippi today.[13] Many obsolete and embarrassing provisions have been targeted by those wishing to modernize Mississippi's constitution. Those in favor of a constitutional revision argue that our present constitution is anti-business and retards economic development. They also argue that it is too long and contains nonfundamental provisions which would be better defined by statute.[14]

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8. "Mississippi has a backwoods image outside of this state. We cause some of it ourselves." Jerry McDonald, Executive Director of the Mississippi Department of Economic Development, *quoted in The State We're In: Marketing Mississippi, Problems, Image Make State Hard to Sell*, The Clarion-Ledger, tabloid reprint of series, December 8-15, 1985, at 28. An interesting example of Mississippi's image in the business community outside the state is cited in Business Week, Jan. 27, 1986. "L. F. Rothschild Chairman Thomas I. Unterberg recalls that he choked on the soft drink he was sipping when Trantum told him he was moving to Mississippi. 'I wouldn't go near that place,' Unterberg says." Recio & Green, A *Wall Street Banker with a Fast Track of His Own*, BUS. WK., Jan. 27, 1986, at 70, 72.

9. In addition, Mississippi has a very small body of corporate common law. As of February 24, 1986, Mississippi had only 106 cases classified in West Publishing Company's digest under its key numbers related to corporations. Most of these concerned jurisdictional problems. This small body of law contributes to the uncertainty about Mississippi as a state in which to incorporate because there is no case law concerning a large number of important topics. One reason Mississippi has a small body of case law is that there are relatively few corporations incorporated in Mississippi. In order to correct this problem, Mississippi's law must become more concrete.

10. *See, e.g.*, Soderquist, *Observations on a New Hawaii Corporation Statute*, 3 U. HAWAII L. REV. 194, 195 (1981).

11. *Id.*

12. This Article will not address every provision of the Mississippi Business Corporation Law or the Mississippi Constitution, but only those provisions that need amendment because they are unmanageable or obsolete. The Revised Model Business Corporation Act will be referred to herein as the "RMBCA" or the "Revised Model Act." *See infra* text accompanying notes 51-55.

13. Southwick, *State Constitution Revision: Mississippi and the South*, 32 MISS. LAW. 21, 22 (1985).

14. *Id.* For a discussion of the history of the corporate provisions of the Mississippi Constitution of 1890, see Clark, *Regulation of Corporations in the Mississippi Constitutional Convention of 1890*, 48 J. MISS. HIST. 31 (1986).

Article VII of the Mississippi Constitution governing corporate law is ripe for amendment.

Three provisions are particularly unusual and outdated by national standards. The first is the portion of article VII, section 178 which provides that a corporation may not be granted existence for a period of more than 99 years.[15] Second is the provision in article VII, section 194 of the Mississippi Constitution which mandates cumulative voting in the election of directors,[16] and third is the same provision and its effective prohibition on non-voting common stock.[17]

A. Limited Corporate Life.

Mississippi is the only state in the nation which does not allow perpetual incorporation.[18] Section 178 was apparently designed to allow a corporation to wind up without expense if at the end of the charter period the state deemed it unwise to allow it to continue.[19] However, this provision has little meaning today and serves no purpose other than to trap the unwary. Corporations are dissolved either voluntarily or involuntarily when necessary. The corporation law of this state does not need a "sunset" provision, particularly when it is so out of step with the corporation law in the rest of the nation.[20] The danger inherent in the provision outweighs any possible benefits. Although there is very little danger in corporations outstaying their welcome, there is some potential danger for corporations which, unaware of this strange provision or unaware that the charter period has expired, continue their operation without a charter.[21] This potential problem will become a reality when corporate charters granted in the 1890's expire in the 1990's.[22] The Secretary of State's office does not know whether any corporations face charter expiration in the next 10 or so years,

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15. MISS. CONST. art VII, § 178; *see also infra* text accompanying notes 18-26.

16. MISS. CONST. art. VII, § 194; *see also infra* text accompanying notes 27-34.

17. MISS. CONST. art. VII, § 194; *see also infra* text accompanying notes 35-42.

18. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 42-43 (3rd ed. 1983).

19. G. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 330 (1928).

20. *See supra* text accompanying note 8.

21. Those who purport to act as a corporation without statutory authority assume the supposed corporate liability for themselves. MISS. CODE ANN. § 79-3-285 (1972 & Supp. 1986).

22. Charters granted prior to 1950 were granted for only fifty years. In 1950, the statute was amended to permit incorporation for a period of 99 years as the constitution provided. At the same time, the legislature enacted a section which provides for an automatic charter extension when the 50 year period of incorporation expires for those corporations chartered prior to 1950. The section provides that if the corporation continues to do business for a period of 90 days after the expiration of its 50 year charter, the corporation's lifetime shall be automatically extended to a term of 99 years from the date of its original charter. MISS. CODE ANN. § 79-1-1 (1972). *See* 1950 Miss. Laws ch. 308, § 3 (amended in 1956, ch. 174, § 1).

and has developed no plan to identify or notify those corporations when their charters are soon to expire.[23]

Perpetual incorporation is universally accepted among the corporate bar and is one of the most often cited advantages of the corporate form.[24] Very little history exists to explain why this provision prohibiting perpetual incorporation was inserted,[25] but prior to 1890, perpetual life for corporations existed under Mississippi law.[26] This limiting provision should be deleted from the constitution and the statute.

B. Mandatory Cumulative Voting.

Another provision which makes Mississippi seem unfriendly to corporate interests is the provision in article VII, section 194 of the Mississippi Constitution which mandates cumulative voting in the election of directors.[27] Mississippi is one of the handful of states with this requirement.[28] Although adopted to provide minority shareholders with access to board representation, the cumulative voting requirement has often failed to provide the promised benefits and now provides limited protection only in some closely held corporations.[29]

The cumulative voting provision is of little use in public companies because there is usually no group which owns a significant percentage of the stock, and if there is such a group, they have enough shares to elect at least one director regardless of cumulative voting.[30] In a closely held corporation, on the other hand, cumulative voting may play a significant role because there are few shareholders and a minority shareholder may obtain board representation in no other way. Even in Mississippi, where most of the corporations are closely held, there is no need for constitu-

23. Telephone interview with Ray Bailey, Assistant Secretary of State of the State of Mississippi, Division of Corporation Law (February 14, 1986).

24. H. HENN & J. ALEXANDER, *supra* note 18, at 132; 1 BLACKSTONE COMMENTARIES 467 (1765); W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 21-22 (5th ed. abr. 1980).

25. Judge Ethridge stated in his treatise on Mississippi Constitutions that this provision "is for the purpose of having the corporation wound up without expense if it should at the end of the charter period be thought unwise to continue it." G. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 330 (1928).

26. MISS. REV. CODE §§ 2398, 2406 (1871).

27. MISS. CONST. art. VII, § 194. The purpose of cumulative voting is to provide minority shareholders the opportunity to elect directors in roughly the same proportion to the shares that they own. ETHRIDGE, *supra* note 19, at 361. Under cumulative voting, each shareholder is entitled to vote the number of shares owned by him multiplied by the number of directors to be elected. The votes may be allocated among the candidates for director in any manner chosen by the shareholder. For a general discussion of cumulative voting, see text and articles cited *infra* notes 132-175.

28. H. HENN & J. ALEXANDER, *supra* note 18, at 42, 495; ARIZ. CONST. art. IV, § 10; IDAHO CONST. art. XI, § 4; KY. CONST. art. 207; MISS. CONST. art. VII, § 194; MO. CONST. art. XI, § 6; N. D. CONST. art. XII, § 6; S. D. CONST. art. XVII, § 5; W. VA. CONST. art. XI, § 4.

29. H. HENN & J. ALEXANDER, *supra* note 18, at 495. *See also infra* text at notes 160-204.

30. That group would probably be able to control the entire board. Soderquist, *supra* note 10, at 195 n.5.

tionally mandated cumulative voting, as cumulative voting may be provided for in either a "mandatory", "presumptive" or "permissive" statute.[31] A number of states provide for presumptive cumulative voting in the election of directors; that is, cumulative voting exists if there is no statement in the articles concerning voting, but the articles may provide otherwise.[32] Other states, the majority, provide for "permissive" cumulative voting, permitting the articles to govern the issue of shareholder voting, with cumulative voting rights existing only if specifically granted by the articles of incorporation.[33] Cumulative voting is not a device which insures minority representation on the board of directors, but only a device which provides the opportunity of board representation to those with a significant holding. The constitution is the document which guarantees individual rights and freedoms, and the subject of cumulative voting has no place in such a document.[34]

C. *Inflexible Capital Structure.*

Another provision which is often unnoticed and consequently violated is the provision in article VII, section 194 of the Mississippi Constitution, which apparently prevents Mississippi corporations from issuing any class of non-voting common stock.[35] Section 194, which mandates cumulative voting, provides that all shareholders must have the right to vote in the election of directors but provides an exemption for preferred stock where the articles provide that there are no voting rights with respect to such stock.[36] This exception was inserted in the Mississippi Constitution in 1954 to allow for non-voting preferred stock.[37]

Mississippi is one of the few states which prohibit the use of non-voting common stock.[38] Although unusual, this kind of provision causes little hardship for very large corporations because

31. For a discussion of the "mandatory" and "permissive" statutes governing cumulative voting, see *infra* notes 160-63.

32. *See infra* text accompanying notes 160-204.

33. *See infra* note 163. Twenty-five jurisdictions now have permissive cumulative voting.

34. *Cf.* Comment, *Cumulative Voting—Advisability of Retaining the Cumulative Voting Provision in the Pennsylvania Constitution*, 8 VILL. L. REV. 391 (1963).

35. MISS. CONST. art. VII, § 194 (1890, amended 1954). Unfortunately, this type of provision was interpreted in People *ex rel.* Watseka Tel. Co. v. Emmerson, 302 Ill. 300, 134 N.E. 707 (1922) and State *ex rel.* Dewey Portland Cement Co. v. O'Brien, 142 W. Va. 451, 96 S.E.2d 171 (1956) to prohibit the issuance of any class of non-voting shares. *But see* State *ex rel.* Frank v. Swanger, 190 Mo. 561, 89 S.W. 872 (1905); Shapiro v. Tropicana Lanes, Inc., 371 S.W.2d 237 (Mo. 1963). The Mississippi section was amended in 1954 to permit the issuance of non-voting preferred stock. 1954 Miss. Laws ch. 424.

36. MISS. CONST. art. VII, § 194 (1890, amended 1954).

37. HUEY B. HOWERTON, CHARLES N. FORTENBERRY, WILLIAM F. WINTER, DONALD S. VAUGHN, WILLIAM J. BLASS, GEORGE W. ROGERS, RUSSELL H. BARRETT, EDWARD H. HOBBS, FREDRICK H. GAREAU, YESTERDAY'S CONSTITUTION TODAY: AN ANALYSIS OF THE MISSISSIPPI CONSTITUTION OF 1890 88 (1960).

38. H. HENN & J. ALEXANDER, *supra* note 18, at 499. *See* ILL. ANN. STAT ch. 32, § 7.40 (Smith-Hurd 1985); IDAHO CONST. art. XI, § 4.

the New York Stock Exchange will not list non-voting common stock and prohibits any listed company from having any class of non-voting common stock outstanding.[39] Further, the Securities and Exchange Commission regards non-voting common stock with disfavor.[40] The same is not true, however, for the majority of corporations which are not governed by New York Stock Exchange rules or by the Securities and Exchange Commission. In these other corporations, which are usually owned and controlled by a relatively small number of shareholders, non-voting common stock may provide a convenient vehicle for the division of relative rights and preferences among shareholders. Some of the best known methods for allocating control in a closely held corporation involve the issuance of either non-voting common stock or common stock with limited voting rights.[41] Article VII, section 194 effectively prevents a corporation from dividing its capital into more than one kind of common stock and therefore denies the corporate bar the flexibility it needs to fashion creative structures for Mississippi corporations.[42] Section 194 of the Mississippi Constitution should be deleted to allow for more flexibility in corporate structure.

D. Miscellaneous Constitutional Provisions.

Other constitutional provisions which are anti-business in nature should also be abandoned. These include provisions which allow the legislature to restrict the power of corporations to acquire and hold land,[43] which grant the legislature the power to alter, amend or repeal any corporate charter without compliance with the general laws,[44] which prohibit the purchase of corporate stock by municipalities,[45] which limit the type of consideration which may be accepted for stock by "transportation corporations," [46] and which prohibit non-Mississippi corporations from owning or operating a railroad in this state.[47] Absurd as well as archaic, these sections of the Mississippi Constitution were apparently grounded in the fear of capital concentration, general distrust of corpo-

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39. N.Y.S.E. COMPANY MANUAL § A15, *cited in* H. HENN & J. ALEXANDER, *supra* note 18, at 501.

40. A. CONARD, CORPORATIONS IN PERSPECTIVE 322 (1976).

41. Ringling Brothers-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947); Lehrman v. Cohen, 43 Del. Ch. 222, 222 A.2d 800 (Sup. Ct. 1966).

42. *See infra* text accompanying notes 137-46.

43. MISS. CONST. art. IV, § 84.

44. *Id.* at § 178.

45. *Id.* at § 183.

46. *Id.* at § 196.

47. *Id.* at § 197.

rations, and a need to protect the agricultural interests of the state.[48] These provisions, which were intended to address fears and correct problems in the 1890's, have no place in the 1980's and should be abandoned, as the economic and political forces which led to the anti-business sections of the constitution have largely abated.

The Governor's Constitutional Study Commission unanimously adopted recommendations on April 9, 1986, to amend or delete these provisions from the constitution in the revision process.[49] Such recommendations are well founded. Mississippi's constitution should be amended to contain only broad enduring principles rather than detailed materials that are better suited to a statute.[50] The section of the Mississippi Constitution concerning corporation matters should do no more than recognize the right of corporations and other forms of business organizations to exist, direct the legislature to provide general laws under which corporate charters may be granted, amended, revoked and forfeited, and guarantee corporations and other business organizations the same basic rights accorded to individuals.

III. THE REVISED MODEL BUSINESS CORPORATION ACT AND THE MISSISSIPPI BUSINESS CORPORATION LAW

The Revised Model Business Corporation Act[51] is a model statute designed to help states modernize their business corporation laws.[52] As such, the RMBCA is organized into chapters which address the economic and social rights and duties of the corporation, its shareholders, its officers and its directors as well as the responsibilities of the state in dealing with both domestic and foreign corporations.[53] The RMBCA was developed by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association during five years of extensive work and study.[54] Because the Committee re-

48. Because of certain aggressive business practices in the 1880's, some of the state farmers became discontented. The domination of the Constitutional Convention of 1890 by the "white farmers of the hilly counties of east Mississippi" led to many of the anti-business provisions of the Mississippi Constitution. Clark, *supra* note 14, at 31.

49. These recommendations were accepted by the Governor's Constitutional Study Commission on February 28, 1986. Telephone conversation with Brad Chism, Clerk of the Governor's Constitutional Study Commission (May 20, 1986).

50. This is in accord with the statement of purpose adopted by the Governor's Constitutional Study Commission considering amendment of Mississippi's constitution. It states: "We believe an effective state constitution should incorporate broad, lasting principles, as opposed to details of a statutory nature." Telephone conversation with Brad Chism, Clerk of the Governor's Constitutional Study Commission (May 20, 1986).

51. The Revised Model Business Corporation Act will be referred to in this Article as the RMBCA. The RMBCA is printed in full with the reporter's comments and annotations in MODEL BUS. CORP. ACT ANN. 3d (1986). Selected provisions of the RMBCA are reprinted herein at Appendix B.

52. MODEL BUS. CORP. ACT ANN. 3d xxiii (1986).

53. *Id.*

54. *Id.* at xxiv.

lied on the knowledge of its members and the experience of several important corporate states which have adopted innovative corporate laws, the RMBCA represents the current trend in state business corporation laws, and the reporter's comments provide research tools for those who wish to consider new provisions. In addition, the Model Business Corporation Act served as the basis for the corporation law of 35 states[55] which are likely to look to the RMBCA as a model for their respective revisions. Its use as a revision tool by numerous states will cause the RMBCA to have a significant impact on corporation law in general.

Mississippi is one of the 35 states which adopted the Model Business Corporation Act (MBCA) as a foundation for its present corporation laws. But when it adopted the 1959 version of the MBCA, the Mississippi Legislature also adopted some interesting deviations and has ignored virtually all subsequent revisions to the MBCA. Thus, the Mississippi version of the MBCA is substantially out of date. The RMBCA provides Mississippi with the opportunity to draw upon the experiences of other states and the resources of the American Bar Association in order to modernize its business corporation law. The RMBCA should be the foundation for a complete revision of Mississippi corporation law.

The balance of this Article will explore important provisions of the Mississippi Act, discuss problems associated with those provisions and illustrate how the RMBCA will help solve those problems.

A. Issues of Corporation Finance

Mississippi's corporation law has numerous corporate finance restrictions which affect a corporation's ability to begin business, as well as the legality of dividends, redemptions and other distributions by a corporation to its shareholders. Restrictions of this kind are usually categorized under the broad heading of "legal capital."[56] Legal capital restrictions are founded upon the belief that a corporation's capital accounts are important to the protection of its shareholders and creditors,[57] and include concepts of par value, stated capital, earned surplus and capital surplus.[58] Legal capital restrictions theoretically protect creditors two ways: first, by requiring that a certain stated amount has been paid for the shares, and second, by limiting distributions to shareholders either

55. *Id.*

56. For an explanation of legal capital problems in general, see B. MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL (2d ed. 1981).

57. *See* B. MANNING, *supra* note 56, at 18-20.

58. For definitions of these terms see *infra* text accompanying notes 101-07.

by dividends or by repurchase of shares.[59] Legal capital provisions were designed to protect creditors in their dealings with the corporation by insuring that there was adequate capital to support the claims.[60] As indicated below,[61] the legal capital method has failed as a creditor protection mechanism.

1. Prerequisites to Incorporation: Section 79-3-111.

Section 79-3-111 provides that a corporation must have accepted subscriptions for and received at least one thousand dollars for shares before it may transact business or incur any indebtedness.[62] Today, this section provides little or no meaningful protection to persons who deal with the corporation.[63] In the last century, capital accounts were viewed as a "trust fund" for creditors.[64] The "trust fund" theory has, however, been completely abandoned in United States jurisdictions because capital accounts do not contain any money at all.[65] Whether a corporation can pay an obligation usually depends upon its earnings, not upon its capital accounts.[66] A security interest in property is a means for protection or insurance against disaster, not a mechanism to determine whether a corporation can meet an obligation.[67] In addition to failing to provide creditor protection, section 79-3-111 may work to impose liability on unwitting directors who allow a corporation to begin business without the required one thousand dollars of paid-in capital.[68] Section 79-3-91(e) provides that the directors who assent to the action of the corporation prior to such payment become jointly and severally liable for any part of the one thousand dollars which was not paid in before the corporation be-

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59. B. MANNING, *supra* note 56, at 35; H. HENN & J. ALEXANDER, *supra* note 18, at 429-33.

60. MODEL BUS. CORP. ACT ANN. 2d § 45(a) 2, at 890 (1971).

61. *See infra* text accompanying notes 62-134.

62. MISS. CODE ANN. § 79-3-111 (1972).

63. Soderquist, *supra* note 10, at 194 n.3. Professor Soderquist explains that a one thousand dollar requirement is of little consequence by modern standards because of its very small amount and because it does nothing to protect creditors. *Id.* at 194 n.3

64. Wood v. Dummer, 30 F. Cas. 435, No. 17,944 (C.C.D. Me. 1824); *See also* Scovill v. Thayer, 105 U.S. 143 (1881); Livingston v. Adams, 225 Mo. App. 824, 43 S.W.2d 836 (1931).

65. Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 192-93, 50 N.W. 1117, 1119 (1892). The court said:

> The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not held in trust, in any proper sense of the term . . . . The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further.

Id; cf. Cargill, Inc. v. American Pork Producers, Inc., 426 F. Supp. 499 (D.S.D. 1977); Hunt, *The Trust Fund Theory and Some Substitutes for It*, 12 Yale L.J. 63 (1902).

66. B. MANNING, *supra* note 56, at 14.

67. *Id.*

68. MISS. CODE ANN. §§ 79-3-111 and 79-3-91(e) (1972 & Supp. 1986). *See infra* text accompanying note 69.

gan to transact business.[69] In light of the minimal protection provided to creditors, directors should not be expected to carry this burden. Most states have abandoned this statute;[70] Mississippi should do the same.

2. *Issuance of Shares: Par Value*

Mississippi corporate law also requires that certain consideration be paid for shares issued by a corporation. The consideration requirements are based primarily on the concept of "par value." Sections 79-3-27,-33 and -35 regulate the issuance of shares and the consideration to be paid for shares when issued by Mississippi corporations. Section 79-3-27 provides that corporations may issue shares with or without par value and in variations as set forth in the articles of incorporation. However, section 79-3-33 adds an unusual requirement: shares with a par value may be issued for consideration of not less than par value, and such stock must have a par value of at least one dollar. This section also provides that no-par stock may be issued for such consideration as the board in its discretion determines but that no-par shares must not be issued for consideration of less than one dollar per share. This one dollar minimum requirement is unique to Mississippi and, in effect, precludes no-par stock.[71]

Section 79-3-33 prohibits any Mississippi corporation from issuing stock for less than one dollar in any circumstance.[72] The stock, if issued for less than one dollar, is assessable or watered.[73] As a result, a shareholder who pays less than par value (or less than one dollar in the case of no-par stock) will be liable for the difference between what he paid and the full amount of the par value or for one dollar per share for no-par stock.[74] Par value has no discernible usefulness and may prove to be an unnecessary burden on a struggling corporation that wishes to sell additional shares of common stock at a time when the market price

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69. MISS. CODE ANN. § 79-3-91(e) (1972 & Supp. 1986).

70. B. MANNING, *supra* note 56, at 40.

71. Hodge and Perry, *The Model Business Corporation Act: Does the Mississippi Version Lime the Bushes?*, 46 MISS. L. J. 371, 380 (1975).

72. MISS. CODE ANN. § 79-3-33 (1972).

73. MISS. CODE ANN. § 79-3-47 (1972 & Supp. 1986). The term watered stock developed from the practice of "aquatizing of livestock before weighing them in for sale." B. MANNING, *supra* note 56, at 20; H. HENN & J. ALEXANDER, *supra* note 18, § 171, at 430.

74. MISS. CODE ANN. § 79-3-47 (1972 & Supp. 1986). A number of theories have been advanced regarding the liability of a shareholder who pays less than the required consideration for the shares. Most of these theories have been replaced by statute today. This is true in Mississippi as well. Mississippi's provision on shareholders' liability for watered stock is identical to the old Model Act formulation. The basis for the obligation is now statutory. *Id. See* H. HENN & J. ALEXANDER, *supra* note 18, § 171, at 431-33.

of its stock is less than one dollar per share.[75]

The apparent reason for the inclusion of this one dollar minimum provision was to prevent the issuance of "penny stock"[76] that could be misleading to the public.[77] If penny stock is deemed to be a problem in Mississippi, the matter should be addressed under state securities laws, not in the general corporation laws.[78] There is no reason to subject all Mississippi corporations to this unusual requirement when all corporations seeking to sell highly speculative investments to the public could be and are regulated by state and federal securities laws.[79]

Not only should the one dollar par and no-par requirement be dropped from Mississippi's law, the entire concept of par value should be abandoned in favor of a fiduciary standard based on valuation and reason. Par value is a dollar amount assigned to corporate shares in the corporate charter and has nothing to do with the market value of shares which are traded or the underlying value of the assets of the business represented by shares. As one author stated, "[p]ar value is a term so generally misunderstood and so completely without significance that many companies today either do not set any [par] value on their stock, in which case it is known as *no-par stock,*[80] or they fix a value . . . so low that it could not possibly be misinterpreted as an index of its real value."[81]

Historically, par value served valid purposes. Par value was designed to provide the capital needed by a firm to begin or expand and to provide value as a basis upon which credit could be

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75. A corporation whose stock is trading at less than one dollar per share may be unable to issue additional shares because it is practically impossible to sell shares at above market. This section would force a corporation which desires or needs to sell more stock to modify its capital structure in order to raise additional capital. Such a corporation could amend its articles and effect a recapitalization, a reverse stock split or a merger. Unfortunately, this type of procedure would require a shareholder vote which might necessitate an expensive proxy solicitation. Hodge and Perry, *supra* note 71, at 381.

76. The term "penny stocks" refers to low priced stocks (priced at under five dollars per share) which are sold by new or questionable companies and "peddled" by high-pressure sale techniques. One author suggests that "anyone who takes a flyer on this kind of deal is much more apt to lose everything he puts into it than he is to make a whopping profit." L. ENGLE & B. BOYD, HOW TO BUY STOCKS 149 (7th ed. 1982).

77. Hodge and Perry, supra note 71, at 380. This provision is not a carryover of prior Mississippi law on the issue of par or no-par stock. This one dollar minimum requirement came into being with the Mississippi Business Corporation Law in 1962. *See* MISS. CODE ANN. § 5309-59 (1942).

78. *See* Hodge and Perry, *supra* note 71, at 380.

79. MISS. CODE ANN. §§ 75-71-101 to -735 (Supp. 1986).

80. This is not possible in Mississippi. *See supra* text accompanying notes 71-75.

81. L. ENGEL & B. BOYD, *supra* note 76, at 10; *accord* W. CARY & M. EISENBERG, *supra* note 24, at 728; B. MANNING, *supra* note 56, at 36.

obtained.[82] Par value also served to protect shareholders by assuring that every purchaser paid the same price for the shares purchased in the offering.[83] The established practice was to set the par value of shares and to sell the shares at that price.[84] The basic rule developed that shares could be issued by a corporation for no less than par value.[85] If a corporation issued stock for less than par value, the shareholder was liable to the corporation and to its creditors for the difference between the par value and the price actually paid.[86] In most states now, liability for "watered stock" is statutory.[87] Watered stock liability serves not only to penalize those guilty of fraud, but the uninformed innocent as well. General concepts of fiduciary duty would serve the same purpose without imposing liability on those who are merely uninformed.

The legal capital rules and restrictions no longer serve their in-

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82. W. CARY & M. EISENBERG, *supra* note 24, at 727; B. MANNING, *supra* note 56, at 19. This function is satirized in W.S. Gilbert's verse:

Some Seven men form an Association
(If possible, all Peers and Baronets)
They start off with a public declaration
To what extent they mean to pay their debts
That's called their Capital . . .

Sir William Schwenck Gilbert, Utopia, Limited or The Flowers of Progress, first performed at the Savoy Theater, London, October 7, 1893, conducted by Sir Arthur Sullivan. L. Ayre, The Gilbert and Sullivan Companion 436 (New York: Dodd, Mead 1972).

83. W. CARY & M. EISENBERG, *supra* note 24, at 729; B. MANNING, *supra* note 56, at 19.

84. W. CARY & M. EISENBERG, *supra* note 24, at 729; B. MANNING, *supra* note 56, at 19.

85. H. HENN & J. ALEXANDER, *supra* note 18, § 123, at 283.

86. For a discussion of the four theories for finding liability when the full par value is not paid, see H. HENN & J. ALEXANDER, *supra* note 18, § 171, at 431-35.

87. ALA. CONST. art. XII, § 236; IDAHO CONST. art. XI, § 17; MO. CONST. art XI, § 8; OHIO CONST. art. XIII, § 3; OR. CONST. art. XI, § 3; ALA. CODE § 10-2A-43 (1975); ALASKA STAT. § 10.05.126 (1962); ARIZ. REV. STAT. ANN. § 10-025 (1956 & Supp. 1986); ARK. STAT. ANN. § 64-210 (1980); CAL. CORP. CODE § 410 (West 1977); COLO. REV. STAT. § 7-4-120 (1973); CONN. GEN. STAT. ANN. § 33-350 (West 1983); DEL. CODE ANN. tit. 8, § 162 (1974); D.C. CODE ANN. § 29-322 (1981); FLA. STAT. ANN. § 607.074 (West 1983); GA. CODE ANN. § 14-2-110 (1982); HAWAII REV. STAT. § 416-92 (1985); IDAHO CODE § 30-1-25 (1980); ILL. ANN. STAT. ch. 32, § 6.40 (Smith-Hurd 1985); IND. CODE ANN. § 23-1-26-3 (Burns Supp. 1986); IOWA CODE ANN. § 496A.24 (West 1967); KAN. STAT. ANN. § 17-6412 (1981); KY. REV. STAT. ANN. § 271A.125 (Baldwin 1983); LA. REV. STAT. ANN. § 12:93 (West 1969); ME. REV. STAT. ANN. tit. 13-A, § 509 (1981); MD. CORPS & ASS'NS. CODE ANN. § 2-215 (1985); MASS. ANN. LAWS ch. 156B, § 23 (West 1979); MICH. COMP. LAWS ANN. § 450.1317 (West 1973); MINN. STAT. ANN. §§ 302A.405, 302A.425 (West 1985); MISS. CODE ANN. § 79-3-47 (1972); MO. ANN. STAT. § 351.275 (Vernon 1966); MONT. CODE ANN. § 35-1-510 (1985); NEB. REV. STAT. § 21-2024 (1983); NEV. REV. STAT. §§ 78.225, 78.230 (1979); N.H. REV. STAT. ANN. § 293-A:25 (Supp. 1985); N. J. STAT. ANN. § 14A:5-30 (West 1969); N.M. STAT. ANN. §§ 53-2-8, 53-11-25 (1978 & Supp. 1983); N.Y. BUS. CORP. LAW §§ 628, 629, 630 (McKinney 1986); N.C. GEN. STAT. §§ 55-53, 55-54 (1982); N.D. CENT. CODE § 10-19.1-69 (1985); OHIO REV. CODE ANN. § 1701.18 (Baldwin 1985); OKLA. STAT. ANN. tit. 18 §§ 1.83, 1.84 (West 1986); OR. REV. STAT. § 57.131 (1985); 15 PA. CON. STAT. ANN. § 1609 (Purdon 1967); R.I. GEN. LAWS § 7-1.1-23 (1985); S. C. CODE ANN. § 33-11-230 (Law. Co-op. 1976 & Supp. 1985); S.D. CODIFIED LAWS ANN. §§ 47-3-22 to 47-3-25 (1983); TENN. CODE ANN. § 48-1-719 (1984); TEX. REV. CIV. STAT. ANN. art. 2.21 (Vernon 1980 & Supp. 1986); UTAH CODE ANN. § 16-10-23 (1972); VT. STAT. ANN. tit. XI, § 1871 (1984); WASH. REV. CODE ANN. § 23A.08.205 (Supp. 1987); W.VA. CODE § 31-1-89 (1982); WIS. STAT. ANN. § 180.20 (West 1957); WYO. STAT. § 17-1-122 (1977).

tended purposes. Par value in no way indicates what a corporation's shares are worth, nor does it guarantee that the capital of the corporation is adequate for it to do business or obtain credit. Par value is a number which is an historical representation of an event which occurred in the past. As with historical cost financial statements, more current information is needed to make relevant decisions regarding a company's financial position. The par value rules also fail to insure that all shareholders pay the same price for their shares. No law requires that all shareholders pay the same price for their shares; and, as long as there is full disclosure among the shareholders and no fraud, an arrangement for shareholders to pay differing prices for their shares is valid.[88] Therefore, any "parity" concept of par value is outdated and no longer valid. Furthermore, in most states, corporations may set par at any number and may also create stock with no par value. Therefore, par in no way represents "capital" in the business context.[89] The flexibility accorded by no-par and low par stock is, of course, subject to the fiduciary duties of the directors in their dealings with subscribers.

In some state statutes, and in the RMBCA, the concept of par value has been abandoned completely, allowing a corporate board to issue stock in exchange for any consideration which it, in the exercise of its good faith business judgment, decides is reasonable and fair.[90] Section 6.21 of the RMBCA provides that the board of directors must determine if the consideration paid or to be paid for the shares is adequate and further provides that the determination of the board of directors regarding the adequacy of consideration is conclusive.[91] This approach solves the problems of "watered stock" liability for issuing shares at a price below par value and relies on the principle of fiduciary duty to protect shareholders and creditors against fraud.[92]

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88. Atlantic Refining Co. v. Hodgman, 13 F.2d 781 (3d Cir. 1926), *cert. denied*, 273 U.S. 731 (1926); Milberg v. Baum, 25 N.Y.S.2d 451 (Sup. Ct. 1941); Bodell v. General Gas & Electric Corp., 15 Del. Ch. 119, 132 A. 442 (Ch. 1926), *aff'd*, 15 Del. Ch. 420, 140 A. 264 (Sup. Ct. 1927); H. HENN & J. ALEXANDER, *supra* note 18, at 424.

89. Capital is defined as "[a]ccumulated goods, possessions and assets, used for the production of profits and wealth . . . ." BLACK'S LAW DICTIONARY 189 (5th ed. 1979). Manning says that the term "legal capital" has "little or no relationship" to the word "capital" as the economist or business person knows it. B. MANNING, *supra* note 56, at 34.

90. *See* CAL. CORP. CODE §§ 205, 409, 418 (West 1977 & Supp. 1986); MINN. STAT. ANN. §§ 302A.401, 302A.405 (1985); MONT. CODE ANN. §§ 35-1-605, 35-1-606, 35-1-610 (1985); MODEL BUS. CORP. ACT ANN. 3d § 6.21 official comment (1986).

91. MODEL BUS. CORP. ACT ANN. 3d § 6.21 (1986).

92. MODEL BUS. CORP. ACT ANN. 3d § 6.21 official comment (1986). The price of the shares and the problem of equality of treatment of shareholders is a matter of fairness and judgment by the board of directors which cannot be effectively addressed by a concept like par value. *Id.*

3. *Issuance of Shares: Consideration*

Section 79-3-35 applies also to the original issuance of shares by a Mississippi corporation.[93] This section sets forth the types of consideration which may be paid for shares of a corporation upon issuance,[94] stating that shares may be issued in exchange for money, property or labor actually performed for the corporation.[95] Neither promissory notes nor future services may constitute legal consideration for shares.[96] The primary purpose of this section was to protect against fraud those creditors who do not have the opportunity to look behind the balance sheet.[97] Another stated purpose of the provision was to protect shareholders who had paid for their shares with money or tangible property against dilution of their investment.[98] While this section was taken without substantial amendment from the 1959 version of the Model Act, it is now outdated and should be amended. The section ignores the fact that many different types of consideration, including promissory notes and contracts for future services, may have value to the corporation. This is a matter for the discretion of the board. Also, because its provisions are so easily circumvented, the section as it now exists fails to prevent fraud.[99] The RMBCA takes a new approach and recognizes that there are many types of benefits for which a corporation should be empowered to issue stock.[100] Section 6.21 of the RMBCA provides that shares may be issued in exchange for "consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation." This leaves the determination of the value of offered consideration to the discretion of the board of directors. In most instances, the board of directors is in the best position to make this decision. Of course, if there is fraud or deceit, the action would be subject to challenge as a breach of fiduciary duty. This RMBCA formula is functionally sound.

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93. MISS. CODE ANN. § 79-3-35 (1972).

94. *Id.*

95. *Id.* The Mississippi Constitution also provides that "transportation corporations" may issue stock only in exchange for money, labor done or property. MISS. CONST. art. VII, § 196.

96. MISS. CODE ANN. § 79-3-35 (1972).

97. MODEL BUS. CORP. ACT ANN. 2d § 19 official comment (1971).

98. *Id.*

99. Corporations will often issue a bonus or an advance of salary to an employee and allow him to use the funds to purchase shares. Similarly, a corporation may lend money (subject to the prohibitions of MISS. CODE ANN. § 79-3-89 (1972)) to a prospective shareholder and allow that person to purchase shares with the proceeds of the loan.

100 . MODEL BUS. CORP. ACT ANN. 3d § 6.21 official comment (1986).

4. *Dividends, Repurchases and Other Distributions*

Another major function of the legal capital structure is to protect creditors and senior shareholders against excessive distributions of company assets to shareholders of the corporation, either in the form of dividends or repurchases. Whether a corporation may pay a dividend or make any distribution usually depends upon the law of the state of incorporation. Most states which adopt traditional concepts of legal capital adhere to the same language.

In order to understand fully the legal capital restrictions on distributions to shareholders, one must understand the meaning of terms such as par value, stated capital, surplus, capital surplus and earned surplus. Par value, as discussed above, is an arbitrary dollar figure assigned to a class of stock. Shares with par value may not be sold for less than that price.[101] Stated capital is an amount derived from the multiplication of par value by the number of shares outstanding, plus the sale price of all no-par shares (less any amount transferred to surplus), plus any amount transferred to stated capital by the board of directors.[102] Surplus is usually defined as the excess of net assets over stated capital.[103] Surplus consists of earned surplus and capital surplus.[104] Earned surplus is that portion of surplus which represents the profits or earnings of the corporation which have not been distributed to shareholders.[105] Capital surplus, the unearned surplus of the company,[106] usually consists of amounts paid for stock in excess of par.[107] Other surplus may result from contributions or revaluation of assets.[108] These concepts are important to the dividend and repurchase restrictions in the Mississippi provisions as well as most other states' current law. Most states follow the general rule that

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101. MISS. CODE ANN. § 79-3-27 (1972 & Supp. 1986).

102. MISS. CODE ANN. § 79-3-3(k) (1972 & Supp. 1986); W. CARY & M. EISENBERG, *supra* note 24, at 809. For example, if there are 1000 shares of $5.00 par value shares outstanding, stated capital is $5000.00.

103. MISS. CODE ANN. § 79-3-3(l) (1972 & Supp. 1986); W. CARY & M. EISENBERG, *supra* note 24, at 809.

104. W. CARY & M. EISENBERG, *supra* note 24, at 809.

105. MISS. CODE ANN. § 79-3-3(m) (1972 & Supp. 1986); W. CARY & M. EISENBERG, *supra* note 24, at 809.

106. MISS. CODE ANN. § 79-3-3(n) (1972 & Supp. 1986); W. CARY & M. EISENBERG, *supra* note 24, at 809.

107. W. CARY & M. EISENBERG, *supra* note 24, at 809.

108. Generally accepted accounting principles adhere to the representation of assets at historical cost. However, when a corporation's real estate increases in value, the corporation may want to "write up" the asset on the left-hand side of the balance sheet, thus creating a surplus on the right-hand side. In Randall v. Bailey, 23 N.Y.S.2d 173 (Sup. Ct. 1940), *aff'd*, 288 N.Y. 280, 43 N.E.2d 43 (1942) the court upheld a dividend distribution based on this "revaluation surplus."

dividends may be paid only to the extent of earned surplus,[109] or perhaps to the extent of surplus.[110] The policy surrounding dividend limitations is that once money or property is contributed to the corporation, it should remain in the corporation as a protection for creditors and senior shareholders.[111] These restrictions, while obsolete, are still very much alive in the Mississippi Business Corporation Law.

a. Dividend Restrictions

When the Mississippi Legislature adopted the dividend provisions for the Mississippi Act, it deviated substantially from the 1959 version of the Model Act. The Mississippi Legislature adopted the Model Act formulations in sections 79-3-83 and -85,[112] but also adopted another section, 79-3-87,[113] which complicates and confuses the Mississippi version.

Section 79-3-83 provides that dividends of cash, property or its own shares may be paid by the corporation at the discretion of the board of directors unless the corporation is insolvent or the payment of the dividend would render the corporation insolvent[114] or unless there is a provision to the contrary in the articles of incorporation.[115] This section limits the amount of dividends of cash and property to the extent of unreserved and

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109. ALA. CODE § 10-2A-67 (1975); ALASKA STAT. § 10.05.204 (1962); ARIZ. REV. STAT. ANN. § 10-045 (1956); COLO. REV. STAT. § 7-5-110 (Supp. 1985); CONN. GEN. STAT. ANN. § 33-356 (b) (West 1983); FLA. STAT. ANN. § 607.137 (West 1977 & Supp. 1986); GA. CODE ANN. § 14-2-90 (1982); IDAHO CODE § 30-1-45 (1980); IND. CODE ANN. 23-1-2-15 (Burns 1984); KY. REV. STAT. ANN. § 271A.225 (Baldwin 1983); ME. REV. STAT. ANN. tit. 13A, § 515 (1964); NEB. REV. STAT. § 21-2043 (1983); N. H. REV. STAT. ANN. § 293-A:45 (Supp. 1985); N. M. STAT. ANN. § 53-11-44 (Supp. 1983); N.D. CENT. CODE § 10-19.1-92 (1985); OR. REV. STAT. § 57.216 (1985); R.I. GEN. LAWS § 7-1.1-40 (1985); S.C. CODE ANN. § 33-9-150 (Law. Co-op. Supp. 1985); S.D. COMP. LAWS ANN. § 47-3-71 (1983); TENN. CODE ANN. § 48-1-511 (1984); TEX. REV. CIV. STAT. ANN. art. 2.38 (Vernon 1980); UTAH CODE ANN. § 16-10-41 (1953); VT. STAT. ANN. tit. XI § 1889 (1984); WASH. REV. CODE ANN. § 23A.08.420 (Supp. 1986); W. VA. CODE § 31-1-99 (1982); WIS. STAT. ANN. § 180.38 (West 1957 & Supp. 1986); WYO. STAT. § 17-1-139 (1977).

110. ARK. STAT. ANN. § 64-402 (1980); DEL. CODE ANN. tit. 8, § 170 (1983); D.C. CODE ANN. § 29-340 (1981); HAWAII REV. STAT. § 416-91 (Supp. 1984); ILL. ANN. STAT. ch. 32, § 9.10 (Smith-Hurd 1985); IOWA CODE ANN. § 496A.41 (West 1962); KAN. STAT. ANN. § 17-6420 (1981); LA. REV. STAT. ANN. § 12:63 (West 1969); MD. CORPS. & ASS'NS. CODE ANN. § 2-309 (1985); MICH. COMP. LAWS ANN. § 450.1351 (West 1973); MO. ANN. STAT. § 351.220 (Vernon 1966); NEV. REV. STAT. § 78.290 (1983); N.J. STAT. ANN. § 14A:7-14 (West 1969); N.Y. BUS. CORP. LAW § 510 (McKinney 1963 & Supp. 1986); N.C. GEN. STAT. § 55-50 (1982); OHIO REV. CODE ANN. § 1701.33 (Baldwin 1979 & Supp. 1985); OKLA. STAT. ANN. tit. 18, § 1.133 (West 1986); PA. STAT. ANN. tit. 15, § 1702 (Purdon 1967).

111. W. CARY & M. EISENBERG, *supra* note 24, at 805.

112. MISS. CODE ANN. §§ 79-3-83, 79-3-85 (1972 & Supp. 1986); MODEL BUS. CORP. ACT ANN. 2d § 45-46 (1971).

113. MISS. CODE ANN. § 79-3-87 (1972 & Supp. 1986).

114. MISS. CODE ANN. § 79-3-83 (1972 & Supp. 1986). The term insolvent is defined in the Act to mean the "inability of a corporation to pay its debts as they become due in the ordinary course of business." MISS. CODE ANN. § 79-3-3(o) (1972 & Supp. 1986).

115. MISS. CODE ANN. § 79-3-83 (1972 & Supp. 1986).

unrestricted[116] earned surplus,[117] provides for the payment of dividends from depletion reserves of "wasting asset" corporations if the articles so provide, and provides for the payment of stock dividends from any surplus.[118] With respect to "stock dividends," the section states that share dividends may be paid with either treasury or unissued shares.[119] Unissued shares may be issued as a dividend to the extent of any unreserved and unrestricted surplus.[120] If unissued shares are used, an amount equal to par value must be transferred to stated capital, or an amount adopted by the board of directors if the shares have no par value.[121]

Section 79-3-85 provides that a corporation may make distributions in cash or property to its shareholders from its capital surplus if (1) the corporation is not insolvent and the distribution would not render the corporation insolvent, (2) the articles of incorporation so provide or the shareholders approve by a two-thirds vote, (3) all cumulative dividends are paid, (4) the distribution will not reduce the net assets of the corporation below the total preferential amount payable to holders of preference shares upon voluntary liquidation and (5) the distribution is identified as a distribution from capital surplus at the time of the payment.[122] So end the provisions parallel to the Model Act.[123]

To the Model Act dividend provision, the Mississippi Legislature added section 79-3-87, which provides that notwithstanding anything else, the board of directors may pay "cash dividends" only from unrestricted and unreserved earned surplus.[124] This section immediately follows the section which provides for distributions from capital surplus if the articles or shareholders allow it. The reason for this provision and its effect are still unclear. Other authors speculate that it may have resulted from "a perceived weakness" in the Model Act provisions limiting distributions to shareholders.[125] The section could be construed to mean that a corporation may not rely on section 79-3-85 to make a cash dis-

116. The term "unreserved and unrestricted" is not defined in the Mississippi statute. MISS. CODE ANN. § 79-3-83 (1972 & Supp. 1986).

117. *Id.*

118. *Id.* A wasting asset corporation is one which is involved in the exploitation of natural resources which are subject to depletion allowances. H. HENN & J. ALEXANDER, *supra* note 18, at 897 n.62; MODEL BUS. CORP. ACT ANN. 2d § 45(b) (1971).

119. MISS. CODE ANN. § 79-3-83 (1972 & Supp. 1986).

120. *Id.*

121. *Id.* Remember that even no-par shares may not be issued for consideration of less than one dollar. MISS. CODE ANN. § 79-3-33 (1972).

122. MISS. CODE ANN. § 79-3-85 (1972 & Supp. 1986).

123. See *infra* text accompanying notes 124-28.

124. MISS. CODE ANN. § 79-3-87 (1972 & Supp. 1986).

125. Hodge and Perry, *supra* note 71, at 376-77.

tribution to shareholders from capital surplus.[126] If this is true, any such payment would be illegal, and the directors and shareholders might incur personal liability for the illegal distribution.[127] Further, the section may be read to prevent distributions of property as well as cash, and if interpreted in this manner, the section would prohibit certain types of divisive reorganizations permitted under section 79-3-85.[128]

b. Repurchase Restrictions

Mississippi's repurchase provision, section 79-3-9, states that a Mississippi corporation has the right to repurchase its own shares. Such purchases may be made, however, only to the extent of unreserved and unrestricted earned surplus. Like section 79-3-85, section 79-3-9 provides that repurchases may be made to the extent of capital surplus if the articles so provide or if such repurchase is approved by a two-thirds vote of its shareholders.[129] Because of this section, the rigid restrictions of section 79-3-87 may be avoided. Using 79-3-9, a corporation may accomplish a distribution from capital surplus by repurchasing a certain number of shares from its shareholders pro rata.

One major problem caused by the restriction of share repurchases occurs in the area of repurchase agreements used to protect ownership interests in close corporations. The problems center around the corporation's legal ability to comply with its contractual obligations to its shareholders. Often corporations enter into agreements to repurchase shares upon the occurrence of a certain event, such as the death or disability of the shareholder. If so, the corporation must have enough legal capital (earned surplus or capital surplus if allowed) to repurchase the shares. If the problem is not anticipated, the corporation may have an obligation and a need to repurchase shares but find that such action is illegal at the time of the repurchase.

If a dividend is paid or a repurchase is effected without the proper "legal capital," the directors who assent to such action may be liable to the corporation for the illegal portion of the distribu-

126. Hodge and Perry, *supra* note 71, at 377.

127. MISS. CODE ANN. § 79-3-91 (1972 & Supp. 1986).

128. Hodge and Perry, *supra* note 71, at 378.

129. MISS. CODE ANN. § 79-3-9 (1972 & Supp. 1986).

tion.[130] Further, any shareholder who receives the distribution will be liable for contribution to the corporation for the amount received if the shareholder knew of the illegality of the distribution or repurchase.[131]

In keeping with its rejection of the concept of par value, the RMBCA rejects the legal capital approach entirely.[132] It places the decision regarding distributions to shareholders in the hands of the board of directors.[133] Distributions are allowable (legal) unless, immediately after the distribution or repurchase, the corporation would be unable to pay its debts as they become due or unless the corporation's assets fail to exceed its liabilities plus an amount necessary to meet the liquidation preferences of any class of stock senior to that receiving the distribution.[134] The RMBCA also provides that a corporation is not bound by generally accepted accounting principles in its determination, but may rely on the fair market value of its assets at the time of the distribution or repurchase.[135] Because it relies on current values and solvency to determine whether and to what extent a corporation may make distributions to its shareholders,[136] the RMBCA is an improvement on traditional dividend restriction statutes, like the Mississippi Act, which rely on historical events and arbitrary formulae to determine whether a corporation may legally distribute money or property to its shareholders. The RMBCA approach is an effective, realistic method of dividend and repurchase restriction and should be adopted in Mississippi.

B. Flexible Capital Structure

The Mississippi Constitution and the Mississippi Statute prohibit Mississippi corporations from issuing non-voting common stock.[137] Section 194 of the Mississippi Constitution entitles all shares to vote cumulatively in the election of directors, but provides an exemption for preferred stock.[138] Therefore, the section

130. MISS. CODE ANN. § 79-3-91 (1972 & Supp. 1986). That section also provides that any director present at the meeting when the action is approved shall be deemed to have assented to the transaction unless his dissent is entered in the minutes of the meeting or unless he files a written dissent with the secretary of the corporation before or immediately after the adjournment of the meeting. *Id.* The section also provides a defense for directors who rely in good faith upon the regular books and records of the corporation which are represented to be correct by the president, the officer of the corporation in charge of the books and records or a certified public accountant. *Id.*

131. *Id.*

132. MODEL BUS. CORP. ACT ANN. 3d § 6.40 (1986).

133. *Id.*

134. *Id.*

135. *Id.*

136. MODEL BUS. CORP. ACT ANN. 3d § 6.40 (1986).

137. MISS. CONST. art. VII, § 194; MISS. CODE ANN. § 79-3-27 (1972 & Supp. 1986).

138. MISS. CONST. art. VII, § 194.

is interpreted to prevent the issuance of any common shares with limited voting rights.[139] The statute, section 79-3-27, follows this interpretation and apparently provides that voting rights can be limited only with respect to preferred shares.[140] This prohibition is particularly unfortunate because issuance of non-voting common stock is one of the best methods to allocate rights and preferences among shareholders in closely held corporations.[141] In many closely held corporations, control can be effectively allocated among the shareholders by issuing different classes of common shares and providing that each class of stock is entitled to elect a certain number of directors.[142] In many cases, corporations are formed under the laws of other jurisdictions in order to take advantage of more flexible capital structure options. Mississippi should amend the constitution and the statute in favor of a completely flexible capital structure.

The RMBCA provides the type of flexibility Mississippi needs in the statute. Section 6.01 authorizes a corporation to issue shares in any classes and provides almost unlimited flexibility in structuring a corporation to meet the needs and desires of the shareholders.[143] Further, the RMBCA completely abandons the terms "common" and "preferred" with respect to shares.[144] Under the RMBCA, a corporation may issue as many classes of shares as it deems appropriate and may call them anything it likes.[145] The traditional terms may be used, but are unnecessary. The drafters indicate that the terms "common" and "preferred" may be misleading because common stock may be created with significant preferences and preferred may be subordinate to common in certain circumstances.[146] The RMBCA provides significant advantages to corporate counsel in planning and creating the capital

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139. *See supra* text accompanying notes 35-42.

140. MISS. CODE ANN. § 79-3-27 (1972 & Supp. 1986) provides that "[t]he articles of incorporation may limit or deny the voting rights of or provide special voting rights for the shares of any class *or* preferred stocks to the extent not inconsistent with the provisions of this chapter." (emphasis added). Apparently, the statute was designed to allow only non-voting preferred shares and not non-voting common shares. The "or" is apparently a typographical error and should be "of."

141. O'NEAL, CLOSE CORPORATIONS, LAW AND PRACTICE, §§ 2.15, 3.17-20 (1971) (provides advice and examples of how non-voting common shares can be used to allocate control in close operations); PAINTER, CORPORATE AND TAX ASPECTS OF CLOSELY HELD CORPORATIONS § 3.8 (1981).

142. Ringling Brothers-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (1947); Lehrman v. Cohen, 43 Del. Ch. 222, 222 A.2d 800 (Sup. Ct. 1966); PAINTER, *supra* note 141, at § 3.8.

143. MODEL BUS. CORP. ACT ANN. 3d § 6.01 (1986).

144. *Id.*

145. *Id.*

146. *Id.* at § 6.01 official comment.

structure for closely held corporations and should be adopted in Mississippi following constitutional amendment.

C. *Shareholders*

1. *Voting*

Mississippi's provisions relating to shareholder voting rights need amendment.[147] This section of the Article will address shareholder voting problems relating to the election of directors and the approval of changes fundamental to corporate existence under Mississippi law.

a. *Quorum and Voting Requirements*

Quorum requirements are designed to allow for adequate representation of shareholders before any action is taken at a corporation's shareholders meeting.[148] In Mississippi, a majority of the shares entitled to vote on a matter constitutes a quorum unless the articles of incorporation provide otherwise.[149] The Mississippi version also contains a provision which prohibits the articles from reducing the number of shares necessary to constitute a quorum below one-third.[150] Section 79-3-61 also sets out the voting requirements for shareholder action: unless the articles of incorporation or bylaws provide for a higher number and if a quorum is present, the affirmative vote of a majority of those shares represented at the meeting constitutes approval of the action voted upon.[151]

This section is not at all unusual, but a more modern statute has developed.[152] From a modern perspective, the Mississippi statute has a major flaw. The section does not provide any automatic protection for superquorum or supermajority voting provisions in the articles of incorporation. A well drafted three-fourths supermajority voting or quorum requirement in case of a merger or consolidation inserted in the articles of a Mississippi corporation may be amended by a two-thirds vote of the shareholders unless the articles require a three-fourths vote to amend that provision of the articles. Although clearly authorized in the statute,

147. *See also infra* text accompanying notes 148-62.

148. Notice is also important to protect shareholders in the same situation. The notice and quorum requirements work together.

149. MISS. CODE ANN. § 79-3-61 (1972).

150. *Id.*

151. *Id.*

152. *See* FLA. STAT. ANN. § 607.094 (West 1977 & Supp. 1986); GA. CODE ANN. § 14-2-116 (1982); MICH. COMP. LAWS ANN. § 450.1415 (West 1973 & Supp. 1985); N.J. STAT. ANN. §§ 14A:5-9, 14A:5-11 (1969); N.Y. BUS. CORP. LAW §§ 608, 614 (McKinney 1963); N.C. GEN. STAT. § 55-65 (1982); R.I. GEN. LAWS § 7-1.1-30 (1985); TEX. REV. CIV. STAT. ANN. § 2.28 (Vernon 1980); *see also* MODEL BUS. CORP. ACT ANN. 3d § 7.27 (1986).

an amendment to the articles to remove a supermajority voting requirement is not in accord with the intent of the drafters of the articles. Automatic protection of supermajority voting and quorum requirements should be a priority in any statutory revision.

The RMBCA takes a new approach to the entire area of quorum and voting problems by providing simply that unless the articles provide otherwise, a quorum is a majority of the shares entitled to vote on the matter.[153] The section allows the articles to increase the number required for a quorum to unanimity or decrease the number to as few as the incorporators or shareholders desire.[154] The one-third minimum was deleted from the RMBCA because it was "thought to be unreasonably confining in certain situations."[155] The section also provides for a new method for determining the result of a shareholder vote. Instead of treating abstaining shares as "no" votes as is done in the Mississippi Act, the RMBCA provision provides that a matter is approved by the shareholders if there are more votes cast in favor of the action than votes cast against the action.[156] Therefore, true abstention is available instead of every abstention being treated as a "no" vote. The RMBCA also provides automatic protection to any supermajority provisions contained in the articles of incorporation.[157] Section 7.27 requires that any amendment of a provision providing supermajority voting or quorum requirements be approved by the same supermajority margin.[158] The RMBCA provides that if there is a supermajority voting or quorum provision in the articles, the quorum to meet and vote required to change that provision must be at least as great as the supermajority vote or quorum it sets.[159] The RMBCA approach solves several shareholder voting problems which exist under the Mississippi Act. First, corporations with a large number of shareholders occasionally find it difficult to procure enough proxies to hold the required shareholders meetings. The RMBCA provision which allows the articles of incorporation to set a lower than one-third quorum provides flexibility for these larger corporations. The RMBCA deals with another shareholder apathy problem by treating shares which do

153. MODEL BUS. CORP. ACT ANN. 3d § 7.25 (1986).

154. *Id; see* MODEL BUS. CORP. ACT ANN. 3d § 7.25 official comment (1986).

155. The example mentioned by the reporter in the comment to section 7.25 of the RMBCA is "where a class of shares with preferential rights is given a limited right to vote that may be exercisable only rarely." MODEL BUS. CORP. ACT ANN. 3d § 7.25 official comment 5 (1986).

156. MODEL BUS. CORP. ACT ANN. 3d § 7.25 (1986).

157. *Id.* at § 7.27.

158. *Id.*

159. *Id.* For example, if the articles provide that any merger must be approved by two-thirds of the outstanding shares, regardless of class, any proposal to amend that section of the articles would have to be approved by a two-thirds vote of the outstanding shares, regardless of class.

not vote at a meeting, or in some cases which do not appear at a meeting, as abstentions rather than "no" votes, as the current law does. These two aspects of the RMBCA help prevent the detrimental effects of shareholder apathy. Further, the RMBCA shareholder voting provisions provide automatic protection for superquorum and supermajority voting requirements. The RMBCA shareholder voting sections should be adopted in Mississippi.

b. *Election of Directors*

One important item to be addressed in a revision of the Mississippi Business Corporation Law is the issue of cumulative voting in the election of directors. The purpose of cumulative voting is to give minority shareholders the opportunity to participate in the management of the corporation through the mechanism of board representation.[160] Currently, the Mississippi Constitution mandates that all classes of common stock have cumulative voting rights in the election of directors. Without a change in the constitution, cumulative voting will continue in every Mississippi corporation.[161] If the constitution is amended to remove mandatory cumulative voting, the statute may then be amended to allow for straight voting in the election of directors if the corporation so desires.[162] Mississippi will then have to choose one of four basic possibilities regarding the status of cumulative voting under Mississippi law: (1) make cumulative voting *mandatory* by statute; (2) adopt *presumptive* cumulative voting, that is, provide that all shares of voting stock vote cumulatively in the election of directors unless the articles of incorporation provide otherwise; (3) adopt *permissive* cumulative voting, that is, provide that cumulative voting for the election of directors exists only if expressly reserved to the shareholders in the articles of incorporation; or (4) prohibit cumulative voting in the election of directors.

There has in the past been a great deal of scholarly debate about the advantages and disadvantages of mandatory cumulative voting, but the debate has largely died out because most state stat-

160. Campbell, *The Origin and Growth of Cumulative Voting for Directors*, 10 Bus. Law. 3, 15 (April 1955). The theory is based on John Stuart Mill's REPRESENTATIVE GOVERNMENT. Mill, Representative Government, in 43 GREAT BOOKS OF THE WESTERN WORLD 327 (R. Hutchins ed. 1952). The idea was that the minority should be represented in any deliberative body. *Id.* at 3-4.

161. *See supra* text accompanying notes 27-34.

162. The Mississippi statute provides that directors must be elected by cumulative voting. MISS. CODE ANN. § 79-3-63 (1972).

utes are now permissive.[163] The Mississippi Legislature may now be compelled to deal with the issue in some detail; therefore, this Article will briefly explore some of the arguments for and against cumulative voting.

Arguments in favor of cumulative voting include the following: first, owners of a corporation should have the same right to representation on the board of directors, which controls the corporation, as any other group in our society has a right to be represented in governmental bodies.[164] A second argument in favor of cumulative voting is that it is the only device available to insure minority representation.[165] A related argument is that cumulative voting allows minority shareholders to express their views before the entire board of directors, whereas under straight voting the minority has no voice at the board level.[166] Proponents of cumulative voting argue further that the presence of minority directors will serve to make the directors more sensitive to the

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163. Most state statutes allow the corporation either to choose cumulative voting in the charter or opt out of cumulative voting in the charter. Only 16 states still have mandatory cumulative voting. CAL. CONST. art. 12, § 1, Note 33; MO. CONST. art. 11, § 6; S.D. CONST. art. XVII, § 5; ARIZ. REV. STAT. ANN. § 10-033(D) (1956); ARK. STAT. ANN. § 64-219 (1980); CAL. CORP. CODE § 708 (West 1977 & Supp. 1986); HAWAII REV. STAT. § 416-74 (1976); IDAHO CODE § 30-1-33(d) (Supp. 1986); KAN. STAT. ANN. § 17-6504 (1981); KY. REV. STAT. ANN. § 271A.165 (Baldwin 1983); MISS. CODE ANN. § 79-3-63 (1972); MONT. CODE ANN. § 35-1-506 (1985); NEB. REV. STAT. § 21-2033 (1983); N.D. CENT. CODE § 10-19.1-39 (1985); OHIO REV. CODE ANN. § 1701.55(c) (Baldwin 1979); S.D. CODIFIED LAWS ANN. § 47-5-6 (1983); W. VA. CODE § 31-1-93 (1982); WYO. STAT. ANN. § 17-1-130 (1977). Only 9 states have presumptive cumulative voting. ALASKA STAT. § 10.05.162 (1985); COLO. REV. STAT. § 7-4-116 (1973); ILL. ANN. STAT. ch. 32, § 7.40 (Smith-Hurd 1985); MINN. STAT. ANN. § 302A.215 (West 1985); PA. STAT. ANN. tit. 15, § 1505 (Purdon Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 2.29(D) (Vernon 1980); S. C. CODE § 33-11-200 (Supp. 1985); WASH. REV. CODE ANN. § 23A.08.300 (Supp. 1986); N.C. GEN. STAT. § 55-67 (1982 & Supp. 1985).
Twenty-five jurisdictions now have permissive cumulative voting. ALA. CODE § 10-2A-53(d) (1975); CONN. GEN. STAT. ANN. § 33-325 (West 1983); DEL. CODE ANN. tit. 8 § 214 (1983); D.C. CODE ANN. § 29-327(d) (1981); FLA. STAT. ANN. § 607.097(4) (West 1977); GA. CODE ANN. § 14-2-117(d) (Supp. 1986); IND. CODE ANN. § 23-1-2-9(k) (Burns Supp. 1986); IOWA CODE ANN. § 496A.32 (West Supp. 1986); LA. REV. STAT. ANN. § 12:75 (West 1969 & Supp. 1986); ME. REV. STAT. ANN. tit. 13-A, § 622 (1964); MD. CORPS. & ASS'NS. CODE ANN. § 2-104(b)(7) (1985); MICH. COMP. LAWS ANN. § 450.1451 (West 1973); NEV. REV. STAT. § 78.360 (1983); N.H. REV. STAT. ANN. § 293-A:33 (Supp. 1986); N.J. STAT. ANN. § 14a:5-24 (West 1969 & Supp. 1986); N.M. STAT. ANN. § 53-11-33 (Supp. 1986); N.Y. BUS. CORP. LAW § 618 (McKinney 1986); OKLA. STAT. ANN. tit. 18 § 1.68(c) (West 1951); OR. REV. STAT. 57.170(4) (1985); R.I. GEN. LAWS § 7-1.1-31 (1985); TENN. CODE ANN. § 48-1-712 (1984); UTAH CODE ANN. § 16-10.31 (1953); VT. STAT. ANN. tit. § 1879 (1984); VA. CODE § 13.1-669 (Supp. 1985).

164. Steadman and Gibson, *Should Cumulative Voting for Directors be Mandatory? – A Debate*, 11 BUS. LAW. 9, 16 (Nov. 1955); *see also* Campbell, *supra* note 160, at 15. This idea comes directly from John Stuart Mill's theory of representative government. Mill, *Representative Government*, in 43 GREAT BOOKS OF THE WESTERN WORLD 327 (R. Hutchins ed. 1952). One authority has said, "Cumulative voting is so obviously in accord with our basic political philosophy of group representation and the party system that it is difficult to understand the legislature's repeated rejection of it . . . ." Young, *The Case for Cumulative Voting*, 1950 WIS. L. REV. 49.

165. Steadman and Gibson, *supra* note 136, at 16-17; *see also* Campbell, *supra* note 160, at 15.

166. Young, *supra* note 164, at 55; Campbell, *supra* note 160, at 15; Steadman and Gibson, *supra* note 164, at 17.

wishes of all of the shareholders[167] and will operate to make board meetings a forum for all shareholders, not just the majority.[168]

A fifth argument is that the presence of minority interests on the board "keeps the game more honest."[169] The argument is that the mere existence of the right to vote cumulatively and elect minority representatives may be enough to curb management excesses and abuses.[170] The argument continues that cumulative voting not only curbs mismanagement, but also serves as an incentive for better performance by the board.[171] At least one authority has argued that since directors elected by cumulative voting are independent in fact, and not dependent on management, they can handle certain board responsibilities better than non-cumulatively elected directors.[172]

A final argument in favor of cumulative voting is that it stimulates the individual shareholder's interest in the corporation because his vote is more effective. Increased shareholder interest in turn strengthens management and the corporation because it encourages other shareholders to buy the stock.[173]

Opponents of cumulative voting also have a number of arguments in their favor, the first being that the proponents of cumulative voting fail to recognize the difference between legislative and executive functions when they apply Mill's representative government theory[174] to corporations. The opponents contend that the function of the board is executive in nature and is analogous to the President and his cabinet, which is made up of the majority party. At this level, where policy is made, it is essential that the board of directors function as a team and all have basically the same theory of corporate management.[175] A minority voice in this setting would disrupt the smooth workings of the corporation. Therefore, the opponents argue, the minority shareholder

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167. Steadman and Gibson, *supra* note 164, at 17. Steadman argues that minority directors will have a "therapeutic effect" on management. *Id.*

168. Young, *supra* note 164, at 56.

169. Sobieski, *In Support of Cumulative Voting*, 15 BUS. LAW. 316, 325 (1960) (quoting an investment adviser).

170. Young, *supra* note 164, at 50; Campbell, *supra* note 160, at 15.

171. Young, *supra* note 164, at 54.

172. Sobieski, *supra* note 169, at 327.

173. *Id.* at 328-29. Sobieski also argues that the strengthening of the corporate structure also strengthens the economy as a whole. *Id.* Steadman and Gibson, *supra* note 164, at 17; Young, *supra* note 164, at 55-56.

174. Mill, *Representative Government*, in 43 GREAT BOOKS OF THE WESTERN WORLD 327 (R. Hutchins ed. 1952).

175. Sturdy, *Mandatory Cumulative Voting: An Anarchronism*, 16 BUS. LAW. 550, 552-54 (1961); Axley, *The Case Against Cumulative Voting*, 1950 WIS. L. REV. 278 (1950); Steadman and Gibson, *supra* note 164, at 26. Gibson argues that Mill's essay applies only to government and not to corporations and further that minority shareholders should not be represented because they are minority shareholders. *Id.* at 22.

should be heard only at the shareholders meeting.[176] In response to the argument that cumulative voting is the only way a minority shareholder can gain board representation, one author suggests that the majority may invite such a shareholder onto the board in an effort to achieve harmony among the directors and shareholders.[177]

In response to the argument that cumulative voting makes shareholders more interested in the affairs of the corporation, opponents argue that there are better ways to accomplish this goal, such as organizing a shareholders committee charged with the duty to keep shareholders informed about corporate matters[178] and to make more information available to shareholders on a regular basis.[179] One author, however, wonders if there is really any way to stimulate the "average" shareholder's interest in corporate affairs. Usually, the average shareholder is interested only in the annual or quarterly dividend.[180]

Those who oppose mandatory cumulative voting argue that minority representation may also lead to factionalism on the board because the minority shareholder may be representing only a special interest group rather than the shareholders as a group.[181] A majority of the board may tend to unite behind management in the face of criticism of management by a belligerent board member. The free flow of information might then stop because the majority would not wish to criticize management in front of the minority member for fear he might use it against the management in public.[182]

Further, minority representation, or special interest group representation, is not necessary because each director has a fiduciary duty to represent all the shareholders and act in the best interest of the corporation at all times.[183] If a director breaches his duty to the corporation, a shareholder has the right to bring

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176. Comment, *Cumulative Voting – Advisability of Retaining the Cumulative Voting Provision in the Pennsylvania Constitution*, 8 VILL. L. REV. 391, 398 (1963).

177. Sturdy, *supra* note 175, at 568. This author suggests that it is more likely that cumulative voting is the *only* way a minority shareholder can get on the board in a closely held corporation. *Id.*

178. Axley, *supra* note 175, at 281.

179. Sturdy, *supra* note 175, at 569.

180. Comment, *supra* note 176, at 398.

181. Steadman and Gibson, *supra* note 164, at 26.

182. Sturdy, *supra* note 175, at 553-54. Sturdy quotes Guy Witter of Dean Witter and Co.:

> Our past experience has been, and present attitude is, that benefits derived from cumulative voting are the exception and seldom work to the advantage of either the corporation or its stockholders. More frequently corporations that permit cumulative voting are the targets for professional troublemakers who are not interested in the welfare of the corporation or its stockholders but whose sole interest is in deriving some personal benefit.

Id. at 556.

183. Steadman and Gibson, *supra* note 164, at 26.

a derivative suit against the directors. Therefore, cumulative voting is not necessary for the protection of the minority.[184] One author suggests that directors elected cumulatively represent the alter ego of the minority, but that directors who are elected non-cumulatively by the majority are under a higher standard of care in favor of minority shareholders because while the minority did not directly elect them, the board has charge of the minority's interests.[185] Civil liability may, of course, be imposed on a director who fails to act in the best interest of the corporation.[186]

Another reason that cumulative voting is disfavored by some is the fear that it may be used by a competitor to gain a seat on the board and thereby learn corporate secrets.[187] Another fear is that cumulative voting may lead to corporate blackmail, or at the least, the purchase of votes. Because shareholders are not compelled to disclose their reasons for voting a certain way, the purchase of votes may never be revealed.[188]

A final argument against cumulative voting is that it turns the election of directors into a numbers racket. In an early Pennsylvania case, a minority of shareholders elected the majority of directors because the majority failed to spread its votes correctly to elect a majority of directors. The court upheld the election.[189] The problem is that there is no way to know before the meeting how many shares will vote.[190]

Opponents of cumulative voting offer several remedies to unhappy minority shareholders. The simplest of these is for the minority shareholders to sell their shares. A shareholder who is displeased with management may be better served to sell his shares and invest in a corporation which fits his ideals rather than to upset the corporation and hurt its profitability.[191] Another remedy

184. Comment, *supra* note 176, at 398.

185. Mattes, *The Burden of the Corporate Director Elected Noncumulatively*, 63 CAL. L. REV. 463, 464-65 (1975).

186. *Id.*

187. Axley, *supra* note 175, at 283. Mississippi law prohibits "any person who is engaged or interested in a competing business" from sitting on a corporation's board unless a majority of the shares approve. MISS. CODE ANN § 79-3-67 (Supp. 1985).

188. Axley, *supra* note 175, at 283.

189. Pierce v. Commonwealth, 104 Pa. St. Rep. 150 (1883), *cited in* Sturdy, *supra* note 174, at 565; *see also* Dulin v. Pacific Wood & Coal Co., 103 Cal. 357, 35 P. 1045 (1894), *reh'g denied*, 103 Cal. 1193, 37 P. 207 (1894); Schwartz v. State *ex rel.* Schwartz, 61 Ohio St. 497, 56 N.E. 201 (1900); Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N.E. 17 (1903); *In re* P.B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S.W. 502 (1907); State *ex rel.* Price v. DuBrul, 100 Ohio St. 272, 126 N.E. 87 (1919). *But see* Zachary v. Milin, 294 Mich. 622, 293 N.W. 770 (1940); State *ex rel.* David v. Dailey, 23 Wash. 2d 25, 158 P.2d 330 (1945).

190. Sturdy, *supra* note 175, at 565-66. "This is not 'democracy' but merely roulette for very high stakes." *Id.* at 567.

191. Axley, *supra* note 175, at 279. Axley argues that most shareholders do not want a dissenter on the board to damage their investment. Therefore, why should the law require what intelligence says is not good. *Id.*

available to the minority is to attempt to gain control of the board by means of a proxy contest or a tender offer.[192] Also, a shareholder can sue derivatively if a director or the board has breached its fiduciary duties.[193] Opponents also argue that the effects of cumulative voting are so easily and often circumvented that cumulative voting rights are a misleading placebo to the minority shareholder.[194]

Cumulative voting may serve a valuable purpose in closely held corporations where the shareholders act more like partners, and these corporations should have the opportunity to choose cumulative voting.[195] Cumulative voting is not, however, healthy for all corporations, particularly those which have a large number of shareholders.[196] Therefore, Mississippi should abandon mandatory cumulative voting. As stated in the section of this Article dealing with constitutional amendment, mandatory cumulative voting is outdated and unnecessary.

If cumulative voting should not be mandatory, but should be available, the question is, then, whether the statute should be presumptive[197] or permissive.[198] The RMBCA takes the position that cumulative voting should be permissive,[199] and its approach is reasonable in view of the limited protection provided by cumulative voting today. Further, the plurality of jurisdictions have adopted a permissive approach, and there is some benefit to be gained in uniform laws.[200] Modern cases now recognize and enforce a fiduciary duty among shareholders in closely held corporations.[201] This duty is one of "utmost good faith and loyalty."[202]

192. Steadman and Gibson, *supra* note 164, at 30.

193. *Id.*

194. *Id.*

195. Some authorities argue that cumulative voting is not even needed in closely held corporations because the same or a more effective result can be reached by the use of shareholders agreements setting forth the rights of each shareholder. Sturdy, *supra* note 175, at 576. This is particularly true in light of the ways available to frustrate cumulative voting. These might include classification of the board of directors and staggering their terms, reducing the number of directors, appointing committees to carry out the functions of the board of directors and issuing more stock to other shareholders. Scott, *The Close Corporation in Contemporary Business*, 13 BUS. LAW. 741 (1958); Lebowitz, *Recent Developments in Texas Corporation Law – Part I*, 28 Sw. L.J. 641, 645 (1974); *see also* Comment, *Cumulative Voting – Removal, Reduction and Classification of Corporate Boards*, 22 U. CHI. L. REV. 751 (1955).

196. Sturdy, *supra* note 175, at 563-65. Sturdy quotes several case histories of problems caused by cumulative voting in public corporations. *Id. Cf.* Soderquist, *supra* note 10, at 195.

197. *See supra* text following note 162.

198. *Id.*

199. MODEL BUS. CORP. ACT ANN. 3d § 7.28(b) (1986).

200. *See supra* note 163.

201. *In re* Estate of Mihm, 345 Pa. Super. 1, 497 A.2d 612 (Pa. Super. Ct. 1985); Estate of Schroer v. Stamco Supply, Inc., 19 Ohio App. 3d 34, 482 N.E.2d 975 (1984); Joseph v. Shell Oil Co., 482 A.2d 335 (Del. Ch. 1984); Smith v. Atlantic Properties, Inc., 12 Mass. App. Ct. 201, 422 N.E.2d 798 (1981); Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 353 N.E.2d 657 (1976).

202. Wilkes, *supra* note 201, at 661 (quoting Cardullo v. Landau, 329 Mass. 5, 8, 105 N.E.2d 843 (1952)).

Coupled with the availability of cumulative voting, flexible capital structure and shareholders agreements, this duty should be sufficient to protect minority shareholders.

The RMBCA, however, has an undesirable feature. A portion of the voting statute provides that shares otherwise entitled to vote cumulatively may not do so unless the meeting notice or proxy statement so provides, or unless the shareholder who wishes to vote cumulatively gives 48 hours notice of his intent to vote cumulatively.[203] The stated purpose of this provision is to make sure that all the shareholders participating in the election of directors know what the rules are and to avoid the distortion which could result when cumulative voting is allowed.[204] The provision may itself lead to confusion because, if cumulative voting exists only where it is requested, the shareholders will not know whether cumulative voting will be employed until they arrive at the meeting. Further, lawyers must be prepared to handle an election in two ways until shortly before the meeting.[205] If cumulative voting for the election of directors is provided for in the articles of incorporation, then directors should always be elected by cumulative voting. Therefore, the permissive aspects of the RMBCA provision, section 7.28, should be adopted, but the provision in subpart (d) should be deleted. This would allow for cumulative voting for the election of directors at all times if the articles call for cumulative voting.

c. *Shareholder Approval of Fundamental Changes*

In all jurisdictions, the shareholders have the right to vote upon special transactions which change the fundamental nature or direction of the corporate entity.[206] These transactions, often called extraordinary transactions, include the sale, lease, or exchange of all or substantially all of the corporation's assets other than in the regular course of business, amendment to the articles of incorporation, merger, consolidation and dissolution.[207] The reason for allowing shareholder participation at this level is to allow the shareholders to prevent fundamental changes in the nature of their investment.[208] In Mississippi, such transactions require approval by the affirmative vote of two-thirds of the shares entitled to vote

203. MODEL BUS. CORP. ACT ANN. 3d § 7.28(d) (1986).
204. *Id.* at § 7.28(d) official comment.
205. *Cf.* Soderquist, *supra* note 10, at 195 n.6.
206. H. HENN & J. ALEXANDER, *supra* note 18, at 955-56.
207. *Id.* at 956.
208. *Id.* at 952.

on the proposal.[209] Half the states have now abandoned the statutory two-thirds majority provision in favor of a simple majority vote standard.[210] The Model Act rejected the two-thirds requirement in its 1969 revision and replaced it with a majority standard which could be altered by the articles of incorporation.[211] This change was due in part to the problem of shareholder apathy in large corporations[212] and partly to a growing belief that fundamental decisions should be made by the majority, not an arbitrary higher percentage.[213]

The RMBCA integrates the need of management for flexibility with the shareholders' need for protection by providing that when shareholders have a right to vote on extraordinary transactions, the transaction must be approved by a majority of the shares of each class entitled to vote thereon.[214] A corporation may include

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209. MISS. CODE ANN. §§ 79-3-157 (1972 & Supp. 1986) (sale of assets other than in the regular course of business), 79-3-117 (1972) (amendment of articles of incorporation), 79-3-147 (1972 & Supp. 1986) (merger or consolidation), 79-3-167 (1972 & Supp. 1986) (dissolution). Corporation attorneys considering a corporate combination or fundamental change should consult the Mississippi Shareholder Protection Act, MISS. CODE ANN. §§ 79-25-1 to -9 (Supp. 1986). The Mississippi Shareholder Protection Act provides supermajority voting requirements in certain "business combinations" as defined therein. *Id.* at § 79-25-5 (1985).

210. ARIZ. REV. STAT. ANN. §§ 10-059, 10-073, 10-079, 10-084 (1977); CAL. CORP. CODE §§ 152, 902, 904, 1001, 1101, 1105, 1201, 1900 (West 1977 & Supp. 1986); DEL. CODE ANN. tit. 8, §§ 242, 251, 271, 275 (1983); FLA. STAT. §§ 607.181, 607.221, 607.241 (1983); GA. CODE ANN. §§ 14-2-191, 14-2-212, 14-2-231, 14-2-273 (1982 & Supp. 1986); IDAHO CODE §§ 30-1-59, 30-1-73, 30-1-79, 30-1-84 (1980 & Supp. 1986); IND. CODE ANN. §§ 23-1-38-3, 23-1-38-4, 23-1-40-1, 23-1-40-3, 23-1-41-2 (Burns Supp. 1986); KAN. STAT. ANN. §§ 17-6602, 17-6701, 17-6801, 17-6804 (1981); KY. REV. STAT. ANN. §§ 271A.295, 271A.365, 271A.395 (Baldwin 1983); ME. REV. STAT. ANN. tit. 13A, §§ 805, 902, 1003 (1981); MICH. COMP. LAWS ANN. §§ 450.1611, 450.1703, 450.1753, 450.1804 (West 1973); MINN. STAT. ANN. §§ 302A.135, 302A.111(2)(e), 302A.613, 302A.631, 302A.661, 302A.721 (West 1985 & Supp. 1986); NEV. REV. STAT. §§ 78.390, 78.470, 78.565, 78.320 (1986); N.H. REV. STAT. ANN. §§ 293-A:59, 293-A:74, 293-A:80, 293-A:85 (Supp. 1985); N.J. STAT. ANN. §§ 14A:9-2, 14A:10-3, 14A:10-11, 14A:12-4 (West 1969 & Supp. 1986); N.C. GEN. STAT. §§ 55-100, 55-108, 55-112, 55-118 (1982); OKLA. STAT. ANN. tit. 18, §§ 1.153, 1.166, 1.164, 1.182 (West 1986); OR. REV. STAT. §§ 57.360, 57.465, 57.511, 57.536 (1985); PA. STAT. ANN. tit. 15, §§ 1805, 1902, 1311, 2102 (Purdon 1967 & Supp. 1986); R.I. GEN. LAWS §§ 7-1.1-54, 7-1.1-67, 7-1.1-72, 7-1.1-76, 7-1.1-77 (1985); TENN. CODE ANN. §§ 48-1-302, 48-1-907, 48-1-1002 (1984); UTAH CODE ANN. §§ 16-10-55, 16-10-68, 16-10-74, 16-10-79 (1972 & Supp. 1986); W. VA. CODE §§ 31-1-107, 31-1-117, 31-1-121, 31-1-126 (1982); and WIS. STAT. ANN. §§ 180.25, 180.51, 180.64, 180.71, 180.753 (West 1957 & Supp. 1986).

211. MODEL BUS. CORP. ACT ANN. 2d §§ 59 (amendment of articles), 73 (merger), 79 (sale of assets other than in the ordinary course of business), 83 (dissolution) (1971).

212. Example: Corporation X has 150,000 shares outstanding. If an affirmative vote of two-thirds of the outstanding shares is required to approve the transaction, 100,000 shares must vote in favor of the transaction. If only 90,000 shares, which would constitute a quorum of over one-half, appear and vote at the meeting, the corporate transaction cannot go forward, even if all 90,000 voting shares approve the transaction.

213. MODEL BUS. CORP. ACT ANN. 2d § 59 official comment (1971).

214. MODEL BUS. CORP. ACT ANN. 3d §§ 12.02 (sale of assets other than in the regular course of business), 10.03 (amendment of articles of incorporation), 11.03 (merger or share exchange), 14.02 (dissolution) (1986).

in its articles provisions requiring a greater margin for approval.[215] Mississippi's law governing shareholder approval of extraordinary transactions should be amended to provide a statutory standard of a majority of the shares to approve such transactions. Provisions for supermajority voting and other protections for minority shareholders may be placed in the articles of incorporation or in agreements among the shareholders as needed.

2. *Shareholder Inspection Rights*

Mississippi's statute concerning shareholder inspection rights, section 79-3-99,[216] provides that any person who has been a shareholder of record for at least six months preceding his demand or who holds at least one percent of all outstanding shares may, after written demand, inspect the books, records of account, minutes and record of shareholders. The inspection right may be exercised only at a reasonable time and for a proper purpose. Before the Mississippi Legislature passed a statute concerning shareholder inspection rights, the Mississippi Supreme Court considered the rights of shareholders to inspect the records of a corporation in *Sanders v. Neely*.[217] In *Sanders*, the court held that in the absence of a statute, Mississippi follows the common-law rule concerning shareholder inspection rights. The shareholder in *Sanders* desired to inspect the books of the corporation in order to ascertain whether the business was being conducted prudently so as to protect the interests of the corporation and his (the shareholder's) interest therein. The court said that this purpose was sufficient unless the officers of the corporation affirmatively proved that the shareholder was acting in bad faith or out of idle curiosity.[218] Since the passage of the shareholder inspection statute in 1962, the Mississippi Supreme Court has not decided any case concerning shareholder inspection rights. Therefore, an issue exists regarding whether the court would find legislative intent in the statute to repeal the common-law right of inspection given to *any* shareholder or whether the statute and common law would be deemed to co-exist. There is some indication in *Sanders* that the common law does survive the enactment of a statute governing inspection

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215. It should be noted that the RMBCA provides that if there is a supermajority voting provision in the articles, the margin to change that provision must be at least as great as the supermajority vote it sets. MODEL BUS. CORP. ACT ANN. 3d § 7.27 (1986). For example, if the articles provide that any merger must be approved by two-thirds of the outstanding shares regardless of class, any proposal to amend that section of the articles would have to be approved by two-thirds vote of the outstanding shares regardless of class. *See supra* text accompanying notes 147-59.

216. MISS. CODE ANN. § 79-3-99 (1972).

217. 197 Miss. 66, 19 So. 2d 424 (1944).

218. *Id.* at 81, 19 So. 2d at 426.

rights. In *Sanders*, the court considered whether or not a provision in the Insurance Code prescribing the duties of the Commissioner of Insurance abrogated or repealed the common-law rights of shareholders to inspect books and records. The court held that it did not,[219] noting that there is a presumption that the legislature does not intend to alter the common law and that the statutes and the common-law rules are presumed to co-exist.[220] The court found no legislative intent to repeal the common-law right of shareholder inspection of corporate books: "[T]he business, books and records of a corporation are the property of its stockholders, and . . . their officers, agents and employees are in possession of such books and records as trustees for the stockholders, without the right to deny *any* stockholder access thereto for a proper purpose at reasonable times."[221]

The Mississippi statute is similar to section 52 of the 1959 version of the Model Business Corporation Act,[222] which specifically granted the right of inspection to shareholders of record provided the shares had been held for six months or that they constituted five percent of all of the corporation's outstanding shares.[223] Taken alone, this statute would seem to restrict the common-law rule because of its limitation on who can assert the right: only shareholders of record who have held their stock six months or more, or those who own five percent or more of the outstanding shares.[224] Some courts, however, hold that the statute enlarges the common-

219. *Id.* at 82, 19 So. 2d at 426.

220. *Id.*

221. *Id.* at 92, 19 So. 2d at 431 (emphasis added).

222. MODEL BUS. CORP. ACT ANN. § 52 (1960).

223. *Id.*

224. *See* Caspary v. Louisiana Land & Exploration Co., 707 F.2d 785 (4th Cir. 1983), *aff'g* 560 F. Supp. 855 (D. Md. 1983). In *Caspary*, a federal court applying Maryland law viewed a shareholder inspection statute as supplanting the common law, not expanding it; therefore, in order to inspect corporate books, a shareholder must comply with the statutory requirements. In *Caspary*, the court said that the first Maryland statute in 1868 dealing with shareholder inspection rights abrogated the common-law right. This statute made inspection rights absolute for shareholders, thereby eliminating "proper purpose" restrictions. *Id.* at 786. It was then revised in 1908 to restrict the right to shareholders owning five percent of the outstanding stock. The court also said that to construe the common-law rule to still exist would make the statutory requirement of five percent ownership illusory. *Id.* at 792. *See generally* Note, *Caspary v. Louisiana Land & Exploration Co. – the Common Law Right to Inspect Corporate Records for Proper Purpose*, 43 MD. L. REV. 572, 593 (1984) (stating that *Caspary* has made Maryland the most restrictive shareholder inspection state in the nation. Even though corporations like pro-management jurisdictions, Maryland has, in this case, "out-Delawared" Delaware). *Id.* at 593. The Maryland inspection rule is divided into two statutes. The first, § 2-512, deals with inspection of bylaws, minutes of shareholders meetings, annual statements of affairs, and voting trust agreements. Any shareholder or holder of a voting trust certificate or his agent is entitled to this right. MD. CORPS. & ASS'NS. CODE ANN. § 2-512 (1975). The second statute, § 2-513, concerns inspection of the corporation's books of account and its stock ledger. Here, the shareholder must be a shareholder of record, have held the stock for at least six months, and own at least five percent of the outstanding shares (if more than one person is requesting, they must own at least five percent together). MD. CORPS. & ASS'NS. CODE ANN. § 2-513 (1975). *See generally* 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2215.1 (Supp. 1985).

law right and that it is an addition to, rather than a substitution for, common law.[225] New York, on the other hand, codified only a portion of its law on shareholder inspection rights and applies the statute to some problems and common-law principles to others.[226] If the statute and the common law do not co-exist, Mississippi's shareholder inspection rights are overly restrictive.

The Delaware statute and the RMBCA take a less restrictive and more reasonable approach. The Delaware statute grants any record shareholder the right to inspect the corporation's stock ledger, list of shareholders, and other books and records and to make copies or extracts during business hours and for a proper purpose.[227] The statute defines "proper purpose" as "a purpose reasonably related to such person's interest as a stockholder."[228] Under the Delaware statute, the shareholder's right of inspection is absolute unless the corporation can show bad faith,

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225. Bank of Heflin v. Miles, 294 Ala. 462, 466, 318 So. 2d 697, 700 (1975). *Bank of Heflin* holds that the Alabama statute, presently ALA. CODE ANN. § 10-2A-79 (1975 & Supp. 1986) (patterned after § 52 of the Model Business Corporation Act) enlarges and extends the common-law right of inspection. *Id.* at 700.

226. N.Y. BUS. CORP. LAW § 624(b) (McKinney 1986). Under the New York statute a shareholder of record who has held his stock for at least six months or who holds at least five percent of its outstanding shares of stock may upon written demand examine the minutes and record of shareholders. He is also entitled to receive, upon written demand, an annual balance sheet and profit and loss statement for the preceding year and any interim balance sheet or profit and loss statement made available to the shareholders. N.Y. BUS. CORP. LAW § 624(e) (McKinney 1986). The New York court has interpreted this statute as an addition to the common-law right of inspection, not a substitution of it. *In re* Steinway, 159 N.Y. 250, 265, 53 N.E. 1103, 1107 (1899); Levine v. Pat-Plaza Amusements, Inc., 67 Misc. 2d 485, 487-88, 324 N.Y.S.2d 145, 148 (N.Y. Sup. Ct. 1971). The New York statute takes one book, the stock book, and changes the common-law right to inspect it from qualified to absolute if the statutory requirements of the holding period or percentage are met. The rest of the common-law rule was left intact. *Steinway*, 159 N.Y. at 265, 53 N.E. at 1107. The court stated the reason for the change was to enable shareholders to learn who was entitled to vote for directors. *Id.* The court has also noted that the statute grants a new right as to financial statements. There was no such right at common law. Therefore, in order to receive this right, the shareholder must meet the statutory requirements. *Levine*, 67 Misc. 2d at 487-88, 324 N.Y.S.2d at 149. But the right to inspect the stock book is based both on the statute and common law. Therefore, if one does not meet the statutory inspection requirements, he may still have a qualified right to inspect under common law. Sivin v. Schwartz, 22 A.D.2d 821, 254 N.Y.S.2d 914 (N.Y. App. Div. 1964); Johncamp Realty, Inc. v. Sanders, 98 Misc. 2d 949, 415 N.Y.S.2d 192 (N.Y. Sup. Ct. 1979).

227. DEL. CODE ANN. tit. 8, § 220(b) (1974).

228. *Id.* Delaware's common law has divided this statute into two different areas with different burdens. When a shareholder seeks to inspect books and records, other than the stock ledger or list of shareholders, the shareholder must establish that his purpose in seeking the information is proper. If, on the other hand, the shareholder is seeking inspection of the shareholder list or stock ledger, the corporation has the burden of proving an improper purpose. If a proper purpose is established, other purposes, proper or improper, are irrelevant. Even if the shareholder proves that his inspection request is proper and reasonably related to his interest as a shareholder, inspection may be refused if it is adverse to the interests of the corporation. Skoglund v. Ormand Industries, Inc., 372 A.2d 204, 207 (Del. Ch. 1976). *See generally* DEL. CODE ANN. tit. 8, § 220(c) (1974). The purpose of the statute is "to provide speedy access to a stock list for a stockholder who has demonstrated a purpose reasonably related to his interest as such." Schnell v. Chris-Craft Industries, Inc., 283 A.2d 852, 854 (Del. Ch. 1971).

an improper motive, or a purpose with no relationship to the person's status as a shareholder.[229] The Delaware statute, which differs substantially from the Mississippi statute, prescribes no holding period or percentage ownership restrictions as Mississippi does. The Mississippi statute does not explicitly define "proper purpose." The Delaware statute requires that the written demand stating the purpose be under oath. Mississippi's statute does not. Both statutes require the shareholder seeking inspection to be a shareholder of record, and grant courts discretion to compel inspection. The primary thrust of the Delaware statute is that any request by a shareholder to inspect the books and records of a corporation must be based on a purpose that is related to his status as a shareholder.[230]

Sections 16.02 and 16.03 of the RMBCA provide that a shareholder, upon written demand and during regular business hours, may inspect documents such as minutes of shareholders meetings and directors meetings, accounting records, records of shareholders, articles of incorporation, bylaws, resolutions by the board, written communications to shareholders, names of board members, and the most recent annual report.[231] However, in order to inspect excerpts from the minutes of the board, or records not subject to inspection under § 16.02(a),[232] the shareholder must (1) make his demand in good faith and for a proper purpose; (2) describe his purpose and the records he desires to inspect; and (3) show that the records are directly connected with his purpose.[233] Furthermore, the shareholder's right of inspection cannot be abolished or conditioned by the corporation's articles or bylaws.[234] This statute is also substantially different from the Mississippi statute. Mississippi puts restrictions on the shareholder holding period and percent ownership. Section 16.02(a) of the RMBCA provides

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229. State *ex rel.* Foster v. Standard Oil Co. of Kansas, 41 Del. 172, 177, 18 A.2d 235, 237-38 (1941). However, the shareholder's statement of purpose for inspecting the shareholders list must contain more than just an intent to communicate with other shareholders. It must describe the substance for the intended communication, or inspection will be refused. Northwest Industries, Inc. v. B.F. Goodrich Co., 260 A.2d 428, 429 (Del. 1969). The Delaware court has said that

> § 220 is narrow in object and scope and is simply a 'look at the list' act. It contemplates summary proceedings and the accelerated scheduling of cases under it emphasizes prompt processing and disposition. The narrow nature of the act must be kept in mind in applying the "proper purpose" requirement.

Mite Corp. v. Heli-Coil Corp., 256 A.2d 855, 857 (Del. 1969). Some cases have seemed to indicate that after a proper purpose is found, the documents inspected should be limited to those concerning the event or condition for which the shareholder originally sought inspection. *Skoglund*, 372 A.2d at 210. However, this right should not be limited by management's deciding that the shareholder may inspect some documents but not others that relate to the shareholder purpose. *Id.* at 211.

230. *Id.* at 207.

231. MODEL BUS. CORP. ACT ANN. 3d § 16.02(a) (1986).

232. Accounting records and the record of shareholders. MODEL BUS. CORP. ACT ANN. 3d § 16.02(b) (1986).

233. *Id.* at § 16.02(b)-(c) (1986).

234. *Id.* at § 16.02(d) (1986).

an absolute right to inspect certain documents under § 16.02(b)-(e), subject only to a showing of proper shareholder purpose. The RMBCA section is similar to Delaware law.[235] It allows *any* shareholder to inspect the books and records for a proper purpose and avoids "fishing expeditions," because the shareholder is required to state his purpose and the documents he wishes to inspect. The RMBCA statute provides a method to allow sincere shareholders to inspect the corporation's books to protect or further their ownership interests, and to prevent abusive shareholders from engaging in fishing expeditions which interrupt the day-to-day business of the corporation. The RMBCA provisions are effective and modern, and could be a benefit to shareholders of Mississippi corporations.

3. *Derivative Actions*

Mississippi's statute governing the procedural requirements for derivative litigation is one of the simplest in the nation.[236] It provides:

> No action shall be brought in this state by a shareholder in the right of a domestic or foreign corporation unless the plaintiff was a holder of shares or of voting trust certificates therefor at the time of the transaction of which he complains, or his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder at such time.[237]

Under this provision, the shareholder seeking to bring an action in the right of the corporation must have owned the shares at the time the allegedly illegal transaction occurred, or have received his shares by operation of law from someone who owned his shares at the time.[238] Mississippi's statute does not require demand on directors, demand on shareholders, verification of the complaint, security for costs, or other procedural requirements provided for in most other jurisdictions.[239]

The RMBCA provides several procedural requirements for actions in the right of the corporation.[240] The procedural requirements of section 7.40 include contemporaneous ownership (the section provides a definition of "shareholder" which includes beneficial owners), verification of the complaint, demand on shareholders, and court settlement approval.[241] Section 7.40 also provides that the court may require an unsuccessful plaintiff to pay

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235. *Skoglund*, 372 A.2d at 207.

236. MISS. CODE ANN. § 79-3-93 (1972).

237. *Id.*

238. *Id.*

239. *Id.*

240. MODEL BUS. CORP. ACT ANN. 3d § 7.40 (1986).

241. *Id.*

the defendant's reasonable attorney fees if the court finds that the suit was commenced without cause,[242] and that a court may stay the shareholder's action while the corporation investigates the alleged wrongdoing.[243]

Whether or not certain procedural requirements are beneficial depends on how the state views the whole concept of shareholder litigation. The primary regulator of corporate management,[244] the derivative suit is the only means of redress available to the shareholder for self dealing and bad faith actions of an unfaithful board of directors.[245] Therefore, shareholder litigation serves a useful societal function. On the other hand, abuses in derivative litigation are widespread.[246] Shareholders and counsel often use derivative litigation as a method to gain large settlements which do not benefit the corporation at all.[247] Strike suit problems are the basis for the strict procedural requirements in derivative litigation which are imposed in most states and in the federal courts.[248] Further, a great deal of controversy currently exists about the general utility of shareholder litigation as a means to protect shareholders from corporate mismanagement.[249] Some scholars argue that the costs associated with derivative suits outweigh the benefits derived.[250] Others disagree, arguing that while there are costs associated with the derivative suit, the benefits justify the costs because of the need to curb corporate managers in some way.[251] This debate is likely to continue for some time to come, but the derivative action seems to be here to stay.

Although the Mississippi statute is very simple and provides relatively few procedural requirements, a few refinements from

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242. *Id.*

243. *Id.*

244. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949).

245. H. HENN AND J. ALEXANDER, *supra* note 18, at § 358; W. CARY AND M. EISENBERG, *supra* note 24, at 632; Schwartz, *In Praise of Derivative Suits: A Commentary on the Paper of Professors Fischel and Bradey*, 71 CORNELL L. REV. 322, 324-27 (1986); Goetz, *A Verdict on Corporate Liability Rules and the Derivative Suit: Not Proven*, 71 CORNELL L. REV. 344, 346-49 (1986).

246. SOLOMON, STEVENSON AND SCHWARTZ, CORPORATIONS LAW & POLICIES, MATERIALS AND PROBLEMS 638 (1982).

247. *See* H. HENN AND J. ALEXANDER, *supra* note 18, at § 358; W. CARY AND M. EISENBERG, *supra* note 24, at 632.

248. W. CARY AND M. EISENBERG, *supra* note 24, at 632; Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS., Summer 1985, 5, 13.

249. *See* Fischel and Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261 (1986); Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW AND CONTEMP. PROBS., Summer 1985, 5.

250. Fischel and Bradley, *supra* note 249, at 262-63; Coffee, *supra* note 249, at 13.

251. Schwartz, *supra* note 245, at 324-27; Goetz, *supra* note 245, at 346-49.

the RMBCA may be beneficial. One particular provision which should be added to the Mississippi section is the definition of "shareholder" to include all beneficial owners of shares in the corporation. The logic of this type of provision is apparent. The beneficial owner of shares should have the right to bring the shareholder's derivative action. The Mississippi section limits the suit to holders of shares or voting trust certificates.[252] While a court might interpret this to include all beneficial shareholders, the definition of "shareholder" should not be left to chance.

Two other provisions which should be included in the Mississippi section are those which allow a court discretion to stay the suit while the corporation investigates the charges and require the court to approve settlements. These two provisions help eliminate the two most common abuses of the derivative litigation process: unfounded suits and collusive settlements. While there has been no flood of litigation in Mississippi under this procedural statute, Mississippi will benefit from these simple and sensible refinements.

4. *Dissenters' Rights*

The right of shareholders to dissent from certain transactions and receive the fair value of their shares is a statutory method designed to balance the needs of management for flexibility in the activities of the corporation against the needs of the investors to withdraw their investment when the fundamental nature of the corporation is changed.[253] Unfortunately, many older statutes, like the Mississippi statute, are very complex and place undue emphasis upon the use of judicial appraisal of shares. The conflict between these two groups often leads to litigation.[254] Modern dissenters' rights statutes simplify compliance procedures and attempt to remove the litigation incentive and induce the parties to determine "fair value" of the shares without resort to the courts.[255] Other problems with Mississippi's dissenters' rights sections should be addressed. These problems include the limitations on the transactions which trigger the right to dissent and the exclusion of beneficial owners from those shareholders entitled to dissent. Mississippi's dissenters' rights sections, 79-3-159 and 79-3-161, are

252. MISS. CODE ANN. § 79-3-93 (1972 & Supp. 1986).

253. H. HENN AND J. ALEXANDER, *supra* note 18, at § 349; Report of the Committe on Corporate Laws, *Changes in the Model Business Corporation Act Affecting Dissenter's Rights*, 32 BUS. LAW. 1855, 1856 (1977).

254. MODEL BUS. CORP. ACT ANN. 3d ch. 13, official comment at 1354-55 (1986).

255. *Cf.* MODEL BUS. CORP. ACT ANN. 3d §§ 13.01-31; COLO. REV. STAT. § 7-4-124 (Supp. 1985); IDAHO CODE § 30-1-81 (1980); MINN. STAT. ANN. § 302A.473 (West 1985); MONT. CODE ANN. § 35-1-812 (1985); NEB. REV. STAT. § 21-2080 (1983); N.H. REV. STAT. ANN. § 293-A:82 (Supp. 1986); OR. REV. STAT. § 57.865-.890 (1985).

based upon an early version of the MBCA.[256] Although the MBCA was amended in 1978 to correct certain weaknesses in the dissenters' rights sections, those changes were not made in the Mississippi law.[257] Consequently, Mississippi's dissenters' rights sections are out of date.

a. Compliance Procedures

One of the major problems with the Mississippi dissenters' rights section is the fact that it is very poorly written and so complicated that compliance is usually difficult and costly. Therefore, shareholders who wish to dissent are often unable to do so, either because the process is too complex, or because they fail to comply correctly with one of the several deadlines or procedural requirements. Generally, in order to comply with the terms of Section 79-3-161 and receive the fair value of his shares, a shareholder must (1) file with the corporation a written objection to the transaction from which he wishes to dissent prior to or at the meeting at which the transaction is submitted to a vote; (2) not vote in favor of the transaction; (3) make a written demand on the corporation for payment of the fair value of his shares within 10 days after the transaction is approved by the shareholders; and (4) submit his stock certificates to the corporation within 20 days after demanding payment for his shares.[258] If a shareholder makes demand upon the corporation, the corporation is required to make a written offer to the dissenting shareholder to buy his shares at a price deemed by the corporation to be the fair value of the shares within 10 days of the time the corporate transaction is effective.[259] If the corporation and the shareholder agree on the fair value of the shares within 30 days of the date of the transaction, the corporation must make payment for the shares within 90 days of the date of the transaction.[260] If the corporation and the shareholder are unable to agree on a price of the shares within 30 days from the date of the transaction, the corporation may, within 60 days of the date of the transaction, file an action in the chancery court in the county where the registered office of the corporation is located, asking that the fair value of the shares be determined.[261]

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256. MISS. CODE ANN. §§ 79-3-159, 79-3-161 (1972 & Supp. 1985); MODEL BUS. CORP. ACT ANN. §§ 73, 74 (1960).

257. *See* Report of the Committee on Corporate Laws, *Changes in the Model Business Corporation Act Affecting Dissenter's Rights*, 32 BUS. LAW. 1855, 1856 (1977).

258. MISS. CODE ANN. § 79-3-161 (1972 & Supp. 1986).

259. *Id.*

260. *Id.* The payment obligation is conditioned upon the surrender of the share certificates to the corporation.

261. *Id.*

If the corporation fails to begin an appraisal proceeding as required by the statute, any dissenting shareholder may do so in the name of the corporation.[262] If suit is filed, the court will determine the fair value of the shares as provided by the statute.[263] The court may appoint appraisers to take evidence and make a recommendation to the court with respect to the fair value of the shares.[264] The costs of appraisal proceedings are usually assessed against the corporation, but the court may apportion costs against a dissenting shareholder if the court finds that the shareholder acted in bad faith in rejecting the written offer of the corporation.[265]

The complex nature of the section makes compliance difficult and costly, and should be simplified. The RMBCA, in a section derived from the 1976 MBCA revision, significantly simplifies dissenters' rights compliance for both the corporation and the shareholder.[266] For the sake of simplicity alone, the RMBCA section is better than the current Mississippi statute.

b. Right to Dissent

Mississippi law fails to provide dissenters' rights for amendments to the articles of incorporation even where substantial shareholder rights are affected.[267] Under current law, shareholders in Mississippi corporations are entitled to dissent only from "[a]ny plan of merger or consolidation to which the corporation is a party . . . or [a]ny sale or exchange of all or substantially all of the property of the corporation" other than in the regular course of business.[268] Section 79-3-159 provides exceptions which deny the right to dissent where the merging corporation is owner of all the shares of the corporations to be merged or where the shareholders are not entitled to vote on the transaction.[269] The section also provides that dissenters' rights are not available for transactions involving the sale of all or substantially all of a corporation's assets other than in the regular course of business if approval of the transaction is conditioned upon the distribution of the net proceeds of the sale to the shareholders within one year of the sale.[270] A more liberal approach to dissenters' rights is needed.

262. *Id.*

263. *Id.* The fair value of the shares as fixed by the court shall include any allowance for interest that the court finds fair and reasonable.

264. *Id.*

265. *Id.*

266. MODEL BUS. CORP. ACT ANN. 3d § § 13.01-31; Report of the Committee on Corporate Laws, *Changes in the Model Business Corporation Act Affecting Dissenter's Rights*, 32 BUS. LAW. 1855, 1856 (1977).

267. MISS. CODE ANN. § 79-3-159 (Supp. 1986).

268. *Id.*

269. *Id.*

270. *Id.*

A shareholder should have the right to dissent and receive the fair value of his shares when the corporation amends its articles of incorporation in such a way as to impair shareholder rights. Providing the right to dissent to amendment of the articles of incorporation serves some very important purposes. Allowing shareholders to dissent and "cash-out" when the fundamental nature of their investment changes provides additional security to shareholders.[271] At the same time, providing dissenters' rights when the articles are substantially amended provides greater flexibility to the majority,[272] because the right to dissent provides an "escape hatch" for a shareholder who would otherwise be forced to accept a fundamental change in his rights without the option to receive fair value for his shares.[273] Dissenters' rights can provide a fair choice to shareholders.

Another change which would benefit Mississippi law is a provision allowing the corporation, in its articles of incorporation or bylaws, to provide dissenters' rights for certain types of transactions which would not trigger dissenters' rights under the statute.[274] Voluntary dissenters' rights may make some preferred shares more attractive and can provide an additional tool for corporate lawyers in creating an appropriate entity for the respective parties.[275] Voluntary dissenters' rights may also protect proposed corporate action from collateral attack by shareholders because, if dissenters' rights are granted, shareholders may not challenge such action unless it is "unlawful or fraudulent."[276] The RMBCA provides all these changes in a very well organized series of sections which should be adopted.

c. *Beneficial Owners*

Dissenters' rights under Mississippi law are limited to record owners of shares.[277] As a consequence, many shareholders are denied the right to dissent because their shares are held by nominees in street names. Mississippi law should provide beneficial owners the right to dissent. The RMBCA specifically provides procedures to allow beneficial owners to exercise their right to dissent.

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271. MODEL BUS. CORP. ACT ANN. 3d § 13.02 official comment (1986).

272. *Id.*

273. *Id.*

274. *See, e.g.*, MODEL BUS. CORP. ACT ANN. 3d § 13.02 official comment (1986).

275. *Id.*

276. *Id.* at §§ 13.02(a)(5), 13.02(b).

277. MISS. CODE ANN. § 79-3-159 and § 79-3-3(g) (1972 & Supp. 1986). Section 79-3-3(g) provides that shareholder means the record holder of shares. *Id.* at § 79-3-3(g). Therefore, there is no provision in section 79-3-159 for dissenters' rights for beneficial owners. *Id.* at § 79-3-159.

The RMBCA provides a workable balance in the area of dissenters' rights because it provides more clarity and simplicity in this area. Mississippi should take advantage of this well drafted and workable provision of corporation law.

d. Directors

1. Indemnification and Insurance

Uncertainty surrounding the liability of directors and the interpretation of the business judgment rule has made indemnification and insurance increasingly important in the last 20 years.[278] A number of social issues are important in determining the extent to which corporate funds should or may be used to pay expenses and judgments against officers and directors acting in their official capacity. The large number of cases, their complexity, and the expense of litigation against board members today discourages intelligent and honest businessmen from sitting on boards of directors unless there is some protection from personal liability.[279] Therefore, some form of protection is necessary to encourage competent persons to sit on corporate boards. On the other hand, indemnification must not allow management to use corporate funds to protect an officer or director who has, in bad faith, committed wrongful acts against the corporation. Allowing indemnification in such a situation encourages objectionable conduct. In addition, corporation law must determine whether indemnification for certain types of offenses (violations of state and federal securities and antitrust laws) will frustrate public policy by preventing the penalty from falling on the responsible officer or director. The statute governing indemnification must strike a balance between the needs of the officers and directors and the public policy set forth in the statutes and common law.[280]

Mississippi makes little provision for indemnification of its

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278. Johnston, *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUS. LAW 1993, 1993 (1978); Knepper, *Officers and Directors: Indemnification and Liability Insurance—An Update*, 30 BUS. LAW. 951, 951 (1975); Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Officers and Directors*, 77 YALE L.J. 1078, 1078 (1968).

279. Johnston, *supra* note 278, at 1994; Silas, *Risk Business, Corporate Directors Bail Out*, 72 A.B.A. J., June 1986, at 24. "Some members of corporate boards of directors are finding that these coveted posts are more trouble than they are worth. The problems, which include stockholder lawsuits, cancellation of director and officer liability insurance, and increased time demands needed to devote to companies, have caused some directors to quit." *Id.* at 24.

280. Johnston, *supra* note 278, at 1994; Knepper, *supra* note 278, at 951-52; Bishop, *supra* note 278, at 1078. As Professor Bishop put it in 1968, "A vast pother has arisen in corporate circles over the dreadful plight of officers and directors, beset on the one hand by predatory strike suitors anxious to convert them and their little families into welfare clients if their efforts to maximize the corporation's profits come to grief, beset on the other by ruthless minions of the Antitrust Division determined to throw them into the federal pen if those efforts succeed." Bishop, *supra* note 278, at 1078.

officers and directors and makes virtually no provision for indemnification of its employees or agents when they face litigation based on their position as a corporate director, officer or employee. Mississippi's provision, section 79-3-7(o), is based on the MBCA as it existed in 1963, and only three other states have retained its language.[281] The Mississippi indemnification statute is extremely limited in light of current business risks and too vague to permit careful planning.[282] Therefore, most states have enacted more comprehensive statutes. Directors and officers who may need indemnification and those who must decide whether indemnification is appropriate under the statute will find little guidance in the Mississippi act. The Mississippi section should be expanded to provide indemnification appropriate to protect those who act for and serve the corporation. The following indemnification and insurance issues are important in analyzing the Mississippi statute:

When is there authority to indemnify?

Who is entitled to indemnification?

Does an officer, director or employee have a right to indemnification?

For what claims will indemnification lie?

What costs and expenses are covered by the indemnification provisions?

What conditions must a director meet to qualify for indemnification?

May a corporation advance an officer, director, or employee for expenses involved in the litigation and if so, under what circumstances?

Who decides whether indemnification is appropriate in a given situation?

May a corporation purchase insurance to protect it against indemnification claims?

Unfortunately, the answers to most of these questions are unclear under current Mississippi law.[283]

When is there authority to indemnify? The Mississippi section on indemnification provides authority to indemnify in limited cir-

281. IND. CODE ANN. § 23-1-2-2(9) (Burns 1984), N.M. STAT. ANN. § 53-11-4.1 (Supp. 1986) and VT. STAT. ANN. tit. 11, § 1852(15) (1984).

282. *See generally* Hodge and Perry, *supra* note 71, at 393-97.

283. *See infra* text accompanying notes 284-321.

cumstances as defined in the statute and as provided in the articles of incorporation, the bylaws or any resolution adopted by the shareholders.[284]

Who is entitled to indemnification? Mississippi's statute provides that a Mississippi corporation has the power to indemnify its past and present officers and directors, and officers and directors of a subsidiary or debtor corporation if the subject corporation has asked them to serve.[285] The section makes no provision for indemnification of employees or agents who are not officers or directors of the corporation.[286] Although they may be entitled to protection under general agency principles,[287] employees and agents should not be excluded from those whom a corporation has the power to indemnify.[288] Because the statute is silent with respect to employees and agents, it is likely not to be interpreted so as to include them.[289] Mississippi's indemnification sections should be amended to allow indemnification for employees and agents who are neither officers nor directors. Adoption of the RMBCA would provide this correction in the Mississippi statute.[290]

Does an officer, director or employee have a right to indemnification? Officers and directors have no right to indemnification under Mississippi law.[291] Unless the articles of incorporation or bylaws provide otherwise, the corporation is under no duty to indemnify its officers or directors.[292] Officers and directors who because of their position with the corporation are named parties to a suit in which they are subsequently judged not liable should be entitled to indemnification from the corporation.[293]

For what claims will indemnification lie? An officer or director of a corporation may find himself a defendant in two types

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284. MISS. CODE ANN. § 79-3-7(o) (1972 & Supp. 1986).

285. *Id.*

286. *Id.*

287. Generally, an agent who incurs liability based upon acts performed for the benefit of and under the direction of his principal, is entitled to indemnification for liability for those acts. McLeod v. Dean, 270 F. Supp. 855, 857 (S.D.N.Y. 1967); *see also* Differential Steel Car Co. v. Macdonald, 180 F.2d 260, 267 (6th Cir. 1950); Lauderdale v. Peace Baptist Church of Birmingham, 246 Ala. 178, 182, 19 So. 2d 538, 542 (1944); RESTATEMENT (SECOND) OF AGENCY §§ 439-440 (1958).

288. Hodge and Perry, *supra* note 71, at 393.

289. Provisions for indemnification of officers and directors should be strictly construed. Diamond v. Diamond, 307 N.Y. 263, 266, 120 N.E.2d 819, 821 (1954); Hodge and Perry, supra note 71, at 393.

290. *See* REVISED MODEL BUS. CORP. ACT ANN. 3d §§ 8.50-.58 (1985).

291. MISS. CODE ANN. § 79-3-7(o) (1972 & Supp. 1986). This section creates only a limited power on the part of the corporation to indemnify.

292. *Id.*

293. Cornell and Little, *Indemnification of Fiduciary and Employee Litigation Costs Under ERISA*, 25 B.C.L. REV. 1, 14-19 (1983); Oesterle, *Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability*, 1983 WIS. L. REV. 513, 514 (1983).

of suits. First is a derivative action by a shareholder against a director or the board of directors claiming recovery on behalf of the corporation for a wrong done to the corporation and not corrected by the board of directors.[294] Derivative actions usually involve allegations of breach of fiduciary duties by directors, at least in the refusal to enforce the claim. Second is an action by a third party against the corporation and its board for a wrong done to the third party.[295] These cases usually involve claims by shareholders or third parties directly against the corporation and its directors individually for violations of specific laws, such as the federal antitrust or securities laws. Whether the Mississippi section allows indemnification with respect to both types of suits is unclear. Although the comments to the 1960 version of the MBCA state that the section should be construed to include non-derivative actions,[296] the comments often become separated from the statute in the legislative process.[297] Other authors suggest that the Mississippi provision does not allow indemnification for judgments paid in third party actions.[298] If this is so, the Mississippi statute fails to provide indemnification for a very important type of claim. Such an interpretation could also impair the corporation's authority to purchase insurance against such claims.[299] Mississippi should adopt a statute which is clear respecting whether and to what extent a corporation may indemnify both derivative and third party actions.

What costs and expenses are covered by the indemnification provisions? The Mississippi statute says that a corporation may indemnify an officer or director for "expenses actually and reasonably incurred . . . in connection with the defense of any action . . . ." [300] The meaning of "expenses" is unclear. One major issue concerning the meaning of "expenses" is whether attorney fees are included.[301] The Mississippi section makes no reference to attorney fees,[302] and in the absence of express statutory authority, Mississippi courts may refuse to allow payment of attorney fees.

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294. A derivative action is a suit brought by a shareholder on behalf of the corporation for some wrong done to the corporation. It is usually allowed only when those in control of the corporation wrongfully refuse to enforce the claim. Hawes v. Oakland, 104 U.S. 450, 460-61 (1881); Continental Securities Co. v. Belmont 206 N.Y. 7, 19, 99 N.E. 138, 142 (1912); H. HENN AND J. ALEXANDER, *supra* note 18, at 1036-37.

295. A third party action is a suit brought by a party unrelated to the corporation and its directors for some wrong.

296. MODEL BUS. CORP. ACT ANN. § 4(o) ¶ 4.04 (1960).

297. Branson, *infra* note 352, at 70.

298. Hodge and Perry, *supra* note 71, at 394.

299. *See infra* text accompanying notes 313-21.

300. MISS. CODE ANN. § 79-3-7(o) (1972 & Supp. 1986).

301. Hodge and Perry, *supra* note 71, at 394.

302. MISS. CODE ANN. § 79-3-7(o) (1972 & Supp. 1986).

Unless there is an express provision including attorney fees in the expenses to be paid by the corporation there can be no assurance that they will be included. Because attorney fees are likely to be one of the largest expenses incurred in the event that a corporate director or officer is named as a party to corporate litigation, indemnification covering these fees is important. If the basic rationale for indemnification is correct or, indeed, accepted, attorney fees should be expressly provided for in the statute. Indemnification against such major expenses may encourage competent individuals to serve as board members.

Two additional problems regarding the meaning of "expenses" include whether (1) payment made in settlement of a claim and (2) expenses incurred in connection with threatened litigation[303] are considered "expenses actually and reasonably incurred." Issues of settled and threatened claims should be addressed in the statute.

What conditions must a director meet to qualify for indemnification? A Mississippi corporation may indemnify its officers and directors unless the party has "been . . . adjudged . . . liable for negligence or misconduct in the performance of duty, or a violation of [the Mississippi antitrust and fair trade laws . . . .]"[304] The Mississippi section does not address civil judgments or convictions against officers and directors based on violations of other laws such as the federal securities laws, the federal antitrust laws or the Internal Revenue Code. Whether indemnification for such directors and officers is authorized under this section or whether such a violation constitutes "negligence or misconduct in the performance of duty" is not clear in the Mississippi Act. Also unaddressed is whether "negligence in the performance of duty" refers only to a breach of a fiduciary duty or extends to other forms of misconduct. Directors, officers and their attorneys need guidelines concerning these issues.

Another unanswered question about the Mississippi indemnification section is whether the provision allowing "any other indemnification" authorized in the articles of incorporation or approved by the shareholders would validate a provision in the articles or bylaws which authorizes indemnification even where the director breached his fiduciary duty to the corporation or vio-

303. Johnston, *supra* note 278, at 2041. Official comments to the 1960 version of the Model Act state that the provision "should be held to cover settlement payments if the corporation has been advised by counsel that the suit was without substantial merit and that settlement payments did not exceed the probable expenses of litigation." MODEL BUS. CORP. ACT ANN. § 4(o) ¶ 4.03 (1960).

304. MISS. CODE ANN. § 79-3-7(o) (1972 & Supp. 1986). No legislative history exists to explain why these two statutory violations were singled out for the purpose of denying indemnification. *See also* Hodge and Perry, *supra* note 71, at 395.

lated the Mississippi antitrust or fair trade laws. Although courts would probably be unwilling to allow indemnification in such a circumstance, the issue is unclear in Mississippi.[305] The corporation law with respect to the indemnification of directors should be clear concerning both when a director is entitled to indemnification under the statute and, in more liberal circumstances, when the corporation may authorize indemnity.

May a corporation advance to an officer, director, or employee expenses involved in the litigation and, if so, under what circumstances? Another issue which arises in the context of corporate litigation is whether the corporation may advance funds to an officer or director to reimburse the officer or director for litigation expenses.[306] The Mississippi section does not specifically provide for the advance payment of expenses.[307] If the corporation fails to provide funds to help meet litigation expenses where indemnification will be granted, the director or officer may suffer unnecessary financial hardship. If the corporation will eventually indemnify the director or officer if he or she is successful in defense of the action, there is no reason to deny the officer or director advances for litigation expenses as long as the advances are made on the condition that the officer or director agrees to repay the corporation in the event that he is required to do so.[308] Mississippi should clarify this matter by statutory amendment.

Who decides whether indemnification is appropriate in a given situation? Another problem with the Mississippi indemnification provision is that it provides no guidance as to how the decision to indemnify is made. The Mississippi section provides only that no indemnification may be granted where the party seeking indemnification has been adjudged liable for negligence or misconduct in the performance of duty or for violations of the Mississippi antitrust[309] or fair trade[310] laws.[311] The section does not address

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305. *See, e.g.*, Lawson v. Baltimore Paint and Chem. Corp., 347 F. Supp. 967, 981-83 (D. Md. 1972); Teren v. Howard, 322 F.2d. 949, 955-56 (9th Cir. 1963); Diamond v. Diamond, 307 N.Y. 263, 267-68, 120 N.E.2d 819, 820-21 (1954). Indemnification in such a situation could be considered unlawful as against public policy because a party should not be indemnified against his own fraudulent or willful misconduct. Johnston, *supra* note 278, at 2006-07.

306. Cornell and Little, *Indemnification of Fiduciary and Employee Litigation Costs Under ERISA*, 25 B.C.L. REV. 1 (1983); Oesterle, *Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability*, 1983 WIS. L. REV. 513 (1983).

307. MISS. CODE ANN. § 79-3-7(o) (1972 & Supp. 1986).

308. One disadvantage to the advance of litigation expenses is that the director may be unable to repay the corporation if he loses the suit. This is not completely unfair however, because there is also a risk that if the tables are turned, the corporation may be unable to repay an officer or director entitled to indemnification. Hodge and Perry, *supra* note 71, at 397.

309. MISS. CODE ANN. §§ 75-21-1 to -39 (1972).

310. *Id.* at § 75-23-1 to -27 (1972).

311. *Id.* at § 79-3-7(o) (1972).

the issue of the conflicts of interest which arise in the context of making an indemnification decision. Other statutes, including the RMBCA, provide specific procedures for deciding whether or not to indemnify a particular party in any of a number of situations.[312] Mississippi needs a provision which will address the corporate procedure necessary to approve or reject indemnification.

May a corporation purchase insurance to protect it against indemnification on claims? Most states allow a corporation to purchase insurance for its officers and directors to protect them against claims and to protect the corporation from indemnification obligations in the event of litigation. Mississippi has no provision allowing for the purchase of such insurance. While the purchase of insurance to cover litigation expenses is probably valid, corporate purchases of insurance may be disallowed to guard against liability for which the corporation could not indemnify its officers and directors.[313] Therefore, the purchase of insurance covering violations of antitrust, securities or tax laws in connection with the affairs of the corporation may be unauthorized. Corporate authority to purchase insurance should be clear in all these situations.

The RMBCA provides a comprehensive plan for providing indemnification and insurance to its officers, directors, employees and other agents.[314] It provides for mandatory indemnification when a director is wholly successful on the merits or otherwise in defending the action to which he was made a party because of his corporate relationship.[315] Indemnification for both derivative and third party claims is included in the RMBCA plan, and the statute sets the standards for both.[316] The RMBCA makes clear that attorney fees and amounts paid in settlement of a claim may

312. ALA. CODE § 10-2A-21 (1975); ARIZ. REV. STAT. ANN. § 10-005 (1956 & Supp. 1986); ARK. STAT. ANN. § 64-309 (1980); COLO. REV. STAT. § 7-3-101 (1973 & Supp. 1985); DEL. CODE ANN. tit. 8, § 145 (1983); FLA. STAT. ANN. § 607.014 (West 1977 & Supp. 1986); GA. CODE ANN. § 14-2-153 (1982); HAWAII REV. STAT. § 416-35 (1985); IDAHO CODE § 30-1-5 (1980); ILL. ANN. STAT. ch. 32, § 8.65 (Smith-Hurd 1985); IOWA CODE ANN. § 496A.4A (West Supp. 1986); KAN. STAT. ANN. § 17-6305 (1981); LA. REV. STAT. ANN. § 12:83 (West 1969 & Supp. 1986); ME. REV. STAT. ANN. tit. 13A, § 719 (1964); MICH. COMP. LAWS ANN. §§ 450.1561-450.1571 (West 1973); MO. ANN. STAT. § 351.355 (Vernon Supp. 1986); NEB. REV. STAT. § 21-2004(15) (1983); NEV. REV. STAT. § 78.751 (1983); N.H. REV. STAT. ANN. § 293-A:5 (1970 & Supp. 1985); OHIO REV. CODE ANN. § 1701.13(E) (Page 1979); OKLA. STAT. ANN. tit. 18, § 1.43a (West 1986); OR. REV. STAT. §§ 57.255, 57.260 (1985); PA. STAT. ANN. tit. 15, §§ 410, 1410 (Purdon 1985 & Supp. 1986); UTAH CODE ANN. § 16-10-4(o) (1953); VA. CODE § 13.1-701 (1985); W. VA. CODE § 31-1-9 (1982); WIS. STAT. ANN. § 180.05 (West 1957 & Supp. 1985); WYO. STAT. § 17-1-105.1(1977); *see infra* notes 313-20.

313. Hodge and Perry, *supra* note 71, at 397.

314. MODEL BUS. CORP. ACT ANN. 3d §§ 8.51, 8.56 (1986).

315. *Id.* at § 8.52.

316. *Id.* at § 8.51(d).

be included in the authorized indemnification.[317] Another feature of the RMBCA plan is its specific procedure for determining whether or not the corporation may or must indemnify the party as well as the amount to which the party is entitled.[318] The RMBCA also provides for the advance of expenses for parties to corporate litigation[319] and authorizes the corporation to purchase insurance to protect officers and directors regardless of the corporation's power to indemnify against such actions.[320] Thus, by integrating the indemnification provisions with those relating to the conduct of directors, the RMBCA strikes a rational balance between conflicting policy considerations.[321]

2. *Standards of Conduct for Directors*

Mississippi has no statutory provisions governing the standards of conduct of corporate directors. Mississippi also has very few cases concerning the duties of corporate directors. This is particularly unfortunate because the issue of directors' duties is one of the most uncertain and controversial areas of corporate law at this time.[322] In Mississippi, directors must rely upon vague standards of conduct set out in a limited number of cases.[323] The origination of standards of conduct for directors developed from the common law rather than from a statute. Courts viewed corporate directors as fiduciaries and held them to the normal fiduciary standards of honesty and good faith. Due to the number and variation of the decisions, states adopted statutes to define the relationship between the corporation and its directors. A substantial number of states have statutes providing that a director must discharge his responsibilities in good faith and with the care that an

317. *Id.* at § 8.50(3).

318. *Id.* at § 8.55.

319. *Id.* at § 8.53.

320. *Id.* at § 8.57.

321. MODEL BUS. CORP. ACT ANN. 3d §§ 8.30-.33 official comment (1986).

322. Manning, *Life in the Boardroom after Van Gorkom*, 41 BUS. LAW. 1, 2 (1985) ("all courts – but particularly Delaware's courts – are struggling to develop a jurisprudence that will answer a series of basic questions" about directors' duties); Veasey, *Further Reflections on Court Review of Judgments of Directors: Is the Judicial Process Under Control?* 40 BUS. LAW. 1373 (1985); Ruder, *Duty of Loyalty – A Law Professor's Status Report*, 40 BUS. LAW. 1383 (1985); Lipton and Brownstein, *Takeover Responses and Directors' Responsibilities – An Update*, 40 BUS. LAW. 1403 (1985); Warden, *The Boardroom as a War Room: The Real World Applications of the Duty of Care and the Duty of Loyalty*, 40 BUS. LAW. 1431 (1985); Fischel, *The Business Judgment Rule and the Trans-Union Case*, 40 BUS. LAW. 1437 (1985).

323. *See infra* cases cited at note 326.

ordinary prudent person would exercise in like circumstances.[324] Most of these states also require that the director act in a way that he perceives to be in the best interest of the corporation.[325]

Mississippi's case law is very narrow with respect to the meaning and requirements of fiduciary duty. The Mississippi cases hold that a director is a fiduciary who owes his corporation a duty to act in good faith, with loyalty, and in accordance with the best interests of the corporation.[326] Most of these cases deal with issues of conflict of interest or self dealing; but one case states that a director owes a duty to exercise the same "diligence and caution" that a careful and prudent owner would exercise in connec-

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324. *See* ALA. CODE § 10-2A-74 (1980); CAL. CORP. CODE § 309 (West 1977); COLO. REV. STAT. § 7-5-101 (Supp. 1985); CONN. GEN. STAT. ANN. § 33-313 (West Supp. 1986); FLA. STAT. ANN. § 607.111 (West 1977 & Supp. 1986); GA. CODE ANN. § 14-2-152 (Supp. 1986); HAWAII REV. STAT. § 416-91.5 (1985); IDAHO CODE § 30-1-35 (1980); IND. CODE ANN. § 23-1-35-1 (Burns Supp. 1986); IOWA CODE ANN. § 496A.34 (West Supp. 1986); LA. REV. STAT. ANN. § 12:91 (West 1969); ME. REV. STAT. ANN. tit. 13A, § 716 (1981 & Supp. 1986); MD. CORPS. & ASS'NS. CODE ANN. § 2-405.1 (1985); MASS. GEN. LAWS ANN. ch. 156B, § 65 (West Supp. 1986); MICH. COMP. LAWS ANN. § 450.1541 (West 1973); MINN. STAT. ANN. § 302A.251 (West 1985); MONT. CODE ANN. § 35-1-401 (1985); NEB. REV. STAT. § 21-2035 (1983); N.H. REV. STAT. ANN. § 293-A:35 (Supp. 1985); N.J. STAT. ANN. § 14A:6-14 (West 1969); N.Y. BUS. CORP. LAW §§ 717, 719 (McKinney 1986); N. C. GEN. STAT. § 55-35 (1982); OHIO REV. CODE ANN. § 1701.59 (Baldwin Supp. 1985); OKLA. STAT. ANN. tit. 18, § 1.34 (West 1986); OR. REV. STAT. § 57.228 (1985); PA. STAT. ANN. tit. 15 § 1408 (Purdon 1967 & Supp. 1986); R.I. GEN. LAWS § 7-1.1-33 (1985); S.C. CODE ANN. § 33-13-150 (Law. Co-op. 1977 & Supp. 1985); TENN. CODE ANN. § 48-1-813 (1984); WASH. REV. CODE ANN. § 23A.08.343 (Supp. 1986); WYO. STAT. §§ 17-1-133, 17-1-141 (1977 & Supp. 1986); *see, e.g.*, Folk, *State Statutes: Their Role in Prescribing Norms of Responsible Management Conduct*, 31 BUS. LAW. 1031 (1976).

325. *See* ALA. CODE § 10-2A-74 (1975); CAL. CORP. CODE § 309 (West 1977); COLO. REV. STAT. § 7-5-101 (Supp. 1985); CONN. GEN. STAT. ANN. § 33-313 (West 1983); FLA. STAT. ANN. § 607.111 (West 1977 & Supp. 1986); HAWAII REV. STAT. § 416-91.5 (1985); IDAHO CODE § 30-1-35 (1980); IND. CODE ANN. § 23-1-35-1 (Burns Supp. 1986); IOWA CODE ANN. § 496A.34 (West Supp. 1986); ME. REV. STAT. ANN. tit. 13A, § 716 (1981 & Supp. 1986); MD. CORPS. & ASS'NS. CODE ANN. § 2-405.1 (1985); MASS. GEN. LAWS ANN. ch. 156B, § 65 (West Supp. 1986); MINN. STAT. ANN. § 302A.251 (West 1985); MONT. CODE ANN. § 35-1-401 (1985); NEB. REV. STAT. § 21-2035 (1983); N.H. REV. STAT. ANN. § 293-A:35 (Supp. 1985); OHIO REV. CODE ANN. § 1701.59 (Baldwin Supp. 1985); OR. REV. STAT. § 57.228 (1985); R.I. GEN. LAWS § 7-1.1-33 (1985); S.C. CODE ANN. § 33-13-150 (Law. Co-op. Supp. 1985); WASH. REV. CODE ANN. § 23A.08.343 (Supp. 1986); WYO. STAT. § 17-1-141 (1977 & Supp. 1986).

326. Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332 (Miss. 1979); McNair v. Capital Elec. Power Ass'n., 324 So. 2d 234, 240 (Miss. 1975); Amer. Empire Life Ins. Co. v. McAdory, 319 So. 2d 237, 240 (Miss. 1975); Cooper v. Miss. Land Co., 220 So. 2d 302, 309 (Miss. 1969); Bentz v. Vardaman Manuf. Co., 210 So. 2d 35, 40 (Miss. 1968); Smith v. Miss. Livestock Prod. Ass'n., 188 So. 2d 758, 762 (Miss. 1966); Frierson Bldg. Supply Co. v. Pritchard, 253 Miss. 541, 553-54, 176 So. 2d 301, 306 (1965); Knox Glass Bottle Co. v. Underwood, 228 Miss. 699, 743, 89 So. 2d 799, 814 (Miss. 1956), *sugg. of error overruled*, 228 Miss. 789, 789, 91 So. 2d 843-44 (1957), *cert. denied*, 353 U.S. 977 (1957); Millsaps v. Chapman, 76 Miss. 942, 953, 26 So. 369, 370 (1899); *see also* Home Tel. Co. v. Darley, 355 F. Supp. 992, 999 (N.D. Miss. 1973), *aff'd*, 489 F.2d 1403 (5th Cir. 1974) (federal court interpreting Mississippi law). Several Mississippi cases cite to Pepper v. Litton, 308 U.S. 295 (1939) in their discussion of the fiduciary duties of directors. Knox Glass Bottle Co. v. Underwood, 228 Miss. 699, 742, 89 So. 2d 799, 814 (Miss. 1956), *sugg. of error overruled*, 328 Miss. 789, 789, 91 So. 2d 843-44 (1957), *cert. denied*, 353 U.S. 977 (1957); Ellzey v. Fyr-Pruf, Inc. 376 So. 2d 1328, 1335 (Miss. 1979).

tion with his own property.[327] These duties are *sui generis*, and there is no certainty about the standards as they currently exist.[328]

The RMBCA has a comprehensive set of standards that govern fiduciary conduct.[329] The RMBCA section, which sets out the general rules of care and loyalty, requires that a director perform his duties "in good faith . . . with the care that an ordinary prudent person in a like position would exercise under similar circumstances; and . . . in a manner he reasonably believes to be in the best interests of the corporation."[330] The RMBCA also allows a director to rely in good faith on reports and opinions prepared by corporate officers or employees, experts, or committees of the board of directors, unless he has reason to doubt their competence or reliability, or unless he possesses some knowledge which prevents good faith reliance.[331] If the required standard of conduct is met, the director is completely exonerated, and there is no need for any further analysis under the business judgment rule.[332] This approach may help clarify the current common-law problems with directors' fiduciary duty and the business judgment rule.[333] The RMBCA gives significant guidance to directors and prospective directors regarding the standard of conduct to which they will be held.

3. *Conflicts of Interest*

The Mississippi corporate statute fails to address the problem of director conflicts of interest and the status of contracts between

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327. *Cf.* McNair v. Capital Elec. Power Ass'n., 324 So. 2d 234, 240 (Miss. 1975) (quoting Webb & Knapp, Inc. v. Hanover Bank, 214 Md. 230, 243, 133 A.2d 450, 456 (1957).) (trustees of electric power association held to fiduciary duty); *see also* Guntharp v. Planters Oil Mill, 358 So. 2d 397, 400 (1978) (directors and officers owe "the duty of dealing fairly and with the utmost caution in regard to the business" of the corporation.).

328. Mississippi does, however, have a statute which permits a director to claim good faith reliance on the books and records of the corporation in meeting any of his obligations as a director, whatever they may be. MISS. CODE ANN. § 79-3-91 (1972 & Supp. 1986).

329. *See* MODEL BUS. CORP. ACT ANN. 3d §§ 8.30-.33 official comment (1986).

330. *Id.* at § 8.30.

331. *Id.*

332. The business judgment rule is a judicially created concept that provides that

> [i]f in the course of management, directors arrive at a decision, within the corporation's powers . . . and their authority, for which there is a reasonable basis, and they act in good faith, as the result of their independent discretion and judgment, and uninfluenced by any consideration other than what they honestly believe to be the best interests of the corporation, a court will not interfere with internal management and substitute its judgment for that of the directors to enjoin or set aside the transaction or to surcharge the directors for any resulting loss.

H. HENN AND J. ALEXANDER, *supra* note 18, at § 242. The comment to RMBCA § 8.30 states that the section is not an attempt to codify the business judgment rule because of the continuing development of the area.

333. *See supra* note 322.

the corporation and its directors.[334] In many situations, a corporation may enter into a contract or transaction with a member of its board of directors, or with a corporation in which a director has a financial or managerial interest.[335] The leading Mississippi case is *Knox Glass Bottle Company v. Underwood.*[336] *Knox Glass*, which involved the lease of trucks to the corporation by its corporate officers and directors, held that where a director acts for and represents both the corporation and himself in a contract, that contract is voidable at the option of the corporation, unless there was shareholder ratification or estoppel. The *Knox Glass* court makes sweeping statements regarding the voidability of contracts where a conflict exists. In that case, the court said:

> [W]here an officer or director represents both himself and the corporation, the contract is voidable by the corporation without reference to the good faith of the defendant or whether the corporation suffered an actual injury; fidelity in the agent is what is aimed at, and "the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal" (citation omitted).[337]

Fortunately, the court went on to say:

> This rule does not proscribe all contracts between a director or officer in the corporation. It simply requires that, if such a contract is made, the corporation's interest must be guarded, and it represented, by disinterested agents free from the control or influence of the interested director or officer.[338]

At the time of the *Knox Glass* decision, the majority rule was that where a conflict existed between the corporation and its directors, the contract was voidable at the election of the corporation unless the directors could show that (1) they had disclosed their personal interests in the transaction, (2) a majority of the disinterested directors had approved the transaction, and (3) the transaction was fair to the corporation.[339] Therefore, most jurisdictions would have validated the contract if approved by a majority of

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334. The only provision in Mississippi corporation law concerning conflicts of interest of directors is section 79-3-67. It states in part: "No person who is engaged or interested in a competing business either individually or as employee or stockholder shall serve on any board of directors of any corporation without the consent of a majority of interest of the stockholders thereof." This provision prevents a competitor from gaining a seat on the board unless a majority of the shareholders agree. MISS. CODE ANN. § 79-3-67 (Supp. 1986).

335. Mississippi examples: Home Tele. Co. v. Darley, 355 F. Supp. 992, 998 (N.D. Miss. 1973) (merger with corporation in which directors held a financial interest); Bentz v. Vardaman Mfg. Co., 210 So. 2d 35, 40-41 (1968) (sale of materials to an affiliate of a director); Millsaps v. Chapman, 76 Miss. 942, 953-54, 26 So. 369, 370 (1899) (sale of land to a director). Other examples: Muller v. Leyendecker, 697 S.W.2d 668, 675-76 (Tex. App. 1985)(lease of property to a director); Neidert v. Neidert, 637 S.W.2d 296, 299-300 (Me. App. 1982) (sale of property to director); Western Inn Corp. v. Heyl, 452 S.W.2d 752, 758 (Tex. Cir. App. 1970) (borrowing of funds from director); Poweroil Mfg. Co. v. Carstensen, 69 Wash. 2d 673, 675, 419 P.2d 793, 797 (1966) (borrowing of funds from director).

336. 228 Miss. 699, 89 So. 2d. 799 (1956).

337. 228 Miss. at 745, 89 So. 2d at 815-16 (citing 13 AM. JUR., *Corporations*, § 1002).

338. 228 Miss. at 745, 89 So. 2d. at 816.

339. Branson, *supra* note 352, at 59.

the disinterested directors or if it was fair to the corporation.[340] While it is not stated explicitly in the case, *Knox Glass* stands for a similar rule. Subsequent Mississippi cases cite *Knox Glass* in support of the rule that " 'self-dealing' . . . automatically raises a presumptive conflict of interest, thus shifting the burden to the fiduciary to justify his conduct." [341]

Under *Knox Glass*, a great deal of uncertainty exists about the enforceability of any contract between the corporation and one or more of its directors (or his affiliates). The uncertainty exists because such contracts will be judged in hindsight by courts after a disagreement arises. No means other than shareholder approval exist to provide advance protection for a contract. In many cases, the cost of the proxy statement to secure shareholder approval of the contract or transaction would outweigh the benefits which the corporation might gain from the transaction. *Knox Glass* prevents a corporation from entering into some valid and beneficial contracts which could be voidable without shareholder ratification. Alternative methods to protect fair and equitable transactions between a corporation and its directors should be available. This does not mean that Mississippi should remove all restrictions on contracts where a conflict of interest exists. Instead, Mississippi should adopt a statute governing this problem as thirty-seven other jurisdictions have done.[342] The RMBCA provides such a statute.

340. By 1960, most courts had departed enough from traditional trust concepts to recognize that all contracts between a corporation and its directors should not be automatically voidable at the option of the corporation, but that a court could carefully scrutinize such a contract and find it void if it was unfair to the corporation. Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 39-40 (1966); Hodge and Perry, *supra* note 71, at 388-89. *Contra* Johnson v. Duensing, 340 S.W.2d 758, 769 (Mo. Ct. App. 1960) ("[N]otwithstanding the views expressed by the courts in some jurisdictions on the subject, the policy of the law in this state has long continued to be . . . [that] 'a director . . . may not . . . profit by reason of his position . . . . It is immaterial that the corporation was not damaged by the transaction in which the profits were made or that he acted throughout in the highest good faith and without intent to injure the corporation.' "). *Id.* at 768-69.

341. Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332 (Miss. 1979); *see also* American Empire Life Ins. Co. v. McAdory, 319 So. 2d 237, 240 (Miss. 1975); Bentz v. Vardaman Manuf. Co., 210 So. 2d 35, 40 (Miss. 1968); Frierson Bldg. Supply Co. v. Pritchard, 176 So. 2d 301, 306 (Miss. 1965). The Mississippi rule appears to be that the contract is voidable only where there is actual fraud. But the rule is not clear.

342. *See* ALA. CODE § 10-2A-63 (1975); ARIZ. REV. STAT. ANN. § 10-041 (1956 & Supp. 1986); CAL. CORP. CODE § 310 (West 1977); COLO. REV. STAT. § 7-5-114.5 (Supp. 1985); CONN. GEN. STAT. ANN. § 33-323 (West 1960 & Supp. 1986); DEL. CODE ANN. tit. 8, § 144 (1983); FLA. STAT. ANN. § 607.124 (West 1977 & Supp. 1986); GA. CODE ANN. § 14-2-155 (1982 & Supp. 1986); IDAHO CODE § 30-1-41 (Supp. 1986); ILL. ANN. STAT. ch. 32, § 8.60 (Smith-Hurd 1985); IND. CODE ANN. § 23-1-10-6 (Burns 1984); KAN. STAT. ANN. § 17-6304 (1981); KY. REV. STAT. ANN. § 271A.205 (Baldwin 1983); LA. REV. STAT. ANN. § 12:84 (West 1969 & Supp. 1986); ME. REV. STAT. ANN. tit. 13A, § 717(1)(1964); MD. CORPS. & ASS'NS. CODE ANN. § 2-419 (1985); MICH. COMP. LAWS ANN. §§ 450.1545, 450.1546 (West 1973); MINN. STAT. ANN. § 302A.255 (West 1985); MONT. CODE ANN. § 35-1-413 (1985); NEB. REV. STAT. § 21-2040.01 (1983); NEV. REV. STAT. § 78.140 (1986); N.H. REV. STAT. ANN. § 293-A:41 (Supp. 1986); N.J. STAT. ANN. § § 14A:6-8(1), 14A:6-8(2) (West Supp. 1985-86); N.Y. BUS. CORP. LAW § 713 (McKinney Supp. 1986); N.C.

The RMBCA abandons the rule of automatic voidability and provides that a transaction[343] is not voidable solely because a director has a conflict of interest.[344] The RMBCA section provides that a conflict of interest transaction is not voidable if (1) all material facts about the transaction and the director's conflict were disclosed to the board and a majority of the disinterested directors[345] "authorized, approved or ratified the transaction";[346] or (2) all material facts about the transaction and the director's conflict of interest were disclosed to the shareholders, and a majority of the disinterested shareholders "authorized, approved or ratified the transaction";[347] or (3) the transaction was fair to the corporation.[348] The abandonment of the automatic voidability rule does not mean that a conflict of interest transaction is automatically valid if one of these conditions is met;[349] the section provides only that the transaction is not voidable on the basis of conflict of interest. The transaction may still be attacked on other grounds, such as failure to follow procedure set forth in other sections of the corporate law, waste, or breach of a duty of care.[350] Conflict of interest rules are necessary to allow the corporation to function efficiently and effectively. The RMBCA section on conflict of interest provides effective conflict of interest rules.

GEN. STAT. § 55-30(b) (1982 & Supp. 1985); OHIO REV. CODE ANN. § 1701.60 (Baldwin 1979); OR. REV. STAT. tit. 7, § 57.265 (1986); PA. STAT. ANN. tit. 15, § 1409.1 (Purdon Supp. 1985); R. I. GEN. LAWS § 7-1.1-37.1 (1985); S. C. CODE ANN. § 33-13-160 (Law. Co-op. Supp. 1985); TENN. CODE ANN. § 48-1-816 (1984); VA. CODE § 13.1-691 (1985); W. VA. CODE § 31-1-25 (1982); WIS. STAT. ANN. § 180.355 (West Supp. 1986); WYO. STAT. § 17-1-136.1 (Supp. 1986).

343. "A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest." MODEL BUS. CORP. ACT ANN. 3d § 8.31 (1986).

344. MODEL BUS. CORP. ACT ANN. 3d § 8.31 official comment (1986).

345. The RMBCA does not define "interested director." The official comment to section 8.31 says that a director is interested if "he or the immediate members of his family have a financial interest in the transaction or a relationship with the other parties to the transaction such that the relationship might reasonably be expected to affect his judgment in the particular matter in a manner adverse to the corporation." *Id.* at § 8.31 official comment.

346. The affirmative vote of a majority of the board of directors who have no interest in the transaction is necessary to approve a conflict of interest transaction; but a single director may disapprove a transaction. For the purpose of considering a conflict of interest transaction, a majority of the directors who have no interest in the transaction constitutes a quorum. The RMBCA also states that the fact that an interested director is present at the meeting or votes on the transaction does not affect the procedural validity of the action if all other conditions of the section are met. *Id.* at § 8.31(c).

347. If shareholders are asked to approve a conflict of interest transaction, the affirmative votes of a majority of shares not held by an interested party, or an affiliate of an interested party, is sufficient to pass the transaction. *Id.* at § 8.31(d). The effect of this subsection may in some cases (where the majority shareholder(s) have an interest in the transaction) require the approval of a majority of the minority. *Id.* at § 8.31 official comment.

348. *Id.* at § 8.31(a).

349. This section does not affect the required procedure to approve corporate actions under the RMBCA. *Id.* at § 8.31 official comment.

350. *Id.*

4. *Management Structure*

The Mississippi Act provides that the board of directors shall manage the business and affairs of the corporation.[351] The new trend in corporate governance is for corporate power to be exercised "by or under the authority" of the board of directors with the business and affairs of a corporation managed *under the direction of* the board of directors.[352] This authority is subject to any limitation contained in the articles of incorporation.[353] The new trend developed because the traditional model requiring all corporations to be managed by a board of directors is not appropriate for every type of enterprise.[354] A corporate statute should be flexible enough to provide some realistic governance alternatives to meet the needs of different types of corporations. In many small, closely held corporations, the board members will also be shareholders, officers, or employees. In those corporations, the business and affairs of the corporation will appropriately be managed *by* the board of directors. In other situations, as in large, publicly held corporations, the directors rarely have any contact with the day-to-day operation of the corporation. In these larger corporations, the more appropriate and accurate theory of corporate governance is that the management of the corporation be performed by the senior executives of the corporation *under the direction of* the board of directors.[355] Mississippi corporations suffer no real harm from this provision, but the new trend in corporate governance should not be ignored in statutory revision. This realistic option should be available.

The Mississippi Act also provides that the number of directors

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351. MISS. CODE ANN. § 79-3-67 (Supp. 1986).

352. Branson, *Countertrends in Corporation Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 MINN. L. REV. 53, 89-92 (1983); MODEL BUS. CORP. ACT ANN. 3d § 8.01 official comment (1986). The following jurisdictions now provide that the business and affairs of a corporation shall be managed "by or under the authority of " the board of directors: ALA. CODE § 10-2A-57 (1975 & Supp. 1986), CAL. CORP. CODE § 300 (West Supp. 1986); CONN. GEN. STAT. ANN. § 33-313 (West 1983 & Supp. 1986); DEL. CODE ANN. tit. 8, § 141 (1983); FLA. STAT. ANN. § 607.111 (West 1977 & Supp. 1986); HAWAII REV. STAT. § 416 91.5 (Supp. 1984); IDAHO CODE § 30-1-35 (1948); IND. CODE ANN. § 23-1-2-11 (Burns 1984); IOWA CODE ANN. § 496A.34 (West Supp. 1985); MD. CORPS. & ASS'NS. CODE ANN. § 2-401 (1985); MICH. COMP. LAWS ANN. §§ 450.1501, 450.1463 (West 1973 & Supp. 1986); MINN. STAT. ANN. §§ 302A.201, 302A.457 (West 1985); MONT. CODE ANN. §§ 35-1-401, 35-1-515 (1985); N.H. REV. STAT. ANN. § 293-A:35 (Supp. 1986); N.Y. BUS. CORP. LAW § 701 (McKinney Supp. 1986); OHIO REV. CODE ANN. §§ 1701.59, 1701.591 (Baldwin 1985); OKL. STAT. ANN. tit. 18, § 1.34 (West 1953); S. C. CODE ANN. §§ 33-11-220, 33-13-10 (Law. Co-op. Supp. 1985); and WASH. REV. CODE ANN. § 23A.08.340 (Supp. 1985).

353. MODEL BUS. CORP. ACT ANN. 3d § 8.01 (1986).

354. Branson, *supra* note 352, at 91. Branson says that "[i]n large corporations especially, that formulation [that directors manage the corporation] does not accord with reality." *Id. See also* MODEL BUS. CORP. ACT ANN. 3d § 8.01 official comment (1986).

355. MODEL BUS. CORP. ACT ANN. 3d § 8.01 official comment (1986).

may be fixed in the bylaws and that the minimum number of directors is three.[356] The requirement that a board of directors be composed of at least three people is also an antiquated statutory concept.[357] Modern corporate statutes drop the statutory minimum to one and allow the corporation to determine how many directors it needs.[358] Although most state statutes still provide for a board of directors, some allow a sole shareholder to act as the board.[359] In corporations which have only one or two shareholders, allowing the corporation to act with a one- or two-person board avoids the need to bring in outsiders and may increase the efficiency of the corporation. The RMBCA goes even further. In corporations which have 50 or fewer shareholders, the shareholders may elect, in the articles of incorporation, to dispense with the board altogether[360] and manage the corporation directly.[361] While

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356. MISS. CODE ANN. § 79-3-69 (1972).

357. Only five states other than Mississippi still require three or more directors in all cases. MO. ANN. STAT. § 351.315 (Vernon Supp. 1985); N. C. GEN. STAT. § 55-25 (1982); N.D. CENT. CODE § 10-19-37 (1985); OKLA. STAT. ANN. tit. 18, § 1.35 (1953); UTAH CODE ANN. § 16-10-34 (1953).

358. Seventeen states require the number of directors to be three unless there are less than three shareholders. In these 17 states, the statutes allow fewer than three directors as long as the number of directors is not fewer than the number of shareholders. ALASKA STAT. § 10.05.177 (1976); ARK. STAT. ANN. § 64-302 (1980); COLO. REV. STAT. § 7-5-102 (Supp. 1985); CONN. GEN. STAT. ANN. § 33-314 (1983); GA. CODE ANN.§ 14-2-141 (Supp. 1986); HAWAII REV. STAT. § 416-4 (1976); LA. REV. STAT. ANN. § 12:81 (West 1969 & Supp. 1986); ME. REV. STAT. ANN. tit. 13-A, § 703 (1964); MD. CORPS. & ASS'NS. CODE ANN. § 2-402 (Supp. 1985); MASS. ANN. LAWS ch. 156, § 21 (Michie/Law. Co-op. 1979); NEV. REV. STAT. § 78.115 (1981); N. Y. BUS. CORP. LAW § 702 (McKinney 1963 & Supp. 1986); OHIO REV. CODE ANN. § 1701.56 (Baldwin 1979); PA. STAT. ANN. tit. 15, § 1402 (Purdon 1967 & Supp. 1985); TENN. CODE ANN. § 48-1-802 (1984); VT. STAT. ANN. tit. II, § 1882 (1984); WYO. STAT. § 17-1-134 (1977). Twenty-five states require one or more directors and allow the corporation to decide how many directors are needed in all circumstances. ALA. CODE § 10-2A-58 (1975); ARIZ. REV. STAT. ANN. § 10-036 (1956); CAL. CORP. CODE §§ 212, 301, 303 (West 1977 & Supp. 1986); DEL. CODE ANN. tit. 8 § 141(b) (1983); FLA. STAT. ANN. § 607.114 (West 1977); IDAHO CODE § 30-1-36 (1980); IND. CODE ANN. § 23-1-2-11(3)(b) (West 1984); IOWA CODE ANN. § 496A.35 (West Supp. 1985); KAN. STAT. ANN. § 17-6301(b) (1981); KY. REV. STAT. ANN. § 271A.180 (Baldwin 1983); MICH. COMP. LAWS ANN. 450-1505 (West 1973); MINN. STAT. ANN. § 302A.203 (West 1985); MONT. CODE ANN. § 35-1-402 (1985); N.H. REV. STAT. ANN. § 293-A:36 (Supp. 1985); N.J. STAT. ANN. § 14A:6-2 (West Supp. 1986); N.M. STAT. ANN. § 53-11-36 (1978); OR. REV. STAT. § 57.185 (1985); R. I. GEN. LAWS § 7-1.1-34 (1985); S.C. CODE ANN. § 33-13-30 (Law. Co-op. Supp. 1985); S.D. CODIFIED LAWS ANN. § 47-5-4 (1983); TEX. REV. CIV. STAT. ANN. art. 2.32 (Vernon 1980); VA. CODE § 13.1-673 (Supp. 1985); WASH. REV. CODE ANN. § 23A.08.350 (Supp. 1987); W. VA. CODE § 31-1-21 (1982); WIS. STAT. ANN. § 180.32 (West Supp. 1986).

359. *See infra* note 361.

360. The corporation may choose to limit the board's authority rather than dispense with the board entirely. MODEL BUS. CORP. ACT ANN. 3d § 8.01 (1986).

361. The articles must state who will exercise the functions of the board. *Id.* at § 8.01. A number of jurisdictions now allow close corporations to dispense with the board of directors or delegate managerial duties to shareholders, other persons, or other corporations. CAL. CORP. CODE § 300 (West Supp. 1986); ME. REV. STAT. ANN. tit. 13A, § 701 (1964); MICH. COMP. LAWS ANN. §§ 450.1501, 450.1463 (West Supp. 1985); MONT. CODE ANN. §§ 35-1-401, 35-1-515 (1985); OHIO REV. CODE ANN. § 1701.59 (Baldwin 1985); S.C. CODE ANN. §§ 33-11-220, 33-13-10 (Law. Co-op. Supp. 1985). Many other jurisdictions allow close corporations to dispense with a board of directors in separate close corporation statutes. *See* Model Close Corporation Supplement and annotations thereto. MODEL BUS. CORP. ACT ANN. 3d 1803-79 (1986).

all corporations need a model of corporate governance, the same model is not appropriate for all corporations. Because corporations are formed for a variety of purposes and in many different sizes, the corporation statute should allow each corporation to shape its management form to meet its specific needs.[362] The state corporate statute should meet the needs of corporations of all types. Mississippi should take advantage of the RMBCA's common-sense flexibility regarding management structure.

E. Miscellaneous Provisions

This portion of the Article will discuss some little known provisions of Mississippi's corporation law which should be amended.

1. Survival of Claims Against a Dissolved Corporation: Section 79-3-209

Section 79-3-209, which was based primarily on the 1960 version of the MBCA, deals with survival of remedies after the dissolution, suspension or forfeiture of the corporation.[363] It provides that dissolution, suspension or forfeiture does not impair any remedy available to or against the corporation for any right or claim existing or any liability incurred prior to the dissolution, suspension or forfeiture.[364] The section also provides for the survival of a claim against a dissolved corporation if an action or proceeding to enforce the claim is commenced within the period of limitation set forth in the applicable statute of limitations. Although the Mississippi section may be adequate to govern pre-dissolution claims, it fails to address the problems of claims that arise after

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362. *See supra* text accompanying notes 351-61.

363. MISS. CODE ANN. § 79-3-209 (1972). MODEL BUS. CORP. ACT ANN. § 98 (1960). That section was renumbered § 105 in the 1969 revision of the Model Business Corporation Act. That section provided:

> The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this Act, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two years so as to extend its period of duration.

For an historical perspective of the problem, see Miller, *The Status of Choses in Action of Dissolved but Unadministered Corporations after Expiration of the Statutory Period for Winding Up*, 9 MISS. L.J. 455 (1937).

364. MISS. CODE ANN. § 79-3-209 (1972). Prior to the adoption of the Mississippi Business Corporation Act, Mississippi provided for the survival of claims against a dissolved corporation for a period of three years. MISS. CODE ANN. § 5353 (1942 & Supp. 1957).

dissolution.[365] Post-dissolution claims often involve claims for personal injuries which occur after dissolution, but which are allegedly caused by products manufactured or sold prior to dissolution.[366] Whether a products liability claim arises before or after dissolution may depend upon the liability theory the court applies to the claim.[367] If a court adopts a warranty theory, the claim will arise at the date of the sale and the statute of limitations will begin to run from the same date.[368] If the claim is in tort, for negligence, the cause of action will accrue at the time of the injury and the statute of limitations will run from that date.[369] The action may also sound in strict liability, a hybrid of the two.[370] In strict liability cases, the courts are split on whether warranty or tort principles apply.[371] A substantial number of jurisdictions hold that the tort standard applies and that the claim accrues and the statute of limitations begins to run at the time of the injury.[372] If the sale occurs before dissolution and the injury thereafter, the theory applied will affect the classification of a claim as pre-dissolution or post-dissolution.[373] If the warranty theory is adopted in this situation, the claim is pre-dissolution; if a tort standard is adopted, the claim is post-dissolution. In Mississippi the application of this section is clouded and may have disastrous results.

In *Naugher v. Fox River Tractor Company*,[374] the application of Mississippi's survival statute, Section 79-3-209, created an unlimited statute of limitations for personal injury cases.[375] In *Naugher*, the court held that a plaintiff who was injured *after* the dissolution of the defendant corporation by a product manufactured and sold *before* the corporation was dissolved could maintain a claim against the defendant because the claim accrued at

365. MISS. CODE ANN. § 79-3-209 (1972). *See generally* Henn and Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865, 899 (1971).

366. Henn and Alexander, *supra* note 365, at 867-73, 888-89; Friedlander and Lannie, *Post-Dissolution Liabilities of Shareholders and Directors for Claims Against Dissolved Corporations*, 31 VAND. L. REV.1363, 1366-69 (1978); Wallach, *Products Liability: A Remedy in Search of a Defendant – The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321, 321 (1976).

367. Henn and Alexander, *supra* note 365, at 888; Wallach, *supra* note 365, at 326.

368. Henn and Alexander, *supra* note 365, at 877; Note, *Statutes of Limitations: Their Selection and Application in Products Liability Cases*, 23 VAND. L. REV. 775, 782-85 (1970).

369. Henn and Alexander, *supra* note 365, at 877-78; Note, *supra* note 368, at 775, 781-82.

370. Henn and Alexander, *supra* note 365, at 873-78.

371. Note, *supra* note 368, at 782-85.

372. *See also* RESTATEMENT (SECOND) OF TORTS § 402A (1965). The restatement takes the position that strict liability sounds in tort even though some courts rely on warranty theories. Note, *Statutes of Limitations: Their Selection and Application in Products Liability Cases*, 23 VAND. L. REV. 775, 787-88 (1970). *But cf.* Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927) (decided on a warranty principle).

373. Henn and Alexander, *supra* note 365, at 888-89.

374. 446 F. Supp. 1281 (N.D. Miss 1977).

375. *See infra* text accompanying note 382.

the time the machine was manufactured and placed on the market.[376] The court then applied the general six-year statute of limitations beginning from the date of the injury rather than the date of the sale.[377] In *Naugher*, the court mixed its theories and adopted a warranty theory for accrual of the claim and a negligence theory for the purpose of determining the applicable statute of limitations.[378] Therefore, the court found that the claim accrued at the date of sale but held that the statute of limitations ran from the date of the injury.[379] If the court had applied either theory consistently, the claim would have been barred. Under a warranty claim, the suit would have been barred by the statute of limitations. If a negligence theory were applied, the claim would have been barred because the survival provision of section 79-3-209 would not apply.[380] Commentators, as well as a majority of cases from other jurisdictions, conclude that a dissolved corporation may be sued only for pre-dissolution claims in those states whose statutes are patterned after the 1960 version of the MBCA.[381] The effect of *Naugher* is to create an unlimited time for which the shareholders and directors of a dissolved corporation may be held responsible for tort claims for products manufactured and sold prior to dissolution.[382]

The decision in *Naugher* makes it practically impossible for a corporation to complete the winding up process in a reasonable time. Further, the *Naugher* decision is unfair to the shareholders and directors of the corporation who may be saddled with claims for an unlimited time after dissolution.[383] On the other hand, denying all claims which arise after dissolution may be unfair to an injured plaintiff.[384] In response to post-dissolution claim problems with the MBCA provision, the RMBCA provides for continuing liability for post-dissolution claims for a specified period after

376. 446 F. Supp. at 1283. In *Naugher*, the plaintiff brought an action against the defendant for damages sustained while using a "crop chopper" manufactured by the defendant. The "crop chopper" was sold to the plaintiff in 1966 and the defendant corporation dissolved in 1968. The plaintiff was injured while using the machine in 1969 and brought suit in 1975. *Id.* at 1282.

377. *Id.*

378. *Id.* at 1283.

379. *Id.*

380. Henn and Alexander, *supra* note 365, at 899.

381. Stone v. Gibson Refrig. Sales Corp., 366 F. Supp. 733, 734 (E.D. Pa. 1973); Bishop v. Schield Bantam Co., 293 F. Supp. 94, 95 (N.D. Iowa 1968); Chadwick v. Air Reduction Co., 239 F. Supp. 247, 251 (N.D. Ohio 1965); Henn and Alexander, *supra* note 365, at 899; Wallach, *supra* note 366, at 326.

382. Under the *Naugher* formulation, a corporation which manufactured a product in 1965 and dissolved in 1975 would be subject to suit by a plaintiff injured by the product in 1985 as long as the suit was brought within six years from the 1985 injury. This is quite clearly not the intent of the statute.

383. Freidlander and Lannie, *supra* note 366, at 1401.

384. MODEL BUS. CORP. ACT ANN. 3d § 14.07 official comment (1986); Henn and Alexander, *supra* note 365, at 905. Freidlander and Lannie, *supra* note 366, at 1400.

dissolution.[385] The RMBCA continues liability for a period of five years from the publication of notice of dissolution.[386] The official commentary to the RMBCA states that while the five-year period is arbitrary, the drafters believed that the "great bulk" of post-dissolution claims will arise within five years.[387]

Mississippi should amend its statute to correct the problems created by a federal judge interpreting Mississippi law. The decision in *Naugher* leaves the shareholders and directors of a dissolved corporation subject to liability for an unlimited period.[388] The RMBCA provides a sound, reasonable solution by balancing the right of plaintiffs to seek redress for injuries against the need for certainty in the dissolution of corporations. This is a provision which should not be ignored in the revision of Mississippi's corporation statutes.

2. *Administrative Dissolution*

Mississippi is one of only three jurisdictions which does not allow involuntary administrative dissolution.[389] Mississippi allows involuntary dissolution only by judicial order.[390] Mississippi's involuntary dissolution statute provides that a corporation may be dissolved by a decree of a chancery court upon an action filed by the attorney general if the corporation (1) failed to file an annual report within the time specified by law, (2) procured its articles by fraud, (3) abused its authority, (4) failed to appoint and maintain an agent for service of process in the state, or (5) failed to file a change of registered agent within 30 days after the change.[391] As a practical matter, this section causes hardship on the secretary of state who has no legal authority to dissolve a delinquent or abandoned corporation, but must refer the problem to the attorney general to bring an action to dissolve the corporation. Unfortunately, the attorney general's office is busy and has limited legal resources available. Often dissolution actions are abandoned, and the secretary of state is left with continued administrative paperwork and no dissolution. In many instances the

385. MODEL BUS. CORP. ACT ANN. 3d § 14.07 (1986).

386. *Id.*

387. *Id.* at § 14.07 official comment.

388. *Naugher*, 446 F. Supp. at 1283.

389. Alabama and Wisconsin still have no administrative dissolution statute. ALA. CODE § 10-2A-192 (1980); WIS. STAT. ANN. § 180.769 (Supp. 1986).

390. MISS. CODE ANN. § 79-3-187 (1972 & Supp. 1986).

391. *Id.* This section was drawn from an earlier version of the Model Act. The reason given for mandatory judicial dissolution was that restricting this type of action to the courts might protect rights which could be lost otherwise. (MBCA comments). This position was not accepted widely, however, and Mississippi is one of only three jurisdictions which do not allow administrative dissolution.

secretary of state wishes to seek dissolution because the corporation has been abandoned by its shareholders.[392] The corporate records of the state should be purged of those corporations that are no longer active or will not comply with state law requirements. Resort to judicial action takes unnecessary time and energy whereas administrative dissolution is a much simpler method to achieve the same objective.

The RMBCA provides for administrative dissolution, as do a large majority of the states.[393] Administrative dissolution under the RMBCA occurs if (1) the corporation fails to pay its franchise taxes and any penalties within 60 days after they are due; (2) the corporation fails to deliver its annual report to the secretary of state within 60 days of its due date; (3) the corporation is without a registered agent or registered office in this state for a period of 60 days or more; (4) the corporation fails to notify the secretary of state within 60 days after its registered agent or registered office has been changed; or (5) the corporation's period of duration stated in its articles of incorporation expires.[394] Under the RMBCA provisions, the corporation receives notice of its pending dissolution and the opportunity to correct the failing within 60 days.[395] If the corporation is dissolved by administra-

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392. Telephone interview with Ray Bailey, Assistant Secretary of State, Division of Corporation Law (Feb. 14, 1986).

393. MODEL BUS. CORP. ACT ANN. 3d §§ 14.20-.23 (1986); ALASKA STAT. § 10.05.519 (1985); ARIZ. REV. STAT. ANN. §§ 10-095, 10-128 (Supp. 1985); ARK. STAT. ANN. §§ 84-1842, 84-1843 (1980 & Supp. 1985); CAL. CORP. CODE 2205 (West Supp. 1986); COLO. REV. STAT. § 7-10-109 (Supp. 1985); CONN. GEN. STAT. ANN. §§ 33-378, 33-387, 33-388 (West 1983); DEL. CODE ANN. tit. 8, §§ 510-514 (1983); FLA. STAT. ANN. § 607.271 (West 1977 & Supp. 1986); GA. CODE ANN. § 14-2-283 (1982 & Supp. 1986); HAWAII REV. STAT. §§ 416-122 to 416-127 (1985); IDAHO CODE §§ 30-1-134 to 30-1-138 (1980); ILL. ANN. STAT. ch. 32, § 12.35 (Smith-Hurd 1985); IND. CODE ANN. §§ 23-1-46-1 to 23-1-46-4 (Burns Supp. 1986); IOWA CODE ANN. § 496A.91 (West 1962 & Supp. 1986); KAN. STAT. ANN. §§ 17-2719, 17-7510 (1981), 50-103 (1983); KY. REV. STAT. ANN. § 271A.615 (Baldwin 1983 & Supp. 1986); LA. REV. STAT. ANN. § 12:163 (West Supp. 1986); ME. REV. STAT. ANN. tit. 13A, § 1302 (1981); MD. CORPS. & ASS'NS. CODE ANN. §§ 3-503 to 3-512 (Supp. 1986); MASS. GEN. LAWS ANN. ch. 156B, §§ 101, 108 (West Supp. 1986); MICH. COMP. LAWS ANN. §§ 450.1922, 450.1925 (West Supp. 1986); MINN. STAT. ANN. § 302A.821 (West 1985); MO. ANN. STAT. §§ 351.525-351.540 (Vernon Supp. 1986); MONT. CODE ANN. § 35-12-1201 (1985); NEB. REV. STAT. §§ 21-313 to 21-323, 21-20135 to 21-20144 (1983); NEV. REV. STAT. ANN. §§ 78.170-.185 (1986); N.H. REV. STAT. ANN. § 293-A:95(I) (Supp. 1985); N.J. STAT. ANN. §§ 54:11-1 to 54:11-5 (West 1986); N.M. STAT. ANN. § 53-5-7 (1983); N.Y. TAX LAW § 203a (McKinney 1986); N.C. GEN. STAT. §§ 105-230, 105-232 (1985); OHIO REV. CODE ANN. §§ 5733.20-.22 (Baldwin 1985); OKLA. STAT. ANN. tit. 18, § 1.198a (1986); OR. REV. STAT. §§ 57.585, 57.755(5) (1985); PA. STAT. ANN. tit. 72, § 1704 (Purdon 1949); R.I. GEN. LAWS §§ 7-1.1-87 to 7-1.1-89 (1985); S.C. CODE ANN. §§ 33-21-110, 33-21-120 (Law. Co-op. Supp. 1985); S.D. CODIFIED LAWS ANN. §§ 47-7-52.1 to 47-7-59 (1983); TENN. CODE ANN. § 67-4-917 (Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 7.01 (Vernon 1980 & Supp. 1986); UTAH CODE ANN. §§ 16-10-88 to 16-10-88.2 (Supp. 1986); VT. STAT. ANN. tit. II, § 2063 (Supp. 1986); VA. CODE §§ 13.1-752 to 13.1-755 (Supp. 1986); WASH. REV. CODE ANN. § 23A.28.125-.127 (Supp. 1986); W. VA. CODE § 31-1-156(b) (1982); WIS. STAT. ANN. § 180.793 (West Supp. 1986); WYO. STAT. §§ 17-1-613, 17-2-102, 17-2-103 (1977).

394. MODEL BUS. CORP. ACT ANN. 3d § 14.20 (1986).

395. *Id.* at § 14.21.

tive order, there is also a reinstatement procedure available if the corporation seeks reinstatement within two years.[396]

Mississippi should adopt administrative dissolution because it reduces the number of records to be maintained by the secretary of state, eliminates wasteful attempts to compel abandoned corporations to comply with state laws and returns unused names to the pool of names available in the state. Most importantly, administrative dissolution and the threat thereof will serve as an effective enforcement mechanism against corporations which fail to pay franchise taxes or file annual reports.[397]

IV. CONCLUSION

This Article has touched only on those sections of the Mississippi Business Corporation Law which are the most outdated and awkward. Attention must be given, however, to the entire statute. Mississippi's business corporation statute needs a major overhaul. The current statute, which is over 20 years old, has received little attention since its passage. Because the statute is outdated and unusual, it enhances Mississippi's backward image. The current statute should be abandonded in favor of a new statute patterned closely after the Revised Model Business Corporation Act. The RMBCA should be adopted with as few changes as possible so that Mississippi's corporation law will be comfortable and flexible for use by both Mississippi lawyers and those from other states. In addition, the proposed statutory amendments cannot be completed unless the Mississippi Constitution is amended to delete the unusual anti-business sections. Therefore, the legislature should consider amendments to both the statute and the constitution at the same time and take advantage of the expertise and knowledge of the drafters of the RMBCA by adopting the statute substantially as written. In connection with any statutory revision, the state must also consider the need to keep the business corporation law updated as the RMBCA is amended. This could be accomplished by nominating a body of interested individuals to keep track of the corporate law nationwide and to propose changes in the Mississippi corporation statutes as needed. Some type of corporate law advisory committee is essential to the continued health of Mississippi corporate law.

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396. MODEL BUS. CORP. ACT ANN. 3d § 14.22 (1986).

397. Telephone interview with Ray Bailey, Assistant Secretary of State, Division of Corporation Law (Feb. 14, 1986); MODEL BUS. CORP. ACT ANN. 3d § 14.20 official comment (1986).

Appendix A
MISSISSIPPI BUSINESS CORPORATION LAW
Selected Provisions

§ 79-3-3. Definitions.

As used in this chapter, unless the context otherwise requires, the term:

(a) "Corporation" or "domestic corporation" means a corporation for profit subject to the provisions of this chapter, except a foreign corporation.

(b) "Foreign corporation" means a corporation for profit organized under laws other than the laws of this state for a purpose or purposes for which a corporation may be organized under this chapter.

(c) "Articles of incorporation" means the original or restated articles of incorporation and all amendments thereto and includes articles of merger.

(d) The principal office in Mississippi of a domestic corporation or of a foreign corporation shall be its registered office, which may be, but need not be, the same as its place of business in this state.

(e) "Shares" means the units into which the proprietary interests in a corporation are divided.

(f) "Subscriber" means one who subscribes for shares in a corporation, whether before or after incorporation.

(g) "Shareholder" means one who is a holder of record of shares in a corporation.

(h) "Authorized shares" means the shares of all classes which the corporation is authorized to issue.

(i) "Treasury shares" means shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation, and have not, either by reason of the acquisition or thereafter, been canceled or restored to the status of authorized but unissued shares. Treasury shares shall be deemed to be "issued" shares, but not "outstanding" shares.

(j) "Net assets" means the amount by which the total assets of a corporation, excluding treasury shares, exceed the total debts of the corporation.

(k) "Stated capital" means, at any particular time, the sum of (1) the par value of all shares of the corporation having a par value that have been issued, (2) the amount of the consideration reeceived by the corporation for all shares of the corporaton without par value that have been issued, except such part of the consideration therefor as may have been allocated to capital surplus in a manner permitted by law, and (3) such amounts not included in clauses (1) and (2) of this paragraph as have been transferred to stated capital of the corporation, whether upon the issue of shares as a share dividend or otherwise, minus all reductions from such sum as have been effected in a manner permitted by law. Irrespective of the manner of designation thereof by the laws under which a foreign corporation is organized, the stated capital of a foreign corporation shall be determined on the same basis and in the same manner as the stated capital of a domestic corporation, for the purpose of computing fees and other changes imposed by this chapter.

(l) "Surplus" means the excess of the net assets of a corporation over its stated capital.

(m) "Earned surplus" means the portion of the surplus of a corporation equal to the balance of its net profits, income, gains and losses from the date of incorporation, or from the latest date when a deficit was eliminated by an application of its capital surplus or stated capital or otherwise, after deducting subsequent distributions to shareholders and transfers to stated capital and capital surplus to the extent such distributions and transfers are made out of earned surplus.

(n) "Capital surplus" means the entire surplus of a corporation other than its earned surplus.

(o) "Insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its business.

§ 79-3-7. General powers.

Each corporation shall have power:

(a) To have succession for a period not to exceed ninety-nine (99) years by its corporate name unless a lesser period of duration is stated in its articles of incorporation.

(b) To sue and be sued, complain and defend, in its corporate name.

(c) To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.

(d) To purchase, take, receive, lease, or otherwise acquire, own, hold, improve, use, and otherwise deal in and with real or personal property, or any interest therein, wherever situated.

(e) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.

(f) To lend money to its employees other than its officers and directors, and otherwise assist its employees, officers and directors.

(g) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof, provided, however, that this section shall not be construed to grant to any corporation the power to create unlawful monopolies, trusts or combinations in restraint of trade in violation of the laws of this state.

(h) To make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income.

(i) To lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(j) To conduct its business, carry on its operations, and have offices and exercise the powers granted by this chapter in any state, territory, district, or possession of the United States, or in any foreign country.

(k) To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.

(l) To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation.

(m) In addition to authority now provided by law, to make donations for the public welfare or for charitable, scientific or educational purposes; and in time of war to make donations in aid of war activities.

(n) In time of war to transact any lawful business in aid of the United States in the prosecution of the war.

(o) To indemnify any director or officer or former director or officer of the corporation, or any person who may have served at its request as a director or officer of another corporation in which it owns shares of capital stock or of which it is a creditor, against expenses actually and reasonably incurred by him in connection with the defense of any action, suit or proceeding, civil or criminal, in which he is made a party by reason of being or having been such director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty, or a violation of the provisions of sections 75-21-1 to 75-21-39, and 75-23-1 to 75-23-27, Mississippi Code of 1972; and to make any other indemnification that shall be authorized by the articles of incorporation or by any bylaw or resolution adopted by the stockholders after notice.

(p) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans, and other incentive plans for any or all of its directors, officers and employees.

(q) To cease its corporate activities and surrender its corporate franchise.

(r) To have and exercise all powers necessary or convenient to affect any or all of the purposes for which the corporation is organized.

(s) To apply to the governor for a renewal of its succession under the corporate name, in which event it shall be sufficient for the governor to give a certificate under the great seal of the state that the original articles of incorporation and certificate of incorporation and all amendments thereto then in effect are renewed for a period not to exceed ninety-nine (99) years. Every certificate of renewal shall be recorded at length in the office of the secretary of state in a well-bound book to be kept by him for that purpose, to be furnished by the state.

§ 79-3-9. Right of corporation to acquire and dispose of its own shares.

A corporation shall have the right to purchase, take, receive or otherwise acquire, hold, own, pledge, transfer or otherwise dispose of its own shares, but purchases of its own shares, whether direct or indirect, shall be made only to the extent of unreserved and unrestricted earned surplus available therefor, and if the articles of incorporation so permit or with the affirmative vote of the holders of at least two-thirds of all shares entitled to vote thereon, to the extent of unreserved and unrestricted capital surplus available therefor.

To the extent that earned surplus or capital surplus is used as the measure of the corporation's right to purchase its own shares, such surplus shall be restricted so long as such shares are held as treasury shares, and upon the disposition or cancellation of any such shares the restriction shall be removed pro tanto.

Notwithstanding the foregoing limitation, a corporation may purchase or otherwise acquire its own shares for the purpose of:

(a) Eliminating fractional shares.

(b) Collecting or compromising indebtedness to the corporation.

(c) Paying dissenting shareholders entitled to payment for their shares under the provision of this chapter.

(d) Effecting, subject to the other provisions of this chapter, the retirement of its redeemable shares by redemption or by purchase at not to exceed the redemption price.

No purchase of or payment for its own shares shall be made at a time when the corporation is insolvent or when such purchase or payment would make it insolvent, or when such purchase would reduce its outstanding capital below the minimum provided in its articles of incorporation to begin business.

§ 79-3-27. Authorized shares.

Each corporation shall have power to create and issue the number of shares stated in its articles of incorporation. Such shares may be divided into one or more classes, any or all of which classes may consist of shares with par value or shares without par value, with such designations, preferences, limitations, and relative rights as shall be stated in the articles of incorporation. The articles of incorporation may limit or deny the voting rights of or provide special voting rights for the shares of any class or preferred stocks to the extent not inconsistent with the provisions of this chapter.

Without limiting the authority herein contained, a corporation, when so provided in its articles of incorporation, may issue shares of preferred or special classes:

(a) Subject to the right of the corporation to redeem any of such shares at the price fixed by the articles of incorporation for the redemption thereof.

(b) Entitling the holders thereof to cumulative, non cumulative or partially cumulative dividends.

(c) Having preference over any other class or classes of shares as to the payment of dividends.

(d) Having preference in the assets of the corporation over any other class or classes of shares upon the voluntary or involuntary liquidation of the corporation.

(e) Convertible into shares of any other class or into shares of any series of the same or any other class, except a class having prior or superior rights and preferences as to dividends or distribution of assets upon liquidation, but shares without par value shall not be converted into shares with par value unless that part of the stated capital of the corporation represented by such shares without par value is, at the time of conversion, at lease equal to the aggregate par value of the shares into which the shares without par value are to be converted.

§ 79-3-33. Consideration for shares.

Shares having a par value shall not have a par value less than one dollar ($1.00). Such shares may be issued for such consideration expressed in dollars, not less than the par value thereof, as shall be fixed from time to time by the board of directors.

Shares without par value may be issued for such consideration expressed in dollars and not less than one dollar ($1.00) per share as may be fixed from time to time by the board of directors unless the articles of incorporation reserve to the shareholders the right to fix the consideration. In the event that such right be reserved as to any shares, the shareholders shall, prior to the issuance of such shares, fix the consideration to be received for such shares, not less than one dollar ($1.00) per share, by a vote of the holders of a majority of all shares entitled to vote thereon.

Treasury shares may be disposed of by the corporation for such consideration expressed in dollars as may be fixed from time to time by the board of directors.

That part of the surplus of a corporation which is transferred to stated capital upon the issuance of shares as a share dividend shall be deemed to be the consideration for the issuance of such shares.

In the event of a conversion of shares, or in the event of an exchange of shares with or without par value for the same or a different number of shares with or without par value, whether of the same or a different class or classes, the consideration for the shares so issued in exchange or conversion shall be deemed to be (1) the stated capital then represented by the shares so exchanged or converted, and (2) that part of surplus, if any, transferred to stated capital upon the issuance of shares for the shares so exchanged or converted, and (3) any additional consideration paid to the corporation upon the issuance of shares for the shares so exchanged or converted.

§ 79-3-35. Payment for shares.

The consideration for the issuance of shares may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor or services actually performed for the corporation. When payment of the consideration for which shares are to be issued shall have been received by the corporation, such shares shall be deemed to be fully paid and non-assessable.

Neither promissory notes nor future services shall constitute payment or part payment for shares of a corporation.

In the absence of fraud in the transaction, the judgment of the board of directors or the shareholders, as the case may be, as to the value of the consideration received for shares shall be conclusive.

§ 79-3-47. Liability of subscribers and shareholders.

A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued.

Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall not be personally liable to the corporation or its creditors for any unpaid portion of such consideration.

An executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver shall not be personally liable to the corporation as a holder of or subscriber to shares of a corporation, but the estate and funds in his hands shall be so liable.

No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder.

§ 79-3-61. Quorum of shareholders.

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 that one-third (1/3) of the shares entitled to vote at the meeting. If a quorum is present, the affirmative vote of the 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.

§ 79-3-63. Voting of shares.

Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders, except to the extent that the voting rights of the shares of preferred stock are limited or denied by the articles of incorporation as permitted by this chapter.

Neither treasury shares, nor shares held by another corporation of a majority of the shares entitled to vote for the election of directors of such other corporation is held by the corporation, shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time.

A shareholder may vote either in person or by proxy executed in writing by the shareholder or by his duly authorized attorney-in-fact. No proxy shall be valid after eleven (11) months from the date of its execution, unless otherwise provided in the proxy.

At each election for directors every shareholder entitled to vote at such election shall have the right to vote, in person or by proxy, the number of shares owned by him for as many persons as there are directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of such candidates.

Shares standing in the name of another corporation, domestic or foreign, may be voted by such officer, agent or proxy as the bylaws of such corporation may prescribe, or, in the absence of such provision, as the board of directors of such corporation may determine.

Shares held by an administrator, executor, guardian or conservator may be voted by him, either in person or by proxy without a transfer of such shares into his name. Shares standing in the name of a trustee may be voted by him, either in person or by proxy, but no trustee shall be entitled to vote shares held by him without a transfer of such shares into his name.

Shares standing in the name of a receiver may be voted by such receiver, and shares held by or under the control of a receiver may be voted by such receiver without the transfer thereof into his name if authority so to do be contained in an appropriate order of the court by which such receiver was appointed.

A shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred.

On and after the date on which written notice of redemption of redeemable shares has been mailed to the holders thereof and a sum sufficient to redeem such shares has been deposited with a bank or trust company with irrevocable instruction and authority to pay the redemption price to the holders thereof upon surrender of certificates therefor, such shares shall not be entitled to vote on any matter and shall not be deemed to be outstanding shares.

§ 79-3-67. Board of directors.

The business and affairs of a corporation shall be managed by a board of directors. Each director shall be eighteen (18) years of age or older, and need not be a resident of this state or shareholder of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe

other qualifications for directors. The board of directors shall have authority to fix the compensation of directors unless otherwise provided in the articles of incorporation. No person who is engaged or interested in a competing business either individually or as employee or stockholder shall serve on any board of directors of any corporation without the consent of a majority of interest of the stockholders thereof.

§ 79-3-69. Number and election of directors.

The number of directors of a corporation shall be not less than three (3). Subject to such limitation, the number of directors shall be fixed by the bylaws, except as to the number constituting the initial board of directors, which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to the bylaws, but no decrease shall have the effect of shortening the term of any incumbent director. In the absence of a bylaw fixing the number of directors, the number shall be the same as that stated in the articles of incorporation. The names and addresses of the members of the first board of directors shall be stated in the articles of incorporation. Such person shall hold office until the first annual meeting of shareholders, and until their successors shall have been elected and qualified. At the first annual meeting of shareholders and at each annual meeting thereafter the shareholders shall elect directors to hold office until the next succeeding annual meeting, except in case of the classification of directors as permitted by this chapter. Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified.

§ 79-3-83. Dividends.

The board of directors of a corporation may, from time to time, declare and the corporation may pay dividends on its outstanding shares in cash, property, or its own shares, except when the corporation is insolvent or when the payment thereof would render the corporation insolvent or when the declaration or payment thereof would be contrary to any restrictions contained in the articles of incorporation, subject to the following provisions:

(a) Dividends may be declared and paid in cash or property only out of the unreserved and unrestricted earned surplus of the corporation, except as otherwise provided in this section.

(b) If the articles of incorporation of a corporation engaged in the business of exploiting natural resources so provide, dividends may be declared and paid in cash out of the depletion reserves, but each such dividend shall be identified as a distribution of such reserves and the amount per share paid from such reserves shall be disclosed to the shareholders receiving the same concurrently with the distribution thereof.

(c) Dividends may be declared and paid in its own shares out of any treasury shares that have been reacquired out of surplus of the corporation.

(d) Dividends may be declared and paid in its own authorized but unissued shares out of any unreserved and unrestricted surplus of the corporation upon the following conditions:

(1) If a dividend is payable in its own shares having a par value, such shares shall be issued at not less than the par value thereof and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus at least equal to the aggregate par value of the shares to be issued as a dividend.

(2) If a dividend is payable in its own shares without par value, such shares shall be issued at such stated value as shall be fixed by the board of directors by resolution adopted at the time such dividend is declared, and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus equal to the aggregate stated value so fixed in respect of such shares; and the amount per share so transferred to stated capital shall be disclosed to the shareholders receiving such dividend concurrently with the payment thereof.

(e) No dividend payable in shares of any class shall be paid to the holders of shares of any other class unless the articles of incorporation so provide or such payment is authorized by the affirmative vote or the written consent of the holders of at least a majority of the outstanding shares of the class in which the payment is to be made. A split-up or division of the issued shares of any class into a greater number of shares of the same class without increasing the stated capital of the corporation shall not be construed to be a share dividend within the meaning of this section.

§ 79-3-85. Distribution from capital surplus.

The board of directors of a corporation may, from time to time, distribute to its shareholders out of capital surplus of the corporation a portion of its assets, in cash or property, subject to the following provisions:

(a) No such distribution shall be made at a time when the corporation is insolvent or when such distribution would render the corporation insolvent.

(b) No such distribution shall be made unless the articles of incorporation so provide or such distribution is authorized by the affirmative vote of the holders of at least two-thirds of the outstanding shares of each class whether or not entitled to vote thereon by the provisions of the articles of incorporation of the corporation.

(c) No such distribution shall be made to the holders of any class of shares unless all cumulative dividends accrued on all preferred or special classes of shares entitled to preferential dividends shall have been fully paid.

(d) No such distribution shall be made to the holders of any class of shares which would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in event of voluntary liquidation to the holders of shares having preferential rights to the assets of the corporation in the event of liquidation.

(e) Each such distribution, when made, shall be identified as a distribution from capital surplus and the amount per share disclosed to the shareholders receiving the same concurrently with the distribution thereof.

The board of directors of a corporation may also, from time to time, distribute to the holders of its outstanding shares having a cumulative preferential right to receive dividends, in discharge of their cumulative dividend rights, dividends payable in cash out of the capital surplus of the corporation, if at the time the corporation has no earned surplus and is not insolvent and would not thereby be rendered insolvent. Each such distribution, when made, shall be identified as a payment of cumulative dividends out of capital surplus.

§ 79-3-87. Specific restrictions on dividends.

Anything to the contrary in this chapter notwithstanding, the board of directors of a corporation shall never declare, nor shall a corporation pay, a cash dividend unless such dividend is out of the unreserved and unrestricted earned surplus only of such corporation and has been legally appropriated for the specific purpose of paying dividends; provided further, that no such dividend shall be declared or paid when the corporation is insolvent or when the payment thereof would render the corporation insolvent or when such payment would be contrary to any provisions in the articles of incorporation. Nothing in this chapter shall impair or prevent a legal distribution to shareholders upon liquidation or dissolution as provided in this chapter.

§ 79-3-89. Loans.

No loans shall be made by a corporation to its officers or directors, and no loans shall be made by a corporation secured by its shares.

§ 79-3-91. Liability of directors in certain cases.

In addition to any other liabilities imposed by law upon directors of a corporation:

(a) Directors of a corporation who vote for or assent to the declaration of any dividend or other distribution of the assets of a corporation to its shareholders contrary to the provisions of this chapter or contrary to any restrictions contained in the articles of incorporation, shall be jointly and severally liable to the corporation for the amount of such dividend which is paid or the value of such assets which are distributed in excess of the amount of such dividend or distribution which could have been paid or distributed without a violation of the provisions of this chapter or the restrictions in the articles of incorporation.

(b) Directors of a corporation who vote for or assent to the purchase of its own shares contrary to the provisions of this chapter shall be jointly and severally liable to the corporation for the amount of consideration paid for such shares which is in excess of the maximum amount which could have been paid therefore without a violation of the provisions of this chapter.

(c) The directors of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

(d) The directors of a corporation who vote for or assent to the making of a loan to an officer or director of the corporation, or the making of any loan secured by shares of the corporation, shall be jointly and severally liable to the corporation for the amount of such loan until the repayment thereof.

(e) If a corporation shall commence business before it has received at least one thousand dollars ($1,000.00) as consideration for the issuance of shares, the directors who assent thereto shall be jointly and severally liable to the corporation for such part of one thousand dollars ($1,000.00) as shall not have been received before commencing business, but such liability shall be terminated when the corporation has actually received one thousand dollars ($1,000.00) as consideration for the issuance of shares.

A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

A director shall not be liable under subparagraphs (a), (b) or (c) of this section if he relied and acted in good faith upon financial statements of the corporation represented to him to be correct by the president or the officer of such corporation having charge of its books of account, or stated in a written report by an independent public or certified public accountant or firm of such accountants fairly to reflect the financial condition of such corporation, nor shall he be so liable if in good faith in determining the amount available for any such dividend or distribution he considered the assets to be of their book value.

Any director against whom a claim shall be asserted under or pursuant to this section for the payment of a dividend or other distribution of assets of a corporation and who shall be held liable thereon, shall be entitled to contribution from the shareholders who accepted or received any such dividend or assets, knowing such dividend or distribution to have been made in violation of this chapter, in proportion to the amounts received by them respectively.

Any director against whom a claim shall be asserted under or pursuant to this section shall be entitled to contribution from the other directors who voted for or assented to the action upon which the claim is asserted.

§ 79-3-93. Provisions relating to actions by shareholders.

No action shall be brought in this state by a shareholder in the right of a domestic or foreign corporation unless the plaintiff was a holder of shares or of voting trust certificates therefor at the time of the transaction of which he complains, or his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder at such time.

§ 79-3-99. Books and records.

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders and board of directors; and shall keep at its registered office or principal place of business, or at the office of its transfer agent or register, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each.

Any person who shall have been a shareholder of record for at least six (6) months immediately preceding his demand or who shall be the holder of record of at least one per cent (1%) of all the outstanding shares of a corporation, upon written demand stating the purpose thereof, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes and record of shareholders and to make extracts therefrom.

Any officer or agent who, or a corporation which, shall refuse to allow any such shareholder, or his agent or attorney, so to examine and make extracts from its books and records of account, minutes, and records of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of ten per cent (10%) of the value of the shares owned by such shareholder, in addition to any other damages or remedy afforded him by law. It shall be a defense to any action for penalties under this section that the person suing therefor has within two (2) years sold or offered for sale any list of shareholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or record of shareholders of such corporation or any other corporation, or was not acting in good faith or for a proper purpose in making his demand.

Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof by a shareholder of proper purpose, irrespective of the period of time during which such shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation.

Upon written request of any shareholder of a corporation, the corporation shall mail to such shareholder its most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations.

§ 79-3-111. Requirement before commencing business.

A corporation shall not transact any business or incur any indebtedness, except such as shall be incidental to its organization or to obtaining subscriptions to or payment for its shares, until there has been paid in for the issuance of shares consideration of the value of at least one thousand dollars ($1,000.00).

§ 79-3-117. Procedure to amend articles of incorporation.

Amendments to the articles of incorporation shall be made in the following manner:

(a) The board of directors shall adopt a resolution setting forth the proposed amendment and directing that

it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(b) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this chapter for the giving of notice of meetings of shareholders. If the meeting be an annual meeting, the proposed amendment or such summary may be included in the notice of such annual meeting.

(c) At such meeting a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least two thirds (2/3) of the shares entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least two thirds (2/3) of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon.

Any number of amendments may be submitted to the shareholders, and voted upon by them, at one meeting.

§ 79-3-147. Articles of merger or consolidation.

Upon such approval, articles of merger or articles of consolidation shall be executed in duplicate by each corporation by its president or a vice president and by its secretary or an assistant secretary, and verified by one (1) 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 such class.

(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 such class voted for and against such plan, respectively.

Duplicate originals of the articles of merger or articles of consolidation shall be delivered to the secretary of state. If the secretary of state finds that such articles conform to law, he shall, when all fees have been paid as in this chapter prescribed:

(1) Endorse on each of such duplicate originals the word "Filed," and the month, day and year of the filing thereof.

(2) File one (1) of such duplicate originals in his office.

(3) Issue a certificate of merger or a certificate of consolidation to which he shall affix the other duplicate original.

The certificate of merger or certificate of consolidation, together with the duplicate original of the articles of merger or articles of consolidation affixed thereto by the secretary of state, shall be returned to the surviving or new corporation, as the case may be, or its representative.

§ 79-3-157. 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 chapter 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 conditions 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 two thirds (2/3) of the outstanding shares of the corporation, unless any class of shares is entitled to vote as a class thereon, in which event such authorization shall require the affirmative vote of the holders of at least two thirds (2/3) 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.

§ 79-3-159. Right of shareholders to dissent.

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 party;

(b) Any business combination, as defined in Section 79-25-3(e), of the Mississippi Shareholder Protection Act, to which the corporation is party; provided, however, that this Section 79-3-159 shall in no way be interpreted to allow a security holder of a corporation subject to the Mississippi Shareholder Protection Act to receive dual compensation for his securities under this section in addition to compensation received directly from such business combination; or

(c) 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 (1) year after the date of sale.

A shareholder may dissent as to less than all of the shares registered in his name. In that event, his rights shall be determined as if the shares as to which he has dissented and his other shares were registered in the names of different shareholders.

The provisions of this section shall not apply to the shareholders of the surviving corporation in a merger if such corporation is on the date of the filing of the articles of merger the owner of all the outstanding shares of the other corporations, domestic or foreign, which are parties to the merger, or if a vote of the shareholders of such corporation is not necessary to authorize such merger.

§ 79-3-161. Rights of dissenting shareholders.

Any shareholder electing to exercise such right of dissent shall file with the corporation, prior to or at the meeting of shareholders at which such proposed corporate action is submitted to a vote, a written objection to such proposed corporate action. If such proposed corporate action be approved by the required vote and such shareholder shall not have voted in favor thereof, such shareholder may, within ten (10) 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 (15) 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 ten (10) 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 corporate 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 (10) 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 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 (12) 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 (30) 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 (90) 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 (30) days a dissenting shareholder and the corporation do not so agree, then the corporation, within thirty (30) days after receipt of written demand from any dissenting shareholder given within sixty (60) days after the date on which such corporate action was effected, shall, or at its election at any time within such period of sixty (60) days may, file a petition in the chancery court of 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 recommend a decision on the question of fair value. The appraisers shall have such power and authority as shall be specified in the 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 shareholder 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 reasonable expenses of the appraisers, but shall exclude the fees 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 a reasonable compensation to any expert or experts employed by the shareholder in the proceeding.

Within twenty (20) 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 and disposed of as the plan of merger or consolidation may otherwise provide.

§ 79-3-167. Voluntary dissolution by act of corporation.

A corporation may be dissolved by the act of the corporation, when authorized in the following manner:

(a) The board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of the 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 chapter for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or special meeting, shall state that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation.

(c) At such meeting a vote of shareholders entitled to vote thereat shall be taken on a resolution to dissolve the corporation. 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 resolution shall be adopted upon receiving the affirmative vote of the holders of at least two-thirds (2/3) of the outstanding shares of the corporation, unless any class of shares is entitled to vote as a class thereon, in which event the resolution shall require for its adoption the affirmative vote of the holders of at least two-thirds (2/3) of the outstanding shares of each class of shares entitled to vote as a class thereon, and of the total outstanding shares.

(d) Upon the adoption of such resolution, a statement of intent to dissolve shall be executed in duplicate by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of the officers signing such statement, which statement shall set forth:

(1) The name of the corporation.

(2) The names and respective addresses of its officers.

(3) The names and respective addresses of its directors.

(4) A copy of the resolution adopted by the shareholders authorizing the dissolution of the corporation.

(5) 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 such class.

(6) The number of shares voted for and against the resolution, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against the resolution, respectively.

Within thirty (30) days after a statement of intent to dissolve has been executed, same shall be published one time in one or more newspapers published in the county where such corporation has its principal office or place of business, or if none be so published, then in one or more newspapers published in the state and having a circulation in such county.

§ 79-3-187. Involuntary dissolution.

A corporation may be dissolved involuntarily by a decree of the chancery court of the county in which its registered office is situated, or of the county in which its principal place of business is situated, in an action filed by the attorney general when it is established that:

(a) The corporation has failed to file its annual report within the time required by this chapter; or

(b) The corporation procured its articles of incorporation through fraud; or

(c) The corporation has continued to exceed or abuse the authority conferred upon it by law; or

(d) The corporation has failed for thirty (30) days to appoint and maintain a registered agent in this state; or

(e) The corporation has failed for thirty (30) days after change of its registered office or registered agent to file in the office of the secretary of state a statement of such change.

§ 79-3-209. Survival of remedy after dissolution, suspension or forfeiture.

The dissolution of a corporation either (1) by the issuance of a certficate of dissolution by the secretary of state, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this chapter, or (3) by expiration of its period of duration; or the suspension of a domestic or a foreign corporation from the right to exercise the powers theretofore granted it for failure to file its annual report as required by law, or the forfeiture of its charter or articles of incorporation or its certificate of authority to do business in Mississippi, or the suspension of a corporation for failure to pay franchise tax, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution, suspension or forfeiture if action or other proceeding is commenced within the period of limitation for the commencement of such action or other proceeding as prescribed in the applicable statutes of limitation. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation shall make application to the secretary of state for a renewal of its articles of incorporation within two (2) years after such dissolution. The secretary of state shall prescribe the form of the application.

§ 79-3-211. Admission of foreign corporation.

No foreign business corporation for profit shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state. No foreign corporation shall be entitled to procure a certificate of authority under this chapter to transact in this state any business which a corporation organized under this chapter is not permitted to transact. A foreign business corporation for profit shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this chapter contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation. No foreign non-profit non-share or non-profit or non-share corporation shall be entitled to procure a certificate of authority under this chapter.

Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities:

(a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(b) Maintaining bank accounts.

(c) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.

(e) Transacting any business in interstate commerce.

(f) Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

(g) Investing in or acquiring, in transactions, outside of Mississippi, royalties and other non-operating mineral interests, and the execution of division orders, contracts of sale and other instruments incidental to the ownership of such non-operating mineral interests.

§ 79-3-285. Unauthorized assumption of corporate powers.

All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

Appendix B
REVISED MODEL BUSINESS CORPORATION ACT
Selected Provisions

CHAPTER 6. SHARES AND DISTRIBUTIONS
SUBCHAPTER A. SHARES

§ 6.01 Authorized Shares

(a) The articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and prior to the issuance of shares of a class the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. All shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class except to the extent otherwise permitted by section 6.02.

(b) The articles of incorporation must authorize (1) one or more classes of shares that together have unlimited voting rights, and (2) one or more classes of shares (which may be the same class or classes as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution.

(c) The articles of incorporation may authorize one or more classes of shares that:

(1) have special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by this Act;

(2) are redeemable or convertible as specified in the articles of incorporation (i) at the option of the corporation, the shareholder, or another person or upon the occurrence of a designated event; (ii) for cash, indebtedness, securities, or other property; (iii) in a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events;

(3) entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative;

(4) have preference over any other class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation.

(d) The description of the designations, preferences, limitations, and relative rights of share classes in subsection (c) is not exhaustive.

SUBCHAPTER B. ISSUANCE OF SHARES

§ 6.21 Issuance of Shares

(a) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(c) Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid, and nonassessable.

(d) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(e) The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid, or the benefits received. If the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part.

SUBCHAPTER D. DISTRIBUTIONS

§ 6.40 Distributions to Shareholders

(a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c).

(b) If the board of directors does not fix the record date for determining shareholders entitled to a distribution (other than one involving a repurchase or reacquisition of shares), it is the date the board of directors authorizes the distribution.

(c) No distribution may be made if, after giving it effect:

(1) the corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) the corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(e) The effect of a distribution under subsection (c) is measured:

(1) in the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of (i) the date money or other property is transferred or debt incurred by the corporation or (ii) the date the shareholder ceases to be a shareholder with respect to the acquired shares;

(2) in the case of any other distribution of indebtedness, as of the date the indebtedness is distributed;

(3) in all other cases, as of (i) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization or (ii) the date the payment is made if it occurs more than 120 days after the date of authorization.

(f) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement.

CHAPTER 7. SHAREHOLDERS

SUBCHAPTER B. VOTING

§ 7.25 Quorum and Voting Requirements for Voting Groups

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or this Act provide otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(b) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(c) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or this Act require a greater number of affirmative votes.

(d) An amendment of articles of incorporation adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in subsection (b) or (c) is governed by section 7.27.

(e) The election of directors is governed by section 7.28.

§ 7.27 Greater Quorum or Voting Requirements

(a) The articles of incorporation may provide for a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is provided for by this Act.

(b) An amendment to the articles of incorporation that adds, changes, or deletes a greater quorum or voting requirement must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

§ 7.28 Voting for Directors; Cumulative Voting

(a) Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(c) A statement included in the articles of incorporation that "[all] [a designated voting group of] shareholders are entitled to cumulate their votes for directors" (or words of similar import) means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

(d) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

(1) the meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or

(2) a shareholder who has the right to cumulate his votes gives notice to the corporation not less than 48 hours before the time set for the meeting of his intent to cumulate his votes during the meeting, and if one shareholder gives this notice all other shareholders in the same voting group participating in the election are entitled to cumulate their votes without giving further notice.

SUBCHAPTER D. DERIVATIVE PROCEEDINGS

§ 7.40 Procedure in Derivative Proceedings

(a) A person may not commence a proceeding in the right of a domestic or foreign corporation unless he was a shareholder of the corporation when the transaction complained of occurred or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(b) A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity the demand made, if any, to obtain action by the board of directors and either that the demand was refused or ignored or why he did not make the demand. Whether or not a demand for action was made, if the corporation commences an investigation of the changes made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

(c) A proceeding commenced under this section may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given the shareholders affected.

(d) On termination of the proceeding the court may require the plaintiff to pay any defendant's reasonable expenses (including counsel fees) incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

(e) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on his behalf.

CHAPTER 8. DIRECTORS AND OFFICERS

SUBCHAPTER A. BOARD OF DIRECTORS

§ 8.01 Requirement For And Duties Of Board Of Directors

(a) Except as provided in subsection (c), each corporation must have a board of directors.

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

(c) A corporation having 50 or fewer shareholders may dispense with or limit the authority of a board of directors by describing in its articles of incorporation who will perform some or all of the duties of a board of directors.

SUBCHAPTER C. STANDARDS OF CONDUCT

§ 8.30 General Standards for Directors

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

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

(3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

§ 8.31 Director Conflict of Interest

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;

(2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or

(3) the transaction was fair to the corporation.

(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if (1) another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction or (2) another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

(c) For purposes of subsection (a)(1), a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (a)(1) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

(d) For purposes of subsection (a)(2), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction, and shares owned by or voted under the control of an entity described in subsection (b)(1), may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (a)(2). The vote of those shares, however, shall be counted in determining whether the transaction is approved under other sections of this Act. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

§ 8.32 Loans to Directors

(a) Except as provided by subsection (c), a corporation may not lend money to or guarantee the obligation of a director of the corporation unless:

(1) the particular loan or guarantee is approved by a majority of the votes represented by the outstanding voting shares of all classes, voting as a single voting group, except the votes of shares owned by or voted under the control of the benefited director; or

(2) the corporation's board of directors determines that the loan or guarantee benefits the corporation and either approves the specific loan or guarantee or a general plan authorizing loans and guarantees.

(b) The fact that a loan or guarantee is made in violation of this section does not affect the borrower's liability on the loan.

(c) This section does not apply to loans and guarantees authorized by statute regulating any special class of corporations.

§ 8.33 Liability for Unlawful Distributions

(a) Unless he complies with the applicable standards of conduct described in section 8.30, a director who votes for or assents to a distribution made in violation of this Act or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this Act or the articles of incorporation.

(b) A director held liable for an unlawful distribution under subsection (a) is entitled to contribution:

(1) from every other director who voted for or assented to the distribution without complying with the applicable standards of conduct described in section 8.30; and

(2) from each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of this Act or the articles of incorporation.

SUBCHAPTER E. INDEMNIFICATION

§ 8.50 Subchapter Definitions

In this subchapter:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" include counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(5) "Official capacity" means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an individual other than a director, as contemplated in section 8.56, the office in a corporation held by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

(6) "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

§ 8.51 Authority to Indemnify

(a) Except as provided in subsection (d), a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

(1) he conducted himself in good faith; and

(2) he reasonably believed:

(i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interests; and

(ii) in all other cases, that his conduct was at least not opposed to its best interests; and

(3) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(d) A corporation may not indemnify a director under this section:

(1) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) in connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

§ 8.52 Mandatory Indemnification

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.

§ 8.53 Advance for Expenses

(a) A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(1) the director furnishes the corporation a written affirmation of his good faith belief that he has met the standard of conduct described in section 8.51;

(2) the director furnishes the corporation a written undertaking, executed personally or on his behalf, to repay the advance if it is ultimately determined that he did not meet the standard of conduct; and

(3) a determination is made that the facts then known to those making the determination would not preclude indemnification under this subchapter.

(b) The undertaking required by subsection (a)(2) must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(c) Determinations and authorizations of payments under this section shall be made in the manner specified in section 8.55.

§ 8.54 Court-Ordered Indemnification

Unless a corporation's articles of incorporation provide otherwise, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court after giving any notice the court considers necessary may order indemnification if it determines:

(1) the director is entitled to mandatory indemnification under section 8.52, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; or

(2) the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he met the standard of conduct set forth in section 8.51 or was adjudged liable as described in section 8.51(d), but if he was adjudged so liable his indemnification is limited to reasonable expenses incurred.

§ 8.55 Determination and Authorization of Indemnification

(a) A corporation may not indemnify a director under section 8.51 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because he has met the standard of conduct set forth in section 8.51.

(b) The determination shall be made:

(1) by the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(2) if a quorum cannot be obtained under subdivision (1), by majority vote of a committee duly designated by the board of directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding;

(3) by special legal counsel:

(i) selected by the board of directors or its committee in the manner prescribed in subdivision (1) or (2); or

(ii) if a quorum of the board of directors cannot be obtained under subdivision (1) and a committee cannot be designated under subdivision (2), selected by majority vote of the full board of directors (in which selection directors who are parties may participate); or

(4) by the shareholders, but shares owned by or voted under the control of directors who are at the time parties to the proceeding may not be voted on the determination.

(c) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subsection (b)(3) to select counsel.

§ 8.56 Indemnification of Officers, Employees, and Agents

Unless a corporation's articles of incorporation provide otherwise:

(1) an officer of the corporation who is not a director is entitled to mandatory indemnification under section 8.52, and is entitled to apply for court-ordered indemnification under section 8.54, in each case to the same extent as a director;

(2) the corporation may indemnify and advance expenses under this subchapter to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director; and

(3) A corporation may also indemnify and advance expenses to an officer, employee, or agent who

is not a director to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors or contract.

§ 8.57 Insurance

A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under section 8.51 or 8.52.

§ 8.58 Application of Subchapter

(a) A provision treating a corporation's indemnification of or advance for expenses to directors that is contained in its articles of incorporation, bylaws, a resolution of its shareholders or board of directors, or in a contract or otherwise, is valid only if and to the extent the provision is consistent with this subchapter. If articles of incorporation limit indemnification or advance for expenses, indemnification and advance for expenses are valid only to the extent consistent with the articles.

(b) This subchapter does not limit a corporation's power to pay or reimburse expenses incurred by a director in connection with his appearance as a witness in a proceeding at a time when he has not been made a named defendant or respondent to the proceeding.

CHAPTER 11. MERGER AND SHARE EXCHANGE

§ 11.03 Action on Plan

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

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

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

(2) the shareholders entitled to vote must approve the plan.

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

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section 7.05. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(e) Unless this Act, the articles of incorporation, or the board of directors (acting pursuant to subsection (c), require a greater vote or a vote by voting groups, the plan of merger or share exchange to be authorized must be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan by that voting group.

(f) Separate voting by voting groups is required:

(1) on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under section 10.04;

(2) on a plan of share exchange by each class or series of shares included in the exchange, with each class or series constituting a separate voting group.

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

(1) the articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in section 10.02, from its articles before the merger;

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

(3) the number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the

merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than 20 percent the total number of voting shares of the surviving corporation outstanding immediately before the merger; and

(4) the number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than 20 percent the total number of participating shares outstanding immediately before the merger.

(h) As used in subsection (g):

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

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

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

CHAPTER 12. SALE OF ASSETS

§ 12.02 Sale of Assets Other Than in Regular Course of Business

(a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property (with or without the good will), otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.

(b) For a transaction to be authorized:

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

(2) the shareholders entitled to vote must approve the transaction.

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

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section 7.05. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a description of the transaction.

(e) Unless the articles of incorporation or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the transaction to be authorized must be approved by a majority of all the votes entitled to be cast on the transaction.

(f) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned (subject to any contractual rights) without further shareholder action.

(g) A transaction that constitutes a distribution is governed by section 6.40 and not by this section.

CHAPTER 13. DISSENTERS' RIGHTS

SUBCHAPTER A.

RIGHT TO DISSENT AND OBTAIN PAYMENT FOR SHARES

§ 13.01 Definitions

In this Chapter:

(1) " Corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.

(2) "Dissenter" means a shareholder who is entitled to dissent from corporate action under section 13.02 and who exercises that right when and in the manner required by sections 13.20 through 13.28.

(3) "Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

(4) "Interest" means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.

(5) "Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(6) "Beneficial shareholder" means the person who is a beneficial owner of shares held by a nominee as the record shareholder.

(7) "Shareholder" means the record shareholder or the beneficial shareholder.

§ 13.02 Right to Dissent

(a) A shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:

(1) consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by section 11.03 or the articles of incorporation and the shareholder is entitled to vote on the merger or (ii) if the corporation is a subsidiary that is merged with its parent under section 11.04;

(2) consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;

(3) consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(4) an amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it:

(i) alters or abolishes a preferential right of the shares;

(ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares;

(iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities;

(iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes other than a limitation by dilution through issuance of shares or other securities with similar voting rights; or

(v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under section 6.04; or

(5) any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(b) A shareholder entitled to dissent and obtain payment for his shares under this chapter may not challenge the corporate action creating his entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

§ 13.03 Dissent by Nominees and Beneficial Owners

(a) A record shareholder may assert dissenters' rights as to fewer than all the shares registered in his name only if he dissents with respect to all shares beneficially owned by any one person and notifies the corporation in writing of the name and address of each person on whose behalf he asserts dissenters' rights. The rights of a partial dissenter under this subsection are determined as if the shares as to which he dissents and his other shares were registered in the names of different shareholders.

(b) A beneficial shareholder may assert dissenters' rights as to shares held on his behalf only if:

(1) he submits to the corporation the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights: and

(2) he does so with respect to all shares of which he is the beneficial shareholder or over which he has power to direct the vote.

SUBCHAPTER B.
PROCEDURE FOR EXERCISE OF DISSENTERS' RIGHTS

§ 13.20 Notice of Dissenters' Rights

(a) If proposed corporate action creating dissenters' rights under section 13.02 is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters'

rights under this chapter and be accompanied by a copy of this chapter.

(b) If corporate action creating dissenters' rights under section 13.02 is taken without a vote of shareholders, the corporation shall notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in section 13.22.

§ 13.21 Notice of Intent to Demand Payment

(a) If proposed corporate action creating dissenters' rights under section 13.02 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights (1) must deliver to the corporation before the vote is taken written notice of his intent to demand payment for his shares if the proposed action is effectuated and (2) must not vote his shares in favor of the proposed action.

(b) A shareholder who does not satisfy the requirements of subsection (a) is not entitled to payment for his shares under this chapter.

§ 13.22 Dissenters' Notice

(a) If proposed corporate action creating dissenters' rights under section 13.02 is authorized at a shareholders' meeting, the corporation shall deliver a written dissenters' notice to all shareholders who satisfied the requirements of section 13.21.

(b) The dissenters' notice must be sent no later than 10 days after the corporate action was taken, and must:

(1) state where the payment demand must be sent and where and when certificates for certified shares must be deposited;

(2) inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(3) supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not he acquired beneficial ownership of the shares before that date;

(4) set a date by which the corporation must receive the payment demand, which date may not be fewer than 30 nor more than 60 days after the date the subsection (a) notice is delivered; and

(5) be accompanied by a copy of this chapter.

§ 13.23 Duty to Demand Payment

(a) A shareholder sent a dissenters' notice described in section 13.22 must demand payment, certify whether he acquired beneficial ownership of the shares before the date required to be set forth in the dissenter's notice pursuant to section 13.22(b)(3), and deposit his certificates in accordance with the terms of the notice.

(b) The shareholder who demands payment and deposits his shares under section (a) retains all other rights of a shareholder until these rights are cancelled or modified by the taking of the proposed corporate action.

(c) A shareholder who does not demand payment or deposit his share certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for his shares under this chapter.

§ 13.24 Share Restrictions

(a) The corporation may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is taken or the restrictions released under section 13.26.

(b) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until these rights are cancelled or modified by the taking of the proposed corporated action.

§ 13.25 Payment

(a) Except as provided in section 13.27, as soon as the proposed corporate action is taken, or upon receipt of a payment demand, the corporation shall pay each dissenter who complied with section 13.23 the amount the corporation estimates to be the fair value of his shares, plus accrued interest.

(b) The payment must be accompanied by:

(1) the corporation's balance sheet as of the end of a fiscal year ending not more than 16 months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;

(2) a statement of the corporation's estimate of the fair value of the shares;

(3) an explanation of how the interest was calculated;

(4) a statement of the dissenter's right to demand payment under section 13.28; and

(5) a copy of this chapter.

§ 13.26 Failure to Take Action

(a) If the corporation does not take the proposed action within 60 days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares.

(b) If after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters' notice under section 13.22 and repeat the payment demand procedure.

§ 13.27 After-Acquired Shares

(a) A corporation may elect to withhold payment required by section 13.25 from a dissenter unless he was the beneficial owner of the shares before the date set forth in the dissenters' notice as the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action.

(b) To the extent the corporation elects to withhold payment under subsection (a), after taking the proposed corporate action, it shall estimate the fair value of the shares, plus accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of his demand. The corporation shall send with its offer a statement of its estimate of the fair value of the shares, an explanation of how the interest was calculated, and a statement of the dissenter's right to demand payment under section 13.28.

§ 13.28 Procedure if Shareholder Dissatisfied With Payment or Offer

(a) A dissenter may notify the corporation in writing of his own estimate of the fair value of his shares and amount of interest due, and demand payment of his estimate (less any payment under section 13.25), or reject the corporation's offer under section 13.27 and demand payment of the fair value of his shares and interest due, if:

(1) the dissenter believes that the amount paid under section 13.25 or offered under section 13.27 is less than the fair value of his shares or that the interest due is incorrectly calculated;

(2) the corporation fails to make payment under section 13.25 within 60 days after the date set for demanding payment; or

(3) the corporation, having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within 60 days after the date set for demanding payment.

(b) A dissenter waives his right to demand payment under this section unless he notifies the corporation of his demand in writing under subsection (a) within 30 days after the corporation made or offered payment for his shares.

SUBCHAPTER C. JUDICIAL APPRAISAL OF SHARES

§ 13.30 Court Action

(a) If a demand for payment under section 13.28 remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the 60-day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

(b) The corporation shall commence the proceeding in the [name or describe] court of the county where a corporation's principal office (or, if none in this state, its registered office) is located. If the corporation is a foreign corporation without a registered office in this state, it shall commence the proceeding in the county in this state where the registered office of the domestic corporation merged with or whose shares were acquired by the foreign corporation was located.

(c) The corporation shall make all dissenters (whether or not residents of this state) whose demands remain unsettled parties to the proceeding as in an action against their shares and all parties must be served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them, or in any amendment to it. The dissenters are entitled to the same discovery rights as parties in other civil proceedings.

(e) Each dissenter made a party to the proceeding is entitled to judgment (1) for the amount, if any, by which the court finds the fair value of his shares, plus interest, exceeds the amount paid by the corporation or (2) for the fair value, plus accrued interest, of his after-acquired shares for which the corporation elected to withhold payment under section 13.27.

§ 13.31 Court Costs and Counsel Fees

(a) The court in an appraisal proceeding commenced under section 13.30 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under section 13.28.

(b) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(1) against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of sections 13.20 through 13.28; or

(2) against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(c) If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited.

CHAPTER 14. DISSOLUTION

SUBCHAPTER A. VOLUNTARY DISSOLUTION

§ 14.02 Dissolution by Board of Directors and Shareholders

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

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

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

(2) the shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (e).

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

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section 7.05. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

(e) Unless the articles of incorporation or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the proposal to dissolve to be adopted must be approved by a majority of all the votes entitled to be cast on that proposal.

§ 14.07 Unknown Claims Against Dissolved Corporation

(a) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:

(1) be published one time in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this state, its registered office) is or was last located;

(2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(3) state that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

(1) a claimant who did not receive written notice under section 14.06;

(2) a claimant whose claim was timely sent to the dissolved corporation but not acted on;

(3) a claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim may be enforced under this section:

(1) against the dissolved corporation, to the extent of its undistributed assets; or

(2) if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him in liquidation,

whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him.

SUBCHAPTER B. ADMINISTRATIVE DISSOLUTION

§ 14.20 Grounds for Administrative Dissolution

The secretary of state may commence a proceeding under section 14.21 to administratively dissolve a corporation if:

(1) the corporation does not pay within 60 days after they are due any franchise taxes or penalties imposed by this Act or other law;

(2) the corporation does not deliver its annual report to the secretary of state within 60 days after it is due;

(3) the corporation is without a registered agent or registered office in this state for 60 days or more;

(4) the corporation does not notify the secretary of state within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or

(5) the corporation's period of duration stated in its articles of incorporation expires.

§ 14.21 Procedure for and Effect of Administrative Dissolution

(a) If the secretary of state determines that one or more grounds exist under section 14.20 for dissolving a corporation, he shall serve the corporation with written notice of his determination under section 5.04.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist within 60 days after service of the notice is perfected under section 5.04, the secretary of state shall administratively dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The secretary of state shall file the original of the certificate and serve a copy on the corporation under section 5.04.

(c) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section 14.05 and notify claimants under sections 14.06 and 14.07.

(d) The administrative dissolution of a corporation does not terminate the authority of its registered agent.

§ 14.22 Reinstatement Following Administrative Dissolution

(a) A corporation administratively dissolved under section 14.21 may apply to the secretary of state for reinstatement within two years after the effective date of dissolution.

The application must:

(1) recite the name of the corporation and the effective date of its administrative dissolution;

(2) state that the ground or grounds for dissolution either did not exist or have been eliminated;

(3) state that the corporation's name satisfies the requirements of section 4.01; and

(4) contain a certificate from the [taxing authority] reciting that all taxes owed by the corporation have been paid.

(b) If the secretary of state determines that the application contains the information required by subsection (a) and that the information is correct, he shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites his determination and the effective date of reinstatement, file the original of the certificate, and serve a copy on the corporation under section 5.04.

(c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

CHAPTER 16. RECORDS AND REPORTS

SUBCHAPTER A. RECORDS

§ 16.02 Inspection of Records by Shareholders

(a) Subject to section 16.03(c), a shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in section 16.01(e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.

(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder

meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:

(1) excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under section 16.02(a);

(2) accounting records of the corporation; and

(3) the record of shareholders.

(c) A shareholder may inspect and copy the records identified in subsection (b) only if:

(1) his demand is made in good faith and for a proper purpose;

(2) he describes with reasonable particularity his purpose and the records he desires to inspect; and

(3) the records are directly connected with his purpose.

(d) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(e) This section does not affect:

(1) the right of a shareholder to inspect records under section 7.20 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant;

(2) the power of a court, independently of this Act, to compel the production of corporate records for examination.