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Corporate Legislation

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aspects of their own securities law without having to accept the entire act. Consequently, the Uniform Act raises the standards of existing securities statutes while achieving a certain degree of uniformity which otherwise could not be reached at all.

DANIEL J. JOHNEDIS

CORPORATE LEGISLATION

During 1961, pursuant to a growing trend, fourteen states enacted professional corporation laws.¹ In general, these new statutes have followed two broad patterns as to professional groups covered, some allowing virtually any professional group to incorporate, others limiting the benefit to specifically named groups.² In no enactment, however, has the professional man been allowed to escape his traditional obligations.³ The Alabama act, for example, provides that no state law applicable to the relationship between a person furnishing professional services and a person receiving such services is changed by its terms.⁴ The Alabama act also provides that members of the corporation shall not be individually liable for claims against the corporation unless a member has personally participated in the transaction out of which the claim arises.⁵ Under the Illinois act a professional man's relationship with his client is unchanged but there is no provision governing personal liability arising out of a transaction where a member is not individually involved.⁶

Professional corporation laws are also pending before the legislatures of several states.⁷ That before the Massachusetts Senate entitled "The Professional Service Corporation Act"⁸ defines professional service as

¹ The fourteen states are: Alabama, Laws 1961, No. 865; Arkansas, Laws 1961, No. 179 (medical), Laws 1961, No. 471 (dental); Connecticut, Laws 1961, P.A. 158; Florida, Laws 1961, No. 285; Georgia, Laws 1961, No. 285; Illinois, Laws 1961, S.B. 804; Minnesota, Laws 1961, c. 1 (1st Spec. sess.); Ohio, Laws 1961, S.B. 550; Oklahoma, Laws 1961, c. 29; Pennsylvania, Laws 1961, S.B. 525; South Dakota, Laws 1961, c. 29; Tennessee, Laws 1961, c. 350; Texas, Laws 1961, c. 158; Wisconsin, Laws 1961, c. 350. In addition, the Supreme Court of Colorado has granted attorneys the privilege of incorporation without the aid of an enabling statute, Colo. Sup. Ct. R. 231.

² In Florida virtually any professional group may incorporate; in Arkansas the benefit is limited to medical and dental corporations.

³ A qualification to this statement must be noted. The Colorado Rules of Civil Procedure, *supra* note 1, at § I G. provide:

that all shareholders of the corporation shall be jointly and severally liable for all acts, errors and omissions of the employees of the corporation except during periods of time when the corporation shall maintain in good standing lawyers' professional liability insurance.

The above mentioned liability insurance must meet minimum standards prescribed by the Colorado Supreme Court.

⁴ Ala. Laws 1961, No. 865 § 6.

⁵ *Ibid.*

⁶ Ill. Laws 1961, S.B. 804 § 6.

⁷ These states are: Kentucky, H. 97; Michigan, H. 64; New Jersey, S. 32; New York, A. 2037, A. 3080, S. 1375; Massachusetts, S. 522, H. 276, H. 277. The two proposals before the Massachusetts House are identical and hereinafter will be referred to as one.

⁸ Mass. S. 522 § 2 (1962).

CURRENT LEGISLATION

. . . any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of the act and by reason of law could not be performed by a corporation.⁹

The proposal before the Massachusetts House would limit the benefit to specifically named groups.¹⁰ Both the House and the Senate versions provide that a corporation composed of a professional group may issue shares only to those who are authorized to provide the same specific services for which the corporation was organized.¹¹ As might be expected, both proposals leave unchanged existing laws applicable to professional relationships.¹²

It is obvious that the reason for these new laws is to allow professional groups to take advantage of deferred compensation plans under the Internal Revenue Code.¹³ By allowing professional men to incorporate, each would then become an "employee" of the corporation.¹⁴ It remains to be seen, however, whether these new corporations will qualify for the benefits they were created to achieve.¹⁵

During 1961, in the interests of directorial flexibility, three more states enacted provisions regulating board action without a formal meeting. In California, if the articles or by-laws so provide, any action which the board is permitted to take may be taken without a meeting "if all members of the board shall individually or collectively consent in writing to such action."¹⁶ Action by written consent, as provided for in the statute, is given the same effect as a unanimous vote by the board. The written consent or consents must be filed with minutes of the proceedings before the board and any writing so filed is required to state that the articles or by-laws authorize the directors to act informally and is prima facie evidence of such authority.¹⁷ The new Ohio provision is similar but makes no provision as

⁹ Mass. H. 276, 277 § 3 (1962).

¹⁰ *Id.* Section 1. These groups are: physicians and surgeons, chiropodists, physical therapists, dentists, veterinarians, architects, optometrists, dispensing opticians, professional engineers and land surveyors, public accountants and attorneys at law.

¹¹ Mass. S. 522 § 9, H. 276, 277 § 3 (1962).

¹² Mass. S. 522 § 7, H. 276, 277 § 10 (1962).

¹³ See, for example, *In re the Florida Bar*, 133 So. 2d 554 (Fla. 1961).

¹⁴ "The principal reason for this change in attitude regarding these professional groups appears to arise out of the provisions of the Internal Revenue Code of 1954 . . . which permit an employer to establish a pension fund for the benefit of his employee." *Id.* at 556.

The case is interesting in that the Florida Bar Association deemed it necessary or advisable to petition the Supreme Court of Florida to enable its members to qualify for the Florida Professional Service Corporation Act, *supra* note 1. The petition was granted subject to specified conditions.

¹⁴ The employer-employee relationship is a basic requirement of a qualified plan, Int. Rev. Code § 401 (1954), Treas. Regs. § 1.401-1(b).

¹⁵ For a discussion of this problem see Comment, *Taxation of Unincorporated Medical Groups*, 1 B.C. Ind. & Com. L. Rev. 260 (1960).

¹⁶ Cal. Corp. Code § 814.5 (Supp. 1961).

¹⁷ *Ibid.*

to the evidentiary effect of a written consent filed upon the corporate records.¹⁸ In Illinois, written consent of all the directors entitled to vote on a particular issue is sufficient, whether or not the articles or by-laws so provide.¹⁹

These new acts resemble statutes in other states which have been operative for some time. For example, in Pennsylvania if all the directors severally or collectively consent in writing to any action "to be taken by the corporation," such action shall be as valid "as though it had been authorized at a meeting of the board of directors."²⁰ The Delaware statute expressly provides that prior to action by the board without a meeting, such action must be consented to in writing by all the directors and filed with minutes of the proceedings before the board.²¹ Perhaps the most liberal statute in this area is that of North Carolina. In North Carolina, action taken by a majority of the board without a meeting is valid if (1) all directors, either before or after such action, consent in writing or, (2) all shareholders know of the action in question and make no prompt objection or, (3) the directors are accustomed to take informal action, this custom being generally known to all shareholders and all directors know of such action and do not promptly object.²²

Some states liberalize the requirements for a valid board meeting rather than provide for action without a meeting. For example, in Louisiana the articles may allow a director who is absent at a meeting to be represented by any other director who may, according to written instructions, vote in place of the absentee director.²³ The Arkansas statute, which is similar, further provides that a director may not be a proxy for more than one other director but a proxy need not be a director so long as he is eligible for election as such.²⁴

In the absence of a statute the general rule is that the board of directors is vested with the management of the corporation as a board and not as individuals.²⁵ According to this view the board has "no authority to act save when assembled at a board meeting."²⁶ There are many exceptions to this rule; thus it has been held that unanimous consent by the board will

¹⁸ Ohio Rev. Code Ann. § 1701.54 (Baldwin 1958). The Ohio statute is unusual in that it provides for informal action by both directors and shareholders in a single statutory provision. If the articles or by-laws so provide, all directors or shareholders, as the case may be, who are entitled to vote may authorize informal action by consenting, in writing, to such action. The written consent or consents so filed must be filed upon the records of the corporation and must recite that the action was taken according to written authorization.

¹⁹ Ill. Ann. Stat. ch. 32, § 157.147.1 (Smith-Hurd Supp. 1961). Unlike the California and Ohio statutes, *supra* notes 16 & 18, the Illinois statute makes no provision as to the effect of a *contra* provision in the articles or by-laws of the corporation.

²⁰ Pa. Stat. Ann. tit. 15, § 2852-402(5).

²¹ Del. Code Ann. tit. 9, § 141(g) (Supp. 1960).

²² N.C. Gen. Stat. § 55-29 (1960).

²³ La. Rev. Stat. § 12:32(c).

²⁴ Ark. Stat. Ann. § 64-406 (1957).

²⁵ *Baldwin v. Canfield*, 26 Minn. 43, 1 N.W. 261 (1879).

²⁶ *Id.* at 54, 1 N.W. at 270.

validate formal action.²⁷ Similarly, where the directors are in the habit of acting informally they may bind the corporation.²⁸ The corporation may also be estopped to deny the validity of an action taken informally.²⁹ Cases have held that where the directors own all the stock of the corporation informal action by the board is valid,³⁰ and shareholders have authority to ratify informal action taken by the board.³¹ It may thus be said that the statutes regulating informal action by the board represent a codification of, rather than a departure from, the existing case law.³²

MICHAEL B. SPITZ

FEDERAL TAX LEGISLATION

INTRODUCTION

The second session of the 87th Congress which convened on January 10, 1962,¹ has at the time of this writing passed only one tax law, the celebrated "Du Pont Bill."² There is, however, an indication that at least some additional changes will be made in the Internal Revenue Code and, therefore, some of the significant proposals will also be discussed in this article.

LEGISLATION PASSED

The "Du Pont Tax Law"³ is a product of a rather specialized situation; consequently, a brief glance at the events creating a need for the legislation will help clarify a later discussion of its provisions.

E. I. Du Pont de Nemours and Co., hereafter referred to as Du Pont, was the owner of twenty-three percent of the common stock of General Motors Corporation, most of which it had acquired about forty years ago.⁴ The Justice Department determined that since Du Pont and General Motors were in allied fields, Du Pont's holdings in General Motors constituted a violation of the antitrust laws. As a result a complaint was filed in 1949 and there began a protracted litigation of the issue.⁵

²⁷ *Sherman v. Fitch*, 98 Mass. 59 (1867).

²⁸ *Scott v. Cord*, 75 Nev. 179, 336 P.2d 773 (1959).

²⁹ *Jourdan v. Long Island R.R.*, 115 N.Y. 380, 22 N.E. 153 (1889).

³⁰ *Gerard v. Empire Square Realty Co.*, 195 App. Div. 244, 187 N.Y. Supp. 306 (1921).

³¹ *Merchant's & Farmer's Bank v. Harris Lumber Co.*, 103 Ark. 283, 146 S.W. 508 (1912).

³² It may be observed that the North Carolina statute, *supra* note 22 is a striking example of case law which has been enacted into a statutory code. On the general subject of informal action by the board of directors, cf. 2 *Fletcher, Corporations* § 391 et. seq. (1954 rev. ed.); *Ballantine, Corporations* § 42 et. seq. (1946).

¹ 108 Cong. Rec. 1 (daily ed. Jan. 10, 1962).

² Public Law 87-403, 76 Stat. 4 (1962).

³ *Supra* note 2.

⁴ S. Rep. No. 1100, 87th Cong., 1st Sess. (1961).

⁵ *Supra* note 4.