

Memorandum 76-54

Subject: Study 77.130 - Nonprofit Corporations (Dissenters' Rights)

Attached to this memorandum is a staff draft of Chapter 13 (Dissenters' Rights) of the General Nonprofit Corporation Law. The draft statute is similar to the provisions of Chapter 13 of the new General Corporation Law (Sections 1300-1312). We have omitted some provisions that are not relevant to nonprofit corporations and added some provisions that are necessary or useful.

Background

Under Section 9002 of the General Nonprofit Corporation Law, the rights of dissenters from a merger or consolidation of a nonprofit corporation are determined by the provisions of Sections 4300-4318 of the General Corporation Law (the predecessor sections of Chapter 13 of the new General Corporation Law). These sections, like Chapter 13 of the new General Corporation Law, provide an exclusive remedy by which the dissenting shareholder may require the corporation to purchase his shares. This remedy replaces any legal or equitable remedy the shareholder may have had to attack a merger or consolidation, whether on the grounds of fraud or unfairness, except that the shareholder may bring an action to test whether the requisite number of shares were voted in favor of the merger or consolidation. (See Sections 4123 of the old General Corporation Law and 1312 of the new General Corporation Law; I. H. Ballantine & G. Sterling, California Corporation Laws § 336 (4th ed. 1976).) It is stated in Ballantine and Sterling that, even if the consent of a shareholder was obtained by fraud, he may not enjoin or rescind the merger or consolidation although he has a common law remedy for damages against the persons who perpetrated the fraud. (Id., Section 336 at 599-600.)

We have not discovered any California cases involving the application of the dissenters' rights provisions to a merger or consolidation of nonprofit corporations.

This is primarily because the dissenter's appraisal remedy only makes sense in the context of nonprofit corporations where the membership represents an ownership interest in the property of the nonprofit corporation, such as would be entitled to a share of the assets on dissolution. Hence, in the case of a charitable corporation, there can be no right to require the nonprofit corporation to purchase the membership. In the case of a merger involving a country club or a condominium, however, the right of a dissenter to be compensated appears to be as important as for the shareholder in a business corporation.

Additional policy questions and problems are discussed in the remainder of this memorandum under specific sections.

Discussion of Particular Sections

§ 6300. Dissenting membership

The draft defines "dissenting membership" in a different manner than the new General Corporation Law defines "dissenting share." Section 1300(b) contains some procedural requirements--i.e., that the holder of the shares must have demanded that the corporation purchase them and have submitted the shares for endorsement--which cause confusion when read with other provisions in the chapter. The draft definition retains the requirements of paragraph (2) of Section 1300(b) to the effect that the membership must have been outstanding at the time of the determination of memberships entitled to vote on the reorganization and not have been voted in favor of the reorganization. Subdivision (a) of draft Section 6300 adds a requirement implicit in existing law that the membership must represent an ownership interest in the nonprofit corporation. We have not continued the provisions of the new General Corporation Law concerning listed shares or short-form mergers since these are of real importance only to business corporations.

The draft does not define "dissenting member" because it did not seem to be useful to do so. The phrase "holder of a dissenting membership" works adequately where we need to refer to the person. Compare Section 1300(c) ("dissenting shareholder" defined).

Throughout Chapter 13, we have used the term "reorganization" which is not yet defined in the draft. This term is defined in Section 152 of the new General Corporation Law but, as will be seen from examining that section, it is not readily adaptable to the nonprofit corporation law. The problem of defining "reorganization" will be dealt with in another memorandum. When reading the draft of Chapter 13, reorganization should be understood to include mergers, consolidations, and sales of assets which are de facto mergers.

§ 6303. Notice of approval of reorganization

Under Sections 1300 and 1301 of the new General Corporation Law, notice of approval of the reorganization by the shareholders is required to be sent only to those who may be entitled to exercise dissenters' rights. Under Section 4109 of the old General Corporation Law, notice of approval of a merger or consolidation was required to be sent to each member. For the time being, we have followed the procedure of the new law which should save money for the corporations involved since they will not have to send notice to as many persons. The Commission should consider whether there is any reason to send notice of approval to every member of a nonprofit corporation.

The new law also eliminates a step in the proceedings since the corporation is required to state its determination of the fair market value of the possibly dissenting share in the notice of approval. (Section 1301(a).) The shareholder then responds with a demand and by submission of his shares for endorsement. Under the old law, the corporation waited for the shareholder to make the first move

by demanding that the corporation purchase his dissenting shares. (Section 4301.) The corporation then had to respond with an offer within five days if it agreed that the shares were dissenting shares. (Section 4304.) Hence, under the old law, the corporation had to mail notice to everyone once and then once more to those making a demand.

§ 6304. Demand for purchase

The nonprofit corporation's statement of fair market value in the notice given pursuant to Section 6303 is an offer to purchase the dissenting membership at that price. This provision is the same as the old and new General Corporation Laws. Should the counter-estimate of fair market value in the member's demand for purchase be binding on the member?

§ 6305. Submission of transferable membership certificate

The provision in the General Corporation Law concerning submission of the shares to the corporation for endorsement presents a problem in the nonprofit corporation law since it is possible to have a membership representing an ownership interest without having a transferable membership certificate or any membership certificate at all. Accordingly, this provision is limited to transferable dissenting membership certificates.

Another problem is that the purpose of the submission and endorsement requirement is not clear from the statute. It seems logical that the corporation would not endorse the shares as dissenting shares pursuant to Section 1302 of the new General Corporation Law unless the corporation agrees that the shares are dissenting. However, Section 1302 does not specifically so provide. Ballantine and Sterling states that the purpose of this provision is to "indicate to purchasers or lenders that the rights of the holders of the shares represented thereby are limited to the rights of dissenting shares." (Ballantine & Sterling,

supra, § 339.) If the corporation endorses the shares as dissenting shares only when it agrees that they are, this provision also serves the purpose of putting the shareholder on notice that the issue of whether the shares are dissenting remains to be resolved, whether informally or by an action.

§ 6306. Notice to member not holding transferable membership certificate

Section 6306 is designed to deal with the problem of a dissenting membership which is not represented by a transferable membership certificate. **In this situation, there is no interest in giving notice to potential purchasers or lenders, but there is an interest in facilitating agreement on the issue of whether the membership is dissenting and on its fair market value.**

§ 6308. Action to determine nature of membership or fair market value

The member or an "interested" nonprofit corporation may bring an action in the circumstances specified in draft Section 6308. The term "interested" is vague, but is used in both the old and new business corporation laws. It apparently includes a surviving or consolidated nonprofit corporation, any other constituent nonprofit corporation, and the nonprofit corporation whose memberships are involved in the action. (See Ballantine & Sterling, supra, § 342 at 611.)

§ 6315. Costs of action

Subdivision (c) of Section 6315 is the same as a new provision of the new General Corporation Law giving the court discretion to require the nonprofit corporation to pay attorney's fees, expert witness fees, and interest where the appraised value of the membership is 125 percent of the price offered by the nonprofit corporation. However, the staff is not sure that this provision is as salutary in the context of nonprofit corporations as it may be for business corporations. It may be overly punitive because, generally speaking, the value of memberships in nonprofit corporations is more difficult to estimate than the value of shares in business corporations.

§ 6317. Rights of dissenting members pending valuation

The introductory clause of this section, which is the same as the first sentence of Section 1308 of the new General Corporation Law, is in brackets because the staff is unsure of its meaning. After the fair market value has been agreed upon or determined, the rights of a dissenting membership are restricted since the dissenting status can be lost only upon the happening of certain events specified in Section 6319. However, before the fair market value is agreed upon or determined, Section 6317 appears to say that all rights and privileges continue and no express limitation appears to restrict those rights.

§ 6321. Limitation on action to test validity of reorganization

This section is derived from part of subdivision (a) of Section 1312 of the new General Corporation Law which in turn was derived from Section 4123 of existing law. Section 4123, which appears in the chapter on mergers and consolidations in existing law, is a limitation on actions to test the validity of a merger or consolidation and also a cross-reference to the two remedies of dissenters--to be compensated according to a preexisting agreement between the shareholder and the corporation or to follow the dissenter's rights procedure. Since the substance of Section 4123 now appears in the chapter dealing with dissenters' rights, no cross-reference is needed. Accordingly, the staff has omitted the last third of subdivision (a) of Section 1312 in the draft of Section 6321. Draft Section 6302, which is the same as Section 1311 of the new General Corporation Law, adequately covers the point that no dissenters' appraisal remedy is available where the nonprofit corporation and the member have already contracted for the amount of compensation.

The draft of Section 6321 does not continue the new provision of subdivision (b) of Section 1312 of the new General Corporation Law. Subdivision (b)

is an exception to the limitation provided by subdivision (a) of Section 1312 (and duplicated in draft Section 6321) in that it permits nondissenting shareholders of a controlled corporation to bring an action to challenge a reorganization on grounds other than that there were not enough votes to authorize the reorganization. Presumably, this new provision permits a shareholder who votes for a reorganization and later finds out that he relied on fraudulent representations to bring an action to enjoin or rescind the reorganization. The second sentence of subdivision (b) of Section 1312 provides some procedural limitations on the exercise of this right. We have not drafted a similar section for the draft of the nonprofit corporation law because the special situation of a reorganization involving controlled corporations does not merit special attention in the area of nonprofit corporations. Furthermore, any need for such a remedy is partially alleviated by draft Section 6322.

§ 6322. Action by dissenting member not holding membership representing ownership interest

The Minutes of the June 1974 meeting indicate that the Commission was at that time favorably disposed toward providing a right of action on behalf of members, directors, and the Attorney General to rescind or enjoin a merger or consolidation where it would defraud the members or would be manifestly unfair to a constituent nonprofit corporation. This remedy would have completely replaced any right to require the nonprofit corporation to purchase the dissenting membership. The staff believes that it is better to have a mixed approach, and that is what the draft of Chapter 13 seeks to do. It seems best to treat memberships which are of a proprietary nature like shares in a business corporation. It may be advisable to recognize by statute that, in the case of fraud, and perhaps manifest unfairness, the members have a right to bring an action.

Accordingly, draft Section 6322 is much more limited than the sections considered two years ago although it could still lead to some vexatious litigation. The Commission may want to limit such actions to actions for fraud, or perhaps even eliminate this section entirely. Presumably, the final draft of the General Nonprofit Corporation Law will provide appropriate authority to the Attorney General to protect charitable trusts in the case of a reorganization involving charitable corporations or nonprofit corporations holding assets on charitable trust. It is difficult to say whether minority members who do not hold memberships representing ownership interests or members of charitable corporations have an interest in preventing a reorganization, distinct from the public interest in charitable purposes, that deserves statutory recognition. In the case of charitable corporations, perhaps the minority members might best be viewed as private attorneys general who have the advantage of having some detailed knowledge of the corporation and being involved in the reorganization process and who are in a good position to make sure that the public interest is protected. Should Sections 6322 and 6323 be retained in some form?

Respectfully submitted,

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Rough Outline

GENERAL NONPROFIT CORPORATION LAW

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CHAPTER 13. DISSENTERS' RIGHTS

§ 6300. Dissenting membership

6300. As used in this chapter, "dissenting membership" means a membership that satisfies all of the following requirements:

(a) The membership represents an ownership interest in the non-profit corporation.

(b) The membership was held of record on the date for the determination of memberships entitled to be voted on the reorganization.

(c) The membership was entitled to be voted on the reorganization but was not voted in favor of the reorganization.

Comment. Section 6300 defines "dissenting membership" for the purposes of Chapter 13 prescribing the rights of members who dissent from a reorganization involving the nonprofit corporation in which the person is a member. Section 6300 is derived in part from portions of subdivision (b) of Section 1300 of the General Corporation Law and subdivision (a) of former Section 4303 but differs substantially from these provisions. Subdivision (a) makes clear that, in the context of nonprofit corporations, a "dissenting membership" must represent an ownership interest. See Section 5405(b) (statement required on transferable membership certificate that represents ownership interest). The ownership interest is the same as the right to assets distributed on dissolution. See Sections 7032, 7034. Hence, it is impossible to have a dissenting membership, as defined in this section, in a charitable corporation. See Section 5181 ("reorganization" defined).

§ 6301. Right to require purchase of dissenting membership; fair market value

6301. (a) A member holding a dissenting membership may, by complying with this chapter, require the nonprofit corporation in which the member holds the dissenting membership to purchase it for cash at its fair market value.

(b) The fair market value of a dissenting membership shall be determined as of the day before the first announcement of the terms of the proposed reorganization, excluding any appreciation or depreciation in consequence of the proposed reorganization, [but adjusted for any membership split or reverse membership split which becomes effective after the date of the proposed reorganization].

Comment. Section 6301 is the same in substance as a portion of subdivision (a) of Section 1300 of the General Corporation Law and former Section 4300.

Note. The language in brackets in subdivision (b) is analogous to a provision in Section 1300(a) of the General Corporation Law; however, its retention and its wording are dependent on provisions of other chapters. "Stock split" and "reverse stock split" are defined terms in the General Corporation Law. See Sections 182, 188. Should we define "membership split" and "reverse membership split"?

§ 6302. Application of chapter

6302. This chapter does not apply to classes of memberships whose terms and provisions specifically set forth the amount to be paid in respect to such memberships in the event of a reorganization.

Comment. Section 6302 is the same in substance as Section 1311 and a portion of subdivision (a) of Section 1312 of the General Corporation Law and former Section 4318 and a portion of former Section 4123.

§ 6303. Notice of approval of reorganization; offer to purchase dissenting membership

6303. (a) Within 10 days after membership approval of a reorganization, each nonprofit corporation involved in the reorganization requiring the approval of that nonprofit corporation's members shall send to each of its members who it believes may hold a dissenting membership all of the following:

- (1) A copy of Sections 6300, 6301, and 6303 to 6310, inclusive.
- (2) A statement of the price determined by the nonprofit corporation to represent the fair market value of the dissenting membership.
- (3) A brief description of the procedure to be followed if the member desires to exercise the right to receive compensation for the dissenting membership and accepts or rejects the price offered by the nonprofit corporation.

(b) The statement of price pursuant to paragraph (2) of subdivision (a) constitutes an offer by the nonprofit corporation to purchase for cash at the price stated any dissenting membership for which a demand for purchase is made unless it loses its status as a dissenting membership pursuant to Section 6319.

Comment. Section 6303 is the same in substance as subdivision (a) of Section 1301 of the General Corporation Law. The nonprofit corporation may comply with this section by sending notice of the approval of the reorganization to all of its members.

404/673

§ 6304

§ 6304. Demand for purchase; contents of demand; time for making

6304. (a) A member holding a dissenting membership, and who desires the nonprofit corporation in which such membership is held to purchase the membership, shall demand that the nonprofit corporation pay the member its fair market value.

(b) The demand for purchase shall be in writing and shall contain the following:

(1) A statement of the class of the membership and, if the nonprofit corporation permits a member to hold more than one membership, the number of memberships which the member demands that the nonprofit corporation purchase.

(2) A statement whether the member accepts the price offered by the nonprofit corporation and, if the offer is not accepted, the member's estimate of the fair market value of the dissenting membership.

[(c) The member's statement of estimated fair market value pursuant to paragraph (2) of subdivision (b) constitutes an offer by the member to sell the dissenting membership to the nonprofit corporation for the stated amount.]

(d) A demand for purchase is not effective for any purpose unless it is received by the nonprofit corporation not later than 30 days after the notice of approval of the reorganization was mailed to the member pursuant to Section 6303.

Comment. Section 6304 is substantively similar to subdivisions (b) and (c) of Section 1301 of the General Corporation Law. Compare former Section 4301. Paragraph (2) of subdivision (b) makes clear that the member is required to state an estimate of fair market value only where the member does not accept the offer of the nonprofit corporation. [Subdivision (c) is new and is analogous to subdivision (b) of Section 6303 providing that the statement of fair market value by the nonprofit corporation is an offer to purchase. These provisions are intended to facilitate agreement by the member and the nonprofit corporation on the fair market value of the dissenting membership.]

404/963

§ 6305

§ 6305. Submission of transferable membership certificate

6305. (a) If a member holds a dissenting membership which is represented by a transferable membership certificate, the member shall submit such certificate to the nonprofit corporation at its principal office at the time the demand for purchase of such membership is made

pursuant to Section 6304, or at any time thereafter, but not later than 30 days after the notice of approval of the reorganization was mailed to the member pursuant to Section 6303.

(b) Upon submission, [if the nonprofit corporation agrees that it is a dissenting membership,] the nonprofit corporation shall stamp or endorse the certificate with a statement that the membership represented thereby is a dissenting membership or shall give the member a receipt so stamped or endorsed in exchange for the certificate.

(c) If a new membership certificate is issued upon a subsequent transfer of a dissenting membership, the new membership certificate shall bear the statement provided by subdivision (b) and the name of the original holder of the dissenting membership.

Comment. Section 6305 is based on Section 1302 of the General Corporation Law and former Section 4302 but differs in several respects. Section 6305 applies only to dissenting memberships which are represented by transferable certificates in the possession of the member. Subdivision (a) makes clear that the transferable certificates must be submitted at the time the demand for purchase is made or thereafter but that submission must be made before expiration of the 30-day period.

Subdivision (b) makes clear that the nonprofit corporation should stamp the membership certificate as a dissenting membership only if it agrees that it is such. The "receipt" referred to in subdivision (b) is the same as the "certificate" as specified in Section 1302; "receipt" is used in Section 6305 to avoid confusion with the membership certificate.

§ 6306. Notice to holder of membership not represented by transferable certificate

6306. (a) If the membership concerning which a demand for purchase has been made pursuant to Section 6304 is not represented by a transferable membership certificate, the nonprofit corporation shall, within five days after receipt of a demand for purchase, mail a notice to the member making the demand.

(b) The notice shall state the following:

(1) Whether the nonprofit corporation agrees that the membership is a dissenting membership.

(2) If the nonprofit corporation agrees that the membership is a dissenting membership, whether the nonprofit corporation agrees with the member's estimate, if any, of the fair market value of the dissenting membership.

Comment. Section 6306 is new. It is applicable in the case of a dissenting membership which is not represented by a transferable membership certificate in the possession of the member. The notice prescribed by Section 6306 provides the member with the information necessary to decide whether to bring an action pursuant to Section 6308. The five-day period is derived from former Section 4304. If there is agreement on the issue of whether the membership is a dissenting membership, the notice facilitates agreement on the price to be paid.

§ 6307. Agreement on price of dissenting membership

6307. (a) If the nonprofit corporation and the member agree that the membership is a dissenting membership and agree upon the price to be paid for such membership, the member is entitled to the agreed price with interest thereon at the legal rate on judgments from the date of the agreement. Such agreement shall be filed with the secretary of the nonprofit corporation.

(b) Subject to the provisions of Section 6316, the nonprofit corporation shall pay the member the price agreed upon, with interest, within 30 days after the agreement is made unless the agreement provides otherwise.

Comment. Section 6307 is the same in substance as Section 1303 of the General Corporation Law and former Sections 4304 and 4305.

§ 6308. Action to determine nature of membership or fair market value; limitation

6308. (a) A member who has made a demand for purchase of the membership as a dissenting membership or an interested nonprofit corporation may bring an action in the superior court to determine whether the membership is a dissenting membership that the nonprofit corporation may be required to purchase or the fair market value of the dissenting membership, or both, or may intervene in any such pending action in either of the following circumstances:

(1) The nonprofit corporation denies that the membership is a dissenting membership that it is required to purchase.

(2) The nonprofit corporation and the member fail to agree upon the price of the dissenting membership.

(b) An action pursuant to this section shall be brought not later than six months after notice of approval of the reorganization was mailed to the member pursuant to Section 6303.

Comment. Section 6303 is the same in substance as subdivision (a) of Section 1304 of the General Corporation Law and former Section 4306.

405/400

§ 6309

§ 6309. Joinder of parties; consolidation

6309. (a) Two or more members may join as plaintiffs or be joined as defendants in an action under Section 6308.

(b) Two or more actions under Section 6308 may be consolidated.

Comment. Section 6309 is the same in substance as subdivision (b) of Section 1304 of the General Corporation Law and former Section 4307.

§ 6310. Determination of issues; appointment of appraisers

6310. (a) On the trial of an action pursuant to Section 6308, the court shall determine the issues.

(b) If the status of the membership as a dissenting membership is in issue, the court shall first determine that issue.

(c) If the fair market value of the dissenting membership is in issue, the court shall determine, or shall appoint one or more impartial appraisers to determine, the fair market value of the dissenting membership.

Comment. Section 6310 is the same in substance as subdivision (c) of Section 1304 of the General Corporation Law and former Section 4308.

§ 6311. Report of appraisers; confirmation by court

6311. (a) Any appraisers appointed by the court pursuant to Section 6310 shall proceed forthwith to determine the fair market value per dissenting membership. Within 10 days from their appointment, or such further time fixed by the court, the appraisers, or a majority of them, shall make and file a report in the office of the court clerk.

(b) After the report is filed, on the motion of a party, the report shall be submitted to the court and considered on such evidence as the

court considers relevant. If the court finds the report reasonable, the court may confirm it.

Comment. Section 6311 is the same in substance as subdivision (a) of Section 1305 of the General Corporation Law and former Section 4309. The standard 10-day period for filing the report of appraisers is derived from subdivision (b) of Section 1305.

405/403

§ 6312

§ 6312. Court determination of fair market value

6312. In an action pursuant to Section 6308, the court shall determine the fair market value of the dissenting membership in either of the following circumstances:

(a) Where a report is not made and filed by the appraisers within the time provided by subdivision (a) of Section 6311.

(b) Where the report of the appraisers is not confirmed by the court.

Comment. Section 6312 is the same in substance as subdivision (b) of Section 1305 of the General Corporation Law and former Section 4310.

§ 6313. Judgment; appeal

6313. (a) Subject to Section 6316, judgment shall be rendered against the nonprofit corporation for payment of an amount equal to the fair market value of each dissenting membership multiplied by the number of such dissenting memberships which a member who is a party is entitled to require the nonprofit corporation to purchase, with interest thereon at the legal rate from the date on which judgment was entered.

(b) Any party may appeal from the judgment.

Comment. Subdivision (a) of Section 6313 is the same in substance as subdivision (c) of Section 1305 of the General Corporation Law and former Section 4311. Subdivision (b) is the same as the last sentence of subdivision (d) of Section 1305 and the last sentence of former Section 4312.

§ 6314. Payment of judgment conditioned on surrender of membership certificate or receipt

6314. A judgment rendered pursuant to Section 6313 is payable only upon the endorsement and delivery to the nonprofit corporation of any membership certificates which have been stamped or endorsed or any receipts which have been issued pursuant to Section 6305.

Comment. Section 6314 is analogous to the first sentence of subdivision (d) of Section 1305 of the General Corporation Law and the first sentence of former Section 4312. See Section 6305 (submission of transferable membership certificate).

§ 6315. Costs of action

6315. (a) Except as provided in subdivisions (b) and (c), the costs of the action, including reasonable compensation to the appraisers to be fixed by the court, shall be assessed or apportioned as the court considers equitable.

(b) If the fair market value of the dissenting membership as determined or confirmed by the court exceeds the price offered by the nonprofit corporation, the nonprofit corporation shall pay the costs.

(c) If the fair market value of the dissenting membership as determined or confirmed by the court is more than 125 percent of the price offered by the nonprofit corporation, the court may in its discretion require the nonprofit corporation to pay attorney's fees, fees of expert witnesses, and interest at the legal rate on judgments from the date of mailing the notice of approval of the reorganization pursuant to Section 6303.

Comment. Section 6315 is the same in substance as subdivision (e) of Section 1305 of the General Corporation Law. Subdivision (c) makes clear that interest runs from the time of mailing of notice of approval of the reorganization pursuant to Section 6303. Compare Section 1305(e).

§ 6316. Unpaid dissenting members as creditors; priority

6316. To the extent that the provisions of Chapter 5 (commencing with Section 5500) prevent the payment to any members holding dissenting memberships of their fair market value, the members become creditors of the nonprofit corporation for the amount thereof, together with interest at the legal rate on judgments until the date of payment, and shall be subordinate to all other creditors in any liquidation proceeding. The debt shall be paid to such members when permissible under the provisions of Chapter 5 (commencing with Section 5500).

Comment. Section 6316 is the same in substance as Section 1306 of the General Corporation Law.

Note. After Chapter 5 is considered, we may want to make the cross-reference in this section more specific.

§ 6317. Rights of dissenting members pending valuation

6317. [Except as expressly limited in this chapter,] holders of dissenting memberships continue to have all the rights and privileges incident to their memberships until the fair market value of their memberships is agreed upon or is determined or confirmed by the court.

Comment. Section 6317 is the same in substance as the first sentence of Section 1308 of the General Corporation Law and the first sentence of former Section 4315.

§ 6318. Withdrawal of dissent

6318. A member may not withdraw a demand for purchase unless the nonprofit corporation consents thereto.

Comment. Section 6318 is the same in substance as the last sentence of Section 1308 of the General Corporation Law and the last sentence of former Section 4315.

§ 6319. Termination of status as dissenting membership

6319. Dissenting memberships lose their status as dissenting memberships and the holders thereof cease to be entitled to require the nonprofit corporation to purchase their memberships upon the happening of any of the following:

(a) The nonprofit corporation abandons the reorganization. Upon abandonment of the reorganization, the nonprofit corporation shall pay on demand to any member who has initiated proceedings for the purchase of a dissenting membership in good faith under this chapter all necessary expenses, including reasonable attorney's fees, incurred in such proceedings.

(b) The membership is transferred prior to the submission of any membership certificate pursuant to Section 6305 or, where there is no transferable certificate of membership, prior to the member's receipt of the notice prescribed by Section 6306.

(c) The membership is surrendered for conversion into a membership of another class in accordance with the articles.

(d) The member and the nonprofit corporation do not agree upon the status of the membership as a dissenting membership or upon the purchase price of the membership, and neither the member nor the nonprofit corporation files a complaint or intervenes in a pending action within the time provided in Section 6308.

(e) The member, with the consent of the nonprofit corporation, withdraws the demand for purchase of the dissenting membership.

Comment. Section 6319 is the same in substance as Section 1309 of the General Corporation Law and former Section 4316. Section 6319, however, does not provide for the cessation of a member's status as a dissenting member since that term is not used in this chapter. Subdivision (b) takes account of the situation where there is no transferable dissenting membership to be submitted to the nonprofit corporation. See Section 6306.

406/171

§ 6320

§ 6320. Suspension of compensation proceedings

6320. If litigation is instituted to test the sufficiency or regularity of the votes of the members in authorizing a reorganization, all proceedings in an action under Section 6308 shall be suspended until the final determination of such litigation.

Comment. Section 6320 is the same in substance as Section 1310 of the General Corporation Law and former Section 4317.

§ 6321. Limitation on action to test validity of reorganization

6321. No member of a nonprofit corporation who has a right under this chapter to demand purchase of the membership held by the member has any right at law or in equity to attack the validity of the reorganization or to have the reorganization set aside or rescinded except in an action to test whether the number of memberships required to authorize or approve the reorganization have been legally voted in favor thereof.

Comment. Section 6321 is the same in substance as a portion of subdivision (a) of Section 1312 of the General Corporation Law and a portion of former Section 4123.

§ 6322. Action by dissenting member not holding membership representing ownership interest

6322. An action to enjoin or rescind a reorganization which serves as a device to defraud members of the nonprofit corporation [, or which is manifestly unfair to the nonprofit corporation,] may be brought by a member holding a membership that satisfies both of the following requirements:

(a) The membership was held of record on the date for the determination of memberships entitled to be voted on the reorganization.

(b) The membership was entitled to be voted on the reorganization and was not voted in favor of the reorganization.

Comment. Section 6322 is new. It gives a member who holds a membership with the characteristics of a dissenting membership as defined in Section 6300, except that the membership does not represent an ownership interest in the nonprofit corporation, a right to bring an action to enjoin or rescind a reorganization which serves as a device to defraud members [or is manifestly unfair to the nonprofit corporation].

Note. This section has been included for purposes of discussion. See the discussion in Memorandum 76-54.

406/177

§ 6323. Limitation on action

6323. No action pursuant to Section 6322 to enjoin or rescind a reorganization may be commenced more than 60 days after the effective date of the reorganization.

Comment. Section 6323 is new. It places a time limit upon the bringing of actions pursuant to Section 6322.