Michigan

Law Revision Commission

Fifth Annual Report

1970

MICHIGAN LAW REVISION COMMISSION

Term Members:

Jason L. Honigman, Chairman
Tom Downs, Vice Chairman
David Lebenbom
Harold S. Sawyer

Ex-Officio Members:

Senators:
Robert L. Richardson
Basil W. Brown

Representatives:

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MICHIGAN LAW REVISION COMMISSION
Fifth Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Law Revision Commission hereby presents its fifth annual report pursuant to Section 14(e) of Act No. 412 of the Public Acts of 1965.

The Commission, created by Section 12 of that Act, consists of the chairmen and ranking minority members of the Committees on Judiciary of the Senate and House of Representatives, the Director of the Legislative Service Bureau, being the five ex-officio members appointed by the Legislative Council. Terms of appointed Commissioners are staggered. The Legislative Council designates the Chairman of the Commission.

The members of the Commission during 1970 were Senator Robert L. Richardson of Saginaw, Senator Basil W. Brown of Highland Park, Representative J. Robert Traxler of Bay City, Representative Donald E. Holbrook, Jr., of Clare, A. E. Reyhons, Director of the Legislative Service Bureau, as ex-officio members; Tom Downs, Jason L. Honigman, David Lebenbom, and Harold S. Sawyer, as appointed members. The Legislative Council appointed Jason L. Honigman Chairman and Tom Downs Vice Chairman of the Commission. Professor Carl S. Hawkins of the University of Michigan Law School completed his first year as Executive Secretary of the Commission.

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators, and other public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

The problems to which the Commission directed its studies during its fifth year of operation were largely identified by a study of statute and case law of Michigan and legal literature by the Commissioners and Executive Secretary. Other subjects were brought to the attention of the Commission by various organizations and groups, and the Commission has responded to any suggestions received from members of the Legislature. The Commission welcomes suggestions from members of the Legislature and any other interested individuals or groups.

From the available topics, the Commission selected the following for immediate study and report:

(1) Michigan Business Corporation Act.
(2) Revision of the Grounds for Divorce.
(3) Abolition of Dower.
(4) Summary Proceedings for Possession of Premises.
(5) Civil Verdicts by 5 of 6 Jurors in Retained Municipal Courts.
(6) District Court Venue in Civil Actions.
(7) Amendment of the Uniform Anatomical Gift Act.
(8) Execution and Levy in Proceedings Supplementary to Judgment.

Recommendations and proposed statutes have been prepared on the above subjects and accompany this report. Because of its size, the recommendation and proposed statute for the Business Corporation Act are presented in a Supplemental Report submitted herewith.

In addition to the foregoing, the Commission recommends favorable consideration of the following prior recommendations upon which no final action was taken by the Legislature in 1970:

(1) Condemnation Procedures Act--S.B. 258 passed by Senate. House Judiciary Committee submitted substitute for S.B. 258, which is recommended for re-enactment. See Recommendations of 1968 Annual Report, p. 11.

(2) Attachment Fees Act--S.B. 158, H.B. 2279. See Recommendations of 1968 Annual Report, p. 23.

(3) Uniform Single Publications Act--S.B. 150, H.B. 2325. See Recommendations of 1968 Annual Report, p. 36.

(4) Revised Uniform Reciprocal Enforcement of Support Act--H.B. 2237 passed by House. See Recommendations of 1968 Annual Report, p. 46.

(5) Quo Warranto Act--H.B. 3327. See Recommendations of 1967 Annual Report, p. 43.

(6) Contribution Among Joint Tortfeasors Act--H.B. 2263 passed by House. See Recommendations of 1967 Annual Report, p. 57.

(7) Qualifications of Fiduciaries Act--H.B. 2278 passed by House. See Recommendations of 1966 Annual Report, p. 32.

(8) Local Administrative Procedures Act--S.B. 1167, H.B. 3980. See Recommendations of 1969 Annual Report, p. 10.

(9) Uniform Child Custody Jurisdiction Act--H.B. 4163 passed by House. See Recommendations of 1969 Annual Report, p. 22.

(10) Personal Service Contracts of Minors Act--Proposal No. 1: S.B. 1218 passed by Senate. Proposal No. 2: H.B. 3956 passed by House. See Recommendations of 1969 Annual Report, p. 36.

(11) Doctor-Psychologist Patient Privilege Act--Proposal No. 1: S.B. 1217, H.B. 4160; Proposal No. 2, S.B. 1219, H.B. 4159. See Recommendations of 1969 Annual Report, p. 56.

(12) Wayne Circuit Court Commissioners Power Act--H.B. 4046 passed by House. See Recommendations of 1969 Annual Report, p. 56.

(13) Insurance Policy in Lieu of Bond Act--H.B. 4042 passed by House. See Recommendations of 1969 Annual Report, p. 59.

(14) Appeals from Municipal Courts Act--S.B. 1213, H.B. 4045. See Recommendations of 1969 Annual Report, p. 61.

(15) Interest on Judgments Act--S.B. 1220, H.B. 4034. See Recommendations of 1969 Annual Report, p. 64.

(16) Constitutional Amendment re Juries of 12--H.J.R. "VV" passed by House. See Recommendations of 1969 Annual Report, p. 65.

Topics on the current study agenda of the Commission are:

(1) Court Costs
(2) Joint Estates in Real and Personal Property
(3) Automobile Accident Medical Payments Protection
(4) Uniform Choice of Forum Act
(5) Uniform Adoption Act
(6) Medical Privilege Waiver
(7) Small Claims Revision
(8) Combination of Wayne County Courts
(9) Technical Amendments to Revised Judicature Act
(10) Tax Refund Procedures
(11) Commercial Leasing Code
(12) Measure of Damages in Wrongful Death Actions

Topics on the future study calendar of the Commission are:

(1) Evidence Code
(2) Disposition of Automobile Accident Cases
(3) Mechanics Liens

As an important part of its functions, the Commission reviews current court decisions to ascertain whether or not these decisions necessitate or make desirable changes in Michigan law. The Commission continues to welcome the advice and assistance of the justices and judges of the courts of this state. The Commission has also reviewed court decisions to ascertain what laws, if any, have been declared unconstitutional by the courts for the purpose of recommending the repeal or revision of any unconstitutional acts.

The Commission continues to operate with its sole staff member, the part time Executive Secretary whose offices are in the Legal Research Building, University of Michigan Law School, Ann Arbor, Michigan 48104. The use of consultants has made it possible to expedite a large volume of work and at the same time give the Commission the advantage of expert assistance at relatively low costs. Faculty members of the four law schools in Michigan continue to cooperate with the Commission in accepting specific research assignments.

The Legislative Service Bureau has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau, who acts as Secretary

of the Commission continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

The Commission submits progress reports to the Legislative Council and members of the Commission have met with the Council and other legislative committees to discuss recommendations and subjects under study by the Commission.

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

1967 Legislative Session

Subject	Commission Report	Act No.
Powers of Appointment	1966, p. 11	224
Interstate and International Judicial Procedures	1966, p. 25	178
Dead Man's Statute	1966, p. 29	263
Corporation Use of Assumed Names	1966, p. 36	138
Stockholder Action Without Meeting	1966, p. 41	201
Original Jurisdiction of Court of Appeals	1966, p. 43	65

1968 Legislative Session

Jury Selection	1967, p. 23	326
Emancipation of Minors	1967, p. 50	293
Guardian ad Litem	1967, p. 53	292
Possibilities of Reverter and Rights of Entry	1966, p. 22	13
Corporations as Partners	1966, p. 34	288
Stockholder Approval of Mortgaging Assets	1966, p. 39	287

1969 Legislative Session

Administrative Procedures Act	1967, p. 11	306
Access to Adjoining Property	1968, p. 21	55
Antenuptial Agreements	1968, p. 27	139
Notice of Tax Assessment	1968, p. 30	115
Anatomical Gifts	1968, p. 39	189
Recognition of Acknowledgements	1968, p. 61	57

Dead Man's Statute Amendment	1966, p. 29	63
Venue Act	1968, p. 19	333

1970 Legislative Session

Appeals from Probate Court Act	1968, p. 32	143
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships Act	1969, p. 44	90
Warranties in Sales of Art Act	1969, p. 47	121
Minor Students Capacity to Borrow Act	1969, p. 51	107
Circuit Court Commission Powers of Magistrates Act	1969, p. 62	[E.S.B. 473]

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Jason L. Honigman, Chairman
Tom Downs, Vice Chairman
David Lebenbom
Harold S. Sawyer

Ex-Officio Members
Sen. Robert Richardson
Sen. Basil W. Brown
Rep. J. Robert Traxler
Rep. Donald E. Holbrook, Jr.
A. E. Reyhons, Secretary

Date: December 17, 1970

RECOMMENDATION RELATING TO REVISION OF THE GROUNDS FOR DIVORCE

Michigan currently employs the traditional fault grounds for divorce. This means the complaining spouse must show that he or she is the "innocent" party who has been wronged by the other spouse in a manner which gives legal grounds for divorce. The most frequently used ground in Michigan and most other states is extreme cruelty, a vague term which can be applied loosely by liberal judges and strictly by those who believe in the indissolubility of marriage. The evidence used at trial consists of a recital by the plaintiff of a wide variety of the spouse's misdeeds which may range from physical abuse to such minor things as constant nagging and criticism.

The present divorce statute creates much hardship, unfairness and incongruity, because:

(1) Since one spouse is seldom significantly more at fault than the other, the proceeding is often based on fiction rather than fact.

(2) In order to assure the granting of the divorce, the avoidance of a contested hearing and the delays incident thereto, divorce participants often are pressured to make unfair and unreasonable concessions as to child custody, alimony, child support or property division.

(3) A recital of the defendant's alleged cruel acts results in increased hostility between the spouses making reconciliation

more improbable and the resulting bitterness impedes the working out of suitable arrangements for custody of the children, visitation rights, alimony, child support and property settlement.

(4) The most significant issue, whether the parties can have a viable marriage, is generally ignored.

Fault grounds for divorce have received widespread criticism. The California Governors Commission on the Family, published in 1966, stated: ". . .[T]he marital fault doctrine forces the court to concentrate upon superficial aspects of the relationship of the parties before it, and it regards each of the 'grounds' and the acts or situations they represent as having precisely the same significance in each marriage. We have concluded that this is unrealistic. . ." (p. 27). It is clear that the elimination of fault grounds for divorce is essential to the upgrading of justice in the family law area.

There are three possible basic approaches to achieve reform of Michigan divorce law:

(1) a total revision of the marriage and divorce laws, which would, among other things, eliminate fault grounds for divorce,

(2) the addition of a non-fault ground for divorce to existing fault grounds for divorce, or

(3) the substitution of one non-fault ground for divorce for the existing fault grounds.

The first approach, eliminating fault grounds within the framework of a comprehensive statutory reform, has been accomplished within

the last two years in California and Iowa. While that is perhaps the ideal method, its implementation is not deemed feasible because of the time involved in drafting an entirely new family code as well as in resolving the legislative disputes that may arise as to many varied sections of the code. Since the incorporation of non-fault grounds for divorce is deemed to be the most significant reform needed, it seems unwise to postpone this issue until a comprehensive revision can be proposed and adopted.

Texas has used the second approach, which superimposes a non-fault ground on the existing fault grounds. Although this allows parties to use the more honest and less traumatic approach, it does not guarantee that they will do so. To have a statute allowing both approaches creates a philosophical inconsistency which is difficult to justify.

Since it is possible by a very simple piece of legislation to eliminate the existing fault grounds and replace them with a single non-fault ground, this seems to be the wisest course of action at the present time. It quickly eradicates the most offensive portion of our divorce law and in no way precludes a future comprehensive revision of our laws affecting the family.

In formulating the non-fault ground for divorce, we have reviewed many models from other states as well as suggestions by authorities in the field. New York has adopted two-year separation

under a separation agreement or judicial decree as a ground for divorce. The California statute allows divorce on a showing of "irreconcilable differences." Texas provides for a decree of divorce "without regard to fault if the marriage has become insupportable because of discord or conflict of the personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of a reconcilitation." A proposed Connecticut statute being presented to the legislature allows divorce when the court concludes that the marriage has broken down irretrievably on the basis of a showing that there is "little prospect of a reconciliation between the spouses and that the legitimate objects of matrimony between the spouses have been destroyed." This proposal further makes it mandatory on the court to grant a divorce without the introduction of evidence if both parties freely join in the petition.

Because it has the virtues of clarity and simplicity, the Commission recommends that Michigan adopt the language used in the Iowa Code which allows divorce where "there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."

Eliminating the adversary nature of Michigan divorce proceedings requires the repeal only of the present grounds for divorce plus

a few sections which are related directly to these grounds. Otherwise the existing laws can be left intact.

In conclusion, it should be emphasized that the new statute would not increase the number of family breakdowns, but would merely provide for a more just and less traumatic procedure for legally terminating marriages which in fact are already dead. The elimination of fault grounds for divorce will in no way increase the incidence of divorce. It will clarify the grounds for divorce, make divorce proceedings less subject to the vagaries of the attitude of the individual judge and obviate much of the incongruity and unfairness of present law. With these objectives in mind, we recommend the following proposed bill:

PROPOSED BILL RE REVISION OF GROUNDS FOR DIVORCE

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. Sections 552.6, 552.7, 552.8, 552.9d, 552.10, 552.18, 552.19, 552.20, 552.21, 552.22, 552.23, 552.24, 552.29, 552.40, 552.41, 552.42, 552.44, 552.46, 552.301 and 552.302 of the Compiled Laws of 1948 are hereby repealed and Sections 552.6, 552.7, 552.8, 552.21, and 552.23 are amended to read as follows.

Sec. 552.6. A complaint for divorce may be filed in the circuit court upon the allegation that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. In the complaint the plaintiff shall make no other explanation of the grounds for divorce than by the use of the statutory language. The defendant in such action may by answer either admit the grounds for divorce alleged or deny the same without further explanation.

An admission by the defendant of the grounds for divorce may be considered by the court but shall not be binding on the court's determination.

Sec. 552.7. In an action for divorce, a judgment dissolving the bonds of matrimony may be entered when the court is satisfied from the evidence presented that there has been a breakdown in the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

Sec. 552.8. An action for separation by way of separate maintenance may be filed by either spouse in the circuit court. In such action, relief, whether temporary or permanent, shall be granted by way of alimony or child support upon a showing of inadequate support having been furnished to the spouse or children entitled to such support.

Sec. 552.21. In an action for divorce or separate maintenance, the court may award such alimony, support payment for minor children or division of the assets of either spouse as shall be fair and equitable under the circumstances. Upon the granting of a divorce, the court in its discretion may require any funds or property to be placed in trust for the benefit of either spouse or the minor children of the marriage on such terms as the court shall direct.

Sec. 552.23. To reimburse the county for the cost of handling alimony or support money payments, a fee of $5.00 shall be paid to the court officer charged with the collection of such accounts in the case of every order for the payment of temporary alimony or support money; and an annual fee of $10.00 shall be paid to said officer January 2 of each year thereafter while support or alimony is due under the temporary order or under a judgment superseding the temporary order, or any judgment for the payment of permanent alimony or support money. Such fees shall be included in the order to be paid by the person ordered to pay such alimony or support money. Every order or judgment for the payment of temporary or permanent alimony or support money shall provide for the payment of such fees. Such fees shall be turned over to the county treasurer and credited to the general fund. In cases where the court appoints the friend of the court custodian, receiver, trustee, or escrow agent of assets owned by the husband and wife, or either of them, the court may fix the amount of the fee for such service, to be turned over to the county treasurer and credited to the general fund.

Sec. 2. The provisions of this act may be made applicable to any pending actions for divorce or separate maintenance by amendment of the complaint or cross-complaint at any time prior to trial.

RECOMMENDATION RELATING TO ABOLITION OF DOWER

Dower is a property right available to a widow in all real property which belonged to her husband at any time during the marriage. It entitles her to a life estate in 1/3 of such real estate. When real estate is owned by a married man, his wife is required to join in the deed in order to bar her right of dower. A married man may own millions of dollars in bank accounts, stocks or other securities and he is free to transfer these without any signature or consent of his wife. It is only as to his real estate holdings that this particular limitation is imposed upon him.

The estate of dower stems from early English common law which was concerned with protecting a widow at a time when land constituted the principal form of wealth. In modern times, the significance of real estate in relation to total wealth has greatly diminished. Moreover, widows are now given special protection by the laws of inheritance which entitle a widow to choose a designated portion of her husband's estate if she is unhappy with the provisions made for her benefit in his will. C.L. 1948, Sections 702.69 to 702.72. The estate of dower is thus largely an anachronism of the law which has continued to survive long after its need and usefulness has vanished.

To date, 14 states have abolished the estate of dower. New York abolished dower in 1930. Even in England where the common

law estate of dower was first initiated, it was abolished in 1925. The National Commissioners on Uniform Laws have likewise recommended the abolition of the estate of dower under the provisions of the Uniform Probate Code. We recommend that the estate of dower be eliminated in Michigan. The proposed bill follows:

PROPOSED BILL

A bill to provide for the abolition of dower and the repeal of all acts inconsistent herewith.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. The estate of dower is hereby abolished.

Sec. 2. Sections 558.1 through 558.29, 558.52, 558.71, 558.81, 558.82, 558.91 and 558.92 of the Michigan Compiled Laws of 1948 are hereby repealed. All other laws in any wise inconsistent with the provisions of this act are hereby repealed to the extent of such inconsistency.

RECOMMENDATION RELATING TO SUMMARY PROCEEDINGS FOR POSSESSION OF PREMISES

Michigan's summary eviction statute has grown by a patchwork of amendments since the original statute was enacted in 1846. R. S. 1846, ch. 123. The present need for some systematic revision has emerged quite clearly in recent years, as the result of a combination of events and circumstances.

(1) The present statute, RJA Ch. 56, provides for summary eviction proceedings to be heard by justics of the peace and circuit court commissioners. With the abolition of those offices by P. A. 1968, No. 154, the new district courts have inherited jurisdiction over these proceedings. C. L. 1948, §§ 600.9921-2, as amended by P. A. 1968, No. 154. But numerous problems have arisen in trying to adapt the statutory procedures to a different court system than that for which they were devised. The principal impetus for this proposed revision has come from the District Court Rules and Forms Committee, whose member judges are most acutely aware of the procedural maladjustments in the present statute.

(2) The present statute was amended by P. A. 1968, No. 297, so as to increase substantially the defenses available to tenants in summary eviction cases and to permit related claims and counterclaims for money damages to be joined. While these amendments have the laudable objective of putting the whole controversy before the court at one time, they also create the need for more careful procedural regulation if some semblance of a quick repossession remedy is to be maintained.

(3) A body of law has been developed by judicial interpretation which requires notice of intent to foreclose in most land contract situations. The law remains considerably uncertain, however, as to the need, nature, timing and method of service of such notice. The proposed statute incorporates specific requirements to eliminate these ambiguities.

(4) The present law permits waiver of the 7 day notice to demand payment of rent as a prelude to eviction by inclusion of a handwritten provision in the lease instrument. C. L. 1948, § 600. 5634. This type of provision is generally found only in dealings between a landlord and a disadvantaged residential tenant who is not in an equal trading position. Summary proceedings are basically intended to grant the landlord expeditious legal process for regaining possession of premises for nonpayment of rent and no significant road block is encountered by the landlord in giving 7 days' notice before suing for eviction. It is only the harsh landlord who by the proposed statute will be deprived of the present artificially structured waiver of the 7 day notice which is typically used in hardship cases where the tenant needs all the relief the law can reasonably grant.

The proposed revision also seeks to remedy a number of other deficiencies and ambiguities in the present statute:

(a) The forcible entry and detainer provision is extended to permit summary eviction of an outright trespasser.

(b) The anachronism of civil arrest for forcible entry is eliminated, consistent with the general practice of using a summons as the initial process in all civil actions and leaving the criminal aspects to be enforced by the criminal laws.

(c) For the purpose of clarity, the grounds for summary eviction of tenants are separated from the grounds applicable to land contracts.

(d) Explicit provisions are added regulating the form, content, and service requirements for the demand for possession for non-payment of rent.

(e) Repossession by a land contract vendor is limited to cases of forfeiture for failure to make money payments. If the claim for repossession is based on more complicated grounds, it should be heard in the circuit court, where a plenary trial and the full powers of equity will be available to determine the materiality of the alleged breach and protect the vendee's equity by a foreclosure sale with right of redemption.

(f) The burden of proof is clarified on the defense of retaliatory eviction.

The proposed revision of the statute is based upon the assumption that procedural detail should be left for court rules. However, to insure an expeditious remedy, the basic provisions for bringing these cases to a prompt hearing are retained in the statute. The remaining procedural matters will be covered by proposed court rules which will be recommended to the Supreme Court for adoption when this bill is passed.

The proposed bill follows:

PROPOSED BILL

A bill to amend Act No. 236 of the Public Acts of 1961, entitled "Revised Judicature Act of 1961," as amended being sections 600.101 to 600.9930 of the Compiled laws of 1948, by adding chapter 57; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 236 of the Public Acts of 1961, as amended, being sections 600.101 to 600.9930 of the Compiled Laws of 1948, is amended by adding chapter 57 to read as follows:

CHAPTER 57

SEC. 5701. AS USED IN THIS CHAPTER:

(A) "SUMMARY PROCEEDINGS" MEANS A CIVIL ACTION TO RECOVER POSSESSION OF PREMISES AND TO OBTAIN CERTAIN ANCILLARY RELIEF AS PROVIDED BY THIS CHAPTER AND BY COURT RULES ADOPTED IN CONNECTION THEREWITH.

(B) "PREMISES" INCLUDES LANDS, TENEMENTS, CONDOMINIUM PROPERTY, COOPERATIVE APARTMENTS, AIR RIGHTS AND ALL MANNER OF REAL PROPERTY. IT INCLUDES STRUCTURES FIXED OR MOBILE, TEMPORARY OR PERMANENT, VESSELS, MOBILE TRAILER HOMES AND VEHICLES WHICH ARE USED OR INTENDED FOR USE PRIMARILY AS A DWELLING OR AS A PLACE FOR COMMERCIAL OR INDUSTRIAL OPERATIONS OR STORAGE.

(C) "LEASE" INCLUDES A WRITTEN OR VERBAL LEASE OR LICENSE AGREEMENT FOR USE OR POSSESSION OF PREMISES.

(D) "DISTRICT" MEANS THE JUDICIAL DISTRICTS PROVIDED FOR IN CHAPTER 81.

NOTES

Source: New

Comment: The present statute does not include definitions. The definition of "premises" is meant to be inclusive,

not exclusive or exhaustive, so that any kind of occupied property may be brought under the statute when there is need for a summary repossession remedy.

SEC. 5704. THE DISTRICT COURT, MUNICIPAL COURTS AND THE COMMON PLEAS COURT OF DETROIT HAVE JURISDICTION OVER SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES UNDER THIS CHAPTER.

NOTES

Source: C. L. 1948, §§ 600.5607, 600.5637, 600.9921, 600.9922, 600.9928.

Comment: Jurisdiction formerly exercised by circuit court commissioners, justices of the peace, and municipal courts is now exercised by the district courts, municipal courts, and the Common Pleas Court of Detroit.

SEC. 5706 (1) THE PROVISIONS OF THIS SECTION RELATE TO VENUE AS TO ALL COURTS HAVING JURISDICTION OVER SUMMARY PROCEEDINGS AND ARE NOT JURISDICTIONAL.

(2) IN DISTRICTS WHERE THE DISTRICT COURT IS OPERATIVE: (A) THE COUNTY IN WHICH THE PREMISES OR ANY PART THEREOF IS SITUATED IS A PROPER COUNTY IN WHICH TO COMMENCE AND TRY SUMMARY PROCEEDINGS IN DISTRICTS OF THE FIRST CLASS; AND (B) THE DISTRICT IN WHICH THE PREMISES OR ANY PART THEREOF IS SITUATED IS A PROPER DISTRICT IN WHICH TO COMMENCE AND TRY SUMMARY PROCEEDINGS IN DISTRICTS OF THE SECOND OR THIRD CLASS.

(3) IN DISTRICTS WHERE THE DISTRICT COURT IS NOT OPERATIVE: (A) THE MUNICIPAL COURT OR COMMON PLEAS COURT OF THE CITY IN WHICH THE PREMISES OR ANY PART THEREOF IS SITUATED IS A PROPER COURT IN WHICH TO COMMENCE AND TRY SUMMARY PROCEEDINGS; AND (B) ANY MUNICIPAL COURT HAVING JURISDICTION, PURSUANT TO SECTION 9928, OVER A TOWNSHIP IN WHICH THE PREMISES OR ANY PART THEREOF IS SITUATED IS A PROPER COURT IN WHICH TO COMMENCE AND TRY SUMMARY PROCEEDINGS.

(4) SUMMARY PROCEEDINGS BROUGHT IN A COUNTY, DISTRICT OR COURT NOT DESIGNATED AS A PROPER COUNTY, DISTRICT OR COURT MAY NEVERTHELESS BE TRIED THEREIN, UNLESS A DEFENDANT MOVES FOR A CHANGE OF VENUE OR THE COURT UPON ITS OWN MOTION ORDERS A CHANGE OF VENUE. THE DEFENDANT'S MOTION OR THE COURT'S ORDER SHALL BE

MADE WITHIN THE TIME AND IN THE MANNER PROVIDED BY COURT RULE, AND THE COURT SHALL TRANSFER SUCH A PROCEEDING TO A PROPER COUNTY, DISTRICT OR COURT ON THE CONDITION THAT THE PLAINTIFF PAY TO THE COURT TO WHICH THE ACTION IS TRANSFERRED AN ADDITIONAL FILING FEE AND ON SUCH OTHER CONDITIONS RELATIVE TO EXPENSE AND COSTS AS MAY BE PROVIDED BY COURT RULE. ON SUCH GROUNDS AND CONDITIONS AS MAY BE PROVIDED BY COURT RULE, THE VENUE OF SUMMARY PROCEEDINGS COMMENCED IN A PROPER COUNTY, DISTRICT OR COURT MAY BE CHANGED TO ANY OTHER COUNTY, DISTRICT OR COURT AND THE PROCEEDING THERE TRIED. THE COURT TO WHICH ANY TRANSFER IS MADE PURSUANT TO THE PROVISIONS OF THIS SUBSECTION SHALL THEREUPON HAVE FULL JURISDICTION OF THE PROCEEDING AS THOUGH THE PROCEEDING HAS BEEN ORIGINALLY COMMENCED THEREIN.

NOTES

Source: C. L. 1948, §§ 600.1601, 600.1605(a), 600.1651, 600.1655, 600.5607(1), 600.8312.

Comments: The basic concept of venue in the court within whose territory the property is situated has been adapted to the new district courts. Consistent with RJA Chapter 16, venue is not jurisdictional, and improper venue is remedied by timely transfer under court rules. See District Court Rules 401-409. Subsection (4) will permit transfers from a district court to the Common Pleas Court or to a municipal court, and vice versa, when necessary to remedy improper venue.

SEC. 5708. EXCEPT AS OTHERWISE PROVIDED IN THIS CHAPTER, THE PROCEDURE IN SUMMARY PROCEEDINGS SHALL BE REGULATED BY RULES ADOPTED BY THE SUPREME COURT AND BY LOCAL COURT RULES NOT INCONSISTENT THEREWITH.

NOTES

Source: C. L. 1948, § 600.8318.

Comment: The statute is drafted consistent with the general assumption that practice and procedure are to be regulated by court rules. Some procedural detail has been written into the statute, however, to assure that the summary remedy provided herein proceeds expeditiously.

SEC. 5711. A PERSON MAY NOT MAKE ANY ENTRY INTO OR UPON PREMISES UNLESS THE ENTRY IS PERMITTED BY LAW. IF ENTRY IS PERMITTED BY LAW, HE SHALL NOT ENTER WITH FORCE BUT ONLY IN A PEACEABLE MANNER.

NOTES

Source: C.L. 1948, § 600.5601.

Comment: The source statute provides for civil arrest as an alternative to service of a summons in cases of forcible entry or detainer. See C.L. 1948, §§ 600.5610, 600.5613, 600.5658. This remedy is seldom used and is inconsistent with the basic policy of the Revised Judicature Act to abolish civil arrest as the original process in civil actions. RJA Sec. 1815. Therefore, the provisions for issuance of a warrant and for civil arrest have been eliminated in this revision. If a criminal trespass is involved, C.L. 1948, § 750.552, the intruder may be arrested and prosecuted in criminal proceedings.

SEC. 5714. (1) THE PERSON ENTITLED TO ANY PREMISES MAY RECOVER POSSESSION THEREOF BY SUMMARY PROCEEDINGS IN THE FOLLOWING CASES:

(A) WHEN A PERSON HOLDS OVER ANY PREMISES, AFTER FAILING OR REFUSING TO PAY RENT DUE UNDER THE LEASE OR AGREEMENT BY WHICH HE HOLDS WITHIN 7 DAYS FROM THE SERVICE OF A WRITTEN DEMAND FOR POSSESSION FOR NONPAYMENT OF THE RENT DUE. FOR THE PURPOSE OF THIS PROVISION, RENT DUE SHALL NOT INCLUDE ANY ACCELERATED INDEBTEDNESS BY REASON OF A BREACH OF THE LEASE UNDER WHICH THE PREMISES ARE HELD.

(B) WHEN A PERSON HOLDS OVER ANY PREMISES IN ANY OF THE FOLLOWING CIRCUMSTANCES:

(i) AFTER TERMINATION OF THE LEASE, PURSUANT TO A POWER TO TERMINATE PROVIDED IN THE LEASE OR IMPLIED BY LAW.

(ii) AFTER THE TERM FOR WHICH THEY ARE DEMISED TO HIM OR TO THE PERSON UNDER WHOM HE HOLDS.

(iii) AFTER THE TERMINATION OF HIS ESTATE BY A NOTICE TO QUIT AS PROVIDED BY SECTION 34 OF CHAPTER 66 OF THE REVISED STATUTES OF 1846, AS AMENDED, BEING SECTION 554.134 OF THE COMPILED LAWS OF 1948.

(C) WHEN THE PERSON IN POSSESSION WILFULLY OR NEGLIGENTLY CAUSES A SERIOUS AND CONTINUING HEALTH HAZARD TO EXIST ON THE PREMISES, OR CAUSES EXTENSIVE AND CONTINUING PHYSICAL INJURY TO THE PREMISES, WHICH WAS DISCOVERED OR SHOULD REASONABLY HAVE BEEN DISCOVERED BY THE PARTY SEEKING POSSESSION NOT EARLIER THAN 90 DAYS BEFORE THE INSTITUTION OF PROCEEDINGS UNDER THIS CHAPTER, AND WHEN SUCH PERSON IN POSSESSION NEGLECTS OR REFUSES FOR 7 DAYS AFTER SERVICE OF A DEMAND FOR POSSESSION OF THE PREMISES TO DELIVER UP POSSESSION OF THE PREMISES OR TO SUBSTANTIALLY RESTORE OR REPAIR THE PREMISES.

(D) WHEN A PERSON TAKES POSSESSION OF PREMISES BY MEANS OF A FORCIBLE ENTRY, HOLDS POSSESSION OF PREMISES BY FORCE AFTER A PEACEABLE ENTRY OR COMES INTO POSSESSION OF PREMISES BY TRESPASS WITHOUT COLOR OF TITLE OR OTHER POSSESSORY INTEREST.

(E) WHEN A PERSON CONTINUES IN POSSESSION OF ANY PREMISES SOLD BY VIRTUE OF ANY MORTGAGE OR EXECUTION, AFTER THE TIME LIMITED BY LAW FOR REDEMPTION OF THE PREMISES.

(F) WHEN A PERSON CONTINUES IN POSSESSION OF ANY PREMISES SOLD AND CONVEYED BY ANY EXECUTOR OR ADMINISTRATOR UNDER LICENSE FROM THE PROBATE COURT OR UNDER AUTHORITY IN THE WILL.

(2) A TENANT OR OCCUPANT IN HOUSING OPERATED BY A CITY, VILLAGE, TOWNSHIP OR OTHER UNIT OF LOCAL GOVERNMENT, AS PROVIDED IN ACT NO. 18 OF THE PUBLIC ACTS OF THE EXTRA SESSION OF 1933, AS AMENDED, BEING SECTIONS 125.651 to 125.705 OF THE COMPILED LAWS OF 1948, IS NOT DEEMED TO BE HOLDING OVER UNDER SUBDIVISION (B) OF SUBSECTION (1) UNLESS THE TENANCY OR AGREEMENT HAS BEEN TERMINATED FOR JUST CAUSE, AS PROVIDED BY LAWFUL RULES OF THE LOCAL HOUSING COMMISSION, OR BY LAW.

NOTES

Source: Subsection (1)
(A) C.L. 1948, § 600.5634 (1) - (2).

(B)
(i) C.L. 1948, § 600.5634(2).
(ii) C.L. 1948, § 600.5634(1).
(iii) C.L. 1948, § 600.5634(5) as amended by P.A. 1968, No. 297.

(C) C.L. 1948, § 600.5634(3) as amended by P.A. 1968, No. 297.

(D) C.L. 1948, § 600.5604, 600.5634(6) as added by P.A. 1968, No. 297.

(E) C.L. 1948, § 600.5634(3).

(F) C.L. 1948, § 600.5634(3).

Subsection (2) C.L. 1948, § 600.5634(1) as amended by P.A. 1968, No. 297.

Comments: Section 5634 of the present statute combines in one section the provisions applicable to tenants as well as those applicable to land contracts, with some resulting confusion regarding which provisions were applicable to which. For clarity this draft separates the provisions applicable to land contracts for inclusion in a later section.

The basic grounds for summary eviction of a tenant have been retained from the present statute, as amended, but for clarity each ground has been stated in a separate clause.

Subsection 5634(1) of the present statute authorizes summary eviction when a tenant holds over "contrary to the conditions or covenants of. . .any lease or agreement under which he holds". This language has led to arguments that the landlord has ground for eviction if the tenant violates any provision of the lease, however insignificant. This provision has been restated in subsection (1)(B)(i) to make it clear that the tenant may be evicted only for a violation which gives the lessor power to terminate the lease, either by express provision in the lease or by implication of law.

The present statute provides a remedy for forcible entry or detainer but not for outright trespass. Subsection

(1)(D) is expanded to authorized summary eviction of one who comes into possession by trespass without claim of right. One who comes into possession in good faith under some colorable claim of title or possessory interest may be a technical trespasser if his claim proves invalid, but his claimed right should be tested by proceedings under RJA Sec. 2932 or by another plenary action, rather than by summary proceedings under this chapter.

SEC. 5716. A DEMAND FOR POSSESSION OR PAYMENT SHALL BE IN WRITING AND ADDRESSED TO THE PERSON IN POSSESSION AND SHALL GIVE THE ADDRESS OR OTHER BRIEF DESCRIPTION OF THE PREMISES. THE REASONS FOR THE DEMAND AND THE TIME TO TAKE REMEDIAL ACTION SHALL BE CLEARLY STATED. WHEN NONPAYMENT OF RENT OR OTHER SUMS DUE UNDER THE LEASE IS CLAIMED, THE AMOUNT DUE AT THE TIME OF THE DEMAND SHALL BE STATED. THE DEMAND SHALL BE DATED AND SIGNED BY THE PERSON ENTITLED TO POSSESSION, HIS ATTORNEY OR AGENT.

NOTES

Source: New

Comment: The present statute requires a demand for payment or possession in certain cases but makes no provision as to the form or contents of such demand. Since the demand is a substantive condition for relief, its basic requirements should be stated clearly.

SEC. 5718. THE DEMAND PROVIDED FOR IN SECTION 5716 MAY BE SERVED BY DELIVERING IT PERSONALLY TO THE PERSON IN POSSESSION, OR BY DELIVERING IT ON THE PREMISES TO A MEMBER OF HIS FAMILY OR HOUSEHOLD, OR AN EMPLOYEE OF SUITABLE AGE AND DISCRETION, WITH A REQUEST THAT IT BE DELIVERED TO THE PERSON IN POSSESSION, OR BY SENDING IT BY FIRST-CLASS MAIL ADDRESSED TO THE PERSON IN POSSESSION. IF THE DEMAND IS MAILED, THE DATE OF SERVICE FOR PURPOSES OF THIS CHAPTER SHALL BE THE NEXT REGULAR DAY FOR DELIVERY OF MAIL AFTER THE DAY WHEN IT WAS MAILED.

NOTES

Source: New.

Comment: The present statute requires a demand for possession or payment in certain cases but makes no provision as to how the demand should be served. While this is not service of process required to give a court jurisdiction, it is a substantive condition for relief and, therefore, its requirements should be clear. Substituted service upon a member of the tenant's family has been approved. McSloy v. Ryan, 27 Mich. 110 (1873). Service by mail should be equally acceptable to landlord or tenant, so long as allowance is made for the time of delivery, so that the tenant's time for response is not substantially reduced. The fact of service, by mail or otherwise, must be established by the plaintiff the same as other substantive requirements for relief.

SEC. 5720. (1) A JUDGMENT FOR POSSESSION OF THE PREMISES FOR AN ALLEGED TERMINATION OF A TENANCY SHALL NOT BE ENTERED AGAINST A DEFENDANT IF ANY OF THE FOLLOWING IS ESTABLISHED:

(A) THAT THE ALLEGED TERMINATION WAS INTENDED SOLELY AS A PENALTY FOR THE DEFENDANT'S ATTEMPT TO SECURE OR ENFORCE RIGHTS UNDER THE LEASE OR AGREEMENT, OR UNDER THE LAWS OF THE STATE OR ITS GOVERNMENTAL SUBDIVISIONS, OR OF THE UNITED STATES.

(B) THAT THE ALLEGED TERMINATION WAS INTENDED SOLELY AS A PENALTY FOR THE DEFENDANT'S COMPLAINT TO A GOVERNMENTAL AUTHORITY WITH A REPORT OF PLAINTIFF'S VIOLATION OF ANY HEALTH OR SAFETY CODE OR ORDINANCE.

(C) THAT THE ALLEGED TERMINATION WAS INTENDED SOLELY AS RETRIBUTION FOR ANY OTHER LAWFUL ACT ARISING OUT OF THE TENANCY.

(D) THAT THE ALLEGED TERMINATION WAS OF A TENANCY IN HOUSING OPERATED BY A CITY, VILLAGE, TOWNSHIP OR OTHER UNIT OF LOCAL GOVERNMENT AND WAS TERMINATED WITHOUT CAUSE.

(E) THAT THE PLAINTIFF ATTEMPTED TO INCREASE THE DEFENDANT'S OBLIGATIONS UNDER THE LEASE OR CONTRACT AS A PENALTY FOR THE LAWFUL

ACTS AS ARE DESCRIBED IN SUBDIVISIONS (A) TO (C), AND THAT THE DEFENDANT'S FAILURE TO PERFORM SUCH ADDITIONAL OBLIGATIONS WAS THE ONLY REASON FOR THE ALLEGED TERMINATION OF TENANCY.

(F) THAT THE PLAINTIFF HAS COMMITTED A BREACH OF THE LEASE WHICH EXCUSES THE PAYMENT OF RENT, WHEN POSSESSION IS CLAIMED FOR NONPAYMENT OR RENT.

(G) THAT THE RENT ALLEGEDLY DUE HAS BEEN PAID TO A RECEIVER UNDER SECTION 135 OF ACT NO. 167 OF THE PUBLIC ACTS OF 1917, AS ADDED, BEING SECTION 125.535 OF THE COMPILED LAWS OF 1948, WHEN POSSESSION IS CLAIMED FOR NONPAYMENT OF RENT.

(2) IF A DEFENDANT WHO ALLEGES A RETALIATORY TERMINATION OF HIS TENANCY SHOWS THAT WITHIN 90 DAYS BEFORE THE COMMENCEMENT OF SUMMARY PROCEEDINGS HE ATTEMPTED TO SECURE OR ENFORCE RIGHTS AGAINST THE PLAINTIFF, OR TO COMPLAIN AGAINST THE PLAINTIFF, AS PROVIDED IN SUBDIVISIONS (A) TO (C) OR (E) OF SUBSECTION (1), BY MEANS OF OFFICIAL ACTION TO OR THROUGH A COURT OR OTHER GOVERNMENTAL AGENCY, AND THE OFFICIAL ACTION HAS NOT RESULTED IN DISMISSAL OR DENIAL OF THE ATTEMPT OR COMPLAINT, A PRESUMPTION IN FAVOR OF THE DEFENSE OF RETALIATORY TERMINATION SHALL THEREBY ARISE, UNLESS THE PLAINTIFF ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE THAT THE TERMINATION OF TENANCY WAS NOT IN RETALIATION FOR SUCH ACTS. IF THE DEFENDANT'S ALLEGED ATTEMPT TO SECURE OR ENFORCE RIGHTS OR TO COMPLAIN AGAINST THE PLAINTIFF OCCURRED MORE THAN 90 DAYS BEFORE THE COMMENCEMENT OF PROCEEDINGS HEREUNDER, OR WAS TERMINATED ADVERSELY TO THE DEFENDANT, A PRESUMPTION ADVERSE TO THE DEFENSE OF RETALIATORY TERMINATION SHALL ARISE AND IT SHALL BE THE DEFENDANT'S BURDEN TO ESTABLISH SUCH DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

NOTES

Source: C.L. 1948, §§ 600.5646(4)-(5), 600.5637(5), as amended by P.A. 1968, No. 297.

Comment: Clauses (A)-(F) of subsection (1)are based upon the cited sources in the present statute. Clause (G) is added to state explicitly that a tenant cannot be evicted for nonpayment of rent when he is making payments to a receiver under the cited statute. Subsection (2) is added to simplify and clarify the burden of proof on the question of retaliatory eviction.

SEC. 5726. A PERSON ENTITLED TO ANY PREMISES MAY RECOVER POSSESSION THEREOF BY A PROCEEDING UNDER THIS CHAPTER AFTER FORFEITURE OF ANY EXECUTORY CONTRACT FOR THE PURCHASE OF SUCH PREMISES BUT ONLY IF THE TERMS OF THE CONTRACT EXPRESSLY PROVIDE FOR TERMINATION OR FORFEITURE OR GIVE THE VENDOR THE RIGHT TO DECLARE A FORFEITURE, IN CONSEQUENCE OF THE NONPAYMENT OF ANY MONIES REQUIRED TO BE PAID UNDER THE CONTRACT. FOR PURPOSES OF THIS CHAPTER, MONIES REQUIRED TO BE PAID UNDER THE CONTRACT SHALL NOT INCLUDE ANY ACCELERATED INDEBTEDNESS BY REASON OF BREACH OF THE CONTRACT.

NOTES

Source: C.L. 1948, § 5634(1).

Comments: For clarity, this provision for recovering possession against a land contract vendee has been separated from the tenancy provisions. The proposed section states explicitly that summary repossession is based upon forfeiture of the contract, and the ground for forfeiture is restricted to nonpayment of monies required to be paid under the contract, which is defined to exclude accelerated indebtedness. Subsequent sections provide that the defendant may avoid forfeiture or issuance of the writ of restitution by paying the amount of money in arrears, thereby precluding acceleration or a deficiency judgment when proceeding under this chapter.

If the plaintiff would impose a forfeiture on grounds other than nonpayment of money, or if he desires to accelerate or hold the defendant liable for any deficiency under the contract, he should be required to foreclose in the circuit court, where the defendant will have the protection of a plenary proceeding and credit for the value of the property. See Waalkes, Vendor's Remedy in Summary Proceedings 30 Mich. S.B.J. 24, 26-27 (Aug., 1951); Durfee and Duffy, Foreclosure of Land Contracts in Michigan; Equitable Suit and Summary Proceeding, 7 Mich. S.B.J. 221 (May, 1928).

Since summary repossession is used as a form of statutory foreclosure, it may be needed in cases where the vendee has abandoned the premises, or has never

taken possession, or has put some other person in possession. See Vendor and Purchaser--Defendant's Possession Not a Jurisdictional Requirement in Foreclosure by Summary Proceedings, 8 Mich. S.B.J. 172 (March, 1929). Therefore, the language of this section does not speak restrictively of proceedings against a vendee in possession after forfeiture, but rather provides simply for an action to recover possession after forfeiture.

SEC. 5728. (1) POSSESSION MAY BE RECOVERED UNDER SECTION 5726 ONLY AFTER THE VENDEE OR PERSON HOLDING POSSESSION UNDER HIM HAS BEEN SERVED WITH A WRITTEN NOTICE OF FORFEITURE AND HAS FAILED IN THE REQUIRED TIME TO PAY MONIES REQUIRED TO BE PAID UNDER THE CONTRACT. UNLESS THE PARTIES HAVE AGREED IN WRITING TO A LONGER TIME, THE PERSON SERVED WITH A NOTICE OF FORFEITURE SHALL HAVE 15 DAYS THEREAFTER BEFORE HE IS REQUIRED TO PAY MONIES REQUIRED TO BE PAID UNDER THE CONTRACT OR TO DELIVER POSSESSION OF THE PREMISES.

(2) THE NOTICE OF FORFEITURE SHALL STATE THE NAMES OF THE PARTIES TO THE CONTRACT AND THE DATE OF ITS EXECUTION, GIVE THE ADDRESS OR LEGAL DESCRIPTION OF THE PREMISES, SPECIFY THE UNPAID AMOUNT OF MONIES REQUIRED TO BE PAID UNDER THE CONTRACT AND THE DATES ON WHICH PAYMENTS THEREOF WERE DUE, AND SHALL DECLARE FORFEITURE OF THE CONTRACT EFFECTIVE IN 15 DAYS, OR SPECIFIED LONGER TIME, AFTER SERVICE OF THE NOTICE, UNLESS THE MONEY REQUIRED TO BE PAID UNDER THE CONTRACT IS PAID WITHIN THAT TIME. THE NOTICE SHALL BE DATED AND SIGNED BY THE PERSON ENTITLED TO POSSESSION, HIS ATTORNEY OR AGENT.

NOTES

Source: New.

Comments: Although the present statute says nothing about notice of forfeiture, judicial decisions have held that the plaintiff must declare a forfeiture as a prerequisite to summary restitution. See Sparling v. Bert, 1 Mich. App. 167, 134 N.W.2d 840 (1965); Hupp Farm Corp. v. Neef, 294 Mich. 160, 292 N.W. 689; Mervez v. Petchesky, 259 Mich. 507, 244 N.W. 144 (1932); Miner v. Dickey, 140 Mich. 518, 103 N.W. 855 (1905). The statute should contain clear and explicit provisions covering the required declaration of forfeiture, including the form and contents of the notice, the methods for service, and the time

within which the forfeiture may be avoided by payment of the amount then in arrears. The methods for service are covered in the following section.

SEC. 5730. THE NOTICE OF FORFEITURE PROVIDED FOR IN SECTION 5728 MAY BE SERVED BY DELIVERING IT PERSONALLY TO THE VENDEE OR PERSON HOLDING POSSESSION UNDER HIM OR BY DELIVERING IT ON THE PREMISES TO A MEMBER OF HIS FAMILY OR HOUSEHOLD, OR AN EMPLOYEE OF SUITABLE AGE AND DISCRETION, WITH A REQUEST THAT IT BE DELIVERED TO THE VENDEE OR PERSON HOLDING POSSESSION UNDER HIM, OR BY SENDING IT BY FIRST-CLASS MAIL ADDRESSED TO THE LAST KNOWN ADDRESS OF THE VENDEE OR THE PERSON HOLDING UNDER HIM. IF THE NOTICE IS MAILED, THE DATE OF SERVICE FOR PURPOSES OF THIS CHAPTER SHALL BE DEEMED TO BE THE NEXT REGULAR DAY FOR DELIVERY OF MAIL AFTER THE DAY WHEN IT WAS MAILED. IF NOTICE CANNOT BE SERVED BY 1 OF THE METHODS PROVIDED ABOVE, IT MAY BE SERVED BY PUBLICATION UNDER THE PROVISIONS OF ACT NO. 235 OF THE PUBLIC ACTS OF 1929, BEING SECTIONS 554.301 and 554.302 OF THE COMPILED LAWS OF 1948, AND THE DATE OF THE THIRD PUBLICATION SHALL BE THE DATE OF SERVICE.

NOTES

Source: New.

Comments: See Comments following Sec. 5728.

SEC. 5732. PURSUANT TO APPLICABLE COURT RULES, A COURT HAVING JURISDICTION OVER SUMMARY PROCEEDINGS MAY PROVIDE FOR PLEADINGS AND MOTIONS, ISSUE PROCESS AND SUBPOENAS, COMPEL THE ATTENDANCE AND TESTIMONY OF WITNESSES, ENTER AND SET ASIDE DEFAULTS AND DEFAULT JUDGMENTS, ALLOW AMENDMENTS TO PLEADINGS, PROCESS, MOTIONS AND ORDERS, ORDER ADJOURNMENTS AND CONTINUANCES, MAKE AND ENFORCE ALL OTHER WRITS AND ORDERS AND DO ALL OTHER THINGS NECESSARY TO HEAR AND DETERMINE THE PROCEEDINGS UNDER THIS CHAPTER.

NOTES

Source: C.L. 1948, § 600.5619.

Comment: This provision is intended to state broadly the necessary procedural powers of the courts, leaving the regulation of procedural detail to court rules.

SEC. 5735. (1) THE COURT IN WHICH THE PROCEEDING IS COMMENCED SHALL ISSUE A SUMMONS, WHICH MAY BE SERVED ON THE DEFENDANT BY ANY OFFICER OR PERSON AUTHORIZED TO SERVE PROCESS OF THE COURT. THE SUMMONS SHALL COMMAND THE DEFENDANT TO APPEAR FOR TRIAL IN ACCORDANCE WITH THE PROVISIONS OF SUBSECTION (2) UNLESS BY LOCAL COURT RULE THE PROVISIONS OF SUBSECTION (3) HAVE BEEN MADE APPLICABLE.

(2) THE SUMMONS SHALL COMMAND THE DEFENDANT TO APPEAR FOR TRIAL AS FOLLOWS:

(A) WITHIN 15 DAYS IN PROCEEDINGS UNDER SECTION 5726. THE SUMMONS SHALL BE SERVED NOT LESS THAN 10 DAYS BEFORE THE DATE SET FOR TRIAL.

(B) WITHIN 10 DAYS IN ALL OTHER PROCEEDINGS. THE SUMMONS SHALL BE SERVED NOT LESS THAN 3 DAYS BEFORE THE DATE SET FOR TRIAL.

IF A SUMMONS IS NOT SERVED WITHIN THE TIME PROVIDED BY THIS SUBSECTION, ADDITIONAL SUMMONS SHALL BE ISSUED AT PLAINTIFF'S REQUEST IN THE SAME MANNER AND WITH THE SAME EFFECT AS THE ORIGINAL SUMMONS.

(3) IN LIEU OF THE PROVISIONS OF SUBSECTION (2), THE COURT MAY BY LOCAL RULE PROVIDE FOR THE APPLICATION OF THIS SUBSECTION, IN WHICH EVENT THE SUMMONS SHALL COMMAND THE DEFENDANT TO MAKE APPEARANCE AS FOLLOWS:

(A) WITHIN 10 DAYS AFTER SERVICE OF THE SUMMONS UPON THE DEFENDANT, IN PROCEEDINGS UNDER SECTION 5726.

(B) WITHIN 5 DAYS AFTER SERVICE OF THE SUMMONS UPON THE DEFENDANT IN ALL OTHER PROCEEDINGS.

A SUMMONS ISSUED UNDER THIS SUBSECTION SHALL REMAIN IN EFFECT UNTIL SERVED OR QUASHED, OR UNTIL THE ACTION IS DISMISSED, BUT ADDITIONAL SUMMONS AS NEEDED FOR SERVICE MAY BE ISSUED AT ANY TIME AT PLAINTIFF'S REQUEST.

(4) EXCEPT AS OTHERWISE PROVIDED BY COURT RULE, THE PROCEEDING SHALL BE HEARD WITHIN 7 DAYS AFTER THE DEFENDANT'S APPEARANCE OR TRIAL DATE AND SHALL NOT BE ADJOURNED BEYOND THAT TIME OTHER THAN BY STIPULATION OF THE PARTIES EITHER IN WRITING OR ON THE RECORD.

NOTES

Source: C.L. 1948, §§ 600.5640, 600.5643.

Comments: The means for serving process and bringing the case to a hearing must be closely regulated if the summary remedy is to achieve its purpose. Therefore, some procedural detail which might otherwise be left for court rules has been incorporated in the statute. The times provided for service of process and date of hearing are essentially the same as under the present statute.

The present statute provides for a summons commanding the defendant to appear for trial on a stated date. This seems to work well in courts which are equipped to give some time to these cases every day. But some district court judges would prefer a summons commanding the defendant to file an appearance within a stated time following service of process, whereupon a trial date would be set. Either system will work and can be made to provide an expeditious hearing within essentially the same time limits. Therefore, this section authorizes a court to adopt the latter alternative by local court rule.

SEC. 5738. ANY PARTY TO SUMMARY PROCEEDINGS MAY DEMAND A TRIAL BY JURY WITHIN THE TIME AND MANNER PROVIDED BY COURT RULE. PROCEDURES FOR SELECTING, IMPANELING AND OTHERWISE GOVERNING JURORS IN SUCH PROCEEDINGS SHALL BE THE SAME AS FOR A TRIAL BY JURY IN OTHER CIVIL ACTIONS IN THE SAME COURT.

NOTES

Source: C.L. 1948, § 600.5622.

Comments: The source provision has been rewritten to accommodate the several different courts who now handle summary proceedings.

SEC. 5739. EXCEPT AS PROVIDED BY COURT RULES, ANY PARTY TO SUMMARY PROCEEDINGS MAY JOIN CLAIMS AND COUNTERCLAIMS FOR MONEY JUDGMENT FOR DAMAGES ATTRIBUTABLE TO WRONGFUL ENTRY, DETAINER

OR POSSESSION, OR FOR BREACH OF THE LEASE OR CONTRACT UNDER WHICH THE LANDS WERE HELD OR FOR WASTE OR MALICIOUS DESTRUCTION TO THE PREMISES, BUT THE COURT MAY ORDER SEPARATE SUMMARY DISPOSITION OF THE CLAIM FOR POSSESSION, WITHOUT PREJUDICE TO ANY OTHER CLAIMS OR COUNTERCLAIMS. A CLAIM OR COUNTERCLAIM FOR MONEY JUDGMENT SHALL NOT EXCEED THE AMOUNT IN CONTROVERSY WHICH OTHERWISE LIMITS THE JURISDICTION OF THE COURT.

NOTES

Source: C.L. 1948, § 600.5637 (4)-(5), as amended by P.A. 1968, No. 297.

Comment: The basic authorization for joinder comes from the source statute. Procedural detail is left to the rules.

SEC. 5741. IF THE JURY OR THE JUDGE FINDS THAT THE PLAINTIFF IS ENTITLED TO POSSESSION OF THE PREMISES, OR ANY PART THEREOF, JUDGMENT MAY THEREUPON BE ENTERED IN ACCORDANCE WITH THE FINDING AND MAY BE ENFORCED BY A WRIT OF RESTITUTION, AS PROVIDED IN THIS CHAPTER. IF IT IS FOUND THAT THE PLAINTIFF IS ENTITLED TO POSSESSION OF THE PREMISES, IN CONSEQUENCE OF THE NONPAYMENT OF ANY MONEY DUE UNDER A TENANCY, OR THE NONPAYMENT OF MONIES REQUIRED TO BE PAID UNDER AN EXECUTORY CONTRACT FOR PURCHASE OF THE PREMISES, THE JURY OR JUDGE MAKING THE FINDING SHALL DETERMINE THE AMOUNT DUE OR IN ARREARS AT THE TIME OF TRIAL, AND THE AMOUNT SHALL BE STATED IN THE JUDGMENT FOR POSSESSION. THE STATEMENT IN THE JUDGMENT FOR POSSESSION SHALL BE ONLY FOR THE PURPOSE OF PRESCRIBING THE AMOUNT WHICH SHALL BE PAID TO PRECLUDE ISSUANCE OF THE WRIT OF RESTITUTION. THE JUDGMENT MAY INCLUDE AN AWARD OF COSTS, WHICH SHALL BE ENFORCEABLE IN THE SAME MANNER AS OTHER CIVIL JUDGMENTS FOR MONEY IN THAT SAME COURT.

NOTES

Source: C.L. 1948, §§ 600.5625, 600.5628, 600.5646, 600.5652.

Comments: The source provisions have been combined into a single section and restated for clarity.

SEC. 5744. (1) SUBJECT TO THE TIME RESTRICTIONS PROVIDED IN THIS SECTION, THE COURT ENTERING A JUDGMENT FOR POSSESSION SHALL ISSUE A WRIT COMMANDING THE SHERIFF, OR ANY OTHER OFFICER AUTHORIZED TO SERVE THE PROCESS, TO CAUSE THE PLAINTIFF TO BE RESTORED AND PUT IN FULL POSSESSION OF THE PREMISES.

(2) THE WRIT OF RESTITUTUION SHALL BE ISSUED FORTHWITH UPON THE ENTRY OF JUDGMENT FOR POSSESSION IN THE FOLLOWING CASES:

(A) WHEN IT SATISFACTORILY APPEARS TO THE COURT THAT THE PREMISES ARE ABANDONED BY THE PARTY IN POSSESSION.

(B) WHEN THE PREMISES ARE SUBJECT TO INSPECTION AND CERTIFICATE OF COMPLIANCE UNDER THE ACT. NO. 167 OF THE PUBLIC ACTS OF 1917, AS AMENDED, BEING SECTIONS 125.401 to 125.543 OF THE COMPLIED LAWS OF 1948, AND THE CERTIFICATE OR TEMPORARY CERTIFICATE HAS NOT BEEN ISSUED AND THE PREMISES HAVE BEEN ORDERED VACATED.

(C) WHEN FORCIBLE ENTRY IS MADE CONTRARY TO LAW.

(D) WHEN AN ENTRY IS MADE PEACEABLY AND POSSESSION IS UNLAWFULLY HELD BY FORCE.

(E) WHEN THE DEFENDANT CAME INTO POSSESSION BY TRESPASS WITHOUT COLOR OF TITLE OR OTHER POSSESSORY INTEREST.

(F) WHEN A TENANT, WILFULLY OR NEGLIGENTLY, CAUSES A SERIOUS AND CONTINUING HEALTH HAZARD TO EXIST ON THE PREMISES, OR CAUSES EXTENSIVE AND CONTINUING INJURY TO THE PREMISES AND NEGLECTS OR REFUSES EITHER TO DELIVER UP POSSESSION AFTER DEMAND OR TO SUBSTANTIALLY RESTORE OR REPAIR THE PREMISES.

(3) WHEN THE JUDGMENT FOR POSSESSION IS BASED UPON THE FORFEITURE OF AN EXECUTORY CONTRACT FOR THE PURCHASE OF THE PREMISES, THE WRIT OF RESTITUTION SHALL NOT BE ISSUED UNTIL THE EXPIRATION OF 90 DAYS AFTER THE ENTRY OF JUDGMENT FOR POSSESSION IF LESS THAN 50% OF THE PURCHASE PRICE HAS BEEN PAID OR UNTIL THE EXPIRATION OF 6 MONTHS AFTER THE ENTRY OF JUDGMENT FOR POSSESSION IF 50% OR MORE OF THE PURCHASE PRICE HAS BEEN PAID.

(4) IN ALL OTHER CASES, THE WRIT OF RESTITUTION SHALL NOT BE ISSUED UNTIL THE EXPIRATION OF 10 DAYS AFTER THE ENTRY OF THE JUDGMENT FOR POSSESSION.

(5) IF AN APPEAL IS TAKEN OR A MOTION FOR NEW TRIAL IS FILED BEFORE ISSUANCE OF THE WRIT OF RESTITUTION AND IF A BOND TO STAY PROCEEDINGS IS FILED, THE WRIT SHALL NOT BE ISSUED BEFORE A LIKE PERIOD OF TIME AS ABOVE PROVIDED FOLLOWING THE FINAL DETERMINATION OF THE APPEAL OR MOTION FOR NEW TRIAL.

(6) WHEN THE JUDGMENT FOR POSSESSION IS FOR NONPAYMENT OF MONEY DUE UNDER A TENANCY OR FOR NONPAYMENT OF MONIES REQUIRED TO BE PAID UNDER AN EXECUTORY CONTRACT FOR PURCHASE OF THE PREMISES, THE WRIT OF RESTITUTION SHALL NOT ISSUE IF, WITHIN THE TIME PROVIDED ABOVE, THE AMOUNT AS STATED IN THE JUDGMENT, TOGETHER WITH THE TAXED COSTS, IS PAID TO THE PLAINTIFF.

(7) ISSUANCE OF THE WRIT OF RESTITUTION, BASED ON A JUDGMENT FOR POSSESSION IN CONSEQUENCE OF THE FORFEITURE OF AN EXECUTORY CONTRACT FOR THE PURCHASE OF THE PREMISES, SHALL FORECLOSE ANY EQUITABLE RIGHT OF REDEMPTION WHICH THE PURCHASER MIGHT HAVE OR CLAIM IN THE PREMISES.

NOTES

Source: C.L. 1948, §§ 600.5628, 600.5673.

Comments: The present statute delays the writ of restitution in tenancy and land contract cases, C.L. 1948, § 600.5673, but permits the judgment to be enforced immediately in forcible entry and detainer cases, C. L. 1948, § 600. 5628. In addition to forcible entry and detainer, there would appear to be no reason for delaying enforcement of the judgment in the other situations covered by the proposed subsection (2).

The time provisions in tenancy and land contract cases are the same as under the present statute but have been reorganized and restated for clarity.

Subsection (7) adds an express declaration of what the courts have held to be the effect of proceedings under the statute. See Durfee and Duffy, Foreclosure of Land Contracts in Michigan; Equitable Suit and Summary Proceeding, 7 Mich. S.B.J. 221, 250-257 (May 1928).

SEC. 5747. IF THE PLAINTIFF FAILS TO PROSECUTE HIS COMPLAINT, OR IF UPON TRIAL OR MOTION THE PLAINTIFF IS FOUND NOT ENTITLED TO POSSESSION OF THE PREMISES, JUDGMENT SHALL BE RENDERED FOR THE DEFENDANT FOR HIS COSTS, WHICH SHALL BE TAXED AND COLLECTED IN THE SAME MANNER AS OTHER CIVIL JUDGMENTS FOR MONEY IN THE SAME COURT.

NOTES

Source: C.L. 1948, § 600.5631.

SEC. 5750. THE REMEDY PROVIDED BY SUMMARY PROCEEDINGS IS IN ADDITION TO, AND NOT EXCLUSIVE OF, OTHER REMEDIES, EITHER LEGAL OR EQUITABLE OR STATUTORY. A JUDGMENT FOR POSSESSION UNDER THIS CHAPTER DOES NOT MERGE OR BAR ANY OTHER CLAIM FOR RELIEF, EXCEPT THAT A JUDGMENT FOR POSSESSION AFTER FORFEITURE OF AN EXECUTORY CONTRACT FOR THE PURCHASE OF LAND SHALL MERGE AND BAR ANY CLAIM FOR MONEY PAYMENTS DUE OR TO BECOME DUE UNDER THE CONTRACT. THE PLAINTIFF OBTAINING RESTITUTION OF ANY PREMISES UNDER THIS CHAPTER IS ENTITLED TO A CIVIL ACTION AGAINST THE DEFENDANT FOR DAMAGES FROM THE TIME OF FORCIBLE ENTRY OR DETAINER, OR TRESPASS, OR OF THE NOTICE OF FORFEITURE, NOTICE TO QUIT OR DEMAND FOR POSSESSION, AS THE CASE MAY BE.

NOTES

Source: C.L. 1948, § 600.5667.

Comment: The last sentence is based upon the source statute. The first sentence is intended to state explicitly the intent of the present statute. The second sentence is intended to make clear that in land contract cases the plaintiff cannot recover the premises under this chapter and then maintain a separate claim for payments due or to become due under the contract. If the plaintiff prefers to have money damages under the contract, he should be required to elect that remedy or to foreclose in the circuit court where the defendant will receive credit for the proceeds of the foreclosure sale.

SEC. 5753. ANY PARTY AGGRIEVED BY THE DETERMINATION OR JUDGMENT OF THE COURT UNDER THIS CHAPTER MAY APPEAL TO THE CIRCUIT COURT OF THE SAME COUNTY. THE APPEAL SHALL BE UPON THE RECORD AND NOT FOR TRIAL DE NOVO, WITH BOND AND PROCEDURE AS PROVIDED BY COURT RULES.

NOTES

Source: C.L. 1948, § 600.5670.

Comments: The provision for an appeal upon the record conforms with the present law governing appeals from the district courts and the Common Pleas Court. See C.L. 1948, § 600.8331, § 728.4. Bond details are left for the court rules.

SEC. 5756. WHEN THE COMPLAINT IS FOR THE RECOVERY OF POSSESSION ONLY, THE FEE FOR FILING A PROCEEDING UNDER THIS CHAPTER SHALL BE $10.00. WHEN A CLAIM FOR MONEY JUDGMENT IS JOINED, THE PLAINTIFF SHALL PAY A SUPPLEMENTAL FILING FEE IN THE SAME AMOUNT AS ESTABLISHED BY LAW FOR THE FILING OF OTHER CIVIL ACTIONS IN THE SAME COURT.

NOTES

Source: New.

Comment: The filing fee in the district courts is $10 if the amount in controversy exceeds $500 and $5 if it does not. Reference to the amount in controversy would be unnecessarily difficult in summary proceedings for possession of land. Therefore, the flat filing fee of $10 is fixed by this provision.

Claims for money judgment may be joined with the claim for possession, but separate trials will frequently be necessary, and the rules will require separate judgments for possession and money damages. Therefore, the supplemental filing fee is provided, treating the claim for money judgment as if it were an additional case.

SEC. 5757. WHEN A CONTESTED TRIAL IS HAD ON A COMPLAINT FOR POSSESSION OF PREMISES, THE PLAINTIFF SHALL PAY A TRIAL FEE EQUAL TO THE FILING FEE TO THE CLERK PRIOR TO THE COMMENCEMENT OF THE TRIAL. WHEN A CONTESTED TRIAL IS HAD ON A CLAIM FOR MONEY JUDGMENT, THE PLAINTIFF SHALL PAY A TRIAL FEE EQUAL TO THE SUPPLEMENTAL FILING FEE TO THE CLERK PRIOR TO THE COMMENCEMENT OF THE TRIAL. A FEE OF $5.00, NOT TAXABLE, SHALL BE CHARGED FOR EACH WRIT OF RESTITUTION OR EXECUTION ISSUED. THE PROVISIONS OF SECTION 2573 SHALL NOT APPLY TO PROCEEDINGS UNDER THIS CHAPTER.

NOTES

Source: New

Comments: This section will make the basic fees in summary proceedings uniform among the several courts handling such proceedings. Fee items not covered by this section or by Sec. 5756 will be the same as in other civil actions in the same court.

SEC. 5759. IN PROCEEDINGS UNDER THIS CHAPTER, COSTS SHALL BE ALLOWED IN THE SAME AMOUNTS AS ARE PROVIDED BY LAW IN OTHER CIVIL ACTIONS IN THE SAME COURT, EXCEPT THAT THE FOLLOWING AMOUNTS SHALL BE ALLOWED AS AN ATTORNEY FEE, UNLESS THE COURT OTHERWISE DIRECTS:

(A) FOR A MOTION WHICH RESULTS IN DISMISSAL OR JUDGMENT, $20.00.

(B) FOR A JUDGMENT TAKEN BY DEFAULT, $15.00.

(C) FOR THE TRIAL OF A CLAIM FOR POSSESSION ONLY, $20.00.

(D) FOR THE TRIAL OF A CLAIM FOR DAMAGES ONLY, $20.00.

(E) FOR A TRIAL INCLUDING BOTH A CLAIM FOR POSSESSION AND A CLAIM FOR MONEY JUDGMENT, $30.00.

NOTES

Source: New.

Comment: The present statute provides for costs to be allowed the same as other proceedings in justice courts. Costs should now be allowed in the same amounts as are provided in other civil actions in the court where the judgment is rendered. The new district courts may assess the same costs as are permitted in the circuit courts. C.L. 1948, § 600.8375. The basic costs for motions, default judgment, and trial have been modified from those otherwise applicable in the circuit courts, based upon the recommendations of the District Courts Rules and Forms Committee. Cf. C.L. 1948, § 600.2441(2).

Section 2. Chapter 56 of Act No. 236 of the Public Acts of 1961, as amended, being sections 600.5601 to 600.5679 of the Compiled Laws of 1948, is repealed as of the effective date of this act, except as to actions previously commenced under chapter 56 and still pending on that date.

NOTES

Source: New.

Comment: Since the new law makes substantial changes, chapter 56 should continue to govern actions pending on the date of repeal.

Section 3. This act shall take effect _____1, 1971, and shall apply only to actions commenced on or after that date.

NOTES

Source: New.

Comments: See Comments following Section 2.

RECOMMENDATION RELATING TO CIVIL VERDICTS BY 5 OF 6 JURORS IN RETAINED MUNICIPAL COURTS

In Michigan all jury trials in civil actions are now by a jury of 6 members. See Mich. Const. (1963) Art. IV, § 44 (Legislature may authorize jury of less than 12 in civil cases); C.L. 1948, § 600.1352, as added by P.A. 1970, No. 118 (jury of 6 in civil cases, applicable to circuit courts, probate courts, district courts and Common Pleas Court of Detroit, C.L. 1948, § 600.1301a); C.L. 1948, § 600.8353, as added by P.A. 1968, No. 154 (jury of 6 in district courts); C.L. 1948, §§ 600.7025 - .7033, 730.23, 730.267, 730.412 (jury of 6 in justice and municipal courts, applicable to contemporary municipal courts by virtue of C.L. 1948, § 730.528; some municipal courts retained, after establishment of district courts, by local option under C.L. 1948, §§ 600.9921(c) and 600.9928(1), as added by P.A. 1968 No. 154, and § 600.9930(1),(8), as added by P.A. 1969, No. 344).

A unanimous verdict is not required, and a verdict must be received in civil cases when 5 of 6 jurors agree. At least this is clear as to civil cases in the circuit courts, district courts,[1] probate courts and the Common Pleas Court of Detroit by virtue of C.L. 1948, § 600.1352, as added by P.A. 1970, No. 118, which now provides:

> "Sec. 1352. In civil cases, trial shall be by a jury of 6. A verdict shall be received when 5 jurors agree."

This might be read as covering all civil jury trials in all Michigan courts, except that it occurs in a chapter of the Revised Judicature Act which is defined as applying to circuit courts, probate courts, district courts, and the Common Pleas Court of Detroit. C.L. 1948, § 1301a, added by P.A. 1969, No. 326. Therefore, it may still be argued that a unanimous verdict of 6 jurors is required in those municipal courts which were not abolished with the establishment of district courts. See C.L. 1948, §§ 9921(c), 600.9928(1), as added by P.A. 1968, No. 154, and § 600.9930(1) as added by P.A. 1969, No. 344. This anachronism should be remedied by the proposed bill, which follows:

1/ A verdict by 5 of 6 jurors is also prescribed in the district courts by C.L. 1948, § 600.8353, as added by P.A. 1968, No. 154.

PROPOSED BILL

A bill to amend section 17 of Act No. 5 of the Public Acts of 1956, entitled Michigan Uniform Municipal Court Act, being section 730.517 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 17 of Act No. 5 of the Public Acts of 1956, being section 730.517 of the Compiled Laws of 1948, is amended to read as follows:

Sec. 17. In any city affected by the provisions of this act, it shall be the duty of the judge presiding in all jury trials to instruct the jury as to the law applicable in the case, which instructions shall be received by the jury as the law of such case. Either party may present written requests to charge to the judge, who shall present all of such requests to the jury as he shall deem to correctly state the law applicable to the case. IN EVERY MUNICIPAL COURT RETAINED AFTER THE ESTABLISHMENT OF THE DISTRICT COURTS, A VERDICT SHALL BE RECEIVED IN CIVIL JURY TRIALS WHEN 5 JURORS AGREE.

RECOMMENDATION RELATING TO DISTRICT COURT VENUE IN CIVIL ACTIONS

The statute governing venue in the district courts provides that "venue in civil actions shall be in the county [or district, in districts of the second or third class] in which the subject of the action is situated, in which the cause of action arose or in which any defendant is established or resides." C.L. 1948, § 600.8312 (5) - (6), as added by P.A. 1968, No. 154, and amended by P.A. 1969, No. 333. The statute thus uses three place references for venue:

(1) where the subject is situated,
(2) where the cause of action arose, or
(3) where defendant is established or resides.

But it is not clear whether it was intended that all three place references be alternatively available in every civil action in the district courts, or whether it was meant that the several place references would be available only as provided in Chapter 16 of the Revised Judicature Act.

If the latter construction is adopted, venue in the district courts would be proper--

(1) where the subject is situated, only in real or local actions under RJA § 1605;
(2) where the cause of action arose, only in actions ex delictu under RJA § 1627; or
(3) where the defendant is established or resides, only in transitory actions under RJA § 1621.

This construction appears to be supported by the observations that the district court venue provision is a part of the Revised Judicature Act, that Chapter 16 of the Revised Judicature Act is a general and comprehensive scheme for civil venue not limited by its terms to the circuit courts, and that the reference in Section 8312 to the place where defendant is "established" has no definition except by reference to Section 1625. Thus it may be argued that the venue provision for the district courts was meant to be correlated with the general venue scheme of RJA Chapter 16, as stated above.

However, it may also be argued that Section 1625 should be read literally and separately, so as to authorize any one of the 3 place alternatives as a venue choice in every civil action. If so, venue in the district courts would be more liberal than in the circuit courts. For example, a contract action could be brought where the cause of action arose under Section 8312 in the district courts, but not under Section 1627 in the circuit courts; or a replevin action could be brought where the defendant is established under Section 8312 in the district courts, but it could be brought only where the property is situated under Section 1605 in the circuit courts.

There is no apparent reason for such incongruities and it is doubtful that they were intended. RJA Chapter 16 is a comprehensive and thoughtful venue scheme which should apply consistently in all courts which try civil actions. Section 8312 should be amended to adapt the venue provisions of Chapter 16 to the district courts.

A proposed bill follows:

PROPOSED BILL

A bill to amend section 8312 of Act No. 236 of the Public Acts of 1961, entitled "Revised Judicature Act of 1961," as added by Act No. 154 of the Public Acts of 1968 and amended by Act No. 333 of the Public Acts of 1969, being section 600.8312 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 8312 of Act No. 236 of the Public Acts of 1961, as added by Act No. 154 of the Public Acts of 1968 and amended by Act No. 333 of the Public Acts of 1969, being section 600.8312 of the Compiled Laws of 1948, is amended to read as follows:

Section 8312. (1) In districts of the first class, venue in criminal actions for violations of state law and all city, village or township ordinances shall be in the county where the violation took place.

(2) In districts of the second class, venue in criminal actions for violations of state law and all city, village or township ordinances shall be in the district where the violation took place.

(3) In districts of the third class, venue in criminal actions for violations of state law and all city, village or township ordinances shall be in the political subdivision thereof where the violation took place, except that when such violation is alleged to have taken place within a political subdivision where the court is not required to sit the action may be tried in any political subdivision within the district where the court is required to sit.

(4) With regard to state criminal violations cognizable by the district court, the following special provisions shall apply:

(a) If an offense is committed on the boundary of 2 or more counties, districts of political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned.

(b) If an offense is committed in or upon any railroad train, automobile, aircraft, vessel or other conveyance in transit, and it cannot readily be determined in which county, district or political subdivision the offense was committed, venue is proper in any county, district or political subdivision through or over which the conveyance passed in the course of its journey.

(5) In districts of the first class, venue in civil actions shall be ~~in-the-county-in-which-the-subject-of-the-action-is situated,-in-which-the-cause-of-action-arose-or-in-which-any-defendant-is-established-or-resides~~ GOVERNED BY SECTIONS 1601 THROUGH 1659 OF THIS ACT, AS AMENDED, EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED BY STATUTES APPLICABLE TO PARTICULAR ACTIONS.

(6) In districts of the second or third class, venue in civil actions shall be ~~in-the-district-in-which-the-subject-of-the-action is-situated,-in-which-the-cause-of-action-arose-or-in-which-any-defendant-is-established-or-resides~~ GOVERNED BY SECTIONS 1601 THROUGH 1659 OF THIS ACT, AS AMENDED, EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED BY STATUTES APPLICABLE TO PARTICULAR ACTIONS; PROVIDED THAT THE WORD "COUNTY" AS USED IN SECTIONS 1601 THROUGH 1659 SHALL MEAN "DISTRICT" FOR THE PURPOSE OF THIS PROVISION.

(7) For purposes of venue, a city which is located in more than one county and which is placed in one district of the first class by provisions of chapter 81, shall be considered a part of that county which contains the greater portion of its population.

RECOMMENDATION RELATING TO AMENDMENT OF THE UNIFORM ANATOMICAL GIFT ACT

In its 1968 Report, the Law Revision Commission recommended adoption of the Uniform Anatomical Gift Act. The proposed bill was adopted in substantially the form recommended by the Commission. P.A. 1969, No. 189; C.L. 1948, §§328.261 - 328.270. However, P.A. 189, as adopted, departed from the Commission's proposed bill by adding in Sec. 5(2) a form for making anatomical gifts. The idea of incorporating such a form in the statute is sound and should be retained. However, the form as adopted has a number of technical defects.

The form does not certify that the donor is of sound mind and eighteen years of age or more, in accordance with Sec. 3(1) of the statute.

Sec. 5(3) of the statute authorizes the gift to be made to a specified donee. This should authorize the donor to specify a particular donee from among the classes of donees authorized by Sec. 4 of the Act including a specified hospital, surgeon, physcian, medical or dental school, college or university, bank or storage facility, as well as any specified individual. Paragraph D of the form, as set forth in the statute, provides for specification of an individual donee to receive the anatomical part for therapy or

transplantation needed by him. Paragraphs A, B and C refer to other classes of donors, but these paragraphs do not literally provide for naming or specifying a particular donor from among the classes covered.

The following Proposed Bill would substitute for the existing form a form adapted from the Comments on the Uniform Act as drafted by the National Conference of Commissioners on Uniform State Laws.

PROPOSED BILL

A bill to amend Sec. 5 of Act No. 189 of the Public Acts of 1969, being C.L. 1948, §328.265.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. Section 5 of Act No. 189 of the Public Acts of 1969, being section 328.265 of the Compiled Laws of 1948, is amended to read as follows:

Sec. 5 (1) A gift of all or part of the body under subsection (1) of section 3 may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated, or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.

(2) A gift of all or part of the body under subsection (1) of section 3 may also be made by document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, must be signed by the donor in the presence of 2 witnesses who must sign the document in his presence. If the donor cannot sign, the document may be signed for him at his direction and in the presence of 2 witnesses who must sign the document in his

presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid. The document shall conform substantially to the following form:

"Certificate of Authorization for Postmortem Study and Examination or Removal of Tissues or Organs"

I, the undersigned, this ..... day of ..... 19....., desiring that my ..... be made available after my demise for .....

A. Any licensed hospital, surgeon or physician, for medical or dental education, research, advancement or medical science therapy or transplantation to individuals;

B. Any accredited medical school, college or university engaged in medical or dental education or research, for therapy, educational research or medical science purposes;

C. Any person operating a bank or storage facility for blood, arteries, eyes, pituitaries, or other human parts for use in medical or dental education, research, therapy or transplantation to individuals;

D. The donee specified below, for therapy or transplantation needed by him or her, do hereby donate my ..... for said purpose to .....

.....(Name of Person).....

.....

.....(Address).....

I AM OF SOUND MIND AND 18 YEARS OR MORE OF AGE.

I HEREBY MAKE THIS ANATOMICAL GIFT TO TAKE EFFECT UPON MY DEATH. THE MARKS IN THE APPROPRIATE SQUARES AND WORDS FILLED INTO THE BLANKS BELOW INDICATE MY DESIRES.

I GIVE: ☐ MY BODY; ☐ ANY NEEDED ORGANS OR PARTS:
☐ THE FOLLOWING ORGANS OR PARTS _____
_____;

TO THE FOLLOWING PERSON (OR INSTITUTION):
☐ THE PHYSCIAN IN ATTENDANCE AT MY DEATH;
☐ THE HOSPITAL IN WHICH I DIE; ☐ THE FOLLOWING NAMED PHYSICIAN, HOSPITAL, STORAGE BANK OR OTHER MEDICAL INSTITUTION _____
_____; ☐ THE FOLLOWING INDIVIDUAL FOR TREATMENT _____;

FOR THE FOLLOWING PURPOSES: ANY PURPOSES AUTHORIZED BY LAW; TRANSPLANTATION; THERAPY; RESEARCH; MEDICAL EDUCATION

I hereby authorize a licensed physician or surgeon, or the State Anatomy Committee to remove and preserve for use my . . . . .for said purpose.

Witnessed this . . . . .day of . . . . (Donor)

. . . ., 19. . . .

. . . . (Name and Address)	. . . . (Address)
. . . . (Name and Address)	. . . . (Telephone)

The gift becomes effective immediately after the death of the donor.

(3) The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician upon or following death, in the absence of any expressed indication that the donor desired otherwise, may accept the gift as donee. The physician who becomes a donee under this subsection shall not participate in the procedures for removing or transplanting a part.

(4) Notwithstanding subsection (4) of section 8, the donor may designate in his will, card or other document of gift the surgeon or

physician to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the gift may employ or authorize any surgeon or physician for the purpose.

(5) Any gift by a person designated in subsection (2) of section 3 shall be made by a document signed by him or made by his telegraphic, recorded telephonic or other recorded message.

(6) A document of gift executed in another state or foreign country and in accord with the laws of that state or country is valid as a document of gift in this state, although the document does not conform substantially to the form set forth in subsection (2).

RECOMMENDATION RELATING TO EXECUTION AND LEVY IN PROCEEDINGS SUPPLEMENTARY TO JUDGMENT

In former practice, a judgment debtor who could not get at property by execution to satisfy his judgment might resort to a separate action in equity for relief. In appropriate circumstances equity could compel the discovery of assets so as to make them subject to execution, or equity could give relief in aid of execution against property which had been fraudulently transferred. As a condition for equitable relief it was necessary for the judgment debtor to show the exhaustion of legal remedies by the return of his writ of execution unsatisfied, or to show that his execution could not be enforced against the property it had been levied upon because of a fraudulent transfer of that property. See 5 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed.) 43-44.

Now that the formal distinctions between law and equity are no longer maintained, Chapter 61 of the Revised Judicature Act provides a simple, integrated remedy for the enforcement of judgments. By motion in the same action which produced the judgment, the debtor may obtain any relief formerly obtained by a separate bill in equity. C.L. 1948, § 600.6104. Such relief may be given even though "execution may not issue," and "it is not necessary that execution be returned unsatisfied before proceedings under this chapter are commenced." Ibid.

Unfortunately, however, reference to the requirement of execution was not eliminated in the later section of Chapter 61 providing for relief against fraudulently transferred property. Section 6131(1) provides that a judgment debtor, complaining of a fraudulent transfer or trying to reach equitable interests in property, in order to make a prima facie case must introduce in evidence "the execution with the levy thereon endorsed".

As explained above, a showing of execution and levy was formerly required because the theory underlying the remedy was equitable intervention to enforce the execution which had been frustrated by fraudulent transfer of the property levied upon. But now that relief may be provided by order of the court on motion in the principal action, there is no reason for retaining the requirements that execution be issued and the property be levied upon before the court can remedy a fraudulent transfer. See 5 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed.) 46-47. This anachronism should be corrected by amendment.

A proposed bill follows:

PROPOSED BILL

A bill to amend section 6131 of Act No. 236 of the Public Acts of 1961, entitled "Revised Judicature Act of 1961," being section 600.6131 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 6131 of Act No. 236 of the Public Acts of 1961, being section 600.6131 of the Compiled Laws of 1948, is amended to read as follows:

Sec. 6131. (1) The ~~complaint~~ COMPLAINANT shall make a prima facie case by introducing in evidence the judgment against the principal defendant, ~~the execution with the levy thereon endorsed~~, and proof of the conveyance complained of. The burden of proof is then on the judgment debtor, the person claiming through him, or the person whom it is claimed holds the property in trust for him, to show that the transaction is in all respects bona fide or that such person is not holding as trustee of the judgment debtor.

(2) In case of a levy on the equitable interest of a judgment debtor, the judgment creditor, may, before the sale on execution, institute proceedings under this chapter to ascertain and determine the rights and equities of the judgment debtor in the property levied on. Where no such proceedings are instituted prior to the sale on execution, they must be instituted within 1 year thereafter.

(3) Where it appears that the judgment debtor at any time within 1 year prior to the date of the commencement of the action in which the judgment is entered has had title to or has paid the purchase price of any real or personal property to which at the time of examination his wife, or any relative or any person on confidential terms with the judgment debtor may claim title or right of possession, the burden of proof shall be upon such judgment debtor, or person claiming title or right of possession, to establish that such transfer or gift from him was not made for the purpose of delaying, hindering and defrauding creditors.

Michigan

Law Revision Commission

Fifth Annual Report

Supplement: Business Corporation Act

1970

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RECOMMENDATION RE BUSINESS CORPORATION ACT

The Michigan Law Revision Commission undertook the drafting of a new corporation law by the unanimous vote at the request of the Private Corporations Committee of the House (letter of February 22, 1968) and of the Senate Corporations and Economic Development Committee (letter of March 28, 1968). To undertake the basic study and draftsmanship, the Commission engaged the services of Professor Stanley Siegel of the University of Michigan Law School. The initial drafts were prepared by Professor Siegel, as Reporter, and thereafter reviewed and revised by the Commission.

The Commission is convinced that Professor Siegel has made an outstanding contribution in presenting the finest piece of legislation in its field. We wish also to acknowledge the invaluable aid of Mr. Cyril Moscow of the Detroit Bar who gave generously of his time in presenting to the Commission the views of the practicing lawyer with intimate knowledge of the corporate field.

Copies of the preliminary drafts as initially approved by the Commission have been promulgated to hundreds of people including many members of the legal profession, state administrative agencies and the members of the two Committees of the Legislature. Many suggestions were received and many changes were incorporated into the final draft of the proposed Law. The Michigan State Bar Association has been particularly helpful through a special subcommittee of its Corporation Section, which has met and counseled with the Commission.

The present General Corporation Act was enacted in 1931 and has since been amended extensively in many respects. In the intervening years, there have been many new developments in the corporate law field, and many states have completely revised their corporation laws. The failure of Michigan to keep its corporation law abreast of the times has led to the incorporation in other states of many corporations whose principal business office is located in Michigan.

With literally hundreds of amendments tacked on to the initial General Corporation Act, its provisions are now often ambiguous and confusing. One of the principal aims of the new Law is to simplify and clarify the statutory language.

Many concepts about corporate functions and proper statutory restrictions have changed with the passage of time. Initially, the corporation was deemed a statutory creation to which the state had granted special privileges to use the corporate form of doing business. This special privilege was thought to justify special restrictions on corporate activities. That concept is a relic of the past, and it is now recognized that a corporation is merely another available form for individuals to engage in business. Thus, corporations generally should have the same latitude as individuals in the manner in which they conduct their business.

The new Law protects all legitimate interests of the state, the public, and the shareholders and creditors of corporations.

From the standpoint of the state, there is no overriding public policy reason for restraints on corporations. To the extent that the state wishes to use corporations as a vehicle for taxation, it is, of course, privileged to do so and the new Law makes no changes in this regard.

The protection of the public against deceptive practices in the sale of stock is already covered by the Blue Sky Law of the state as well as by the Securities Act of 1933 and the Securities Exchange Act of 1934, and the regulations of the Securities and Exchange Commission. No changes are being proposed by the new Law in that field.

For the protection of shareholders, the new Law, like the present law, incorporates the concept of the fiduciary duty of all officers and directors. The standard of fair dealing is not only proclaimed by the statute but widely confirmed in many court decisions. Other mandatory statutory restrictions such as pre-emptive rights and mandatory cumulative voting have now been eliminated in most states. If such restrictions are desired, the new statute specifically permits the creation of almost any kind of limitation, by either contract, charter or by-law provision. Such restrictive arrangements are generally desired only for the small privately-owned corporations and the new act clarifies their availability for those purposes.

To protect the rights of creditors of corporations, the same basic protections are accorded as in the case of individual debtors. Corporations are precluded from distributing assets to shareholders or to others when such distribution would cause the corporation to be insolvent and unable to meet its debt obligations. In all other respects, the new Law follows the modern trend in corporate law to free the corporation from limitations relating to shareholder distributions.

The new Law has adhered to these basic principles in conformance with existing legislation in the most forward-looking states. It is a widely known fact that in recent years there has been an increasing tempo in the flight of Michigan corporations to incorporate under the laws of states with more modernized corporation codes. Delaware has reaped the major benefits of this kind of migration. There appears no sound reason of public policy why Michigan should not be equally modern in its corporate laws, thereby avoiding the loss of tax revenues resulting from the flight of its domestic corporations by incorporation in other states.

The corporation laws of Delaware have been improved over the years by way of amendment of their pre-existing laws, without a major revision of their code as a whole. New York and New Jersey have both made complete revisions in their corporation laws. The American Bar Association has likewise promulgated a Model Business

Corporation Act. In the preparation of the instant Law, the Model Act and the laws of each of these states as well as others have been studied. The corporation laws of no single state were taken as the model for the new Law although basic ideas and principles, as well as specific language, have been borrowed from a number of states, with the aim of creating a sound corporation law in the light of modern principles. If the proposed act is adopted by the legislature there should be no sound reason for any corporation to seek incorporation in another state.

We have made no attempt to revise the laws relating to non-profit corporations or to certain other special types of corporations, such as banks, insurance companies and railroad corporations. These problems require special study and it was deemed impractical to undertake such study at this time. In large measure, these spcial corporations are governed by the General Corporation Act by specific reference thereto and to that extent their treatment, of course, will be modernized by the adoption of the new law. After the new law has been adopted, it is expected that the Commission will undertake a review of the laws governing these special corporations with a view to suggesting amendments where the need is indicated. Of course, it is not intended that such a review is to be undertaken by the Commission as to an entire industry, such as the banking or insurance industry, unless specific request therefor is made by the legislature.

The new law is presented with comments indicating the source of the new provision under each section. It is to be noted that in a few instances of comparatively minor significance, the Reporter has indicated his dissent from the views of the Commission. In each of such instances, the arguments supporting the respective views of the Commission and the Reporter are stated under the source designation.

Submitted herewith is an introductory comment from the Reporter which should be helpful in understanding the format of the new law along with the proposed statute which is entitled "Michigan Business Corporation Act".

Memorandum of Reporter

by Stanley Siegel

This memorandum will explain the choice of organization of the proposed Michigan Business Corporation Act. Section-by-section analysis of the proposed new law is provided with the text of the law itself.

Organization of the Law:

To the extent possible and desirable, existing Michigan statutory language or rules are preserved. Changes of form and language, to the extent possible, make use of other established statutes as well; in particular, liberal use is made of the recently-revised statutes of Delaware, New York, and New Jersey, as well as the ALI-ABA Model Business Corporation Act. Totally new language is used only where the objectives of the law cannot be satisfied through existing formulations.

The reasons for this approach, though obvious, bear repetition. To the extent existing language is used, litigation history bearing on that language (whether in Michigan or in other jurisdictions) is available to clarify the intent of the statute. Totally new language often implies a break with previous rules which may, in fact, not be intended; therefore, language which has acquired a meaning that is desirable is carried into the new law in haec verba. Moreover, since Michigan corporations will frequently do business in other states, it is desirable to the extent possible to enact a corporation statute not unlike that of other major corporate jurisdictions.

The present Michigan General Corporation Act, enacted in 1931, is outdated; its rigidity in such areas as corporate changes, capital structure, and director indemnification has been the major factor in leading several major Michigan corporations (e.g., Clark Equipment Co., Hoover Ball and Bearing) to reincorporate in Delaware. The organization of the present Act is confusing, and it has some major omissions. Accordingly, this "revision" effort is

is essentially a rewriting of the entire law, and it is desirable in doing so to choose the clearest and most understandable organization. The organization of the Model Act, the essential features of which have been widely adopted (The MBCA was used as the basis for some 21 state corporation law revisions) is basically chronological; if for no other reason, its wide adoption commends it for consideration. A major failing of the Model Act, however, is its excessive simplicity: as shall be noted below, the Act does not address a number of corporate problems. Perhaps for that reason, it has not been adopted without changes and additions by many of the major jurisdictions (except Illinois, upon whose Code the MBCA is largely based).

The organization proposed is essentially that of the New York Business Corporation Law, enacted in 1961 after a five year study costing several million dollars. It is essentially chronological, similar to the Model, but far more complete. It should be noted at the outset that choice of New York's organization does not imply choice of the substantive provisions of the NYBCL, although some of the latter will be recommended.

Close Corporation Provisions:

A considerable body of literature has been devoted to the inadequacies of present corporate laws in dealing with the problems of close corporations. That special attention must be devoted to these problems in the law revision is a foregone conclusion. At the outset, however, it is essential to decide whether these problems can be dealt with adequately through general provisions in the law itself, or alternately whether it is necessary or desirable to provide a separate law or chapter for close corporations. The latter approach has been followed in Florida (Fla. Stat. Ann. § 608.0100 - .0107 (1965)), Delaware (Del. Gen. Corp. Law subch. 14, §§ 341-355 (Supp. 1968)), and Maryland (Md. Code Ann. art. 23, §§ 100-111 (Supp. 1967)). By contrast, three-quarters of the remaining jurisdictions have some special provisions for close corporations, but no separate statute.

The proposed revision follows the majority of jurisdictions in making special provisions for close corporations without a separate chapter set aside for such corporations. Among these special provisions, included at appropriate points throughout the text are sections dealing with:

-Incorporation by one incorporator.
-Board of directors with fewer than three members.
-Optional high-vote or high-quorum requirements.
-Relaxed formalities: management by shareholders.
-Stock transfer restrictions.
-Shareholder agreements.
-Deadlock, dissolution, and arbitration.

At least a few of these provisions are already a part of Michigan law; e.g., incorporation by one man (M.C.L.A. § 450.3); high-vote and high-quorum requirements (M.C.L.A. 450.32); and provision for voting trusts (M.C.L.A. § 450.34 (1963)). Moreover, the character of at least a few of these provisions will be such that they will have application to more than simply close corporations.

A major problem of close corporation legislation is definitional: what corporations shall be permitted to make use of the special sections? The problem becomes particularly perplexing if the draftsman attempts to apply the same standard of applicability to all of the special sections, as must be the case if close corporations are the subject of a separate law or chapter. Thus, Forida defines a close corporation as "a corporation for profit whose shares of stock are not generally traded in the markets maintained by securities dealers or brokers" (Fla. State. § 608.0100 (2)(1965)), and permits any such corporation to elect treatment under the special provisions. However, it is not altogether clear that all of the special provisions should turn on this one criterion; provisions for dissolution or provisional directors in the event of deadlock might have value for publicly-traded corporations. By contrast, New York applies the public-traded test only to the validity of restrictive shareholder agreements (N.Y. Bus. Corp. Law § 620 (c)(Supp. 1967)).

The New York and Florida statutes have in common a similar approach to qualification for special treatment: a close corporation, to make use of the special code sections (or special code chapter, as in Florida) must "qualify" by meeting a stated test. Other tests are possible; an early commentator proposed a test based on number of shareholders (no more than 10) and lack of public trading; Winer, Proposing a New York "Close Corporation" Law, 28 Corn. L.Q. 313, 315 (1943). At least one recent commentator supports such a quantitative standard to provide definitional clarity and uniformity; Bradley, Toward a More Perfect Close Corporation: The Need for More and Improved Legislation, 54 Geo. L. J. 1145, 1190 (1960).

A second approach to defining close corporation status is presented in the recent revisions of the Maryland and Delaware corporation codes. Both include separate chapters for close corporations, and in both, close corporation status is achieved by election plus qualification (both include both a numerical and public-traded standard). However, in Maryland and Delaware, action that might disqualify close-corporation status, rather than automatically voiding such status, triggers a remedy on the part of shareholders to void the action. E.g., Del. Gen. Corp. Law § 348 (b) vests the Court of Chancery with jurisdiction to enjoin any action which would threaten close corporation status, on the complaint of any shareholder. Maryland has similar provisions. Although this approach avoids the major objection to the Florida statute--that a single transaction constituting public trading (an ill-defined concept) would void agreements and understandings and alter completely the relationships of the shareholders--it does not avoid the more important objection to separate close corporation legislation: that it attempts, generally unsuccessfully, to apply the same standard for application for diverse code sections of inherently varying applicability.

Accordingly, the section-by-section approach to close corporations is here adopted.

MICHIGAN BUSINESS CORPORATION ACT

MICHIGAN BUSINESS CORPORATION ACT

Chapter 1: Title, Definitions and Miscellaneous Procedural Provisions.

§ 101. Short title; rules of construction.

(a) This act shall be known and may be cited as the "Michigan Business Corporation Act."

(b) This act shall be liberally construed and applied to promote its underlying purposes and policies.

(c) Underlying purposes and policies of this act are, among others,

(1) to simplify, clarify and modernize the law governing business corporations;

(2) to provide a general corporate form for the conduct of lawful business with such variations and modifications from the form so provided as the interested parties in any corporation may agree upon, subject only to over-riding interests of this State and of third parties; and

(3) to give special recognition to the legitimate needs of the close corporation.

(d) The presence in certain provisions of this act of the words "unless otherwise provided in the articles of incorporation or by-laws" or words of similar import, does not imply that the effect of other provisions may not be varied by provisions in the articles of incorporation or by-laws.

SOURCE: NJSA § 14A:1-1, verbatim except that (c)(1) as proposed reads "business corporations", rather than simply "corporations". Paragraphs (b) and (c) are New Jersey innovations; as a general matter, it seems wise to introduce this statement of legislative intention, since the new Act will represent a substantial change in the direction of the law.

The title "Business Corporation Act" was chosen because the revised law is intended for application to business corporations, and not to corporations generally. Section 103 of this revision delineates the extent to which other corporations are to be governed by some sections of the Act.

§ 102. Definitions.

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

(a) "Administrator" means the chief officer of the Department of Commerce or of any other agency or department authorized by law to administer the provisions of this act, or his designated representative.

(b) "Articles of incorporation" includes (1) the original articles of incorporation or any other instrument filed or issued under any statute to organize a domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger, or consolidation or other certificates or instruments filed or issued under any statute; or (2) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated.

(c) "Authorized shares" mean the shares of all classes that the corporation is authorized to issue.

(d) "Bonds" includes secured and unsecured bonds, debentures, and notes.

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

(f) "Corporation" or "domestic corporation" means a corporation for profit organized under this act, or existing

on its effective date and theretofore formed under any other statute of this state for a purpose or purposes for which a corporation may be organized under this act.

(g) "Director" means any member of the governing board of a corporation. The term "board" means "board of directors."

(h) "Earned surplus" means the portion of the surplus of a corporation that represents the accumulated net earnings, gains and profits, after the deduction of all losses, that have not been distributed to the shareholders as dividends or transferred to stated capital or capital surplus, or applied to other purposes permitted by law, as determined in accordance with section 419.

(i) "Foreign corporation" means a corporation for profit organized under laws other than the laws of this state which has as its purpose or among its purposes a purpose for which a corporation may be organized under this Act.

(j) "Insolvent" means being unable to pay debts as they become due in the usual course of the debtor's business.

(k) "Net assets" means the amount by which the total assets of a corporation, as defined herein, exceed the total liabilities of the corporation as determined in accordance with

generally accepted accounting principles. Stated capital and surplus are not liabilities.

(l) "Person" means an individual, a partnership, a domestic or foreign corporation, or any other association, corporation, trust or legal entity.

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

(n) "Stated capital" means the sum of (1) the par value of all shares with par value that have been issued; (2) the amount of consideration received for all shares without par value that have been issued, except such part of the consideration therefor as may have been allocated to surplus in a manner permitted by law; and (3) such amounts not included in classes (1) and (2) as have been transferred to stated capital, whether upon the issuance of shares or otherwise, minus all reductions from such sums as have been effected in a manner permitted by law.

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

(p) "Total assets" means the total of those properties and rights entered upon the books of the corporation in accordance with generally accepted accounting principles, or the current

fair market value of such properties and rights of the corporation.

(q) "Treasury shares" means shares which have been issued, have been subsequently acquired by the corporation, and have not been cancelled. Treasury shares are issued shares, but not outstanding shares, and are not assets.

* * * * * * * *

SOURCES: (a), (g), (k), (l), (p), (q) original.
(b), (d), (f) - NYBCL § 102.
(c), (e), (m), (n), (o) 0 MBCA § 2.
(h), (j) - NJSA § 14A:1-2.
Subsection (p) is original. Some may argue that "generally accepted accounting principles" may vary widely. Nevertheless, such a limitation, together with the allowance of fair market values, provides the only real protection available to creditors against excessive asset distributions. The definition is in accord with the provisions of the Model Act and other statutes immunizing directors from liability for distributions when they rely on financial statements (See MBCA § 48 (1969 rev.) and NYBCL § 717). The closest analogous statute is North Carolina § 55-2(2):

> Assets means those properties and rights other than treasury shares, which in accordance with generally accepted principles of sound accounting practice, are recognized as being properly entered upon the books and balance sheets of business enterprises in terms of a monetary value.

The issue of whether "surplus" is produced by increases in the value of assets without sale thereof (so-called "unrealized appreciation") has been resolved favorably in a leading New York case and negatively (with some statutory guidance) in a leading Pennsylvania decision.

Compare Randall v. Bailey, 228 N.Y. 280, 43 N.E.2d 43 (1942) with Berks Broadcasting Co. v. Craumer, 356 Pa. 620, 52 A.2d 571 (1947). Strangely, New York's new Business Corporation Law which claims in the Reviser's Notes to adopt the rule of Randall v. Bailey does not so state in the statutory language itself. Indeed, the New York definitions are substantially identical to those in the Model Business Corporation Act, which are also unclear on the point. The proposed definitions adopt a carefully limited Randall v. Bailey approach: the term "total assets," is defined to allow revaluation of assets to "fair market value"; and since this term ultimately leads to the definition of surplus, there is a specific rule. Appraisal increases, consistent with generally accepted accounting and financial practices, should be treated as capital surplus.

§ 103. Application of act.

(a) This act applies to every domestic business corporation and to every foreign business corporation which is authorized or does business in this state except as otherwise provided in this act or by other law. This act also applies to any other domestic corporation or foreign corporation of any type or kind to the extent, if any, provided under this act or any law governing such corporation. After the effective date of this act, the General Corporation Act shall not apply to a corporation to which this act applies. A reference in any statute of this state, which makes a repealed provision of the General Corporation Act applicable to a corporation, shall be deemed and construed to refer to and make applicable the corresponding provision, if any, of this act unless the context requires otherwise. The provisions of this act shall not be applicable to insurance, railroad, bridge, tunnel companies, union depot companies, and building and loan associations. The provisions of this act shall, unless otherwise provided in, or inconsistent with, the act under which such corporation is or shall have been formed, be applicable to banking corporations, industrial banks, fraternal benefit societies, trust, deposit and security companies, summer resort associations, brine pipe line companies, telegraph companies, telephone companies, safety

and collateral deposit companies, canal, river and harbor improvement companies, cemetery, burial and cremation associations, and agricultural and horticultural fair societies.

(b) This act applies to commerce with foreign nations and among the several states, and to corporations formed by or under any act of Congress, only to the extent permitted under the Constitution and laws of the United States.

(c) The enactment of this act shall not affect the duration of a corporation which is existing on the effective date of this act. Any such existing corporation, its shareholders, directors and officers shall have the same rights and be subject to the same limitations, restrictions, liabilities and penalties as a corporation formed under this act, its shareholders, directors and officers.

(d) This act shall not affect any cause of action, liability, penalty or action or special proceeding, which on the effective date of this act is accrued, existing, incurred, or pending, but the same may be asserted, enforced, prosecuted or defended as if this act had not been enacted.

* * * * * * * *

SOURCE: Adopted from NYBCL § 103, with exceptions from application verbatim from MCLA § 450.3.
The New York section was used, since it most clearly indicates the application of the act, the repeal of prior acts, and the construction of

cross-references to prior acts as applying to the new act. It specifically denies any impact on the duration of existing corporations, or on causes of action existing prior to enactment of the act. The substance of this section is identical to MCLA §§ 450.191, 450.192, 450.189.

The reporter notes that attention should be given to revision of the laws relating to corporations not governed by this act.

§ 104. Effect of invalidity of part of act.

If any provision of this chapter or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared severable.

* * * * * * * *

SOURCE: This is a standard "severability" clause, assuring continued validity of the remainder of the act if one section is held invalid. The language is that of NYBCL § 111; MBCA § 151 (1969 rev.) is substantively identical. Michigan law presently has a general severability section to the same effect: MCLA § 8.5.

§ 105. Reservation of power.

This act may be supplemented, altered, amended or repealed by the legislature, and every corporation, domestic or foreign, to which this act applies shall be bound thereby.

* * * * * * * *

SOURCE: NJSA § 14A:1-5. This is a standard reservation by the legislature of power to alter the law; it avoids the "vested rights" claim of shareholders to preclude amendment of the statute, a claim first encountered in Dartmouth College v. Woodward, 4 Wheat. 518 (1819). See Keller v. Wilson & Co., Inc., 21 Del. Ch. 391, 190 Atl. 115 (Sup. Ct. 1936) (Preferred arrearages held "vested rights"). The present corporation law has such a reservation of power in MCLA § 450.520. To the same effect, with somewhat different language, is MBCA § 149 (1969 rev.).

§ 106. Execution and filing of documents.

(a) A document relating to a domestic or foreign corporation required or permitted to be filed under this act shall be filed with the Administrator.

(1) The document shall be in the English language, except that the corporate name need not be in the English language if written in English letters or Arabic or Roman numerals, and the articles of incorporation of a foreign corporation under section 1103 of this act need not be in the English language.

(2) The filing shall be accomplished by delivering the document to the Administrator together with the fees and any accompanying documents required by law. If the document substantially conforms with the requirements of this act, the Administrator shall endorse upon it the word "Filed" with his official title and the dates of receipt and of filing thereof, and shall file and index it in his office. If so requested at the time of the delivery of the document to his office, the Administrator shall include the hour of filing in his endorsement thereon. The Administrator shall prepare and return a true copy of the document to the person who submitted it for filing showing the filing date thereof.

(3) The document shall be effective at the time of filing unless a subsequent effective time is set forth in such document, in which case the document shall be effective at the time so specified, which shall in no event be later than 90 days after the date of filing.

(b) If a document relating to a domestic corporation or a foreign corporation is required or permitted to be filed under this act and is also required by this act to be executed on behalf of such corporation, the document shall be signed by the chairman or vice chairman of the board, or the president or a vice president. The name of any person so signing such a document, and the capacity in which he signs, shall be stated beneath or opposite his signature. The document may, but need not, contain:

(1) the corporate seal; or

(2) an attestation by the secretary or an assistant secretary of the corporation; or

(3) an acknowledgment or proof.

If the corporation is in the hands of a receiver, trustee, or other court appointed officer, the document shall be signed by such fiduciary or the majority of them, if there are more than one.

* * * * * * * *

SOURCE: This section is original, but is derived from NJSA § 14A:1-6, first two paragraphs.

COMMENT: This section is in keeping with a trend in recent revisions to include uniform provisions on the filing and execution of documents under the statute. A comparable New York provision, NYBCL § 104, was not recommended primarily because of its great complexity. At least three issues must be resolved in determining such uniform filing proceedings:

(1) Should multiple signatures (e.g., President and Secretary) be required? The proposed provision requires only one signature.

(2) Should verification be required? The proposed provision makes verification optional.

(3) Should county filing be required? The proposed provision deletes this requirement.

No provision analogous to the suggested section appears either in the Model Act or in the Michigan Statutes.

Note that under the proposed section no rejection by the administrator is contemplated for minor procedural imperfections.

§ 107. Waiver of notice.

(a) Whenever, under this act or the articles of incorporation or by-laws of any corporation or by the terms of any agreement or instrument, a corporation or the board or any committee thereof is authorized to take any action after notice to any person or persons or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of such period of time, if at any time before or after such action is completed the person or persons entitled to such notice or entitled to participate in the action to be taken or, in the case of a shareholder, by his attorney-in-fact, submit a signed waiver of such requirements.

(b) Whenever any notice or communication is required to be given to any person by this act, the articles of incorporation or by-laws, or by the terms of any agreement or instrument relating to the internal affairs of the corporation, or as a condition precedent to taking any corporate action, and communication with such person is then unlawful under any statute of this state or of the United States or any regulation, proclamation or order issued under said statutes, then the giving of such notice or communication to such person shall not be required and there shall be no duty to apply for license or other permission to do so. Any affidavit, certificate or other instrument which is required to be made or filed as

proof of the giving of any notice or communication required under this chapter shall, if such notice or communication to any person is dispensed with under this paragraph, include a statement that such notice or communication was not given to any person with whom communication is unlawful. Such affidavit, certificate or other instrument shall be as effective for all purposes as though such notice or communication had been personally given to such person.

(c) Whenever any notice or communication is required or permitted by this act to be given by mail, it shall, except as otherwise expressly provided in this act, be mailed to the person to whom it is directed at the address designated by him for that purpose or, if none is designated, at his last known address. Such notice or communication is given when deposited, with postage thereon prepaid, in a post office or official depository under the exclusive care and custody of the United States Postal Service. Such mailing shall be registered, certified or other first class mail except where otherwise required by this act.

* * * * * * * *

SOURCE: NYBCL § 108. This is another useful provision detailing procedures for the waiver of required notices; it is of particular value in avoiding unnecessary formalities in the organization and conduct of close corporations. The section generally derives from MBCA § 144 (1969 rev.), the substance of which is subsection (a) of the recommended

language. New York's statute adds provisions for waiver of notice if communication is unlawful, and for notice effective by first class mail; this language is also included. MBCA § 144 and MCLA § 450.39 similarly permit waiver of notice, but in less specific and comprehensive terms.

§ 108. Appeal from Administrator.

(a) If the Administrator shall fail promptly to file any document submitted for filing under this act, he shall, within ten days after the delivery thereof to him, give written notice of his refusal to file to the person submitting the same, specifying the reasons therefor. From such disapproval the person may appeal pursuant to the provisions of the Administrative Procedure Act. (MCLA §§ 24.101 - 24.110).

(b) If the Administrator shall refuse or revoke the authorization of any foreign corporation to transact business in this state pursuant to this act, such foreign corporation may appeal pursuant to the provisions of the Administrative Procedure Act. (MCLA §§ 24.101 - 24.110).

* * * * * * * *

SOURCE: The idea of the appeal procedure and the general language is from MBCA § 140 (1969 rev.), except that appeal is also provided for refusal of authorization. In the place of the appeal procedure detailed in MBCA § 140, the administrative appeal provision of the Administrative Procedure Act is cross-referenced.

COMMENT: A number of sections found in other corporation statutes, which would normally appear in this chapter, are not included because they are adequately covered by the Revised Judicature Act. For completeness, they are cited in this note. It may be desirable to include as a section of the revised law an appropriate series of cross references.

Instruments as evidence. (e.g., MBCA § 141) MCLA § 600.2107 provides generally that copies of public records are admissible as evidence. MCLA § 600.2140 provides that the doing of business within Michigan constitutes prima facie evidence of corporate existence (without the requirement of some states to file copies of the Articles of incorporation).

Corporate seal as evidence. MCLA § 600.2142 provides that presence of the corporate seal on a document purporting to be executed by a corporation shall be prima facie evidence that it was so executed.

Proceedings by the attorney-general. MCLA title 600 ch. 36 provides broad powers of supervision by the attorney-general and the courts, over corporations. These include the power to obtain restraint against unauthorized exercise of corporate powers; the power to compel an accounting from corporate officers, to suspend those who have abused their trust, and generally to assure lawful conduct by such officer; the power to sequester corporate assets to satisfy judgments; the power of creditors to obtain a creditors bill and enforce stock subscriptions; and the power to compel discovery of corporate assets. These, together with the Michigan Court Rules, (e.g., R. 309 on interrogatories), provide ample supervision power.

Chapter 2: Formation of Corporations, Corporate Name, and Service of Process.

§ 201. Incorporators.

One or more persons may act as incorporator or incorporators of a corporation by signing in ink and filing articles of incorporation for such corporation.

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SOURCE: This section is substantively identical to MBCA § 53 (1969 rev.), except that only a single copy is required to be filed. Existing Michigan requirements of filing in triplicate and acknowledgement are deleted, consistent with § 106 hereof. The present Michigan provision, MCLA 450.2(c) allows corporations or partnerships to act as incorporators. If, as the proposed statute contemplates, the incorporators may act in the capacity of promoter and organizer of the corporation, there seems little reason to exclude corporations and partnerships from this capacity. The New York Business Corporation Law limits incorporators to natural persons, perhaps because incorporators are active participants in the organization process in New York. (See NYBCL § 404). However, since corporations act through their agents, they may similarly participate in the organization process and may be held to the same fiduciary obligations as individual promoters. Moreover, since as a practical matter corporations and partnerships do organize other corporations (using natural incorporators, where required as "straw men") it seems most appropriate to continue to recognize actual practice in the new law.

Language in MCLA § 450.3 concerning application of the Act is included in § 103 hereof.

§ 202. Articles of Incorporation.

(a) The articles of incorporation shall set forth:

(1) The name of the corporation;

(2) The purpose or purposes for which the corporation is organized. It shall be a sufficient compliance with this paragraph to state substantially, alone or with specifically enumerated purposes, that the corporation may engage in any activity within the purposes for which corporations may be organized under the Michigan Business Corporation Act, and all such activities shall by such statement be deemed within the purposes of the corporation, subject to expressed limitations, if any;

(3) The aggregate number of shares which the corporation shall have authority to issue; if such shares are to consist of one class only, the par value of each of such shares, or a statement that all of such shares are without par value;

(4) If the shares are, or are to be, divided into classes, or into classes and series, the designation of each class and series, the number of shares in each class and series, and a statement of the relative rights, preferences and limitation of the shares of each class and series, to the extent that such designations, numbers, relative rights, preferences, and limitations have been determined;

(5) If any class of shares is to be divided into series, a statement of any authority vested in the board to divide the class of shares into series, and to determine or change for any series its designation, number of shares, relative rights, preferences and limitations;

(6) The street address, and the mailing address if different from the street address, of the corporation's initial registered office, and the name of the corporation's initial resident agent at such address;

(7) The names and addresses of the incorporators; and

(8) The duration of the corporation if other than perpetual.

(b) The articles of incorporation may also contain:

(1) The following provision or the substance thereof: Whenever a compromise or arrangement or any plan of reorganization of this corporation is proposed between this corporation and its creditors or any class of them or between this corporation and its shareholders or any class ot them, any court of equity jurisdiction within the state may, on the application of this corporation or of any creditor or any shareholder thereof, or on the application of any receiver or receivers appointed for the corporation, order a meeting

of the creditors or class of creditors or of the shareholders or class of shareholders to be effected by the proposed compromise or arrangement or reorganization, to be summoned in such manner as said court directs. If a majority in number representing 3/4 in value of the creditors or class of creditors, or of the shareholders or class of shareholders to be affected by the proposed compromise or arrangement or reorganization, agree to any compromise or arrangement or any reorganization of this corporation as a consequence of such compromise or arrangement, said compromise or arrangement and said reorganization, shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, or on all the shareholders or class of shareholders and also on this corporation.

(2) Any provision not inconsistent with this act or any other statute of this state, which the incorporators elect to set forth for the management of the business and the conduct of the affairs of the corporation, or creating, defining, limiting or regulating the powers of the corporation, its directors, and shareholders or any class of shareholders including any provision which under this act is required or permitted to be set forth in the by-laws.

(c) Whenever the provision of (b)(1) is included in the original articles of incorporation of any corporation, all persons who become creditors or shareholders thereof shall be deemed to have become creditors or shareholders subject in all respects to said provision, and the same shall be binding upon them; and whenever the said provision is inserted in the articles of any corporation, by an amendment of such articles, all persons who become creditors or shareholders of such corporation after such amendment becomes effective shall be deemed to have become such creditors or shareholders subject in all respects to the said provisions, and the same shall be absolutely binding upon them. The circuit court shall have the power to administer and enforce the said provision and to restrain, pendente lite, all actions and proceedings against any such corporation with respect to which the court so restraining shall have begun the administration or enforcement of said provision, and to appoint a temporary receiver or receivers for such corporation and to grant such receiver or receivers such powers as shall be deemed proper.

* * * * * * * *

SOURCE: (a) and part of (b) are from NJSA § 14A:2-7, first paragraph, with New Jersey's unique provision for delaying the effective date of the articles deleted.

Also deleted is the requirement to name the first board in the articles. This section is in substance equivalent to MCLA § 450.4 and to the Model Act § 54, (1969 rev.). However, paragraph (a)(2) enables a corporation to use an "all purposes" clause in its articles and thereby eliminate much useless boilerplate. No formula of words is required by the statute to assure "all purposes" authorization: any statement substantially to that effect will suffice.

(b)(1) and (c) are from MCLA § 450.4(3). A substantively identical provision appears in Del. Corp. Law § 102 (b)(2).

§ 203. Filing of articles of incorporation.

Upon filing of the articles of incorporation, the corporate existence shall begin, and such filing shall be conclusive evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been organized under this act, except in an action or special proceeding brought by the attorney-general.

* * * * * * * *

SOURCE: NJSA § 14A:2-7(2) with conforming editorial changes. This paragraph continues existing Michigan law that the corporate existence begins on filing of the articles. By contrast, the MBCA § 56 distinguishes the filing of the articles of the incorporation from the issuance by the secretary of state of a certificate of incorporation. It is on the happening of the latter event that corporate existence begins under MBCA. State corporate statutes are rather evenly split between these two rules (See the annotation to §50 in the MBCA Annotated). Existing Michigan law appears simpler and more definite, and it is therefore continued.

§ 204. Organization meeting.

Before or after the filing of the articles of incorporation a majority of the incorporators, at a meeting or by written instrument, shall select a board of directors and may adopt by-laws. On or after the filing date of the articles of incorporation, any member of the board may call the first meeting of the board upon not less than two days notice by mail to each director. A majority of the directors shall constitute a quorum for the first meeting of the board. At the first meeting, the board may adopt by-laws, elect officers and transact such other business as may come before the meeting.

* * * * * * * *

SOURCE: Original. This provision allows for the naming of the initial board by the incorporators either before or after the filing of the articles of incorporation. This procedure is similar to, but more flexible than, the Delaware procedure (Del. Corp. Law § 107) under which the articles may name the initial board of directors, but if they do not, the incorporators elect the first board. The proposed section has the virtues of simplicity and accuracy: in virtually all cases, the "election" by the incorporators is a formality, and there is no need to preserve rigidity in the procedure. This is a liberalization of present MCLA § 450.7, which mandates a first meeting of incorporators, but allows waiver in writing of notice thereof.

Note that notice of all types can be waived pursuant to § 107 of this revision.

§ 205. Corporate name.

(a) The corporate name of a domestic corporation or of a foreign corporation authorized to transact business in this state:

(1) Shall contain the word "corporation," "company," "incorporated" or "limited," or shall contain an abbreviation of one of such words; or, in the case of a foreign corporation authorized to transact business in this state under Section 1102 of this act, shall contain words or abbreviations of like import in other languages provided they are written in Roman characters or letters.

(2) Shall not contain any word of phrase, or abbreviation or derivative thereof, which indicates or implies that it is organized for any purpose other than one or more of the purposes permitted by its article of incorporation.

(3) Shall not be the same as, or confusingly similar to, the corporate name of any domestic corporation, or of any foreign corporation authorized to transact business in this state, or any corporate name currently reserved under this act or a predecessor act, unless the written consent of such other domestic or foreign corporation or holder of a reserved name to the adoption of a confusingly similar name, but not the same name, is filed in the office of the Administrator or, in lieu of such consent, there is filed

a certified copy of a final judgment of a court of competent jurisdiction establishing the prior right of the corporation to the use of the name in this state.

(4) Shall not contain any word or phrase, or any abbreviation or derivative thereof, the use of which is prohibited or restricted by any other statute of this state, unless any such restrictions have been complied with.

(b) No corporation formed or existing under or subject to the provisions of this act shall assume any name which implies that it is a banking corporation, an insurance or surety company or a trust company, and no such corporation shall use the words, "bank" "industrial bank", "deposit", "insurance", "surety", "security", "trust", "trust company", or "guaranty", or "building and loan" in its corporate name, or use any combination of the letters or words along with other letters or words in its corporate name to indicate or convey the idea of a bank or banking or industrial banking activity or security.

(c) This section shall not prevent a foreign corporation from being authorized to transact business in this state under an assumed name which is available for corporate use under this section if such corporation files with its application for an original or amended certificate of authority a resolution of its board

adopting such assumed name for use in transacting business in this state.

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SOURCE: (a) and (c) are from the MBCA § 8 (1969 rev.) and NJSA § 14A:2-2, with conforming editorial changes. (b) is from MCLA § 450.6. This section, and sections 206 and 207, does not preclude action for unfair competition based on confusion of names.

§ 206. Reserved name.

(a) Any person may reserve the right to the use of a corporate name by filing an application to reserve the corporate name, which shall be executed by the applicant. If the Administrator finds that the name is available for corporate use, he shall reserve the name for the exclusive use of the applicant for a period of one hundred twenty days.

(b) The Administrator, for good cause shown, may extend the reservation for periods of not more than sixty days each. Not more than two such extensions shall be granted.

(c) The right to the exclusive use of a specified corporate name so reserved may be transferred to any other person or corporation by filing a notice of such transfer, executed by the applicant for whom the name was reserved, and specifying the name and address of the transferee.

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SOURCE: (a) and (c) are derived from MBCA § 9 (1969 rev.) which, with more detail but the same 120-day time period, repeats the substance of MCLA § 450.6a. (b) is from NYBCL § 303(c), and represents a change in Michigan law, which now requires a totally new filing, with a 10-day lapse period to follow after expiration of the initial 120 days.

§ 207. Assumed Name.

A corporation may carry on or transact its business under an assumed name other than its corporate name, not precluded from use by section 205 (a)(3), by filing a certificate setting forth the true name of the corporation and the assumed name under which such business is to be conducted. This section shall create no substantive rights to the use of a particular assumed name.

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SOURCE: Original. The objective of this section is to remove corporate assumed names from the filing requirements of MCLA §§ 445.1 - 445.5, which are at variance with the usual filing requirements for corporations. The 1967 amendments to §§ 445.1, 445.1(b), and 445.4 have been repealed to exclude corporations, and this section would fill the gap. The virtue of the § 207 arrangement is that the Administrator is the central filing agency for corporate assumed names, thus not only simplifying filing, but also making possible central control of the use of such names.

The purpose of this section is solely to confer the right to use assumed names and to provide filing and notice thereof.

§ 208. By-laws.

The initial by-laws of a corporation shall be adopted by its incorporators, its shareholders or its board of directors. Either the shareholders or the board shall have the power to amend or repeal the by-laws or adopt new by-laws unless such power is reserved exclusively to the shareholders by the articles of incorporation. The shareholders may prescribe in the by-laws that any by-law made by them shall not be altered or repealed by the board. The by-laws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

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SOURCE: Original. Note that initial by-laws may be adopted either by the incorporators, the board, or the shareholders, per existing MCLA § 450.16. The existing prohibition against the board making by-laws "fixing their number, qualifications, classifications, or term of office" is deleted, since it is inconsistent with recent statutory revisions and since such protection can, in any event, be included in the articles of incorporation, or in the by-laws.

§ 209. Registered office and resident agent.

Each domestic corporation and each foreign corporation authorized to transact business in this state shall have and continuously maintain in this State:

(a) A registered office which may be, but need not be, the same as its place of business.

(b) A resident agent, which agent may be either an individual resident in this state whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office.

* * * * * * * *

SOURCE: MBCA § 12 (1969 rev.) expanded to cover authorized foreign corporations (see § 1102). This continues, in rather clearer language, the existing Michigan requirement that every corporation maintain a registered office and resident agent. MCLA § 450.38. Resident agents appointed prior to the effective date of this act will continue in office under this act.

§ 210. Change of registered office or resident agent.

(a) A domestic corporation or a foreign corporation authorized to transact business in this state, may change its registered office or change its resident agent, or both, upon filing a statement setting forth:

(1) The name of the corporation.

(2) The street address of its then registered office, and its mailing address if different from its street address.

(3) If the address of its registered office be changed, the street address and the mailing address, if different from the street address, to which the registered office is to be changed.

(4) The name of its then resident agent.

(5) If its resident agent be changed, the name of its successor resident agent.

(6) That the address of its registered office and the address of the business office of its resident agent, as changed, will be identical.

(7) That such change was authorized by resolution duly adopted by its board of directors.

(b) Any resident agent of a corporation may resign as such agent by filing a written notice thereof with the Administrator,

who shall promptly mail a copy thereof to the president or a vice-president of the corporation. The corporation shall promptly appoint a successor resident agent. The appointment of the resigning agent shall terminate upon the appointment of a successor or upon the expiration of thirty days after receipt of such notice, whichever shall first occur.

* * * * * * * * *

SOURCE: (a) and (b) are MBCA § 13 (1969 rev.) with clarifying editorial changes, expanded to cover authorized foreign corporations (see § 1102). MBCA § 12 provisions on filing are deleted, since filing provisions of § 106 hereof govern. The proposed section provides the same procedures as existing Michigan law, MCLA § 450.79.

§ 211. Service of process on resident agent.

(a) The resident agent so appointed by a corporation shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served.

(b) Every person, whether a resident or nonresident of this state, by the acceptance of election, appointment or employment as a director or officer of any corporation organized under this act or in existence on the effective date of this act, shall be held, by such acceptance, to have appointed the resident agent of such corporation as his agent upon whom any process may be served while such person is a director or officer, in any action commenced in any court of general jurisdiction in this state, arising out of or founded upon any action of such a domestic corporation or of such person as a director or officer of such a domestic corporation. Upon accepting service of any such process, the resident agent shall forthwith forward the same to such director or officer at his last known address.

* * * * * * * *

SOURCE: (a) Is the first paragraph of MBCA § 14 (1969 rev.). MCLA § 600.1920 details procedures for service of process on corporations, resident agents, and the corporation commission (or Secretary of State). In addition, MCLA §§ 600.711, 600.715 detail the basis for general and limited personal jurisdiction

over corporations. These provisions of title 600 are applicable equally to domestic and foreign corporations.

(b) is MCLA § 450.701 with conforming editorial changes and an additional requirement that process be forwarded by the resident agent. MCLA § 600.1930 details the procedures for service upon agents required by law (and the notes thereto cross-reference MCLA § 450.701). Accordingly, the additional provisions of the existing corporation law detailing the service of process (MCLA §§ 450.702, 450.703) are unnecessary, as is a provision allowing existing directors to resign and avoid liability during a transition period (§ 450.704).

Chapter 3: Corporate Purposes and Powers

§ 301. Purposes.

(a) A corporation may be formed under this act for any lawful business purpose or purposes except to engage in any business for which a corporation may be formed under any other statute of this state unless such statute permits formation under this act.

(b) In time of war or other national emergency, a corporation may do any lawful business in aid thereof, notwithstanding the purpose or purposes set forth in its articles of incorporation, at the request or direction of any competent governmental authority.

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SOURCE: Paragraph (a) is from the New York Business Corporation Law § 201 (a); it is substantively identical to MBCA § 3. The purposes section of the Michigan law is now included in MCLA § 450.3 (incorporators; applicability of act), which lists in the "exceptions" clause those corporations that cannot be formed under the Act. Such listing is included in the proposed Act in § 103, and is therefore unnecessary in this section.

Paragraph (b) is NYBCL § 201 (c). The emergency powers clause is now a fixture of new corporation codes and is generally recognized as essential to meet the corporate problems of the demands of national security. It is found, for example, in MBCA § 4(n), and Del. Corp. Law § 122(12). In addition, a very detailed provision for emergency by-laws, officer succession, and other details of corporate action in the event of national disaster, is contained in Del. Corp. Law § 110 and MBCA § 27A (1969 rev.), but this degree of detail seems to unnecessary.

COMMENT: This chapter, consistent with movements evidenced in most recent corporation law revisions, is drafted to give the corporation the widest powers, and to preclude generally any attack on those powers except by the state. Note that § 202(2)(a)(2) of this proposed Act presumes that every corporation has the full powers of Chapter 3 unless, of course, other limitations are imposed in the articles of incorporation. To date, the broadest language on powers of a corporation is to be found in the New York, New Jersey and Delaware laws.

§ 302. Powers.

Each corporation, subject to any limitations provided in this act or any other statute of this state or its articles of incorporation, shall have power in furtherance of its corporate purposes:

(a) To have perpetual duration.

(b) To sue and be sued in all courts and to participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in like cases as natural persons.

(c) To have a corporate seal, and to alter such seal at pleasure, and to use it by causing it or a facsimile to be affixed or impressed or reproduced in any other manner.

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

(e) To sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, or create a security interest in, all or any of its property, or any interest therein, wherever situated.

(f) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer, or otherwise dispose of, mortgage, pledge,

use and otherwise deal in and with, bonds and other obligations, shares, or other securities or interests issued by others, whether engaged in similar or different business, governmental or other activities, including banking corporations or trust companies; provided, such stock of banking corporations or trust companies is acquired as part of a plan of reorganization of such banking corporation or trust company; and provided, that any corporation organized or doing business in this state under this act shall not have the power to guarantee or anywise become security upon any bond or other undertaking securing the deposit of public moneys.

(g) To make contracts, give 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 of any interest therein, wherever situated.

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

(i) To do business, carry on its operations, and have offices and exercise the powers granted by this act in any jurisdiction within or without the United States.

(j) To elect or appoint officers, employees and other agents of the corporation, define their duties, fix their compensation and the compensation of directors, and to indemnify corporate directors, officers, employees and agents.

(k) To adopt, amend or repeal by-laws, including emergency by-laws, relating to the business of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its shareholders, directors or officers.

(l) To make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof.

(m) To pay pensions, establish and carry out pension, profit-sharing, share bonus, share purchase, share option, savings, thrift and other retirement, incentive and benefit plans, trusts and provisions for any or all of its directors, officers and employees.

(n) To purchase receive, take, or otherwise acquire, own, hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares.

(o) To participate with others in any corporation, partnership, limited partnership, joint venture, or other association of any kind, or in any transaction, undertaking or

agreement which the participating corporation would have power to conduct by itself, whether or not such participation involves sharing or delegation of control with or to others.

(p) To cease its corporate activities and dissolve.

(q) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is formed.

* * * * * * * *

SOURCE: This section is based on NYBCL § 202 and NJSA § 14A:3-1; it is differently organized, but as broad in scope as Del. Corp. Law §§ 121-123. The section is at the same time broader and more specific in its grant of powers than MBCA § 4 and MCLA § 450.10. Note that § 302(f) continues the existing Michigan Prohibition against acquiring shares of banking corporations (§ 450.10 (i)) verbatim. Arguments for and against such prohibitions are not here advanced: This revision simply continues the prohibition with no change either in substance or in language. Section 302 (j) cross-references to indemnification provisions (§ 615 hereof); and § 302 (o) permits corporations to be partners, venturers and promoters. There is no flat prohibition on loans to officers and directors but the subject is dealt with in more detail in § 612 hereof. "Key man insurance," now specifically permitted by Del. Corp. Law § 122(16), is included within the general language of this section without specific reference.

Existing provisions in MCLA § 450.10 (h) concerning acquisition of the corporation's own shares are included in §§ 415, 416 hereof.

§ 303. Defense of ultra vires.

No act of a corporation and no transfer of real or personal property to or by a corporation, otherwise lawful, shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such transfer, but such lack of capacity or power may be asserted:

(a) In an action by a shareholder against the corporation to enjoin the doing of any act or the transfer of real or personal property by or to the corporation.

(b) In an action by or in the right of the corporation to procure a judgment in its favor against an incumbent or former officer or director of the corporation for loss or damage due to his unauthorized act.

(c) In an action or special proceeding by the attorney-general to dissolve the corporation or to enjoin it from the doing of unauthorized business.

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SOURCE: Substance from NYBCL § 203, MBCA § 7(1969 rev.). In substance, essentially equivalent to MCLA § 450.11, but the existing provision is not as clear, particularly as to the right of action by the attorney-general.

§ 304. Defense of usury.

Corporations domestic or foreign, whether or not formed at the request of the lender, may by agreement in writing, and not otherwise, agree to pay any rate of interest in excess of the legal rate and in such instances where the rate is above the legal rate the defense of usury is prohibited: Provided that nothing contained herein shall prevent any charitable, religious, or other nonprofit corporation from waiving the defense of usury when the amount borrowed exceeds the principal sum of $250,000.

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SOURCE: MCLA § 450.78, with an additional phrase to negate the inference of Borinstein, 270 Mich. 359.

Chapter 4: Capital Structure and Corporate Finance

§ 401. Authorized shares.

(a) Every corporation shall have power to issue the number of shares authorized in its article of incorporation. Such shares may be all of one class or may be divided into two or more classes. Each class shall consist or either shares with par value or shares without par value, having such designations and such relative voting, dividend, liquidation and other rights, preferences and limitations, consistent with this act, as shall be stated in the articles of incorporation. The articles of incorporation may deny, limit or otherwise define the voting rights and may limit or otherwise define the dividend or liquidation rights of shares of any class.

(b) If the shares are divided into two or more classes, the shares of each class shall be designated to distinguish them from the shares of all other classes.

(c) Subject to the designations, relative rights, preferences and limitations applicable to separate series, each share shall be equal toevery other share of the same class.

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SOURCE: The substance of this provision is from NJSA § 14A: 7-1. Subsection (c) indicates equality of shares unless otherwise provided.

The proposed language carries forward the substance of MCLA § 450.17, except as to series of preferred stock, discussed under § 402 below.

§ 402. Issue of any class of shares in series.

(a) If the articles of incorporation so provide, the shares of any class of stock may be divided into and issued in series. If the shares of any such class are to be issued in series, then each series shall be so designated as to distinguish the shares thereof from the shares of all other series and classes.

(b) Any or all of the series of any such class and the variations in the relative rights and preferences as among different series may be fixed and determined by the articles of incorporation.

(c) If the articles of incorporation shall expressly vest authority in the board of directors, then, to the extent that the article of incorporation shall not have established series and fixed and determined the variations in the relative rights and preferences as among series, the board of directors shall have authority to divide any classes into series, and within the limitations set forth in the articles of incorporation, fix and determine the relative rights and preferences of the shares of any series so established.

(d) A certificate containing the resolution of the board of directors establishing and designating the series and fixing and determining the relative rights and preferences

thereof shall be filed in accordance with section 106 of this act. Upon filing, the resolution shall constitute an amendment to the articles of incorporation.

* * * * * * * *

SOURCES: The section is original. The purpose of this section and comparable sections in other statutes (Del. Corp. Law § 151; NYBCL § 502; MCLA § 450.17; MBCA § 16) is to grant the directors flexibility in setting the terms of stock issues. Note that the corporation itself has virtually unlimited power to set terms of classes of stock under § 401 of the proposed law; but that power must be exercised by provisions in the Articles. This section 402 details to what degree the Articles may delegate to the Board authority to set terms of "series" of stock authorized in the Articles.

The proposed section allows the board to establish wide variations among series, if authorized in the Articles. Present MCLA § 450.17 allows variations among only five characteristics:

1. Dividend rate.
2. Redemption terms, if any.
3. Liquidation preference, voluntary or involuntary.
4. Sinking fund provisions, if any.
5. Conversion terms, if any.

No such limitations as to variations are contained in the new section.

§ 403. Convertible shares and bonds.

(a) When so provided in the articles of incorporation, and subject to the restrictions in paragraph (d) a corporation may issue shares convertible, at the option of either the holder or the corporation or upon the happening of a specified event, into shares of any class or into shares of any series of any class. Authorized shares, whether issued or unissued, may be made so convertible within such period and upon such terms and conditions as are authorized in the articles of incorporation.

(b) Unless otherwise provided in the articles of incorporation, and subject to the restrictions of paragraph (d), a corporation may issue its bonds convertible into other bonds or into shares of the corporation within such period and upon such terms and conditions as are fixed by the board.

(c) If there is shareholder approval for the issue of bonds or shares convertible into shares of the corporation, such approval may provide that the board is authorized by amendment of the articles to increase the authorized shares of any class or series to such number as will be sufficient, when added to the previously authorized but unissued shares of such class or series, to satisfy the conversion privileges

of any such bonds or shares convertible into shares of such class or series.

(d) No bonds or shares convertible into shares of the corporation shall be issued unless:

(1) A sufficient number of authorized but unissued shares of the appropriate class or series are reserved by the board to be issued only in satisfaction of the conversion privileges of such convertible bonds or shares when issued; or

(2) The aggregate conversion privileges of such convertible bonds or shares when issued do not exceed the aggregate of any shares reserved under subparagraph (1) and any additional shares which may be authorized by the board under paragraph (c).

(e) The consideration for shares issued upon the exercise of a conversion privilege shall be that provided in paragraph (e) of section 405.

(f) When shares or bonds have been converted, they shall be cancelled. Shares which have been converted shall be restored to the status of authorized but unissued shares, unless otherwise provided in the articles of incorporation.

SOURCE: Substance from NYBCL § 519, but with convertibility authorized at the option of the corporation and on specified events, as provided in Del. Corp. Law § 151(e)(1969 rev.). The only existing Michigan reference to convertible shares is MCLA § 450.17 allowing variations in "the terms and conditions on which shares are convertible."

§ 404. Share subscriptions.

(a) A subscription, whether made before or after the formation of a corporation, shall not be enforceable unless in writing and signed by the subscriber.

(b) A subscription for shares of a corporation to be organized shall be irrevocable and may be accepted by the corporation for a period of six months, unless otherwise provided by the terms of the subscription agreement or unless all of the subscribers consent to the revocation of such subscription.

(c) Unless otherwise provided in the subscription agreement:

(1) subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments and at such times, as shall be determined by the board; and

(2) any call made by the board for payment on subscriptions shall be ratable as to all shares of the same class or as to all shares of the same series, as the case may be.

(d) Unless otherwise provided by the subscription agreement the corporation shall be entitled to retain any shares as security for the performance by the subscriber of his obligations under a subscription agreement and subject to the power of sale or recission upon default provided in paragraph (e) of this section.

(e) In the event of default in the payment of any installment or call or other amount due under the terms of the subscription agreement, including any amount which may become due as a result of a default in the performance of any provision thereof, the corporation shall have the following rights and duties:

(1) It may proceed to collect the amount due in the same manner as any other debt owing to it. At any time before full satisfaction of the claim or any judgment therefor, it may proceed as provided in paragraph (e)(2).

(2) It may sell the shares in any reasonable manner. Notice of the time and place of any public sale or of the time after which any private sale may be had, together with a statement of the amount due upon

each share, shall be given in writing to the subscriber personally or by registered or certified mail at least 20 days before any such time stated in the notice. Any excess of net proceeds realized over the amount due plus interest shall be paid over to the subscriber. If the sale is made in good faith, in a reasonable manner and upon the notice required by this paragraph, the corporation may recover the difference between the amount due plus interest and the net proceeds of the sale. A good faith purchaser for value shall acquire title to the sold shares free of any rights of the subscriber even though the corporation fails to comply with one or more of the requirements of this subsection.

(3) It may rescind the subscription, with the effect provided in paragraph (f) of this section, and may recover damages for breach of contract. Unless special circumstances show proximate damages of a different amount, the measure of damages shall be the difference

between the market price at the time and place for tender of the shares and the unpaid contract price. Liquidated damages may be provided for in the subscription agreement in any amount which is reasonable under the circumstances, including the difficulties of proof of loss. The subscriber shall be entitled to restitution of any amount by which the sum of his payments exceeds the corporation's damages for breach of contract, whether fixed by agreement or judgment. The rights and duties set forth in this paragraph shall be interpreted as cumulative so far as is consistent with the purpose of entitling the corporation to a full and single recovery of the amount due or its damages. The subscription agreement may limit the rights and remedies of the corporation set forth in this paragraph, and may add to them so far as is consistent with the preceding sentence.

(f) The recission by the corporation of a subscription under which a portion of the shares subscribed for have been issued and in which the corporation retains a security interest, as provided in paragraph (d) of this section, shall effect the cancellation of such shares.

(g) A contract made with a corporation to purchase its shares, whether shares to be issued or treasury shares, is a subscription agreement and not an executory contract to purchase shares, unless otherwise provided in the agreement.

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SOURCE: Paragraph (b) is from MBCA § 17; paragraph (a) is NYBCL § 503(b); paragraphs (c)(e)(f) and (g) are NJSA § 14A:7-3, without the requirement that calls for payment be proceeded by thirty days' notice. (d) is adopted from NJSA § 14A:7-3. This section is clearer and somewhat more liberal than existing Michigan provisions (MCLA §§ 450.27, 450.28); the increased liberality is that the subscription agreement may detail forfeiture terms. Note that the intention of paragraphs (d), (e) and (f) is to provide the corporation with all the remedies it may need to net the subscription price or damages, but no more. Paragraph (g) assures that the corporation is entitled to the unpaid subscription balance regardless of its damages and whether or not it is solvent when it sues.

§ 405. Consideration for shares.

(a) Shares having a par value may be issued for such consideration, not less than the par value thereof, as shall 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.

(b) Shares without par value may be issued for such consideration 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.

(c) Unless otherwise provided in the articles of incorporation, treasury shares may be disposed of by the corporation for such consideration as may be fixed from time to time by the board of directors.

(d) 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 the consideration for the issuance of such shares.

(e) Upon a conversion of shares or of convertible bonds, or upon 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 different class or series, the

consideration for the shares so issued in exchange or conversion shall be any one or more of the following, as determined by the board:

(1) the stated capital then represented by the shares so exchanged or converted, or, in the case of convertible bonds, the principal sum of and the accrued interest on the convertible bonds;

(2) any stated capital not theretofore allocated to any designated class or series of shares which is thereupon allocated to the new shares;

(3) that part of surplus, if any, transferred to stated capital upon the issuance of shares for the shares or bonds so exchanged or converted;

(4) any additional consideration paid to the corporation upon the issuance of shares for the shares or bonds so exchanged or converted.

* * * * * * * *

SOURCE: NJSA § 14A:7-4 with two changes: (a) allows consideration for par value shares to be set by the shareholders, and (e) clarifies that the four categories of consideration are as elected by the board. This section is in substance identical to NYBCL § 504, except that the New York section also includes language on payment for shares, included in section 406 of this revision. MBCA § 18 is also substantially similar, except that it requires consideration to be expressed in dollars. This point is addressed in § 406 hereof without the requirement for dollar valuation.

Existing Michigan law is contained in MCLA §§ 450.18, 450.19, 450.21. This section makes no substantive change, but clarifies and simplifies these provisions.

§ 406. Payment for shares.

(a) The consideration for the issuance of shares may be paid, in whole or in part, in money or other property, tangible or intangible, or in services performed or to be performed for the corporation or for its benefit or in its formation or reorganization.

(b) Except where the consideration is future services or payment, when payment of the full consideration for which shares are to be issued is received by the corporation, the subscriber shall thereupon become entitled to all the rights and privileges of a holder of such shares, including the registration in his name of a certificate representing them, and such shares shall be fully paid and nonassessable. Where the consideration is future services or payment, the rights of the subscriber shall be determined by the subscription agreement.

(c) 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, options or rights to shares shall be conclusive.

* * * * * * * *

SOURCE: (a) and (b) are original. Subsection (c) is MBCA § 19, third paragraph, expanded to cover options and rights. Language clarifying the fact that promoters services are valid consideration is taken from NYBCL § 504(a). This section specifically validates future services and future payment as

consideration for the present issuance of shares, a substantive reversal of existing MCLA § 450.21.

There appears no sound reason why there should be imposed any legal restraints on issuance of stock for promissory notes or future services. While the failure to perform the obligation results in a failure of consideration, it is no more onerous than litigation for any other breach of contract. The financial strength of the corporation is limited by too many factors to single out the requirement that stock must be fully paid for before issuance. In the realities of commercial life, there is often a need for issuance of stock for which the consideration is to be received at a later date. There appears no sound reason of public policy to preclude it.

REPORTER'S DISSENT: No jurisdiction presently accepts future services as payment for shares, and only one--Montana--validates promissory notes as payment for shares. Though these forms of consideration are valid to bind an ordinary contract, they have not, historically, provided adequate protection in the form of paid in capital to the creditors of the corporation. Thus, even the most liberal corporate jursidictions, such as Delaware, New Jersey and New York--as well as the Model Act--specifically prohibit such consideration. Moreover, it is unclear what need there is to validate such consideration, since shares can always be issued in the future when payment is actually received or the service actually rendered.

§ 407. Liability of subscribers and shareholders.

(a) A holder of or subscriber for shares of a corporation shall be under no obligation to the corporation or its creditors to pay for such shares other than the obligation to pay to the corporation the unpaid portion of the consideration for which such shares were issued or to be issued, which in no event shall be less than the amount of the consideration for which such shares could be lawfully issued.

(b) A person holding stock in a fiduciary or representative capacity shall not be personally liable to the corporation as the holder of or subscriber for shares of a corporation but the estate and funds in his hands shall be so liable.

(c) Any person becoming an assignee, transferee or pledgee 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 liable to the corporation or its creditors for any unpaid portion of such consideration, but the original holder or subscriber and any assignee or transferee prior to an assignment or transfer to a person taking in good faith and without such knowledge or notice shall remain liable therefor.

SOURCE: NJSA § 14A:5-30. This section is in substance identical to MBCA § 25, but the draftsmanship is clearer. Existing Michigan law does not clearly state these liabilities by statute, but decisions under the statute make clear that the above rules prevail in Michigan. See MCLA § 450.21 and annotation thereto; also MCLA § 450.29.

§ 408. Rights and options to purchase shares; employees' stock.

(a) Subject to any provisions in its articles of incorporation, a corporation may create and issue, whether or not in connection with the issue and sale of any of its shares or bonds, rights or options entitling the holders thereof to purchase from the corporation, upon such consideration, terms and conditions as may be fixed by the board of directors, shares of any class or series, whether authorized but unissued shares, treasury shares or shares to be purchased or acquired.

(b) The consideration for shares to be purchased under any such right or option shall comply with the requirements of sections 405 and 406.

(c) The terms and conditions of such rights or options, including the time or times at or within which and the price or prices at which they may be exercised and any limitations upon transferability, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options.

(d) The issue of such rights or options to one or more directors, officers or employees of the corporation or a subsidiary or affiliate thereof, as an incentive to service or continued service with the corporation, a subsidiary or

affiliate thereof, or to a trustee on behalf of such directors, officers or employees, shall be authorized or ratified at a meeting of shareholders, or issued pursuant to a plan adopted or ratified by the shareholders.

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SOURCE: NYBCL § 505, substantially edited and simplified, and with a simple shareholder vote substituted for the New York requirement of majority of outstanding shares, in subsection (d). To the same effect is MBCA § 20. New Jersey deals with compensation in very detailed terms (see NJSA §§ 14A:8-1 - 14A:8-6); this extensive coverage does not appear to clarify or expand on the alternative forms of compensation. Well established case-law now legalizes compensation and option plans of every description.

Existing Michigan law does not speak to the subject of this section; it simply authorizes employee stock purchase plans; MCLA § 450.24.

§ 409. Expenses of organization, reorganization and financing.

The reasonable charges and expenses of organization or reorganization of a corporation, and the reasonable expenses of and compensation for the sale or underwriting of its shares, may be paid or allowed by such corporation out of the consideration received by it in payment for its shares without thereby rendering such shares not fully paid or assessable.

* * * * * * * *

SOURCE: MBCA § 22. Most new codes have adopted this language in haec verba, to eliminate common-law doubts as to validity of such expenses as consideration; see, e.g., NYBCL § 507; NJSA § 14A:7-10. It is clearer and more comprehensive than Michigan language now contained in provisos in MCLA §§450.18, 450.19:

> "Nothing contained herein shall be construed to prevent a corporation from paying or allowing a reasonable underwriting discount or sales commission in compensation of services performed in sale of its securities."

§ 410. Share certificates.

(a) The shares of a corporation shall be represented by certificates signed by the chairman or vice-chairman of the board, or the president or a vice-president and by the treasurer or an assistant treasurer, or the secretary or an assistant secretary of the corporation, and may be sealed with the seal of the corporation or a facsimile thereof. The signatures of the officers upon a certificate may be facsimilies if the certificate is countersigned by a transfer agent or registered by a registrar other than the corporation itself or its employee. In case any officer who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation with the same effect as if he were such officer at the date of issue.

(b) The corporation shall furnish to any shareholder upon request and without charge, a full statement of the designation, relative rights, preferences and limitations of the shares of each class authorized to be issued, and if the corporation is authorized to issue any class of preferred shares in series, the designation, relative rights, preferences and limitations of each series so far as the same have been fixed and the

authority of the board to designate and fix the relative rights, preferences and limitations of other series.

(c) Each certificate representing shares shall state upon the face thereof:

(1) That the corporation is formed under the laws of this state.

(2) The name of the person or persons to whom issued.

(3) The number and class of shares, and the designation of the series, if any, which such certificate represents.

(4) The par value of each share represented by such certificate, or a statement that the shares are without par value.

(d) The corporation may issue a new certificate for shares in place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the board may require the owner of the lost or destroyed certificate, or his legal representative, to give the corporation a bond sufficient to indemnify the corporation against any claim that may be made against it on account of the alleged lost or destroyed certificate or the issuance of any such new certificate.

(e) Unless otherwise provided in the articles of incorporation, if the shares or other securities of a corporation are listed on a national securities exchange, the

corporation may by resolution of the board eliminate certificates representing such shares or securities and provide for such other methods of recording and noticing ownership as may be provided by the rules of such national securities exchange.

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SOURCE: (a) through (d) are NYBCL § 508, with provisions on stock transfer and share issuance deleted (included in another section herein). Also deleted is prefatory language in paragraph (b) requiring language on the share certificates stating that the corporation will provide a statement of designations and preferences. This provision is eliminated since it furnishes no information to the stockholder except upon contacting the corporation. The elimination of this provision does not preclude the right of the stockholder to gain such information by requesting it from the corporation or receiving a copy of the articles of incorporation from the Administrator. Apart from these deletions, the proposed section is substantively identical to MCLA § 450.25.

(e) is original. Considerable attention has been focused recently on the elimination of stock certificates. It is clear that the physical handling of such certificates entails substantial expense and risk of loss, and that within a period of years, alternative approaches to certificate transfer will become mandatory as stock trading volume increases. This section simply permits the use of any alternative arrangement adopted by a national securities exchange, for shares or securities listed thereon.

Although it would be possible to detail such an alternative procedure, it is more appropriate--in effect--to delegate the determination of procedure to the most concerned parties: the exchanges.

The most recent argument "For Eliminating the Stock Certificate" appears in a column by Eli Weinberg

(of the New York firm of Lybrand, Ross Bros. & Montgomery) in the Wall Street Journal of Thursday, Sept. 24, 1970. For more comprehensive coverage, see Jolls, Can We Do Without Stock Certificates?, 23 Bus. Lawyer 909 (1968), and Kendall, The Certificateless Society: A Realistic Appraisal, 24 Bus. Lawyer 141 (1968).

REPORTER'S DISSENT: The deletion of the requirement in (b) of notice of availability of information as to preferences on shares is unprecedented. Such notice is required in all jurisdictions and constitutes some protection to shareholders in the form of notice of potential prior claims. Little is saved by its deletion but a few lines of type.

§ 411. Fractional shares and scrip.

(a) A corporation may, but shall not be obliged to, issue certificates for fractions of a share where necessary to effect share transfers, share distributions or reclassifications, mergers, consolidations or reorganizations, which shall entitle the holder, in proportion to his fractional holdings, to exercise voting rights, receive dividends and participate in liquidating distributions.

(b) As an alternative, a corporation may pay in cash the fair value of fractions of a share as of the time when those entitled to receive such fractions are determined.

(c) As an alternative, a corporation may issue scrip in registered or bearer form over the manual or facsimile signature of an officer of the corporation or of its agent, exchangeable as therein provided for full shares, but such scrip shall not entitle the holder to any rights of a shareholder except as therein provided. Such scrip shall be issued subject to the condition that it shall become void if not exchanged for certificates representing full shares before a specified date; and may be subject to the condition that the shares for which such scrip is exchangeable may be sold by the corporation and the proceeds thereof distributed to the holders of such scrip, or subject to any other conditions which the board may determine.

(d) A corporation may provide reasonable opportunity for persons entitled to fractions of a share or scrip to sell such fractions of a share or scrip or to purchase such additional fractions of a share or scrip as may be needed to acquire a full share.

* * * * * * * *

SOURCE: NYBCL § 509, except that scrip is mandatorily to be eliminated per NJSA § 14A:7-13. This section is in substance identical to MBCA § 24, but is clearer; e.g., specific language affords the alternative of paying cash instead of using fractional shares. Existing Michigan law has no comparable section.

§ 412. Determination of amount of stated capital.

(a) The consideration received by a corporation upon the issuance of shares having a par value shall constitute stated capital to the extent of the par value of such shares, and the excess, if any, shall constitute capital surplus.

(b) The consideration received by a corporation upon the issuance of shares without par value shall constitute stated capital unless, at the time of the issuance of such shares, the board shall allocate a portion of such consideration to capital surplus. No such allocation shall be made of any portion of the consideration received for shares without par value having a preference in the assets of the corporation in the event of involuntary liquidation except the amount, if any, of such consideration in excess of such preference.

(c) If shares have been or shall be issued by a corporation in merger or consolidation or in acquisition of all or substantially all of the outstanding shares or of the property and assets of another corporation, whether domestic or foreign, any amount that would otherwise constitute capital surplus under the foregoing provisions of this section may instead be allocated to earned surplus by the board of directors of the issuing corporation except that its aggregate earned surplus shall not exceed the sum of the earned surpluses as defined in this chapter of the issuing corporation and of all other

corporations, domestic or foreign, that were merged or consolidated or of which the shares or assets were acquired.

(d) The stated capital of a corporation may be increased from time to time by resolution of the board of directors directing that all or a part of the surplus of the corporation be transferred to stated capital. The board of directors may direct that the amount of the surplus so transferred be deemed to be stated capital in respect of any designated class of shares.

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SOURCE: MBCA § 21, except for deletion of the 60-day period for allocation to capital surplus in (b). NYBCL § 506 is identical, except that paragraph (c) is deleted; NJSA § 14A:7-8 is identical except that paragraph (b) of that statute does not require reservation in stated capital of the liquidiation preference of preferred shares. The substance of the proposed provision is unchanged from less clearly drafted provisions now in MCLA § 450.20 with one major exception: the new section deletes existing requirements to maintain at least one-half of the consideration for no-par shares as stated capital. This provision is anachronistic, and its protective features can easily be avoided by using low-par stock in any event. Note also, that the existing requirement that par value shares have a par no less than $1 (MCLA § 450.17) has been deleted; it, too, is more of an irritation than a protection.

§ 413. Dividends or other distributions in cash or property.

(a) A corporation may, by action of its board of directors, declare and pay dividends or make other distributions in cash or its bonds or its property, including the shares or bonds of other corporations, on its outstanding shares, except when currently the corporation is insolvent or would thereby be made insolvent, or when the declaration, payment or distribution would be contrary to any restrictions contained in the articles of incorporation.

(b) Dividends may be declared or paid and other distributions may be made out of surplus only.

(c) When any dividend is paid or any other distribution is made, in whole or in part, from sources other than earned surplus, it shall be accompanied by a written notice (1) disclosing the amounts by which such dividend or distribution affects stated capital, capital surplus and earned surplus, or (2) if such amounts are not determinable at the time of such notice, disclosing the approximate effect of such dividend or distribution upon stated capital, capital surplus and earned surplus and stating that such amounts are not yet determinable.

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SOURCE: NYBCL § 510 except that the "wasting asset" exception to subparagraph (b) is deleted. There appears no need for a "wasting assets" provision, since the stated capital

can be liberally amended under the new Act. Moreover, the doctrine has recently been criticized as ill-suited to its purposes. See Carpenter, A Critical Evaluation of the Wasting Asset Distribution, 25 Bus. Lawyer 1733 (1970). Substantially identical to NJSA § 14A:7-14, except that the New Jersey statute does not protect the liquidation preference of preferred shares. Del Corp. Law § 170 is substantially identical to the proposed section--though burdened with archaic draftsmanship--except that it also permits "nimble dividends": dividends out of current profits when there is a surplus deficiency. As a matter of policy, the desirability of nimble dividends is questionable; moreover there are few cases of legitimate desire to declare dividends that cannot be solved by use of capital surplus, particularly in connection with reduction of stated capital (§ 418 hereof). Thus, New Jersey--though extremely liberal--excluded nimble dividends from its revision; most revisions in recent years have done the same.

Note that this provision differs substantially from the Model Act §§ 45, 46 and MCLA §§ 450.22, 450.23, 450.23a in several aspects:

(1) It permits payment of all dividends out of any surplus, whether earned or capital. By contrast, both the Model Act and existing Michigan law limit cash and property dividends to earned surplus. The Model Act allows use of capital surplus upon a majority class vote of the shareholders (§46), while the Michigan law allows use of capital surplus or stated capital upon 2/3 class vote of the shareholders (§ 450.23a), and also allows use of capital surplus for payment of preferred dividends (MCLA § 450.22). The limitation to use of earned surplus flows originally from notions of protection of creditors through maintenance of a "trust fund" consisting of paid-in capital. Whatever value this notion may have--and it has very little in a business community relying more heavily on earnings than on assets for security--it is substantially compromised by allowing distribution of the "trust fund" upon

vote of the shareholders without a veto by the protected creditors. Indeed, without unduly prolonging this comment, it is fair to assert that careful advance planning can validate virtually any dividend even under the MBCA or Michigan provisions. The proposed statute eliminates this premium on technical craftsmanship and simply validates those dividends that careful planners would otherwise pay in any event.

(2) The proposed statute does add a protective feature not now in the Model Act or the Michigan law. It requires, in paragraph (c), that distributions not out of earned surplus be identified and reported to the shareholders. Thus the shareholders will be apprised whether their dividends are from earnings or are a return of capital.

(3) The proposed statute specifically overrules the provision of MCLA § 450.22 that prohibits the use of unrealized appreciation of assets for the declaration and payment of dividends. Definitions in § 102 (earned surplus, capital surplus, and total assets) clearly permit appraisal write-ups of assets and assign these increases to capital surplus. Thus the new law clearly adopts the principle of Randall v. Bailey, 288 N.Y. 280, 43 N.E.2d 43 (1942).

§ 414. Share dividends.

(a) Subject to any restrictions contained in its articles of incorporation, a corporation may, by action of its board of directors, pay dividends in its own shares as provided in this section.

(b) Such dividends may be paid in authorized but unissued shares out of surplus upon the following conditions:

(1) if a dividend is payable in 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 shares without par value, the amount of stated capital to be represented by each share shall be fixed by the board of directors by resolution adopted at the time such dividend is declared, unless the articles of incorporation reserve to the shareholders the right to fix the consideration for the issue of such shares, and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus equal to the aggregate stated capital represented by such shares.

(c) Such dividends may be paid in treasury shares, in which event no transfer from surplus to capital need be made.

(d) A split-up or division of the issued shares of any class or series into a greater number of shares of the same class or series without increasing the stated capital of the corporation shall not be construed to be a share dividend within the meaning of this section.

(e) Every share dividend or other distribution of shares of the corporation shall be accompanied by a written notice (1) disclosing the amounts by which such distribution affects stated capital, capital surplus and earned surplus, or (2) if such amounts are not determinable at the time of such notice, disclosing the approximate affect of such distribution upon stated capital, capital surplus and earned surplus and stating that such amounts are not yet determinable.

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SOURCE: Substance from MBCA § 45(c), (d), (e). Language adapted from NJSA § 14A:7-15. Both New Jersey and New York (NYBCL § 511) allow the distribution of stock dividends on treasury stock. This is a deceptive way to create treasury stock out of unissued stock; it lends itself to abuse and is, in any event, unnecessary. Existing Michigan law (MCLA § 450.22) restricts stock dividends to earned surplus and appreciation of assets; this revision liberalizes that rule.

Paragraph (e) is the reporting requirement of NYBCL § 511(f), also adopted by New Jersey in a separate reporting section (NJSA § 14A:7-17). This requirement

causes minimal disruption to the corporation, but is of great value to the shareholder in evaluating the effect of a distribution he receives.

§415. Redeemable shares.

(a) A corporation may provide in its articles of incorporation for one or more classes or series of shares which are redeemable, in whole or in part, at the option of the corporation in cash, its bonds or other property, at such price or prices, within such period or periods, and under such conditions as are stated in the articles of incorporation. If so provided in its articles of incorporation, a corporation may create a sinking fund for the redemption of any class or classes of redeemable shares.

(b) A corporation which is an open-end investment company, as defined in an Act of Congress entitled "Investment Company Act of 1940," as amended or supplemented, or any act adopted in substitution therefor, may, if its articles of incorporation so provide and upon compliance with that act, issue shares which are redeemable at the option of the holder at a price approximately equal to the shares' proportionate interest in the net assets of the corporation, and a shareholder may compel redemption of such shares in accordance with their terms.

(c) A corporation may provide, in its original articles of incorporation or by an amendment approved by unanimous vote of the shareholders, for one or more classes or series of shares which are redeemable, in whole or in part, at the option of the shareholder. Subject to the restrictions imposed by section 416, such

shares may be redeemable in cash, bonds of the corporation or other property, at such price or prices, within such period or periods and under such conditions as are stated in the articles of incorporation and such shares may also be redeemable at the option of the corporation. The articles of incorporation may be amended to delete or change a provision for shares redeemable at the option of the shareholder only with the unanimous approval of the holders of such shares. The provisions of this subsection shall not be applicable to an open-end investment company.

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SOURCE: NJSA § 14A:7-6, verbatim except for cross-references, deletion of paragraph (d) detailing filing requirements for amendment of the articles, and deletion in (c) of limits on the size of the shareholder group when shares are redeemable by the shareholders.

This section is a broad grant of power to create redeemable shares of any class or designation. There is no requirement that a residual class be non-redeemable, since judicial intervention could be obtained in the event of an inappropriate redemption. Thus, a closely-held corporation can issue all of its stock as redeemable shares. Moreover, pursuant to paragraph (c), the shares of such a corporation may be made redeemable at the option of the holders. This device simplifies considerably the usual buy-sell arrangements among shareholders of such corporations. The financial restrictions on redemption of shares are set forth in § 416 hereof.

Existing Michigan redemption provisions, contained in MCLA § 450.37, simply authorize by inference the issuance of preferred stock redeemable at the option of the corporation.

§ 416. Purchase and redemption by a corporation of its own shares.

(a) A corporation shall have the right to purchase or otherwise acquire, and to sell, create a security interest in, or otherwise dispose of its own shares, but purchases of its own shares, whether direct or indirect, shall be made only out of surplus, except as provided in this section.

(b) A corporation may purchase its own shares out of stated capital for the purpose of

(1) eliminating fractional shares;

(2) collecting or compromising indebtedness to the corporation; or

(3) paying dissenting shareholders entitled to payment for their shares under the provisions of this act.

(c) A corporation may redeem or purchase its redeemable shares out of stated capital, except when after such redemption or purchase net assets would be less than the stated capital remaining after giving effect to the cancellation of such shares.

(d) A corporation may purchase its nonredeemable shares out of stated capital, if such shares have a preference over the shares of any other class or series in the payment of dividends or in the distribution of the assets upon liquidation, except when after such purchase net assets would be less than the stated capital remaining after giving effect to the cancellation of such shares.

(e) No purchase or redemption of its own shares shall be made by a corporation

(1) contrary to any restrictions contained in the articles of incorporation;

(2) at a time when the corporation is insolvent or when such purchase or redemption would render the corporation insolvent;

(3) unless after such purchase or redemption there remain outstanding one or more classes or series of shares possessing, among them collectively, voting rights and unlimited residual rights as to dividends and distribution of assets on liquidation; or

(4) in the case of redeemable shares and within the period of their redeemability, at a price greater than the applicable redemption price plus, in the case of shares entitled to cumulative dividends, the dividends which would have accrued to the next dividend date following the date of purchase or redemption.

(f) A corporation which has purchased its own shares out of surplus may defer payment for such shares over such period as may be agreed between it and the selling shareholder. The obligation so created shall constitute an ordinary debt of the

corporation and the validity of any payment made upon the debt so created shall not be affected by the absence of surplus at the time of such payment.

* * * * * * * *

SOURCE: NJSA §14A:7-16, verbatim except for cross-references and the deletion of paragraph (g) dealing with reduction of assets below liquidation preferences of preferred stock. The latter paragraph is inconsistent with section 418 hereof.

This section broadly allows redemption of shares out of surplus or stated capital, subject only to the protection of remaining stated capital and the usual limitation concerning insolvency. Note that the section imposes no requirement of "proper corporate purpose," which is, in any event, to be determined by equitable principles. Note also that subsection(f) establishes clearly the principle that availability of surplus is to be determined as of the purchase date; subsequent lack of surplus will not, therefore, impair the original repurchase obligation. This new principle should materially ease the problems of close corporation shareholders having their shares redeemed in installments, and should solve the problems produced by such cases as Mountain States Steel Foundries, Inc. v. Commissioner, 284 F.2d 737 (4th Cir. 1960)(surplus required as of each installment payment).

Existing Michigan law is neither as broad nor as specific: MCLA §§450.10(h), 450.37 allow repurchase of shares out of surplus and redemption of shares out of stated capital.

§ 417. Reacquired shares.

(a) Shares that have been issued and have been purchased, redeemed or otherwise reacquired by a corporation shall be cancelled if they are reacquired out of stated capital, or if they are converted shares, or if the articles of incorporation require that such shares be cancelled upon reacquisition.

(b) Any shares reacquired by the corporation and not required to be cancelled may be either retained as treasury shares or cancelled by the board at the time of reacquisition or at any time thereafter.

(c) Neither the retention of reacquired shares as treasury shares, nor their subsequent distribution to shareholders or disposition for a consideration shall change the stated capital. When treasury shares are disposed of for a consideration, the capital surplus shall be increased by the full amount of the consideration received unless the corporation exercises the option granted in subparagraph (a)(4) of section 419.

(d) When reacquired shares other than converted shares are cancelled, the stated capital of the corporation is thereby reduced by the amount of stated capital then represented by such shares plus any stated capital not theretofore allocated to any designated class or series which is thereupon allocated to the shares cancelled. The amount by which stated capital

has been reduced by cancellation of reacquired shares during a stated period of time shall be disclosed in the next financial statement covering such period that is furnished by the corporation to all its shareholders or, if practicable, in the first notice of dividend or share distribution that is furnished to the holders of each class or series of its shares between the end of the period and the next such financial statement, and in any event to all its shareholders within fifteen months of the date of the reduction of capital.

(e) Shares cancelled under this section are restored to the status of authorized but unissued shares. However, it the articles of incorporation prohibit the reissue of any shares required or permitted to be cancelled under this section, the board by resolution shall adopt an amendment of the articles reducing the number of authorized shares accordingly, and shall file such amendment in accordance with this act.

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SOURCE: NYBCL § 515, which is substantively identical to NJSA § 14A:7-18 and MBCA §§ 67-68, except that the requirement of filing with the state in the proposed section is limited to situations where cancelled shares may not be reissued. Both NJ and MBCA require filing of all cancellations, as does present Michigan law (MCLA § 450.37). The value of this procedure is doubtful, since the state is ordinarily unconcerned with filing of stock transactions except as to authorization of new shares or de-authorization of shares.

The reporting period in paragraph (d) is extended to fifteen months.

§ 418. Reduction of stated capital.

(a) The stated capital of a corporation may at any time be reduced by eliminating from stated capital amounts previously transferred from surplus to stated capital and not allocated to any designated class or series of shares, or by eliminating any amount of stated capital represented by issued shares having a par value, to the extent that such stated capital exceeds the aggregate par value of such shares, or by reducing the amount of stated capital represented by issued shares without par value. Such reduction of capital may be made by resolution of the board of directors setting forth the amount of the proposed reduction, the manner in which the reduction shall be effected, and the date upon which the reduction shall become effective.

(b) No reduction of stated capital shall be made under this section unless after such reduction the stated capital exceeds the aggregate preferential amounts payable upon involuntary liquidation upon all issued shares having preferential rights in the assets plus the par value of all other issued shares with par value.

(c) When a reduction of stated capital has been effected under this section, the amount of such reduction shall be disclosed in the next financial statement covering the period in which such reduction is made that is furnished by the cor-

poration to all its shareholders or, if practicable, in the first notice of dividend or share distribution that is furnished to the holders of each class or series of its shares between the date of such reduction and the next such financial statement, and in any event, within fifteen months of the date of reduction of capital.

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SOURCE: (a) is original. Paragraphs (b) and (c) are from NYBCL § 516. Three basic formulations are possible for reduction of capital: reduction simply on resolution of the board (e.g., NYBCL § 516); reduction on resolution of the board and filing with the Administrator (e.g., NJSA § 14A:7-19); and reduction upon majority shareholder vote plus filing with the Administrator (e.g., MBCA § 69; Del. Corp. Law § 244). The first course was chosen. This section is a liberalization of existing Michigan law (MCLA § 450.43), which now requires a 2/3 vote, and also requires notification of creditors if par value is reduced by more than 50%.

Note that this section addresses reductions of capital not requiring amendment of the articles of incorporation. Such reductions as reducing the par value will require the formalities of the amendment procedure and are not covered by this section.

§ 419. Special provisions relating to surplus.

(a) Whenever under this chapter it is necessary for a corporation to determine the amount or availability of its earned surplus, the following rules shall apply:

(1) The amount of the earned surplus of a corporation shall be computed from the date of formation; provided that upon the merger, consolidation or combination of two or more corporations by purchase or otherwise, the amount of the earned surplus of the surviving, consolidated or purchasing corporation shall not exceed the aggregate net earned surplus of the component corporations, reduced by such distributions to shareholders and transfers of earned surplus to stated capital or capital surplus as were made in connection with the issue of shares or otherwise at the time of merger, consolidation or combination.

(2) All or part of the earned surplus of a corporation may be transferred by the board at any time to capital surplus or to stated capital.

(3) Any surplus resulting from reduction of stated capital shall be capital surplus.

(4) When a corporation has applied its earned surplus to the acquisition of treasury shares and such shares

are subsequently disposed of for a consideration, the corporation may, at its option, restore to earned surplus, out of the consideration received and on an appropriate basis per share, all or part of the amount by which earned surplus was reduced at the time of acquisition of such shares. If the consideration received exceeds the amount by which earned surplus was reduced with respect to such shares, the excess shall be capital surplus.

(b) Nothing in this section shall prevent a corporation from creating reserves from its earned surplus or capital surplus for any proper purpose or purposes, or from increasing, decreasing or abolishing any such reserve.

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SOURCE: NYBCL § 517 with clarifying editorial changes, but New York's subsection (a)(4)--which allows "quasi-reorganizations" to eliminate surplus deficits--is deleted. With the exception of this substantive change, this section brings together the provisions of MCLA §§ 450.20, 450.22, 450.43. It is deemed unsound and misleading to designate as "earned surplus" any sums that do not in fact represent earnings of the corporation. Thus devices presently permissible (MCLA § 450.43) such as eliminating earned surplus deficits by transfer of capital surplus will no longer be available.

REPORTER'S DISSENT: Virtually all contemporary statutes--Michigan included (MCLA § 450.43)--allow corporations to apply capital surplus to the elimination of an earned surplus deficit. This procedure, with full disclosure, avoids the need to carry past deficits indefinitely on the financial statements. It is a procedure recognized as generally accepted by the SEC and the American Institute of CPA's. Its elimination would be an addition of rigidity to the law, to no advantage.

§ 420. Corporate bonds.

(a) A corporation may, in its articles of incorporation, confer upon the holders of any bonds issued or to be issued by the corporation, rights to inspect the corporate books and records and to vote in the election of directors and on any other matters on which shareholders of the corporation may vote to the extent, in the manner, and subject to the conditions provided in the articles of incorporation. The articles may grant to the board the power to confer such voting or inspection rights under the terms of any bonds issued or to be issued by the corporation.

(b) The signatures of the officers upon a bond may be facsimilies.

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SOURCE: Original. The comparable provision in Michigan law is MCLA § 450.36. This section is useful in noting that bonds may be voting.

Chapter 5: Shareholders

§ 501. Meetings of shareholders.

(a) Meetings of shareholders may be held at such place, either within or without this state, as may be provided in the by-laws. In the absence of any such provision, all meetings shall be held at the registered office or such other place as shall be determined by the board.

(b) An annual meeting of the shareholders for election of directors and for such other business as may come before the meeting shall be held at such time as may be provided in the by-laws, unless such action is taken by written consent as provided in section 503. Failure to hold the annual meeting at the designated time, or to elect a sufficient number of directors at such meeting or any adjournment thereof, shall not affect otherwise valid corporate acts or work a forfeiture or give cause for dissolution of the corporation, except as provided in section 912. If the annual meeting for election of directors is not held on the date designated therefor, the directors shall cause the meeting to be held as soon thereafter as convenient. If there is a failure to hold an annual meeting for a period of 90 days after the date designated therefor, or if no date has been designated for a period of 15 months after the organization of the corporation or after its last annual meeting, the circuit court may, upon the application of any shareholder, summarily order the meeting

or the election, or both, to be held as such time and place, upon such notice and for the transaction of such business as may be designated in such order. At any meeting ordered to be called by the circuit court pursuant to this paragraph, the shareholders present in person or by proxy and having voting powers shall constitute a quorum for the transaction of the business designated in such order.

(c) Special meetings of the shareholders may be called by the chairman of the board, the president or the board, or by such other officers, directors or shareholders as may be provided in the by-laws. Notwithstanding any such provision, upon the application of the holder or holders of not less than 10% of all the shares entitled to vote at a meeting, the circuit court, for good cause shown, may order a special meeting of the shareholders to be called and held at such time and place, upon such notice and for the transaction of such business as may be designated in such order. At any meeting ordered to be called by the circuit court pursuant to this paragraph, the shareholders present in person or by proxy and having voting powers shall constitute a quorum for the transaction of the business designated in such order.

SOURCE: Paragraph (a) is the first paragraph of MBCA § 28 (1969 rev.), except that the second sentence gives the board discretion as to place of meeting in the absence of a by-law provision. The remaining paragraphs are consistent with the remainder of MBCA § 28, but are more specific and complete than that section. Paragraph (b) is NJSA § 14A:5-2, with the following changes:

--the NJ provision providing a stated date (first Tuesday in April) for annual meetings if not provided in the by-laws is deleted as unnecessary.

--a New York provision (from NYBCL § 602 (b)) is inserted to the effect that there will be no cause for dissolution except as provided in the section on deadlock, where failure to elect directors is one possible cause for a petition to dissolve for deadlock.

--specific provision is made for doing the business of the annual meeting by written consent under § 503.

--the time limits for failure to hold a meeting are increased.

Paragraph (c) is NJSA § 14A:5-3, with minor editorial changes. The advantage of the New Jersey provisions over those in the Model Act is that they specify how a special meeting is called, who constitutes a quorum where a meeting must be ordered, and what procedures may be followed if the annual meeting is not duly held. Existing Michigan law (MCLA § 450.38) requires an annual meeting and permits special meetings, but specifies nothing further.

COMMENT: There is considerable business opinion to the effect that the annual shareholders' meeting--particularly in large, publicly-held corporations--is an expensive anachronism. In the view of many, the functions of the meetings, both informative and action, may be served adequately and with considerable saving of effort, by use of mail notices and mail votes. It is desirable at least to permit such a procedure by corporations desirous of using it. That possibility is encompassed in the section of this chapter (§ 503 infra) on action by shareholders without a meeting.

§ 502. Notice of meeting of shareholders; waiver.

(a) Except as otherwise provided in this act, written notice of the time, place and purpose or purposes of every meeting of the shareholders shall be given not less than 10 nor more than 60 days before the date of the meeting, either personally or by mail, to each shareholder of record entitled to vote at the meeting.

(b) When a meeting is adjourned to another time or place, it shall not be necessary, unless the by-laws otherwise provide, to give notice of the adjourned meeting if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken and at the adjourned meeting only such business is transacted as might have been transacted at the original meeting. However, if after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given to each shareholder of record on the new record date entitled to notice under subsection (a) of this section.

(c) Attendance of a person at a meeting of shareholders, in person or by proxy, shall constitute a waiver of notice of such meeting, except when the shareholder attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transactions of any business because the meeting is not lawfully

called or convened.

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SOURCE: Paragraphs (a) and (b) are NJSA § 14A:5-4 verbatim, except for the subparagraph reference in the last line of (b). This language is drawn from MBCA § 29, with the addition of a paragraph dealing with adjourned meetings. Paragraph (c) is from Del. Corp. Law § 229. The implied waiver by attendance at the meeting is a usual provision, at common law if not provided by statute. Existing Michigan law (MCLA § 450.39) provides for notice as provided in the by-laws, and allows for waiver of notice; no maximum or minimum notice periods are stated.

§ 503. Action by shareholders without a meeting.

Unless otherwise provided in the articles of incorporation, any action required by this act to be taken at any annual or special meeting of shareholders of a corporation, or any action which may be taken at any annual or special meeting of such shareholders, may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those shareholders who have not consented in writing. In the event that the action which is consented to is such as would have required the filing of a certificate under any other section of this act, if such action had been voted upon by shareholders at a meeting thereof, the certificate filed under such other section shall state, in lieu of any statement required by such section concerning a vote of shareholders, that written consent has been given in accordance with the provisions of this section, and that written notice has been given as provided in this section.

SOURCE: Del Corp. Law § 228, as amended, verbatim. This is the most liberal provision in the area, allowing all action by shareholders to be taken without a meeting and without any form of prior notice, provided only that sufficient shareholders favor the action to have carried a vote at a shareholders meeting. Neither the New York nor the Model Act contain such a provision, the Model Act (§145) permitting action without a meeting only by unanimous consent of the shareholders. This latter provision is the same as Michigan law, MCLA § 450.39a.

One other statute, New Jersey's (NJSA § 14A:5-6), also makes provision for action without a meeting, but allows non-unanimous action only if specifically permitted by the articles of incorporation.

The Delaware statute offers the soundest approach to this problem. If we think of the total of all corporations, both private and publicly held, in almost every situation, the action sought by the controlling stockholders will be approved without contest from other stockholders. By requiring a meeting in such cases, there would be imposed on 99% of the corporations, the needless expenditure of time and money incident to the holding of a stockholders meeting as well as delay of consummation.

In the case of publicly held companies, a stockholders' meeting is needed in order to get the necessary votes. Incident to such meetings, SEC proxy rule requirements will provide advance notice and detailed information. In such cases, this provision will not change these requirements.

From the standpoint of protecting the 1% of contested situations (if it is that high), the statute provides for prompt notice after the taking of the corporate action. Upon such notice being received, the contestant would still have available various court remedies, including appraisal rights and injunctive relief. Even if the after-the-fact injunctive relief should not be fully effective, any wrongful conduct is remediable by judgment for damages. When dealing with responsible parties, a judgment for damages is normally an adequate remedy. Where parties are not responsible, no provision of law is adequate to fully protect the stockholder. The dishonest corporate manipulator can usurp corporate funds without regard to any restrictions of law.

To condition the right to take action without a meeting upon a specific provision in the articles, as in New Jersey, is an unwarranted burden. It places a premium on the sophistication needed by the draftsmen to make sure that such a provision is included in the articles. Moreover, each existing corporation would have to amend its articles to get the benefit of that provision.

It makes no sense to penalize all corporations and their stockholders by legal restrictions which are costly in time and money for the possible benefit of the miniscule number of stockholders who might get added protection. On the whole, the proposed provision best meets the needs of the vast majority of corporations and their stockholders, without any serious impingement on the right of all stockholders to be fairly dealt with.

REPORTER'S DISSENT: The Delaware statute, as opposed to other possible formulations (such as New Jersey's), is objectionable on two grounds:

1. The majority stockholders can approve corporate action of all types without affording any prior notice to the other shareholders of the corporation. If the ground rules are to be that the minority has no right to notification of corporate actions, it seems appropriate that this be so provided in the articles, as required in New Jersey.
2. This section is particularly objectionable on major corporate changes (mergers, sales of assets, dissolution, etc.), since it gives minority shareholders no notice whatever of the details of such changes. Even New Jersey's enormously liberal statute continues the requirement of a meeting to approve such changes. The proposed section deletes not only the meeting, but notice as well. Thus, the minority have no basis on which to decide on appraisal remedies, and cannot seek injunctive relief against an unfair merger, since knowledge of the merger will come to them only after the merger has been completed.

The proposed section thus reflects Delaware's interest in maximizing corporate flexibility, even at the expense of shareholder rights. It is submitted that Delaware has

gone too far, and that the New Jersey approach is quite flexible enough, while maintaining reasonable shareholder protection.

§ 504. Record date.

(a) For the purpose of determining the shareholders entitled to notice of and to vote at any meeting of shareholders or any adjournment thereof, or to express consent or to dissent from any proposal without a meeting, or for the purpose of determining shareholders entitled to receive payment of any dividend or allotment of any right, or for the purpose of any other action, the by-laws may provide for fixing, or in the absence of such provision the board may fix, in advance, a date as the record date for any such determination of shareholders. Such date shall not be more than 60 nor less than 10 days before the date of such meeting, nor more than 60 days prior to any other action.

(b) If no record date is fixed

(1) the record date for the determination of shareholders entitled to notice of or to vote at a meeting of shareholders shall be the close of business on the day next preceeding the day on which notice is given, or, if not notice is given, the day next preceeding the day on which the meeting is held; and

(2) the record date for determining shareholders for any purpose other than that specified in subparagraph (1) shall be the close of business on the day on which the resolution of the board relating thereto is adopted.

(c) When a determination of shareholders of record entitled to notice of or to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment thereof, unless the board fixes a new record date under this section for the adjourned meeting.

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SOURCE: NYBCL § 604, verbatim, except for the sixty-day period substituted for New York's 50 days. With this change, the section was adopted verbatim by New Jersey; NJSA § 14A:5-7. The Model Act provision (MBCA § 30) is somewhat outdated, in that it details the archaic procedure of closing the transfer books. The proposed section is also more complete in setting a record date where one is not set in accordance with by-law provisions. Existing Michigan law (MCLA § 450.32), though not making provision for a record date where not otherwise provided, is similar in substance to the proposed section, including the maximum 60-day period. § 450.32 also refers to closing the transfer books, but this seems unnecessary.

505. Voting list.

(a) The officer or agent having charge of the stock transfer books for shares of a corporation shall make and certify a complete list of the shareholders entitled to vote at a shareholders' meeting or any adjournment thereof. Such list shall

(1) be arranged alphabetically within each class and series, with the address of, and the number of shares held by, each shareholder;

(2) be produced at the time and place of the meeting;

(3) be subject to the inspection of any shareholder during the whole time of the meeting; and

(4) be prima facie evidence as to who are the shareholders entitled to examine such list or to vote at any meeting.

(b) If the requirements of this section have not been complied with, then, on demand of any shareholder in person or by proxy who, in good faith, challenges the existence of sufficient votes to carry any resolution before the meeting, the meeting shall be adjourned until the requirements are complied with. Failure to comply with the requirements of this section shall not affect the validity of any action taken at such meeting prior to the making of any such demand.

SOURCE: NJSA § 14A:5-8 with the addition in (b) of the phrases: "who, in good faith, challenges the existence of sufficient votes to carry any resolution before the meeting." Major differences between this section and MBCA § 31 are:

--listing is by class of shares. Since class voting is provided by several sections of the act, a listing by class is desirable. Little additional work is required in compiling such a list.
--the damage remedy (officer held liable "to any shareholder suffering damage on account of such failure" to provide shareholder list, "to the extent of such damage") is deleted as impracticable and of little value.
--an adjournment provision is inserted in the event of noncompliance provided that the noncompliance--as defined in (b)--is material to the vote.

Existing Michigan law (MCLA § 450.35) is substantively quite different. Its provisions, and reasons for its rejection herein, are as follows:

--List to be available ten days before election. Unnecessary, since inspection rights under section 518 hereof provide for general availability of stock records to stockholders. The list as of meeting date serves the sole function of verifying right to vote.
--Neglect to provide list, if wilful, disables the responsible officer from election of office at that election: a draconian remedy, quite unnecessary if adjournment is provided when the list is not presented.
--Original stock ledger or duplicate ledger or list are only evidence of those entitled to vote. Provision that the list is prima facie evidence is sufficient.

§ 506. Quorum of shareholders.

(a) Unless a greater or lesser quorum is provided in the articles of incorporation or this act, the holders of shares entitled to cast a majority of the votes as a meeting shall constitute a quorum at such meeting. The shareholders present in person or by proxy at a duly organized meeting may continue to do business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. Whether or not a quorum is present, the meeting may be adjourned by a vote of the shares present.

(b) Whenever the holders of any class or series of shares, are entitled to vote separately on a specified item of business, the provisions of this section shall apply in determining the presence of a quorum of such class or series for the transaction of such specified item of business.

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SOURCE: NJSA § 14A:5-9, with the addition of language clarifying that a lower than majority quorum may be established and with editorial clarification of the last sentence of (a). Greater and lesser quorum requirements in the articles are now common practice, and are of considerable value to close corporations. Existing Michigan law (MCLA § 450.32) gives general authority to set quorum by provision in the articles, and sets no lower limit. While an early Michigan decision may suggest lower limit of no less than a majority, see Hill v. Town, 172 Mich. 508, 138 N.W. 334 (1912), the proposed section nullifies any such construction.

§ 507. Proxies.

(a) Every shareholder entitled to vote at a meeting of shareholders or to express consent or dissent without a meeting may authorize another person or persons to act for him by proxy.

(b) Every proxy must be signed by the shareholder or his duly authorized agent or representative. No proxy shall be valid after the expiration of three years from the date thereof unless otherwise provided in the proxy. Every proxy shall be revocable at the pleasure of the shareholder executing it, except as otherwise provided in this section.

(c) The authority of the holder of a proxy to act shall not be revoked by the incompetence or death of the shareholder who executed the proxy unless, before the authority is exercised, written notice of an adjudication of such incompetence or of such death is received by the corporate officer responsible for maintaining the list of shareholders.

(d) A proxy which is entitled "irrevocable proxy", and which states that it is irrevocable, is irrevocable when it is held by any of the following or a nominee of any of the following:

(1) A pledgee;

(2) A person who has purchased or agreed to purchase the shares;

(3) A creditor or creditors of the corporation who extend or continue credit to the corporation in consideration of the proxy;

(4) A person who has contracted to perform services as a director, officer or employee of the corporation, if a proxy is required by the contract of such employment;

(5) Any other holder of a proxy coupled with an interest;

(6) A person designated by or under an agreement under paragraph (a) of section 514.

(e) Notwithstanding a provision in a proxy stating that it is irrevocable, the proxy becomes revocable after the pledge is redeemed, or the debt of the corporation is paid, or the period of employment provided for in the contract of employment has terminated, or the agreement under paragraph (a) of section 514 has terminated; and, in a case provided for in subparagraphs (d)(3) or (4), becomes revocable three years after the date of the proxy or at the end of the period, if any, specified therein, whichever period is less, unless the period of irrevocability is renewed from time to time by the execution of a new irrevocable proxy as provided in this section. This paragraph does not affect the duration of a proxy under paragraph (b).

(f) A proxy may be revoked, notwithstanding a provision making it irrevocable, by a purchaser of shares without knowledge of the existence of the provision unless the existence of the proxy and its irrevocability is noted conspicuously on the face or back of the certificate representing such shares.

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SOURCE: Essentially NYBCL § 609 except for the addition of (d)(5), validating other proxies coupled with an interest, and the deletion of paragraphs requiring the issuance of proxies by pledgees and prohibiting sale of votes. The latter is prohibited by common law where contrary to public policy, and statutory enactment is unnecessary. New York's eleven-month limitation in (b) is extended to three years. The cross-reference (§ 514) is to the section on voting agreements, and it specifically validates irrevocable proxies incident to voting agreements, thus avoiding the undesirable result of Abercrombie v. Davies, 36 Del. Ch. 371, 130 A.2d 338 (Sup. Ct. 1957) (striking down irrevocable proxies as an invalid voting trust). The New York provision is the clearest and most comprehensive on proxies: the arrangements listed in (d) will prove of value in management of close corporations, corporate borrowing, and corporate compensation plans. The Model Act (§ 33, ¶ 3), by contrast, simply allows proxies valid up to eleven months. Existing Michigan law is even more terse: MCLA § 450.38 simply authorizes voting by proxy.

§ 508. Vote of shareholders.

(a) Each outstanding share shall be entitled to one vote on each matter submitted to a vote, unless otherwise provided in the articles of incorporation. A vote may be cast either orally or in writing, unless otherwise provided in the by-laws.

(b) Whenever any action, other than the election of directors, is to be taken by vote of the shareholders, it shall be authorized by a majority of the votes cast by the holders of shares entitled to vote thereon, unless a greater plurality is required by the articles of incorporation or another section of this act. Except as otherwise provided by the articles of incorporation, directors shall be elected by a plurality of the votes cast at an election.

(c) The articles of incorporation may provide that any class or classes of shares, or any series thereof, shall vote as a class to authorize any action, including amendments to the articles of incorporation. Such voting as a class shall be in addition to any other vote required by this act. Where voting as a class or series is provided in the articles of incorporation, it shall be by the proportionate vote provided in the articles or, if no proportionate vote is so provided, then for any action other than the election of directors, by a majority of the votes cast by the

holders of shares of such class or series entitled to vote thereon.

(d) Where voting as a class or series is required by this act to authorize any action, such action shall be authorized by a majority of the votes cast by the holders of shares of each such class or series entitled to vote thereon, unless a greater vote is required by the articles of incorporation or another section of this act. Such voting as a class shall be in addition to any other vote required by this act.

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SOURCE: (a) is NJSA § 14A:5-10; (b), (c) and (d) are NJSA §§ 14A:5-11 and 14A:5-24(3). All are verbatim, except for substitution of "articles of incorporation" for "certificate of incorporation" and the addition in (a) of language permitting oral or written votes. Also deleted throughout, consistent with § 503, is the phrase "at such meeting." These sections appear to be the clearest and most complete on the subject. Existing MCLA § 450.32 simply provides that the articles may specify required votes.

§ 509. Inspectors of election.

(a) If the by-laws require inspectors at any shareholders' meeting, such requirement is waived unless compliance therewith is requested by a shareholder present in person or by proxy and entitled to vote at such meeting. Unless otherwise provided in the by-laws, the board, in advance of any shareholders' meeting, may appoint one or more inspectors to act at the meeting or any adjournment thereof. If inspectors are not so appointed, the person presiding at a shareholders' meeting may, and on the request of any shareholder entitled to vote thereat shall, appoint one or more inspectors. In case any person appointed fails to appear or act, the vacancy may be filled by appointment made by the board in advance of the meeting or at the meeting by the person presiding thereat.

(b) The inspectors shall determine the number of shares outstanding and the voting power of each, the shares represented at the meeting, the existence of a quorum, the validity and effect of proxies, and shall receive votes, ballots or consents, hear and determine all challenges and questions arising in connection with the right to vote, count and tabulate all votes, ballots or consents, determine the result, and do such acts as are proper to conduct the election or vote with fairness to all shareholders. On request of the person presiding at the meeting or any shareholder

entitled to vote thereat, the inspectors shall make a report in writing of any challenge, question or matter determined by them and execute a certificate of any fact found by them. Any report or certificate made by them shall be prima facie evidence of the facts stated and of the vote as certified by them.

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SOURCE: NYBCL §§ 610, 611 verbatim, except for deletion of the inspector's oath, an archaic requirement. These sections are in substance identical to the New Jersey provisions (NJSA §§14A:5-25, 5-26), except that those provisions specifically disable an inspector from election to directorship. A fair number of statutes are silent on inspectors. (e.g., the Model Act and Delaware). Existing Michigan law is not at variance from the substance of the proposed sections (MCLA § 450.41).

§ 510. Voting by corporations, pledgees, life tenants, fiduciaries and co-owners.

(a) Shares standing in the name of another domestic or foreign corporation whether or not such corporation is subject to this act may be voted by an officer or agent, or by proxy appointed by any officer or agent or by some other person, who by resolution of its board or pursuant to its by-laws, shall be appointed to vote such shares.

(b) 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, or a nominee of the pledgee.

(c) Shares held by any person in any representative or fiduciary capacity may be voted by him without a transfer of such shares into his name. Where shares are held jointly by any number of fiduciaries, and the instrument or order appointing such fiduciaries does not otherwise direct, such shares shall be voted as follows:

(1) If only one votes, his act binds all;

(2) If more than one votes, the shares shall be voted as the majority of such fiduciaries shall determine;

(3) If the fiduciaries are equally divided as to how the shares shall be voted, any court having jurisdiction may,

in an action brought by any of such fiduciaries or by any beneficiary, appoint an additional person to act with such fiduciaries in such matter, and the stock shall be voted by the majority of such fiduciaries and such additional person.

(d) Shares held by two or more persons as joint tenants or as tenants in common may be voted at any meeting of the shareholders by any of such persons, unless another joint tenant or tenant in common seeks to vote any of such shares in person or by proxy. In the latter event, the written agreement, if any, which governs the manner in which such shares shall be voted, shall control if presented at the meeting. If there be no such agreement presented at the meeting, the majority in interest of such joint tenants or tenants in common present shall control the manner of voting. If there be no such majority, the shares shall, for the purpose of voting, be divided among such joint tenants or tenants in common in accordance with their interest in the shares.

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SOURCE: (a) is original; (b) is NJSA § 14A:5-17; (c) is NJSA § 14A5-15 with added language (from Del. Corp. Law § 217(b)) to cover the situation of a single joint fiduciary voting the shares; (d) is NJSA § 14A:5-16. Common owners vote according to their interest in the shares as provided in (d), rather than equally, as provided by New Jersey. The proposed language is substantively similar to language in MBCA § 33, except for greater detail on voting by fiduciaries and co-owners. Existing Michigan Law (MCLA § 450.33) merely empowers fiduciaries to vote stock, and retains power of the pledgor to vote his stock except by agreement otherwise.

§ 511. Voting of shares owned or controlled by the corporation; voting of shares called for redemption.

(a) Treasury shares shall not be voted at any meeting or counted in determining the total number of outstanding shares at any given time. If the corporation holds shares entitled to elect a majority of directors of another domestic corporation or a foreign corporation, shares of the corporation held by such domestic corporation or foreign corporation shall not be voted at any meeting or counted in determining the total number of outstanding shares at any given time.

(b) 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 desposited 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.

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SOURCE: (a) is NJSA § 14A:5-13 with editing changes; (b) is NJSA 14A:5-18 verbatim. The provisions are substantively identical to language in MBCA § 33, but again are clearer. Existing Michigan law prohibits voting shares of its own stock owned by a corporation "directly or indirectly;" MCLA § 450.10(h). The existing language does not appear to address the circular control issue dealt with in (a) of the proposed new section; nor does it address the redemption issue of paragraph (b).

§ 512. Cumulative voting.

The articles of incorporation may provide that 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.

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SOURCE: MBCA § 33, ¶4, first alternative. This constitutes a major substantive change from existing Michigan law which mandates cumulative voting for directors. MCLA § 450.32. The proposed provision makes cumulative voting optional, and presumes noncumulative voting unless the articles provide otherwise. There is little reason today to mandate cumulative voting: it provides protection to minority shareholders in well-organized close corporations, but often has little value in other settings. The statutory presumption against cumulative voting is now in effect in Delaware, N.Y., New Jersey and a fair number of other sophisticated corporate jurisdictions.

§ 513. Greater voting requirements.

(a) Whenever, with respect to any action to be taken by the shareholders of a corporation, the articles of incorporation require the vote or concurrence of the holders of a greater proportion of the shares, or of any class or series thereof, than required by this act with respect to such action, the provisions of the articles of incorporation shall control. An amendment of the articles of incorporation which adds, changes or deletes such a provision shall be authorized by the vote required to amend the articles of incorporation pursuant to section 702, or by the same vote as would be required to take action under such provision, whichever is greater.

* * * * * * * *

SOURCE: MBCA § 143, with additional original language based on NJSA § 14A:5-12 and NYBCL § 616. The proposed section prevents introduction, change or deletion of greater-than-majority voting provisions without the same vote as required under the provisions themselves. Thus, a unanimous vote would be required to add, change or delete a unanimity voting provision. New York's statute so states, but in unduly complex language. Note that greater-than-majority voting provisions are of great value particularly to close corporations. The only provision for greater-than-statutory voting in Michigan is contained in the section on sale of substantially all of the corporation's assets: MCLA § 450.57; there is no general authorization for such provisions.

§ 514. Voting agreements; control of directors.

(a) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as therein provided, or as they may agree, or as determined in accordance with a procedure agreed upon by them.

(b) A provision in the articles of incorporation may restrict the board in its management of the business of the corporation, or delegate to one or more shareholders or other persons, all or any part of such management otherwise within the authority of the board, if all the incorporators have authorized such provision in the articles of incorporation or the holders of record of all outstanding shares, whether or not having voting power, have authorized such provision in an amendment to the articles of incorporation.

(c) A provision authorized by subsection (b) shall become invalid if,

(1) subsequent to the adoption of such provision, shares are transferred or issued to any person who takes delivery of the share certificate without notice thereof, unless such person consents in writing to such provisions; or

(2) any shares of the corporation are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association.

(d) The effect of any provision authorized by subsection (b) shall be to relieve the directors and impose upon the shareholders the liability for managerial acts or omissions that is imposed on directors by law to the extent that, and so long as, the discretion or powers of the directors in their management of corporate affairs is controlled by any such provision.

(e) If the articles of incorporation contain a provision authorized by subsection (b), the existence of such provision shall be noted conspicuously on the face of every certificate for shares issued by such corporation, and each holder of such certificate shall conclusively be deemed to have taken delivery with notice of such provision.

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SOURCE: Based on NJSA § 14A:5-21, except for changes of sectional cross-references, changes from "certificate" to "articles of incorporation," and deletion, in the second line of subsection (c) of the phrase " to the knowledge of the board." Also deleted is NJSA § 14A:5-21(4). With these changes, the section is substantially identical to (and is based on) NYBCL § 620. Paragraph (b) is rephrased affirmatively, with no substantive change from N.Y. or N.J. The New York section states that amendment of the articles to change such provisions is by

two-thirds vote, or such greater as is provided in the articles. This provision was deleted by New Jersey and this revision, leaving amendment to the usual amendment procedures.

The proposed section is the most complete, and in most ways the most liberal, of all sections specifically validating control agreements. It validates specifically agreements concerning only voting, as well as agreements concerned with internal management. Thus, (a), coupled with provisions for irrevocable proxies in § 507 hereof, avoids the problems of the Ringling Bros. (29 Del. Ch. 610, 53 A.2d 441 (1947)) and Abercrombie (36 Del. Ch. 371, 130 A.2d 338 (1957)) decisions, neither of which may have satisfactorily been put to rest by Del. Corp. Law § 218(c).

The agreements contemplated by (b) have been upheld in some jurisdictions (Galler v. Galler, 32 I11.2d 16, 203 N.E.2d 577 (1964)) and for some purposes (Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936)(choice of officers and salaries)), but have been rejected elsewhere (Long Park, Inc. v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633 (1948) ("sterilization of the board of directors")). This subsection clearly validates the agreements, though they must be in the articles and unanimously agreed to.

The Delaware provisions validating the second form of agreement (managerial) are quite different. Del. Corp. Law § 350 validates such agreements as among the parties even if non-unanimous and not appearing in the articles. A precondition to operation of § 350, however, is election by the corporation to secure status as a "close corporation." Such status is limited to corporations with no more than 30 shareholders, as well as other requirements of non-public issuance and trading. Thus, the Delaware statute may be criticized on two grounds: (1) It is not sufficiently broad, in that corporations with more than 30 shareholders cannot use its provisions; but (2) it is too liberal, in that it allows less than all shareholders to impose their will by agreement as to details of management. In this connection, it should be noted that no decision prior to Delaware's new law validated an internal control agreement agreed to by

fewer than all the shareholders. At the risk of repetition, note that the revision permits pure voting agreements (those detailed in subsection (a) of the proposed section) to be non-unanimous.

Michigan law has no comparable provision, and the Model Act simply rejects negative inferences as to voting agreements in the revised § 34 (1969 rev.).

§ 515. Voting trusts.

(a) One or more shareholders of a corporation may confer upon a trustee or trustees the right to vote or otherwise represent his or their shares, for a period not to exceed 10 years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by filing an executed counterpart of the agreement at the registered office of the corporation, and by transferring his or their shares to such trustee or trustees for the purposes of the agreement. After the filing of the agreement, certificates for shares so transferred shall be surrendered and cancelled and new certificates therefor issued to such trustee or trustees stating that they are issued under such agreement, and in the entry of such ownership in the records of the corporation that fact shall also be noted, and such trustee or trustees may vote the shares so transferred during the term of such agreement. The copy of the voting trust agreement so filed shall be subject to inspection at any reasonable time by any shareholder of the corporation or any holder of a beneficial interest in the voting trust, in person or by agent or attorney. Voting trust certificates shall be issued to evidence beneficial interests in the voting trust.

(b) A trustee who votes shares subject to a voting trust shall incur no responsibility as shareholder, trustee, or otherwise, except for his malfeasance.

(c) Where two or more persons are designated as voting trustees, and the right and method of voting any shares in their names at any meeting of the corporation are not fixed by the agreement appointing the trustees, the right to vote said shares and the manner of voting the same at any such meeting shall be determined by a majority of the trustees. If the trustees are euqally divided as to how the shares shall be voted, the vote of said shares shall be divided equally among said trustees.

(d) At any time within twelve months prior to the time of expiration of any such voting trust agreement as originally fixed or as extended as herein provided, one or more beneficiaries of the voting trust may, by agreement in writing and with the written consent of such voting trustees, extend the duration of such voting trust agreement with regard to the shares subject to their beneficial interest for an additional period not exceeding 10 years. The voting trustees shall, prior to the time of expiration of any such voting trust agreement, as originally fixed or as previously extended, as the case may be, file in the registered office of the corporation an executed counterpart of such extension agreement and of their consent

thereto, and thereupon the duration of such voting trust agreement shall be extended for the period fixed in such extension agreement; but no such extension agreement shall affect the rights or obligations of persons not parties thereto.

(e) The validity of a voting trust or of an extension thereof, otherwise lawful, shall not be affected during a period of ten years from the date of its commencement by the fact that by its terms it will or may last beyond such ten-year period; but it shall become inoperative at the end of such ten-year period.

* * * * * * * *

SOURCE: NJSA § 14A:5-20, with the following substantive changes:
--21 year period changed to 10 years, to accord with the majority of jurisdictions, including Michigan (MCLA § 450.34). The Model Act and Delaware also use 10 years.
--2 year extension period in (d) reduced to 12 months, to accord with the shorter period of the trust itself; see, e.g., NYBCL § 621(d).
--language in (a) referring to "original issue shares" deleted as unnecessarily complex and adding no substance. Language requiring transfer of shares is clear enough.
--language in (c) giving court authority to resolve deadlock among voting trustees eliminated. Substituted language of present MCLA § 450.34 allowing division of votes among trustees in those circumstances. The latter approach is simpler and equally equitable.

The proposed language is somewhat more complete than existing Michigan law; e.g., (e) resolves an ambiguity as to effectiveness of a trust if its term is beyond the allowable limit. Otherwise there is no substantive change from existing law.

§ 516. Transfer of shares and share transfer restrictions.

(a) The shares of a corporation shall be personal property and shall be transferable in accordance with the provisions of Article 8 of the Uniform Commercial Code (M.C.L.A. § 440.8101 et. seq.), as amended from time to time, except as otherwise provided in this act.

(b) A written restriction on the transfer or registration of transfer of a security of a corporation, if permitted by this section and noted conspicuously on the security, may be enforced against the holder of the restricted security or any successor or transferee of the holder including an executor, administrator, trustee, guardian or other fiduciary entrusted with like responsibility for the person or estate of the holder. Unless noted conspicuously on the security, a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction.

(c) A restriction on the transfer or registration of transfer of securities of a corporation may be imposed either by the articles of incorporation or by the by-laws or by an agreement among any number of security holders or among such holders and the corporation. No restriction so imposed shall be binding with respect to securities issued prior to the adoption of the

restriction unless the holders of the securities are parties to an agreement or voted in favor of the restriction.

(d) In particular and without limitation of the generality of the power granted by paragraph (c) to impose restrictions, a restriction on the transfer or registration of transfer of securities of a corporation is permitted by this section if it:

(1) Obligates the holders of the restricted securities to offer to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing, a prior opportunity to acquire the restricted securities;

(2) Obligates the corporation or any holder of securities of the corporation or any other person or any combination of the foregoing, to purchase the securities which are the subject of an agreement respecting the purchase and sale of the restricted securities;

(3) Requires the corporation or the holders of any class of securities of the corporation to consent to any proposed transfer of the restricted securities or to approve the proposed transferee of the restricted securities;

(4) Prohibits the transfer of the restricted securities to designated persons or classes of persons, and such designation is not contrary to public policy; or

(5) Exists for the purpose of maintaining the status of the corporation as an electing small business corporation under subchapter S of the United States Internal Revenue Code.

* * * * * * * *

SOURCE: (a) is NJSA § 14A:7-12 verbatim, except for change in the numbering of the statutory cross-reference. (b) through (d) are Del. Corp. Law § 202 with the following changes:

--Introductory language in (d) is from NJSA § 14A:7-12. The Delaware statute attempts to assure generality by adding a subparagraph (5) allowing "any other lawful restriction." Neither approach is sure-fire, but the generality language in the beginning is preferable.

--Language in (d)(1) calling for exercise "within a reasonable time" is deleted, since unreasonable restraints will be dealt with in any event by the courts.

--Wording in (d)(4) prohibiting "manifestly unreasonable" restraints is changed to "contrary to public policy." The latter is a more generally understood term.

--A paragraph specifically validating restraints for Subchapter S Corporations is added as (d)(5).

The Delaware statute is the most complete on this subject, which is mentioned in existing Michigan law (MCLA § 450.10 (f)) only insofar as authorizing by-laws on certification and transfer of stock. Share transfer restrictions, generally upheld in some forms at common law, are extremely valuable to close corporations. The proposed section goes beyond the common law by validating not only the so-called "first option" restrictions, but also making enforceable "consent restraints."

§ 517. Preemptive rights.

(a) Except as otherwise provided in the articles of incorporation or by agreement, a corporation may issue or deliver unissued or treasury shares, or option rights, or securities having conversion or option rights, without first offering them to existing shareholders.

(b) The preemptive rights, whether created by statute or common law, of shareholders of corporations organized prior to the effective date of this act shall not be affected by subsection (a). Any such corporation may alter or abolish its shareholders' preemptive rights by an amendment of its articles of incorporation.

* * * * * * * *

SOURCE: NJSA § 14A:5-29, verbatim, except for change of "certificate" to "articles of incorporation," and allowance of preemptive rights by agreement. This section represents a reversal of the substantive rule now in effect under MCLA § 450.31. The existing Michigan rule presumes preemptive rights unless they are written out of the articles; issuances of shares for non-cash consideration, for conversion rights, and out of the treasury are not now within the preemptive right. The second paragraph of the proposed language avoids any implication that the statute automatically eliminates existing preemptive rights, but also negates any "vested rights" theory which would preclude their elimination by amendment of the articles.

Preemptive rights can be a valuable source of protection primarily to the shareholders of close corporations. To the larger corporation, they are a source of irritation, and are most frequently written out of the articles. The presumption against preemptive rights is gaining favor, and it is adopted here.

§ 518. Books and records; right of inspection.

(a) Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. Unless otherwise provided in the by-laws, such books, records and minutes may be kept outside this state. The corporation shall keep at its registered office or at the office of its transfer agent in this state, a record or records containing the names and addresses of all shareholders, the number, class and series of shares held by each and the dates when they respectively became the holders of record thereof, except that in the case of shares listed on a national securities exchange, the records of the holders of such shares may be kept at the office of the corporation's transfer agent within or without this state. Any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into written form within a reasonable time. A corporation shall convert into written form without charge any such records not in such form, upon the written request of any person entitled to inspect them.

(b) Upon the written request of any shareholder, the corporation shall mail to such shareholder its balance sheet as at the end of the preceding fiscal year; its statements of income

and earned surplus for such fiscal year; and, if prepared by the corporation, its statement of source and application of funds for such fiscal year.

(c) Any person who is a shareholder of record of a corporation, upon at least ten days' written demand shall have the right for any proper purpose to examine in person or by agent or attorney, during usual business hours, its minutes of shareholders meetings and record of shareholders and to make extracts therefrom, at the places where the same are kept pursuant to subsection (a).

(d) Upon proof by a shareholder of a proper purpose, a court of competent jurisdiction may compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation, and may allow such shareholder to make extracts therefrom.

(e) Holders of voting trust certificates representing shares of the corporation shall be regarded as shareholders for the purpose of this section.

* * * * * * * *

SOURCE: NJSA § 14A:5-28, with one substantive change: The alternative requirement of 6 months ownership or 5% interest is deleted. Also the list of financial statements in (b) is changed. In the place of "profit

and loss statement," an archaic term no longer in general use, the term "statement of income" is used. In addition, the corporation is required to distribute a statement of source and application of funds if such a statement is prepared by the corporation. This enormously valuable statement is now regularly required by the American Institute of CPA's, and it should be available on the same terms as other financial statements to the shareholders demanding it.

The New Jersey section here recommended is adapted largely from MBCA § 52, with a number of significant modernizing features, as well as a few substantive changes:

- --provision is made in (a) for computer records, and for translation to readable form of such records.
- --the required financial statements are listed; in the MBCA they are referred to generically as "financial statements."
- --voting trust certificates are treated as record ownership shares.
- --the provision for a penalty for officers not complying with the section is deleted.

The proposed provision works a substantive change on existing Michigan law. MCLA §§ 450.35 and 450.45 affording access, respectively, to shareholders lists and financial records, both require the applicant to be a 2% shareholder.

§ 519. Shareholders' derivative action.

(a) An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a record holder or beneficial owner of shares or of voting trust certificates of the corporation.

(b) In any such action, it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law from a person who was a shareholder at such time.

(c) In any such action, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort.

(d) Such action shall not be discontinued, compromised or settled without the approval of the court having jurisdiction of the action. If the court shall determine that the interest of the shareholders or of any class or classes thereof will be substantially affected by such discontinuance, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to the shareholders or class or classes thereof whose interests it determines will be so affected; if notice is so directed to be given, the court

may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as special costs of the action and recoverable in the same manner as statutory taxable costs.

(e) If the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as a result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney's fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them. This paragraph shall not apply to any judgment rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage sustained by them.

(f) In any action hereafter instituted in the right of any domestic or foreign corporation by a record holder or beneficial owner of shares or of voting trust certificates of the corporation, the court having jurisdiction, upon the final judgment and finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the parties named as defendant the reasonable expenses, including fees of attorneys, incurred by them in the defense of such action.

SOURCE: Paragraphs (a) through (e) are NYBCL § 626, except that (b) is clarified to assure devolution from a contemporaneous owner. Also, (a) and (e) are clarified to require that plaintiff be either a record holder or beneficial owner. Paragraph (f) is an adaptation of MBCA § 49, ¶2. This section is the most complete on the subject of derivative suits, and it effectively eliminates the abuses of the so-called "strike suit" while preserving the efficacy of the derivative action itself.

Paragraph (b) repeats the now universal rule of contemporaneous ownership, as well as contemporary ownership, as a precondition for derivative suits. Paragraph (c) requires that the plaintiff exhaust his intra-corporate remedies but does not require the useless and enormously expensive ritual of making demand on the shareholders. Paragraph (d), by retaining court control over discontinuance of the action, effectively eliminates private settlements and thus wipes out the putative derivative suit actually brought for private benefit. This paragraph, together with the requirement in paragraph (e) that recovery be held for the benefit of the corporation, assures the protection of the corporation and the other shareholders. The history of these safeguards is in two New York decisions: Manufacturers Mutual Fire Ins. Co. of Rhode Island v. Hopson, 176 Misc. 220, 25 N.Y.S.2d 502 (Sup. Ct. 1940), aff'd mem., 288 N.Y. 688, 43 N.E.2d 71 (1942)(allowing discontinuance over objection of other shareholders); Clark v. Greenberg, 296 N.Y. 146, 71 N.E.2d 443 (1947) (holding recipient of settlement proceeds liable to corporation; same case as Hopson). The Clark case, coupled with changes in the New York statute provoked by Hopson, produced the rule proposed in paragraphs (d) and (e) above.

Paragraph (f), adopted from the Model Act, reflects the common law rule that expenses may be assessed where the action was essentially without reasonable cause.

Present Michigan law, MCLA § 450.47, simply authorizes derivative actions against directors and officers.

Chapter 6: Directors and Officers

§ 601. Board of directors.

The business and affairs of a corporation shall be managed by its board, except as in this act or in its articles of incorporation otherwise provided. Directors need not be shareholders of the corporation unless the articles of incorporation or by-laws so require. The articles of incorporation or by-laws may prescribe other qualifications for directors.

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SOURCE: NJSA § 14A:6-1, with requirement that directors be at least 21 years old deleted. This section is a major substantive change from existing MCLA § 450.14, in that it specifically recognizes the validity of management other than by the board: see § 514 hereof and comments thereto.

§ 602. Number of directors.

The board of directors of a corporation shall consist of one or more members. The number of directors shall be fixed by, or in the manner provided in, the by-laws, unless the articles of incorporation fix the number of directors.

* * * * * * * *

SOURCE: Del. Corp. Law § 141(b)(1969 rev.), first two sentences. This is the most liberal statute on the subject, allowing the board to be any size. The one or two-man board eliminates the formalities of additional directors in close corporations. This provision represents a substantive change from MCLA § 450.13(1), which now mandates a three-man board.

§ 603. Election and term of directors; classification.

(a) The initial board of directors shall hold office until the first annual meeting of the shareholders. At the first annual meeting of the shareholders and at each annual meeting thereafter the shareholders shall elect directors to hold office until the succeeding annual meeting, except in case of the classification of directors as permitted by this act. Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified, or until his resignation or removal. A director may resign by written notice to the corporation. The resignation shall be effective upon receipt thereof by the corporation or at such subsequent time as shall be specified in the notice of resignation.

(b) The articles of incorporation may provide that in lieu of annual election of all directors the directors be divided into either two or three classes, each to be as nearly equal in number as possible, the term of office of directors in the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after such classification the number of directors

equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes.

(c) Any corporation having more than one class of shares may provide in its articles of incorporation for the election of one or more directors by the shareholders of any class or series, to the exclusion of other shareholders.

* * * * * * * *

SOURCE: (a) is derived from NJSA § 14A:6-3, except that the phrase "initial board of directors" is substituted for "directors named in the certificate of incorporation," since section 204 hereof does not require the naming of the initial board in the articles. The initial board serves only until the first meeting of shareholders. Also, directors may leave office by resignation or removal. Note that election of directors may be had without a shareholders' meeting, pursuant to section 503 hereof.

(b) is MBCA § 37, (1969 revision) modified to allow classification even where the board has fewer than nine members. Also the last sentence--prohibiting classification prior to the first shareholders' meeting--is deleted. It provides, as do most classification statutes, classes with terms of a maximum of three years. By comparison, New York (NYBCL § 704) provides for up to four classifications; New Jersey (NJSA § 14A:6-4(1), allows five classifications with no lower limit on the size of each; and Delaware (Del. Corp. Code § 141(d)) is substantively identical to the proposed section, with the limit of three.

(c) is NJSA § 14A:6-4(2), with editorial changes. It allows classifications of directors not based on length of term, often desirable in close corporations or desirable to protect a class of stock. The provision is unique to New Jersey.

Existing MCLA § 450.13(2) is not changed in substance, and existing MCLA § 450.13(4), first sentence, appears to allow classification in the same form as proposed paragraph (b).

§ 604. Removal of directors.

(a) Unless otherwise provided in the articles or by-laws any director or the entire board may be removed, with or without cause, by a vote of the holders of a majority of the shares entitled to vote at an election of directors.

(b) In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no one of the directors may be removed if the votes cast against his removal would be sufficient to elect him if then cumulatively voted at an election of the entire board of directors, or, if there be classes of directors, at an election of the class of directors of which he is a part.

(c) Whenever the holders of any class or series of stock or of any bonds are entitled to elect one or more directors by the provisions of the articles of incorporation, the provisions of this section shall apply, with respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class or series of stock or the holders of such bonds and not to the vote of the outstanding shares as a whole.

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SOURCE: MBCA § 39 (1969 rev.) with the following changes:
--specific authority in (a) to provide otherwise in the articles.
--added language in (c) covering directors elected by series or by bonds.
--deletion of the requirement of special meeting for removal.
A comparable New York section (NYBCL § 706(d)) also

authorizes action by the attorney-general or on petition of 10% of the shareholders. MCLA § 600.3605 already provides this remedy, in broader terms, on application to the circuit court. The existing Michigan removal provision (MCLA § 450.13(3)) provides--consistent with existing mandatory cumulative voting--for cumulative voting on removal; the section also makes no provision for removal without cause. The proposed section does not distinguish removal with and without cause. The proposed section mandates cumulative voting for removal only where it is in effect for election of directors.

§ 605. Vacancies.

(a) Unless the right to fill vacancies is reserved to the shareholders by the articles of incorporation or by-laws, any vacancy occurring in the board may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the board. Any directorship to be filled by reason of an increase in the number of directors or to fill a vacancy may be filled by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

(b) If at any time, by reason of death or resignation or other cause, a corporation should have no directors in office, then any officer, or any shareholder or an executor, administrator, trustee or guardian of a shareholder, or other fiduciary entrusted with like responsibility for the person or estate of a shareholder, may call a special meeting of shareholders in accordance with the provisions of the articles of incorporation or the by-laws.

* * * * * * * * *

SOURCE: (a) is from MBCA § 48 (1969 rev.), with two changes: addition of the first phrase, allowing reservation to shareholders of right to fill vacancies; and provision that all vacancies are filled only until the next election. By contrast, provisions in New Jersey (NJSA § 14A:6-5) and New York (NYBCL § 705) require, respectively, that shareholders vote on vacancies for newly-created directorships and on vacancies created by removals without cause. An argument may be made for shareholder election in both

of these cases, though it is unclear why these two statutes each selected only one situation for the shareholder vote requirement. Existing MCLA § 450.13(4)(a) provides that all vacancies are to be filled by the board only until the next election, and this simple, expeditious procedure is carried forward without substantive change.

(b) is from Del Corp. Law § 223(a).

§ 606. Place and notice of meetings of the board of directors.

(a) Meetings of the board of directors, regular or special, may be held either within or without this state.

(b) Regular meetings of the board of directors may be held with or without notice, as prescribed in the by-laws. Special meetings of the board of directors shall be held upon such notice as is prescribed in the by-laws. Attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting unless required by the by-laws.

(c) Unless otherwise restricted by the articles of incorporation or the by-laws, member of the board of directors or any committee designated by the board may participate in a meeting by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other; and participation in a meeting pursuant to this subsection shall constitute presence in person at such meeting.

SOURCE: (a) and (b) are MBCA § 43 (1969 rev.) verbatim. (c) is in substance Del. Corp. Law § 141(i) (1969 rev.) Existing MCLA § 450.13(4)(b) is substantively similar to (a) and (b) in that meetings may be held as a majority of the directors may determine. The requirement of provisions in the by-laws, however, gives more protection to directors who might otherwise be inconvenienced or disadvantaged by ad hoc decisions without notice. (c) is unique to Delaware, but highly useful as sophisticated communications devices are more widely used.

§ 607. Quorum and vote of board of directors and committees; action of directors without a meeting.

(a) A majority of the board then in office, or of any committee thereof, shall constitute a quorum for the transaction of business, unless the articles of incorporation or the by-laws shall provide that a greater or lesser number shall constitute a quorum. The vote of the majority present at a meeting at which a quorum is present shall be the action of the board or of the committee, unless the vote of a greater number is required by this act, the articles of incorporation or the by-laws. Amendment of the by-laws by directors shall require the vote of not less than a majority of the board then in office.

(b) Unless otherwise provided by the articles of incorporation or by-laws, any action required or permitted to be taken pursuant to authorization voted at a meeting of the board or any committee thereof, may be taken without a meeting if, prior or subsequent to such action, all members of the board or of such committee, as the case may be, consent thereto in writing. Such written consents shall be filed with the minutes of the proceedings of the board or committee. Such consent shall have the same effect as a vote of the board or committee for all purposes.

* * * * * * * * *

SOURCE: NJSA § 14A:6-7, with two substantive changes:
--the lower limit of one-third or two persons, whichever is greater, is deleted.

--the majority required is changed from a majority of the entire board to a majority of the board then in office, except in the case of amendment of the by-laws.

The basis of both of these changes is that they avoid unnecessary formalities. Since the board itself is vested with power to fill vacancies, there is no reason to require that it fill the vacancies to constitute a quorum. Moreover, the obtaining of such a quorum where substantial numbers of outside directors are on the board may be unnecessarily difficult. Furthermore by provision of either the articles or by-laws, the quorum may be set at a majority of the authorized board rather than the number of board members then in office.

REPORTER'S DISSENT: The setting of a quorum at a majority of the entire board is universal in corporate statutes, from the latest revision of the Model Act (MBCA § 40 (1969 rev.)), to Delaware and New Jersey. Existing Michigan law is unclear on the matter, although it does set a minimum one-third quorum: MCLA § 450.13(4)(c). Existing laws also prohibit the board from making or altering by-laws affecting the board's number, qualifications, classification, or term of office. (MCLA § 450.16). A potential for abuse is established--particularly in close corporations--if remaining directors can take advantage of the death or disability to produce a quorum and vote on matters with a "rump" board. It is more desirable to follow the lead of recent statutes and require that the quorum be determined by the size of the entire board.

§ 608. Committees of the board.

(a) Unless otherwise provided in the articles of incorporation or the by-laws, the board may designate one or more committees, each committee to consist of one or more of the directors of the corporation. The board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The by-laws may provide that in the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member.

(b) Any such committee, to the extent provided in the resolution of the board of directors, or in the by-laws, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation; but no such committee shall have the power or authority in reference to:

(1) amending the articles of incorporation,

(2) adopting an agreement of merger or consolidation,

(3) recommending to the shareholders the sale, lease or exchange of all or substantially all of the corporation's property and assets,

(4) recommending to the shareholders a dissolution of the corporation or a revocation of a dissolution,

(5) amending the by-laws of the corporation,

(6) filling vacancies in the board of directors, or

(7) fixing of compensation of the directors for serving on the board or on any committee;

and unless the resolution, by-laws or articles of incorporation expressly so provide, no such committee shall have the power or authority to declare a dividend or to authorize the issuance of stock.

(c) Each such committee, and each member thereof, shall serve at the pleasure of the board.

* * * * * * * * *

SOURCE: Del. Corp. Law § 141(c)(1969 rev.), with the addition of two items (numbers (6) and (7)) from the NYBCL § 712. The first sentence of (a) was changed to allow the board to designate committees by the usual procedures of the board, rather than requiring a resolution of a majority of the entire board. Subsection (c) was added to clarify the fact that the committee and its members serve at the pleasure of the board.

Existing MCLA § 450.13(4)(d) authorizes such committees, with a minimum size of two members, but the existing section is not as detailed as the proposed section.

§ 609. Officers.

(a) The officers of a corporation shall consist of a president, a secretary, a treasurer, and, if desired, a chairman of the board, one or more vice-presidents, and such other officers as may be prescribed by the by-laws or determined by the board. Unless otherwise provided in the articles or by-laws, the officers shall be elected or appointed by the board.

(b) Any two or more offices may be held by the same person but no officer shall execute, acknowledge or verify any instrument in more than one capacity if such instrument is required by law or the articles or by-laws to be executed, acknowledged or verified by two or more officers.

(c) Any officer elected or appointed as herein provided shall hold office for the term for which he is so elected or appointed and until a successor is elected or appointed and has qualified, subject to earlier termination by removal or resignation.

(d) All officers of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the by-laws, or as may be determined by resolution of the board not inconsistent with the by-laws.

* * * * * * * *

SOURCE: NJSA § 14A:6-15, with the added phrase "or determined by the board" in (a). Note that (a) effectively permits

election of officers by the shareholders, thus avoiding needless formalities, where so desired, in close corporations. With this exception, the proposed section carries forward the substance of MCLA § 450.15. A provision in that section stating that the board may, without prejudice to contract damage remedies, remove officers at will, is included in section 610 of this revision.

§ 610. Removal and resignation of officers.

(a) Any officer elected or appointed by the board may be removed by the board with or without cause. An officer elected by the shareholders may be removed, with or without cause, only by vote of the shareholders, but his authority to act as an officer may be suspended by the board for cause.

(b) The removal of an officer shall be without prejudice to his contract rights, if any. The election or appointment of an officer shall not of itself create contract rights.

(c) Any officer may resign by written notice to the corporation. The resignation shall be effective upon receipt thereof by the corporation or at such subsequent time as shall be specified in the notice of resignation.

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SOURCE: (a) and (b) are NYBCL § 716, first two subsections, except for deletion of "without cause" in (b). (c) is NJSA § 14A:6-16(2). New York's third subsection, allowing a shareholder suit to remove an officer, is deleted, since adequate provision for such action is made in MCLA title 600, ch. 36. See comments to § 108 hereof.

Existing MCLA § 450.15, though it makes no provision for officers elected by shareholders, is substantively to the same effect as the proposed section.

§ 611. Interested directors.

(a) No contract or other transaction between a corporation and one or more of its directors or officers, or between a corporation and any domestic or foreign corporation, firm or association of any type or kind in which one or more of its directors or officers are directors or officers, or are otherwise interested, shall be void or voidable solely by reason of such common directorship, officership or interest, or solely because such director or directors are present at the meeting of the board or committee thereof which authorizes or approves the contract or transaction, or solely because his or their votes are counted for such purpose if,

(1) the contract or other transaction is fair and reasonable to the corporation at the time it is authorized, approved or ratified; or

(2) the material facts as to his relationship or interest and as to the contract or transaction are disclosed or known to the board or committee and the board or committee authorizes, approves, or ratifies the contract or transaction by a vote sufficient for the purpose without counting the vote or votes of such common or interested director or directors; or

(3) the material facts as to his relationship or interest and as to the contract or transaction are disclosed or known to the shareholders, and they authorize, approve or ratify the contract or transaction.

(b) When the validity of any such contract is questioned, the burden of establishing its validity on any of the grounds provided in subsection (a) hereof shall be upon the director, officer, corporation, firm or association asserting its validity.

(c) Common or interested directors may be counted in determining the presence of a quorum at a board or committee meeting at which a contract or transaction described in subsection (a) is authorized, approved or ratified.

(d) The board, by the affirmative vote of a majority of directors in office and irrespective of any personal interest of any of them, shall have authority to establish reasonable compensation of directors for services to the corporation as directors, officers or otherwise; provided that the approval of the shareholders shall be required if the by-laws, the articles, or other provisions of this act so provide.

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SOURCE: Derived from NJSA § 14A:6-8, with the following changes: common officership is added in subsection (a) to avoid the possibility that the section will be deemed inapplicable in that situation; and (d) provides for shareholder approval not only as required by the by-laws, but as required by the articles or the act. The disclosure language in (a)(2) and (a)(3) is from Del. Corp. Law § 144. Substantially similar provisions are in effect in New York (NYBCL § 713) and Delaware (Del. Corp. Law § 144) except that Delaware allows a vote in the situation of (a)(2) even where less than a quorum is disinterested. (b) is an adaptation of existing MCLA § 450.13(5), dealing with burden or proof.

This very liberal section allows any of several methods to avoid a cloud over transactions involving common and interested directors. Note that (d) greatly eases the burden of directors setting their own compensation as directors and officers, while preserving the essential "reasonableness" test. The Model Act (MBCA § 41 (1969 rev.), now is substantively similar to the proposed section. Present Michigan law (MCLA § 450.47) appears to provide no exception to the absolute fiduciary duty of directors.

§ 612. Loans to directors, officers or employees.

Any corporation may lend money to, or guarantee any obligation of, or otherwise assist any officer or other employee of the corporation or of its subsidiary, including any officer or employee who is a director of the corporation or its subsidiary, whenever, in the judgment of the directors, such loan, guaranty or assistance may reasonably be expected to benefit the corporation. The loan, guaranty or other assistance may be with or without interest, and may be unsecured, or secured in such manner as the board of directors shall approve, including without limitation, a pledge of shares of stock of the corporation. Nothing in this section shall be deemed to deny, limit or restrict the powers of guaranty or warranty of any corporation at common law or under any statute.

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SOURCE: Del. Corp. Law § 143. This section liberally authorizes loans and other assistance to directors, officers and other employees. It requires no shareholder approval for loans to directors, as does New Jersey (NJSA § 14A: 6-11) or the Model Act (MBCA § 47 (1969 rev.)). The section considerably liberalizes existing Michigan law (MCLA § 450.46) which requires loans to officers and directors to be approved by the disinterested vote of 2/3 of the entire board.

§ 613. Duty of directors and officers.

(a) Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. In discharging their duties, directors and officers, when acting in good faith, may rely upon the opinion of counsel for the corporation, upon the report of an independent appraiser selected with reasonable care by the board of directors, or upon financial statements of the corporation represented to them to be correct by the president or the officer of the 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.

(b) Every action against a director or officer for failure to satisfy the duties imposed by this section shall be commenced within three years next after the cause of any such action shall have accrued, or within two years next after the time when such cause is discovered, or should reasonably have been discovered, by one complaining thereof, whichever shall sooner occur.

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SOURCE: (a) NYBCL § 717, with the addition of reliance upon opinions of counsel (from NJSA § 14A:6-14) and appraisers

(from Del. Corp. Law § 141(e)) in the exculpatory clause. Existing MCLA § 450.47 expresses a similar fiduciary obligation, but does not cover officers and contains no exception for reliance on opinions of counsel, appraisers, or accountants. The exception is derived from MBCA § 48 (1969 rev.).

(b) Existing MCLA § 450. 47 second paragraph, with a limitations period of three years substituted for the existing six-year period.

§ 614. Liability of directors and shareholders in certain cases.

(a) In addition to any other liabilities imposed by this act or other law upon directors of a corporation, directors who vote for, or concur in, any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons, respectively, as a result of such action but not to exceed the amount unlawfully paid or distributed:

(1) the declaration of any dividend or other distribution of assets to the shareholders contrary to the provisions of this act or contrary to any restrictions contained in the articles of incorporation or by-laws;

(2) the purchase of the shares of the corporation contrary to the provisions of this act or contrary to any restrictions contained in the articles of incorporation or by-laws;

(3) the distribution of assets to shareholders during or after dissolution of the corporation without paying, or adequately providing for, all known debts, obligations and liabilities of the corporation, except that the directors shall be liable only to the extent that such debts, obligation and liabilities of the corporation are not thereafter paid, discharged, or barred by statute or otherwise;

(4) the making of any loan to an officer, director or employee of the corporation or of any subsidiary thereof contrary to the provisions of this act.

(b) Any director against whom a claim is successfully asserted under this section shall be entitled to contribution from the other directors who voted for, or concurred in, the action upon which the claim is asserted.

(c) Directors against whom a claim is successfully asserted under this section shall be entitled, to the extent of the amounts paid by them to the corporation as a result of such claims:

(1) upon payment to the corporation of any amount of an improper dividend or distribution, to be subrogated to the rights of the corporation against shareholders who received such dividend or distribution in proportion to the amounts received by them respectively;

(2) upon payment to the corporation of any amount of the purchase price of an improper purchase of shares: (a) to have the corporation rescind such purchase of shares and recover for their benefit, but at their expense, the amount of such purchase price from any seller who sold such shares with knowledge of facts indicating that such purchase of shares by the corporation was not authorized by this act; or (b) to have the corporation assign to such directors such shares and any claim against the seller;

(3) upon payment to the corporation of the claim of any creditor by reason of a violation of subsection (a) (3) of this section, to be subrogated to the rights of the corporation against shareholders who received an improper distribution of assets;

(4) upon payment to the corporation of the amount of any loan made improperly to a director or officer, to be subrogated to the rights of the corporation against a director or shareholder who received the improper loan.

(d) A director shall not be liable under this section if he has complied with section 613.

(e) A director of a corporation who is present at a meeting of its board, or any committee thereof of which he is a member, at which action on any corporate matter referred to in this section is taken shall be presumed to have concurred in 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 or promptly after the adjournment thereof. Such right to dissent shall not apply to a director who voted in favor of such action. A director who is absent from a meeting of the board, or any committee thereof of which he is a member, at which any such action is taken shall be presumed to have

concurred in the action unless he shall file his dissent with the secretary of the corporation within a reasonable time after he shall have knowledge of such action.

(f) Any shareholder who shall accept or receive any dividend or distribution not authorized by this act to be made shall be liable to the corporation in the amount accepted or received by him.

(g) Every action against a director or shareholder for recovery upon a liability imposed by subsections (a) or (f) of this section shall be commenced within three years next after the cause of any such action shall have accrued. Every action under subsections (b) or (c) shall be commenced within three years next after payment by the director to the corporation.

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SOURCE: Subsections (a),(b),(c),(d), and (g) are from NJSA § 14A:6-12, with the following changes:
--editorial changes in (a), to improve style.
--first line of (a) has the words "by this act or" introduced, to clarify that other section of this act may impose other liabilities.
--a limit on liability is established in the last clause of (a).
--the knowledge requirement of (c)(1) is deleted, and thus the common-law rule (that an innocent recipient of an illegal distribution is not chargeable) is reversed.
--in (c)(2), the director is given an alternative remedy to have the corporation assign the shares and claim against the seller.
--statute of limitations in (g) is changed from New Jersey's six years to three years, to carry forward existing Michigan law (MCLA § 405.48).

Subsection (e) is NJSA § 14A:6-13. The section carries forward with only one change the existing Michigan law (MCLA § 450.48), but with greater clarity and specificity. The only change is deletion of the additional requirement that directors pay interest at 6% on liabilities imposed by the section.

Subsection (f) is the second sentence of MCLA § 450.48. This section therefore defines not only director liability under stated circumstances, but shareholder liability as well.

§ 615. Indemnification of officers, directors and employees.

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

(b) A corporation shall have power to indemnify any person who was or is a party to or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

(c) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections

(a) and (b), or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subsections (a) and (b) (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsections (a) and (b). Such determination shall be made

(1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or

(2) if such quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or

(3) by the shareholders.

(e) Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized in the manner provided in subsection (d) upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

(f) A provision made to indemnify directors or officers in any action, suit or proceeding referred to in subsections (a) and (b), whether contained in the articles of incorporation, the by-laws, a resolution of shareholders or directors, an agreement or otherwise, shall be invalid only insofar as it is in conflict with this section. Nothing contained in this section shall affect any rights to indemnification to which persons other than directors and officers may be entitled by contract or otherwise by law. The indemnification provided in this section shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such person.

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

(h) For the purposes of this section, references to "the corporation" include all constituent corporations absorbed in a consolidation or merger as well as the resulting or surviving corporation so that any person who is or was a director, officer, employee

or agent of such constituent corporation or is or was serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise shall stand in the same position under the provisions of this section with respect to the resulting or surviving corporation as he would if he had served the resulting or surviving corporation in the same capacity.

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SOURCE: Subsections (a) through (e) and (g) are MBCA § 5 (1969 rev.), with one substantive change: the MBCA provision in (a) and (b) states "he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation. To this phrase has been added: "or its shareholders." Subsection (f) is original. Subsection (h) is Del. Corp. Law § 145(h) (1970 rev.).

The MBCA section was drafted jointly with the Delaware Revision Commission's revision of Delaware's Corporation Law, and is identical to Del. Corp. Law § 145. It is, by far, the most permissive indemnification statute. Note that the section distinguishes indemnification as to third-party suits (subsection (a), which allows indemnification of judgments, as well as expenses), and indemnification as to actions by shareholders and the corporation itself (subsection (b), which allows indemnification of expenses only). Note, also, that indemnification is mandatory for the successful defendant in either case, as provided in subsection (c); and that advances of litigation expenses are permitted by subsection (e). The substantive change in (a) and (b) is designed to eliminate potential abuses of the section. The words "or not opposed to" were designed to allow indemnification of Texas Gulf Sulphur defendants (see Sebring, infra), a dubious ploy probably inconsistent with both state and federal corporate law. Indeed, the draftsman of the

Delaware provision, Professor Folk, opposed these words. See Note, Law for Sale, 117 Pa. L. Rev. 861, 879 (1969). The addition of stockholders as protected parties avoids this undesirable construction. The procedures for granting indemnification in subsection (d) are quite liberal; indeed a critical commentator questions whether the independent legal counsel will be truly independent in such a determination. See Bishop, Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers, 77 Yale L.J. 1078 (1968).

The provision in subsection (f) that no indemnification may be in conflict with this section is at first glance a substantive change from the MBCA-Delaware approach, which specifically provides that the section is non-exclusive. However, even the Model Act draftsmen and the Delaware Commission were unable to state what forms of indemnification agreement would be upheld by a court as not unconscionable which are not already provided for in the statute. See Sebring, Recent Legislative Changes in the Law of Indemnification of Directors, Officers and and Others, 23 Business Lawyer 95, 105 (1967). More importantly, it is difficult to see why any conscientious board would confer on its members indemnification broader than that specifically authorized by the section. The Delaware reporter strongly opposed the nonexclusive language ultimately adopted in that statute. See Note, Law for Sale, 117 Pa. L. Rev. 861, 883 (1969).

Existing Michigan law (MCLA § 450.10(1)) generally authorizes indemnification, except where the director or officer is adjudged liable for negligence or misconduct. The proposed provision is more specific and permissive.

Chapter 7: Amendments

§701. Amendment of articles of incorporation.

(a) A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired so long as the amendment contains only such provisions as might lawfully be contained in original articles of incorporation filed at the time of making such amendment.

(b) In particular, and without limitation upon the general power of amendment granted by subsection (a), a corporation may amend its articles of incorporation.

(1) to change its corporate name;

(2) to enlarge, limit, or otherwise change its corporate purposes or powers;

(3) to change the duration of the corporation;

(4) to increase or decrease the aggregate number of shares, or shares of any class or series of any class, which the corporation has authority to issue;

(5) to increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued;

(6) to exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued;

(7) to change the designation of all or any part of it shares, whether issued or unissued, and to change the preferences, limitations and the relative rights in respect of all or any part of its shares, whether issued or unissued;

(8) to change shares having par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares without par value, whether issued or unissued, into the same or a different number of shares having par value;

(9) to change the shares of any class or series, whether issued or unissued, and whether with or without par value, into a different number of shares of the same class or series or into the same or a different number of shares, either with or without par value, of other classes or series;

(10) to create new classes or series of shares having rights and preferences superior or inferior to, or equal with, the shares of any class or series then authorized, whether issued or unissued;

(11) to cancel or otherwise affect the right of the holders of the shares of any class or series to receive dividends which have accrued but have not been declared;

(12) to divide any class of shares, whether issued or unissued, into series and fix the designations of such series and the preferences, limitations and relative rights of the shares of such series;

(13) to authorize the board to divide authorized but unissued shares of any class into series and fix the designations and number of shares of such series and the preferences, limitations and relative rights of the shares of such series;

(14) to authorize the board to fix or change the designation or number of, or preferences, limitations or relative rights of the shares of any theretofore established series the shares of which have not been issued;

(15) to revoke, diminish or enlarge the authority of the board to take any of the actions set forth in subparagraphs (b)(13) and (b)(14) of this section;

(16) to limit, deny or grant to shareholders of any class the preemptive right to acquire shares of the corporation, whether then or thereafter authorized;

(17) to strike out, change or add any provision, not inconsistent with law, for the management of the business and the conduct of the affairs of the corporation, or

creating, defining, limiting and regulating the powers of the corporation, its directors and shareholders or any class of shareholders, including any provision which under this act is required or permitted to be set forth in the by-laws.

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SOURCE: NJSA § 14A:9-1, with changes in cross-references and with the revival of existence provisions in (b)(3) deleted. This section is derived from MBCA §58, and is substantively nearly identical. Note that (a) requires only that the amendment itself be lawful at the time it is made. Existing Michigan law (MCLA §450.43) is confused and vague on the right to amend, though it appears in substance to be similar to the proposed section.

§702. Procedure for amendment of articles of incorporation.

(a) Before the first meeting of the board, the incorporators may amend the articles of incorporation by complying with subsection 705(a).

(b) All other amendments of the articles of incorporation, except as otherwise provided in this act, shall be approved by the shareholders in the following manner:

(1) Notice of a meeting, 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 act for the giving of notice of meetings of shareholders.

(2) At such meeting a vote of shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the outstanding shares entitled to vote thereon and, in addition, if any class or series of shares is entitled to vote thereon as a class, the affirmative vote of a majority of the outstanding shares of each such class or series. The voting requirements of this section shall be subject to such greater requirements as are provided in this

act for specific amendments, or as may be provided in the articles of incorporation.

(3) Any number of amendments may be acted upon at one meeting.

(4) Upon adoption, a certificate of amendment shall be filed as provided in section 705.

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SOURCE: Original: Substance from MBCA §59 (1969 rev.), with some language from NJSA § 14A:9-2. Existing Michigan law provides for majority vote (MCLA §450.43) except for 2/3 vote on elimination of preemptive rights. The Model Act MBCA § 59 (1969 rev.) is similar in structure, and now similarly provides a majority vote for amendment. Throughout this proposed act, majority vote is presumed, consistent with provisions in the best of recent revisions: Delaware, New Jersey, New York (except as to mergers), Model Act.

§703. Class voting on amendments.

(a) The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the provisions of the articles of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, or alter or change the powers, preferences or special rights of the shares of such class or other classes so as to affect such class adversely.

(b) If any proposed amendment would alter or change the powers, preferences, or special rights of any class so as to affect adversely one or more series of a class, but not the entire class, then only the shares of the one or more series affected by the amendment shall as a group be considered a single class for the purposes of this section.

* * * * * * * *

SOURCE: Derived from Del. Corp. Law § 242(d)(2)(1969 rev.), with three changes:

--last sentence, authorizing increase or decrease of authorized shares as provided in articles, deleted as unnecessary.

--language revised to require class vote if provisions of <u>other</u> classes are amended with adverse impact on affected shares. Note that this section applies only where a vote is called for pursuant to § 702. Thus, for example, where series of shares are designated as provided in § 403, no class vote is provided, and that section provides its own protection for affected shareholders.

--(b) is clarified to require only a single vote of all adversely affected series within the class.

Existing MCLA § 450.43 provides for a class vote whenever an amendment "shall change the rights, privileges or preferences of the holders of shares of any class." The proposed section will extend a class vote in cases where it is not now offered, and will eliminate it in cases where it presently applies. It is a substantive change, intended to afford protection where it is appropriate and necessary.

§704. Right of affected shareholders to dissent to amendments.

(a) A holder of any adversely affected shares who does not vote for or consent in writing to a propsed amendment shall, pursuant to the provisions of section 809, have the right to dissent and to receive payment for such shares, if the amendment

(1) materially alters or abolishes any preferential right of such shares having preferences; or

(2) creates, alters or abolishes any material provision or right in respect of the redemption of such shares or any sinking fund for the redemption or purchase of such shares.

(b) In no event shall such dissenting shareholder receive payment in excess of the sum payable upon redemption of such shares or liquidation of the corporation, whichever is less.

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SOURCE: (a) is derived from NYBCL § 806(b)(6). This section appears to be unique to New York, but it has much to recommend it. The proposed appraisal proceedings under § 809(b) are substantially limited to those cases where there is no market for the stock. In such cases, the amendments described in the proposed section might substantially reduce a shareholder's rights, with no source of redress. Thus, as a practical matter no widely-held corporation should fear this section, while at the same time it provides meaningful protection against oppression in the closely-held corporation. Moreover, the provision in (b), which is original, puts a reasonable upper limit on appraisal recovery under this section.

§705. Certificate of amendment.

(a) If the amendment is made as provided in section 702(a), a certificate of amendment shall be signed by all the incorporators and filed on behalf of the corporation, setting forth the amendment so adopted, and reciting that the amendment is made by unanimous consent of the incorporators before the first meeting of the board.

(b) In the case of all other amendments of the articles of incorporation, except as otherwise provided in this act, a certificate of amendment, setting forth the amendment, shall be executed and filed on behalf of the corporation and shall certify that the amendment has been duly adopted in accordance with section 702(b).

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SOURCE: Original, derived from Del. Corp. law § 242(c)(1). Filing is in accordance with § 106 hereof, with effective date as determined by that section. Existing Michigan law provides that amendments (MCLA § 450.43) shall be filed in the same manner as the original articles (MCLA § 450.5). As noted earlier in connection with § 106, the procedures for all such filings have been considerably streamlined by the proposed sections.

§706. Restated articles of incorporation.

(a) A corporation may, whenever desired, integrate into a single instrument all of the provisions of its articles of incorporation which are then in effect and operative, as theretofore amended, and it may at the same time also further amend its articles of incorporation by adopting restated articles of incorporation.

(b) If the restated articles of incorporation merely restate and integrate but do not further amend the articles, as theretofore amended, they may be adopted by the board of directors without a vote of the shareholders, or by the shareholders, in which latter case the procedure and vote required by section 702(b) shall be applicable. If the restated articles of incorporation restate and integrate and also further amend in any material respect the articles of incorporation, as theretofore amended, they shall be adopted by the shareholders pursuant to section 702(b).

(c) Restated articles of incorporation shall be specifically designated as such in the heading thereof. They shall state, either in the heading or in an introductory paragraph, the corporation's present name, and, if it has been changed, the name under which it was originally incorporated, and the date of filing of its original articles of incorporation. Restated articles shall also state that they were duly adopted by

directors or shareholders, as the case may be, in accordance with the provisions of this section. If adopted by the board of directors without a vote of the shareholders, they shall state that they only restate and integrate and do not further amend the provisions of the corporation's articles of incorporation as theretofore amended, and that there is no material discrepancy between those provisions and the provisions of the restated articles. Restated articles of incorporation may omit such provisions of the original articles which named the incorporator or incorporators, the initial board of directors, or any original subscribers for shares; and such omission shall not be deemed a further amendment.

(d) Restated articles of incorporation shall be executed and filed in accordance with section 106 of this act. When such filing becomes effective, the corporation's original articles of incorporation, as amended, shall be superseded; and thenceforth the restated articles, including any further amendments made thereby, shall be the articles of incorporation of the corporation.

(e) Any amendment effected in connection with the restatement and integration of the articles of incorporation shall be subject to any other provision of this act, not inconsistent with this section, which would apply if a certificate of amendment were filed to effect such amendment.

SOURCE: Del. Corp. Law §245, with nonsubstantive editorial changes for consistent style. Also, in (b) the requirement of shareholder adoption is limited to material amendments. The proposed section is the simplest and most straight-forward of the recent sections on the subject. It carries forward the substance of MCLA §§450.43c, 450.43d, with the simplified filing procedures of §106 hereof, and with provision (not now in Michigan law) for simultaneous amendment and restatement of the articles.

§707. Abandonment of amendment.

Prior to the effective date of an amendment of the articles of incorporation for which shareholder approval is required under the provisions of this act, such amendment may be abandoned pursuant to provisions therefor, if any, set forth in the resolution of the shareholders approving such amendment. If a certificate of amendment has been filed by the corporation, it shall file a certificate of abandonment within 10 days after such abandonment.

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SOURCE: NJSA §14A:9-6, first sentence. This section, apparently unique to New Jersey, permits an amendment to provide for its abandonment at the discretion of the board. Since the effective date is determined by § 106, this section gives the board some leeway to abandon the amendment where--for example--complex negotiations (e.g., in C-type reorganizations) leading to the amendment fall through. New Jersey's section provides an added thirty-day period for delayed effective date, which is included in §106 of this revision. Added to this section is a requirement to file a certificate of abandonment when a certificate of amendment has previously been filed.

Chapter 8: Corporate Combinations and Dispositions

§ 801. Merger or consolidation of domestic corporations.

(a) Any two or more domestic corporations may merge into one of such corporations or consolidate into a new corporation pursuant to a plan of merger or consolidation approved in the manner provided by this act.

(b) The board of each corporation proposing to participate in a merger or consolidation shall adopt a plan of merger or consolidation, setting forth:

(1) The name of each constituent corporation and the name of the surviving or consolidated corporation.

(2) As to each constituent corporation, the designation and number of outstanding shares of each class and series, specifying the classes and series entitled to vote and further specifying each class and series, if any, entitled to vote as a class; and, if the number of any such shares is subject to change prior to the effective date of the merger or consolidation, the manner in which such change may occur.

(3) The terms and conditions of the proposed merger or consolidation, including the manner and basis of converting the shares of each constituent corporation into shares, bonds or other securities of the surviving or consolidated corporation,

or into cash or other consideration, which may include shares, bonds, rights or other property or securities of a corporation whether or not a party to the merger, or into any combination thereof.

(4) In case of merger, a statement of any amendments to the articles of incorporation of the surviving corporation to be effected by such merger; in case of consolidation, all statements required to be included in articles of incorporation formed under this act.

(5) Such other provisions with respect to the proposed merger or consolidation as the board considers necessary or desirable.

* * * * * * * * *

SOURCE: Derived from NYBCL §§ 901, 902, with § 901 thereof (power of merger or consolidation) summarized as (a) of the proposed section. (b)(3) adds a provision that other consideration may consist of property, securities or obligations of a corporation not a party to the merger or consolidation. This provision, derived from NJSA § 14A:10-1, will be useful to corporations wishing to issue shares or securities of parent or subsidiary corporations in mergers. The permissible consideration under this section would, of course, include fractional shares.

Substantively, this section follows the Model Act (§§ 71, 72 (1969 rev.)), but it avoids separate sections for merger and consolidation; the latter approach, rarely used today, is treated as a merger in all current statutes. Delaware's statute (Del. § 251) also treats the two together, and is substantively similar to the proposed language, but is less specific

on the provisions of the merger plan; in particular, it makes no requirement that the plan disclose who may vote on the merger. New Jersey's provisions separate merger and consolidation, with substantive and disclosure provisions similar to Delaware. (NJSA §§ 14A:10-1, 14A:10-2).

Present Michigan law (MCLA § 450.52) does not detail the provisions of the plan of merger or consolidation: the two are treated together. A 1969 amendment eliminated the apparent requirement that the consideration be shares of the surviving corporation, with no provision for cash or other consideration.

§ 802. Approval by shareholders.

(a) The plan of merger or consolidation adopted by the board of each constituent corporation shall be submitted for approval at a meeting of its shareholders. Notice of such meeting shall be given to each shareholder of record, whether or not entitled to vote at such meeting, not less than 20 days before such meeting, in the manner provided in this act for the giving of notice of meetings of shareholders. Such notice shall include, or shall be accompanied by

(1) A copy or summary of the plan or merger or consolidation, as the case may be; and

(2) A statement informing shareholders who, under section 809 of this act, are entitled to dissent, that they have the right to dissent and to be paid the fair value of their shares by complying with the procedures set forth in section 810.

(b) At each such meeting, a vote of the shareholders shall be taken on the proposed plan of merger or consolidation. The plan shall be approved upon receiving the affirmative vote of a majority of the outstanding shares of the corporation entitled to vote thereon, and, in addition, if any class or series is entitled to vote thereon as a class, the affirmative vote of a majority of the outstanding shares of each such class or series. Any class or series of shares of any such corporation shall be

entitled to vote as a class if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to the articles of incorporation, would entitle such class or series of shares to vote as a class.

(c) Notwithstanding the requirements of (a) and (b), unless required by its articles of incorporation, no vote of shareholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if

(1) The plan of merger does not amend in any respect the articles of incorporation of such constituent corporation;

(2) Each share of stock of such constituent corporation outstanding immediately prior to the merger becoming effective shall remain as an identical share of the surviving corporation; and

(3) Either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued under such plan do not exceed 20 per cent of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger.

SOURCE: (a) and (b) are NJSA § 14A:10-3, with editorial revisions and changes as indicated below. Note that the proposed section follows recent trends in requiring a majority vote for major corporate changes, and in requiring a class vote only where the merger terms would require class vote if cast in the form of an amendment. In this respect, the section works a significant substantive change on MCLA § 450.52, which mandates a 2/3 class vote. The 1969 revision of the Model Act (§ 73) now similarly adopts a majority vote, as does Delaware.

One provision of the New Jersey approach on vote was rejected: the New Jersey section requires the majority only of those shares actually voting. In this respect it is unique: the Model Act, Delaware (§ 251), and all other major jurisdictions, require an absolute majority of voting shares. New Jersey offers no explanation for this watering-down of shareholder rights, and it is not included in this revision.

Of course, the voting requirements of this section may be increased, pursuant to section 513 of the revision. No cross reference to that section should be necessary within the proposed section 802.

(c) is Del. Corp. law § 251(f)(1970 revision), which provides for mergers in some situations without a shareholders vote of the surviving corporation. The purpose of this new provision is to make the statutory merger, at least under some circumstances, as simple a procedure as the sale-of-assets merger (the "C Reorganization" of § 368(a)(1)(C) of the Internal Revenue Code of 1954).

§ 803. Certificate of merger or consolidation.

(a) After approval of the plan of merger or consolidation, a certificate of merger or a certificate of consolidation, as the case may be, shall be executed and filed on behalf of each corporation. The certificate shall set forth:

(1) the plan of merger or the plan of consolidation; and

(2) a statement that the plan of merger of consolidation has been adopted by the board and approved by the shareholders in accordance with section 801 and 802; or

(3) in the case of a merger governed by subsection 802(c), that the plan of merger was approved by the board of directors without any vote of shareholders of the surviving corporation.

(b) The certificate of merger or consolidation shall become effective in accordance with section 106.

* * * * * * * *

SOURCE: NJSA § 14A:10-4, except that New Jersey's provision for delayed effective date is deleted since it is covered by § 106 hereof. Filing is in accordance with procedures of § 106.

Existing Michigan law (MCLA § 450.52, second paragraph), provides a more cumbersome filing process, and includes provision for delaying the effective date up to 31 days after the date of filing, pursuant to agreement.

§ 804. Merger of subsidiary corporation.

(a) Any domestic corporation owning at least 90% of the outstanding shares of each class of another domestic corporation or corporations may merge such other corporation or corporations into itself, or may merge itself, or itself and any such subsidiary corporation or corporations, into any such subsidiary corporation, without approval of the shareholders of any of the corporations, except as provided in subsections (e) and (f) of this section. The board of the parent corporation shall approve a plan of merger setting forth those matters required to be set forth in plans of merger under section 801. Approval by the board of any such subsidiary corporation shall not be required.

(b) If the parent corporation owns less than 100% of the outstanding shares of each subsidiary corporation, it shall mail to each minority shareholder of record of each subsidiary corporation, unless waived in writing, a copy or summary of the plan of merger. The parent corporation shall also mail to each shareholder who, under section 809 of this act is entitled to dissent, a statement informing such shareholder that he has the right to dissent and to be paid the fair value of his shares by complying with the procedures of section 810.

(c) A certificate of merger shall be executed and filed on behalf of the parent corporation. The certificate shall set forth:

(1) The plan of merger;

(2) The number of outstanding shares of each class of each subsidiary corporation which is a party to the merger and the number of such shares of each class owned by the parent corporation; and

(3) If the parent corporation owns less than 100% of the outstanding shares of each subsidiary corporation, the date of the mailing of a copy or a summary of the plan of merger to minority shareholders of each subsidiary corporation; or if all such shareholders have waived such mailing in writing, a statement that such waiver has been obtained.

(d) The merger shall become effective in accordance with section 106.

(e) Approval of the shareholders of any such subsidiary corporation shall be obtained pursuant to its articles of incorporation, if such articles require approval of a merger by the affirmative vote of the holders of more than the percentage of the shares of any class or series of such corporation then owned by the parent corporation.

(f) Approval of the shareholders of the parent corporation shall be obtained:

(1) whenever its articles of incorporation require shareholder approval of such a merger; or

(2) pursuant to section 802 where

(i) the plan of merger contains a provision which would amend any part of the articles of incorporation of the parent corporation into which a subsidiary corporation is being merged, unless such amendment is one that can be made by the board without shareholder approval, or

(ii) a subsidiary corporation is to be the surviving corporation.

(g) The grant of the power to merge under this section shall not preclude the effectuation of any merger as elsewhere provided in this act.

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SOURCE: NJSA § 14A:10-5, except that New Jersey's requirement of ownership of 90% of each series of each class is deleted as too onerous. The 90% short-merger is emerging as the majority rule: it has now been adopted by the Model Act (§ 75 of the 1969 revision), and was initiated by Delaware (§ 253). The proposed section, like Delaware's, also allows short-form downhill mergers into subsidiary corporations. The section is more complete than Delaware's in that it authorizes complex downhill mergers with more than two corporations. In addition, it more clearly spells out situations where shareholder approval will be required.

Filing is in accordance with section 106 of the revision.

This section is entirely new to Michigan law.

§ 805. Effect of merger or consolidation.

When the merger or consolidation has been effected:

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

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

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

(d) The surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, of a public as well as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed

to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger of consolidation.

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

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

* * * * * * * *

SOURCE: MBCA § 76 (1969 revision). This language has been adopted verbatim or with minor nonsubstantive changes

in most recent revision. The Delaware sections, with the same substantive effect, are carry-overs from an earlier statute, and require three sections to cover the substance of this one. (Del.Corp. Law §§ 259-261).

Existing Michigan Law is substantively identical, but not as complete in its covereage: MCLA §§ 450.55.

§ 806. Merger or consolidation of domestic and foreign corporations.

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

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

(2) If the surviving or new corporation, as the case may be, is to be governed by the laws of any jurisdiction other than this state, it shall comply with the provisions of this act with respect to foreign corporations if it is to transact business in this state, and it shall be liable, and be subject to service of process in any proceeding in this state, for the enforcement of any obligation of any domestic corporation which is a party to such merger or consolidation, and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such domestic corporation against the surviving or new corporation.

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

(c) One or more foreign corporations and one or more domestic corporations may be merged in the manner provided in section 804 if such merger is permitted by the laws of the jurisdiction of incorporation of such foreign corporation, provided that, if the parent corporation is a foreign corporation, it shall, notwithstanding the provisions of the laws of its jurisdiction of incorporation, comply with the provisions of subsection 804(b) with respect to notice to shareholders of any domestic subsidiary corporation which is a party to the merger.

(d) The provisions of subsection 802(c) shall apply to a merger in which the surviving corporation is a domestic corporation.

(e) Within 30 days after the effective date of a merger or consolidation under this section, the surviving corporation shall file its certificate that the merger or consolidation has become effective under the laws of the jurisdiction of the foreign corporation which was a party to the merger or consolidation.

SOURCE: (a) and (b) are MBCA § 77, except that the language is clarified to permit merger with foreign corporations incorporated outside the United States, as provided by the New Jersey revision (NJSA § 14A:10-7); in this respect, the section goes further than Delaware's § 258, which is otherwise substantively identical. Subsection (a)(2) is modified to provide substantively for continued liability and service of process within this state with respect to obligations of a domestic corporation which is a party to the merger; this avoids the need for the Model Act's required agreements and designations. The choice of law in (b) is also changed to make foreign law govern if the foreign corporation survives.

Added to the Model Act language are subsections (c) and (d) from NJSA § 14A:10-7, which clarify the fact that short-merger provisions are available in domestic-foreign mergers if permitted by the laws of the foreign corporation's incorporation jurisdiction, and which allow merger in some cases without a vote of the surviving corporation's shareholders.

Existing Michigan law (MCLA § 450.52) provides for the merger of domestic and foreign corporations under the same procedures as merger of domestic corporations as to the Michigan corporations. By inference, the foreign corporation is to follow procedures prescribed by laws of its jurisdiction. The proposed section is clearer and, consistent with other sections in this chapter, is more easily complied with.

The additional subsection (e), which is original, assures notification to the administrator that the merger has become effective.

§ 807. Abandonment of merger or consolidation.

At any time prior to the effective date of the certificate of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. If a certificate of merger or consolidation has been filed by a corporation, such corporation shall file a certificate of abaondonment within 10 days after such abandonment, but not later than the proposed effective date.

* * * * * * * *

SOURCE: MCLA §§ 73,77. Second sentence from NJSA § 14A:10-8. This paragraph appears in two places in the Model Act (for domestic mergers, and for domestic-foreign mergers); it is included here in one separate section. A substantively identical provision appears as Del. Corp. Law § 251(d). Michigan includes no such provision in existing law.

§ 808. Sale or other disposition of assets.

(a) The sale, lease exchange, or other disposition of all, or substantially all, the property and assets of a corporation in the usual and regular course of its business as conducted by such corporation, and the mortgage or pledge of any or all property and assets of the corporation whether or not in the usual and regular course of business may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of cash or other property, including shares, bonds or other securities of any other corporation, domestic or foreign, as shall be authorized by its board of directors; and in any such case, unless otherwise provided in the articles of incorporation, no approval of the shareholders shall be required.

(b) A sale, lease, exchange, or other disposition of all, or substantially all, the property and assets, with or without the goodwill, of a corporation, if not in the usual and regular course of its business as conducted by such corporation, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of cash or other property, including shares, bonds or other securities of any other corporation, domestic or foreign, as may be authorized in the following manner:

(1) The board of directors shall approve a proposal for such sale, lease, exchange, or other disposition.

(2) The proposed transaction shall be submitted for approval at a meeting of shareholders. Notice of such meeting shall be given to each shareholder of record whether or not entitled to vote at such meeting, not less than 20 days before such meeting, in the manner provided in this act for the giving of notice of meetings of shareholders. Such notice shall include, or shall be accompanied by:

(i) a statement summarizing the principal terms of the proposed transaction or a copy of any documents containing the principal terms; and

(ii) a statement informing shareholders who, under section 809 of this act, are entitled to dissent, that they have the right to dissent and to be paid the fair value of their shares by complying with the procedures set forth in section 810.

(3) At such meeting the shareholders may authorize such sale, lease, exchange, 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. Such authorization shall require the affirmative vote of the holders of a majority of the outstanding shares of the corporation entitled to vote thereon, and, in addition, if

any class or series is entitled to vote thereon as a class, the affirmative vote of a majority of the outstanding shares of each such class or series.

(c) Notwithstanding authorization by the shareholders, the board, in its discretion, may abandon such sale, lease, exchange, or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders.

* * * * * * * *

SOURCE: (a) is MBCA § 78 (1969 revision), with the addition of the phrase "business as conducted by such corporation," to clarify the fact that ordinary course of business refers to actual business rather than merely authorized acts of the corporation.

(b) and (c) are MBCA § 79 (1969 revision), with editorial revisions, the same change as noted in (a), and the added requirement (taken from NJSA § 14A:10-10) that shareholders be informed of their right to dissent.

As proposed, the section is substantively similar to Del. Corp. Law §§ 271, 272, except that Delaware, unlike most jurisdictions, has historically afforded no appraisal remedy upon sale of assets.

Existing Michigan law (MCLA §§ 450.57, 450.57a) applies the same rules as the proposed section, except that a class vote is mandatory in all cases.

Note that though the proposed language is widely adopted, several interpretive issues remain open for the courts: --the scope of the usual course of business; and
--the meaning of "all or substantially all of its assets."

COMMENT: The sale of assets technique has become a favorite choice of corporate planners in effecting a merger. The sale (by the disappearing corporation, in return for assets of the surviving corporation) is promptly followed by dissolution of the selling corporation. The results, of course, are similar to those of a statutory merger.

A principal difference between sale of assets and statutory merger is that the surviving corporation (assuming it has adequate authorized shares) need never submit the effective merger to a vote of its shareholders. Some commentators and courts see potential for abuse in this situation, particularly where the putative "survivor" is actually the smaller corporation, which has been absorbed by the larger enterprise in a reverse purchase. The common law has developed a doctrine, accepted in several states, but resoundingly rejected in Delaware. The "de facto merger" doctrine would require that the formalities of a merger be complied with where the transaction has the effect of a merger or reverse merger. [See Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958) (reverse purchase); Rath v. Rath Packing Co., 136 N.W.2d 410 (Iowa 1965) (de factor merger); Heilbrunn v. Sun Chem. Corp., 38 Del. Ch. 321, 150 A.2d 755 (Sup. Ct. 1959) (rejecting de facto merger doctrine)].

Though the status of the doctrine is clear in Delaware, it is unclear in most other jurisdictions, having been accepted in greater or lesser degree wherever litigated. It is the intention of the Commission to adopt the Delaware view, rejecting the "de facto merger" doctrine.

§ 809. Right of shareholders to dissent.

(a) Except as provided in subsection (b) hereof any shareholder of a domestic corporation shall have the right to dissent from any of the following corporate actions:

(1) Any plan of merger or consolidation to which the corporation is a party, other than a plan pursuant to which shareholders receive cash, bonds, or shares, or any combination thereof, provided that such shares satisfy the requirements of subsection (b) of this section;

(2) Any sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation not in the usual or regular course of business as conducted by such corporation, other than:

(i) a transaction pursuant to a plan of dissolution of the corporation which provides for distribution of substantially all of its net assets to shareholders in accordance with their respective interests within one year after the date of such transaction, where such transaction is for cash, bonds or shares, or any combination thereof, provided that such shares satisfy the requirements of subsection (b) of this section.

(ii) a sale pursuant to an order of a court having jurisdiction;

(3) Any amendment of the articles of incorporation giving rise to a right to dissent pursuant to section 704.

(b) Unless otherwise provided in the articles of incorporation, a shareholder shall not have the right to dissent with respect to any of the corporate actions specified in subsection (a) of this section, with respect to shares which are listed on a national securities exchange or are held of record by not less than 2,000 persons on the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting of shareholders at which the corporate action is to be acted upon.

(c) A shareholder may not dissent as to less than all of the shares owned beneficially by him and with respect to which a right of dissent exists. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner with respect to which the right of dissent exists.

(d) A shareholder of a surviving corporation to a merger shall not have the right to dissent from a plan of merger, if the merger did not require for its approval the vote of such shareholder pursuant to section 802(c) of this act.

SOURCE: Original. Derived from Del. Corp. Law § 262 and NJSA § 14A:11-1. The proposed section cuts back significantly on the availability of the appraisal remedy under MCLA §§ 450.44, 450.54, consistent with recent thinking in this area as noted below.

The operation of the proposed section is such that appraisal is given only where it is necessary to protect the shareholder; and it is denied where its use would be as a weapon to thwart an otherwise validly approved corporate transaction. It has long been thought by commentators that the appraisal remedy is expensive and unwieldy, and that it is frequently unnecessary. For the shareholder who can dispose of his shares on the market, appraisal is unnecessary. Yet a large block of such shareholders demanding appraisal can threaten a substantial cash drain on the corporation and jeopardize a proposed merger.

These considerations led the Delaware draftsmen to eliminate appraisal where the affected shares are listed on a national exchange or held of record by 2,000 or more shareholders (Del. § 262(k)). Revisers of the Model Act obviously felt that the 2,000 shareholder-ownership did not provide an adequate market, and they eliminated appraisal only with respect to shares listed on a national exchange (MBCA § 80 (1969 revision)). New Jersey followed a middle course, eliminating appraisal for listed shares and for those regularly traded over the counter. (NJSA § 14A:11-1). The Delaware approach is adopted here.

The proposed section, however, goes well beyond Del. § 262(k) in eliminating appraisal whenever the consideration <u>received</u> consists of cash, bonds or shares which satisfy subsection (b). Thus, while Delaware would eliminate appraisal in a merger only if the shares surrendered <u>and</u> those received had a public market, the proposed section eliminates appraisal if <u>either</u> the shares surrendered or any shares received have a public market. This additional Delaware requirement is not essential, since a shareholder unhappy with the proposed merger is always free to sell his stock, since the appraisal exclusion operates only where there is presumably an adequate market. If the value of his stock has been lessened by the merger, that risk is no greater than the risk attendant to any major corporate

decision which is approved by a majority of the shareholders. Furthermore, no action of the majority is binding on a shareholder who can demonstrate in a court action that the terms of the merger are unfair.

Existing Michigan law grants appraisal across the board for mergers and sales of assets: MCLA §§ 450.44, 450.54. This section is therefore a major liberalization.

REPORTER'S DISSENTS: (1) Delaware's § 262(k)(1969 rev.) is based on the sound premise that the existence of a fair market for disposition of shares precludes the need for an appraisal remedy. That section therefore assumes not only that the shareholder's shares have such a market, but that the consideration he is to receive for his shares has such a market. Elimination of this second requirement in the proposed section would allow a plan offering essentially unmarketable securities to be free of an appraisal remedy. Such a result is theoretically unsupportable and unfair as well.

(2) Further, appraisal protects against not only lack of a market, but also against drastic market declines occasioned by announcement of a reorganization plan. Thus, under all appraisal statutes, value changes occasioned by announcement of the plan are eliminated in arriving at appraised value.

Under the Delaware approach as here proposed, if an announced merger causes a significant decline in the price of listed shares, the objecting owner would have only one choice: to seek an injunction. Injunctions are rarely granted in reorganization cases--and a statute giving the courts reason to grant them more readily should be viewed as highly objectionable.

This defect could be remedied in the proposed language by eliminating appraisal only if the stock price does not drop to less than some stated percentage (e.g., 75%) of its price on the record date for voting on the plan, by the time appraisal rights must be elected under the statute.

The virtue of this approach is that it would grant appraisal in the two situations where it is necessary: (1) where there is no market for the shares; and (2) where the market is significantly adversely affected by announcement of the reorganization plan.

§ 810. Procedure to enforce dissenting shareholder's right to receive payment for shares.

(a) A dissenting shareholder intending to enforce his right under this act to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation, before the meeting of shareholders at which the action is submitted to a vote, or at such meeting but before the vote, written objection to the action. The objection shall include a statement that he intends to demand payment for his shares if the action is taken. Such objection is not required from any shareholder to whom the corporation did not give notice of such meeting in accordance with this chapter or where the proposed action is authorized by written consent of shareholders without a meeting.

(b) Within ten days after the shareholders' authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite shareholders, the corporation shall give written notice of such authorization or consent by certified or registered mail to each shareholder who filed written objection or from whom written objection was not required, excepting any who voted for or consented in writing to the proposed action.

(c) Within twenty days after the mailing of notice to him, any shareholder to whom the corporation was required to give such notice and who elects to dissent shall file with the corporation a written notice of such election, stating his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares. Any shareholder who elects to dissent from a merger under section 804 or paragraph (c) of section 806 shall file a written notice of such election to dissent within twenty days after the mailing to him of a copy of the plan of merger or a summary of the plan as provided under section 804.

(d) Upon filing a notice of election to dissent, the shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section. A notice of election may be withdrawn only with the written consent of the corporation. If a notice of election is withdrawn, or the proposed corporate action is abandoned or rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenter's rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the filing of his notice of election, including any intervening dividend or other distribution or, if any such rights have expired or any

such dividend or distribution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion, but without prejudice otherwise to any corporate proceedings that may have been taken in the interim.

(e) No later than ten days after the consummation of such corporate action, the corporation, or, in the case of a merger or consolidation, the surviving or new corporation, shall give written notice thereof to each dissenting shareholder who has made demand as herein provided, and shall make a written offer to each such shareholder to pay for such shares at a specified price deemed by such corporation to be the fair value thereof. If within thirty days after the making of such offer, the corporation making the offer and any shareholder agree upon the price to be paid for his shares, payment therefor shall be made within sixty days after the consummation of the proposed corporate action, upon the surrender of the certificates representing such shares.

(f) The following procedure shall apply if the corporation fails to make such offer within such period of ten days, or if it makes the offer and any dissenting shareholder fails to agree upon the price to be paid for his shares within the period of thirty days thereafter:

(1) The corporation shall, within twenty days after the expiration of such period, file an action in the circuit court

of the county in which the registered office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without a registered office in this state, such action shall be brought in the county where the registered office of the domestic corporation, whose shares are to be valued, was located.

(2) If the corporation fails to file such action within such period of twenty days, any dissenting shareholder may file such action for the same purpose not later than thirty days after the expiration of such twenty-day period or within thirty days after he is notified by mail of the consummation of such transaction, whichever is later. If such action is not filed within such thirty-day period, all dissenter's rights hereunder shall be terminated.

(3) All dissenting shareholders, excepting those who, as provided in paragraph (e), have agreed with the corporation upon the price to be paid for their shares, shall be made parties to such action, which shall have the effect of an action in rem against their shares.

(4) The court shall determine whether each dissenting shareholder,,as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date, excluding any appreciation or depreciation directly or indirectly induced by such corporate action or its proposal.

(5) The final order in the action shall determine the value of the shares of each dissenting shareholder and require the corporation to pay such sum to the dissenting shareholders.

(6) The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the shareholders' authorization date to the date of payment.

(7) The costs and expenses of such proceeding shall be determined by the court and shall be assessed against the corporation, except that all or any part of such costs and expenses may be apportioned and assessed, as the

court may determine, against any or all of the dissenting shareholders who are parties to the proceeding if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith. Such expenses shall include reasonable compensation for and the reasonable expenses of the appraiser, but shall exclude the fees and expenses of counsel for and experts employed by any party unless the court, in its discretion, awards such fees and expenses. In exercising such discretion as to payment of the attorney fees of the dissenting shareholders, the court shall consider any of the following: (A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer was made by the corporation; and (C) that the corporation failed to institute the special proceeding within the period specified therefor.

(8) Within sixty days after final determination of the proceeding, the corporation shall pay to each dissenting shareholder the amount found to be due him, upon surrender of the certificates representing his shares.

(g) Shares acquired by the corporation upon the payment of the agreed value therefor or of the amount due under the final order, as provided in this section, shall become treasury shares or be

cancelled as provided in section 418 (Reacquired 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.

(h) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (d), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

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SOURCE: From NYBCL § 623, considerably edited, with some language from MBCA § 81 (1969 rev.) Substantive procedures of appraisal statutes vary little from jurisdiction to jurisdiction. New York's statute is quite complete and detailed, and summarizes the procedure in a single section. By contrast, the Model Act section (MBCA § 81 (1969 revision)) is lacking in some detail, as is the Delaware section (Del. Corp. Law § 262--which is also peculiarly tied to Delaware court procedure. New Jersey takes ten sections to express the effects of the proposed one (NJSA §§ 14A:11-2 to 14A:11-11).

Existing Michigan Law (MCLA §§ 450.44, 450.54) is substantively the same as the proposed section, though also not as detailed; except that the proposed section allows a dissenting shareholder to withdraw his demand at any time until the corporation makes an offer of the fair value of his shares.

Chapter 9: Dissolution

§901. Methods of dissolution.

(a) A corporation may be dissolved in any of the following ways:

(1) automatically by expiration of any period of duration to which the corporation is limited by its articles of incorporation;

(2) by action of the incorporators or directors pursuant to section 902;

(3) by action of the board and the shareholders pursuant to section 903;

(4) by action of a shareholder or shareholders pursuant to section 904;

(5) by a judgment of the circuit court in an action brought pursuant to this act or otherwise; or

(6) automatically, pursuant to the provisions of section 1002, for failure to file an annual report or pay the privilege fee.

(b) Any corporation whose assets had been wholly disposed of under court order in receivership or bankruptcy proceedings may be summarily dissolved by order of the court having jurisdiction of such proceedings; a copy of such order shall be filed by the clerk of such court with the Administrator.

SOURCE: NJSA § 14A:12-1, derived from N.Car. B.C.L. § 55-114(a). (b) is from MCLA §450.65. This section is essentially a catalog of dissolution methods. It serves the same function as MCLA §450.65, though it is more complete.

§902. Dissolution before commencement of business.

(a) A corporation may be dissolved by action of its incorporators or directors, provided that the corporation

(1) has not commenced business;

(2) has not issued any shares;

(3) has no debts or other liabilities; and

(4) has received no payments on subscriptions for its shares, or, if it has received such payments, has returned them to those entitled thereto, less any part thereof disbursed for expenses.

(b) The dissolution of such a corporation shall be effected in the following manner: a majority of the incorporators or directors, shall execute and file a certificate of dissolution stating:

(1) the name of the corporation;

(2) that the corporation has not commenced business and has issued no shares, and has no debts or other liabilities;

(3) that the corporation has received no payments on subscriptions to its shares, or, if it has received such payments, that it has returned them to those entitled thereto, less any part thereof disbursed for expenses; and

(4) that a majority of the incorporators or directors have elected that the corporation be dissolved.

SOURCE: NJSA § 14A:12-2, edited. Similar to the Model Act section (§ 82, 1969 revision). MCLA § 450.66 remains substantively unchanged, but with clarified procedures.

§903. Dissolution pursuant to action of board and shareholders.

(a) A corporation may be dissolved by action of its board and shareholders as provided in this section.

(b) The board of directors shall adopt a resolution that the corporation be dissolved.

(c) The proposed dissolution shall be submitted for approval at a meeting of shareholders. Notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this act for the giving of notice of meetings of shareholders, and shall state that the purpose, or one of the purposes, of such meeting is to vote on the dissolution of the corporation.

(d) At such meeting a vote of shareholders shall be taken on the proposed dissolution. The dissolution shall be adopted upon receiving the affirmative vote of the holders of a majority of the outstanding shares of the corporation entitled to vote thereon, and, in addition, if any class or series is entitled to vote thereon as a class, the affirmative vote of a majority of the outstanding shares of each such class or series.

(e) If dissolution is approved as provided in this section, a certificate of dissolution shall be executed and filed on behalf of the corporation, setting forth:

(1) the name of the corporation;

(2) the date and place of the meeting of shareholders approving the dissolution; and

(3) a statement that dissolution was approved by the requisite vote of directors and shareholders.

* * * * * * * *

SOURCE: Derived from MBCA §84 (1969 revision), except that the Model Act's complex procedure of filing notice of intention to dissolve, followed by filing of articles of dissolution, is replaced by the simpler procedure of simply filing a certificate of dissolution. Subsection (e) is NJSA § 14A:12-4(6) simplified in accordance with Del. Corp. Law § 275. Existing MCLA § 450.67 requires a 2/3 shareholder vote, and MCLA § 450.73 provides an alternative dissolution of solvent corporations by a 3/4 vote.

A number of state statutes and the Model Act provide specifically for dissolution by 100% shareholder vote without a meeting and without board action. Such a section seems unnecessary, since proposed § 503 of the revision allows shareholder action without a meeting, and the elimination of board action where 100% shareholder accord is achieved is merely a formality.

§904. Dissolution pursuant to provision in articles of incorporation.

The articles of incorporation may contain a provision that any shareholder, or the holders of any specified number or proportion of shares, or of any specified number or proportion of shares of any class or series thereof, may require the dissolution of the corporation at will or upon the occurrence of a specified event. If the articles of incorporation contain such a provision, dissolution of the corporation may be effected by the filing of a certificate of dissolution executed and filed on behalf of the corporation when authorized by a holder or holders of the number or proportion of shares specified in such provision, given in such manner as may be specified therein, or if no manner is specified therein, when authorized on written consent signed by such holder or holders. The certificate of dissolution shall state (1) the name of the corporation, and (2) that the corporation is dissolved pursuant to a designated provision in the articles of incorporation.

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SOURCE: NYBCL § 1002; NJSA 14A:12-5, paragraph (a) only. This section contains unique provisions allowing for dissolution on terms set in the articles of incorporation. Its particular value is in permitting consent dissolution on deadlock or other eventuality in the case of a close corporation. Michigan has no such provision. Delaware has a similar provision limited only to close corporations: Del Corp. Law § 335.

Provisions in the New York, New Jersey and Delaware sections requiring unanimous vote to establish the procedures of this section, and requiring notice on each share certificate of the existence of such procedures, are deleted as unwarranted. This section, though useful, is not likely to be widely used: if it is to have any significant value, it should not be encumbered by such procedural restrictions.

REPORTER'S DISSENT: The three states that have adopted this unique--and highly useful--section have all required unanimous shareholder approval for its inclusion in the articles of incorporation, and have all required notice on the share certificates of its application. Since this section drastically changes the usual rules of corporate continuity and dissolution, these safeguards are absolutely essential. No corporate statute provides these procedures without the safeguards attached to them.

§905. Effective time of dissolution.

A corporation is dissolved:

(a) when the period of duration stated in the corporation's articles of incorporation expires;

(b) when a certificate of dissolution is filed pursuant to sections 902, 903, or 904;

(c) when a judgment of forfeiture of corporate franchises or of dissolution is entered by a court of competent jurisdiction; or

(d) as provided in section 1002 for failure to file an annual report or pay a privilege fee.

* * * * * * * *

SOURCE: NJSA § 14A:12-8, except that the New Jersey provision for dissolution by proclamation of the Governor is deleted.

This section works a substantive change on existing Michigan law, which now provides (MCLA § 450.72) that dissolution is effective upon final payment and distribution of remaining proceeds. As noted under § 906, below, a substantive change is also effected with respect to the status of the directors of a corporation in dissolution.

§906. Effect of dissolution.

(a) Except as a court may otherwise direct, a dissolved corporation shall continue its corporate existence but shall carry on no business except for the purpose of winding up its affairs by:

(1) collecting its assets;

(2) selling or otherwise transferring, with or without security, such of its assets as are not to be distributed in kind to its shareholders;

(3) paying its debts and other liabilities; and

(4) doing all other acts incident to liquidation of its business and affairs.

(b) Subject to the provisions of subsection (a) of this section, and except as otherwise provided by court order, the corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred. In particular, and without limiting the generality of the foregoing:

(1) the directors of the corporation shall not be deemed to be trustees of its assets and shall be held to no greater standard of conduct than that prescribed by section 613;

(2) title to the corporation's assets shall remain in the corporation until transferred by it in the corporate name;

(3) the dissolution shall not change quorum or voting requirements for the board or shareholders, nor shall it alter provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws;

(4) shares may be transferred;

(5) the corporation may sue and be sued in its corporate name and process may issue by and against the corporation in the same manner as if dissolution had not occurred; and

(6) no action brought against the corporation prior to its dissolution shall abate by reason of such dissolution.

(c) A copy of any judicial order of dissolution shall be forwarded promptly to the Administrator by the receiver or other person designated by the court.

SOURCE: (a) and (b) are NJSA § 14A:12-9, with minor editorial changes, except that paragraph (3) of the New Jersey section (providing that sale of corporate assets will proceed under the same rules as though dissolution had not taken place) is deleted, on the basis that the dissolution vote is a decision to authorize all sales, whether or not in the ordinary course of business. (c) is original.

This section reflects a major substantive change from existing Michigan law. MCLA § 450.74a now provides that upon dissolution, the directors of a corporation become trustees of the assets. This approach has lost ground in recent revisions, and liberal jurisdictions (with Delaware as an apparent exception--see Del. § 279, which allows appointment of directors as receivers on petition of shareholders or creditors) now generally provide for continuation of the directors in office until liquidation and winding up are completed. Purely as a practical matter, this approach seems desirable, and there appears little reason to change the management structure and liabilities during the liquidation period.

Note, also, that the proposed section does not carry forward the limitation of three years of continuation as a body corporate, now contained in MCLA § 450.75.

Of course, the proposed section contemplates, in (b), that the court may alter its provisions. Thus, in some dissolution situations, receivers will be appointed and the management of the corporation changed or retired.

§907. Revocation of voluntary dissolution proceedings; renewal of corporate existence.

(a) Dissolution proceedings commenced pursuant to sections 903 or 904 may be revoked at any time prior to complete distribution of assets, provided that no proceeding pursuant to section 909 is pending, by filing a certificate of revocation signed, in person or by proxy, by all of the shareholders, stating that revocation is effective pursuant to this subsection and that all the shareholders of the corporation have signed the certificate in person or by proxy.

(b) Dissolution proceedings commenced pursuant to section 903 may also be revoked at any time prior to complete distribution of assets, provided that no proceeding pursuant to section 909 is pending, in the following manner:

(1) the board of directors shall adopt a resolution that the dissolution be revoked. The proposed revocation shall be submitted for approval at a meeting of shareholders. In connection with such meeting, the shareholders shall be given the same notice, and the revocation shall be approved by the same vote, as that required by section 903 for the approval of dissolution.

(2) a certificate of revocation, stating

(i) that dissolution is revoked pursuant to this subsection, and

(ii) the information required by subsection 903(e) shall be executed and filed on behalf of the corporation.

(c) A corporation whose term has expired may renew its corporate existence, provided that no proceeding pursuant to section 909 is pending, in the following manner:

(1) The board of directors shall adopt a resolution that the corporate existence be renewed. The proposed renewal shall be submitted for approval at a meeting of shareholders. Notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this act for the giving of notice of meetings of shareholders, and shall state that the purpose, or one of the purposes, of such meeting is to vote on the renewal of the corporate existence.

(2) At such meeting a vote of shareholders entitled to vote thereat shall be taken on the proposed renewal. Such proposed renewal shall be adopted upon receiving the affirmative vote of the holders of a majority of the outstanding shares of the corporation and, in addition, if any class or series is entitled to vote

thereon as a class, the affirmative vote of a majority of the outstanding shares of each such class or series.

(3) If renewal of the corporate existence is approved as provided in this subsection, a certificate of renewal shall be executed and filed on behalf of the corporation, setting forth:

(i) the name of the corporation;

(ii) the date and place of the meeting of shareholders approving the renewal of existence; and

(iii) a statement that renewal was approved by the requisite vote of directors and shareholders.

(d) Upon filing of the certificate of revocation of dissolution or of renewal of existence, as the case may be, the revocation of the dissolution proceedings or the renewal of the corporate existence shall become effective, and the corporation may again carry on its business.

(e) Revocation of dissolution or renewal of corporate existence, as the case may be, shall not relieve the corporation of any penalties or liabilities that may have accrued against it under any law of this state.

(f) In the event that during the period of expiration of term, or dissolution, the corporate name or a confusingly similar name has been assigned to another corporation, the Administrator may require that the corporation adopt a different name upon filing of a certificate of revocation of dissolution or of renewal of existence.

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SOURCE: (a) and (b) are drawn from the drafting of NJSA § 14A:12-10, but the substance of the section is from MBCA §§ 88-91 (1969 revision). In particular, New Jersey's unique limitations that no assets may be distributed prior to revocation, and the revocation may occur only within 60 days of dissolution, are deleted. There is no comparable provision in Michigan law. (c) (d) and (e) are drawn in substance from MCLA §§ 450.60, 450.61, with majority vote substituted for 4/5 vote, and with the existing time limit deleted. (f) is original.

§908. Notice to creditors; filing or barring claims.

(a) At any time after a corporation has been dissolved, the corporation, or a receiver appointed for the corporation pursuant to this chapter, shall give notice requiring all creditors to present their claims in writing. Such notice shall be published three times, once in each of three consecutive weeks, in a newspaper of general circulation in the county in which the registered office of the corporation is located and shall state that all persons who are creditors of the corporation shall file their claims in writing with the corporation or the receiver, as the case may be, at a place and on or before a date named in the notice, which date shall be not less than six months after the date of the first publication.

(b) On or before the date of first publication of the notice prescribed in subsection (a) of this section, the corporation, or the receiver, as the case may be, shall mail a copy of the notice to each known creditor of the corporation. The giving of such notice shall not constitute recognition that any person to whom such notice is directed is a creditor of the corporation other than for the purpose of receipt of notice hereunder.

(c) As used in this section, "creditor" means all persons to whom the corporation is indebted, and all other persons who

have claims or rights against the corporation, whether liquidated or unliquidated, matured or unmatured, direct or indirect, absolute or contingent, secured or unsecured.

(d) Except as provided elsewhere in this act, any creditor who does not file his claim as provided in the notice given pursuant to this section, and all those claiming through or under him, shall be forever barred from suing on such claim or otherwise realizing upon or enforcing it; except that this subsection: (i) shall not apply to claims which are in litigation on the date of the first publication of the notice pursuant to subsection (a) of this section; (ii) shall not preclude the enforcement of any lien, encumbrance or other security interest. A claim filed by the trustee or paying agent for the holders of bonds or coupons shall have the same effect if filed by the holder of any such bond or coupon.

(e) If the corporation, or the receiver of a corporation appointed pursuant to this chapter, rejects in whole or in part any claim filed by a creditor, the corporation or the receiver, as the case may be, shall mail notice of such rejection to the creditor. If the creditor does not bring suit upon such claim within 60 days from the time such notice was mailed to him, the creditor and all those claiming through or under him shall, except as otherwise provided in this chapter, be forever barred from suing on such claim or otherwise realizing upon or enforcing it.

SOURCE: NJSA §§ 14A:12-12 through 14A:12-14. Added to subsection (d) is language preserving security interests and allowing trustees to file claims for bondholders. The latter is from NYBCL §1007(b). The proposed section does not vary the substance of MCLA §§ 450.68, 450.69, except that it is clearer and more complete on notice, particularly as to disallowed claims. The corresponding Model Act section (MBCA § 87, 1969 revision), is deficient in not detailing the terms of the required notice.

§909. Jurisdiction of court to supervise liquidation.

(a) At any time after a corporation has been dissolved in any manner, a creditor, as defined in section 908, or a shareholder of the corporation, or the corporation itself, may apply to the circuit court for a judgment that the affairs of the corporation and the liquidation of its assets continue under the supervision of the court. The court shall make such orders and judgments as may be required, including, but not limited to, the continuance of the liquidation of the corporation's assets by its officers and directors under the supervision of the court, or the appointment of a receiver of the corporation to be vested with such powers as the court may designate to liquidate the affairs of the corporation.

(b) For good cause shown, and so long as the corporation has not made complete distribution of its assets, the circuit court may, in an action pending under subsection (a) of this section or otherwise, permit a creditor who has not filed his claim within the time limited by section 908, or who has not begun suit on a rejected claim within the time limited by section 908, to file such claim, or to bring such suit, within such time as the court shall direct.

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SOURCE: NJSA § 14A:12-15. This is the clearest and most specific section on jurisdiction of the court.

There is only a vague reference to court supervision in existing MCLA § 450.65: "If the proceedings are voluntary they may be conducted either out of court or subject to the supervision of the court."

§910. Distribution to shareholders.

Any assets remaining after payment of or provision for claims against the corporation shall be distributed among the shareholders according to their respective rights and interests. Distribution to the shareholders may be made either in cash or in kind, or both.

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SOURCE: NJSA § 14A:12-16. To the same effect are MCLA § 450.70 and Model Act § 87(b)(1969 revision).

§911. Attorney General's action for judicial dissolution.

(a) The Attorney General may bring an action in the circuit court for the dissolution of a corporation upon the ground that the corporation:

(1) has procured its organization through fraud;

(2) has repeatedly and wilfully exceeded the authority conferred upon it by law; or

(3) has repeatedly and wilfully conducted its business in an unlawful manner.

(b) The enumeration in this section of grounds for dissolution shall not exclude any other statutory or common law action by the Attorney General for the dissolution of a corporation or the revocation or forfeiture of its corporate franchises.

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SOURCE: NJSA § 14A:12-6 with the addition of "wilfully" to items (2) and (3). This section is derived from the Model Act § 94 (1969 revision), except that two grounds for action therein stated are deleted; failure to file annual report and pay franchise tax, and failure to appoint resident agent or notify state of change thereof. As to the first, chapter 10 of this revision provides for automatic dissolution without action for failure to pay taxes or to file the annual report. The need for dissolution in the second situation seems unclear, in view of the long-arm provisions of the Revised Judicature Act (see notes to § 211 of this revision). As to other powers of the Attorney General, see the Comment to § 108 of this revision. Existing Michigan law appears to have no provision comparable to the proposed § 911, although its equivalent in a common law quo warranto proceeding would undoubtedly be found by a court in an appropriate case.

§912. Action in case of deadlock.

A corporation may be dissolved by a judgment entered in an action brought in the circuit court by one or more directors or by one or more shareholders entitled to vote in an election of directors of the corporation, upon proof that:

(1) the directors of the corporation, or its shareholders if a provision in the corporation's articles of incorporation contemplated by section 514(b) is in effect, are unable to agree by the requisite vote on material matters respecting the management of the corporation's affairs; or

(2) the shareholders of the corporation are so divided in voting power that they have failed to elect successors to any of the directors whose terms have expired or would have expired upon the election and qualification of their successors; and

(3) as a result of the facts contemplated by subparagraphs (1) and (2), the corporation is unable to function effectively in the best interests of its creditors and stockholders.

* * * * * * * *

SOURCE: NJSA § 14A:12-7 with changes to clarify the section:

(1) revised to read "material matters".

(2) revised to read "elect successors to any of the directors."

(3) revised to read "function effectively."

These changes all liberalize the section.

New Jersey and the Model Act share the fact that they allow dissolution for deadlock on the petition of any shareholder or director. Since deadlock can be caused in a multi-party situation, the 50% requirement for petition of shareholders of New York's § 1104, or even the one-third requirement of California's § 4650(b), may prove inadequate. Model Act § 97 (1969 revision), which has been included in many recent revisions, limits dissolution on director-deadlock to situations where irreparable injury is threatened. The unfortunate judicial gloss on this language is that unless insolvency is imminent, the court will deny dissolution; see In re Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954). The proposed section negates this rule, and allows dissolution based on the interests of the parties despite solvent operations.

Note that the cross-reference to § 514(b) is to shareholder agreements restricting the discretion of directors.

As proposed, the revision thus affords several remedies for deadlock, including specific performance of agreements by the stockholders concerning dissolution (§ 904), and this section for judicial dissolution in the absence of an agreement.

§913. Action by shareholder for discretionary remedy against oppressive acts.

(a) The circuit court shall have full power to adjudge the dissolution of, and to liquidate the assets and business of, a corporation, in an action filed by a shareholder when it is established that the acts of the directors or those in control of the corporation are illegal, fraudulent, or wilfully unfair and oppressive to the corporation or to such shareholder.

(b) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in subsection (a) of this section, the circuit court upon establishment of such grounds may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate, including, without limitation, an order:

(1) cancelling or altering any provision contained in the articles of incorporation, or any amendment thereof, or in the by-laws of the corporation;

(2) cancelling, altering, or enjoining any resolution or other act of the corporation;

(3) directing or prohibiting any act of the corporation or of shareholders, directors, officers or other persons party to the action; or

(4) providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by the officers, directors or other shareholders responsible for the wrongful acts.

SOURCE: Derived from South Car. Code Ann. §§ 12-22.15(a)(4); 12-22.23 (Supp. 1968).

The purpose of the provision is to provide a remedy for oppressive acts of majority shareholders or directors. Dissolution as an available remedy, as provided in subsection (a) is widely provided in the United States: e.g., MBCA § 97(a)(2) and (a)(4), allowing dissolution where "the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent" and also when "the corporate assets are being misapplied or wasted". The problem with this approach is that it is unduly limited: dissolution may be too drastic a remedy. The alternative approaches of (b) are derived from section 210 of the English Companies Act and section 186 of the Uniform Australian Companies Act. Some favorable experience has developed in England and the Commonwealth countries with these provisions. See Afterman, Statutory Protection for Oppressed Minority Shareholders: A Model for Reform, 55 Va.L.Rev. 1043 (1969). The South Carolina statute, which is an improvement, has had no litigation to date.

Note that the alternative remedies of (b) are not mandatory. They simply afford the court greater flexibility in the oppression situation. It is unlikely, of course, that any such remedy would be imposed on a corporation whose shares are readily marketed, since the market itself would provide relief from oppression in almost any situation.

§914. Judicial reorganization of corporation.

(a) Any corporation for which a plan of reorganization has been confirmed by the judgment of a court of competent jurisdiction pursuant to the provisions of any applicable law of this state or of the United States shall have full power and authority to put into effect and carry out the plan without action by its directors or shareholders. Such power and authority may be exercised, and such proceedings and acts may be taken, as may be directed by such judgment by the receiver or trustee of such corporation appointed in the reorganization proceedings, or by any other person or persons designated by the court.

(b) Such corporation may, in the manner provided in paragraph (a) but without limiting the generality or effect of paragraph (a), alter, amend or repeal its bylaws; constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of, or in addition to all or some of the directors or officers then in office; amend its articles of incorporation, and make any change in its capital or capital stock, or any other amendment, change, or alteration, or provision, authorized by this act; be dissolved, transfer all or part of its assets, merge or consolidate as permitted by this act, in any of which cases,

however, no shareholder shall have any statutory right of a appraisal of his shares; change the location of its registered office and remove or appoint a resident agent; authorize and fix the terms, manner and conditions of the issuance of bonds, debentures or other obligations, whether or not convertible into shares of its capital stock of any class, or bearing warrants or other evidences of optional rights to purchase or subscribe for shares of its capital stock of any class; or lease its property and franchises.

(c) Any certificate or other document required or permitted by law to be filed or recorded to accomplish any corporate purpose, sought to be accomplished pursuant to the plan of reorganization, shall be made, executed and acknowledged, as may be directed by such judgment by the persons designated in paragraph (a) of this section, and shall certify that provision for the making of such certificate, or other document, is contained in the plan of reorganization or in a judgment of a court having jurisdiction of the proceeding, under such applicable statute of this state or of the United States for the reorganization of such corporation, and that the plan has been confirmed, as provided by such applicable statute, with the title and venue of the proceeding and the date of the judgment confirming the plan. Such certificate or other document shall be filed as provided in section 106 and upon such filing

shall thereupon become effective in accordance with the terms thereof and the provisions of this section.

(d) If after the filing of any certificate or other document as provided in this section the order of confirmation of the plan of reorganization is reversed or vacated or such plan is modified, such other or further certificates or documents shall be filed as may be required to conform to the plan of reorganization as finally confirmed or to the judgment of the court.

(e) Irrespective of any other provisions of this act, such corporation may issue its shares of capital stock and its bonds for the consideration specified in the plan of reorganization after the confirmation of such plan.

(f) Except as otherwise provided in this section, no certificate or other document filed pursuant to this section shall be deemed to confer on any corporation any powers, privileges or franchises, except those permitted to be conferred on a corporation formed or existing under this act.

(g) On the filing of any certificate or other document made or executed pursuant to this section or any other section of this act, there shall be paid to the administrator the same fees as are payable by corporations not in reorganization upon filing like certificates or other documents.

SOURCE: MCLA § 450.43a with editorial changes, and expanded in (a) to include state reorganization proceedings. A comparable provision appears in NYBCL § 808 and Del. Corp. Law § 303.

Chapter 10: Reports

§ 1001. Annual Report.

(a) The directors of every domestic corporation shall at least once in each year cause a financial report of the corporation for the preceding fiscal year to be made and distributed to each shareholder thereof within four months after the end of the fiscal year. The report shall include its statement of income and its year-end balance sheet and such other disclosures as may be required by this act.

(b) A report shall be filed with the Administrator on or before May 15 of each year by all corporations, domestic and foreign, subject to this act. The report, on a form approved by the Administrator, shall contain the following:

(1) the name of the corporation.

(2) the address of its registered office in this state.

(3) the state and date of incorporation, term of corporate existence, if other than perpetual; and, if a foreign corporation, the date when admitted to do business in this state.

(4) the names and residence addresses of its president, secretary and treasurer and its directors and resident agent.

(5) the general nature and kind of business in which the corporation is engaged.

(6) the amount of authorized capital stock and number and par value of shares of each class authorized, and the number of shares of stock without par value authorized.

(7) the amount of capital stock subscribed.

(8) the amount of capital stock paid in.

(9) the nature and book value of the property owned and used by the corporation both within and without this state, given separately as to property within and without this state.

(10) a complete and detailed statement of the assets and liabilities of the corporation as shown by the books of such corporation, at the close of business on December 31 or upon the date of the close of its first fiscal year, next preceding, which shall be the same balance sheet as furnished to shareholders as provided by subsection (a) of this section. Every corporation organized on or after January 1 and prior to May 15 of any one year, and every foreign corporation admitted to do business subsequent to January 1 and prior to May 15 of any one year, except corporations incorporated and organized under section 450.187a and continuing domestic and foreign corporations resulting from mergers or consolidations, shall file a report showing the condition of its business on the date of its incorporation or admittance, with a filing fee of

$5.00 and a privilege fee of $10.00. The report of a continuing corporation resulting from a merger or consolidation shall contain a complete and detailed statement of its assets and outstanding liabilities as shown on the books of the corporation on the effective date of merger or consolidation if that date is subsequent to the preceding December 31 or the close of its first fiscal year, next preceding.

(11) such other information as the Administrator may reasonably require for the purpose of computing the annual privilege fee provided by law, or for other purposes under this act.

(c) The reports required by this section shall be submitted in accordance with section 106 together with a $10 filing fee and the annual privilege fee required by law. The reports shall be open to reasonable inspection by the public promptly after filing by the corporation.

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SOURCE: Most of the language in this chapter is derived from existing Michigan Law, which is more complete and understandable than the language of recent revisions in other states.

(a) is from MCLA § 450.45 ¶ 2. Subsection (b) is MCLA § 450.82, with the following changes:

--"administrator" is substituted for treasury department as the recipient of the report.

--MCLA § 450.82(j)--requiring disclosure of the value fixed for sale of no-par value shares--is deleted as archaic.

--Also deleted as unnecessary are MCLA § 450.82(d), (n) and (o).

Subsection (c) carries forward the substance of MCLA §§ 450.83, 450.84, but without the county clerk filing of the latter section, which has been deleted throughout the revision under § 106.

§ 1002. Default in filing reports or paying fees.

(a) If any corporation neglects or refuses to make and file the reports and pay any fees required by law within the time specified, such corporation shall, in addition to its liability for any such fees, be subject to a penalty of ten per cent of the amount of such fees; and in addition thereto, a penalty of one per cent for each month or part of month that the same is delinquent.

(b) If any domestic corporation neglects or refuses for two consecutive years to make and file the annual reports and pay any annual privilege fees required by law, the corporation shall be automatically dissolved upon written notice from the Administrator. Until any such corporation shall have been disolved, it shall be entitled to the issuance by the Administrator, upon request, of a certificate of good standing setting forth that it has been validly incorporated as a domestic corporation and that it is validly in existence under the laws of this state.

(c) If any foreign corporation neglects or refuses in any one year to make and file the annual report and pay any annual privilege fee required by law, its certificate of authority shall be subject to revocation in accordance with section 1107 of this act. Until revocation of its certificate of authority, or withdrawal from this state or termination of existence of such foreign corporation,

such foreign corporation shall be entitled to the issuance by the Administrator, upon request, of a certificate of good standing setting forth that it has been validly authorized to transact business in this state and that it holds a valid certificate of authority to transact business in this state.

(d) The Administrator for good cause shown may extend the time for the filing of any report for a period not exceeding one year from the due date thereof.

(e) The Administrator shall report promptly to the attorney general every case of failure or neglect under this section and section 1003, and the attorney general shall institute action for the imposition of the prescribed penalties. Whenever any corporation has neglected or refused to make and file its report within 20 days after the time limited in this act, the Administrator shall cause notice of that fact to be given by mail to such corporation, directed to its registered office. The Administrator's certificate of the mailing of such notice shall be prima facie evidence on all courts and places of that fact, and that such notices were duly received by said corporation.

(f) A corporation which has been dissolved pursuant to subsection (b) of this section, or whose certificate of authority has been revoked pursuant to subsection (c) of this section and section 1107 of this act, may renew its corporate existence or its

certificate of authority by filing the reports and paying the fees for the years for which they were not filed and paid, and for every subsequent intervening year, together with the penalties provided by subsection (a) of this section. Upon filing of such reports and payment of such fees and penalties, the corporate existence or the certificate of authority, as the case may be, shall be renewed. In the event that during the intervening period the corporate name or a confusingly similar name has been assigned to another corporation, the Administrator may require that the corporation adopt or use within this state, as the case may be, a different name.

* * * * * * * *

SOURCE: With editorial changes to conform to style:
(a) is MBCA § 135 (1969 rev.).
(b) and (d) are MCLA § 450.91.
(c) is original. New provisions are added in (b) and (c) to assure issuance of certificates of good standing even where privilege fees are in dispute.
(e) is MCLA § 450.90.

This section preserves the substance of some existing penalties for nonfiling and nonpayment, but substitutes more sophisticated penalties where appropriate. In the proposed section, the word "administrator" is substituted for "secretary of state," throughout.

A recent thoughtful comment strongly condemns the penalties of MCLA § 450.87, excluded from this section. See Schulman & Vernava, Corporations, in 1969 Annual Survey of Michigan Law, 16 Wayne L. Rev. 753 at 756-758. The authors suggest that increasing the penalties under

MCLA § 450.88 would prove a more effective and logical deterrent to failure to file. Substituted for MCLA § 450.88 in the proposed section are the percentage penalties of MBCA § 135, which are responsive to these suggestions.

(f) is original, derived from language in MCLA §§ 450.431, 450.432.

§ 1003. False statements in reports, certificates, and records.

(a) In case any corporation which is required to file reports as provided in section 1001 shall wilfully make any false statement in such report, such corporation shall be subject to an additional penalty in the sum of 50 per cent of the amount of the franchise or privilege fee required to be paid. Such penalty shall in no case be less than 50 dollars nor more than 10,000 dollars.

(b) Any person who knowingly makes or files or any person who knowingly assists in the preparation or filing of any false or fraudulent report, certificate or other statement required by this act to be filed by a corporation with any public officer of this state, or any person knowing the same to be false or fraudulent, who procures, counsels, or advises the preparation or filing of such report, certificate or statement shall be guilty of a misdemeanor and fined not to exceed 1,000 dollars for each such offense.

(c) Every officer or agent of a corporation who shall knowingly falsify or wrongfully alter the books, records or accounts of a corporation shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not to exceed 1,000 dollars for each such offense.

(d) If any report, certificate or other statement made or public notice given by the officers or directors of a corporation shall be false in any material representation, or if any of the books,

records or accounts of the corporation shall be knowingly or wrongfully altered, the officers, directors or agents knowingly or wrongfully authorizing, signing or making such false report, certificate, other statement or notice or authorizing or making such wrongful alteration shall jointly and severally be personally liable to any person who has become a creditor or shareholder of the corporation upon the faith of such false material representation or alteration therein for all damages resulting therefrom. No action shall be maintained for the liability imposed by this section unless brought within two years from the time of the discovery of such false representation or alteration and within six years from the time the certificate, report, public notice or other statement or such alteration shall have been made or given, as the case may be, by the officers, directors or agents of such corporation.

* * * * * * * *

SOURCE: This section combines, with editorial changes, several penalty sections in the existing law.
(a) is MCLA § 450.89, applying penalties to the corporation for false statements in the annual report.
(b) is MCLA § 450.49, applying criminal penalties to persons who make false statements in filings.
(c) is MCLA § 450.51, applying criminal penalties to persons who falsify corporate records.
(d) is MCLA § 450.50, extending a limited civil damage remedy to those injured by false statements issued by the corporate officers.

NOTE: No section on fees in included herein, since existing MCLA §§ 450.301-450.310 may be maintained intact.

Chapter 11: Foreign Corporations

§ 1101. Application of act to foreign corporations.

(a) Foreign corporations which are duly authorized to transact business in this state on the effective date of this act, for a purpose or purposes for which a corporation might secure such authority under this act, shall be entitled to all the rights and privileges applicable to foreign corporations which receive certificates of authority to transact business in this state under this act, and from the time this act takes effect such corporations shall be subject to all the duties, restrictions, penalties, and liabilities prescribed herein for foreign corporations which receive certificates of authority to transact business in this state under this act.

(b) A foreign corporation which receives a certificate of authority under this act shall, until a certificate of revocation or of withdrawal is issued as provided in this act, enjoy the same rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which the certificate of authority is issued; and, except as in this act otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.

(c) A foreign corporation which transacts business in this state without a certificate of authority under this act shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a foreign corporation which receives such certificate of authority, in addition to any other penalties or liabilities imposed by law.

* * * * * * * *

SOURCE: NJSA § 14A:13-2 with editing changes. In this chapter, substantial use is made of New Jersey's chapter 13, which is more complete than the equivalent Model Act sections.

(a) and (b) of the proposed section are substantially MBCA §§ 123, 107 (1969 revision). The Model Act provision in § 106 (also included in MCLA § 450.94):

"nothing in this Act contained shall be construed to authorize this State to regulate the organization or the internal affairs of such corporation "

is not included herein. Some recent choice-of-law developments vest authority in the state to regulate some internal affairs in situations justified by state contacts. The Model Act formulation would unnecessarily restrict the state's power to regulate in the public interest in this area.

Much of the substance of the proposed section is now included in MCLA § 450.94. MCLA § 450.97 makes provision for application to foreign corporations not within this revision. Accordingly that section should be retained.

§ 1102. Admission of foreign corporations.

(a) No foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the Administrator. A foreign corporation may be authorized to do in this state any business which may be done lawfully in this state by a domestic corporation, to the extent that it is authorized to do such business in the jurisdiction of its incorporation, but no other business.

(b) 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 act, by reason of carrying on in this state any one or more of the following activities:

(1) maintaining or defending any action or suit or any administrative or arbitrative proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

(2) holding meetings of its directors or shareholders or carrying on any other activities concerning its internal affairs;

(3) maintaining bank accounts;

(4) maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing

and maintaining trustees or depositories with relation to its securities;

(5) effecting sales through independent contractors;

(6) 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;

(7) borrowing money, with or without security;

(8) securing or collecting debts or enforcing any rights in property securing the same;

(9) transacting any business in interstate commerce;

(10) conducting an isolated transaction not in the course of a number of repeated transactions of like nature.

(c) Any foreign corporation may acquire or, through any other person, firm or corporation legally entitled to engage in business in this state, may take loans, or participations or interests therein, insured or guaranteed in whole or in part by the federal housing administration or the veterans' administration or any successor or similar agency of the federal government, which are secured in whole or in part by mortgages of real property located in this state, and any foreign corporation may purchase any loan, or participation or interest therein, secured in whole or in part by a mortgage of real property located in this state, without

qualifying or maintaining authority to carry on, do or transact business in this state under this act or any other law of this state relating to such qualification or authority and without paying fees with respect thereto. Neither the failure, heretofore or hereafter, of any such foreign corporation to qualify or maintain authority to carry on, do or transact business within this state under this act or any such other law of this state nor its failure, heretofore, or hereafter, to pay fees with respect thereto shall in any manner affect or impair its ownership of such loans, or participations or interests therein, whether heretofore or hereafter made or acquired, or its right to collect and service the same through any other person, firm or corporation legally entitled to engage in business in this state, or its right to enforce the same or to acquire, hold, protect, convey, lease and otherwise contract and deal with respect to the property mortgaged as security therefor.

(d) This section shall not apply in determining the contacts or activities which may subject a foreign corporation to service or process or taxation in this state.

* * * * * * * *

SOURCE: NJSA § 14A:13-3, except that (b) is from MBCA § 106 (1969 revision). The 30-day limit in (b)(10) was deleted. (c) is MCLA § 450.97, second paragraph, verbatim.
MCLA § 450.93 contains the first sentence of (a) of the proposed section, but has no equivalent of (b) and (c). These paragraphs, or their equivalent, are contained in most recent revisions.

§ 1103. Certificate of authority.

(a) To procure a certificate of authority to transact business in this state, a foreign corporation shall file with the Administrator an application setting forth:

(1) the name of the corporation and the jurisdiction of its incorporation;

(2) the date of incorporation and the period of duration of the corporation;

(3) the street address and the mailing address if different from the street address, of the main business or headquarters office of the corporation;

(4) the address of the registered office of the corporation in this state, and the name of its resident agent in this state at such address, together with a statement that the resident agent is an agent of the corporation upon whom process against the corporation may be served;

(5) the character of the business it is to transact in this state, together with a statement that it is authorized to transact such business in the jurisdiction of its incorporation;

(6) the nature and value of the property owned and used by the corporation both within and without this state, given separately as to property within and without this state.

(7) the total amount of business transacted during the preceding fiscal year and the amount of business, if any, transacted in this state; and

(8) such additional information as the Administrator may require in order to determine whether the corporation is entitled to a certificate of authority to transact business in this state and to determine the fees and taxes prescribed by law.

(b) Attached to the application shall be a copy of the articles of incorporation and all amendments thereto, duly certified by the proper officer of the jurisdiction of incorporation. Also attached to the application shall be a certificate setting forth that such corporation is in good standing under the laws of the jurisdiction of its incorporation, executed by the offical of such jurisdiction who has custody of the records pertaining to corporations and dated not earlier than 30 days prior to the filing of the application. If such certificate is in a foreign language, a translation thereof under oath of the translator shall be attached thereto.

(c) Upon the filing of the application, accompanied by the filing and privilege fees prescribed by law, the Administrator shall issue to the foreign corporation a certificate of authority to transact business in this state.

(d) Upon the issuance of a certificate of authority by the Administrator, the foreign corporation shall be authorized to

transact in this state any business of the character set forth in its application. Such authority shall continue so long as it retains its authority to transact such business in the jurisdiction of its incorporation and its authority to transact business in this state has not been surrendered, suspended or revoked.

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SOURCE: NJSA §§ 14A:13-4, 14A:13-5. The additional information requirements of existing MCLA § 450.93 were added as items (6) and (7), of paragraph (a). Item (8) of paragraph (a) is from MBCA § 110(1)(1969 revision). The proposed section is substantially identical to MBCA § 110. A substantive change from the New Jersey provision is inclusion of an additional requirement from MCLA § 450.93 to file a copy of the articles of incorporation, also required by the Model Act § 111.

Filing is in accordance with § 106 hereof. The appeal procedure of MCLA § 450.93 is not carried forward, but the equivalent appeal may be had under this revision § 108.

The procedure of (c) and (d) is as presently prescribed by the first sentences of MCLA § 450.94: filing plus issuance of a certificate. That section provides, however, for annual reissuance of the certificate on payment of the privilege fees. The proposed section, by contrast, contemplates issuance of a single certificate which may be revoked for failure to file reports, pay fees, or otherwise comply with the act.

§ 1104. Amendment to Articles of Incorporation.

Whenever the articles of incorporation of a foreign corporation authorized to transact business in this state are amended, such foreign corporation shall within sixty days after the amendment becomes effective, file with the Administrator a copy of the amendment duly authenticated by the proper officers of the jurisdiction in which it is incorporated; but the filing thereof shall not of itself enlarge or alter the purpose or purposes which such corporation is authorized to pursue in the transaction of business in this state, nor authorize such corporation to transact business in this state under any other name than the name set forth in its certificate of authority or an assumed name, as provided in this act.

* * * * * * * *

SOURCE: MBCA § 116 (1969 revision), with 60 day filing period. This section is substantively identical to the last sentence of MCLA § 450.94, including the filing period of 60 days.

Detailed provisions of MCLA § 450.95 (requiring additional information to be filed when a foreign corporation increases in authorized capital stock) are not included herein, since they appear to be covered by the annual report requirement.

§ 1105. Supplemental statement of foreign corporation.

Every foreign corporation which has been admitted to do business in this state which shall thereafter increase its authorized capital stock or increase the proportion of its authorized capital stock represented by property owned or used or business transacted in this state shall file a supplemental statement giving a detailed account of the amount of such increase, and shall pay such additional franchise fee on account thereof as may be prescribed by law. The supplemental statement shall be filed on or before May 15 of each year. The portion of authorized capital stock of such corporation represented by property owned or used and business transacted in this state shall be determined by multiplying the entire amount of its authorized capital stock by the most recent allocation factor, if any, used in the computation of its annual franchise fee.

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SOURCE: MCLA § 450.95, revised to provide for the filing of a supplemental statement at the time of filing of the annual report and to provide that the allocation factor used in determining the annual franchise fee also would be used in calculating additional franchise fees based upon authorized capital.

§ 1106. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to transact business in this state may withdraw from this state upon procuring from the Administrator a certificate of withdrawal. In order to procure a certificate of withdrawal, such foreign corporation shall file an application for withdrawal setting forth:

(1) the name of the corporation and the jurisdiction of its incorporation;

(2) that the corporation is not transacting business in this state;

(3) that the corporation surrenders its authority to transact business in this state;

(4) a post-office address within or without this state to which the Administrator shall mail a copy of any process against the corporation that may be served on him; and

(5) such information as may be required by the Administrator to determine and assess any unpaid privilege fees payable by such foreign corporation as required by law.

(b) Upon the filing of the application for withdrawal, accompanied by the filing and privilege fees prescribed by law, the Administrator shall issue to the corporation a certificate of withdrawal, whereupon:

(1) the authority of the corporation to transact business in this state shall cease;

(2) the authority of its resident agent in this state to accept service of any process against the corporation shall be deemed revoked; and

(3) service of process in any action or proceeding based upon any liability or obligation incurred by it within this state before the issuance of the certificate of withdrawal may thereafter be made on such corporation by service thereof on the Administrator.

(c) The post-office address specified in subparagraph (a)(4) of this section may be changed from time to time by written notice to the Administrator.

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SOURCE: NJSA § 14A:13-8, with added language in (a)(5) and (b) specifically requiring tax clearance for withdrawal, and with paragraph (c) simplified. The substance of MBCA §§ 119, 120 (1969 revision) is identical.

Existing MCLA § 450.94 has similar substance, but is less clear on the procedures for withdrawal.

§ 1107. Termination of existence of foreign corporation.

(a) When a foreign corporation authorized to transact business in this state is dissolved, or its authority or existence is otherwise terminated or cancelled in the jurisdiction of its incorporation, or it is merged into or consolidated with another corporation, there shall be filed with the Administrator

(1) a certificate of the official of the jurisdiction of incorporation of such foreign corporation who has custody of the records pertaining to corporations, evidencing the occurrence of any such event; or

(2) a certified copy of an order or judgment of a court of competent jurisdiction directing the dissolution of such foreign corporation, the termination of its existence, or the cancellation of its authority;

together with a statement on behalf of the corporation of the post-office address within or without this state to which the Administrator may mail a copy of any process against the corporation that may be served on him, and such information as may be required by the Administrator to determine and assess any unpaid privilege fees payable by such foreign corporation as required by law.

(b) Upon the filing of the certificate, order or judgment and the statement of the post-office address, accompanied by the filing and privilege fees prescribed by law, the Administrator shall issue a certificate of withdrawal with like effect as provided in § 1105(b).

(c) The post-office address specified in subsection (a) hereof may be changed from time to time in the same manner as is provided in subsection 1105(c).

* * * * * * * * *

SOURCE: NJSA § 14A:13-9, with added language in (a) and (b) specifically requiring tax clearance. New Jersey and New York (NYBCL § 1311) are unique in providing this simpler procedure on termination of the corporation, and it appears to be a valuable addition to the statute. Absent this provision, the filing requirements of § 1105 would be applicable.

§ 1108. Revocation of certificate of authority.

(a) In addition to any other ground for revocation provided by law, the certificate of authority of a foreign corporation to transact business in this state may be revoked by the Administrator upon the conditions prescribed in this section when:

(1) the corporation has failed to maintain a resident agent in this state as required by this act; or

(2) the corporation has failed, after change of its registered office or resident agent, to file a statement of such change as provided by this act; or

(3) the corporation has failed, after amending its articles of incorporation, to file a copy of such amendment as provided by this act;

(4) the corporation has failed to file its annual report within the time required by this act, or has failed to pay any annual privilege fee required by law; or

(5) the corporation has failed to comply with section 806(e).

(b) No certificate of authority of a foreign corporation shall be revoked by the Administrator unless:

(1) he shall have given the corporation not less than 90 days' notice that such default exists and that its certificate of authority will be revoked unless such default is cured within 90 days after the mailing of such notice; and

(2) the corporation shall fail prior to revocation to cure such default.

Such notice shall be sent by registered or certified mail to the corporation at its registered office in this state and at its main business or headquarters office as such offices are on record in the office of the Administrator.

(c) Upon revoking any such certificate of authority, the Administrator shall issue a certificate of revocation and shall mail a copy to such corporation at each of the addresses designated in subsection (b) of this section.

(d) The issuance of the certificate of revocation shall have the same force and effect as the issuance of a certificate of withdrawal under subsection 1105(b).

* * * * * * * *

SOURCE: NJSA § 14A:13-10, with added language at (a)(3) specifying default in filing copies of amendments to articles; and at (a)(4), specifying default in paying taxes. The proposed section is nearly identical to MBCA §§ 121, 122 (1969 revision).

Existing MCLA § 480.94 simply authorizes revocations for doing unauthorized business or failing to comply with state laws.

§ 1109. Transacting business without a certificate of authority.

(a) No foreign corporation transacting business in this state without a certificate of authority shall maintain any action or proceeding in any court of this state, until such corporation shall have obtained a certificate of authority. An action commenced by a foreign corporation having no certificate of authority shall not be dismissed if a certificate of authority has been obtained prior to the order of dismissal. This prohibition shall apply to

(1) any successor in interest of such foreign corporation, except any receiver, trustee in bankruptcy or other representative of creditors of such corporation; and

(2) any assignee of the foreign corporation, except an assignee for value who accepts an assignment without knowledge that the foreign corporation should have but has not obtained a certificate of authority in this state.

(b) The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this state.

(c) In addition to any other liabilities imposed by law, a foreign corporation which transacts business in this state without a certificate of authority shall forfeit to the state a penalty of not less than $100.00, nor more than $1,000.00 for each calendar

month, not more than 5 years prior thereto, in which it shall have transacted business in this state without a certificate of authority. No penalty under this subsection shall exceed $10,000. Such penalty shall be recovered with costs in an action prosecuted by the Attorney General.

* * * * * * * *

SOURCE: NJSA § 14A:13-11. with penalty provisions from existing MCLA § 450.95. Also added in (a) is a provision for avoiding dismissal by obtaining a certificate of authority. To the same effect is MBCA § 124 (1969 revision). The proposed section imposes a five-year limitation period on the penalty; no limitation is set by § 450.95.

MCLA § 450.95 invalidates contracts of noncomplying foreign corporations. This remedy is often perverse. It is rejected in (b), consistent with most recent revisions.

MCLA §§ 450.93a, 450.96 impose severe personal penalties on directors, officers and agents acting in violation of the foreign corporation sections or as agents for unauthorized foreign corporations. The value of these sections is doubtful, and their continuation is not recommended.

Chapter 12: Repealer

§ 1201. Repeal.

The following acts and parts of acts amendatory thereto are hereby repealed:

Act 327, Public Acts 1931, as amended, sections 1 - 42; section 43 (except last paragraph); sections 44 - 61; sections 65 - 80; sections 82 - 83; sections 87 - 91a. Act 48, Public Acts 1947.