Ohio Legislative Service Commission

Bill Analysis

Aida S. Montano

Sub. H.B. 379

128th General Assembly
(As Reported by H. Civil and Commercial Law)

Reps. Carney and Mecklenborg, Bolon, Combs, Domenick, Letson, McGregor, Okey, Murray, Oelslager, Coley, Dyer, Harwood, Stautberg, Stebelton

BILL SUMMARY

GENERAL CORPORATION LAW

Dissenting shareholders

- Provides the circumstances in which no relief is available to a dissenting shareholder if an amendment to the articles makes certain changes or in the event of an authorization to lease, sell, exchange, transfer, or otherwise dispose of all or substantially all of the assets of a corporation, including whether the shares of the corporation for which the dissenting shareholder would otherwise be entitled to relief are listed on a National Securities Exchange on a specified date.

- Specifies the following shareholders that are not entitled to relief as dissenting shareholders: (1) shareholders of a domestic corporation that is being merged or consolidated into a surviving or new entity or is being converted, under certain conditions, including whether the shares of the corporation for which the dissenting shareholder would otherwise be entitled to relief are listed on a National Securities Exchange on a specified date, (2) shareholders of the surviving corporation in the case of a merger into a domestic corporation, under certain conditions, including whether the shares entitling them to vote are listed on a National Securities Exchange on certain dates, and (3) shareholders of an acquiring corporation in the case of a combination or majority share acquisition, under certain conditions, including whether the shares entitling them to vote are listed on a National Securities Exchange on certain dates.

- Permits a corporation to notify the corporation's shareholders before the vote on the proposal that relief is available as dissenting shareholders and, if such notice is given, requires a shareholder electing to be eligible as a dissenting shareholder to

deliver to the corporation before the vote on the proposal a written demand for payment of the fair cash value of the shares as to which the shareholder seeks relief.

- Provides that any premium associated with control of the corporation or any discount for lack of marketability or minority status is excluded from the computation of the fair cash value of the shares of a dissenting shareholder and that the fair cash value of a share that was listed on a National Securities Exchange at any of specified times must be the closing sale price on the Exchange as of the applicable date.

Recording of corporate mortgages

- Applies to electric cooperatives existing law's provisions on the recording of mortgages of corporate property with the county recorder and the filing with the Office of the Secretary of State of such mortgages that include rolling stock, movable equipment, or machines.

Voluntary dissolution

- Permits a resolution of dissolution to also include the date on which the certificate of dissolution is to be filed or the conditions or events that will result in the filing of the certificate, or authorization for the officers or directors to abandon the proposed dissolution before the filing of the certificate of dissolution.

- Requires the certificate of dissolution to set forth the internet address of each domain name held or maintained by or on behalf of the corporation, instead of the names and addresses of its directors and officers or the names and addresses of the incorporators if the resolution of dissolution is adopted by the incorporators under existing law.

- Modifies current law's requirements pertaining to certain types of evidence that must accompany a certificate of dissolution filed with the Secretary of State.

- Generally replaces existing law's public notice requirements following the filing of a certificate of dissolution with the following: (1) the corporation must give notice of the dissolution, with specified contents, to each known creditor and each person that has a claim against the corporation (existing law modified), (2) the corporation must post the notice on any web site it maintains in its name and provide a copy of the notice to the Secretary of State to be posted on its web site, (3) the Secretary of State generally must make available to the public through the Internet a list of any domestic corporations that have filed a certificate of dissolution and a copy of the certificate of dissolution and the above notice for each of those corporations.

- Provides that for the purposes of a corporation winding up its affairs when it is dissolved voluntarily, when the articles of a corporation have been canceled, or when the period of existence of the corporation specified in its articles has expired, the corporation must continue as a corporation for a period of four years from the dissolution, expiration, or cancellation, subject to extension by a court.

- Provides that a corporation's voluntary dissolution, cancellation of the articles, expiration of the period of existence, appointment of a receiver to wind up its affairs, or other action to dissolve a corporation does not eliminate or impair any remedy available to or against the corporation or its directors, officers, or shareholders for any right or claim existing, or liability incurred, prior to the dissolution, if the action is brought within the required limitations period.

- Authorizes the enforcement of any property right of a corporation that is discovered after the winding up of the corporation, the collection and division of the assets discovered among the persons entitled to those assets, and the prosecution of actions or proceedings in its corporate name.

- Enacts procedures for a corporation that has given notice of dissolution to reject any matured claim made by a claimant or to offer security to any claimant whose claim is contingent, conditional, or unmatured, including filing an application to the court with jurisdiction for a determination of the amount and form of security; lists the duties of a dissolved corporation with respect to claims and offers of security; and specifies the circumstances in which a shareholder who has received a distribution of the assets may or may not be liable for a claim.

Judicial dissolution

- Modifies existing law that authorizes a corporation to be dissolved judicially by an order of the court of common pleas of the county in which the corporation has its principal office: (1) in an action brought by the holders of shares entitling them to exercise *at least 2/3* (instead of a majority) of the voting power of the corporation on such proposal, when it is established that it is beneficial to the shareholders that the corporation be judicially dissolved, or the holders of such lesser proportion as are entitled by the articles to dissolve the corporation voluntarily, or (2) in an action brought by one-half of the directors when there is an even number of directors or by the holders of shares entitling them to exercise *at least 2/3* (instead of ½) of the voting power, when it is established that the corporation has an even number of directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, or that the corporation has an uneven number of directors and the shareholders are deadlocked in voting power and

unable to agree upon or vote for the election of directors as successors to directors whose terms normally would expire upon the election of their successors.

GENERAL CORPORATION LAW AND NONPROFIT CORPORATION LAW

- Modifies the General Corporation Law and the Nonprofit Corporation Law by providing that a right to indemnification or to advancement of expenses arising under a provision of the articles or the regulations cannot be eliminated or impaired by an amendment to that provision after the occurrence of the act or omission that becomes the subject of the civil, criminal, administrative, or investigative action, suit, or proceeding for which the indemnification or advancement of expenses is sought, unless the provision in effect at the time of that act or omission explicitly authorizes that elimination or impairment after the act or omission has occurred.

TABLE OF CONTENTS

CONTENT AND OPERATION

GENERAL CORPORATION LAW

Dissenting shareholders

Amendment of articles

Existing law provides that certain dissenting shareholders are entitled to relief, subject to specified exceptions, if an amendment to the articles makes certain changes. The bill provides that no relief as a dissenting shareholder is available: (1) if the shares of the corporation for which the dissenting shareholder would otherwise be entitled to relief are listed on a National Securities Exchange (NSE) as of the day immediately preceding the date of the vote and no proceedings have been commenced to delist the shares from the NSE as of the time of the vote, or (2) if (a) the amendment changes issued shares of a particular class that have preference in dividends or distributions or on liquidation over shares of any other class into shares of any other class, or changes any of the express terms of issued shares of such particular class, and the holders of the shares of such particular class are substantially prejudiced thereby and the articles do not expressly or by implication provide for or permit such amendment, and (b) the shares to be received are listed on a NSE and no proceedings are pending to delist the shares as of the effective time of the amendment. (R.C. 1701.74(A)(1) and (B)(4).)

Sale or disposition of entire assets

Existing law provides that dissenting holders of shares of any class, whether or not entitled to vote, are entitled to relief in the event of an authorization to lease, sell, exchange, transfer, or otherwise dispose of all or substantially all of the assets of a corporation. The bill provides an exception to such relief for holders of shares if both of the following apply: (1) the shares of the corporation for which the dissenting shareholder would otherwise be entitled to relief are listed on a NSE as of the day immediately preceding the date of the vote at a meeting of the shareholders, and (2) the consideration to be received by the shareholders consists of shares or shares and cash in lieu of fractional shares that, immediately following the time of the vote of the shareholders, are listed on a NSE, and no proceedings are pending to delist the shares from the NSE as of the time of the vote. (R.C. 1701.76(C).)

Shareholders not entitled to relief

The bill provides that all of the following shareholders are not entitled to relief as dissenting shareholders (R.C. 1701.84(B)):

(1) Shareholders of a domestic corporation that is being merged or consolidated into a surviving or new entity, domestic or foreign, pursuant to R.C. 1701.78, 1701.781,

1701.79, 1701.791, or 1701.801 or shareholders of a domestic corporation that is being converted pursuant to R.C. 1701.792 of the Revised Code, if both of the following apply:

(a) The shares of the corporation for which the dissenting shareholder would otherwise be entitled to relief are listed on a NSE as of the day immediately preceding the date on which the vote on the proposal is taken at the meeting of the shareholders.

(b) The consideration to be received by the shareholders consists of shares or shares and cash in lieu of fractional shares that, immediately following the effective time of a merger, consolidation, or conversion, as applicable, are listed on a NSE and for which no proceedings are pending to delist the shares from the NSE as of the effective time of the merger, consolidation, or conversion.

(2) In the case of a merger into a domestic corporation, the shareholders of the surviving corporation who under R.C. 1701.78 or 1701.781 are entitled to vote on the adoption of an agreement of merger, but only as to the shares so entitling them to vote, if the shares so entitling them to vote are listed on a NSE both as of the day immediately preceding the date on which the vote on the proposal is taken at the meeting of the shareholders and immediately following the effective time of the merger and there are no proceedings pending to delist the shares from the NSE as of the effective time of the merger;

(3) In the case of a combination or a majority share acquisition, the shareholders of the acquiring corporation who under R.C. 1701.83 of the Revised Code are entitled to vote on such transaction, but only as to the shares so entitling them to vote, if the shares so entitling them to vote are listed on a NSE both as of the day immediately preceding the date on which the vote on the proposal is taken at the meeting of the shareholders and immediately following the effective time of the combination or majority share acquisition, and there are no proceedings pending to delist the shares from the NSE as of the effective time of the combination or majority share acquisition.

Relief for dissenting shareholders--demand for payment of fair cash value of shares

The bill modifies the requirements that apply to the relief sought by the above described dissenting shareholders. It provides that not later than 20 days before the date of the meeting at which the proposal will be submitted to the shareholders, the corporation may notify the corporation's shareholders that relief is available. The notice must include or be accompanied by all of the following: (1) a copy of R.C. 1701.85, (2) a statement that the proposal can give rise to rights under R.C. 1701.85 if the proposal is approved by the required vote of the shareholders, and (3) a statement that the shareholder will be eligible as a dissenting shareholder under R.C. 1701.85 only if the shareholder delivers to the corporation a written demand with the information

described in the following paragraph before the vote on the proposal will be taken at the meeting of the shareholders and the shareholder does not vote in favor of the proposal.

The bill provides that if the corporation delivers such notice to its shareholders, a shareholder electing to be eligible as a dissenting shareholder must deliver to the corporation before the vote on the proposal is taken a written demand for payment of the fair cash value of the shares as to which the shareholder seeks relief. The demand for payment must include the shareholder's address, the number and class of such shares, and the amount claimed by the shareholder as the fair cash value of the shares.

If the corporation does not notify the corporation's shareholders as described above (added by the bill), not later than ten days after the date on which the vote on the proposal was taken at the meeting of the shareholders, the dissenting shareholder must deliver to the corporation a written demand for payment to the dissenting shareholder of the fair cash value of the shares as to which the dissenting shareholder seeks relief, which demand must state the dissenting shareholder's address, the number and class of such shares, and the amount claimed by the dissenting shareholder as the fair cash value of the shares (existing law).

The bill provides that if a signatory, designated and approved by the dissenting shareholder, executes the demand, then at any time after receiving the demand, the corporation may make a written request that the dissenting shareholder provide evidence of the signatory's authority. The shareholder must provide the evidence within a reasonable time but not sooner than 20 days after the dissenting shareholder has received the corporation's written request for evidence. (R.C. 1701.85(A)(3) to (6).)

Computation of fair cash value

Existing law provides that in computing fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders must be excluded. The bill provides that any premium associated with control of the corporation, or any discount for lack of marketability or minority status also must be excluded from the computation of the fair cash value. The fair cash value of a share that was listed on a NSE at any of the following times must be the closing sale price on the NSE as of the applicable date:[1] (1) immediately before the

[1] If the proposal was required to be submitted to the shareholders of the corporation, fair cash value as to those shareholders must be determined as of the day prior to the day on which the vote by the shareholders was taken and, in the case of a merger pursuant to R.C. 1701.80 or 1701.801, fair cash value as to shareholders of a constituent subsidiary corporation must be determined as of the day before the adoption of the agreement of merger by the directors of the particular subsidiary corporation (R.C. 1701.85(C)(1)).

effective time of a merger or consolidation, (2) immediately before the filing of an amendment to the articles of incorporation, or (3) immediately before the time of the vote of the shareholders for an authorization to lease, sell, exchange, transfer, or otherwise dispose of all or substantially all of the assets of the corporation. (R.C. 1701.85(C)(1)(b) and (2).)

Recording of corporate mortgages

Existing law

Existing law requires that a mortgage of property of any description, or any interest in the property, made (1) by a corporation that is a railroad or a public utility, (2) by a domestic or foreign corporation organized for the purpose of constructing, acquiring, owning, or operating a railroad or public utility or any part of a railroad or public utility, or, as a common carrier, a trolley bus system, in whole or in part in this state, (3) by a municipal corporation pursuant to Section 12 of Article XVIII, Ohio Constitution, (4) by the state, a county, or a municipal corporation, pursuant to R.C. Chapter 165., or a port authority pursuant to R.C. 4582.06 or 4582.31, be recorded in the office of the county recorder of each county in Ohio in which that property is situated or employed. However, a mortgage by such mortgagor that includes rolling stock or movable equipment such as cars, locomotives, or trolley buses, motor buses, or other vehicles, or machines for aerial transportation, may be filed in the Office of the Secretary of State, and when so filed has the same effect, as to the lien created by that mortgage on the rolling stock, movable equipment, or machines, as though filed in the office of the recorder of each county in which the rolling stock, movable equipment, or machines are situated or employed. In lieu of filing an original of the mortgage described in this paragraph, a true copy of the mortgage, with an affidavit by the mortgagor, the mortgagee, or an agent of either that it is a true copy, may be filed. Any mortgage described in this paragraph is a lien on the property described in the mortgage from the respective times of its filing for record with the recorders of those counties; but any mortgage covering rolling stock, movable equipment, or machines is a lien on that stock, equipment, or machines from the time of the filing of the mortgage or true copy with the Secretary of State.

If any mortgage by its terms creates a lien upon any property that may thereafter be acquired by the mortgagor, it is a lien upon all the interest of the mortgagor in that after-acquired property from the date of its acquisition, if the mortgage was or is recorded or filed as described above.

The Secretary of State must charge and collect, for every mortgage or true copy filed in the Secretary of State's office, a fee of $10 and, for each page in excess of 25 pages an additional fee of $1. The Secretary of State must endorse on the mortgage or true copy the time of its filing and keep a record of the filing in a book to be kept for

that purpose, giving the names of all parties to the mortgage, alphabetically arranged, the date of the mortgage, and the time of its filing. The mortgage or true copy and the record of its filing is open to public inspection. When the mortgage is canceled, the date of cancellation must be entered on the margin of the record of the mortgage.

The mortgages of the character described above need not be otherwise filed or refiled as security interests under R.C. Chapter 1309. (R.C. 1701.66(A) to (E).)

Operation of the bill

The bill applies all of the above provisions to a mortgage of property of any description, or any interest in the property, made by an electric cooperative as defined in R.C. 4928.01 (see **COMMENT** 1) (R.C. 1701.66(A)(5)).

Voluntary dissolution

Contents of resolution of dissolution

Existing law requires a resolution of dissolution for a corporation to set forth: (1) that the corporation elects to be dissolved and (2) any additional provision considered necessary with respect to the proposed dissolution and winding up. Instead of requiring a resolution of dissolution to set forth any additional provision as in (2), above, the bill permits a resolution of dissolution to set forth any such additional provision. The bill provides that the resolution of dissolution also may include: (1) the date on which the certificate of dissolution is to be filed or the conditions or events that will result in the filing of the certificate, or (2) authorization for the officers or directors to abandon the proposed dissolution before the filing of the certificate of dissolution. (R.C. 1701.86(B).)

Adoption of resolution of dissolution

The bill modifies existing law by providing that the shareholders at a meeting held for such purpose may adopt a resolution of dissolution by the affirmative vote of the holders of shares entitling them to exercise 2/3 of the voting power of the corporation on such proposal or, if the articles provide or permit, by the affirmative vote of a greater or lesser proportion, though *not* (added by the bill) less than a majority, of such voting power, and by such affirmative vote of the holders of shares of any particular class as is required by the articles (R.C. 1701.86(E)).

Certificate of dissolution

Existing law provides that upon the adoption of a resolution of dissolution, a certificate must be prepared, on a form prescribed by the Secretary of State, setting forth the following: (1) the name of the corporation, (2) a statement that a resolution of

dissolution has been adopted, (3) a statement of the manner of adoption of such resolution, and, in the case of its adoption by the incorporators or directors, a statement of the basis for such adoption, (4) the place in Ohio where its principal office is or is to be located, (5) the names and addresses of its directors and officers, unless the resolution of dissolution is adopted by the incorporators, in which case the names and addresses of the incorporators shall be set forth in the certificate, (6) the name and address of its statutory agent, and (7) the date of dissolution, if other than the filing date. The bill replaces the information in (5), above, with the internet address of each domain name held or maintained by or on behalf of the corporation. It adds to the provision in (7), above, the provision that the date of dissolution cannot be more than 90 days after the filing of the certificate of dissolution. (R.C. 1701.86(F)(5) and (7).)

Under existing law, when the resolution of dissolution is adopted by the incorporators or a majority of them, the certificate must be signed by not less than a majority of them. When the resolution is adopted by the directors or by the shareholders, the certificate must be signed by any authorized officer, unless the officer fails to execute and file such certificate within 30 days after the adoption of the resolution or upon any date specified in the resolution as the date upon which such certificate is to be filed or upon the expiration of any period specified in the resolution as the period within which such certificate is to be filed, whichever is latest, in which event the certificate of dissolution may be signed by any three shareholders and must set forth a statement that the persons signing the certificate are shareholders and are filing the certificate because of the failure of the officers to do so. Under the bill, when the resolution of dissolution is adopted by the incorporators, the certificate must be signed by not less than a majority of them. *In all other cases*, the certificate must be signed by any authorized officer, unless the officer fails to execute and file such certificate within 30 days after the date upon which such certificate is to be filed. *In that latter* event, the certificate of dissolution may be signed by any three shareholders *or, if there are less than three shareholders, all of the shareholders* and must set forth a statement that the persons signing the certificate are shareholders and are filing the certificate because of the failure of the officers to do so (italicized language is added by the bill). (R.C. 1701.86(G).)

Under existing law, a certificate of dissolution, filed with the Secretary of State, must be accompanied by specified evidence, among which are the following (R.C. 1701.86(H)(2) and (3)):

(1) A receipt, certificate, or other evidence showing the payment of all franchise, sales, use, and highway use taxes accruing up to the date of such filing or, if applicable, to the later date specified in the certificate of dissolution, or that such payment has been adequately guaranteed;

(2) A receipt, certificate, or other evidence showing the payment of all personal property taxes accruing up to the date of such filing or, if applicable, to the later date specified in the certificate of dissolution, or that such payment has been adequately guaranteed.

The bill modifies (1) and (2), above, as follows (italicized language is added by the bill):

(1) A receipt, certificate, or other evidence showing the payment of all franchise, sales, use, and highway use taxes accruing up to the date of dissolution, or *showing* that such payment has been adequately guaranteed*, or an affidavit of one or more of the persons executing the certificate of dissolution or of an officer of the corporation containing a statement that the corporation is not required to pay some or all those taxes*;

(2) A receipt, certificate, or other evidence showing the payment of all personal property *and commercial activity* taxes accruing up to the date of dissolution or *showing* that such payment has been adequately guaranteed*, or an affidavit of one or more of the persons executing the certificate of dissolution or of an officer of the corporation containing a statement that the corporation is not required to pay some or all those taxes.*

Notice of dissolution

Existing law provides that following the filing of the certificate of dissolution, the directors or the incorporators, as the case may be, must forthwith cause a notice of voluntary dissolution to be published once a week on the same day of each week for two successive weeks, in a newspaper published and of general circulation in the county in which the principal office of the corporation was to be or is located, and must forthwith cause written notice of dissolution to be given either personally or by mail to all known creditors of, and to all known claimants against, the dissolved corporation (R.C. 1701.87).

The bill replaces existing law with the following provisions. A corporation must give notice of a dissolution by certified or registered mail, return receipt requested, to each known creditor and to each person that has a claim against the corporation, including claims that are conditional, unmatured, or contingent upon the occurrence or nonoccurrence of future events. The notice must state all of the following:

(1) That all claims must be presented in writing and must identify the claimant and contain sufficient information to reasonably inform the corporation of the substance of the claim;

(2) The mailing address to which the person must send the claim;

(3) The deadline, which must be not less than 60 days after the date the notice is given, by which the corporation must receive the claim;

(4) That the claim will be barred if the corporation does not receive the claim by the deadline;

(5) That the corporation may make distributions to other creditors or claimants, including distributions to shareholders of the corporation, without further notice to the claimant.

Giving any notice or making any offer under the General Corporation Law does not revive any claim then barred or constitute acknowledgment by the corporation that any person to whom the corporation sent notice under the bill is a proper claimant and does not operate as a waiver of any defense or counterclaim. A claim is barred if a claimant that was given written notice does not deliver the claim to the dissolved corporation by the deadline stated in the notice.

The corporation must post the notice on any web site the corporation maintains in the corporation's name and provide a copy of the notice to the Secretary of State to be posted on the web site maintained by the Secretary of State as described in this paragraph. Generally, the Secretary of State must make both of the following available to the public in a format that is searchable, viewable, and accessible through the internet: (1) a list of any domestic corporations that have filed a certificate of dissolution, and (2) for each corporation on that list, a copy of both the certificate of dissolution and the notice delivered as described above. After the materials relating to any dissolved corporation have been posted for four years, the Secretary of State may remove from the web site the information that the Secretary posted that relates to that corporation.

If the certificate of dissolution is filed five years or less after the effective date of the bill, the corporation must publish the above notice at least once a week for two successive weeks, in a newspaper published and of general circulation in the county in which the principal office of the corporation was to be or is located. (R.C. 1701.87.)

Winding up affairs

Existing law provides that when a corporation is dissolved voluntarily, when the articles of a corporation have been canceled, or when the period of existence of the corporation specified in its articles has expired, the corporation must cease to carry on business and do only such acts as are required to wind up its affairs, or to obtain reinstatement of the articles in accordance with R.C. 1701.07, 1701.921, 1785.06, or 5733.22, or are permitted upon reinstatement by R.C. 1701.922(C), and for such purposes it must continue as a corporation. The bill provides that for those purposes,

the corporation must continue as a corporation for a period of four years from the dissolution, expiration, or cancellation, and a court acting pursuant to R.C. 1701.89 may extend such four-year period. (R.C. 1701.88(A).)

The bill further provides that the voluntary dissolution of a corporation, cancellation of the articles of a corporation, expiration of the period of existence of a corporation, appointment of a receiver to wind up the affairs of the corporation, or other action to dissolve a corporation under the General Corporation Law does not eliminate or impair any remedy available to or against the corporation or its directors, officers, or shareholders for any right or claim existing, or liability incurred, prior to the dissolution, if either of the following brings such an action: (1) the corporation within the time limits otherwise permitted by law, or (2) any other person before four years after the date of the dissolution or within the time limits otherwise required by R.C. 1701.881 or any other provision of law, whichever is less. Any action, suit, or proceeding begun by or against the corporation within those time limits does not abate, and the corporation must, solely for the purpose of such action, suit, or proceeding, be continued as a body corporate beyond the four-year period and until any judgments, orders, or decrees are fully executed, without the necessity for any court order. The bill removes the provision in existing law that provides that any process, notice, or demand against the corporation may be served by delivering a copy to an officer, director, liquidator, or person having charge of its assets or, if no such person can be found, to the statutory agent. (R.C. 1701.88(B) and (C).)

Existing law provides that the directors of the corporation and their survivors or successors must act as a board of directors in accordance with the regulations and bylaws until the affairs of the corporation are completely wound up. Subject to the orders of courts of this state having jurisdiction over the corporation, the directors must proceed as speedily as is practicable to a complete winding up of the affairs of the corporation and, to the extent necessary or expedient to that end, must exercise all the authority of the corporation. Without limiting the generality of such authority, they may do certain specified actions, including applying assets to the payment of obligations, and, after paying or adequately providing for the payment of all known obligations of the corporation, distributing the remainder of the assets either in cash or in kind among the shareholders according to their respective rights and interests. The bill modifies existing law by providing that the directors of the corporation and their successors must act as a board of directors in accordance with the *articles and* regulations until the affairs of the corporation are completely wound up. Subject to the orders of courts of this state having jurisdiction over the corporation *acting pursuant to R.C. 1701.89*, the directors must proceed as speedily as is practicable to a complete winding up of the affairs of the corporation. *For that purpose*, the directors may exercise all the authority of the corporation. Without limiting the generality of such authority, they may do all of the actions specified in existing law, including (1) *appointing agents,*

liquidators, or other entities or persons to carry out the winding up of the corporation's business, (2) applying assets to the payment of obligations, and (3) distributing the remainder of the assets either in cash or in kind among the shareholders according to their respective rights and interests *after paying or adequately providing for the payment of all known obligations of the corporation under R.C. 1701.882* (see "**Duties of dissolved corporation**," below) *and for claims that have not been made known to the corporation or that have not arisen but that, based on facts known to the corporation, are likely to arise or to become known to the corporation within five years after the date of dissolution or such longer period of time as the directors or a court acting under R.C. 1701.89 may determine, not to exceed ten years after the date of dissolution*. (Italicized language is added by the bill.) (R.C. 1701.88(D)(3), (14), and (15).)

The bill deletes the following provisions of existing law: (1) without limiting the authority of the directors and subject to R.C. 1701.76(E), any action within the purview of R.C. 1701.88 which is authorized or approved at a meeting held for such purpose by the holders of shares entitling them to receive 2/3 of the value of the remaining assets is conclusive for all purposes upon all shareholders of the corporation, and (2) all deeds and other instruments of the corporation must be in the name of the corporation and be executed, acknowledged, and delivered by the officers appointed by the directors. (Existing R.C. 1701.88(E) and (F).)

The bill modifies existing law by providing that at any time during the winding up of its affairs, the corporation by its directors may make application (the bill deletes "to the court of common pleas of the county in this state in which the principal office of the corporation is located" in existing law) to have the winding up continued under supervision of the court, as provided in R.C. 1701.89 (R.C. 1701.88(E)).

Finally, the bill provides that if any property right of a corporation is discovered after the winding up of the corporation, any member or members of the board of directors that wound up the affairs of the corporation, or a receiver appointed by the court, may enforce the property right, collect and divide the assets discovered among the persons entitled to those assets, and prosecute actions or proceedings in the corporate name of the corporation. Any assets so collected must be distributed and disposed of in accordance with any applicable court order or, in the absence of a court order, in accordance with R.C. 1701.88 (R.C. 1701.88(F)).

Corporation's actions regarding claims

The bill provides that a corporation that has given the notice of dissolution as described above in "**Notice of dissolution**" may do the following (R.C. 1701.881(A) and (B)):

(1) Reject, in whole or in part, any matured claim made by a claimant by sending notice of the rejection by certified or registered mail, return receipt requested, to the claimant within 90 days after receipt of the claim and at least 30 days before the expiration of the four-year period for the continuance of a corporation as described above in "**Winding up affairs**." Such a notice sent must include or be accompanied by a copy of R.C. 1701.881(A) (this paragraph) and of R.C. 1701.89 (jurisdiction of court over winding up of affairs of voluntarily dissolved corporation). A claim against a corporation is barred if a claimant whose claim is rejected by the corporation does not commence an action to enforce the claim within 30 days after the corporation mails the rejection notice.

(2) Offer security to any claimant whose claim is contingent, conditional, or unmatured as the corporation determines is sufficient to provide compensation to the claimant if the claim matures. The corporation must send the corporation's offer to the claimant by certified or registered mail, return receipt requested, within 90 days after receipt of the claim and at least 30 days before the expiration of the four-year period the continuance of a corporation as described above in "**Winding up affairs**." Such a notice sent must include or be accompanied by a copy of R.C. 1701.881(B) (this paragraph) and of R.C. 1701.89. If the claimant offered the security does not deliver to the corporation a written notice rejecting the offer within 30 days after the corporation mails the offer for security, the claimant is deemed to have accepted the security as the sole source from which to satisfy claimant's claim against the corporation.

A corporation that has given a notice described above in "**Notice of dissolution**" may file an application with the court having jurisdiction under R.C. 1701.89 for a determination of the amount and form of insurance or other security that satisfies both of the following requirements: (a) the insurance or other security will be sufficient to provide compensation to any claimant who has rejected the offer for security made pursuant to R.C. 1701.881, and (b) the insurance or other security will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the corporation or that have not arisen but that, based on the facts known to the corporation, are likely to arise or to become known to the corporation within five years after the date of dissolution or such longer period of time as the directors or a court acting under R.C. 1701.89 may determine, not to exceed ten years after the date of dissolution. (R.C. 1701.881(C).)

Duties of dissolved corporation

The bill requires a dissolved corporation to do all of the following (R.C. 1701.882(A)):

(1) Pay the claims made and not rejected as described above in (1) under "**Corporation's actions regarding claims**";

(2) Post the security offered and not rejected as described above in (2) under "**Corporation's actions regarding claims**";

(3) Post security ordered by the court in any proceeding described in the last paragraph under "**Corporation's actions regarding claims**," above;

(4) Make any payment required by a court acting under R.C. 1701.89;

(5) Pay or make provision by insurance or otherwise for all other claims that are mature, known, and uncontested or that have been finally determined to be owing by the corporation and any other claims described above in (b) in the last paragraph under "**Corporation's actions regarding claims**." In the absence of fraud, the judgment of the board of directors of the dissolved corporation as to the provision the corporation made for the payment of all such claims is conclusive (R.C. 1701.882(C)).

The bill requires a corporation to pay in full any claims and liabilities or provide for those payments in full by insurance or otherwise if the corporation has sufficient assets. If the corporation does not have sufficient assets, a corporation must pay claims and liabilities or provide for those payments by insurance or otherwise in order of their priority. Among claims of equal priority, the corporation must apportion those payments to the extent of funds legally available therefore. Any remaining assets must be distributed to the shareholders of the corporation according to their respective rights and preferences. (R.C. 1701.882(B).)

Effect of dissolution on liability of shareholder

The bill provides that the dissolution of a corporation does not affect the limited liability of a shareholder with respect to transactions occurring or acts or omissions done or omitted in the name of or by the corporation. A shareholder who receives a distribution of assets from a dissolved corporation is not liable for any claim against the corporation in an amount in excess of the amount of shareholder's pro rata share of the claim or the amount distributed to the shareholder, whichever is less. The aggregate liability of any shareholder for claims against a dissolved corporation cannot exceed the amount distributed to that stockholder after the dissolution. A shareholder of a dissolved corporation, the assets of which were distributed pursuant to the General Corporation Law, may be liable for a claim against the corporation only if an action on that claim is commenced before expiration of the period of four years after the date of the dissolution or within the time limits otherwise required as described above in "**Corporation's actions regarding claims**," whichever is less. (R.C. 1701.883.)

Jurisdiction of court

The bill modifies existing law with respect to the authority of the court of common pleas that has jurisdiction to wind up the affairs of a voluntarily dissolving corporation. It provides that without limiting the generality of its authority, the court of common pleas of the county in this state in which the principal office of a voluntarily dissolved corporation is located, *in which the principal office was to be located, or in which the principal office* of a corporation whose articles have been canceled or whose period of existence has expired *is located*, upon the complaint of the corporation, a majority of the directors, or a creditor or *claimant* (instead of shareholder), and upon such notice to all the directors and such other persons interested as the court considers proper, at any time may order and adjudge in respect of *all of* the matters specified in existing law, including the following (modifications made by the bill are italicized) (R.C. 1701.89(A)(1), (2), (4), (7), (11), and (12)):

(1) *Any proceedings or actions described above in the last paragraph under* "**Corporation's actions regarding claims**";

(2) The presentation and proof of all claims and demands against the corporation and of all rights, interests, or liens in or on any of its *property including property described above in the last paragraph under* "**Winding up affairs**"; the fixing of the time within which and the manner in which such proof must be made and the person to whom such presentation must be made; and the barring from participation in any distribution of assets of all persons failing to make and present proofs as required by the order of the court;

(3) The settlement or determination of all claims of every nature against the corporation or any of its property; the determination of the assets required to be retained *or insurance to be obtained* to pay or provide for the payment of such claims or any claim; the determination of the assets available for distribution among shareholders; and the making of new parties to the proceeding so far as the court considers proper for the determination of all matters;

(4) The appointment of a special master commissioner *or guardian ad litem* to hear and determine any such matters with such authority as the court considers proper. *The applicant in the proceeding must pay the reasonable fees and expenses of the special master commissioner or guardian ad litem, including all reasonable expert witness fees, unless otherwise ordered by the court.*

(5) The allowance and payment of compensation to the directors or any of them (the bill deletes "to liquidators, to a receiver, to the attorney for the complainant" in existing law), or to any person (the bill deletes "properly") rendering services beneficial to the corporation or to those interested in it;

(6) The entry of a judgment or decree which, if it so provides, may operate as the deed or other instrument ordered to be executed, or the appointment of a master *or guardian ad litem* to execute such deed or instrument in the name of the corporation with the same effect as if executed by an authorized officer pursuant to authority conferred by the directors or the shareholders of the corporation, whenever there is no officer or agent competent to execute such deed or instrument, whenever the corporation or its officers do not perform or comply with a judgment or decree of court, or whenever the court considers it proper.

Receiver for winding up affairs

The bill modifies existing law by providing that whenever, after a corporation is dissolved voluntarily or the articles of a corporation have been cancelled or the period of existence of a corporation has expired, a receiver is appointed to wind up the affairs of the corporation, all the claims, demands, rights, interests, or liens of creditors, claimants, and shareholders must be determined as of the day on which the receiver was appointed *unless those claims, demands, rights, interests, or liens have already been determined as described above under* "**Corporation's actions regarding claims**" (added by the bill). The bill provides that *unless otherwise ordered,* the receiver has the authority as in existing law. (R.C. 1701.90.)

Judicial dissolution

The bill modifies existing law that authorizes a corporation to be dissolved judicially as follows (modifications made by the bill are italicized) (R.C. 1701.91(A)(2)(a), (3), and (4)):

(1) By an order of the court of common pleas of the county in this state in which such corporation has its principal office, in an action brought by holders of shares entitled to dissolve the corporation voluntarily, when it is established that its articles have been canceled or its period of existence has expired (the bill deletes "and that it is necessary in order to protect the shareholders that the corporation be judicially dissolved" in existing law);

(2) By an order of the court of common pleas of the county in this state in which the corporation has its principal office, in an action brought by the holders of shares entitling them to exercise *at least 2/3* (instead of a majority) of the voting power of the corporation on such proposal, when it is established that it is beneficial to the shareholders that the corporation be judicially dissolved*, or the holders of such lesser proportion as are entitled by the articles to dissolve the corporation voluntarily* (relocated by the bill);

(3) By an order of the court of common pleas of the county in this state in which the corporation has its principal office, in an action brought by one-half of the directors when there is an even number of directors or by the holders of shares entitling them to exercise *at least 2/3* (instead of ½) of the voting power, when it is established that the corporation has an even number of directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, or when it is established that the corporation has an uneven number of directors and that the shareholders are deadlocked in voting power and unable to agree upon or vote for the election of directors as successors to directors whose terms normally would expire upon the election of their successors.

The bill provides that the provisions described above in "**Notice of dissolution**" relating to the authority and duties of directors during the winding up of the affairs of a corporation dissolved voluntarily, with respect to the jurisdiction of courts over the winding up of the affairs of a corporation, and with respect to receivers for winding up the affairs of a corporation are applicable to corporations judicially dissolved (R.C. 1701.91(D)).

Appointment of provisional director

Existing law prohibits the appointment of a provisional director by the court of common pleas until a hearing is held by the court. Notice of the hearing must be given to each director and the secretary of the corporation in any manner that the court may direct. The bill provides that if directed by the court, the notice also must be given to each of the shareholders. The complainants must establish at the hearing that, because of irreconcilable differences among the existing directors (existing law) *or because there are no directors and the shareholders are unable to elect any directors* (added by the bill), the continued operation of the corporation has been substantially impeded or made impossible. (R.C. 1701.911(A).)

GENERAL CORPORATION LAW AND NONPROFIT CORPORATION LAW

Indemnification and advancement of expenses

Under current law, the indemnification authorized by the General Corporation Law (R.C. 1701.13) and the Nonprofit Corporation Law (R.C. 1702.12) is not exclusive of, and is in addition to, any other rights granted to those seeking indemnification under the articles, the regulations, any agreement, a vote of shareholders (or members in the case of a nonprofit corporation) or disinterested directors, or otherwise, both as to action in their official capacities and as to action in another capacity while holding their offices or positions, and continues as to a person who has ceased to be a director, trustee, officer, employee, member, manager, or agent (or a director, officer, employee, member, manager, agent, or volunteer in the case of a nonprofit corporation) and inures

to the benefit of the heirs, executors, and administrators of that person. (See **COMMENT** 2.) (R.C. 1701.13(E)(6) and 1702.12(E)(6).)

The bill extends the above provision to the advancement of expenses authorized by the General Corporation Law and the Nonprofit Corporation Law (see **COMMENT** 3). The bill further provides in the General Corporation Law and the Nonprofit Corporation Law that a right to indemnification or to advancement of expenses arising under a provision of the articles or the regulations cannot be eliminated or impaired by an amendment to that provision after the occurrence of the act or omission that becomes the subject of the civil, criminal, administrative, or investigative action, suit, or proceeding for which the indemnification or advancement of expenses is sought, unless the provision in effect at the time of that act or omission explicitly authorizes that elimination or impairment after the act or omission has occurred. (R.C. 1701.13(E)(6) and 1702.12(E)(6).)

Authority of directors

The General Corporation Law and the Nonprofit Corporation Law, unchanged by the bill, require a director to perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. The bill adds the provision in both Laws that a director serving on a committee of directors is acting as a director. (R.C. 1701.59(B) and 1702.30(B).)

LIMITED LIABILITY COMPANY

Persons performing services to limited liability company or members

The bill modifies existing law by providing that absent an express agreement to the contrary, a person providing goods to or performing services for a member or group of members of a limited liability company owes no duty to, incurs no liability or obligation to, and is not in privity with the limited liability company, any other members of the limited liability company, or the creditors of the limited liability company by reason of providing goods to or performing services for the *member or group of members of the* (added by the bill) limited liability company (R.C. 1705.61(B)).

TECHNICAL CHANGES

The bill makes grammatical, gender neutralizing, and other technical changes in the sections that it amends.

COMMENT

1. R.C. 4928.01(A)(5), not in the bill, defines "electric cooperative" as a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in Ohio to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

2. The General Corporation Law and the Nonprofit Corporation Law authorize a corporation to indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed civil, criminal, administrative, or investigative action, suit, or proceeding, other than an action by or in the right of the corporation, by reason of the fact that the person is or was a director, officer, employee, or agent of the corporation (or a director, officer, employee, agent, or volunteer of the nonprofit corporation), or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another domestic or foreign, nonprofit or for profit corporation (or at the request of the nonprofit corporation as a director, officer, employee, member, manager, agent, or volunteer of another domestic or foreign, nonprofit or business corporation), a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit, or proceeding, if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, if the person had no reasonable cause to believe the person's conduct was unlawful. With certain exceptions, a corporation also may indemnify or agree 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 or suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that the person is or was a director, officer, employee, or agent of the corporation (or a director, officer, employee, agent, or volunteer of the nonprofit corporation), or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another domestic or foreign, nonprofit or for profit corporation (or at the request of the nonprofit corporation as a director, officer, employee, member, manager, agent, or volunteer of another domestic or foreign, nonprofit or business corporation), a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit, if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation. (R.C. 1701.13(E)(1) and (2) and 1702.12(E)(1) and (2).)

3. The General Corporation Law provides that, generally, expenses, including attorney's fees, incurred by a director in defending the action, suit, or proceeding described in the preceding paragraph must be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, upon receipt of an undertaking by or on behalf of the director in which the director agrees to repay that amount if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation, and to reasonably cooperate with the corporation concerning the action, suit, or proceeding. Expenses, including attorney's fees, incurred by a director, trustee, officer, employee, member, manager, or agent in defending any action, suit, or proceeding described in the preceding paragraph, may be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, as authorized by the directors in the specific case, upon receipt of an undertaking by or on behalf of the director, trustee, officer, employee, member, manager, or agent to repay such amount, if it ultimately is determined that the person is not entitled to be indemnified by the corporation. (R.C. 1701.13(E)(5).)

The Nonprofit Corporation Law provides that, generally, the expenses incurred by the director or volunteer in defending the action, suit, or proceeding described above in **COMMENT** 2, including attorney's fees, must be paid by the corporation. Upon the request of the director or volunteer, those expenses must be paid as they are incurred, in advance of the final disposition of the action, suit, or proceeding. Notwithstanding this provision, the expenses incurred by a director or volunteer in defending such an action, suit, or proceeding, including attorney's fees, may not be paid by the corporation upon the final disposition of the action, suit, or proceeding, or, if paid in advance of the final disposition of the action, suit, or proceeding, must be repaid to the corporation by the director or volunteer, if it is proved, by clear and convincing evidence, in a court with jurisdiction that the act or omission of the director or volunteer was one undertaken with a deliberate intent to cause injury to the corporation or was one undertaken with a reckless disregard for the best interests of the corporation. Expenses, including attorney's fees, incurred by a director, officer, employee, member, manager, agent, or volunteer in defending any action, suit, or proceeding described above in **COMMENT** 2 may be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, as authorized by the directors in the specific case, upon receipt of an undertaking by or on behalf of the director, officer, employee, member, manager, agent, or volunteer to repay the amount if it ultimately is determined that the person is not entitled to be indemnified by the corporation. (R.C. 1702.12(E)(5).)

HISTORY

ACTION	DATE
Introduced	11-24-09
Reported, H. Civil & Commercial Law	02-02-10

h0379-rh-128.docx/kl