Approved 4-30-92
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Rep. John M. Solbach at
Chairperson

3:30 ~~x~~a.m./p.m. on March 26, 1992 in room 313-S of the Capitol.

All members were present except:

Representative Parkinson who was excused.

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Judy Goeden, Committee Secretary

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association
Gary Stotts, Department of Corrections
Ben Coates, Kansas Sentencing Commission
Robert Alderson, Kansas Bar Association
John Wine, Assistant Attorney General
Sara Ullman, Kansas Register of Deeds Association
Bill Mitchell, Kansas Land Title Association
Richard DeBowes, Kansas State University
Dorothy Thompson, Kansas State University
Lawrence Litson, Dist. Mag. Judge, Gove County
Kathryn Carter, Dist. Mag. Judge, Cloud County
Thomas Tuggle, District Judge, Concordia
Larry Magill, Independent Insurance Agents of Kansas
Don Horttor, Delta Dental Plan

The chairman called the meeting to order.

Hearing was opened on HB 3105, retention of original depositions and interrogatories.

Ron Smith, Kansas Bar Association, testified on behalf of Rex Beasley, Koch Industries, in favor of HB 3105. (Attachment #1)

Hearing on HB 3105 was closed.

Rep. Smith moved to report SB 753 favorably for passage. Rep. Douville seconded the motion. Motion carried.

The Revisor reviewed SB 588, child support orders. She gave a handout from Kansas Bar Association to members. (Attachment #2)

Representative Pauls moved to table SB 588. Rep. Smith seconded the motion. Motion carried.

SB 479, sentencing guidelines, was taken under consideration. Gary Stotts presented the fiscal impact statement for SB 479. He said there are no assumptions for juvenile offenders in this impact statement, only adults. In answer to committee members questions he said there is no specific provision in the bill for added jail sentences that may be given. The DOC feels SB 479 gives constructive improvements to the existing system. He felt there will probably be people getting out on parole under the guideline quicker than under current law. He felt more Class D & E offenders would be kept in the community. (Attachment #3)

Ben Coates, Executive Director, Kansas Sentencing Commission, summarized the last three years work on the sentencing guidelines. He felt there were three items which needed to be discussed: 1) racial disparity, 2) growing monthly prison population, 3) how decisions are going to be made. He said the top ten reasons prisioners were incarcerated in 1991 were drugs, burglaries, thiefts, forgeries, robberies, indecent

liberties, aggravated batteries, aggravated robberies and traffic offenses.

Continued consideration of SB 479 was closed except for testimony from Kevin Moriarity, Odell Jones, B. Horne and Kent Gregg which will be heard 3/30/92 from 3:30-4:00 P.M.

HB 3152, amendments to the corporation code, was opened for hearing.

Bob Alderson, Chairman of Kansas Bar Association Legislative Committee, testified in favor of HB 3152. (Attachment #4)

John Wine, General Counsel, Secretary of State's Office, testified in favor of HB 3152. (Attachment #5) He had one proposed amendment and a draft of his amendment was supplied to the Revisor.

Sara Ullman, Kansas Register of Deeds Association, testified in opposition to HB 3152. (Attachment #6)

Bill Mitchell, Kansas Land Title Association, testified in opposition to HB 3152. He did not want the requirement of filing Articles of Incorporation in the local Register of Deeds office stricken. He did not know how other states handle this. He said the Kansas system is working as far as title companies using it now.

Hearing on HB 3152 was closed.

Hearing on SB 415, confidentiality of information developed thru peer review at KSU Veternarian Center, was opened.

Richard DeBowes, DVM, MS, Kansas State University, testified in favor of SB 415. (Attachment #7) He answered committee members questions.

Dorothy Thompson, Associate University Attorney, KSU, testified in favor of SB 415. Attachment #8) She answered questions.

Hearing on SB 415 was closed.

Hearing on SB 597, increased powers & duties to district magistrate judges if assigned by district administrative judge, was opened.

Lawrence Litson, Magistrate Judge, Gove County, testified in favor of SB 597. (Attachment #9) He answered questions from committee members.

Kathryn Carter, Magistrate Judge, Cloud County, testified in favor of SB 579. (Attachment #10) She answered questions from committee members.

District Judge Thomas Tuggle, Concordia, testified in favor of SB 597. (Attachment #11) In answer to a committee member's question, he said the District Judges' Association Executive Committee has voted to oppose the bill.

Hearing on SB 597 was closed.

Hearing was opened on SB 625, enacting the Uniform Simultaneous Death Act, was opened, however there being no conferees on the bill, hearing was closed.

Hearing on SB 627, required vote on merger or consolidation agreements, was opened.

Larry Magill, Independent Insurance Agents of Kansas, testified in favor of SB 627. (Attachment #12)

Don Horttor, Delta Dental Plan, presented an amendment he proposed to SB 627. (Attachment #13)

Meeting adjourned at 5:45 P.M.

KOCH INDUSTRIES INC

LEGAL DEPARTMENT
LITIGATION SECTION

REX G. BEASLEY
ASSOCIATE GENERAL COUNSEL

March 24, 1992

VIA FEDERAL EXPRESS

Ronald Smith - Legislative Counsel
Kansas Bar Association
Kansas Law Center
1200 Harrison
Topeka, Kansas 66601

Re: House Bill No. 3105

Dear Ron:

I regret that I am going to be out of town on March 26 and therefore unable to testify in support of the above bill. This letter contains an explanation of the need for the passage of the bill; please feel free to share it with the House Committee.

Prior to changes in K.S.A. 60-230(f), original deposition transcripts obtained in litigation were filed with the Clerk of the District Court in the Judicial District where the legal proceedings were pending. Supreme Court Rule No 108 gives the clerk guidance on the retention and disposition of "court record". Presumably to ease the burden on the Court of storing original deposition transcripts, the Legislature made changes to K.S.A. 60-230(f) which transferred the burden of maintaining the original deposition transcripts to the litigants or their counsel. However, neither the litigants nor their counsel have the benefit of any rule providing guidance concerning the retention or disposition of the original deposition transcripts. In addition to original deposition transcripts, litigants and their counsel are frequently in possession of many other original discovery documents after a case is closed. Guidance should also be given concerning those materials as well.

HJC
3-26-92
#1
1 of 2

4111 East 37th Street North ▪ Wichita, Kansas 67220 ▪ P.O. Box 2256 ▪ Wichita, Kansas 67201
316/832-4030 ▪ FAX 316/832-8950

I first recognized the need for House Bill No. 3105 while preparing a closed litigation file for storage. There was no need to retain the original deposition transcripts yet there did not appear to be any authority to relieve me of the obligations imposed by the provisions of K.S.A. 60-230(f). The question was investigated by the Wichita Bar Association's Civil Practice and Procedure Committee. No answer could be found. The Board of Governors of the Wichita Bar Association authorized the Committee to make a proposal to the Kansas Supreme Court that it adopt a new Supreme Court Rule to address the problem. A rule very similar to House Bill No. 3105 was proposed to the Supreme Court. The Supreme Court determined that the problem should be addressed by the Legislature.

House Bill No. 3105 provides the necessary authority and guidance that is presently lacking and should be passed as proposed.

Very truly yours,

Rex G. Beasley
Associate General Counsel

RGB/am

HJC
3-26-92
#1
202

A SECOND CENTURY OF SERVICE
1882
KANSAS BAR ASSOCIATION

March 18, 1992

The Hon. Alex Scott
State Representative
State Capitol Building, Room #448N
Topeka, KS 66612

re: SB 588; CINC child support orders

Dear Dr. Scott:

Several members who practice family law have expressed concern with new subsection (3) on page 17 of this bill. The section requires a complaint contain a request that the parent or parents of a juvenile be ordered to pay child support. There was a thought that such a request should probably not be made in the complaint unless it is the filing entity's intent to sever parental rights. Many juve cases often end up with the child going back to live with the parents but under supervision. A child support order, or change in order, would be inappropriate in such circumstances. Subsection (3) requires the motion in all complaints, however. Further, there was concern the motion itself will anger and confuse many parents and they may tend to focus on that element of the proceeding instead of what they can do to get their juvenile back on the right track.

KBA has no position on the bill; these family law members just asked me to pass along these concerns for you to consider should you work this bill.

Cordially,

Ron Smith,
General Counsel

HJC
3-26-92
Attach #2

1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601-1037 • FAX (913) 234-3813 • Telephone (913) 234-5696

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
900 S.W. Jackson—Suite 400-N
Topeka, Kansas 66612-1284
(913) 296-3317

Joan Finney
Governor

Gary Stotts
Secretary

MEMORANDUM

To: Representative John Solbach, Chairperson
House Judiciary Committee

From: Gary Stotts
Secretary of Corrections

Subject: Fiscal Impact of SB 479--Revised

Date: March 26, 1992

This is to update the January 24, 1992 memorandum to Senator Winter describing the fiscal impact of SB 479, as introduced, on the Kansas Department of Corrections. Information will be presented in two areas: first, to reflect amendments to SB 479 made in the Senate; and second, to reflect the impact of a scenario providing for staggered implementation of retroactivity.

Summary of Original Fiscal Impact Statement

The approach used in estimating the fiscal impact of SB 479 in its original form was to compare projected costs through FY 2001 under two scenarios: (1) continuation of existing law; and (2) implementation of sentencing guidelines as provided in SB 479. The department's basic finding in doing this comparison was that continuation of current practice would require expenditure of an estimated $150.2 million more through FY 2001 than would be required to implement the guidelines. All costs were projected as incremental changes to the Governor's FY 1993 budget recommendations.

HJC 3-26-92 #3 1 of 6

Some of the key factors used by the department in preparing its estimates include the following:

- Costs were estimated only for facilities, programs and services administered by the Department of Corrections.
- All cost estimates were based on current dollars; no attempt was made to estimate inflationary impacts.
- Inmate population projections under both scenarios were made using a projection model developed for the department by the National Council on Crime and Delinquency (NCCD). Baseline projections were prepared by NCCD last fall; sentencing guidelines projections were prepared by staff of the Sentencing Commission, using the NCCD model.
- Inmate population levels under the baseline projection reach 8,121 by the end of FY 2001. Under the guidelines projection, inmate population levels are generally stable during the projection period, ranging from 5,500 to 5,725.
- Community Corrections estimates provide only for adult offenders.

These and other factors and assumptions were incorporated in the department's fiscal impact estimates. Changes in one or more of the factors could have a significant effect on the total estimate.

<u>SB 479 as Amended by the Senate (No Retroactivity; Effective Date of July 1, 1993)</u>

Of the amendments made to the bill by the Senate, two have an effect on the department's fiscal note for the bill--the change in the implementation date from July 1, 1992 to July 1, 1993; and deletion of the retroactivity provisions. Neither change affects the department's projected costs under the scenario for continuation of current practice; cumulative costs still are estimated to total $170.5 million through FY 2001.

Estimated costs under the sentencing guidelines scenario have been adjusted, however, in the following respects to reflect the Senate amendments establishing the effective date as July 1, 1993 and eliminating retroactive applications.

HJC
3-26-92
#3
2846

- A phased reduction in bed capacity would be initiated on July 1, 1994 instead of January 1, 1993.
- Community corrections program expansions would be implemented on July 1, 1993 instead of July 1, 1992.
- Funding was deleted for temporary positions budgeted to perform file reviews of existing inmate population as part of retroactivity implementation.
- ADP adjustments that were made to reflect the impact of retroactivity have been deleted.

The department estimates that, through FY 2001, expenditures under current law would be $134.1 million more than would be required under sentencing guidelines as passed by the Senate.

Staggered Implementation of Retroactivity and Effective Date of July 1, 1992

As introduced, SB 479 contained retroactive provisions that would have been implemented simultaneously with the effective date of July 1, 1992. The department has been asked to develop cost estimates based upon an implementation schedule staggered by felony class, assuming a July 1, 1992 effective date. The following schedule has been established by which the department would complete its sentencing guidelines report for each inmate:

August 15, 1992	Class E Felonies
October 15, 1992	Class D Felonies
December 1, 1992	Class C Felonies
December 31, 1992	Class A & B Felonies

The maximum time to elapse between completion of the sentencing guidelines report and the final sentence determination would be 120 days--which means that there could be as much as a four-month interval between the dates given above and actual release dates for

HJC 3-26-92 #3 3086

inmates in the respective felony classes. For purposes of the fiscal note, the department has estimated that approximately 1,200 inmates could be released early under the staggered implementation.

As with the other sentencing guidelines scenarios, the department has assumed that parole supervision would be provided using a caseload ratio of 50:1. However, the ratio is based on projected caseloads exclusive of or after the one-time surge in parole population due to retroactivity. During the two to three year period that would be required for the retroactive "bubble" to work through the parole caseload, the average caseload per officer would be greater than 50.

The department estimates that cumulative expenditures through FY 2001 under current law would be $137.7 million greater than those required under a July 1, 1992 sentencing guidelines effective date, with staggered implementation of retroactivity according to the schedule given above.

Tables are attached which summarize the department's estimates of the fiscal impact of SB 479 as amended by the Senate, and of staggered implementation of retroactivity.

Attachments

cc: Senator Winter, Chairperson
Senate Judiciary Committee
Division of the Budget
Legislative Research Department
Ben Coates, Director, Kansas Sentencing Commission

HJC 3-26-92 #3 HB

SB 479, AS PASSED BY THE SENATE

Estimated Adjustment
to
Department of Corrections Expenditures
FY 1993-2001
1993 Non-Inflated Millions of Dollars

A. Accumulated Nine-Year Period, FY 1993-2001

	Sentencing Guidelines	Current Policy	Net Impact
Capital Improvements & Related Equipment	$ -	$ 61.9	$ (61.9)
Facility Operations	(49.4)	100.6	(150.0)
Field Services (Parole)	15.3	8.0	7.3
Community Corrections	63.0	-	63.0
Other	7.5	-	7.5
Totals	$ 36.4	$170.5	$(134.1)

B. Annual Adjustment to Base

At End of Nine-Year Period, FY 1993-2001	$ 6.5	$ 24.4	$(17.9)

C. FY 1993 Adjustments to Governor's Budget Report

Total Net Adjustment $ 1.9

HJC 3-26-93 #3 5086

SB 479, STAGGERED APPLICATION OF RETROACTIVITY

Estimated Adjustment
to
Department of Corrections Expenditures
FY 1993-2001
1993 Non-Inflated Millions of Dollars

A. Accumulated Nine-Year Period, FY 1993-2001

	Sentencing Guidelines	Current Policy	Net Impact
Capital Improvements & Related Equipment	$ -	$ 61.9	$ (61.9)
Facility Operations	(58.9)	100.6	(159.5)
Field Services (Parole)	17.2	8.0	9.2
Community Corrections	65.9	-	65.9
Other	8.6	-	8.6
Totals	$ 32.8	$170.5	$(137.7)
Accelerated Option	$ 26.5		$(144.0)

B. Annual Adjustment to Base

At End of Nine-Year Period, FY 1993-2001	$ 6.7	$ 24.4	$(17.7)

C. FY 1993 Adjustments to Governor's Budget Report

Total Net Adjustment	$ 4.3
Accelerated Option	$ 3.2

HJC 3-26-92 #3 1 of 6

ALDERSON, ALDERSON, MONTGOMERY & NEWBERY

ATTORNEYS AT LAW

2101 S.W. 21ST STREET
P.O. BOX 237
TOPEKA, KANSAS 66601-0237

W. ROBERT ALDERSON, JR.
ALAN F. ALDERSON
STEVEN C. MONTGOMERY
C. DAVID NEWBERY
JOSEPH M. WEILER
JOHN E. JANDERA
DANIEL B. BAILEY
DARIN M. CONKLIN

TELEPHONE:
(913) 232-0753
FAX:
(913) 232-1866

MEMORANDUM

TO: House Committee on Judiciary

FROM: Bob Alderson, Chair, KBA Legislative Committee

RE: House Bill No. 3152 -- Amendments to Kansas General Corporation Code

DATE: March 26, 1992

The purpose of this Memorandum is to provide brief explanatory statements regarding each of the amendments that would be effected in the General Corporation Code by the enactment of HB 3152, which was drafted to implement current KBA legislative policy. In furtherance of recommendations of the KBA Legislative Committee, which I have chaired for the past three years, the KBA Board of Governors recommended essentially three types of amendments to the Code: (1) To incorporate recent changes in the Delaware Corporation Code, so as to maintain the Kansas Code's substantial conformity with the corresponding Delaware corporation laws; (2) to clarify certain of the changes made in the Code as a result of the last two legislative efforts to maintain conformity with the Delaware Code in 1986 and 1988; and (3) to delete the requirement that any instrument which is required by any provision of the Code to be filed with the Secretary of State must also be recorded with the Register of Deeds of the county in which the corporation's registered office is located in this state.

The following is a summary of the amendments made by each section of the bill.

Section 1 (17-6002).

Subsection (a)(1) sets forth the various "words of incorporation" that may be used in a corporation's name, and it requires that a corporation's name must be such as to distinguish it "upon the records in the office of the secretary of state" from names of other corporations, limited liability companies and "partnerships." The amendment to this subsection appears in line 27 on page 1, where the word "limited" is inserted before the word partnerships, not only to conform with the corresponding provision of the Delaware Code, but also in recognition of the fact that only limited partnerships must be registered with the Secretary of State. General partnerships are not required to be registered under Kansas law. The further amendment on page 1 in line 30, by inserting "limited liability company or limited partnership," is made to correspond with the prior requirement as to the names of entities which are registered with the Secretary of State.

HJC 3-26-92 Attach #4 1 of 10

Section 2 (17-6003).

K.S.A. 17-6003 is amended on page 6 by the deletion of paragraphs (5) and (6) of subsection (c), as contained in lines 1 to 7, inclusive. The deletion of this language accomplishes the KBA's recommendation to eliminate the requirement that instruments filed with the Secretary of State must also be recorded with the appropriate register of deeds. The further changes on page 6 in subsections (d) and (f) are to accommodate this change.

Section 3 (17-6009).

The amendments proposed to 17-6009 reflect an effort to clarify some ambiguities which resulted from the Legislature's amendments to this section in 1988, so as to conform with the corresponding section of the Delaware Code. The 1988 conforming amendments paid substantially more attention to form, than substance, employing archaic language and outdated drafting techniques which generally have been discarded in Kansas for nearly 20 years. Moreover, one of the so-called "clarifying" amendments produces more confusion than clarity.

As a result of those amendments, the initial sentence of 17-6009 now provides that the original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators or by the initial directors if named in the articles. That provision is substantially the same as it was prior to the 1988 amendment, although it is extended now to "other" bylaws not just the original bylaws and the powers now include the amendment or repeal of the bylaws, not just the adoption. The confusion arises, however, from the fact that engrafted onto this provision is a statement that, prior to the corporation receiving any payment for its stock, the board of directors may adopt, amend or repeal bylaws. This is confusing, in light of the fact that the "initial directors" constitute a "board of directors," and these initial directors serve until the first annual meeting of stockholders or until their successors are chosen and qualified. During that time, certainly, stock is normally issued to stockholders. Otherwise, there can be no meeting of stockholders.

Thus, the 1988 amendments create uncertainty as to the extent of the power of the initial directors to adopt bylaws. There are other confusing aspects of these prior amendments, particularly as they relate to the respective powers of stockholders and directors to adopt bylaws, and as they govern the adoption of bylaws in nonstock corporations.

The amendments proposed in this section have attempted to clarify these situations.

Section 4 (17-6203).

The only substantive changes proposed in this section appear in subsection (a) (lines 16 to 23, inclusive, on page 8) and accommodate the elimination of the requirement to record instruments with the register of deeds.

HJC
3-26-92
#4
2810

Section 5 (17-6204).

The substantive changes occur in subsections (a) and (c). In both subsections, amendments are proposed to accommodate the elimination of the requirement to record instruments with the register of deeds. Also, in subsection (c), the term "registered agent" is changed to "resident agent" to be consistent with Kansas law. Subsection (c) was added as one of the 1988 conforming amendments, but the terminology used in the Delaware law was not changed to correspond to the language which always has been used in Kansas. The Legislature made a conscious decision in 1972 that it would not change the prior practice of referring to this officer as a "resident" agent merely for the sake of conforming to Delaware's reference to this officer as "registered" agent.

Section 6 (17-6205).

The only substantive change proposed in this section is to accommodate the elimination of the requirement with the register of deeds to record instruments. The amendments appear on page 10, by the deletion of lines 15 to 24, inclusive.

Section 7 (17-6206).

The only substantive change proposed to this section appears in subsection (b) and is for the purpose of accommodating the elimination of the requirement to record instruments with the register of deeds.

Section 8 (17-6301).

The conforming amendments of 1988 included an amendment to subsection (c) of 17-6301. However, in conforming this provision to the corresponding provision of the Delaware Code, the Legislature perpetuated an ambiguity which exists in the Delaware law regarding powers of committees of the board of directors. Substantially all of the powers of a board of directors may be conferred upon any of its committees, with certain stated exceptions. One of those exceptions is that no committee shall have the power or authority with reference to amending the articles of incorporation. The "conforming amendment" of 1988 added an "exception" to that exception concerning the board's powers relating to designations, preferences, and other rights regarding the corporation's shares of stock.

However, this "exception" to the exception requires that these powers be exercised pursuant to K.S.A. 17-6401, which specifically provides that the resolution contemplated must be adopted pursuant to authority "expressly vested" in the board by the articles of incorporation. Accordingly, where such resolution is adopted and it provides for the exercise of authority by a committee of the board, it does not operate as an amendment of the articles of incorporation, but rather pursuant to authority expressly provided therein. Thus, stating a committee's authority respecting the corporation's shares of stock as an exception to the prohibition against a committee exercising any power or authority regarding amendment of the articles of incorporation is inappropriate.

H JC
3-26-92
#4
30 of 10

To clarify, the language which is stricken on page 12 in lines 37 and 38 is reinserted on page 13 in lines 6 and 7. As a result, the powers of a committee regarding the corporation's stock pursuant to a resolution specifically authorized by the board becomes one of the enumerated powers of a committee, and the exception regarding amendment of the articles of incorporation is repositioned in connection with the other prohibited powers of committees, where it was prior to the 1988 amendment.

The other substantive amendment to this section appears in subsection (k)(2) on page 15. The insertion of the new language in lines 5 and 6 not only conforms to the corresponding provision of the Delaware law, it also recognizes the fact that, in 1988, the Legislature eliminated the mandatory requirement that there be cumulative voting for directors, and made cumulative voting permissive. Even though that change was effected in the same bill which added subsection (k) to 17-6301, the change in cumulative voting was not recognized in subsection (2) as it is in the Delaware law.

Section 9 (17-6302).

The amendments to this section appear in subsection (d) on page 15, lines 38 to 41, inclusive. Currently, this subsection provides that the failure to "elect" the corporation's officers shall not dissolve a corporation. However, "election" of officers is not required. Subsection (b) provides that "[o]fficers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body." Accordingly, the change proposed in subsection (d) recognizes that officers may be selected in some manner other than election.

Section 10 (17-6401).

Subsequent to the 1988 conforming amendments to the Code, subsection (b) of the corresponding Delaware law was entirely rewritten. The Delaware law, as rewritten, is substituted for the existing subsection (b) of 17-6401.

In subsection (g), amendments are made to accommodate the elimination of the requirement that instruments be recorded with the register of deeds. Also in that subsection (page 19, lines 29 and 30), the words "or series" are deleted. Not only will the deletion of these words achieve conformity with the corresponding provision of the Delaware corporation law, it will permit the accomplishment of the clear intent of the Kansas statute. It is apparent that the limitation imposed by the Delaware statute on increasing the number of shares of a series of any class of stock is the total number of authorized shares of such class. However, the limitation in the Kansas statute is the total number of shares of the "class or series." Since that language does not appear in the corresponding provision of the Delaware law, it is unclear why that has been included in 17-6401.

HJC
3-26-92
#4
4010

On page 20, lines 23 to 36, inclusive, subsection (h) has been deleted. This subsection was added to 17-6401 in 1986, and at that time, the language was in substantial conformity with the language contained in the corresponding Delaware law. However, the Delaware provision was contained in subsection (f) of the corresponding Delaware statute, and not in a separate subsection (h). Thus, when the Kansas statute was further amended in 1988 to conform its provisions to Delaware law, subsection (f) was amended by the addition of language that is substantially the same as the last two sentences of subsection (h). Moreover, the first sentence of subsection (h) has been substantially duplicated by a 1988 amendment to 17-6408. Thus, the entirety of subsection (h) duplicates other Code provisions and is superfluous.

Section 11 (17-6418).

The phrase "new uncertificated shares or" is added to subsection (b) of 17-6418 on page 21, line 28. The addition of this language not only achieves conformity with the corresponding provision of the Delaware law, but also achieves consistency within the subsection. The new language was omitted from the 1988 conforming amendments to this statute, an apparent oversight.

Section 12 (17-6422).

Conforming amendments were made to 17-6422 in 1988. However, portions of the corresponding Delaware statute were omitted, apparently by inadvertence, and other language in the Kansas statute has become confused as a result of the drafting changes in 1988. The first of these inconsistencies is reconciled by the amendments on page 21, lines 42 and 43. The pertinent portion of this statute now relates to the "amount of the assets, liabilities and net profits of the corporation, or both." The phrase "or both" makes no sense, since there are more than two items identified and they are joined by the conjunctive "and." The proposed change is in conformity with the corresponding Delaware statute.

Similarly, the new language shown in lines 1 and 2 at the top of page 22 was omitted from the 1988 conforming amendments and was replaced by the stricken language in line 1. Not only does the statute as currently drafted make no sense because of these changes, it does not conform to the Delaware law. The amendments rectify this problem.

Section 13 (17-6423).

This section is currently in conformity with the corresponding Delaware law. However, the last sentence thereof (lines 14 to 18, inclusive, on page 22) is of questionable value. It provides that no designation as capital by the board of directors shall be necessary where shares are being distributed pursuant to a "split-up" or division of its stock, rather than as payment of a dividend which has been declared payable in shares of the corporation's capital stock. Since the provisions preceding that sentence require the designation as capital only where dividends are declared and paid in shares

HJC 3-26-92 #4 5 of 10

of the corporation's capital stock, and since a "split-up" or stock division is not the equivalent of a stock dividend, this sentence appears to be unnecessary and merely states the obvious.

Section 14 (17-6506).

As a result of the conforming amendments in 1988, this section conforms to the corresponding Delaware law. However, both codes contained some rather imprecise language, and the amendments in HB 3152 attempt to provide clarity. In several places, this statute and the corresponding Delaware statute attribute voting power to shares of stock, when in reality, voting power is exercised by the holders of the stock. Shares of stock are not "entitled to vote" as the statute declares, but rather the holders thereof are so entitled. While this is not an "earthshaking problem," HB 3152 provides an opportunity to provide precision to existing language.

Section 15 (17-6508).

The only substantive amendments to 17-6508 appear in lines 22 and 25 on page 23. Both amendments are designed to achieve conformity with the corresponding Delaware statute.

Section 16 (17-6513).

Even though 17-6513 is nearly identical to its Delaware counterpart as a result of the 1988 conforming amendments, neither statute adequately addresses the problem of filling vacancies or newly-created directorships. While subsection (a) of the statute deals with the situation where there are no directors then in office, by reason of death, resignation or other cause, the statute does not provide a procedure to deal with the situation where there may be directors in office who were elected by all of the stockholders, but there are no remaining directors in office who were elected by the holders of a particular class or series of stock and for whom a vacancy or newly-crated directorship is to be filled. The statute does not provide any apparent authority for the directors who are elected by all stockholders to fill such vacancy or newly-created directorship, and except to the extent provided in subsection (c), there is no authority for the persons identified in subsection (a) to call a special meeting of stockholders or apply to the district court, since the overriding condition of subsection (a), that there be no directors then in office, has not been satisfied.

Accordingly, the new paragraph appearing in lines 2 to 15, inclusive, on page 25 has been prepared in an effort to accommodate this hiatus.

Section 17 (17-6515).

"Registered agent" in line 29 on page 26 is changed to "resident agent."

HJC
3-26-92
#4
6 of 10

Section 18 (17-6601).

The only change proposed in this section occurs in line 7 on page 27, and it is intended to accommodate the elimination of the requirement that instruments be recorded with the register of deeds.

Section 19 (17-6602).

The amendments in paragraphs (1) and (3) of subsection (a) are to accommodate the elimination of the requirement that instruments be recorded with the register of deeds.

In addition, a new subsection (c) has been added, in order to maintain the section's conformity with the corresponding Delaware statute. Subsection (c) was added to the Delaware statute subsequent to the 1988 conforming amendments to 17-6602.

Section 20 (17-6605).

The only amendment made to this section is in subsection (d), and it is intended to accommodate the elimination of the requirement that instruments be recorded with the register of deeds.

Section 21 (17-6701).

In subsection (b) of 17-6701, the amendments in lines 34 and 35 on page 31 are designed to achieve conformity with the Delaware Code. In addition, the amendments are necessary to make sense of this provision. When two or more corporations merge, there is only one surviving corporation.

Similar amendments are made in subsections (c) and (d), by inserting in several instances the phrase "or resulting" after the word "surviving." In each of these instances, the context is referring to a merger or consolidation. On the one hand, when two or more corporations merge, there is but a single "surviving" corporation; whereas, the new corporation formed when two or more corporations consolidate is the "resulting" corporation.

An additional substantive amendment is made in subsection (d) by the insertion of the new language in lines 19 and 20 on page 33. Subsection (c) permits the filing of a certificate of merger or consolidation in lieu of filing the agreement of merger or consolidation itself. Accordingly, the new language proposed for insertion in subsection (d) would accommodate that provision. It is to be noted, however, that the new language is not found in the corresponding Delaware statute. Nonetheless, it would appear to be necessary.

The amendments to subsection (f) are designed to achieve conformity with the corresponding provision of the Delaware law.

HJC
3-26-92
#4
708/C

Section 22 (17-6702).

As was the case in 17-6701, amendments are proposed to this section to reference the surviving "or resulting" corporation, when referenced in context of a merger or consolidation. In addition, changes are made to accommodate the elimination of the requirement that instruments be recorded with the register of deeds. All of the amendments to this section appear in subsection (c) on page 36.

Section 23 (17-6703).

The substantive amendments to 17-6703 occur in subsection (a) thereof and, for the most part, are designed to achieve conformity with the corresponding Delaware statute, which was not achieved by the 1988 amendments. In addition, the requirement that a certified copy of the certificate of ownership and merger be recorded with the register of deeds is deleted.

Section 24 (17-6704).

Subsection (b) of this statute is amended to achieve conformity with the 1990 amendments to the corresponding Delaware section. It would appear that no real substantive change has been effected; rather, it improves clarity.

In subsection (c), the amendments are intended to accomplish the conformity apparently intended by the 1988 amendments to this section. However, because of an apparent, inadvertent drafting error, conformity was not achieved.

Similarly, the amendments to subsection (d) are designed to achieve conformity with Delaware law, and with one exception, these amendments merely clarify the existing statute. The only new, substantive provision appears on page 42 in lines 7 to 10, inclusive, by including a new sentence providing for the effective date of an agreement of merger or consolidation where the surviving or resulting entity is a joint-stock association.

Subsection (f) also is amended to conform to Delaware law, by including "charitable joint-stock associations" within the contemplation of the subsection's declaration that nothing in 17-6704 shall be deemed to authorize the merger of such entity into a stock corporation or joint-stock association if the charitable status would be lost by such merger or consolidation.

Section 25 (17-6705).

The only substantive amendment to this section occurs in subsection (c) on page 43, by deleting the sentence beginning in line 36 and ending in line 42, to accommodate the elimination of the requirement that instruments be recorded with the register of deeds.

HJC 3-26-92 #4 8810

Section 26 (17-6706).

Subsequent to the 1988 conforming amendments to this section, the corresponding Delaware statute was amended to broaden its scope. Whereas the Kansas statute applies to the merger or consolidation of nonstock, nonprofit corporations, the Delaware statute applies to the merger or consolidation of all nonstock corporations, irrespective of whether they are nonprofit or profit. The amendments to 17-6706 incorporate the recent Delaware amendments.

In addition, in subsection (c), the requirement that the agreement of merger or consolidation be recorded is deleted, consistent with the elimination of the requirement that instruments be recorded with the register of deeds.

Section 27 (17-6707).

K.S.A. 17-6707 does not presently conform with the corresponding section of the Delaware Code, because of amendments made to the Delaware statute in 1988. Conformity would be achieved by the amendments proposed in HB 3152. Some of these amendments are primarily to clarify the section's intent. However, the new language on page 47 in lines 1 to 14, inclusive, provides for the contingency that shares of a stock corporation or membership interest of a nonstock corporation are not to be converted solely into shares or other securities of the stock corporation or membership interests of the nonstock corporation surviving or resulting from the merger or consolidation.

In addition, in subsection (c) on page 48, lines 6 and 7, an amendment is proposed to accommodate the elimination of the requirement that instruments be recorded with the register of deeds.

Section 28 (17-6804).

The amendments to this section occur in subsections (b) and (c) and are solely for the purpose of accommodating the elimination of the requirement that instruments be recorded with the register of deeds.

Section 29 (17-6805).

The 1988 conforming amendments to this statute failed to achieve complete conformity with the corresponding Delaware statute. Subsection (a) of the Kansas statute applies to the dissolution of a nonprofit, nonstock corporation, while the Delaware statute applies to the dissolution of any nonstock corporation. The amendments proposed in HB 3152 would achieve conformity with the Delaware statute.

Subsection (b) of 17-6805 also has been amended to achieve conformity with the Delaware counterpart, by deleting the language at the end of the subsection in lines 40, 41 and 42. Although deletion of this language achieves conformity with the Delaware statute, the amendment is somewhat insignificant, since the deleted language merely explains the nature of the certificate prescribed by K.S.A. 17-6803.

H JC 3-26-92 Att 9 & 10

Section 30 (17-6913).

The only substantive amendment to this statute appears in subsection (c) on page 51, and it is for the purpose of accommodating the elimination of the requirement that instruments be recorded with the register of deeds.

Section 31 (17-7001).

The only substantive amendment to this section appears in subsection (b) on page 53, and is for the purpose of accommodating the elimination of the requirement that instruments be recorded with the register of deeds.

Section 32 (17-7002).

The only substantive amendment to this section occurs in subsection (b) on page 54, and is for the purpose of accommodating the elimination of the requirement that instruments be recorded with the register of deeds.

Section 33 (17-7204).

The words "and recording" in line 6 on page 57 are deleted, to accommodate the elimination of the requirement that instruments be recorded with the register of deeds.

Section 34 (17-7302).

The words "and recording" in line 13 on page 58 are deleted, to accommodate the elimination of the requirement that instruments be recorded with the register of deeds.

HJC 3-26-92 #4 10 of 10

Bill Graves
Secretary of State

2nd Floor, State Capitol
Topeka, KS 66612-1594
(913) 296-2236

STATE OF KANSAS

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
HOUSE BILL NO. 3152

March 26, 1992

The office of the Secretary of State supports the technical provisions of HB 3152 and encourages this committee to favorably recommend it for passage.

The technical provisions clarify the existing corporate code and keep our code in conformity with the Delaware corporate code. These technical provisions will have no fiscal impact on this office or on corporations.

Other provisions of this bill would end the requirement that a copy of corporate filings be recorded in the office of the register of deeds. Secretary Graves has reservations about ending the local availability of corporate records, but because dual filing has only local impact, he defers to the judgment of the committee.

Finally, we ask this committee to adopt an amendment that would clearly limit the length of time in which a corporation may seek a refund of a franchise tax overpayment. The statutes governing refunds of tax refunds by the Department of Revenue limit the time for filing such claims to three years beyond the due date of the return. We ask for similar language applicable to corporate franchise tax refunds. A draft has been supplied to the Revisor.

Recently, we have heard that some corporations may amend prior annual reports to utilize a different accounting method that would reduce the franchise tax due. With no clear statute of limitations on these claims, the fiscal impact could be significant. We urge this committee to adopt three years as a reasonable time for corporations to make such claims.

Again, we encourage this committee to amend and favorably report HB 3152 for passage.

Thank you.

John Wine, General Counsel

HJC
3-26-92
Attachment #5

REGISTER OF DEEDS

KANSAS ASSOCIATION

The Kansas Register of Deeds Association is in opposition to certain portions of H.B. 3152. Most of this bill appears to deal with technical issues concerning the form and filing requirements of Articles of Incorporation, but one provision of the bill would strike the requirement of filing Articles of Incorporation in the local Register of Deeds' office where the corporations do business. It is this provision which we oppose.

We ask that you carefully consider striking the requirement to file locally. The language dealing with this change begins on page 6 line 1 (with other changes reflecting the same throughout the bill). The following factors we believe make it inefficient and costly to change the requirement of local filing.

1) Title and Abstract Companies search the local records for information. Counties which use the abstract system, rather than the title insurance system on title reports would find this especially burdensome. Having this information only available at the state level will greatly decrease the efficiency of their work and increase the cost to the general public of accessing the information.

2) The general public also accesses these records at the local level. This again will delay and increase the cost for them in getting to the information which they may need. The Register of Deeds offices are in the business of providing this information in a very timely and cost effective manner.

3) The local records are used to pick up the change of name for the tax roll purposes by the County Clerk and Treasurer. They are used to track corporations and the personal property tax which may be due from these corporations by the Appraiser. They are used to verify ownership on subdivision plat filings by the Register of Deeds. It is valuable information to have filed at the local level. Access only via the Secretary of State's office will be cumbersome to the counties.

4) Filing only at the state level will greatly decrease the revenues of the counties and increase the burden in access, while at the same time increase the costs and burden at the state level in responding to inquiries. In this case, two negatives do not make a positive. Although it could be argued that this will reduce the cost for the corporation, it shifts their savings to increased costs for businesses and individuals searching the records and increases the cost to the state government in providing the information.

We would be happy to stand for any questions.

HJC
3-26-92
Attach #6
1 of 2

Shawnee County Fiscal Impact of H.B. 3152

1990 - $30,445 collected from Articles of Incorporation filings.

1991 - $31,154 collected from Articles of Incorporation filings.

Total documents filed in Shawnee County in 1991 39,538.
Article of Incorporation filings 2,777

Articles represent 7% of total filings.

If the same percentage would hold true for Johnson County it would represent 6,300 filings and a fiscal impact of approximately $80,000 -$100,000.

HJC
3-26-92
Attach #6
282

KSU
KANSAS STATE UNIVERSITY

Department of Clinical Sciences

College of Veterinary Medicine
Veterinary Medical Teaching Hospital
Manhattan, Kansas 66506-5606
913-532-5708 Administrative Office
913-532-5700 Large Animal
913-532-5690 Small Animal
FAX: 913-532-4309

MEMORANDUM

TO: House Judiciary Committee

FROM: Richard M. DeBowes, DVM, MS
Associate Head, Department of Clinical Sciences

RE: SB 415: Confidentiality of Peer Review of Medical Records, Kansas State University, College of Veterinary Medicine, Veterinary Medical Teaching Hospital

DATE: March 23, 1992

The mission of the Kansas State University, College of Veterinary Medicine, Department of Clinical Sciences is directed primarily towards the education of veterinary, graduate, and postgraduate student trainees in the clinical medical sciences. Furthermore, as part of their developmental and clinical research missions, the faculty and staff of the entire Veterinary College often utilize and review case materials, medical records, and data from the Veterinary Medical Teaching Hospital to evaluate the efficacy and appropriateness of currently practiced medical and surgical therapies.

In order to accomplish these missions, it is essential that the faculty and staff have the freedom to utilize case materials and medical records from the Veterinary Medical Teaching Hospital (VMTH). To maintain an environment which fosters the scholarly growth of both faculty and clinical trainees, it is imperative that our faculty have the opportunity to seek the collegial review of their clinical methods and when appropriate, participate in the clinical review process without fear of subsequent entanglement in civil legal actions. Failure to provide the faculty with such protection will severely limit their ability to instruct our veterinary and graduate students and will drastically limit the faculty's ability to grow professionally through the responsible application of constructive case review processes.

Despite the existence of such protections for the University of Kansas Medical Center, recent experience with a civil legal action suggests that these necessary protections are not automatically extended to the instructional, research, and service activities of the Kansas State University, Veterinary Medical Teaching Hospital. We know that you can appreciate the instructional and educational merits of the peer review process. For these reasons, the Department of Clinical Sciences and the College of Veterinary Medicine seek to protect from subpoena or legal discovery, all written documents pertaining to medical case reviews for instructional, scientific or administrative purposes.

HJC 3-26-92 Attachment #7

March 26, 1992

TESTIMONY BEFORE THE HOUSE JUDICIARY
ON SENATE BILL NO. 415

by Dorothy L. Thompson
Assoc. University Attorney
Kansas State University

Passage of this bill is needed to allow the KSU Veterinary Medical Center to carry out a program of internal monitoring and self-criticism of the quality of its veterinary service without fear that its efforts will be used against it by litigants.

The internal monitoring of which I speak is in the form of peer review by members of the veterinary medical staff. If "privileged," as spelled out in this bill, the results of the work of peer review committees would not be required to be released by the Veterinary Medical Center. Moreover, nothing from the work of these committees would be admissible in evidence in any judicial or administrative proceeding. Nor could any individual who participated in the peer review process testify concerning the results of a peer review.

The need for a very specific statute such as this one became clear in the course of my handling of a lawsuit against Kansas State University and a number of faculty from the College of Veterinary Medicine. In that case, the faculty requested that a peer review committee review two equine cases in which the outcome had not been positive. The review committee did a very thorough job and pointed out every possible problem in the care of the animals involved. As is intended, the review committee raised various questions and stated various opinions concerning the treatment and care of the animals. The purpose of this process was, of course, to identify any areas in which the treatment of future cases could in any way be improved.

Thereafter, the owner of one of the animals whose treatment was reviewed brought a lawsuit and, in the course of discovery, the report of the equine review committee was, as required by the rules of discovery, made known to the plaintiff. The University contended that the report, as a remedial action under K.S.A. 60-451, was inadmissible at trial. The district judge, however, ruled the report itself and the testimony of the members of the review committee were admissible. As a result of this ruling, the University was denied summary judgment. Only after trial could the ruling of the district judge as to the admissibility of the report be appealed. As a result, the University determined that this case should be settled and did so.

This experience demonstrated to the KSU Veterinary Medical Center that a specific statute protecting its peer review reports from discovery and from admissibility was sorely needed. Peer review reports by human health care providers are currently privileged under K.S.A. 65-4915. Senate Bill No. 415 is patterned after that statute. The KSU Veterinary Medical Center clearly needs to carry on an active peer review process to assure that its veterinary service is as good as it can possibly be. To that end, the unhampered and candid advice of peer review panels is an absolute necessity. However, unless the work of these committees is protected against misuse by litigants, the faculty and staff of the Veterinary Medical Center will not feel free to do the kind of critical self-analysis that is needed to assure the highest veterinary service possible. I therefore urge the committee to move forward with the passage of S.B. 415.

HJC
3-26-92
Attachment #8

Mr. Chairman, Ladies and Gentlemen:

I am Lawrence Litson, Distirct Magistrate Judge from Gove County, Kansas. As a lawyer who pracitced 8½ years before taking office and with 10 years experience as a Magistrate, I see several advantages in Senate Bill 597.

1) It will save a District Judge from driving as much as 90 to 100 miles one way to hear 1 or 2 short cases.

2) It will help reduce the caseload of some District Judges giving more time with the cases they do have.

3) It could help eliminate some continuances in cases where a last minute answer would otherwise take a case out of Magistrate Jurisdiction.

4) Particularly in Western Kansas, it will make judges more readily available to attorneys due to the mileage situation I mentioned before.

5) And, finally, this bill does not eliminate any magistrate positions, nor does it threaten non-lawyer magistrates as some have feared would happen.

Thank you all for allowing me to present my views here today.

HJC
3-26-92
Attachment #9

DISTRICT COURT
TWELFTH JUDICIAL DISTRICT
STATE OF KANSAS

Kathryn Carter
DISTRICT MAGISTRATE JUDGE
CLOUD COUNTY COURTHOUSE

811 Washington
CONCORDIA, KANSAS 66901
PH. (913) 243-8130

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
BY
DISTRICT MAGISTRATE JUDGE KATHRYN CARTER
IN SUPPORT OF S.B. 597

Chairman Solbach and members of the committee:

I am the District Magistrate Judge for Cloud County, Kansas, in the Twelfth Judicial District. I graduated from KU Law School and am licensed to practice law. In June of 1987 I was appointed to the bench.

I testify today in support of S.B. 597. The proposed expansion of jurisdiction for law trained district magistrate judges could benefit the State of Kansas in may ways.

The experience in my district is similar to that of the other two judicial districts served by a single district judge. According to our 1991 statistics, Judge Tuggle's load of those cases that are beyond the jurisdiction of the magistrates, i.e. felony, domestic relations and chapter 60, exceeds the state average of the same. However, our total caseload per judge, that is of all cases, is below the state average of the same. This is true of the district to the west of us, the Seventeenth Judicial District, which is also served by only one district judge, but has a law trained magistrate. It would be a much more efficient use of magistrates, if the one qualified under K.S.A. 20-334 were able to assist the district judge. This magistrate could equalize the caseload of the district judge, and if need be, the other magistrates could take up those cases the law trained magistrate might need to abandon due to scheduling.

Case management, per se, is a considerable task in a single district judge district. Although more populous, and more geographically compact, districts are able to use case-stacking as a management tool, in view of the fact that our district judge covers an area of six counties, over 4,000 square miles, this is not a tool available to us.

HJC 3-26-92 Attach #10 1 of 2

In a single district judge district, our judge must regularly use a standing cross-assignment that the Supreme Court has put in place, calling upon district judges from another district to travel to take up cases when he vacations or recuses himself in cases where he has a conflict of interest, travel and meal expenses charged to the state. Having a judge available in the district would result in a savings to the state.

The greatest savings, however, is probably in the area of appeals. At this time a defendant in a misdemeanor criminal case in our district enjoys no just the right to his day in court, but to two days in court. Even in the case of a jury finding that a defendant is guilty, if the trial was conducted by a magistrate, the defendant may have a second jury trial before a district judge. Certainly when the jury trial is conducted by a law trained magistrate, this must be a perversion of the system.

I would like to note and praise an important provision in S.B. 597, that which requires the assignment of the case AND the consent of the magistrate. This protection encourages the cooperation between the administrative judge and the magistrates in insuring the most efficient and equitable use of this proposal.

In conclusion, it seems clear that allowing a district magistrate judge who meets the statutory qualifications of a district judge to share the caseload would facilitate the movement of cases through court, improve citizen's access to the system, and ease the burden of the district judge.

I appreciate your time, attention and consideration given me today, and urge you to support S.B. 597. Thank-you.

HJC
3-26-93
Attach #10
2 of 2

DISTRICT COURT OF KANSAS
TWELFTH JUDICIAL DISTRICT
Cloud, Jewell, Lincoln, Mitchell, Republic and Washington

Cloud County Courthouse
Post Office Box 423
Concordia, Kansas 66901

THOMAS M. TUGGLE
District Judge
913-243-8125

JO ANNE RICE
Administrative Assistant
913-243-8131

BECKY L. HOESLI, C.S.R.
Official Court Reporter
913-243-8193

March 23, 1992

Hon. John Solbach
Chairman
Kansas Judiciary Committee
Kansas House of Representatives
State Capitol Building
Topeka, KS 66602

Re: Senate Bill No. 597.

Dear Representative Solbach and Other Members of the Committee:

I am submitting the following written testimony in support of Senate Bill No. 597 and I request that the testimony be entered into the record:

By way of introduction I am the Administrative District Judge of the Twelfth Judicial District. The district consists of six counties in north central Kansas with a population of approximately 40,000 people. This is a single district judge district. The caseload of the district judge is well above the state average.

The bill lets the administrative judge determine what cases, if any, to assign to a law trained district magistrate judge and the assignment can be made only if it is agreeable to the district magistrate judge. Because the district magistrate judges would not receive any additional compensation for these addition duties the bill would have no adverse fiscal impact.

The bill permits the additional use of law trained judges at no expense to the state. Perhaps more importantly it can be a savings to the litigants. In some instances a case will be tried to a district magistrate judge and one or both of the parties know in advance that the case will be appealed to the district judge. This occurs in DUI cases and often in child in need of care cases where parental rights are terminated. It has never made sense to me in cases of this type to have the case heard twice by law trained judges.

HJC
3-26-92
Attach #11
1 of 2

In addition, it would be of assistance to me to have a law trained judge who could act in my absence from the district or when it is necessary for me to recuse in a case. Presently, in such cases it is necessary for me to have a district judge assigned from another judicial district.

I urge your careful consideration of this bill.

Sincerely,

Thomas M. Tuggle

TMT/jr

HJC
3-26-92
Attach #11
282

Testimony on SB 627
Before the House Judiciary Committee
March 26, 1992
By: Larry W. Magill, Jr. for the
Independent Insurance Agents of Kansas
and the
Professional Insurance Agents of Kansas

Thank you Mr. Chairman and members of the committee for the opportunity to appear today in support of SB 627, a measure that we requested the Senate Judiciary Committee introduce.

Our two associations have entered into serious consolidation discussions that should be concluded by this summer with a possible merger on September 1st or October 1st.

We have discussed a merger off and on since the early 1980's. All of the surveys conducted in Kansas as well as countrywide indicate that anywhere from 80-95% of our members in each association support merging the two. We address identical memberships with very similar programs, benefits and services. In this age of reducing commissions and difficult insurance markets, our members cannot afford to support two associations.

In doing the preliminary research for a merger, we asked our attorney to let us know what would be required. Attached to my testimony is his response along with copies of the statutes in question. As he points out in his letter, there is some ambiguity between K.S.A. 17-6705(c) and K.S.A. 17-6505 as to whether a vote of the entire membership of both associations is required with two-thirds voting in favor.

However, since both of our associations elect our officers by a general membership vote and one of them elects board members by a

HJC
3-26-92
Attach #12
1 of 3

general membership vote, we felt that the only safe way to proceed was to obtain a vote of the entire membership. This will be very time consuming and costly since the entire membership never responds to anything! It will probably involve several proxy mailings followed by individual phone calls to each member.

A mail vote like this will not give the members an opportunity to appear at a meeting, ask questions and voice concerns in a give and take discussion. Unfortunately, a mail vote requires them to act only on the basis of information we provide to them through the mail.

We believe most nonprofit boards make every effort to accurately represent the interests of their members. If they do not, the members will not remain a part of the organization. If a merger were affected that did not meet with member approval, they would simply cease paying dues to the organization.

We have not had time to analyze the other 49 states' requirements for merger of two nonprofit corporations. We do know that five other state Independent Insurance Agent and Professional Insurance Agent associations have already merged and that none of them had to have a vote of the entire membership of each association. Whether they simply formed a new corporation without dissolving the old to circumvent the statute, ignored it or had a different law, we are not certain. We also suspect that the Kansas law was simply patterned after a similar Delaware statute with very little discussion or debate. Mergers of nonprofit associations are relatively uncommon and ours is probably the largest to come along in quite awhile.

We are committed to moving ahead with the merger regardless of whether this legislation passes. We are also convinced we will obtain

HJC
3-26-92
#12
2813

the necessary number of positive votes, but would like to avoid the time and expense that will require. For that reason, we urge the committee to act favorably on SB 627. We would be happy to answer questions or provide any additional information the committee would like.

HJC
3-26-92
#12
3 of 3

GI RT & ROBERTS, CHARTE D
ATTORNEYS AT LAW
5601 SW BARRINGTON COURT SOUTH
P.O. BOX 4306
TOPEKA, KANSAS 66604
(913) 273-7722
FAX # (913) 273-8560
ID # 48-0992424

FLOYD E. GEHRT
ROBERT L. ROBERTS
WILLIAM A. LARSON
WILLIAM W. SNEED
GREGORY A. LEE
CRAIG C. BLUMREICH
RON D. MARTINEK
BRIAN G. BOOS
MATTHEW S. CROWLEY

ASSOCIATED COUNSEL
HARLAND K. RIEGER

January 2, 1992

Larry Magill
Independent Insurance Agents of Kansas
815 Topeka Avenue
Topeka, Kansas 66612

Re: IIAK - PIA Merger

Dear Larry:

I have had a chance to do some preliminary research on the potential consolidation or merger of PIA and IIAK. I'm enclosing a copy of K.S.A. 17-6705, K.S.A. 17-6712 and K.S.A. 17-6505. Generally, K.S.A. 17-6705 governs the merger or consolidation of nonstock, nonprofit corporations. I am assuming that IIAK and PIA are indeed nonstock, nonprofit corporations.

The basic procedure for a merger or consolidation is outlined under K.S.A. 17-6705. The governing board of the corporations that desire to either merge or consolidate must enter into an agreement of merger or consolidation. The difference between merger and consolidation is that under a merger one corporation is merged into the other, whereas in a consolidation the corporations are consolidated and new articles of incorporation are promulgated. In my view, a merger would be somewhat less expensive than a consolidation. For one thing, if the corporations merged it would be possible to use the articles of incorporation of the surviving corporation with whatever changes are necessary rather than having to prepare new articles of incorporation for a consolidated corporation. There are also various other formalities that would have to be accomplished for a new consolidated corporation. Furthermore, it might simpler tax-wise. It is possible that with a consolidation the new corporation would have to reapply for tax exempt status under 501(c)(6) of the Internal Revenue Code. I understand that you will talk with your accountants concerning this issue. If you decided to do a merger rather than a consolidation, it is of course always possible to change the name of the corporation into which the other corporation is merged. This is a very simple procedure.

HJC
3-26-92
#12
4813

The agreement to merge or consolidate has to include the five specific items set forth in K.S.A. 17-6705(b). In order to prepare an agreement for merger or consolidation I would have to get together with the boards or their respective representatives to hammer out the details of the agreement. Probably item four which refers to the manner of converting the memberships of each constituent corporation to the membership of the surviving or consolidated corporation will be the most critical of the requirements to be determined. After briefly reviewing the by-laws of both corporations, it seems to me to be obvious that new by-laws would also have to be prepared.

Once the agreement is reached, it must be approved at either an annual meeting or a special meeting of each constituent corporation.

K.S.A. 17-6705 provides that to approve the merger or consolidation a two thirds vote of the members who have a right to vote for the governing bodies of the associations is required. There are a couple of points concerning this requirement that are not absolutely clear in reading the applicable statute and in reviewing the by-laws of the associations.

The PIA by-laws provide that the members have the right to vote for the board of directors, so it seems to be fairly clear to me that with respect to the PIA, the two thirds requirement would apply to the membership at large.

The IIAK by-laws are far more complicated. The association is governed by a board of governors consisting of 17 members which include the president, president elect, vice president, secretary, treasurer, state national director, immediate past president, six zone directors, three members representing the membership at large and the president of the Kansas Young Agents committee. The majority of the officers are elected by the membership at large while the remainder of the officers and directors are appointed by either the president or the president elect. Consequently, a portion of the governing body is elected by the membership and a portion is appointed by officers elected by the membership.

K.S.A. 17-6705 does not contemplate this sort of situation. The statute provides that where the membership has the right to vote for the governing body of the association, a two thirds vote of the membership is required to approve the merger. It also states that where no members of the association have the right to vote for the governing body, and where the governing body is elected by the governing body itself, a two thirds vote of the governing body is sufficient to approve a merger or consolidation. After considering the issue at some length, we've come to the conclusion that the only safe way to approve the merger and consolidation for the IIAK is to obtain a two thirds vote from the membership because clearly some of the members do elect some of the governing body of the association, and those who are appointed are appointed by elected members of the governing body.

HJC
3-26-92
#12
5013

The other issue with respect to the two thirds requirement is whether the two thirds requirement applies to the entire membership or simply a quorum of the membership. K.S.A. 17-6705(c) seems to state that two thirds of the entire membership is required. The point is not entirely clear, however. The comments to K.S.A. 17-6705 refer to K.S.A. 17-6505, which I have also enclosed. Under K.S.A. 17-6505, one third of the voting membership of a nonstock corporation constitutes a quorum for the transaction of business. The by-laws can, and in this case do, provide for a quorum of less than one third of the membership. The approval of various actions by the membership requires a majority vote of a quorum unless the action for which approval is sought is governed by a statute which requires a larger number. In this case it could be argued that the two thirds requirement in K.S.A. 17-6705 simply refers to a two thirds quorum as allowed under K.S.A. 17-6505 as opposed to a two thirds vote of the entire membership of both associations.

There are no cases in Kansas addressing whether you need a two thirds vote of the membership or a two thirds vote of a quorum in order to comply with the requirement of K.S.A. 17-6705(c). However, K.S.A. 17-6705 appears to have been modeled from a Delaware statute, and it is possible that we could find some case law in Delaware or other states that have modeled their statutes after Delaware that might give us some guidance on this point. It strikes me that it would be a lot easier to obtain approval of the merger or consolidation if we only needed a two thirds vote of a quorum. We will look into this issue and see what we can find. As it stands now, however, my reading of the statute is that we need a two thirds vote of the entire membership.

To go on with the procedure, after the agreement is reached and the date of the annual or special meeting is set, you must provide notice to each member at least 20 days prior to the date of the meeting. Assuming a two thirds vote is obtained, the agreement, or alternatively, a certificate of merger or consolidation, as authorized by K.S.A. 17-6701(c), must be filed with the Secretary of State and the proper filing fees paid. The certificate or agreement must also be filed with the Register of Deeds in the counties in which the registered agents for service of process of the corporations are located.

I'm enclosing a copy of K.S.A. 17-6712 because that statute applies to nonstock as well as stock corporations. In order to comply with K.S.A. 17-6712, after the certificate of merger is approved and filed, you must within ten days notify any member of either association who has objected in writing and has voted against the merger or consolidation, that the merger or consolidation has become effective. If any member, within 20 days after the date of mailing the notice, makes demand in writing, the merged or new corporation must pay to the member the value of the member's membership. There is a procedure for judicially determining the value of the dissenting member's membership in the event an agreement cannot be reached.

HJC
3-26-92
#12
6 of 13

This is a rather difficult statute to comply with or to interpret for nonstock corporations since it is basically enacted to apply to stock corporations, but by definition has been expanded to nonstock corporations. In my view the only monetary value to a membership in IIAK or PIA would be a prorated portion of the dues, assuming the dues are collected on an annual basis. For example, if a member pays all of his dues in 1992 in January, and the merger or consolidation becomes effective in April, any member who has objected in writing and voted against the consolidation or merger may make a demand within 20 days after the merger became effective and presumably would be entitled to a proportionate refund of his dues. Under this statute a member would obviously forfeit his membership if he made such a demand. I have no idea whether any members of either IIAK or PIA would be so upset with a merger or consolidation that they would file a demand pursuant to this statute, but the notification as to the effective date of the merger or consolidation must be sent out to dissenting members who have objected in writing in order to comply with the law.

You also brought up the issue of what to do with the for profit subsidiaries of both associations. It would of course be possible to go through a merger or consolidation procedure with the for profit subsidiaries as well. I believe, however, it would be much simpler to have one of the for profit subsidiaries purchase the stock of the other and then change the name of the for profit subsidiary, if necessary. If you do a merger rather than a consolidation, the for profit subsidiary of the association within which the other is merged should be the one that purchases the stock. If you do a consolidation, the situation would be somewhat more complicated, but could probably still be accomplished with a stock purchase agreement of some sort. I might add that this might be another reason that a merger might be a little less complicated and expensive.

Please let me know if you have any questions about the basic procedures for merger and consolidation as I have outlined. In the meantime I will try to see if we can find any case law on this two thirds requirement that might simplify it for the corporations. I will look forward to hearing from you. Thank you.

Very truly yours,

GEHRT & ROBERTS, CHARTERED

William A. Larson

WAL/js
encl.

HJC
3-26-92
#19
7813

Civil Rights v. Service Envelope Co., 233 K. 20, 25, 660 P.2d 549 (1983).

17-6710. Issuance of stock, bonds, securities and other obligations by corporation surviving or resulting from merger or consolidation. When two or more corporations are merged or consolidated, the corporation surviving or resulting from the merger or consolidation may issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make, or obligations it will be required to assume, in order to effect the merger or consolidation. For the purpose of securing the payment of any such bonds and obligations, it shall be lawful for the surviving or resulting corporation to mortgage its corporate franchise, rights, privileges and property, real, personal or mixed. The surviving or resulting corporation may issue certificated or uncertificated shares of its capital stock and other securities to the stockholders of the constituent corporations in exchange or payment for the original shares, in such amount as shall be necessary in accordance with the terms of the agreement of merger or consolidation in order to effect such merger or consolidation in the manner and on the terms specified in the agreement.

History: L. 1972, ch. 52, § 88; L. 1973, ch. 100, § 8; L. 1986, ch. 399, § 13; July 1.

Source or prior law:

17-3709.

KANSAS COMMENT

This section, Delaware § 260 and former K.S.A. 17-3709 are nearly identical in enumerating certain general powers of a corporation surviving a merger or resulting from a consolidation of corporations.

Cross References to Related Sections:

Power of corporation to deal in securities of other corporations, see 17-6103.

Stock and dividends, see ch. 17, art. 64.

Conferral of voting rights on holders of corporation's bonds, debentures or other obligations, see 17-6511.

Sale, lease or exchange of corporation's property and assets, see 17-6801.

Mortgage or pledge of corporation's property and assets, see 17-6802.

Defense of usury not available to corporation in enforcing payment of any bond, note or other evidence of indebtedness, see 17-7105.

Research and Practice Aids:

Corporations ⇐ 587, 588.

C.J.S. Corporations §§ 1610, 1627, 1628.

17-6711. Effect of merger or consolidation on pending actions. Any action or proceeding, whether civil, criminal or administrative, pending by or against any corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

History: L. 1972, ch. 52, § 89; July 1.

Source or prior law:

17-3708.

KANSAS COMMENT

This section is identical to Delaware § 261, which is substantially the same as former K.S.A. 17-3708. These sections have the effect of saving pending actions by or against a corporation which is a party to a merger or consolidation.

Cross References to Related Sections:

Effect of dissolution on pending actions, see 17-6811.

Substitution of trustee or receiver as plaintiff in pending actions, see 17-6909.

Actions against corporations, directors, officers or stockholders, see ch. 17, art. 71.

Effect of code on pending actions, see 17-7403.

Research and Practice Aids:

Corporations ⇐ 591.

C.J.S. Corporations § 1631 et seq.

17-6712. Payment for "stock" of "stockholder" objecting to merger or consolidation; "stockholder," "stock" and "share" defined; notice to objecting stockholders; demand for payment; appraisal and determination of value by district court, when; taxation of costs; rights of objecting stockholders; status of stock; section inapplicable to certain shares of stock. (a) When used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation.

(b) The corporation surviving or resulting from any merger or consolidation, within 10 days after the effective date of the merger or consolidation, shall notify each stockholder of any corporation of this state so merging or consolidating who objected thereto in writing and whose shares either were not entitled to vote or were not voted in favor of the merger or consolidation, and who filed such written objection with the corporation before the taking of the vote on the merger or consolidation,

HJC 3-26-92 #1

that the merger or consolidation has become effective. If any such stockholder, within 20 days after the date of mailing of the notice, shall demand in writing, from the corporation surviving or resulting from the merger or consolidation, payment of the value of the stockholder's stock, the surviving or resulting corporation shall pay to the stockholder, within 30 days after the expiration of the period of 20 days, the value of the stockholder's stock on the effective date of the merger or consolidation, exclusive of any element of value arising from the expectation or accomplishment of the merger or consolidation.

(c) If during a period of 30 days following the period of 20 days provided for in subsection (b), the corporation and any such stockholder fail to agree upon the value of such stock, any such stockholder, or the corporation surviving or resulting from the merger or consolidation, may demand a determination of the value of the stock of all such stockholders by an appraiser or appraisers to be appointed by the district court, by filing a petition with the court within four months after the expiration of the thirty-day period.

(d) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the corporation, which shall file with the clerk of such court, within 10 days after such service, a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the corporation. If the petition shall be filed by the corporation, the petition shall be accompanied by such duly verified list. The clerk of the court shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the corporation and to the stockholders shown upon the list at the addresses therein stated and notice shall also be given by publishing a notice at least once, at least one week before the day of the hearing, in a newspaper of general circulation in the county in which the court is located. The court may direct such additional publication of notice as it deems advisable. The forms of the notices by mail and by publication shall be approved by the court..

(e) After the hearing on such petition the court shall determine the stockholders who have complied with the provisions of this section and become entitled to the valuation of and payment for their shares, and shall appoint an appraiser or appraisers to determine such value. Any such appraiser may examine any of the books and records of the corporation or corporations the stock of which such appraiser is charged with the duty of valuing, and such appraiser shall make a determination of the value of the shares upon such investigation as seems proper to the appraiser. The appraiser or appraisers shall also afford a reasonable opportunity to the parties interested to submit to the appraiser or appraisers pertinent evidence on the value of the shares. The appraiser or appraisers, also, shall have the powers and authority conferred upon masters by K.S.A. 60-253 and amendments thereto.

(f) The appraiser or appraisers shall determine the value of the stock of the stockholders adjudged by the court to be entitled to payment therefor and shall file a report respecting such value in the office of the clerk of the court, and notice of the filing of such report shall be given by the clerk of the court to the parties in interest. Such report shall be subject to exceptions to be heard before the court both upon the law and facts. The court by its decree shall determine the value of the stock of the stockholders entitled to payment therefor and shall direct the payment of such value, together with interest, if any, as hereinafter provided, to the stockholders entitled thereto by the surviving or resulting corporation. Upon payment of the judgment by the surviving or resulting corporation, the clerk of the district court shall surrender to the corporation the certificates of shares of stock held by the clerk pursuant to subsection (g). The decree may be enforced as other judgments of the district court may be enforced, whether such surviving or resulting corporation be a corporation of this state or of any other state.

(g) At the time of appointing the appraiser or appraisers, the court shall require the stockholders who hold certificated shares and who demanded payment for their shares to submit their certificates of stock to the clerk of the court, to be held by the clerk pending the appraisal proceedings. If any stockholder fails to comply with such direction, the court shall dismiss the proceedings as to such stockholder.

(h) The cost of any such appraisal, including a reasonable fee to and the reasonable expenses of the appraiser, but exclusive of fees of counsel or of experts retained by any party, shall be determined by the court and taxed upon the parties to such appraisal or any of them as appears to be equitable, except that

HJC 3-26-97 #

the cost of giving the notice by publication and by registered or certified mail hereinabove provided for shall be paid by the corporation. The court, on application of any party in interest, shall determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto.

(i) Any stockholder who has demanded payment of the stockholder's stock as herein provided shall not thereafter be entitled to vote such stock for any purpose or be entitled to the payment of dividends or other distribution on the stock, except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation, unless the appointment of an appraiser or appraisers shall not be applied for within the time herein provided, or the proceeding be dismissed as to such stockholder, or unless such stockholder with the written approval of the corporation shall deliver to the corporation a written withdrawal of the stockholder's objections to and an acceptance of the merger or consolidation, in any of which cases the right of such stockholder to payment for the stockholder's stock shall cease.

(j) The shares of the surviving or resulting corporation into which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

(k) This section shall not apply to the shares of any class or series of a class of stock, which, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders at which the agreement of merger or consolidation is to be acted on, were either (1) registered on a national securities exchange, or (2) held of record by not less than 2,000 stockholders, unless the articles of incorporation of the corporation issuing such stock shall otherwise provide; nor shall this section apply to any of the shares of stock of the constituent corporation surviving a merger, if the merger did not require for its approval the vote of the stockholders of the surviving corporation, as provided in subsection (f) of K.S.A. 17-6701 and amendments thereto. This subsection shall not be applicable to the holders of a class or series of a class of stock of a constituent corporation if under the terms of a merger of consolidation pursuant to K.S.A. 17-6701 or 17-6702, and amendments thereto, such holders are required to accept for such stock anything except (i) stock or stock and cash in lieu of fractional shares of the corporation surviving or resulting from such merger or consolidation, or (ii) stock or stock and cash in lieu of fractional shares of any other corporation, which at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders at which the agreement of merger or consolidation is to be acted on, were either registered on a national securities exchange or held of record by not less than 2,000 stockholders, or (iii) a combination of stock or stock and cash in lieu of fractional shares as set forth in (i) and (ii) of this subsection.

History: L. 1972, ch. 52, § 90; L. 1973, ch. 100, § 9; L. 1986, ch. 399, § 14; July 1.

Source or prior law:

17-3707a.

KANSAS COMMENT

Section 17-6712 is a combination of the provisions of § 262 of the Delaware code and former K.S.A. 17-3707a, which set forth the rights of dissenting stockholders in corporations merging or consolidating. The provisions of this section can be summarized as follows:

(1) Subsection (a) is identical to the Delaware provision; former 17-3707a did not contain any provisions which defined "stockholder," "stock" and "share" so as to make these terms applicable throughout the section to non-stock as well as stock corporations.

(2) Subsection (b) is nearly identical to the corresponding subsection of Del. § 262. It reverses, to some extent, the requirements of the first paragraph of 17-3707a with respect to the burden of initiating the procedure for paying a dissenting stockholder for the value of his stock. The prior Kansas statute placed the burden upon the dissenting stockholder to initially make the requisite written demand upon the corporation surviving or resulting from any merger or consolidation, while subsection (b) requires that prior to any such stockholder being obligated to make demand for payment, such surviving or resulting corporation must give notice to dissenting stockholders that the merger or consolidation has become effective. There is no change from prior law, however, with respect to the procedure for making such demand and the time frames with respect thereto, but it should be noted that a dissenting stockholder under subsection (b) includes a stockholder who did not have the right to vote for the merger or consolidation, as well as a stockholder who did not vote for the proposition. A dissenting stockholder under 17-3707a was one who had the right to vote for the merger or consolidation but who did not vote in favor thereof.

(3) Under Del. § 262 (c), where there is disagreement as to the value of stock, the dissenting stockholder or the corporation may petition the court within four months after the expiration of the time for payment stated in subsection (b) and demand the determination of the value of the stock of all such stockholders by an appraiser. The corresponding provision in the 1939 code was quite similar, but the time

HJC 3-26-92 #12 1006 13

C.J.S. Business Trusts § 11; Corporations § 1605 et seq.; Joint Stock Companies § 48.

17-6705. Merger or consolidation of domestic nonstock, nonprofit corporations. (a) Any two or more nonstock, nonprofit corporations of this state may merge into a single corporation, which may be any one of the constituent corporations, or they may consolidate into a new nonstock, nonprofit corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The governing body of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) such other provisions or facts required or permitted by this act to be stated in articles of incorporation for nonstock, nonprofit corporations as can be stated in the case of a merger or consolidation, stated in such altered form as the circumstances of the case require; (4) the manner of converting the memberships of each of the constituent corporations into memberships of the corporation surviving or resulting from the merger or consolidation; and (5) such other details or provisions as are deemed desirable. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation.

(c) The agreement shall be submitted to the members of each constituent corporation who have the right to vote for the election of the members of the governing body of their corporation, at an annual or special meeting thereof for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each member of each such corporation who has the right to vote for the election of the members of the governing body of such corporation, at the member's address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof, as the governing body shall deem advisable. At the meeting the agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the agreement, each member who has the right to vote for the election of the members of the governing body of his corporation being entitled to one vote. If the votes of 2/3 of the total number of members of each such corporation who have the voting power above mentioned shall be for the adoption of the agreement, then that fact shall be certified on the agreement by the officer of each such corporation performing the duties ordinarily performed by the secretary or assistant secretary of a corporation, under the seal of each such corporation. The agreement so adopted and certified shall be executed, acknowledged and filed, and shall become effective, in accordance with K.S.A. 17-6003, and amendments thereto. It shall be recorded in the office of the register of deeds of the county in this state in which the registered office of each such constituent corporation is located; or if any of the constituent corporations shall have been specially created by act of the legislature, then the agreement shall be recorded in the county where such corporation had its principal place of business in this state. The provisions set forth in the last sentence of subsection (c) of K.S.A. 17-6701, and amendments thereto, shall apply to a merger under this section, and the reference therein to "stockholder" shall be deemed to include "member" hereunder.

(d) If, under the provisions of the articles of incorporation of any one or more of the constituent corporations, there shall be no members who have the right to vote for the election of the members of the governing body of the corporation other than the members of that body themselves, the agreement duly entered into as provided in subsection (b) shall be submitted to the members of the governing body of such corporation or corporations, at a meeting thereof. Notice of the meeting shall be mailed to the members of the governing body in the same manner as is provided in the case of a meeting of the members of a corporation. If at the meeting ⅔ of the total number of members of the governing body shall vote by ballot, in person, for the adoption of the agreement, that fact shall be certified on the agreement in the same manner as is provided in the case of the adoption of the agreement by the vote of the members of a corporation; thereafter, the same procedure shall be followed to consummate the merger or consolidation.

(e) The provisions of subsection (e) of

HJC 3-26-12 #12 1108 13

:.S.A. 17-6701, and amendments thereto, hall apply to a merger under this section.

(f) Nothing in this section shall be deemed o authorize the merger of a charitable non-tock corporation into a nonstock corporation : such charitable nonstock corporation would hereby have its charitable status lost or im-aired, but a nonstock corporation may be nerged into a charitable nonstock corporation vhich shall continue as the surviving orporation.

History: L. 1972, ch. 52, § 83; L. 1988, h. 99, § 43; Revived and amend., L. 1988, h. 100, § 43; May 5.

KANSAS COMMENT

By virtue of K.S.A. 17-2904, private Kansas corporations ot organized for profit (stock or non-stock) were subject) the applicable provisions of the 1939 corporation code :gulating corporations organized for profit. Thus 17-3701 : seq. governed the merger or consolidation of non-stock, onprofit corporations, as well as stock corporation orga-ized for profit. Delaware, however, makes special pro-sion (U255) for the merger or consolidation of domestic on-stock, nonprofit corporations, and 17-6705 is nearly lentical to that provision.

The procedure prescribed by this section is quite similar) the procedure for merging or consolidating other do-estic corporations. One notable exception is that this ction requires a two-thirds vote in favor of the agreement merger or consolidation by the members of the non-ock, nonprofit corporation (or by the governing body ereof, if no members are entitled to vote) for adoption the agreement. Also, there are no provisions in this ction corresponding to subsection (d) or (f) of section 17-01 but it should be noted that subsection (e) of 17-6701 applicable to a merger under this section.

ross References to Related Sections:

Effect of merger or consolidation of charitable corpo-tions or associations on gift, devise or bequest to one of iginal corporations or associations, see 17-1738.

Voting rights of members of non-stock corporations, see -6505.

Amendment of articles of incorporation, see 17-6602.

Fee for filing agreement of merger or consolidation, see -7506.

esearch and Practice Aids:

Corporations ⇐ 581 et seq.

C.J.S. Corporations § 1605 et seq.

17-6706. Merger or consolidation of do-estic and foreign nonstock, nonprofit cor-orations; service of process upon surviving resulting corporation. (a) Any one or more onstock, nonprofit corporations of this state ay merge or consolidate with one or more her nonstock, nonprofit corporations of any her state or states of the United States or of e District of Columbia, if the laws of such her jurisdiction permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction. The constituent corporations may merge into a single corporation, which may be any one of the constituent corporations, or they may consolidate into a new nonstock, nonprofit corporation formed by the consolidation, which may be a corporation of the state of incorporation of any one of the constituent corporations, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. In addition, any one or more nonstock, nonprofit corporations organized under the laws of any jurisdiction other than one of the United States may merge or consolidate with one or more nonstock, nonprofit corporations of this state if the surviving or resulting corporation will be a corporation of this state, and if the laws under which the other corporation or corporations are formed permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction.

(b) All the constituent corporations shall enter into an agreement of merger or consolidation. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) the manner of converting the memberships of each of the constituent corporations into memberships of the corporation surviving or resulting from such merger or consolidation; (4) such other details and provisions as shall be deemed desirable; and (5) such other provisions or facts as shall then be required to be stated in articles of incorporation by the laws of the state which are stated in the agreement to be the laws that shall govern the surviving or resulting corporation and that can be stated in the case of a merger or consolidation. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation.

(c) The agreement shall be adopted, approved, executed and acknowledged by each of the constituent corporations in accordance with the laws under which it is formed and, in the case of a Kansas corporation, in the same manner as is provided in K.S.A. 17-6705, and amendments thereto. The agreement shall be filed and recorded and shall become effective for all purposes of the laws of this state when and as provided in K.S.A. 17-6705, and amend-

HJC 3-26-92 #12 12-2-13

Source or prior law:

17-3303.

KANSAS COMMENT

Section 17-6504 is a recodification of 17-3303, which made it mandatory that cumulative voting be afforded each stockholder at all elections of directors. Section 214 of the Delaware code, making cumulative voting permissive only, was rejected because it does not afford adequate protection to minority stockholders.

Revisor's Note:

Section inapplicable to corporations not authorized to issue stock, see 17-6505.

Cross References to Related Sections:

Voting provisions authorized for inclusion in articles of incorporation, see 17-6002 (b) (4).

Election of directors at organizational meeting, see 17-6008.

Board of directors, see 17-6301.

Voting rights of holders of fractional shares, see 17-6405.

Conferral of voting rights on holders of corporation's bonds, debentures or other obligations, see 17-6511.

Research and Practice Aids:

Corporations ⇐ 200.

C.J.S. Corporations § 549.

Law Review and Bar Journal References:

Mandatory cumulative voting retained to afford more protection to minority stockholders in "The Kansas Corporation Code of 1972," William E. Treadway, 40 J.B.A.K. 301, 343 (1971).

17-6505. Voting rights of members of nonstock corporations; proxies; quorum; election of governing body; failure to hold election. (a) The provisions of K.S.A. 17-6501 to 17-6504 and K.S.A. 17-6506, and amendments thereto, shall not apply to corporations not authorized to issue stock.

(b) Unless otherwise provided in the articles of incorporation of a nonstock corporation, each member shall be entitled at every meeting of members to one vote in person or by proxy, but no proxy shall be voted after three (3) years from its date, unless the proxy provides for a longer period.

(c) Unless otherwise provided in this act, the articles of incorporation or bylaws of a nonstock corporation may specify the number of members having voting power who shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business. In the absence of such specification in the articles of incorporation or bylaws of a nonstock corporation, 1/3 of the members of such corporation shall constitute a quorum at a meeting of such members, and the affirmative vote of a majority of such members present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the members, unless the vote of a greater number is required by this chapter, the articles of incorporation or bylaws.

(d) If the election of the governing body of any nonstock corporation shall not be held on the day designated by the bylaws, the governing body shall cause the election to be held as soon thereafter as convenient. The failure to hold such an election at the designated time shall not work any forfeiture or dissolution of the corporation, but the district court may summarily order such an election to be held upon the application of any member of the corporation. At any election pursuant to such order, the persons entitled to vote in such election who shall be present at such meeting, either in person or by proxy, shall constitute a quorum for such meeting, notwithstanding any provision of the articles of incorporation or the bylaws of the corporation to the contrary.

History: L. 1972, ch. 52, § 58; L. 1988, ch. 99, § 24; Revived and amend., L. 1988, ch. 100, § 24; May 5.

Source or prior law:

17-2904, 17-3304 and 17-3305.

KANSAS COMMENT

Subsections (a) and (b) of this section are similar to the provisions of former K.S.A. 17-3304 in providing for the voting rights of members of corporations not authorized to issue capital stock. Subsection (a) makes inapplicable to all non-stock corporations the provisions of sections 17-6501 to 17-6504, all relating to the voting rights of stockholders. The first sentence of 17-3304 was not as broad in scope, since it excluded from application to "nonprofit" corporations having no capital stock only the provisions of 17-3303 requiring cumulative voting.

Subsection (b) and the balance of 17-3304 are essentially the same in providing that without any provisions in the articles of incorporation to the contrary, members of nonstock corporations are entitled to one vote, either in person or by proxy, but proxies are limited to a duration of three years, unless otherwise stated therein.

Subsection (c) authorizes quorum requirements for meetings of the members of non-stock corporations to be set forth in the articles of incorporation or in the bylaws of the corporation. The quorum requirements, for both stock and non-stock corporations, were formerly contained in 17-3305, and are essentially the same as those contained in subsection (c). It should be noted that nearly identical quorum requirements for corporations authorized to issue capital stock are made in section 17-6505 of the new code. Also applicable to this discussion is former K.S.A. 17-2904, which permitted non-profit corporations to prescribe in the bylaws or articles of incorporation rules for ascertaining its membership, but if they were not so prescribed, only persons who were current on their dues could vote at meetings, either in person or by proxy.

HJC
3-26-92
#12
13813

TO: Members of House Judiciary Committee

RE: SB 627

My name is Don Horttor. I am a partner in Cosgrove, Webb & Oman, a Topeka law firm, which serves as general counsel for Delta Dental Plan of Kansas, Inc. (DDPK). DDPK is a nonprofit dental service corporation organized and operating under "the nonprofit dental service corporation act". It is the only such corporation in Kansas. It writes dental insurance.

The members of DDPK can only be dentists and must be those dentists who have executed participating agreements with the corporation. At the present time it has 938 members, i.e., participating dentists, and that number constitutes more than 3/4ths of the total active licensed dentists in Kansas. DDPK operates under the supervision and control of the Commissioner of Insurance.

The Board of Directors of DDPK consists of ten (10) persons, four (4) of whom are elected by the members (participating dentists) of DDPK, and six (6) of whom are appointed by the Governor and the Insurance Commissioner. In other words, the members of the Board of Directors who are elected by the membership of the corporation possess only four (4) of the ten (10) votes.

HJC
3-26-92
#13
1 of 4

The by-laws of the corporation, approved by the Commissioner of Insurance, provide that at any meeting of members a quorum shall consist of ten (10) members eligible to vote at such meeting. Not infrequently there is barely a quorum present for annual meetings.

The possible effect of SB 627 would be to allow as few as seven (7) votes, if only a quorum was present, to adopt a plan of merger or consolidation for a corporation with 938 members total. In other words, an affirmative vote from less than 7/10ths of one percent of the total membership could drastically change the corporation. Admittedly, the Board of Directors must have previously approved the plan of merger or consolidation, but because of the peculiar makeup of the Board of DDPK, the plan of merger or consolidation could have been approved by the Board of Directors with every member of that Board of Directors elected by the membership voting against the plan, since those elected members constitute only four (4) of the total of ten (10).

As to DDPK, we believe this permits too few persons to have far too much control over such significant matters as consolidation or merger. We prefer the stability and deliberateness promoted by the present law which, for these purposes, would require approval by 2/3rds of the total membership (626 affirmative votes instead of 7).

HJC
3-26-92
#13
2 of 4

We therefore request that SB 627 be amended so as to exclude nonprofit dental service corporations from the changes proposed in that bill and instead leaves nonprofit dental service corporations under the law as it is presently. We have attached a suggested amendment to accomplish such exclusion.

Respectfully submitted,

DON HORTTOR,
Counsel for Delta Dental
Plan of Kansas, Inc.

HJC
3-26-92
#13
3 of 4

the right to vote for the election of the members of the governing body of such corporation, at the member's address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof, as the governing body shall deem advisable. At the meeting the agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the agreement, each member who has the right to vote for the election of the members of the governing body of his corporation being entitled to one vote. If ***the votes of*** ~~the votes of~~ ⅔ of the total number of members ~~of each such corporation who have the voting power above mentioned shall be~~ ***voting at an annual or special meeting for the purpose of acting on the agreement vote*** ***of each such corporation who have the voting power above mentioned shall be*** for the adoption of the agreement, then that fact shall be certified on the agreement ***or, in the case of a nonstock, nonprofit insurance corporation, if ⅔ of the total number of members voting at an annual or special meeting for the purpose of acting on the agreement vote for the adoption of the agreement*** by the officer of each such corporation performing the duties ordinarily performed by the secretary or assistant secretary of a corporation, under the seal of each such corporation. The agreement so adopted and certified shall be executed, acknowledged and filed, and shall become effective, in accordance with K.S.A. 17-6003, and amendments thereto. It shall be recorded in the office of the register of deeds of the county in this state in which the registered office of each such constituent corporation is located; or if any of the constituent corporations shall have been specially created by act of the legislature, then the agreement shall be recorded in the county where such corporation had its principal place of business in this state. The provisions set forth in the last sentence of subsection (c) of K.S.A. 17-6701, and amendments thereto, shall apply to a merger under this section, and the reference therein to "stockholder" shall be deemed to include "member" hereunder.

(d) If, under the provisions of the articles of incorporation of any one or more of the constituent corporations, there shall be no members who have the right to vote for the election of the members of the governing body of the corporation other than the members of that body themselves, the agreement duly entered into as provided in subsection (b) shall be submitted to the members of the governing body of such corporation or corporations, at a meeting thereof. Notice of the meeting shall be mailed to the members of the governing body in the same manner as is provided in the case of a meeting

of the members of a corporation. If at the meeting ⅔ of the total number of members of the governing body shall vote by ballot, in person, for the adoption of the agreement, that fact shall be certified on the agreement in the same manner as is provided in the case of the adoption of the agreement by the vote of the members of a corporation; thereafter, the same procedure shall be followed to consummate the merger or consolidation.

(e) The provisions of subsection (e) of K.S.A. 17-6701, and amendments thereto, shall apply to a merger under this section.

(f) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation into a nonstock corporation if such charitable nonstock corporation would thereby have its charitable status lost or impaired, but a nonstock corporation may be merged into a charitable nonstock corporation which shall continue as the surviving corporation.

Sec. 2. K.S.A. 17-6705 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

other than a Nonprofit Dental Service Corporation organized and operated under "the nonprofit dental service corporation act", as defined in K.S.A. 40-19a01, et seq.

HJC
3-26-92
#13
5/24