CHAPTER 8

Directors and Officers

ARTICLE 1

Board of Directors

CROSS REFERENCES

Powers and duties of benefit director, see Section 33‑38‑410.

**SECTION 33‑8‑101.** Requirement for and duties of board of directors.

 Unless otherwise provided in:

 (a) Chapters 1 through 20 of this Title;

 (b) the articles of incorporation; or

 (c) an agreement unanimously approved by the shareholders and disclosed in the articles of incorporation and on the corporation’s share certificates,

 all corporate powers must be exercised by or under the authority of, and the business and affairs of a corporation must be managed under the direction of, a board of directors. If the authority of the board is dispensed with or limited by a provision in the articles of incorporation under (b) or by a shareholder agreement under (c), the articles or the agreement shall describe who is to perform some or all of the duties of a board of directors.

HISTORY: Derived from 1976 Code Section 33‑11‑220 [1962 Code Section 12‑16.22; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 21; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑10 [1962 Code Section 12‑18.1; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

[Note: Section 33‑8‑101 differs substantially from 1984 Model Act Official Text section 8.01. See the South Carolina Reporters’ Comments.].

Section 8.01 requires that every corporation have a board of directors except that a corporation with 50 or fewer shareholders may dispense with or limit the authority of the board of directors by describing in the articles “who will perform some or all of the duties of a board of directors.” Section 8.01(c). This election is independent of the various close corporation elections permitted by the Model Statutory Close Corporation Supplement, though the basic standard of 50 shareholders is the same in both section 8.01 and that Supplement.

Obviously, some form of governance is necessary for every corporation. The board of directors is the traditional form of corporate governance but it need not be the exclusive form. Patterns of management may be tailored to specific needs in connection with family controlled enterprises, wholly or partially owned subsidiaries, or corporate joint ventures without the requirement of electing close corporation status under the Model Statutory Close Corporation Supplement. The persons who perform some or all of the duties of the board of directors may be designated “trustees,” “agents,” or “managers,” and they may be selected in ways other than the traditional election by the shareholders. It is necessary, however, that some person or group perform these duties, and the designated persons, while performing them, are subject to the same duties as directors.

An example of the restructuring of the traditional board of directors permitted by section 8.01 is presented by the facts of Lehrman v. Cohen, 43 Del. Ch. 222, 222 A.2d 800 (Del. 1966), where two shareholders (or allied family interests) had equal voting power and wished to permit the corporation’s attorney to cast a tie‑breaking vote on the board of directors without giving him a participating equity interest in the corporation. While the desired result was successfully achieved in that case by creating a class of voting shares without a significant economic interest in the corporation, the same result may be reached under section 8.01 directly by provision in the articles of incorporation without creating a special class of shares.

Any arrangement under section 8.01(c) may also be established by a close corporation election under the Model Statutory Close Corporation Supplement (See Chapter 18 of this Act).

When a corporation has more than 50 shareholders, it must adopt the traditional board of directors as its sole form of governance. Because questions may at least theoretically arise how joint share ownership and other arrangements should be counted in applying a numerical limitation, section 1.42 prescribes rules for calculating the number of shareholders for the purpose of this and other numerical limitations in the Model Act.

Section 8.01(b) states that if a corporation has a board of directors “all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of,” the board of directors. The quoted language is chosen to reflect the role and functions of boards of directors in all varieties of corporations. In a small corporation and in some larger corporations where the board of directors is composed entirely of persons actively involved in the management of the corporate business, it may be reasonable to describe management as being “by” the board of directors. But a different model is appropriate for the boards of directors of publicly held corporations, which usually include individuals not actively involved in management. In these corporations it is not feasible to impose a requirement that the business and affairs of the corporation be managed “by” the board of directors. In these corporations the appropriate model is that the business and affairs be managed “under the direction of” the board of directors, since the role of the board of directors consists principally of the formulation of major management policy with little or no direct involvement in day‑to‑day management.

As a correlative, in large and complex publicly held corporations it is generally recognized that the board of directors may delegate to appropriate officers those powers not required by law to be exercised by the board of directors itself. Although delegation does not relieve the board of directors from its responsibilities of oversight, directors should not be held personally responsible for actions or omissions of officers, employees, or agents of the corporation so long as the directors have relied reasonably upon these officers, employees, or agents. See section 8.30 and its Official Comment. The board of directors has the power to probe to any depth it chooses in day‑to‑day management, but it has the responsibility to do so only to the extent that section 8.30 requires.

Section 8.01(b) also recognizes that the powers of the board of directors may be limited by express provisions in the articles of incorporation.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Official Text of this section in the Model Act would have introduced major changes in South Carolina law. It would have created massive problems for corporations having management agreements under Section 33‑11‑220 and for corporations that use bylaw provisions to effect control. The fifty shareholder cut‑off in Model Act Section 8.01(c) for use of an alternative to board control was seen as inviting problems. One problem involved counting noses. A second problem was the likelihood that many corporations and their counsel would not be alert to the passage of the fifty shareholder threshold.

Section 33‑13‑10 of the 1981 South Carolina Business Corporation Act was deemed generally satisfactory. Under it, board control may be made subject to special provision in the articles, bylaws, or in shareholder agreements entered into under Section 33‑11‑220. The revision was deemed to cut board discretion, to introduce an arbitrary barrier, and to invite litigation by persons contesting the validity of corporate action.

This section retains the essence of prior law, with a description in the statute of permissible shareholder agreements rather than by reference to some other section. The power in former Section 33‑13‑10 to limit board authority by a bylaw provision was abandoned because public notice is lacking.

Under subsection (c) the existence of the agreement is all that need be disclosed in the articles and on the stock certificates. The full text of the agreement need not be reproduced verbatim.

DERIVATION: 1984 Model Act Section 8.01, with substantial amendments—see the South Carolina Reporters’ Comments.

CROSS REFERENCES

Amendment of articles of incorporation, see Sections 33‑10‑101 et seq.

Articles of incorporation, see Section 33‑2‑102.

Close corporations, Statutory Close Corporation Supplement, see Sections 33‑18‑210, 33‑18‑220.

Committee exercising authority of board of directors, see Section 33‑8‑250.

Indemnification, see Sections 33‑8‑500 through 33‑8‑580.

Number of shareholders, see Section 33‑1‑420.

Officers, see Sections 33‑8‑400 et seq.

Professional Corporations, Professional Corporation Supplement, see Sections 33‑19‑101 et seq.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Termination of statutory close corporation status, see Section 33‑18‑310.

Library References

Corporations 296, 297.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 460 to 468.

RESEARCH REFERENCES

ALR Library

10 ALR 2nd 701 , Power of President of Corporation to Have Litigation Instituted by it Where Board of Directors Has Failed or Refused to Grant Permission.

Encyclopedias

S.C. Jur. Banks and Banking Section 77, Board Manages Affairs of Bank.

S.C. Jur. Charities Section 44, Benefit Corporations‑Accountability.

S.C. Jur. Hospitals Section 3, Governing Body.

S.C. Jur. Hospitals Section 17, Corporate Negligence.

S.C. Jur. Mortgages Section 12, Capacity of Parties.

Forms

Am. Jur. Pl. & Pr. Forms Corporations Section 257 , Introductory Comments.

South Carolina Legal and Business Forms Section 1:18 , Directors.

South Carolina Legal and Business Forms Section 1:209 , Board of Directors‑General Powers.

**SECTION 33‑8‑102.** Qualifications of directors.

 The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this State or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe.

HISTORY: Derived from 1976 Code Section 33‑13‑20 [1962 Code Section 12‑18.2; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The elimination of mandatory special qualifications for directors is now nearly universal. The articles of incorporation or bylaws, however, may prescribe special qualifications, an option that is most likely to be utilized in closely held corporations where qualifications for directors may be used as a device for ensuring representation and voting power on the board of directors.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section contains no change in the prior law.

DERIVATION: 1984 Model Act Section 8.02.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Close corporations, Statutory Close Corporation Supplement, see Sections 33‑18‑210 et seq. .

Professional Corporations, Professional Corporation Supplement, see Sections 33‑19‑101 et seq.

Library References

Corporations 15, 282.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 32, 447.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Hospitals Section 3, Governing Body.

Forms

South Carolina Legal and Business Forms Section 1:18 , Directors.

**SECTION 33‑8‑103.** Number and election of directors.

 (a) A board of directors consists of one or more individuals with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

 (b) In the case of a corporation which is not a public corporation, if a board of directors has power under the articles of incorporation or under a bylaw provision to fix or change the number of directors, the board may increase or decrease by thirty percent or less the number of directors last approved by the shareholders, but only the shareholders may increase or decrease by more than thirty percent the number of directors last approved by the shareholders.

 (c) The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed within the minimum and maximum by the shareholders or the board of directors. After shares are issued, only the shareholders may change the range for the size of the board or change from a fixed to a variable‑range size board or vice versa.

 (d) Directors are elected at the first annual shareholders’ meeting and at each annual meeting thereafter unless their terms are staggered under Section 33‑8‑106.

HISTORY: Derived from 1976 Code Section 33‑13‑30 [1962 Code Section 12‑18.3; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑40 [1962 Code Section 12‑18.4; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1998 Act No. 328, Section 4.

OFFICIAL COMMENT

Section 8.03 (Section 33‑8‑103) prescribes rules for the determination of the size of the board of directors of corporations that have not dispensed with a board of directors under section 8.01(c) (Section 33‑8‑101(c)), and for changes in the size of the board of directors once it is established.

1. Minimum Number of Directors.

Section 8.03(a) (Section 33‑8‑103(a)) provides that the size of the initial board of directors may be “specified in or fixed in accordance with” the articles of incorporation or bylaws. The size of the board of directors may thus be fixed initially in the fundamental corporate documents, or the decision as to the size of the initial board of directors may be made thereafter by those authorized in those documents. After shares have been issued, however, the power to increase or decrease the size of the board of directors by more than 30 percent, whether by amendment of the bylaws or otherwise, is reserved to the shareholders.

Before 1969 the Model Act required a board of directors to consist of at least three directors. Since then, however, the Model Act, and the corporation statutes of an increasing number of states, have provided that the board of directors may consist of one or more members. A board of directors consisting of one or more individuals may be appropriate for corporations with one or two shareholders, or for corporations with more than two shareholders where in fact the full power of management is vested in only one or two persons. The requirement that every corporation have a board of directors of at least three directors may require the introduction into these closely held corporations of persons with no financial interest in the corporation.

2. Changes in the Size of the Board of Directors.

Sections 8.03(b) and (c) (Section 33‑8‑103(b) and (c)) prescribe rules for corporations in which the board of directors has authority to establish or change the size of the board of directors. It has no application to corporations in which the size of the board of directors is fixed by the bylaws and the shareholders reserve to themselves the power to amend bylaws. See section 10.20 (Section 33‑10‑200). The basic premise is that the determination of the size of the board of directors should rest with the shareholders. These subsections also prevent the board of directors from manipulating its own size without the approval of the shareholders. But experience has shown, particularly in larger corporations, that it is desirable to grant the board of directors some authority to change its size without incurring the expense of obtaining shareholder approval.

Subsection (b) therefore permits the board of directors to increase or decrease its own size by up to 30 percent without shareholder approval. The 30 percent is calculated from the size last approved by the shareholders,thereby preventing directors from tacking a series of 30 percent increases or decreases to alter the basic composition of a board of directors without shareholder approval. For example, in a board of directors fixed or approved by the shareholders at 15 members, the board may, without shareholder approval, change the size of the board to as few as 11 or as many as 19; a board of 5 may be changed by the board to as few as 4 or as many as 6. The 30‑percent limit was established to give the board of directors reasonable leeway in adjusting its own size. Thus, when a director resigns, the board of directors should normally be able to reduce its own size and elect not to fill the vacancy without shareholder action; similarly, if an exceptionally qualified person becomes available (or is invited to serve on the board of directors because of a felt need), he may normally be added to the board of directors without shareholder approval.

Alternatively, subsection (c) authorizes the articles of incorporation or bylaws to establish a variable‑range size for the board of directors. If a variable range size is established, either the shareholders or the board of directors may prescribe or change the size of the board of directors within that range. However, only the shareholders may amend the bylaws to change the limits established for the size of the board of directors, or to change from a variable‑range size board to a fixed board or vice versa. A variable‑range size board is intended to provide essentially the same benefits as the authority granted a board of directors by subsection (b) to change its own size by 30 percent. Many publicly held corporations have established variable‑range size boards of directors pursuant to general authority in state statutes. Specific recognition and regulation of this wide‑spread practice seems desirable.

Section 8.03(c) (Section 33‑8‑103(c)) also applies to a variable‑range size board of directors whose initial size is established by the articles of incorporation if the articles authorize changing the limits of the size of the board without having to amend the articles.

The limitations on the authority of the board of directors set forth in this section are substantive restrictions that may not be changed by provisions in articles of incorporation or bylaws. For example, a general provision in bylaws granting the board of directors authority to amend bylaws does not authorize a board of directors, after shares are issued, to change the limits of a variable‑range board established by the bylaws.

Sections 8.03(b) and (c) (Sections 33‑8‑103(b) and (c)) are primarily designed for publicly held corporations. In closely held corporations, typically, a change in the size of the board of directors may be accomplished readily by the shareholders if that is desired. In many closely held corporations, on the other hand, a board of directors of a fixed size may be an essential part of a control arrangement. In these situations, an increase or decrease in the size of the board of directors by even a single member may significantly affect control. In order to effectuate control arrangements dependent on a board of directors of a fixed size, the power of the board of directors to change its own size must be negated. This may be accomplished by fixing the size of the board of directors in the articles of incorporation or by expressly negating all powers of the board of directors to change the size of the board, whether by amendment of the bylaws or otherwise. See section 10.22 (Section 33‑10‑220).

3. Annual Elections of Directors.

Section 8.03(d) (Section 33‑8‑103(d)) makes it clear that all directors are elected annually unless the board is staggered. See section 8.05 (Section 33‑8‑105) and its Official Comment.

SOUTH CAROLINA REPORTERS’ COMMENTS

The revision gives shareholders more protection than the 1981 South Carolina Business Corporation Act by not automatically empowering directors to increase the size of the board. The Official Text of the Model Act does not identify the source of such power. For this reason, language has been added to subsection (b) to make the exercise of such power dependent upon a provision found in the articles or in the bylaws.

The revision also contemplates the power of directors to decrease the number of board seats, again assuming that the bylaws or articles allow such action. A thirty percent increase or decrease limitation is built into the directors’ power to add or subtract board seats.

The variable range enabling provision of (c) simply recognizes what is a widespread practice in publicly‑held corporations.

DERIVATION: 1984 Model Act Section 8.03.

CROSS REFERENCES

Annual shareholders’ meeting, see Section 33‑7‑101.

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Cumulative voting, see Section 33‑7‑280.

Deadlocked board of directors as ground for dissolution, see Section 33‑14‑300.

Staggered terms, see Section 33‑8‑106.

Terms of directors, generally, see Section 33‑8‑105.

Library References

Corporations 281, 283.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 373, 433 to 434, 445 to 446.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 61, Voting of Shares.

S.C. Jur. Banks and Banking Section 76, Election.

S.C. Jur. Hospitals Section 3, Governing Body.

Forms

South Carolina Legal and Business Forms Section 1:18 , Directors.

South Carolina Legal and Business Forms Section 1:154 , Board of Directors‑Maximum and Minimum Number.

South Carolina Legal and Business Forms Section 1:205 , Directors‑Number.

South Carolina Legal and Business Forms Section 1:288 , Election of Director‑Notice of Election‑Acceptance.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 276, Number of Directors.

**SECTION 33‑8‑104.** Election of directors by certain classes of shareholders.

 If the articles of incorporation authorize dividing the shares into classes, the articles also may authorize the election of all or a specified number of directors by the holders of one or more authorized classes of shares. A class of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors.

HISTORY: Derived from 1976 Code Section 33‑13‑50 [1962 Code Section 12‑18.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.04 (Section 33‑8‑104) makes explicit that the articles of incorporation may provide that a specified number (or all) of the directors may be elected by the holders of one or more classes of shares. This approach is widely used in closely held corporations to effect an agreed upon allocation of control, for example, to ensure minority representation on the board of directors by issuing to that minority a class of shares entitled to elect one or more directors. A class (or classes) of shares entitled to elect separately one or more directors constitutes a separate voting group for purposes of the election of directors; within each voting group directors are elected by a plurality of votes and quorum and voting requirements must be separately met by each voting group. See sections 7.25, 7.26, and 7.28 (Sections 33‑7‑250, 33‑7‑260, and 33‑7‑280).

SOUTH CAROLINA REPORTERS’ COMMENTS

This section basically repeats prior law.

DERIVATION: 1984 Model Act Section 8.04.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Classes of shares, see Section 33‑6‑101.

Close corporations, Statutory Close Corporation Supplement, see Sections 33‑18‑210 et seq.

Cumulative voting, see Section 33‑7‑280.

Election of directors, generally, see Section 33‑7‑280.

Removal of directors, see Sections 33‑8‑108 and 33‑8‑109.

Voting by voting groups: Cumulative voting for directors, see Section 33‑7‑280.

Voting by voting groups: Quorum and voting requirements generally, see Sections 33‑7‑250 and 33‑7‑260.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 283.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 373, 434, 445 to 446.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Hospitals Section 3, Governing Body.

**SECTION 33‑8‑105.** Terms of directors generally.

 (a) The terms of the initial directors of a corporation expire at the first shareholders’ meeting at which directors are elected.

 (b) The terms of all other directors expire at the next annual shareholders’ meeting following their election unless their terms are staggered under Section 33‑8‑106.

 (c) A decrease in the number of directors does not shorten an incumbent director’s term.

 (d) The term of a director elected to fill a vacancy expires at the next shareholders’ meeting at which directors are elected.

 (e) Despite the expiration of a director’s term, he continues to serve until his successor is elected and qualifies or until there is a decrease in the number of directors.

HISTORY: Derived from 1976 Code Section 33‑13‑40 [1962 Code Section 12‑18.4; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], and Section 33‑13‑50 [1962 Code Section 12‑18.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.05 (Section 33‑8‑105) provides for the annual election of directors at the annual shareholders’ meeting with the single exception that terms may be staggered as permitted in section 8.06 (Section 33‑8‑106).

Section 8.05(c) (Section 33‑8‑105(c)) provides that a decrease in the number of directors does not shorten the term of an incumbent director or divest any director of his office. Rather, the incumbent director’s term expires at the annual meeting at which his successor would otherwise be elected.

Section 8.05(d) (Section 33‑8‑105(d)) provides that the terms of all directors elected to fill vacancies expire at the next meeting of shareholders at which directors are elected. Thus, if terms are staggered under section 8.06 (Section 33‑8‑106), the term of a director elected to fill a vacant term with more than a year to run is shorter than the term of his predecessor. The board of directors may take appropriate steps, by designation of short terms or otherwise, to return the rotation of election of directors to the original terms established or fixed by the articles or bylaws.

Section 8.05(e) (Section 33‑8‑105(e)) provides for “holdover” directors so that directorships do not automatically become vacant at the expiration of their terms but the same persons continue in office until successors qualify for office. Thus the power of the board of directors to act continues uninterrupted even though an annual shareholders’ meeting is not held or the shareholders are deadlocked and unable to elect directors at the meeting.

SOUTH CAROLINA REPORTERS’ COMMENTS

No significant change in prior law is made by this section.

DERIVATION: 1984 Model Act Section 8.05.

CROSS REFERENCES

Annual shareholders’ meeting, see Section 33‑7‑101.

Court‑ordered shareholders’ meeting, see Section 33‑7‑103.

Removal of directors, see Sections 33‑8‑108 and 33‑8‑109.

Resignation of director, see Section 33‑8‑107.

Staggered terms, see Section 33‑8‑106.

Vacancies on board, see Section 33‑8‑110.

Library References

Corporations 291.

Westlaw Topic No. 101.

C.J.S. Corporations Section 450.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:207 , Directors‑Term of Office.

**SECTION 33‑8‑106.** Staggered terms for directors.

 If there are six or more directors, the articles of incorporation may provide for staggering their terms by dividing the total number of directors into two or three groups, with each group containing one‑half or one‑third of the total, as near as may be. The terms of directors in the first group expire at the first annual shareholders’ meeting after their election; the terms of the third group, if any, expire at the third annual shareholders’ meeting after their election. At each annual shareholders’ meeting held thereafter, directors are chosen for a term of two years or three years, as the case may be, to succeed those directors whose terms expire.

HISTORY: Derived from 1976 Code Section 33‑13‑50 [1962 Code Section 12‑18.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1994 Act No. 461, Section 6.

OFFICIAL COMMENT

Section 8.06 (Section 33‑8‑106) recognizes the practice of “classifying” the board or “staggering” the terms of directors so that only one‑half or one‑third of them are elected at each annual shareholders’ meeting and directors are elected for two or three‑year terms rather than one‑year terms.

Under section 8.06 (Section 33‑8‑106) at least three directors must be elected at each annual meeting. These directors may be elected by one or more voting groups, as provided in the articles of incorporation.

The principal justification for staggering the board today is that it protects against sudden change in the management of the corporation despite a change in shareholdings. It also reduces the impact of cumulative voting since a greater number of votes is required to elect a director if the board is staggered than is required if the entire board were elected at each annual meeting.

The staggered board of directors is sometimes used by incumbent management to make unwanted takeover attempts more difficult to effectuate. It is unlikely to be effective alone, however, since the shareholders may in any event remove directors under section 8.08 whether or not their terms are staggered. As a result, a staggered board is likely to be used for this purpose only in conjunction with a provision that directors may be removed only for cause.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section basically repeats prior law.

DERIVATION: 1984 Model Act Section 8.06.

CROSS REFERENCES

Annual shareholders’ meeting, see Section 33‑7‑101.

Cumulative voting, see Section 33‑7‑280.

Election of directors generally, see Section 33‑7‑280.

Number of directors, see Section 33‑8‑103.

Removal of directors, see Sections 33‑8‑108 and 33‑8‑109.

Resignation of director, see Section 33‑8‑107.

Terms of directors generally, see Section 33‑8‑105.

Vacancies on board, see Section 33‑8‑110.

Library References

Corporations 291.

Westlaw Topic No. 101.

C.J.S. Corporations Section 450.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 61, Voting of Shares.

S.C. Jur. Hospitals Section 3, Governing Body.

Forms

South Carolina Legal and Business Forms Section 1:18 , Directors.

South Carolina Legal and Business Forms Section 1:207 , Directors‑Term of Office.

South Carolina Legal and Business Forms Section 1:208 , Directors‑Term of Office‑Staggered Terms.

South Carolina Legal and Business Forms Section 1:288 , Election of Director‑Notice of Election‑Acceptance.

NOTES OF DECISIONS

In general 1

1. In general

A provision of the bylaws of a homeowners association, providing for a staggered board consisting of no less than 3 nor more than 5 persons, was internally inconsistent and violated Section 33‑8‑106. Ortega v. Kingfisher Homeowners Ass’n, Inc. (S.C.App. 1994) 314 S.C. 180, 442 S.E.2d 202.

**SECTION 33‑8‑107.** Resignation of directors.

 (a) A director may resign by delivering written notice to the board of directors, its chairman, or the corporation.

 (b) A resignation is effective when the notice is delivered unless the notice specifies a later effective date.

HISTORY: Derived from 1976 Code Section 33‑13‑40 [1962 Code Section 12‑18.4; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The resignation of a director is effective when the written notice is delivered unless the notice specifies a later effective date, in which case the director continues to serve until that later date. Since the person giving the notice is still a member of the board, he may participate in all decisions until the specified date, including the choice of his successor under section 8.10 (Section 33‑8‑100). The participation of the retiring director in the decision on his successor may be of importance in closely held corporations where control of the board may be affected by the resignation.

Vacancies created by a resignation effective at a later date may be filled before that date under section 8.10 (Section 33‑8‑100).

SOUTH CAROLINA REPORTERS’ COMMENTS

No significant change in the prior law is made by this section.

DERIVATION: 1984 Model Act Section 8.07.

CROSS REFERENCES

“Deliver” includes mail, see Section 33‑1‑400.

“Notice” defined, see Section 33‑1‑410.

“Secretary” defined, see Section 33‑1‑400.

Vacancies on board, see Section 33‑8‑110.

Library References

Corporations 292.

Westlaw Topic No. 101.

C.J.S. Corporations Section 452.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 84, Removal of Directors; Resignation; Vacancies.

**SECTION 33‑8‑108.** Removal of directors by shareholders.

 (a) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

 (b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.

 (c) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him.

 (d) A director may be removed by the shareholders only at a meeting called for the purpose of removing him and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.

 (e) “Cause” for removal of a director under this section means fraudulent or dishonest acts, or gross abuse of authority in the discharge of duties to the corporation, and must be established after written notice of specific charges and opportunity to meet and refute such charges.

HISTORY: Derived from 1976 Code Section 33‑13‑70 [1962 Code Section 12‑18.7; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.08(a) (Section 33‑8‑108(a)) accepts the view that since the shareholders are the owners of the corporation, they should normally have the power to change the directors at will. This section reverses the common law position that directors have a statutory entitlement to their office and can be removed only for cause—fraud, criminal conduct, gross abuse of office amounting to a breach of trust, or similar conduct. The power to remove directors is subject to several restrictions set forth in section 8.08 (Section 33‑8‑108):

(1) The power to remove a director without cause may be eliminated by a provision in the articles of incorporation. Such a provision in effect guarantees the directors the same entitlement to office that directors enjoyed at common law. It is likely to be used in closely held corporations as an element of an agreed‑upon allocation of power and control which ensures directors immunity from removal except for cause. It may also be used in publicly held corporations that fear changes in ownership of the majority of the shares and desire to provide security to the directors.

(2) If the articles of incorporation provide that one or more classes of shares constitute a separate voting group entitled to elect a director (see section 8.04 (Section 33‑8‑104)), only the shareholders of that voting group may participate in the vote whether or not to remove that director. But that director may be removed by court proceeding under section 8.09 (Section 33‑8‑109) despite this section.

(3) If cumulative voting is not authorized, a director is removed (with or without cause) only if the votes cast to remove him exceed the votes cast to retain him at a meeting of the voting group electing him at which a quorum of shares entitled to vote on his election is present.

(4) If cumulative voting is authorized, a different standard for removal is involved. Under cumulative voting, a director may be removed (with or without cause) only if the votes cast in favor of retaining him would not have been sufficient to elect him pursuant to cumulative voting at that meeting. This provision guarantees that a minority faction with sufficient votes to guarantee the election of a director under cumulative voting will be able to protect that director from removal by the remaining shareholders. The director, however, may be removed by court proceeding under section 8.09 (Section 33‑8‑109) despite this section. In computing whether or not a director elected by cumulative voting is protected from removal from office by section 8.08(c) (Section 33‑8‑108(c)), the votes should be counted as though (1) the vote to remove the director occurred in an election to elect the number of directors normally elected by the voting group along with the director whose removal of the director had been cast for his election, and (3) all votes for removal of the director had been cast cumulatively in an efficient pattern for the election of a sufficient number of candidates so as to deprive the director whose removal is being sought of his office.

Removal of directors under section 8.08(d) (Section 33‑8‑108(d)) requires the meeting notice to state that removal of specific directors will be proposed.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, like the Model Act, adds the potential for a “shark repellant” tactic by allowing the articles to specify that directors may be removed only for cause. This is new. The definition of “cause” previously found in Section 33‑13‑70(f) of the 1981 South Carolina Business Corporation Act is incorporated as subsection (e). The text of the Model Act had no definition. Another difference between the Model Act and the new provision is that the Model Act failed to spell out the “due process” rights of directors accused of misconduct. This deficiency is also addressed in subsection (e).

DERIVATION: 1984 Model Act Section 8.08, with amendments—see South Carolina Reporters’ Comments.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Court‑ordered removal, see Section 33‑8‑109.

Cumulative voting, see Section 33‑7‑280.

Election of directors by voting group of shareholders, see Section 33‑8‑104.

Notice of meeting, see Section 33‑7‑105.

Quorum for voting group, see Section 33‑7‑250.

“Secretary” defined, see Section 33‑1‑400.

Shareholders’ meetings, see Sections 33‑7‑101 through 33‑7‑103.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Vacancy on board of directors, generally, see Section 33‑8‑110.

Voting for directors generally, see Section 33‑7‑280.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 294.

Westlaw Topic No. 101.

C.J.S. Corporations Section 454.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 72, Removal of Directors by Shareholders.

S.C. Jur. Banks and Banking Section 84, Removal of Directors; Resignation; Vacancies.

S.C. Jur. Hospitals Section 3, Governing Body.

**SECTION 33‑8‑109.** Removal of directors by judicial proceeding.

 (a) The circuit court of the county where a corporation’s principal office (or, if none in this State, its registered office) is located may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least five percent of the outstanding shares of any class if the court finds that (1) the director engaged in fraudulent or dishonest acts, or gross abuse of authority in discharge of duties to the corporation, and (2) removal is in the best interest of the corporation.

 (b) The court that removes a director may bar the director from reelection for a period prescribed by the court.

 (c) If shareholders commence a proceeding under subsection (a), they shall make the corporation a party defendant.

HISTORY: Derived from 1976 Code Section 33‑13‑70 [1962 Code Section 12‑18.7; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 144, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.09 (Section 33‑8‑109) authorizes the removal of a director who is found in a judicial proceeding to have engaged in fraudulent or dishonest conduct or gross abuse of office. For example, a judicial proceeding (as contrasted with removal under section 8.08 (Section 33‑8‑108)) may be necessary or appropriate in the following situations:

(1) In a closely held corporation, the director charged with misconduct is elected by voting group or cumulative voting, and the shareholders with power to prevent his removal exercise that power despite the existence of fraudulent or dishonest conduct. The classic example is where the director charged with misconduct himself possesses sufficient votes to prevent his own removal and exercises his voting power to that end.

(2) In a publicly held corporation, the director charged with misconduct declines to resign, though urged to do so, and because of the large number of widely scattered shareholders, a special shareholders’ meeting can be held only after a period of delay and at considerable expense.

A shareholder who owns less than 10 percent of the outstanding shares of the corporation may bring suit derivatively in the name of the corporation under this section upon compliance with the requirements of section 7.40 (Section 33‑7‑400). A shareholder who owns at least 10 percent of the outstanding shares of the corporation may maintain suit in his own name and in his own right without compliance with section 7.40 (Section 33‑7‑400). The corporation, however, must be made a party to the proceeding. See section 8.09(c) (Section 33‑8‑109(c)).

The purpose of section 8.09 (Section 33‑8‑109) is to permit the prompt and efficient elimination of dishonest directors. It is not intended to permit judicial resolution of internal corporate struggles for control except in those cases in which a court finds that the director has been guilty of wrongful conduct of the type described.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Official Text of the Model Act proposed to change the law by allowing shareholders to institute the litigation contemplated by the section only if they hold ten percent, rather than five percent, of the stock as under Section 33‑13‑70(e) of the 1981 South Carolina Business Corporation Act. The five percent limit was retained.

Under either prior law or the revision, proof of negligence will not support a claim for removal. Further, under the revision, proof of fraudulent misconduct does not necessarily guarantee that a court will order removal, for it could conclude that removal was not in the best interest of the corporation.

DERIVATION: 1984 Model Act Section 8.09.

CROSS REFERENCES

Derivative proceedings, see Section 33‑7‑400.

“Principal office”: defined, see Section 33‑1‑400.

“Proceeding” defined, see Section 33‑1‑400.

Registered office: required, see Sections 33‑2‑102 and 33‑5‑101.

Removal of directors by shareholders, see Section 33‑8‑108.

“Shareholder” defined, see Section 33‑1‑400.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Library References

Corporations 294.

Westlaw Topic No. 101.

C.J.S. Corporations Section 454.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 84, Removal of Directors; Resignation; Vacancies.

S.C. Jur. Hospitals Section 3, Governing Body.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 358, Removal of Directors by Judicial Proceeding.

**SECTION 33‑8‑110.** Vacancy on board.

 (a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

 (1) the shareholders may fill the vacancy;

 (2) the board of directors may fill the vacancy; or

 (3) if the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

 (b) If the vacant office was held by a director elected by a voting group of shareholders, only the holders of shares of that voting group may fill the vacancy.

 (c) A vacancy that will occur at a specific later date (by reason of a resignation effective at a later date under Section 33‑8‑108(b) or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

 (d) If, by reason of death, resignation, or other cause, a corporation has no directors in office, then any officer or any shareholder or an executor, administrator, trustee, or guardian of a shareholder or other fiduciary entrusted with like responsibility for the person or estate of a shareholder may call for a special meeting of shareholders to elect directors or may apply to the court for an order requiring election of directors.

HISTORY: Derived from 1976 Code Section 33‑13‑60 [1962 Code Section 12‑18.6; 1962 (52) 1996; 1969 (56) 701; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Vacancies on the board of directors may be filled either by the shareholders or by the board of directors. In large corporations the cost of calling a special meeting of shareholders may be prohibitive so that in those corporations filling vacancies by the board of directors is the norm. On the other hand, in a closely held corporation the shareholders may fill vacancies as readily as the board.

Section 8.10(a)(3) (Section 33‑8‑100(a)(3)) allows the directors remaining in office to fill vacancies even though they are fewer than a quorum. The test for the exercise of this power is whether the directors remaining in office are fewer than a quorum, not whether the directors seeking to act are fewer than a quorum. For example, on a board of six directors where a quorum is four, if there are two vacancies, they may not be filled under section 8.10(a)(3) (Section 33‑8‑100(a)(3)) at a “meeting” attended by only three directors. Even though the three directors are fewer than a quorum, section 8.10(a)(3) (Section 33‑8‑100(a)(3)) is not applicable because the number of directors remaining in office—four—is not fewer than a quorum.

Section 8.10(b) (Section 33‑8‑100(b)) provides that if a voting group of shares is entitled to elect a director, only that voting group is entitled to fill a vacant office which was held by a director elected by that voting group. This section is part of the consistent treatment of directors elected by a voting group of shareholders. See sections 1.40, 7.25, 7.26, 7.28, 8.04 and 8.08(b) (Sections 33‑1‑400, 33‑7‑250, 33‑7‑260, 33‑7‑280, 33‑8‑104, and 33‑8‑108(b)).

Section 8.10(c) (Section 33‑8‑100(c)) permits vacancies that will arise on a specific later date to be filled in advance of that date so long as the designee does not actually take office until the vacancy occurs. The director in the office that will become vacant may participate in the selection of his successor. A vacancy arising at a later date is most likely to arise because of a resignation effective at a later date; it may also arise in connection with retirements or with prospective amendments to bylaws. In a closely held corporation with a balance of power on the board of directors that was reached by agreement, a prospective resignation followed by the appointment of a successor under this section permits the board to act on the replacement before the change in balance caused by the resignation.

SOUTH CAROLINA REPORTERS’ COMMENTS

The power of directors to fill vacancies under the revision is assumed unless the articles provide to the contrary; under the 1981 South Carolina Business Corporation Act, the articles or bylaws could be used to reserve the power of filling vacancies to the shareholders. This is not a major change. For clarity, a change of language was made in subsection (b). Section 33‑13‑60(d) of the 1981 South Carolina Business Corporation Act contemplated the problem of no directors left, a rare occurrence not dealt with in the revision. The coverage of prior law was preserved by creation of a new subsection (d).

DERIVATION: 1984 Model Act Section 8.10.

CROSS REFERENCES

Election of directors by voting group of shareholders, see Section 33‑8‑104.

Number of directors, see Section 33‑8‑103.

Quorum and voting of directors, see Section 33‑8‑240.

Removal of directors, see Sections 33‑8‑108 and 33‑8‑109.

Resignation of directors, see Section 33‑8‑107.

Shareholders’ meetings, see Sections 33‑7‑101 through 33‑7‑103.

Terms of directors generally, see Section 33‑8‑105.

Voting by voting group, see Sections 33‑7‑250 and 33‑7‑260.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 295.

Westlaw Topic No. 101.

C.J.S. Corporations Section 434.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 84, Removal of Directors; Resignation; Vacancies.

**SECTION 33‑8‑111.** Compensation of directors.

 Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors for their services as directors, or in any other capacity.

HISTORY: Derived from 1976 Code Section 33‑13‑160 [1962 Code Section 12‑18.16; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

This section puts at rest the question whether the board of directors can fix the compensation of its members for serving as directors. The practice of compensating directors is now of long standing, and the establishment of a policy with respect to director compensation is an appropriate function of the board of directors.

In publicly held corporations, compensation is customarily provided to non‑management directors. As stated in The Corporate Director’s Guidebook,” . . . it is expected that a non‑management director will devote substantial attention to the affairs of the corporation and will be compensated accordingly.” 33 BUS. LAW. 1591, 1622 (1978).

SOUTH CAROLINA REPORTERS’ COMMENTS

It was decided to add to the end of the Model Act Official Text the phrase “for their services as directors, or in any other capacity,” in order to make clear that the revision sanctions the approval by directors of compensation packages for inside directors.

DERIVATION: 1984 Model Act Section 8.11.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Committees, see Section 33‑8‑250.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Library References

Corporations 308.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 490, 530 to 536.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Hospitals Section 3, Governing Body.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 2126, Power of Directors‑To Set Their Own Compensation for Filling Other Offices.

ARTICLE 2

Meetings and Action of Board of Directors

**SECTION 33‑8‑200.** Meetings.

 Unless the articles or bylaws otherwise provide:

 (a) The board of directors may hold regular or special meetings in or out of this State.

 (b) The board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is considered to be present in person at the meeting.

HISTORY: Derived from 1976 Code Section 33‑13‑80 [1962 Code Section 12‑18.8; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

This section authorizes meetings of directors anywhere. No distinction is made between meetings in‑state and out‑of‑state. It also authorizes the board of directors to permit any or all directors to participate in a meeting by the use of any means of communication by which all directors participating may simultaneously hear each other. This decision is discretionary with the board of directors, and a person participating in this fashion is deemed to be present in person at the meeting for purposes of quorum and voting requirements.

With the development of modern electronic technology, it is possible that the advantages of the traditional meeting, at which all members are present at a single place, may be obtained even though the members are physically dispersed and no two directors are present at the same place. The advantage of the traditional meeting is the opportunity for interchange that is permitted by a meeting in a single room at which members are physically present. If this opportunity for interchange is thought to be available by the board of directors, a meeting may be conducted by electronic means although no two directors are physically present at the same place and no specific place for the meeting is designated.

SOUTH CAROLINA REPORTERS’ COMMENTS

No significant change in prior law is made by this section.

DERIVATION: 1984 Model Act Section 8.20.

CROSS REFERENCES

Action without meeting, see Section 33‑8‑210.

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Committees of board of directors, see Section 33‑8‑250.

Notice of meeting, see Section 33‑8‑220.

Quorum and voting, see Section 33‑8‑240.

Waiver of meeting notice, see Section 33‑8‑230.

Library References

Corporations 298(2).

Westlaw Topic No. 101.

C.J.S. Corporations Section 460.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 79, Board Meetings.

S.C. Jur. Cooperative Credit Unions Section 48, Meetings of the Board of Directors.

Forms

South Carolina Legal and Business Forms Section 1:19 , Directors‑Meetings.

South Carolina Legal and Business Forms Section 1:222 , Board of Directors‑Meetings‑Participation in Meeting by Conference Telephone.

**SECTION 33‑8‑210.** Action without meeting.

 (a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by Chapters 1 through 20 of this Title to be taken at a board of directors’ meeting may be taken without a meeting if the action is assented to by all members of the board.

 (b) The action may be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken. Action evidenced by written consents under this subsection is effective when the last director signs the consent, unless the consent specifies a different effective date. A consent signed under this subsection has the effect of a meeting vote and may be described as such in any document.

HISTORY: Derived from 1976 Code Section 33‑13‑120 [1962 Code Section 12‑18.12; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The power of the board of directors to act unanimously without a meeting is based on the pragmatic consideration that in many situations a formal meeting is a waste of time. For example, in a closely held corporation there will often be informal discussion by the manager‑owners of the venture before a decision is made. And, of course, if there is only a single director (as is permitted by section 8.03 (Section 33‑8‑103)), a written consent is the natural method of signifying director action. Consent may be signified on one or more documents if desirable.

In publicly held corporations, formal meetings of the board of directors may be appropriate for many actions. But there will always be situations where prompt action is necessary and the decision noncontroversial, so that approval without a formal meeting may be appropriate.

Under section 8.21 (Section 33‑8‑210) the requirement of unanimous consent precludes the possibility of stifling or ignoring opposing argument. A director opposed to an action that is proposed to be taken by unanimous consent, or uncertain about the desirability of that action, may compel the holding of a directors’ meeting to discuss the matter simply by withholding his consent.

SOUTH CAROLINA REPORTERS’ COMMENTS

The official text of the Model Act envisions only one way to have valid board action without a meeting: Unanimous written consent. The language in Section 33‑13‑120(a), (b), and (e) of the 1981 South Carolina Business Corporation Act, although internally inconsistent, contradictory, and confusing, attempted to recognize numerous ways, apart from unanimous written consent, that corporate action may be deemed ratified and held binding for the benefit of the corporation and third persons. The thrust of most of these additional methods was that if all the directors knew of the “informal” action and none objected, the “informal” action was deemed valid corporate action.

It was feared that adoption of the Model Act without amendment created a significant risk that a court might not apply the common law ratification principles now expressly provided in the law. This could lead to frustrated expectations and unjust results. It is expressly intended that common law ratification principles continue to apply to informal corporate action as spelled out in this clarified language.

Therefore, this section in addition to approving of actions taken in writing by all the directors, specifically recognizes that actions taken informally by a majority of the board, pursuant to a custom of the company, or in other ways will be the action of the company so long as all the directors assent. The term “assent” is specifically left undefined. It clearly does not require a written consent, rather it continues the broad common law provisions of ratification.

Since neither majority action nor existing custom is required (as was true under the prior statute), and since the term “assent” is not restricted, this Section 33‑8‑210 is broader than the prior statute.

However, in order to avoid any controversy as to whether any action has been properly taken, boards of directors should reduce all their informal actions to writing. Each director should approve in writing the action to be, or previously taken.

DERIVATION: 1984 Model Act Section 8.21.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Committees of board of directors, see Section 33‑8‑250.

“Notice” defined, see Section 33‑1‑410.

Notice of meeting, see Sections 33‑8‑220.

Waiver of meeting notice, see Section 33‑8‑230.

Library References

Corporations 298(1).

Westlaw Topic No. 101.

C.J.S. Corporations Section 460.

RESEARCH REFERENCES

ALR Library

10 ALR 2nd 701 , Power of President of Corporation to Have Litigation Instituted by it Where Board of Directors Has Failed or Refused to Grant Permission.

Encyclopedias

S.C. Jur. Banks and Banking Section 79, Board Meetings.

S.C. Jur. Cooperative Credit Unions Section 48, Meetings of the Board of Directors.

Forms

South Carolina Legal and Business Forms Section 1:19 , Directors‑Meetings.

South Carolina Legal and Business Forms Section 1:160 , Board of Directors‑Unanimous Written Consent of Directors.

South Carolina Legal and Business Forms Section 1:223 , Board of Directors‑Informal Action by Directors.

**SECTION 33‑8‑220.** Notice of meeting.

 (a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

 (b) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two days’ notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

HISTORY: Derived from 1976 Code Section 33‑13‑90 [1962 Code Section 12‑18.9; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Regular meetings of the board of directors may be held without notice and special meetings require only two days’ notice unless other requirements are imposed by the articles of incorporation or bylaws. The notice may be written or oral. Also, no statement of the purpose of either a regular or special meeting is necessary unless required by the articles of incorporation or bylaws. These requirements differ from the requirements applicable to meetings of shareholders because of fundamental differences in their roles: directors are expected to be more closely involved in corporate affairs than shareholders, and meetings of directors are held more systematically and regularly than meetings of shareholders.

SOUTH CAROLINA REPORTERS’ COMMENTS

The only change of substance as to notice is that the period for notice of a special meeting has been cut from four to two days, a minor change.

DERIVATION: 1984 Model Act Section 8.22.

CROSS REFERENCES

Action without meeting, see Section 33‑8‑210.

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Committees of board of directors, see Section 33‑8‑250.

Effective date of notice, see Section 33‑1‑410.

Meetings of board of directors, see Sections 33‑8‑200 and 33‑8‑210.

“Notice” defined, see Section 33‑1‑410.

Waiver of notice, see Section 33‑8‑230.

Library References

Corporations 298(3).

Westlaw Topic No. 101.

C.J.S. Corporations Section 460.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 79, Board Meetings.

S.C. Jur. Cooperative Credit Unions Section 48, Meetings of the Board of Directors.

Forms

South Carolina Legal and Business Forms Section 1:19 , Directors‑Meetings.

South Carolina Legal and Business Forms Section 1:217 , Board of Directors‑Meetings‑Notice.

South Carolina Legal and Business Forms Section 1:315 , Directors’ Meeting‑Notice.

**SECTION 33‑8‑230.** Waiver of notice.

 (a) A director may waive any notice required by this act, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b), the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

 (b) A director’s attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

HISTORY: Derived from 1976 Code Section 33‑13‑90 [1962 Code Section 12‑18.9; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 144, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.23(a) (Section 33‑8‑230(a)) reverses the common law rule that invalidates waivers of notice by directors after the date and time of the meeting. In modern practice, notice is often a technical requirement and waivers should be freely permitted.

Section 8.23(b) (Section 33‑8‑230(b)) recognizes that the function of notice is to inform directors of a meeting. If a director actually appears at the meeting he has probably had notice of it and generally should not be able to raise a technical objection that he was not given notice.

In cases where actual prejudice occurs because of the lack of notice, as may be indicated by the absence of one or more other directors, the director must call attention to the defect at the outset of the meeting or promptly upon his arrival. That director, or a director who did not receive notice and was not present at the meeting, may then attack the validity of the action taken for want of notice. If a director properly objects to the meeting being held, he is not presumed to have assented to actions taken thereafter, but he waives his objection if he thereafter votes for or assents to action taken at the meeting. See section 8.24(d) (Section 33‑8‑240(d)).

SOUTH CAROLINA REPORTERS’ COMMENTS

No significant change in the prior law is made by this section.

DERIVATION: 1984 Model Act Section 8.23.

CROSS REFERENCES

Action without meeting, see Section 33‑8‑210.

Committees of board of directors, see Section 33‑8‑250.

Meetings of board of directors, see Section 33‑8‑200.

“Notice” defined, see Section 33‑1‑410.

Notice of meeting, see Section 33‑8‑220.

“Secretary” defined, see Section 33‑1‑400.

Library References

Corporations 298(3).

Westlaw Topic No. 101.

C.J.S. Corporations Section 460.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:19 , Directors‑Meetings.

South Carolina Legal and Business Forms Section 1:218 , Board of Directors‑Meetings‑Notice‑Waiver.

**SECTION 33‑8‑240.** Quorum and voting.

 (a) Unless the articles of incorporation or bylaws require a greater number, a quorum of a board of directors consists of:

 (1) a majority of directors then in office if the corporation has a fixed board size; or

 (2) a majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable‑range size board.

 (b) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one‑third of the fixed or prescribed number of directors determined under subsection (a).

 (c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

 (d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is considered to have assented to the action taken unless: (1) he objects at the beginning of the meeting (or promptly upon his arrival) to holding it or transacting business at the meeting; (2) his dissent or abstention from the action taken is entered in the minutes of the meeting; or (3) he delivers written notice of his dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

HISTORY: Derived from 1976 Code Section 33‑13‑100 [1962 Code Section 12‑18.10; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

In the absence of a provision in the articles of incorporation or bylaws, a quorum is determined as follows:

(1) If a board of directors consists of a fixed number—whether fixed by the board or shareholders under section 8.03(b) (Section 33‑8‑103(b))—a quorum is a majority of that number. Thus, if a board of directors has a fixed membership of 15, a quorum is 8. If the board of directors has exercised its power under section 8.03(b) (Section 33‑8‑103(b)) to increase its size to 19, a quorum is 10; if it reduced its size to 12, a quorum is 7.

(2) If the board of directors is a variable size board, a quorum consists of a majority of the number of directors prescribed at that time by the board of directors or shareholders. If no number is prescribed, then a quorum consists of a majority of the directors in office immediately before the meeting begins.

Section 8.24(b) (Section 33‑8‑240(b)) provides that the articles of incorporation or bylaws may decrease the size of the quorum to one‑third of the number of directors determined under section 8.24(a) (Section 33‑8‑240(a)).

Section 8.24(a) (Section 33‑8‑240(a)) allows the articles of incorporation or bylaws to increase the quorum up to and including unanimity while section 8.24(c) (Section 33‑8‑240(c)) allows these documents similarly to increase the vote necessary to take action. The articles of incorporation or bylaws may also establish quorum or voting requirements with respect to directors elected by voting groups of shareholders pursuant to section 8.04 (Section 33‑8‑104). The option to increase either or both the vote and quorum requirements most commonly is exercised in closely held corporations where a greater degree of participation is thought appropriate or where a minority participant in the venture seeks to obtain a veto power over corporate action.

The phrase “when the vote is taken” in section 8.24(c) (Section 33‑8‑240(c)) is designed to make clear that the board of directors may act only when a quorum is present. If directors leave during the course of a meeting, the board of directors may not act after the number of directors present is reduced to less than a quorum.

Under section 8.24(d) (Section 33‑8‑240(d)) directors, if they object or abstain with respect to action taken by the board of directors or a committee of the board of directors, must make their position clear in one of the ways described in this subsection. If objection is made in the form of a written dissent, it may be transmitted by wire, telecopier, or other medium of data transmission. This written objection serves the important purpose of forcefully bringing the position of the dissenting member to the attention of the balance of the board of directors. The requirement of a written objection also prevents a director from later seeking to avoid responsibility because of secret doubts about the wisdom of the action taken. The right of dissent or abstention is not available to a director who voted in favor of the action taken.

Section 8.24(d) (Section 33‑8‑240(d)) applies only to directors who are present at the meeting. Directors who are not present are not deemed to have assented to any action taken at the meeting in their absence.

SOUTH CAROLINA REPORTERS’ COMMENTS

No significant change in the prior law is made by this section.

DERIVATION: 1984 Model Act Section 8.24.

CROSS REFERENCES

Action without meeting, see Section 33‑8‑210.

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Committees, see Section 33‑8‑250.

Meetings of board of directors, see Section 33‑8‑200.

“Notice” defined, see Section 33‑1‑410.

Number of directors, see Section 33‑8‑103.

“Secretary” defined, see Section 33‑1‑400.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Library References

Corporations 298(5).

Westlaw Topic No. 101.

C.J.S. Corporations Section 460.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:19 , Directors‑Meetings.

South Carolina Legal and Business Forms Section 1:158 , Board of Directors‑Meetings‑High Quorum Requirement.

South Carolina Legal and Business Forms Section 1:220 , Board of Directors‑Meetings‑Quorum.

**SECTION 33‑8‑250.** Committees.

 (a) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees and appoint members of the board of directors to serve on them. Each committee must have two or more members who serve at the pleasure of the board of directors.

 (b) The creation of a committee and appointment of members to it must be approved by the greater of (1) a majority of all the directors in office when the action is taken or (2) the number of directors required by the articles of incorporation or bylaws to take action under Section 33‑8‑240.

 (c) Sections 33‑8‑200 through 33‑8‑240, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.

 (d) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under Section 33‑8‑101.

 (e) A committee, however, may not:

 (1) authorize distributions;

 (2) approve or propose to shareholders action that Chapters 1 through 20 of this Title requires be approved by shareholders;

 (3) fill vacancies on the board of directors or on any of its committees;

 (4) amend articles of incorporation pursuant to Section 33‑10‑102;

 (5) adopt, amend, or repeal bylaws;

 (6) approve a plan of merger not requiring shareholder approval;

 (7) authorize or approve reacquisition of shares, except according to a formula or method prescribed by the board of directors; or

 (8) authorize or approve the issuance or sale or contract for sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares, except that the board of directors may authorize a committee (or a senior executive officer of the corporation) to do so within limits specifically prescribed by the board of directors.

 (f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in Section 33‑8‑300.

HISTORY: Derived from 1976 Code Section 33‑13‑110 [1962 Code Section 12‑18.11; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.25 (Section 33‑8‑250) makes explicit the common law power of a board of directors to act through committees of directors and specifies the powers of the board of directors that are nondelegable, that is, powers that only the full board of directors may exercise. Section 8.25 (Section 33‑8‑250) deals only with committees of the board of directors exercising the functions of the board of directors; the board of directors or management, independently of section 8.25 (Section 33‑8‑250), may establish nonboard committees composed of directors, employees, or others to deal with corporate powers not required to be exercised by the board of directors.

Section 8.25(b) (Section 33‑8‑250(b)) provides that a committee of the board of directors may be created only by the affirmative vote of a majority of the board of directors then in office, or, if greater, by the number of directors required to take action by the articles of incorporation or the bylaws. This supermajority requirement reflects the importance of the decision to invest board committees with power to act under section 8.25 (Section 33‑8‑250).

Committees of the board of directors are assuming increasingly important roles in the governance of publicly held corporations. See “The Corporate Director’s Guidebook,” 33 BUS. LAW. 1591 (1978). “The Overview Committees of the Board of Directors,” 35 BUS. LAW. 1335 (1980). Executive committees have long provided guidance to management between meetings of the full board of directors. Audit committees also have a long history of performing essential review and control functions on behalf of the board of directors. In recent years nominating and compensation committees, composed primarily or entirely of non‑management directors, have also become more widely used by publicly held corporations.

Section 8.25 (Section 33‑8‑250) establishes the desirable and appropriate role of director committees in light of competing considerations: on the one hand, it seems clear that appropriate board committee action is not only desirable but also is likely to improve the functioning of larger and more diffuse boards of directors; on the other hand, wholesale delegation of authority to a board committee, to the point of abdication of director responsibility as a board of directors, is manifestly inappropriate and undesirable. Overboard delegation also increases the potential, where the board of directors is divided, for usurpation of basic board functions by means of delegation to a committee dominated by one faction.

The statement of nondelegable functions set out in section 8.25(e) (Section 33‑8‑250(e)) is based on the principle that prohibitions against delegation should be limited generally to actions substantially affecting the rights of shareholders among themselves as shareholders and specifically to (1) those matters that have immediate and irrevocable effect (such as the declaration of a dividend), (2) those matters that may well become irrevocable without swift action, and (3) those matters that will cause changes of position by others that cannot be rectified. As a result, delegation of authority to committees under section 8.25(e) (Section 33‑8‑250(e)) may be broader than mere authority to act with respect to matters arising within the ordinary course of business. The ordinary course of business standard for delegation was rejected as being too narrow and inappropriate for many modern corporations. For example, although section 8.25(e)(8) (Section 33‑8‑250(e)(8)) makes nondelegable the decision whether to issue and sell shares or create a class or series of shares with designated rights and preferences, it permits the board of directors to delegate to a committee (within limits specifically prescribed by the board of directors) the important but more limited functions of fixing the specific terms—including without limitation, the price, the dividend rate, provisions for redemption, sinking fund, conversion, voting or preferential rights, and provisions for other features of a class or series of shares. The committee may also be empowered to adopt any final resolution setting forth the terms and to authorize the appropriate filing with the Secretary of State required by this Act. Thus, terms of the sale of shares may be set quickly and upon the most accurate information without necessarily involving a meeting of the board of directors. The phrase “(or senior executive officer of the corporation)” also permits these functions to be delegated to the chief financial officer or other appropriate officer of the corporation. The subsection also permits delegation to a committee of authority to determine the terms of a contract or option for the sale of shares if the board prescribes specific limits in a stock option plan or otherwise. This delegation avoids requiring involvement of the full board in the details of the administration of stock option or other compensation plans.

Section 8.25(e) (Section 33‑8‑250(e)) prohibits delegation of authority with respect to most mergers, sales of substantially all the assets, amendments to articles of incorporation and voluntary dissolution under section 8.25(e)(2) (Section 33‑8‑250(e)(2)) since these require shareholder action. In addition, section 8.25(e) (Section 33‑8‑250(e)) prohibits delegation to a board committee of authority to declare dividends or distributions, designate director candidates for purposes of proxy solicitation, fill board vacancies, approve a so‑called “short‑form merger” (where the interests of the minority shareholders warrant special attention), authorize the disposition or reacquisition of shares, or amend the bylaws or the articles of incorporation (without shareholder approval under section 10.02 (Section 33‑10‑102)). On the other hand, under section 8.25(e) (Section 33‑8‑250(e)) many actions of a material nature, such as the authorization of long‑term debt and capital investment or the pricing of shares, may properly be made the subject of committee delegation.

The statutes of several states make nondelegable certain powers not listed in section 8.25(e) (Section 33‑8‑250(e))—for example, the power to change the principal corporate office, to appoint or remove officers, to fix director compensation, or to remove agents. These are not prohibited by section 8.25(e) (Section 33‑8‑250(e)) since the whole board of directors may reverse or rescind the committee action taken, if it should wish to do so, without undue risk that implementation of the committee action might be irrevocable or irreversible.

Section 8.25(f) (Section 33‑8‑250(f)) makes clear that although the board of directors may delegate to a committee the authority to take action, the designation of the committee, the delegation of authority to it, and action by the committee will not alone constitute compliance by a non‑committee board member with his responsibility under section 8.30 (Section 33‑8‑300). On the other hand, a non‑committee director also will not automatically incur liability should the action of the particular committee fail to meet the standard of care set out in section 8.30 (Section 33‑8‑300). The non‑committee member’s liability in these cases will depend upon whether he failed to comply with section 8.30(b)(3) (Section 33‑8‑300(b)(3)). Factors to be considered in this regard will include the care used in the delegation to and supervision over the committee, and the amount of knowledge regarding the particular matter which the non‑committee director has available to him. Care in delegation and supervision include appraisal of the capabilities and diligence of the committee directors in light of the subject and its relative importance and may be facilitated, in the usual case, by review of minutes and receipt of other reports concerning committee activities. The enumeration of these factors is intended to emphasize that directors may not abdicate their responsibilities and secure exoneration from liability simply by delegating authority to board committees. Rather, a director against whom liability is asserted based upon acts of a committee of which he is not a member avoids liability if the standards contained in section 8.30 (Section 33‑8‑300) are met.

Section 8.25(f) (Section 33‑8‑250(f)) has no application to a member of the committee itself. The standard applicable to a committee member is set forth in section 8.30(a) (Section 33‑8‑300(a)).

SOUTH CAROLINA REPORTERS’ COMMENTS

This section makes two changes in the 1981 South Carolina Business Corporation Act worth noting. First, under the revision there is power to name committees unless the articles or bylaws provide to the contrary. This is a switch in presumptions; under prior law, you needed an enabling provision in the articles or bylaws to appoint a board committee. The second change is that under prior law you could have a one‑director committee; under the revision, you need a minimum of two members. The rest of this section carries through the substance of prior law.

DERIVATION: 1984 Model Act Section 8.25.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Determination and authorization of indemnification, see Section 33‑8‑550.

Dissolution, see Sections 33‑14‑101 et seq.

Distributions to shareholders, see Section 33‑6‑400.

Duties of board of directors, see Section 33‑8‑101.

Issuance of shares, see Sections 33‑6‑101 and 33‑6‑102.

Mergers, see Sections 33‑11‑101 et seq.

Quorum and voting, see Section 33‑8‑240.

Reacquisition of shares, see Sections 33‑6‑103 and 33‑6‑310.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Vacancies on board, see Section 33‑8‑110.

Library References

Corporations 299, 305.

Westlaw Topic No. 101.

C.J.S. Corporations Section 473.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:18 , Directors.

South Carolina Legal and Business Forms Section 1:210 , Board of Directors‑Delegation of Powers to Committees.

South Carolina Legal and Business Forms Section 1:307 , Resolution‑Appointment of Executive or Other Committee.

ARTICLE 3

Standards of Conduct

**SECTION 33‑8‑300.** General standards for directors.

 (a) A director shall discharge his duties as a director, including his duties as a member of a committee:

 (1) in good faith;

 (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

 (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.

 (b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

 (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

 (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person’s professional or expert competence; or

 (3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

 (c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

 (d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

 (e) An action against a director for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

HISTORY: Derived from 1976 Code Section 33‑13‑150 [1962 Code Section 12‑18.15; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.30 (Section 33‑8‑300) defines the general standard of conduct for directors. It sets forth the standard by focusing on the manner in which the director performs his duties, not the correctness of his decisions. Section 8.30(a) (Section 33‑8‑300(a)) thus requires a director to perform his duties in good faith, with the care of an ordinarily prudent person in a like position and in a manner he believes to be in the best interests of the corporation. This standard is based on former section 35 of the 1969 Model Act, a number of state statutes and on judicial formulations of the duty of care applicable to directors. Section 8.30 also parallels, to the extent possible, the indemnification provisions of sections 8.50 through 8.58 (Section 33‑8‑500 through 33‑8‑580).

In determining whether to impose liability, the courts recognize that boards of directors and corporate managers continuously make decisions that involve the balancing of risks and benefits for the enterprise. Although some decisions turn out to be unwise or the result of a mistake of judgment, it is unreasonable to reexamine these decisions with the benefit of hindsight. Therefore, a director is not liable for injury or damage caused by his decision, no matter how unwise or mistaken it may turn out to be, if in performing his duties he met the requirements of section 8.30 (Section 33‑8‑300).

Even before statutory formulations of directors’ duty of care, courts sometimes invoked the business judgment rule in determining whether to impose liability in a particular case. In doing so, courts have sometimes used language similar to the standards set forth in section 8.30(a) (Section 33‑8‑300(a)). The elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts. In view of that continuing judicial development, section 8.30 (Section 33‑8‑300) does not try to codify the business judgment rule or to delineate the differences, if any, between that rule and the standards of director conduct set forth in this section. That is a task left to the courts and possibly to later revisions of this Model Act.

Section 8.30 (Section 33‑8‑300) should be read in light of the basic duty of directors set forth in section 8.01(b) (Section 33‑8‑101(b)) that the “business and affairs of a corporation [shall be] managed under the direction of” the board. Since the board may delegate or assign to appropriate officers of the corporation the authority or duty to exercise powers that section 8.01 does not require the board to retain, directors are not personally responsible under section 8.30 (Section 33‑8‑300) for actions or omissions of officers, employees, or agents of the corporation so long as the directors, complying with the standard of care set forth in section 8.30 (Section 33‑8‑300), have acted reasonably in delegating responsibility.

1. Section 8.30(a) (Section 33‑8‑300(a)).

Section 8.30(a) (Section 33‑8‑300(a)) establishes a general standard of care for all directors. It requires a director to exercise “the care an ordinarily prudent person in a like position would exercise.” Some state statutes use the words “diligence,” “care,” and “skill” to define this duty, e.g., N.C. GEN. STAT. ANN. Section 55‑35 (1975). There is very little authority as to what “skill” and “diligence,” as distinguished from “care,” can be required or properly expected of corporate directors in the performance of their duties. “Skill,” in the sense of technical competence in a particular field, should not be a qualification for the office of director. The concept of “diligence” is sufficiently subsumed within the concept of “care.” Accordingly, the words “diligence” and “skill” were omitted from the standard adopted.

Likewise, section 8.30 (Section 33‑8‑300) does not use the term “fiduciary” in the standard for directors’ conduct, because that term could be confused with the unique attributes and obligations of a fiduciary imposed by the law of trusts, some of which are not appropriate for directors of a corporation.

Several of the phrases chosen to define the general standard of care in section 8.30(a) (Section 33‑8‑300(a)) deserve specific mention:

(1) The reference to “ordinarily prudent person” embodies long traditions of the common law, in contrast to suggested standards that might call for some undefined degree of expertise, like “ordinarily prudent businessman.” The phrase recognizes the need for innovation, essential to profit orientation, and focuses on the basic director attributes of common sense, practical wisdom, and informed judgment.

(2) The phrase “in a like position” recognizes that the “care” under consideration is that which would be used by the “ordinarily prudent person” if he were a director of the particular corporation.

(3) The combined phrase “in a like position . . . under similar circumstances” is intended to recognize that (a) the nature and extent of responsibilities will vary, depending upon such factors as the size, complexity, urgency, and location of activities carried on by the particular corporation, (b) decisions must be made on the basis of the information known to the directors without the benefit of the hindsight, and (c) the special background, qualifications, and management responsibilities of a particular director may be relevant in evaluating his compliance with the standard of care. Even though the quoted phrase takes into account the special background, qualifications and management responsibilities of a particular director, it does not excuse a director lacking business experience or particular expertise from exercising the common sense, practical wisdom, and informed judgment of an “ordinarily prudent person.”

The process by which a director informs himself will vary but the duty of care requires every director to take steps to become informed about the background facts and circumstances before taking action on the matter at hand. In relying upon the performance by management of delegated or assigned duties pursuant to section 8.01 (Section 33‑8‑101) (including, for example, matters of law and legal compliance), the director may depend upon the presumption of regularity, absent knowledge or notice to the contrary. A director may also rely on information, opinions, reports, and statements prepared or presented by others as set forth in section 8.30(b) (Section 33‑8‑300(b)). Furthermore, a director should not be expected to anticipate the problems which the corporation may face except in those circumstances where something has occurred to make it obvious to the director that the corporation should be addressing a particular problem.

2. Section 8.30(b) (Section 33‑8‑300(b)).

A director complying with the standards expressed in section 8.30(a) (Section 33‑8‑30(a)) is entitled to rely upon information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by the persons or committees described in section 8.30(b) (Section 33‑8‑300(b)). The right to rely under this section applies to the entire range of matters for which the board of directors is responsible. Under section 8.30(c) (Section 33‑8‑300(c)), however, a director so relying must be without knowledge concerning the matter in question that would cause his reliance to be unwarranted. Also inherent in the concept of good faith is the requirement that, in order to be entitled to rely on a report, statement, opinion, or other matter, the director must have read the report or statement in question, or have been present at a meeting at which it was orally presented, or have taken other steps to become generally familiar with its contents. In short, the director must comply with the general standard of care of section 8.30(a) (Section 33‑8‑300(a)) in making a judgment as to the reliability and competence of the source of information upon which he proposes to rely.

Section 8.30(b) (Section 33‑8‑300(b)) permits reliance upon outside advisers, including not only those in the professional disciplines customarily supervised by state authorities, such as lawyers, accountants, and engineers, but also those in other fields involving special experience and skills, such as investment bankers, geologists, management consultants, actuaries, and real estate appraisers. The concept of “expert competence” in section 8.30(b)(2) (Section 33‑8‑300(b)(2)) embraces a wide variety of qualifications and is not limited to the more precise and narrower recognition of experts under the Securities Act of 1933. In this respect, section 8.30(b) goes beyond any existing state business corporation act, although several state statutes permit reliance on reports of appraisers selected with reasonable care by the board of directors and deal with the scope and nature of corporate reports and records generally.

Section 8.30(b) (Section 33‑8‑300(b)) permits reliance upon a committee of the board of directors when performing a supervisory or other functions in instances where neither the full board of directors nor the committee takes dispositive action. For example, there may be reliance upon an investigation undertaken by a board committee and reported to the full board of directors, which forms the basis for action by the board of directors itself. Another example is reliance upon a committee of the board of directors, such as a corporate audit committee, with respect to the ongoing role of oversight of the accounting and auditing functions of the corporation. In addition, where reliance upon information or materials prepared or presented by a board committee is not involved, a director may properly rely on dispositive action by a board committee (of which he is not a member) empowered to act pursuant to authority delegated under section 8.25 (Section 33‑8‑250) or acting with the acquiescence of the board of directors. In this connection, see the Official Comment to section 8.25 (Section 33‑8‑250). A director may similarly rely on committees not created under section 8.25 (Section 33‑8‑250) which have non‑director members.

In conditioning reliance upon reasonable belief that the board committee merits the director’s “confidence,” section 8.30(b)(3) (Section 33‑8‑300(b)(3)) recognizes a difference between a board committee and an expert. In sections 8.30(b)(1) and (2) (Sections 33‑8‑300(b)(1) and (2)), the reference is to “competence of an expert,” which recognizes the expectation of experience and in most instances technical skills on the part of those upon whom the director may rely. In section 8.30(b)(3) (Section 33‑8‑300(b)(3)), the concept of “confidence” is substituted for “competence” in order to avoid any inference that technical skills are a prerequisite.

By identifying those upon whom a director may rely in discharging his duties, section 8.30(b) (Section 33‑8‑300(b)) does not limit the ability of directors to delegate their powers under section 8.01(a) to committees of the board of directors or officers of the corporation, except where this delegation is expressly prohibited by the Act. Delegation should be carried out in accordance with the standards set forth in section 8.30(a) (Section 33‑8‑300(a)). See also section 8.25 and its Official Comment with respect to delegation to committees.

3. Section 8.30(c) (Section 33‑8‑300(c)).

Section 8.30(c) (Section 33‑8‑300(c)) expressly prevents a director from “hiding his head in the sand” and relying on information, opinions, reports, or statements when he has actual knowledge which makes reliance unwarranted.

4. Section 8.30(d) (Section 33‑8‑300(d)).

Section 8.30(d) (Section 33‑8‑300(d)) follows former section 35 of the Model Act, which provided that: “An individual who performs the duties of his office in accordance with this section is not liable for serving or having served as a director.” Thus, both former section 35 and current section 8.30(d) (Section 33‑8‑300(d)) are self‑executing, and the individual director’s exoneration from liability is automatic. If compliance with the standard of conduct set forth in former section 35 or section 8.30 (Section 33‑8‑300) is established, there is no need to consider possible application of the business judgment rule. The possible application of the business judgment rule need only be considered if compliance with the standard of conduct set forth in former section 35 or section 8.30 (Section 33‑8‑300) is not established.

Section 8.30(d) (Section 33‑8‑300(d)) makes clear that the section will apply whether or not affirmative action was in fact taken. If the board of directors or a committee considers an issue (such as a recommendation of independent auditors concerning the corporation’s internal accounting controls) and determines not to take action, the determination not to act is protected by section 8.30 (Section 33‑8‑300). Similarly, if the board of directors or committee delegates responsibility for handling a matter to subordinates, the delegation constitutes “action” under section 8.30 (Section 33‑8‑300). Section 8.30(d) (Section 33‑8‑300(d)) applies (assuming its requirements are satisfied) to any conscious consideration of matters involving the affairs of the corporation. It also applies to the determination by the board of directors of which matters to address and which not to address. Section 8.30(d) (Section 33‑8‑300(d)) does not apply only when the director has failed to consider taking action which under the circumstances he is obliged to consider taking.

5. Application to Officers.

Section 8.30 (Section 33‑8‑300) generally deals only with directors. Section 8.42 (Section 33‑8‑420) and its Official Comment explain the extent to which the provisions of section 8.30 (Section 33‑8‑300) apply to officers.

SOUTH CAROLINA REPORTERS’ COMMENTS

There are three main differences between the Official Text of the Model Act and Section 33‑13‑150 of the 1981 South Carolina Business Corporation Act. The first change concerns format. The Model Act separates the standards for directors and officers into two sections, Sections 33‑8‑300 and 33‑8‑420. Under prior law, directors’ and officers’ duties were treated in one section. The Model Act format is adopted by this act.

The second difference is that under the Model Act, the duties owed run only to the benefit of the corporation, whereas under the 1981 South Carolina Business Corporation Act as well as the 1962 Business Corporation Act the duty has run to the corporation and its shareholders. Shareholders have been express statutory beneficiaries of duties owed by corporate insiders. According to South Carolina Business Corporation Act 131 (Annot. ed. 1964):

“Section 73 of the Amendments Act of 1963 made an extremely important addition to [Section 12‑18‑15, which became Section 33‑13‑150], by adding after the phrase ‘with a view to the interests of the corporation’ the words ‘and of the shareholders.’ The purpose here is to make clear that the fiduciary duty of directors runs to the shareholders, and prevents them from making use of their favored position to take advantage of shareholder interests. The phrase codifies existing South Carolina law. . . . The phrase was added to avoid any implication that the wording of Section 12‑18‑15 might exclude, or overrule, the duty owing under the common law to shareholders.”

More legislative history regarding the addition to Section 12‑18‑15 is found in Folk, “The South Carolina Corporation Law: Reconsiderations and Prospects”, 15 S.C.L. Rev. 467, 479 (1963):

“Section 8.15 declares a standard of duty of directors and officers, but as presently worded makes that duty run only to the corporation. There may be a negative inference that directors owe no duties to shareholders as such. But this is contrary to established law on the fiduciary duty of directors. . . . Even assuming that the courts of this State would not infer any purpose to reduce the customary scope of director duties, it would be necessary to examine the case law to find the principle established. The object of section 8.15 is to codify director duties so that one knows of their existence from the face of the statute. Accordingly, to clarify and relieve uncertainty in an important area, the Technical Amendments Bill proposes that director duties extend to ‘the corporation’ and to ‘the shareholders’.”

As the foregoing authorities suggest, the underlying principle of shareholders being express beneficiaries of fiduciary duties predates the technical amendment made in 1963. South Carolina case law since Black v. Simpson, 94 S.C. 312, 77 S.E. 1023 (1913), has firmly embraced the notion that officers and directors owe duties to shareholders as well as the entity. The principle has been applied in insider trading cases (see Jacobson v. Yaschik, 249 S.C. 577, 584, 155 S.E.2d 601, 605 (1967)) and squeeze‑out cases (see Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 322 S.E.2d 674 (1984)).

In 1981, the Model Act’s articulation of duties owed was adopted verbatim with the exception that the established principle that shareholders of South Carolina corporations are express statutory beneficiaries of duties owed was retained. The Reporter’s Comments generated in connection with the 1981 revision show that the drafters expressly intended to retain the language brought in by the 1963 amendment mentioned above. See South Carolina Business Corporation Act of 1962—Suggestions for Revision 241 (Nov. 1979).

The substance of the current Model Act provision has not changed since it was last reviewed at the time of the 1981 amendments.

Basically, the drafters of the current revision faced three alternatives: follow the Model Act entirely; continue the pattern of following the Model Act but with added express recognition of the legal principle that duties run to shareholders; or opt for a very pro‑insider statute along the lines recently adopted by Delaware. The Delaware formulation, in certain cases, allows elimination or limitation on a director’s liability for money damages for negligent or reckless misconduct. See Del. Senate Bill 533, amending sec. 102, title 8, Delaware Code to add new subsection (7), effective July 1, 1986.

The decision of whether to adhere strictly to the Model Act, to maintain the status quo in this State, or to opt for the Delaware approach (or one even more liberal) raised philosophical points. Basically, there was some sentiment in favor of laxity and some in favor of rigor, some sentiment in favor of express articulation that duties are owed to shareholders and some in favor of silence. A major concern on the part of those wishing to eliminate the mention of a duty owed was their perception that it is difficult to find good people to serve as directors, and eliminating mention of the duty will help encourage good people to serve on boards. One concern of proponents of the status quo is that dropping from the statute a duty that previously existed can hardly be taken as anything different than a repudiation of prior law. It would be strange intentionally to change the text of the statute and then claim in the Reporters’ Comments that the text change was without any purpose.

After detailed discussion and analysis, the decision was made to retain mention in this provision of a direct duty owed to shareholders. In addition, as the result of an amendment initiated in the South Carolina House of Representatives and revised by the Senate, certain large corporations (those with gross assets of twenty‑five million dollars or more, or that have five hundred or more shareholders, or that are Section 12(g) reporting companies under the Securities Exchange Act of 1934) can include in their articles of incorporation a provision exempting directors from liability for simple negligence in some kinds of damage suits against the directors brought by one or more shareholders of the corporation. (This statute, which is a modification of the Delaware statute referred to above, is discussed in more detail in the South Carolina Reporters’ Comments to Section 33‑2‑102 of this act.).

The third difference between prior law and the Model Act section is that the South Carolina statute, since the enactment of the 1981 South Carolina Business Corporation Act, has had a special statute of limitations found in Section 33‑13‑150(d). As enacted it cut off suits based on violations of the statute unless brought:

“within three (3) years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs.”

Note that under the statute, the plaintiff’s right to bring a cause of action which had been concealed, and could never have been reasonably discovered, lapsed after three years. There was no provision for tolling based on fraudulent concealment. Arguably, the statute would reward fraudulent concealment of a wrong. The statute was flawed. If the statute rewarded fraudulent concealment by corporate fiduciaries, it was bad policy; if it was intended not to apply in cases of fraudulent concealment, it was poorly drafted.

The leading proponents of adding the statute of limitations to the Model Act section were also the leading proponents for elimination of the duty to shareholders on the theory that it was better to have the Model Act unsullied by local law.

There was a general willingness to import a specific limitations period into the statute defining duties owed. This was accomplished by adding to the Model Act provision a new subsection (e) which reads the same as Section 33‑13‑150(d) of the prior law, but with this limitation added at the end: “This limitations period does not apply to breaches of duty which have been concealed fraudulently.” The advantage of the short limitations period set forth in subsection (e) is not available to fiduciaries who fraudulently conceal their wrongdoing.

DERIVATION: 1984 Model Act Section 8.30.

CROSS REFERENCES

Accountability for benefit corporation, see Section 33‑38‑400.

Committees, see Section 33‑8‑250.

Conflict of interest, see Section 33‑8‑310.

Derivative proceedings, see Section 33‑7‑400.

Duty of board of directors, see Section 33‑8‑101.

Indemnification, see Sections 33‑8‑500 through 33‑8‑580.

Liability for unlawful distributions, see Section 33‑8‑330.

Loans to directors, see Section 33‑8‑320.

Meetings of board of directors, see Sections 33‑8‑200 and 33‑8‑210.

Officers, see Sections 33‑8‑400 et seq.

Quorum of directors, see Section 33‑8‑240.

Removal of directors, see Sections 33‑8‑108 and 33‑8‑109.

Standards of conduct for officers, see Section 33‑8‑420.

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S.C. Jur. Limitation of Actions Section 43, Corporations.

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Annual survey of South Carolina law, business law. 42 S.C. L. Rev. 11 (Autumn 1990).

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1. In general

Absent evidence that one of two dual directors of Chapter 7 debtor and its parent company made any verbal representations to representatives of cotton gins that had entered into prepetition contracts to sell cotton to debtor, cotton gins failed to establish their claims for fraud, negligent misrepresentation, and promissory estoppel under Alabama, Georgia, or North Carolina law. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Estoppel 85; Fraud 9

Absent evidence showing that dual directors of Chapter 7 debtor and its parent company, whether acting individually or on behalf of and for the benefit of parent, voted to substitute debtor’s forward contract with German corporation with subsidiary contracts with German corporation’s subsidiaries for the purpose of inducing debtor’s breach of its separate, prepetition “ginner contracts” for the purchase of cotton from cotton gins, cotton gins failed to establish their claim against directors and parent for tortious interference with contract under Alabama, Georgia, or North Carolina law. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Torts 242

Under South Carolina law, when there is a question as to whether a director of an insolvent corporation has fulfilled his fiduciary obligations to creditors, the issues of the director’s reasonableness and good faith are irrelevant, as is the severity of the breach; the only issue is whether there has been a breach at all. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1993

Genuine issues of material fact existed as to Chapter 7 debtor’s solvency on the date that its board of directors voted to substitute debtor’s forward contract with German corporation with subsidiary contracts with German corporation’s subsidiaries and as to the relation between the vote and debtor’s ultimate inability to perform its “ginner contracts” with creditors, precluding summary judgment in creditors’ action against directors for breach of their fiduciary duties owed to creditors under South Carolina law. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Bankruptcy 2164.1

Creditors, namely, cotton gins that had entered into prepetition contracts to sell cotton to Chapter 7 debtor, did not allege, and did not possess the right to allege, a claim against debtor’s directors for an alleged breach of the fiduciary duties that directors owed to debtor and its shareholders; creditors’ amended complaint listed the count in question as one for breach of fiduciary duty to creditors, and bankruptcy court’s order of sale limited the scope of trustee’s sale to creditors to only the trustee’s interest, if any, in “the nine causes of action asserted in the Adversary Proceedings,” which contended that directors breached only those limited duties that extend to creditors of a corporation upon insolvency. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Bankruptcy 2162; Bankruptcy 3070

Under South Carolina law, Chapter 7 debtor did not function as the agent of its parent company and two individuals who were dual directors of the two entities and, thus, parent and directors did not ratify debtor’s prepetition ginning contracts with cotton gins and could not be held vicariously liable for the contracts’ alleged breach; mere fact that parent at times loaned debtor money to meet margin calls did not, in and of itself, signal financial dependence, the evidence showed instead that debtor functioned independent of parent, given evidence of debtor’s adherence to corporate formalities, independent employee and management structure, and autonomous execution of contracts and lending agreements separate and apart from the control of parent and the dual directors, and so cotton gins failed to establish an agency relationship between debtor on the one hand and parent and dual directors on the other. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1065

Piercing of Chapter 7 debtor’s corporate veil was not appropriate under South Carolina law, in action against debtor’s parent company and dual directors brought by cotton gins that had entered into prepetition contracts with debtor; under first prong of DeWitt test, even when viewed in light most favorable to plaintiffs, evidence was insufficient to show that debtor was merely a facade for parent company’s operations, given ample evidence showing debtor’s adherence to corporate formalities, including properly conducted board meetings complete with official minutes, maintenance of books and records, and the existence of bank accounts and lines of credit owned and controlled exclusively by debtor and not its individual members, as well as report of defendants’ solvency expert showed that, during the relevant time, debtor was not grossly undercapitalized and was capable of paying its operating expenses. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1065

Evidence showing that Chapter 7 debtor paid its parent company management fees for the advice and experience of its directors, received loans from parent for the purpose of meeting margin calls, employed as directors several individuals who also served as directors for parent, and participated in business cooperatives with parent, without more, was insufficient to demonstrate the “total domination and control” necessary for application of the alter ego doctrine under South Carolina law, given evidence that debtor maintained separate bank accounts, obtained credit lines based solely upon its own assets and liabilities, obtained and possessed its own federal tax identification number and accordingly paid taxes when they became due, employed legal counsel and accounting firms separate of those used by parent, and maintained the same general management and employee structure both before and after parent became its majority shareholder. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1065

Under South Carolina law, majority shareholder of Chapter 7 debtor could not be held liable for breach of contract for any alleged repudiation of debtor’s prepetition “ginner contracts” with cotton gins; absent a finding that parent company functioned as the alter ego of debtor, parent stood in the position of a third‑party to the ginner contracts, and the mere presence of dual directors on both entities’ boards did not provide a basis for imposition of liability. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1065; Corporations and Business Organizations 1645; Corporations and Business Organizations 1647

Under South Carolina law, Chapter 7 debtor’s directors, who were not parties to debtor’s prepetition “ginner contracts” with cotton gins, could not be held personally liable for any alleged anticipatory repudiation of the contracts. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1960

The business judgment rule will not apply if the corporate directors have engaged in self‑dealing, fraud, or other unconscionable conduct. Kuznik v. Bees Ferry Associates (S.C.App. 2000) 342 S.C. 579, 538 S.E.2d 15, rehearing denied, certiorari granted, certiorari dismissed. Corporations And Business Organizations 1842; Corporations And Business Organizations 1966

2. Statute of limitations

Statute setting limitations period for shareholder suits for director’s breach of duty requires a plaintiff to commence suit within either: (1) three years after the cause of action accrues, or (2) two years after the date the plaintiff discovers or reasonably should discover the breach; whichever period occurs or expires first controls. Roof v. Swanson (S.C.App. 2001) 344 S.C. 315, 543 S.E.2d 278. Limitation Of Actions 58(4); Limitation Of Actions 100(7)

3. Salary and compensation

Yearly salary and bonus of Chapter 7 debtor‑corporation’s president, totaling less than $250,000.00 for the head of a $13 million company which had historically been very profitable, represented good faith compensation and bonus for president’s service, and not an improper transfer under the Bankruptcy Code or South Carolina law. In re Southern Textile Knitters (C.A.4 (S.C.) 2003) 65 Fed.Appx. 426, 2003 WL 124771, Unreported. Bankruptcy 2646; Corporations And Business Organizations 2845

4. Shareholder actions

A breach of the fiduciary duty owed by controlling shareholders of a corporation to minority shareholders must be pursued through a derivative, and not an individual, action. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Corporations and Business Organizations 2179

Special referee’s finding that family member owners of auto‑service company did not breach fiduciary duty to minority shareholder was supported by the evidence, including evidence that minority shareholder perpetrated the fraudulent activities that he complained about in his action for breach of fiduciary duty, including filing inaccurate tax returns, that family member owners did not know he was taking actions that were fraudulent, and that fraudulent tax returns impacted all shares in corporation equally. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Corporations and Business Organizations 1526(3)

Shareholders could not pursue individual actions against bank and mortgage lender’s officers and directors under the special duty exception to the general rule that shareholders do not have standing to bring direct claims for wrongs that diminish the value of their shares in a corporation, even though South Carolina recognized a duty of a corporate director to perform his duties in good faith, absent allegations of any facts from which it could have been inferred that the officers and directors owed shareholders a duty that was personal to them that was distinct from any duty owed to the corporation itself. Rice‑Marko v. Wachovia Corp. (S.C.App. 2012) 398 S.C. 301, 728 S.E.2d 61. Banks and Banking 54(5)

4.5. Creditors

Creditor was precluded under South Carolina law from bringing direct claim against insolvent corporation’s board of directors for breach of fiduciary duty after directors made distributions of corporate assets to shareholders who were relatives of directors; creditor failed to demonstrate a harm particular to it, as required for liability, since there were multiple potential creditors stemming from corporation’s liability as part owner of Comprehensive Environmental Response Compensation and Liability Act (CERCLA) superfund site. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 126 F.Supp.3d 611. Corporations and Business Organizations 2235

5. Estoppel

Creditors, in adversary proceeding against Chapter 7 debtor’s parent company and the entities’ dual directors, were judicially estopped from arguing that three particular contracts that debtor had executed with third parties were unenforceable “sham” contracts; earlier in the proceeding, creditors argued that the substitution of two of the contracts for the other contract constituted a breach of directors’ fiduciary duties to creditors of debtor, an argument which necessarily presumed that the one contract was enforceable, the parties agreed that the two contracts came into existence as a result of transferring and splitting the other contract’s purchase obligations, which also acknowledged that the one contract’s terms were valid and enforceable, and creditors had asserted the enforceability of the two contracts in a prior state‑court proceeding, where they obtained a result in their favor, as well as in an arbitration proceeding, where a panel had declared the contracts valid. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Estoppel 68(2)

6. Review

Minority shareholder’s appeal, in shareholder’s action against auto‑service company and others, was proper as to special referee’s finding that accountant aided and abetted company owners in breaching their fiduciary duty to shareholders, despite fact that shareholder did not attach copy of order relating to accountant until he filed second amended notice of appeal more than 30 days after underlying order had been filed, where shareholder added accountant as respondent within 30 days of underlying order, and accountant thus at least had notice he was a party to the appeal within the time required to file an appeal from the special referee’s decision. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Appeal and Error 422

**SECTION 33‑8‑310.** Director or Officer conflict of interest.

 (a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director’s interest in the transaction if any one of the following is true:

 (1) the material facts of the transaction and the director’s interest were disclosed or known to the board of directors or a committee of the board of directors, and the board of directors or a committee authorized, approved, or ratified the transaction;

 (2) the material facts of the transaction and the director’s interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or

 (3) the transaction was fair to the corporation.

 If (1) or (2) has been accomplished, the burden of proving unfairness of any transaction covered by this section is on the party claiming unfairness. If neither (1) nor (2) has been accomplished, the party seeking to uphold the transaction has the burden of proving fairness.

 (b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if (1) another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction or (2) another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

 (c) For purposes of subsection (a)(1), a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (a)(1) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

 (d) For purposes of subsection (a)(2), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction, and shares owned by or voted under the control of an entity described in subsection (b)(1), may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (a)(2). The vote of those shares, however, is counted in determining whether the transaction is approved under other sections of Chapters 1 through 20 of this Title. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

HISTORY: Derived from 1976 Code Section 33‑13‑160 [1962 Code 12‑18.16; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 5.

OFFICIAL COMMENT

Historically, the scope of a director’s duty of loyalty to a corporation has been defined by judicial decision rather than by statute. The courts have developed and refined this duty based on increasing sophistication and experience with the corporate form, and the need to encourage honest decisions by directors and to discourage direct or indirect devices by which directors may benefit personally at the expense of creditors or shareholders. Over the years, courts have been vigilant to subject novel transactions and devices to scrutiny.

Sections 8.31 and 8.32 (Sections 33‑8‑310 and 33‑8‑320) deal with various facets of the duty of loyalty. The Model Act, however, does not attempt to define the full range of this duty. Indeed, any such attempt would probably be self‑defeating since the language chosen might be used to limit prematurely the standards under which directors should act.

1. Conflict of Interest Transactions in General.

Section 8.31 (Section 33‑8‑310) deals only with “conflict of interest” transactions by a director with the corporation, that is, transactions in which the director has an interest either (1) directly or (2) indirectly through an entity in which the director has a financial or managerial interest covered by section 8.31(b) (Section 33‑8‑310(b)). A conflict of interest transaction does not include transactions in which the director participates in the transaction only as a shareholder and receives only a proportionate share of the advantage or benefit of the transaction. Section 8.31 (Section 33‑8‑310) deals only with conflict of interest transactions involving directors, it does not address analogous transactions entered into by officers, employees, or substantial or dominating shareholders unless they are also directors.

Section 8.31 (Section 33‑8‑310) rejects the common law view that all conflict of interest transactions entered into by directors are automatically voidable at the option of the corporation without regard to the fairness of the transaction or the manner in which the transaction was approved by the corporation. Section 8.31(a) (Section 33‑8‑310(a)) makes any automatic rule of voidability inapplicable to transactions that are fair or that have been approved by directors or shareholders in the manner provided by the balance of section 8.31 (Section 33‑8‑310). The approval mechanisms set forth in sections 8.31(c) and (d) (Section 33‑8‑310(c) and (d)) relate only to the elimination of this automatic rule of voidability and do not address the manner in which the transactions must be approved under other sections of this Act. This is made clear by the express limitations in sections 8.31(c) and (d) (Section 33‑8‑310(c) and (d)) that they are applicable only “for the purposes of this section” as well as the language of the second and third sentences of section 8.31(d) (Section 33‑8‑310(d)).

The elimination of the automatic rule of voidability does not mean that all transactions that meet one or more of the tests set forth in section 8.31(a) (Section 33‑8‑310(a)) are automatically valid. These transactions may be subject to attack on a variety of grounds independent of section 8.31 (Section 33‑8‑310)—for example, that the transaction constituted waste, that it was not authorized by the appropriate corporate body, that it violated other sections of the Model Business Corporation Act, or that it was unenforceable under other common law principles. The sole purpose of section 8.31 is to sharply limit the common law principle of automatic voidability and in this respect, section 8.31 (Section 33‑8‑310) follows earlier versions of the Model Act and the statutes of many states dealing with conflict of interest transactions.

2. Requirements for Approval of Conflict of Interest Transactions.

Sections 8.31(c) and (d) (Sections 33‑8‑310(c) and (d)) provide special rules for determining whether the board of directors (or a committee thereof) or the shareholders have authorized, approved, or ratified a conflict of interest transaction so as to bring subsections (a)(1) or (a)(2) into play. Basically, these subsections require the transaction in question to be approved by an absolute majority of the directors (on the board of directors, or on the committee, as the case may be) or shares whose votes may be counted in determining whether the transaction should be authorized, approved, or ratified. If these votes are not obtained, the transaction is tested under the fairness test of subsection (a)(3). The vote required for authorization, approval, or ratification of a conflict of interest transaction is more onerous than the standard applicable to normal voting requirements for approval of corporate actions—i.e., that a quorum be present and only the votes of directors or shares present or represented at that meeting be considered—because of the importance of assuring that conflict of interest transactions receive as broad consideration within the corporation as possible if independent review on the basis of fairness is to be avoided.

a. Consideration by the directors.

Section 8.31(c) (Section 33‑8‑310(c)) provides that if a conflict of interest transaction is to be considered by the board of directors or a committee of the board, only the votes of directors “who have no direct or indirect interest in the transaction” may be counted in determining whether to authorize, approve, or ratify the transaction. A vote mistakenly cast by an interested director, however, does not affect the validity of the authorization, approval, or ratification by a committee or by the board of directors under section 8.31 (Section 33‑8‑310) if it otherwise meets the requirement of this subsection. The presence of the interested director at the meeting similarly does not affect the validity of the action by the disinterested directors. Because of the voting disqualification of interested directors, section 8.31(c) (Section 33‑8‑310(c)) provides that a majority of the disinterested directors on the committee or on the board of directors, as the case may be, constitute a quorum for purposes of authorizing, approving, or ratifying the conflict of interest transaction under section 8.31 (Section 33‑8‑310), subject always, however, to the requirement that more than one director must approve the transaction. This two director minimum is applicable to a committee of the board of directors as well as the board of directors itself.

b. Consideration by the shareholders.

When a director’s conflict of interest transaction is considered by the shareholders, section 8.31(d) (Section 33‑8‑310(d)) applies a similar but somewhat more complex prohibition: votes by shares “owned by or voted under the control of a director who has a direct or indirect interest in the transaction” and votes by shares “owned or voted under the control of an entity described in subsection (b)(1)”—that is, an entity in which the director has a material financial interest or is a general partner—may not be counted. This prohibition is based on the belief that the same considerations that prevent votes cast by interested directors from being counted in favor of a conflict of interest transaction also compel the conclusion that votes cast by shares owned or controlled by them, or by entities involved in the transaction in which they have a material financial interest, should also not be counted when the issue is the authorization, approval, or ratification of a conflict of interest transaction under section 8.31 (Section 33‑8‑310). A similar prohibition does not appear in section 41 of the 1969 Model Act.

In some situations, the prohibition of section 8.31(d) (Section 33‑8‑310(d)) will result in the conflict of interest issue being resolved by a majority of a minority of the shares. This will occur, for example, whenever a director who is the majority shareholder of the corporation is interested in a transaction. The vote on the conflict of interest issue under section 8.31 (Section 33‑8‑310), however, must be distinguished from the vote on the approval of the transaction itself under other sections of the Model Act, in which there is no prohibition against the voting of shares owned or controlled by an interested director. For example, if a parent corporation wishes to merge its 60‑percent‑owned subsidiary into itself, and the majority shareholder of the parent is a director of the subsidiary, the votes of the shares owned by the parent corporation may not be counted under section 8.31(d) (Section 33‑8‑310(d)) (since the shares are owned by an entity which is a party to the transaction and which the director controls). The shares nevertheless may be voted on the merger proposal itself under chapter 11 of the Model Act and the merger will, of course, normally be approved solely by the vote of the shares owned by the parent corporation. On the other hand, the test of section 8.31(a)(2) (Section 33‑8‑310(a)(2)) is not met unless the transaction is approved by at least a majority of the votes cast by the holders of the 40 percent of the shares not owned by the parent corporation. If this requirement is not met, the transaction may be evaluated under the fairness test of section 8.31(a)(3) (Section 33‑8‑310(a)(3)).

3. Indirect Conflicts of Interest.

Section 8.31 (Section 33‑8‑310) is applicable to “indirect” as well as direct conflicts; “indirect” is defined in section 8.31(b) (Section 33‑8‑310(b)) to cover transactions between the corporation and an entity in which the director has a material financial interest or is a general partner. Further, section 8.31(b) (Section 33‑8‑310(b)) covers indirect conflicts where the director is an officer or director of another entity (but does not have a material financial interest in the transaction) if the transaction is of sufficient importance that it is or should be considered by the board of directors of the corporation. The purpose of this last clause is to permit normal business transactions between large business entities that may have a common director to go forward without concern about the technical rules relating to conflict of interest unless the transaction is of such importance that it is or should be considered by the board of directors or the director may be deemed to have a material financial interest in the transaction. Thus, section 8.31 (Section 33‑8‑310) covers transactions between corporations with interlocking or common directors as well as the direct “interested director” transaction.

4. “Fairness” of a Transaction.

The fairness of a transaction for purposes of section 8.31 (Section 33‑8‑310) should be evaluated on the basis of the facts and circumstances as they were known or should have been known at the time the transaction was entered into. For example, the terms of a transaction subject to section 8.31 (Section 33‑8‑310) should normally be deemed “fair” if they are within the range that might have been entered into at arms‑length by disinterested persons.

5. An “Interested” Director.

The Model Act does not attempt to define precisely when a director should be viewed as “interested” for purposes of participating in the decision to adopt, approve, or ratify a conflict of interest transaction. Section 8.31(b) (Section 33‑8‑310(b)) does, however, define one aspect of this concept—the “indirect” interest. For purposes of section 8.31 (Section 33‑8‑310) a director should normally be viewed as interested in a transaction if he or the immediate members of his family have a financial interest in the transaction or a relationship with the other parties to the transaction such that the relationship might reasonably be expected to affect his judgment in the particular matter in a manner adverse to the corporation.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Official Text of the Model Act statute omits any specificity on the issues of who has to show what, and when. Language added to Section 33‑8‑310(a)(3) (the last two sentences) is designed to accomplish this objective. Unlike prior law, the Model Act does not treat interested director contracts differently from interlocking directorate contracts. The Model Act language, which is incorporated into this section, is preferable in this regard.

DERIVATION: 1984 Model Act Section 8.31.

CROSS REFERENCES

Accountability for benefit corporation, see Section 33‑38‑400.

Committees, see Section 33‑8‑250.

“Entity” defined, see Section 33‑1‑400.

Indemnification, see Sections 33‑8‑500 through 33‑8‑580.

Loans to directors, see Section 33‑8‑320.

“Proceeding” defined, see Section 33‑1‑400.

Quorum and voting: by directors, see Section 33‑8‑240.

Quorum and voting: by shareholders, see Sections 33‑7‑250 through 33‑7‑270.

Standards of conduct: directors, see Section 33‑8‑300.

Standards of conduct: officers, see Section 33‑8‑420.

Vote needed to approve transactions by shareholders: amendment to articles of incorporation, see Section 33‑10‑103.

Vote needed to approve transactions by shareholders: generally, see Sections 33‑7‑250 and 33‑7‑260.

Vote needed to approve transactions by shareholders: mergers and share exchanges, see Section 33‑11‑103.

Vote needed to approve transactions by shareholders: sale of assets, see Section 33‑12‑102.

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NOTES OF DECISIONS

In general 1

1. In general

Under South Carolina law, a director’s fiduciary duties to a corporation’s creditors are triggered upon insolvency. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1993

Under South Carolina law, by failing to disclose a conflict of interest, a director breaches the duty he or she owes only to the corporation, whether insolvent or financially stable, and the liability for this misconduct is an asset of the corporation, ordinarily remediable by a suit in the name of the corporation. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1870; Corporations and Business Organizations 1916

Under South Carolina law, a director owes a duty to the corporation he serves to disclose any conflicts of interest related to transactions in which the corporation is involved. In re Joseph Walker & Company, Inc. (Bkrtcy.D.S.C. 2014) 522 B.R. 165. Corporations and Business Organizations 1870

Evidence was sufficient to establish that directors’ actions in establishing truss company to supply trusses to corporation, which manufactured panelized structures, and directors purchasing new facility to rent to corporation after it lost its original facility, did not constitute misappropriations of corporate opportunities, as required in order for a constructive trust to be imposed on the business and new facility, in breach of fiduciary duty derivative action controlling shareholder brought against directors; there was evidence that controlling shareholder insisted on the distribution of all profits, insisted that corporation engage in an expensive lawsuit against a competitor of controlling shareholder and corporation’s only other customer and refused to invest any further funds to corporation beyond his nominal initial investment, and there was evidence that directors took the actions they did because corporation lacked the financial capability to do so. Straight v. Goss (S.C.App. 2009) 383 S.C. 180, 678 S.E.2d 443. Trusts 102(1)

Any error by special referee in finding that corporation and truss company established by corporation’s directors engaged in a “common paymaster scheme” for the payment of labor, did not harm controlling shareholder, in negligent mismanagement, conversion and breach of fiduciary duty action controlling shareholder brought against directors; though directors used a common payroll account for both the corporation and truss business, there was evidence that the use of one payroll account for the two companies had cost‑saving benefits and was an appropriate practice, that the funds paid by corporation for truss business labor were offset by the trusses the business provided to corporation, that the accounts were reconciled at the end of each year, and that at the end of the final year of corporation’s active business corporation owed truss company money. Straight v. Goss (S.C.App. 2009) 383 S.C. 180, 678 S.E.2d 443. Reference 73

Evidence was sufficient to establish that doctrine of unclean hands precluded controlling shareholder, who distributed panelized structures, from recovering from directors of corporation, which manufactured panelized structures, in negligent mismanagement, conversion and breach of fiduciary duty action against directors; controlling shareholder alleged that directors usurped corporate opportunities and engaged in unfair conflict of interest transactions, but there was evidence that controlling shareholder did not provide corporation with the capital he originally agreed to provide and looted corporation’s assets, that directors financed purchase of new building for corporation after corporation lost its original building and shareholder refused to provide the financing, that shareholder forced corporation to sue its only other customer, a competing distributor, and that shareholder’s actions forced directors to take the actions he complained of. Straight v. Goss (S.C.App. 2009) 383 S.C. 180, 678 S.E.2d 443. Equity 65(2)

Evidence was sufficient to establish, in trial of controlling shareholder’s breach of fiduciary duty and conversion derivative action, that distributions corporation made to a company established by directors/minority shareholders was pursuant to an agreement between directors, corporation and controlling shareholder to equalize distributions and preserve corporation’s status as an S corporation; corporation was in the business of manufacturing panelized buildings, and there was evidence that controlling shareholder, who distributed panelized buildings, wanted corporation to cease doing business with a competing distributor, that controlling shareholder directed corporation to sue competitor, that the lawsuit was not in corporation’s interest, and that the parties agreed that legal fees corporation paid on controlling shareholder’s behalf would be equalized by payments made to directors’ company. Straight v. Goss (S.C.App. 2009) 383 S.C. 180, 678 S.E.2d 443. Corporations And Business Organizations 1854

Evidence was sufficient to establish, in trial of controlling shareholder’s breach of fiduciary duty derivative action, that directors of corporation which manufactured panelized buildings did not violate corporate conflict of interest statute when they established a business to supply trusses to the corporation, and that transactions between truss business and corporation were fair; there was evidence that directors established truss business after corporation’s previous supplier raised truss prices by 15 percent, that controlling shareholder made it clear that he did not want corporation to engage in any other business opportunities, that the corporation lacked the finances to establish its own truss business, that directors borrowed money in their own name to establish the business, and that corporation and truss business were operated as separate companies and engaged in arm’s length transactions. Straight v. Goss (S.C.App. 2009) 383 S.C. 180, 678 S.E.2d 443. Corporations And Business Organizations 1887

Evidence was sufficient to establish, in trial of derivative action brought by controlling shareholder, that directors’ purchase of new facility and lease of such facility to corporation after it lost its original facility was fair to corporation and did not violate corporate conflict of interest statute; there was evidence that corporation needed a new facility after original facility was damaged in two fires and new landlord decided to take over original facility for his own use, that corporation did not have the financial ability to secure a mortgage on the new facility and controlling shareholder was unwilling to guarantee the mortgage on corporation’s behalf, that directors subsequently personally financed the purchase of the new facility, and that directors consulted with the executive director of a county economic alliance organization to determine what constituted competitive rent. Straight v. Goss (S.C.App. 2009) 383 S.C. 180, 678 S.E.2d 443. Corporations And Business Organizations 1891

Salary overrides that directors of corporation approved in order to compensate themselves for their work as corporate officers were proper and fair to the corporation; letter of intent signed by the shareholders and directors in regard to the formation of the corporation stated that officers’ compensation could be increased with board approval, board of directors approved the increased compensation, directors personally guaranteed corporation’s loans and letters of credit and at times pledge their own personal assets after the other shareholders refused to co‑sign loans and provide the capital they had initially agreed to provide, and directors both worked 16 hour days as well as weekends on behalf of the corporation. Straight v. Goss (S.C.App. 2009) 383 S.C. 180, 678 S.E.2d 443. Corporations And Business Organizations 1820

Under South Carolina law, burden of proving the fairness of a conflict of interest transaction, that is, one in which corporation’s director has a direct or indirect interest, lies on the party seeking to defend the transaction; burden of proof may be shifted back to the party challenging the transaction in one of two circumstances, if transaction was ratified by majority of the disinterested directors, or if it was ratified by majority of the disinterested shareholders. In re Southern Textile Knitters (C.A.4 (S.C.) 2003) 65 Fed.Appx. 426, 2003 WL 124771, Unreported. Corporations And Business Organizations 1910

**SECTION 33‑8‑320.** Loans to directors.

 (a) Except as provided by subsection (c), a corporation may not directly or indirectly lend money to or guarantee the obligation of a director of the corporation unless:

 (1) the particular loan or guarantee is approved by a majority of the votes represented by the outstanding voting shares of all classes, voting as a single voting group, except the votes of shares owned by or voted under the control of the benefited director; or

 (2) the corporation’s board of directors determines that the loan or guarantee benefits the corporation and either approves the specific loan or guarantee or a general plan authorizing loans and guarantees.

 (b) The fact that a loan or guarantee is made in violation of this section does not affect the borrower’s liability on the loan.

 (c) This section does not apply to loans and guarantees authorized by statute regulating any special class of corporations.

HISTORY: Derived from 1976 Code Section 33‑13‑170 [1962 Code Section 12‑18.17; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.32 (Section 33‑8‑320) treats specially a second type of conflict of interest transaction: loans by the corporation to directors (including loans obtained by directors from third persons on the basis of the corporation’s credit). Early statutes in many states made all these loans unlawful because they were believed to be inherently subject to abuse; the modern view epitomized by section 8.32 (Section 33‑8‑320) recognizes that these loans may be proper and desirable in some situations.

The basic test for validity under section 8.32(a) (Section 33‑8‑320(a)) is that either (1) the particular loan is approved by a majority of the shares or by the board of directors after a specific finding that the loan benefits the corporation, or (2) the loan is pursuant to a general plan approved by the board of directors as being of benefit to the corporation. This type of plan will normally cover at least directors, officers, and high‑level employees, and possibly lower level employees as well. Examples of these plans are employee benefit plans, plans authorizing loans of petty cash, and advances for expenses reasonably anticipated to be incurred in the performance of the duties of the director, officer, or employee.

Section 8.32(b) (Section 33‑8‑320(b)) makes clear that an irregular or improper loan is nevertheless legally enforceable by the corporation against the borrower.

Section 8.32(c) (Section 33‑8‑320(c)) provides for an exception for loans by banks, savings and loans, and other lending institutions that are authorized by law to make loans to directors in the ordinary course of business. The protections provided by the statutes applicable to these entities render unnecessary the protections provided by section 8.32 (Section 33‑8‑320).

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which incorporates Model Act Section 8.32 waters down prior law in four respects. First, there is no absolute requirement of “adequate security” and a “prevailing” rate of interest as in Section 33‑13‑170 of the 1981 South Carolina Business Corporation Act. Second, prior law called for both board and shareholder approval of the transaction. The Model Act calls for approval by either. Third, prior law called for coverage of transactions with directors of parents and subsidiaries; the Model Act does not. Fourth, prior law required that the transaction be made “for the benefit of the corporation”; the Model Act does not.

To prevent the possibility that directors could avoid the reach of the section by acting through affiliates, the words “directly or indirectly” were added to subsection (a).

DERIVATION: 1984 Model Act Section 8.32.

CROSS REFERENCES

Accountability for benefit corporation, see Section 33‑38‑400.

Conflict of interest, see Section 33‑8‑310.

Directors’ action, see Sections 33‑8‑200 and 33‑8‑210.

Shareholders’ action, see Sections 33‑7‑101 through 33‑7‑104.

Standards of conduct for directors generally, see Section 33‑8‑300.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 316(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 498, 500, 507, 509, 521 to 523, 526, 529.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 44, Benefit Corporations‑Accountability.

NOTES OF DECISIONS

In general 1

1. In general

Statute which prohibits loans to directors, officers, and shareholders, does not prohibit corporation from guaranteeing obligation of wholly‑owned subsidiary corporation. Tuller v. Nantahala Park Co. (S.C. 1981) 276 S.C. 667, 281 S.E.2d 474. Corporations And Business Organizations 2488

**SECTION 33‑8‑330.** Liability for unlawful distributions.

 (a) A director who votes for or assents to a distribution made in violation of Section 33‑6‑400 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating Section 33‑6‑400 or the articles of incorporation if it is established that he did not perform his duties in compliance with Section 33‑8‑300. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.

 (b) A director held liable under subsection (a) for an unlawful distribution is entitled to contribution:

 (1) from every other director who could be held liable under subsection (a) for the unlawful distribution; and

 (2) from each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of Section 33‑6‑400 or the articles of incorporation.

HISTORY: Derived from 1976 Code Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Although the revisions to the financial provisions of the Model Act have simplified and rationalized the rules for determining the validity of distributions (see section 6.40 (Section 33‑6‑400)), the possibility remains that a distribution may be made in violation of these rules. Section 8.33 (Section 33‑8‑330) provides that directors who fail to meet the standards of conduct of section 8.30 (Section 33‑8‑300) and vote for or assent to an unlawful distribution are personally liable for the portion of the distribution that exceeds the maximum amount that could have been lawfully distributed. A director who is compelled to restore that amount to the corporation is entitled to contribution from every other director who voted for or assented to the distribution. In addition, the director may also recover any amounts paid to shareholders who accepted the payments knowing that they were in violation of the statute. A shareholder who receives a payment not knowing of its invalidity is entitled to retain it. Although no attempt has been made to work out in detail in the Model Act the relationship between this right of recoupment from shareholders and the right of contribution from assenting directors, it is expected that a court will equitably apportion the obligations and benefits arising from the application of the principles set forth in this section.

SOUTH CAROLINA REPORTERS’ COMMENTS

Under Section 33‑6‑400, distributions are lawful if they are based on accountings or appraisals that are “reasonable in the circumstances.” Section 33‑8‑330 is designed to allow a director who approves distributions based upon unreasonable accountings or appraisals to escape liability if he meets the standard of Section 33‑8‑300. Presumably, this will occur only where the faulty advice of a professional (such as an accountant or appraiser) is relied on by the board and where such reliance is reasonable under the circumstances. Section 33‑8‑330 really is unnecessary except that it serves as a signpost pointing to the standards of Section 33‑8‑300. It is a vestigial remain of a bygone era when directors faced virtually strict liability if they approved illegal distributions.

DERIVATION: 1984 Model Act Section 8.33.

CROSS REFERENCES

Accountability for benefit corporation, see Section 33‑38‑400.

“Distribution” defined, see Section 33‑1‑400.

Distributions to shareholders generally, see Section 33‑6‑400.

Indemnification, see Sections 33‑8‑500 through 33‑8‑580.

Optional provisions of articles of incorporation imposing, eliminating, or limiting personal liability of director to corporation or shareholders, see Section 33‑2‑102.

Standards of conduct for directors, see Section 33‑8‑300.

Library References

Corporations 310(4).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 475, 485.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 75, Extent of Liability.

S.C. Jur. Charities Section 44, Benefit Corporations‑Accountability.

Forms

South Carolina Legal and Business Forms Section 1:6 , Formation‑Content of Articles of Incorporation.

South Carolina Legal and Business Forms Section 1:18 , Directors.

Notes of Decisions

In general 1

1. In general

Court’s prior erroneous determination in action by creditor against insolvent corporation’s directors under South Carolina’s Statute of Elizabeth governing fraudulent conveyances, that South Carolina law did not recognize derivative suits by creditors, was law of the case on corporate directors’ motion for judgment as a matter of law; determination would not work a manifest injustice, since creditor would recover on fraudulent conveyance claim. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 126 F.Supp.3d 611. Courts 99(6)

Provision of South Carolina Business Corporations Act prohibiting distributions making a corporation insolvent did not preclude suit by creditor against corporate directors for improper distributions; corporation was already insolvent at the time the challenged distributions were made, and provision addressed only a shareholder’s rights to challenge distributions rendering a corporation insolvent. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 126 F.Supp.3d 611. Corporations and Business Organizations 1993

ARTICLE 4

Officers

CROSS REFERENCES

Corporate officers exempt from unemployment benefits absent employer election, procedure, exceptions, see Section 41‑27‑265.

**SECTION 33‑8‑400.** Required officers.

 (a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

 (b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

 (c) The bylaws or the board of directors shall delegate to one of the officers responsibility for preparing minutes of the directors’ and shareholders’ meetings and for authenticating records of the corporation.

 (d) The same individual may hold more than one office in a corporation simultaneously.

HISTORY: Derived from 1976 Code Section 33‑13‑130 [1962 Code Section 12‑18.13; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.40 Section 33‑8‑400) permits every corporation to designate the officers it wants. The designation may be made in the bylaws or by the board of directors consistent with the bylaws. This is a departure from earlier versions of the Model Act and most state corporation acts, which require certain officers, usually the president, the secretary, and the treasurer, and generally authorize the corporation to designate additional or assistant officers. Experience has shown, however, that little purpose is served by a statutory requirement that there be certain officers, and statutory requirements may sometimes create problems of implied or apparent authority or confusion with nonstatutory offices the corporation desires to create.

The board of directors may appoint assistant officers pursuant to its general powers under section 8.40(a) (Section 33‑8‑400(a)); duly appointed officers may also appoint assistant officers if authorized by the board under section 8.40(b) (Section 33‑8‑400(b)).

Throughout the Model Act, the act of a board designating an officer is referred to as an “appointment” rather than an “election.” The Act also consistently uses the word “elect” when referring to the selection of directors, thus emphasizing the difference in the section process.

The board of directors, as well as duly appointed corporate officers or other agents, may also appoint agents from the corporation.

The bylaws or the board of directors must also delegate to an officer the responsibility to prepare minutes and authenticate records of the corporation; the person performing this function is referred to as the “secretary” of the corporation throughout the Model Act. See section 1.40 (Section 33‑1‑400). Under this act a corporation may have this and all other corporate functions performed by a single individual.

This person who is designated by the bylaws or the board as responsible for maintaining minutes of meetings and authenticating records of the corporation thereby has authority to bind the corporation by his authentication under this section. This delegation of authority, traditionally vested in the corporate “secretary,” allows third persons to rely on authenticated records without inquiring into their truth or accuracy.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section makes an obvious change, explained in the Official Comment, from the tradition of requiring a president, vice‑president, secretary, and treasurer.

DERIVATION: 1984 Model Act Section 8.40.

CROSS REFERENCES

Agents of corporation, see Section 33‑5‑102.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Contract rights of officers, see Section 33‑8‑440.

Duties of officers, see Section 33‑8‑410.

Officer as employee of corporation, see Section 33‑1‑400.

Officer liability for benefit corporation, see Section 33‑38‑420.

Removal of officers, see Section 33‑8‑430.

“Secretary” defined, see Section 33‑1‑400.

Standards of conduct for officers, see Section 33‑8‑420.

Tenure of officers, see Section 33‑8‑440.

Library References

Corporations 300 to 303.

Westlaw Topic No. 101.

C.J.S. Corporations Section 468.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 77, Board Manages Affairs of Bank.

S.C. Jur. Banks and Banking Section 85, Election of Officers.

S.C. Jur. Banks and Banking Section 87, Powers of Officers.

S.C. Jur. Hospitals Section 4, Administrator.

Forms

South Carolina Legal and Business Forms Section 1:20 , Officers.

South Carolina Legal and Business Forms Section 1:289 , Election of Officers‑Secretary’s Certificate.

South Carolina Legal and Business Forms Section 1:298 , Resolution‑Authorization to Appoint Assistants.

**SECTION 33‑8‑410.** Duties of officers.

 Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.

HISTORY: Derived from 1976 Code Section 33‑13‑130 [1962 Code Section 12‑18.13; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.41 (Section 33‑8‑410) recognizes that persons designated as officers have the formal authority set forth for that position (1) by its description in the bylaws, (2) by specific resolution of the board of directors, or (3) by direction of another officer authorized by the board of directors to prescribe the duties of other officers.

These methods of investing officers with formal authority do not exhaust the sources of an officer’s actual or apparent authority. Many cases state that specific corporate officers, particularly the chief executive officer, may have implied authority merely by virtue of their positions. This authority, which may overlap the express authority granted by the bylaws, generally has been viewed as extending only ordinary business transactions, though some cases have recognized unusually broad implied authority of the chief executive officer or have created a presumption that corporate officers have broad authority, thereby placing on the corporation the burden of showing lack of authority. Corporate officers may also be vested with apparent (or ostensible) authority by reason of corporate conduct on which third persons reasonably rely.

In addition to express, implied, or apparent authority, a corporation is normally bound by unauthorized acts of officers if they are ratified by the board of directors. Generally, ratification extends only to acts that could have been authorized as an original matter. Ratification may itself be express or implied and may in cases serve as the basis of apparent (or ostensible) authority.

SOUTH CAROLINA REPORTERS’ COMMENTS

No change in the prior law is made by this section.

DERIVATION: 1984 Model Act Section 8.41.

CROSS REFERENCES

Assistant officers, see Section 33‑8‑400.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Officer as employee, see Section 33‑1‑400.

Officer liability for benefit corporation, see Section 33‑38‑420.

“Secretary” defined, see Section 33‑1‑400.

Standards of conduct: directors, see Section 33‑8‑300.

Standards of conduct: officers, see Section 33‑8‑420.

Library References

Corporations 300 to 303, 307, 310.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 468, 475 to 489.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 89, Duties of Officers.

S.C. Jur. Charities Section 44, Benefit Corporations‑Accountability.

S.C. Jur. Hospitals Section 4, Administrator.

Forms

South Carolina Legal and Business Forms Section 1:227 , Officers‑Appointment.

NOTES OF DECISIONS

In general 1

1. In general

President’s unilateral decision to file a voluntary Chapter 7 petition for debtor‑corporation was an unauthorized corporate act under South Carolina law, warranting dismissal of the case, where neither debtor’s articles of incorporation nor its bylaws contained any authorization for its president to file a petition, there was no shareholders’ agreement granting president such authority, and no evidence was presented to the court indicating that president’s filing was ratified by the other director. In re Elgin’s Paint & Body Shop, Inc. (Bkrtcy.D.S.C. 2000) 249 B.R. 110. Bankruptcy 2256

**SECTION 33‑8‑420.** Standards of conduct for officers.

 (a) An officer with discretionary authority shall discharge his duties under that authority:

 (1) in good faith;

 (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

 (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.

 (b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

 (1) one or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

 (2) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person’s professional or expert competence.

 (c) An officer is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

 (d) An officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section.

 (e) An action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

HISTORY: Derived from 1976 Code Section 33‑13‑150 [1962 Code Section 12‑18.15; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

This section provides that a non‑director officer with discretionary authority must meet the same standards of conduct required of directors under section 8.30 (Section 33‑8‑300). But his ability to rely on information, reports, or statements, may, depending upon the circumstances of the particular case, be more limited than in the case of a director in view of the greater obligation he may have to be familiar with the affairs of the corporation. See section 8.42(b) (Section 33‑8‑420(b)). Non‑director officers with more limited discretionary authority may be judged by a narrower standard, though every corporate officer or agent owes duties of fidelity, honesty, good faith, and fair dealing to the corporation. The Official Comment to section 8.30 (Section 33‑8‑300) is generally applicable to non‑director officers as well as to directors.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section basically applies the standard of Section 33‑8‑300 to officers. The South Carolina Reporters’ Comments to Section 33‑8‑300 apply.

DERIVATION: 1984 Model Act Section 8.42.

CROSS REFERENCES

Appointment of officers, see Section 33‑8‑400.

Director conflict of interest, see Section 33‑8‑310.

Duties of officers, see Section 33‑8‑410.

Indemnification, see Sections 33‑8‑500 through 33‑8‑580.

Officer liability for benefit corporation, see Section 33‑38‑420.

Removal of officers, see Section 33‑8‑430.

Standards of conduct for directors, see Section 33‑8‑300.

Library References

Corporations 307, 310, 319(4), 320(3).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 475 to 489.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 92, Negligence.

S.C. Jur. Charities Section 44, Benefit Corporations‑Accountability.

S.C. Jur. Limitation of Actions Section 43, Corporations.

Forms

South Carolina Legal and Business Forms Section 1:20 , Officers.

NOTES OF DECISIONS

In general 1

Civil conspiracy 2.5

Fiduciary duties 4

Limitations 3

Review 5

Tortious interference 2

1. In general

Under both North and South Carolina law, general manager with total authority and decision making power over corporation constitutes a corporate “officer,” regardless of his title. In re Congaree Triton Acquisitions, LLC (Bkrtcy.D.S.C. 2014) 512 B.R. 578. Fraud 7

Special referee’s finding that family member owners of auto‑service company did not violate public policy and wrongfully and constructively discharge minority shareholder from his employment with company was supported by the evidence, including testimony of minority shareholder’s mother, father, and sister that minority shareholder stopped working voluntarily. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Labor And Employment 782

Minority shareholder was liable to family member owners of auto‑service company for conversion, based on minority shareholder retaining attorney to represent himself, not company, and paying attorney with company funds. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Conversion And Civil Theft 106

Minority shareholder was liable to family member owners of auto‑service company for conversion based on his scheme involving used commercial tires, in which he recorded fake inventory and then paid himself for it. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Corporations and Business Organizations 1556

The General Assembly intended the South Carolina Business Corporation Act to codify the common law duties owed to shareholders by officers and directors, and thus, stockholders’ breach of fiduciary duty claim brought against corporate officer was required to be brought within the statute’s terms. Clearwater Trust v. Bunting (S.C. 2006) 367 S.C. 340, 626 S.E.2d 334. Corporations And Business Organizations 1721; Corporations And Business Organizations 1930

Issue as to whether any of the alleged statements made by corporate officers to investor were misleading was for the jury in fraud action brought by investor who had invested $100,000 in corporation for computers and personnel but who later discovered the corporate officers had used the investment to pay back loans to themselves that they had made to the corporation. Brown v. Stewart (S.C.App. 2001) 348 S.C. 33, 557 S.E.2d 676, rehearing denied, certiorari denied. Fraud 64(3)

Sufficient evidence supported jury finding that investor suffered damages when he relied on alleged misrepresentations of corporate officers; investor lost initial investment of $100,000, plus the amount of interest or gain he would have earned on the money had the corporation operated properly. Brown v. Stewart (S.C.App. 2001) 348 S.C. 33, 557 S.E.2d 676, rehearing denied, certiorari denied. Corporations And Business Organizations 1938(4)

2. Tortious interference

Investor’s lawsuit against corporate officers, and the subsequent restraining order which prevented officers from selling the corporation, did not constitute tortious interference with prospective contractual relations; investor’s sole purpose was to protect his rights as a minority shareholder, and officers did not challenge the restraining order. Brown v. Stewart (S.C.App. 2001) 348 S.C. 33, 557 S.E.2d 676, rehearing denied, certiorari denied. Torts 242

2.5. Civil conspiracy

Special referee’s finding that family member owners of auto‑service company did not engage in civil conspiracy to loot company at expense of minority shareholder was supported by the evidence, including testimony provided by family member owners, company accountant, and others. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Conspiracy 19

3. Limitations

Stockholders’ action against corporate officer for breach of his fiduciary duty in regards to the corporation’s purchase of stockholders’ shares was precluded by the statute of limitations, where the stockholders’ commenced their action more than two years after the discovery of the alleged breach. Clearwater Trust v. Bunting (S.C. 2006) 367 S.C. 340, 626 S.E.2d 334. Corporations And Business Organizations 1934

4. Fiduciary duties

Senior executives’ fiduciary duty to disclose truthful and accurate information about corporation’s financial health was owed to corporation, not individually to shareholder who sought to recover personally for loss in value of his stock that he refrained from selling in reliance on executives’ alleged misrepresentations, thus barring shareholder’s individual cause of action, under North Carolina and South Carolina law, on grounds that special duty exception to general rule against individual suits for injuries to corporation did not apply, where shareholder was only one of many shareholders to receive or rely on executives’ alleged misrepresentations. Rivers v. Wachovia Corp. (C.A.4 (S.C.) 2011) 665 F.3d 610. Corporations and Business Organizations 2079

Under South Carolina law, there was sufficient evidence to support jury’s finding that trailer leasing company’s vice president violated his fiduciary duties to company in connection with his dealings with competitor, despite vice president’s contentions that his actions were consistent with company’s best interests and that he made business judgments that were within his discretion, in light of evidence that vice president approved falsified credit requests and leased trailers to competitor at prices below market value, that he colluded with manager in falsely informing company’s customers that competitor was sister company, and that vice president falsely told one customer that his account had been sold to competitor and to remit further payments subject to its terms. GTR Rental, LLC v. DalCanton, 2008, 547 F.Supp.2d 510, entered. Corporations And Business Organizations 1882

Under North Carolina law, individual may owe a fiduciary duty to corporation if he is considered to be a de facto officer or director, with authority for tasks such as signing tax returns, offering major input as to company’s formation and operation, or managing company. In re Congaree Triton Acquisitions, LLC (Bkrtcy.D.S.C. 2014) 512 B.R. 578. Corporations and Business Organizations 1841

Allegations in Chapter 7 trustee’s complaint, that defendants were managers of corporations with full and total control over corporate operations and management, including retention and dismissal of employees, adjustment of salaries and compensation, and any expenditures relating to day to day operation of companies, alleged facts plausibly indicating existence of relationship of special confidence, of kind sufficient to give rise to common law fiduciary duties on managers part with respect to their performance of duties as managers, regardless of whether they qualified as officers of corporations. In re Congaree Triton Acquisitions, LLC (Bkrtcy.D.S.C. 2014) 512 B.R. 578. Bankruptcy 2154.1

Trustee of Chapter 7 estate of debtor that, as part of transaction by which it acquired corporate assets, also acquired corporations’ breach of fiduciary duty claims against managers that exercised control over corporate operations and management, could pursue these breach of fiduciary duty claims, as assets of Chapter 7 estate, though managers’ fiduciary duties ran to corporations and not to debtor. In re Congaree Triton Acquisitions, LLC (Bkrtcy.D.S.C. 2014) 512 B.R. 578. Corporations And Business Organizations 1801

Allegations in Chapter 7 trustee’s complaint, that defendants were managers of corporations with full and total control over corporate operations and management, including retention and dismissal of employees, adjustment of salaries and compensation, and any expenditures relating to day to day operation of companies, alleged facts plausibly indicating that defendants, whatever their title, were corporate “officers,” that owed fiduciary duties of loyalty and due care to companies. In re Congaree Triton Acquisitions, LLC (Bkrtcy.D.S.C. 2014) 512 B.R. 578. Corporations and Business Organizations 1843; Corporations and Business Organizations 1845

A breach of the fiduciary duty owed by controlling shareholders of a corporation to minority shareholders must be pursued through a derivative, and not an individual, action. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Corporations and Business Organizations 2179

Special referee’s finding that family member owners of auto‑service company did not breach fiduciary duty to minority shareholder was supported by the evidence, including evidence that minority shareholder perpetrated the fraudulent activities that he complained about in his action for breach of fiduciary duty, including filing inaccurate tax returns, that family member owners did not know he was taking actions that were fraudulent, and that fraudulent tax returns impacted all shares in corporation equally. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Corporations and Business Organizations 1526(3)

5. Review

Minority shareholder’s appeal, in shareholder’s action against auto‑service company and others, was proper as to special referee’s finding that accountant aided and abetted company owners in breaching their fiduciary duty to shareholders, despite fact that shareholder did not attach copy of order relating to accountant until he filed second amended notice of appeal more than 30 days after underlying order had been filed, where shareholder added accountant as respondent within 30 days of underlying order, and accountant thus at least had notice he was a party to the appeal within the time required to file an appeal from the special referee’s decision. Mason v. Mason (S.C.App. 2015) 412 S.C. 28, 770 S.E.2d 405, rehearing denied, certiorari dismissed. Appeal and Error 422

**SECTION 33‑8‑430.** Resignation and removal of officers.

 (a) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the notice specifies a later effective date. If a resignation is made effective at a later date and the corporation accepts the future effective date, its board of directors may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date.

 (b) A board of directors may remove any officer, except an officer elected by the shareholders pursuant to the articles of incorporation, the bylaws, or a shareholder agreement, at any time with or without cause. An officer elected by the shareholders pursuant to the articles of incorporation, the bylaws, or a shareholder agreement may be removed only by the shareholders entitled to elect that officer.

HISTORY: Derived from 1976 Code Section 33‑13‑140 [1962 Code Section 12‑18.14; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.43(a) (Section 33‑8‑430(a)) is declaratory of current law. It recognizes that corporate officers may resign, that, with the consent of the board of directors, they may resign effective at a later date, and that the board of directors may fill a future vacancy to become effective as of the effective date of the resignation.

In part because of the unlimited power of removal, confirmed by section 8.43(b) (Section 33‑8‑430(b)), a board of directors may grant an officer an employment contract that extends beyond the term of the board of directors. This type of contract is binding on the corporation even if the articles of incorporation or bylaws provide that officers are appointed for a term shorter than the period of the employment contract. If a later board of directors refuses to reappoint that person as an officer, he has the right to sue for damages but not for specific performance of his employment contract.

Section 8.43(b) (Section 33‑8‑430(b)) is also declaratory of current law. The tenure of all corporate officers is subject to the will of the board of directors. If the board of directors loses confidence in a corporate officer, that officer may be removed irrespective of contract rights or the presence or absence of “cause” in a legal sense. Section 8.44 (Section 33‑8‑440) provides that removal of an officer who has contract rights is without prejudice to whatever rights the former officer may assert in a suit for damages for breach of contract.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Official Text of the Model Act eliminated the power of shareholders to protect an officer they appoint from removal by the board contained in Section 33‑13‑140(a)(1) of the 1981 South Carolina Business Corporation Act. This right was carried forward into this act by adding the second sentence to subsection (b).

DERIVATION: 1984 Model Act Section 8.43.

CROSS REFERENCES

Contract rights of officers, see Section 33‑8‑440.

“Deliver” includes mail, see Section 33‑1‑400.

Effective date of notice, see Section 33‑1‑410.

Notice to the corporation, see Section 33‑1‑410.

Library References

Corporations 292, 294.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 452, 454.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:20 , Officers.

South Carolina Legal and Business Forms Section 1:228 , Officers‑Resignation and Removal.

South Carolina Legal and Business Forms Section 1:296 , Resolution of Board of Directors‑Removal of Officer.

**SECTION 33‑8‑440.** Contract rights of officers.

 (a) The appointment of an officer does not itself create contract rights.

 (b) An officer’s removal does not affect the officer’s contract rights, if any, with the corporation. An officer’s resignation does not affect the corporation’s contract rights, if any, with the officer.

HISTORY: Derived from 1976 Code Section 33‑13‑140 [1962 Code Section 12‑18.14; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.43 (Section 33‑8‑430) makes clear that the appointment of an officer does not itself create contract rights in the officer. The removal of an officer with contract rights is without prejudice to his later enforcement of contract rights in a suit for damages for breach of contract. See the Official Comment to section 8.43 (Section 33‑8‑430).

Similarly, an officer with an employment contract who prematurely resigns may be in breach of his employment contract. The mere appointment of an officer for a term does not create a contractual obligation on his part to complete the term.

SOUTH CAROLINA REPORTERS’ COMMENTS

No change in the prior law is made by this section.

DERIVATION: 1984 Model Act Section 8.44.

CROSS REFERENCES

Appointment of officers and assistant officers, see Section 33‑8‑400.

Resignation or removal of officers, see Section 33‑8‑430.

Library References

Corporations 291, 292, 294.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 450 to 452, 454.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:20 , Officers.

ARTICLE 5

Indemnification

CROSS REFERENCES

Application of this article to Special Purpose Reinsurance Vehicles, see Section 38‑14‑120.

**SECTION 33‑8‑500.** Article definitions.

 In this subchapter:

 (1) “Corporation” includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor’s existence ceased upon consummation of the transaction.

 (2) “Director” means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation’s request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation’s request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. “Director” includes, unless the context requires otherwise, the estate or personal representative of a director.

 (3) “Expenses” include counsel fees.

 (4) “Liability” means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

 (5) “Official capacity” means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an individual other than a director, as contemplated in Section 33‑8‑560, the office in a corporation held by the officer, or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. “Official capacity” does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

 (6) “Party” includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

 (7) “Proceeding” means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18.18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The definitions set forth in section 8.50 (Section 33‑8‑500) apply only to subchapter E (Article 5 of Chapter 8 of Title 33) and have no application elsewhere in the Model Act.

1. CORPORATION.

A special definition of “corporation” is included in subchapter E to make it clear that predecessor entities that have been absorbed in mergers or other transactions are included within the definition. It is probable that the same result would be reached for many transactions under section 11.06 (Section 33‑11‑106) (effect of merger or share exchange), which provides for the assumption of liabilities by operation of law upon a merger. The express responsibility of successor entities for the liabilities of their predecessors under this subchapter is broader than under section 11.06 (Section 33‑11‑106) and may impose liability on a successor although section 11.06 (Section 33‑11‑106) does not. Section 8.50(1) (Section 33‑8‑500(1)) is thus an essential aspect of the protection provided by this subchapter for persons eligible for indemnification.

2. DIRECTOR.

A special definition of “director” is included in Article 5 to make it clear that a person who is or was a director is covered by this subchapter while serving at the corporation’s request in another enterprise. The purpose of this definition is to give directors the benefits of the protection of this subchapter while serving at the corporation’s request in a responsible position in employee benefit plans, trade associations, nonprofit or charitable entities, foreign or domestic entities, and other kinds of profit or nonprofit ventures. A director serving at the corporation’s request in such a venture is viewed as acting as a director of the corporation for purposes of this subchapter even though he is also acting in some other capacity in the other venture.

The second sentence of section 8.50(2) (Section 33‑8‑500(2)) addresses the question of liabilities arising under the Employee Retirement Income Security Act (ERISA). It makes clear that a director who is serving as a fiduciary of an employee benefit plan is nevertheless viewed as acting as a director for purposes of this subchapter. Special treatment is felt to be necessary because of the broad definition of “fiduciary” in section 3(21) of ERISA, 29 U.S.C. Section 1002(21) (1974), and the requirement of section 404 (Section 1104(a)) that a “fiduciary” must discharge his duties “solely in the interest” of the participants and beneficiaries of the employee benefit plan. Decisions by a director serving as a fiduciary under the plan on questions regarding eligibility for benefits, investment decisions, and interpretation of plan provisions regarding qualifying service, years of service, and retroactivity are all subject to the protections of this subchapter. See also sections 8.50(4) and 8.51(b) (Sections 33‑8‑500(4) and 33‑8‑510(b)) of this subchapter. Similar provisions appear in the business corporation acts of New York, N.Y. BUS. CORP. LAW ANN. Section 723 (McKinney 1983), and Connecticut, CONN. GEN. STAT. ANN. Section 33‑320a (West Supp. 1981).

The estate or personal representative of a director is entitled to the rights of indemnification possessed by the director himself. See the last sentence of section 8.50(2) (Section 33‑8‑500(2)). The phrase, “unless the context requires otherwise,” was added to make clear that the estate or personal representative did not have the right to participate in directoral decisions whether to grant indemnification authorized in this subchapter.

3. EXPENSES.

“Expenses” is defined to include counsel fees to avoid repeated references to such fees every time” expenses” appears throughout the subchapter.

4. LIABILITY.

“Liability” is defined for convenience, to avoid repeated references to recoverable items throughout the subchapter. Even though the definition of “liability” includes both expenses and amounts paid to satisfy or to settle substantive claims, indemnification against substantive claims is not allowed in several provisions in Article 5. For example, indemnification in suits brought by or in the name of the corporation is limited to expenses. See section 8.51(e) (Section 33‑8‑510(e)).

The definition of “liability” permits the indemnification only of “reasonable expenses incurred.” The intention is that any portion of expenses falling outside the perimeter of reasonableness should not be indemnified, and that, if necessary, an allocation of expenses should be made. By contrast, unlike earlier versions of the Model Act and statutes of many states, section 8.50(4) (Section 33‑8‑500(4)) provides that amounts paid to settle or satisfy substantive claims are not subject to a reasonableness test. Since payment of these amounts is permissive—mandatory indemnification is available under section 8.52 (Section 33‑8‑520) only where the defendant is “wholly successful”—a special limitation of “reasonableness” for settlements is inappropriate. Further, it is undesirable to base the statutory test of power to indemnify on an affirmative finding that a settlement is reasonable. Indeed, the grant of authority to indemnify only those settlements that are “reasonable” would suggest an “all or nothing” approach inconsistent with the basic philosophy of indemnification of “reasonable” expenses.

“Penalties” and “fines” are expressly included within the definition of “liability” so that in appropriate cases these items may also be indemnified. See section 8.51 (Section 33‑8‑510). The purpose of this definition is to cover every type of monetary obligation that may be imposed upon a director, including civil penalties (which have been authorized in a number of recent statutes), restitution, and obligations to give notice (which are proposed as part of the revision of the federal criminal code). This definition also expressly includes the levy of the excise taxes under the Internal Revenue Code pursuant to ERISA within the definition of “fines.”

5. OFFICIAL CAPACITY.

The definition of “official capacity” is necessary because the term determines which of the two alternative standards of conduct set forth in section 8.51 (Section 33‑8‑510) applies: if action is taken in an “official capacity,” the person to be indemnified must have reasonably believed he was acting in the best interests of the corporation, while if the action in question was not taken in his “official capacity,” he need only have reasonably believed that the conduct was not opposed to the best interests of the corporation.

6. PARTY.

The definition of “party” establishes the basic coverage of the subchapter. The definition includes every individual “who was, is, or is threatened to be made a named defendant or respondent in a proceeding.” A person who is only called as a witness is not a “party” within this definition, and as specifically provided in section 8.58(b) (Section 33‑8‑580(b)), indemnification of this person is not limited by this subchapter.

7. PROCEEDING.

The broad definition of “proceeding” ensures that the benefits of this subchapter will be available to directors in new and unexpected, as well as traditional, types of proceedings whether civil, criminal, administrative, or investigative. It also includes appeals in lawsuits and petitions to review administrative actions.

SOUTH CAROLINA REPORTERS’ COMMENTS

In this litigious age, indemnification is a matter of keen importance to corporate fiduciaries. The issue, realistically, is not “whether,” but “under what circumstances.”

One of the major accomplishments of the 1981 revision of the corporate code was the adoption of a “state of the art” indemnification provision based on the Model Act.

Adoption of the 1984 Model Act’s indemnification provision verbatim continues the tradition. The revised act’s indemnification provision basically separates the parts of what was previously a single section of 1822 words. The aim is to provide a statute that is readable, supported by detailed comments, and one that gives reasonable protection to corporate directors, officers, and agents. By following the Model Act, South Carolina corporations and courts called on to interpret and apply the statute will be able to draw from the Official Comments and case law in other jurisdictions that likewise adopt the revision. A hoped‑for result is that there will be more certainty as to the indemnification rights of corporate fiduciaries, with less time and money spent on litigating.

DERIVATION: 1984 Model Act Section 8.50.

CROSS REFERENCES

Definitions, see Section 33‑1‑400.

Witness indemnification, see Section 33‑8‑580.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 34, Indemnification and the Corporation’s Duty to Individuals Regarding Liability Arising Out of the Individuals’ Conduct of the Corporation’s Business.

S.C. Jur. Attorney Fees Section 69, Strictly Construed Statutory Language.

**SECTION 33‑8‑510.** Authority to indemnify.

 (a) Except as provided in subsection (d), a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

 (1) he conducted himself in good faith; and

 (2) he reasonably believed:

 (i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interest; and

 (ii) in all other cases, that his conduct was at least not opposed to its best interest; and

 (3) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

 (b) A director’s conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

 (c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

 (d) A corporation may not indemnify a director under this section:

 (1) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

 (2) in connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

 (e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18.18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

1. Section 8.51(a)(Section 33‑8‑510(a)).

The standards for indemnification of directors contained in this subsection define the outer limits for which voluntary indemnification is permitted under the Model Act. Conduct which does not meet these standards is not eligible for voluntary indemnification under the Model Act, although court‑ordered indemnification may be available under section 8.54(2) (Section 33‑8‑540(2)). Conduct that falls within these outer limits does not automatically entitle directors to indemnification, although many corporations have adopted bylaw provisions that obligate the corporation to indemnify directors to the maximum extent permitted by statute. Absent such a bylaw provision, section 8.52 (Section 33‑8‑520) defines a much narrower area in which the directors are entitled as a matter of right to indemnification.

Some state statutes provide separate, but usually similarly worded, standards for indemnification in third‑party suits and indemnification in suits brought by or in the name of the corporation. The Model Act establishes a single uniform test to make clear that the outer limits of conduct for which indemnification is permitted should not be dependent on the type of proceeding in which the claim arises. To prevent circularity in recovery, however, section 8.51(e) (Section 33‑8‑510(e)) limits indemnification in connection with suits brought by or in the name of the corporation to expenses incurred and excludes amounts paid to settle or satisfy substantive claims.

The standards of conduct described in sections 8.51(a)(1) and 8.51(a)(2)(i) (Section 33‑8‑510(a)(1) and 33‑8‑510(a)(2)(i))—that a director’s conduct in his official capacity was in “good faith” and in the corporation’s “best interests”—is closely related to the basic standards of conduct imposed by section 8.30 (Section 33‑8‑300), but the two standards are not identical. No attempt is made to define “good faith,” a term used in both section 8.30 (Section 33‑8‑300) and section 8.51 (Section 33‑8‑510). The concept of good faith involves a subjective test, which would include “a mistake of judgment,” in the words of the Official Comment to section 8.30 (Section 33‑8‑300), even though made unwisely by objective standards. But the affirmative requirement of section 8.30 (Section 33‑8‑300)—that the “care of an ordinarily prudent person in a like position” be exercised—is not included in the standard of conduct for indemnification. On the other hand, section 8.51 (Section 33‑8‑510) requires that there be a “reasonable” belief on the part of the director in most instances, and in the case of criminal proceedings that there be no “reasonable” cause to believe the conduct was unlawful. Accordingly, it is possible that a director who has not acted “with the care an ordinarily prudent person in a like position would exercise under similar circumstances,” as required by section 8.30 (Section 33‑8‑300), could nevertheless be indemnified, if the standard of section 8.51 (Section 33‑8‑510) were met. As a corollary, it is clear that a director who has met the section 8.30 (Section 33‑8‑300) standards of conduct would be eligible in virtually every case to be indemnified under section 8.51 (Section 33‑8‑510).

Section 8.51(a)(2)(ii) (Section 33‑8‑510(a)(2)(ii)) requires, if a director is not acting in his official capacity, that his action be “at least not opposed to” the corporation’s best interests. This standard is applicable to the director when serving another entity at the request of the corporation or when sued simply because he is or was a director. The words “at least” were added to qualify “not opposed to” in order to make it clear that this test is an outer limit for conduct other than in an official capacity.

2. Section 8.51(b)(Section 33‑8‑510(b)).

This section makes clear that a director who is serving as a trustee or fiduciary for an employee benefit plant under ERISA meets the standard for indemnification under section 8.51(a) (Section 33‑8‑510(a)) if he reasonably believes his conduct was in the best interests of the participants in and beneficiaries of the plan. This standard is a specific application of the more general test that conduct not in official corporate capacity is indemnifiable if it is “at least not opposed to” the best interests of the corporation and provides a standard for indemnification that is consistent with the statutory policies embodied in ERISA. See the Official Comment to Section 8.50 (Section 33‑8‑500).

3. Section 8.51(c)(Section 33‑8‑510(c)).

The purpose of section 8.51(c) (Section 33‑8‑510(c)) is to reject the argument that indemnification is automatically improper whenever a proceeding has been terminated on a basis that does not exonerate the director claiming indemnification. Even though a final judgment or conviction is not automatically determinative of the issue whether the minimum standard of conduct was met, any judicial determination of substantive liability would in most instances be entitled to considerable weight. By the same token, it is clear that the termination of a proceeding by settlement or plea of nolo contendere should not of itself create a presumption either that conduct met or did not meet the standard of section 8.51 (Section 33‑8‑510). On the other hand, a final determination of nonliability or acquittal automatically entitles the director to indemnification of expenses under section 8.52 (Section 33‑8‑520).

Section 8.51(c) (Section 33‑8‑510(c)) applies expressly to indemnification expenses in derivative actions as well as to indemnification in third party suits. The most likely application of this subsection to derivative actions will be to settlements since a judgment or order would normally result in liability to the corporation and thereby preclude all indemnification under section 8.51(d) (Section 33‑8‑510(d)). In the rare event that a judgment or order entered against the director did not include a determination of liability to the corporation, the entry of the judgment or order would not be determinative that the director failed to meet the requisite standard of conduct.

4. Section 8.51(d)(Section 33‑8‑510(d)).

This subsection makes clear that indemnification is not permissible under section 8.51 (Section 33‑8‑510) in the face of a finding of improper conduct either because liability is imposed in favor of the corporation in a suit brought by or in its name or because there is a finding that the director improperly received a personal benefit as a result of his conduct. Indemnification under this subsection is prohibited if a director is adjudged liable in a derivative suit because it is believed that there should be no indemnification in this situation unless a court first finds it proper. Section 8.54 (Section 33‑8‑540) permits a director found liable to the corporation to petition a court for judicial determination of entitlement to indemnification. Voluntary indemnification is also prohibited if there has been an adjudication that a director improperly received a personal benefit, even if, for example, he acted in a manner not opposed to the best interests of the corporation. Improper use of inside information for personal benefit should not be an action for which the corporation may provide indemnification, even if the corporation was not thereby harmed. Although it is unlikely that a person found liable for receiving an improper personal benefit would be found to have met the statutory standard of conduct set forth in section 8.51(a)(2)(ii) (Section 33‑8‑510(a)(2)(ii)), this limitation is made explicit in section 8.51(d)(2) (Section 33‑8‑510(d)(2)). Recourse to a court under section 8.54 (Section 33‑8‑540) may also be appropriate in some improper benefit cases—for example, where it would be unfair for a small personal benefit to foreclose indemnification in an expensive and complicated matter.

5. Section 8.51(e)(Section 33‑8‑510(e)).

This subsection limits indemnification in suits brought by or in the right of the corporation to expenses incurred in connection with the proceeding. Its purpose is to avoid circularity that would be involved if a corporation seeks to indemnify a director for payments made in settlement by the director to the corporation. This subsection applies only to settlements since all indemnification is prohibited by section 8.51(d)(1) (Section 33‑8‑510(d)(1))—subject to the right to seek judicially approved indemnification under section 8.54 (Section 33‑8‑540)—in cases where a director is “adjudged” liable in the corporation.

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comment to Section 33‑8‑500.

DERIVATION: 1984 Model Act Section 8.51.

CROSS REFERENCES

Advance for expenses, see Section 33‑8‑530.

Court‑ordered indemnification, see Section 33‑8‑540.

Derivative proceedings, see Section 33‑7‑400.

Determination of indemnification, see Section 33‑8‑550.

“Expenses” defined, see Section 33‑8‑500.

Insurance, see Section 33‑8‑570.

“Liability” defined, see Section 33‑8‑500.

Mandatory indemnification, see Section 33‑8‑520.

“Official capacity” defined, see Section 33‑8‑500.

“Proceeding” defined, see Section 33‑8‑500.

Report to shareholders on indemnification, see Section 33‑16‑210.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Library References

Corporations 308(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 490, 530 to 532, 536.

RESEARCH REFERENCES

Forms

Am. Jur. Pl. & Pr. Forms Indemnity Section 1 , Introductory Comments.

South Carolina Legal and Business Forms Section 1:163 , Board of Directors‑Indemnification.

**SECTION 33‑8‑520.** Mandatory indemnification.

 Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18.18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 AJ No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.51 (Section 33‑8‑510) determines whether indemnification may be made voluntarily by a corporation if it elects to do so. Section 8.52 (Section 33‑8‑520) determines whether a corporation must indemnify a director for his expenses; in other words, section 8.52 creates a statutory right of indemnification in favor of the director who meets the requirements of that section. Enforcement of this right by judicial proceeding is specifically contemplated by section 8.54(1) (Section 33‑8‑540(1)), which also gives the director a statutory right to recover expenses incurred by him in enforcing his statutory right to indemnification under section 8.52 (Section 33‑8‑520).

The basic standard for mandatory indemnification is that the director has been “wholly successful, on the merits or otherwise,” in the defense of the proceeding. The word “wholly” is added to avoid the argument accepted in Merritt‑Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del 1974), that a defendant may be entitled to partial mandatory indemnification if he succeeded by plea bargaining or otherwise to obtain the dismissal of some but not all counts of an indictment. A defendant is “wholly successful” only if the entire proceeding is disposed of on a basis which involves a finding of nonliability. However, the language in earlier versions of the Model Act and in many other state statutes that the basis of success may be “on the merits or otherwise” is retained. While this standard may result in an occasional defendant becoming entitled to indemnification because of procedural defenses not related to the merits—e.g., the statute of limitations or disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits in order to establish eligibility for mandatory indemnification.

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comment to Section 33‑8‑500.

DERIVATION: 1984 Model Act Section 8.52.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Court‑ordered indemnification, see Section 33‑8‑540.

“Expenses” defined, see Section 33‑8‑500.

Indemnification of officers, employees, and agents, see Section 33‑8‑560.

Insurance, see Section 33‑8‑570.

“Party” defined, see Section 33‑8‑500.

“Proceeding” defined, see Section 33‑8‑500.

Report to shareholders on indemnification, see Section 33‑16‑210.

Voluntary indemnification, see Section 33‑8‑510.

Library References

Corporations 308(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 490, 530 to 532, 536.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 34, Indemnification and the Corporation’s Duty to Individuals Regarding Liability Arising Out of the Individuals’ Conduct of the Corporation’s Business.

Forms

South Carolina Legal and Business Forms Section 1:163 , Board of Directors‑Indemnification.

Notes of Decisions

In general 1

1. In general

Under South Carolina law, District Court would limit use of settlement proceeds to defense costs accrued and payment of judgment in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action against insured, in approving settlement between insured corporation and liability insurer, until such time as the insured corporation’s directors were wholly successful in defending themselves in separate action brought against directors by third party. Ross Development Corp. v. Fireman’s Fund Ins. Co., 2011, 809 F.Supp.2d 449. Insurance 3392

**SECTION 33‑8‑530.** Advance for expenses.

 (a) A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

 (1) the director furnishes the corporation a written affirmation of his good faith belief that he has met the standard of conduct described in Section 33‑8‑510;

 (2) the director furnishes the corporation a written undertaking, executed personally or on his behalf, to repay the advance if it is ultimately determined that he did not meet the standard of conduct; and

 (3) a determination is made that the facts then known to those making the determination would not preclude indemnification under this subchapter.

 (b) The undertaking required by subsection (a)(2) must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

 (c) Determinations and authorizations of payments under this section must be made in the manner specified in Section 33‑8‑550.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18.18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

It is often critically important to a director who is made a party to a complex proceeding that the corporation he served have power to make advances for expenses at the beginning of and during the proceeding. Adequate legal representation and adequate preparation of a defense may require substantial payments of expenses before a final determination and unless the corporation may make advances of expenses, a defendant may be unable to finance his own defense. This problem is complicated by reason or the fact that during the early stages of a proceeding (when advances are often needed) the facts underlying the claim cannot be fully evaluated and the board of directors therefore cannot accurately ascertain the ultimate propriety of indemnification.

Section 8.53 (Section 33‑8‑530) establishes a workable standard: indemnification is permitted if the facts then known to those making the determination do not establish that indemnification would be precluded under section 8.51 (Section 33‑8‑510). The directors (or special legal counsel) making the determination under section 8.53(c) (Section 33‑8‑530(c)) would normally communicate with counsel and the persons monitoring the matter for the corporation in order to gain familiarity with the status of the proceeding and the relevant facts that have emerged, but it is not required (or expected) that any form of independent investigation be undertaken for purposes of the determination. Thus, an advance may be made under section 8.53 (Section 33‑8‑530) unless it becomes clear, from the facts at hand that indemnification under section 8.51 (Section 33‑8‑510) cannot be provided. As additional facts become known, a different determination may be required.

This section is a compromise between the view of some that advances should be made automatically at the claimant’s request and at any time before the litigation is terminated and the view of others that a special investigation should be made before each advance.

In addition to the requirement that the facts then known to those acting on the request for an advance do not preclude indemnification, section 8.53(a) (Section 33‑8‑530(a)) requires a written affirmation by the director of his good faith belief that he has met the standard of conduct necessary for indemnification by the corporation and a written undertaking by or on behalf of the director to repay the advance if it is ultimately determined that he has not met the standard of conduct. Under section 8.53(b) (Section 33‑8‑530(b)), the undertaking need not be secured and financial ability to repay is not a prerequisite. The theory underlying the subsection is that, in advancing expenses, wealthy directors should not be favored over directors whose financial resources are modest.

The limitations of section 8.53 (Section 33‑8‑530) apply only to persons who are directors at the time the advance is made. Thus the corporation may advance the expenses of former directors without obtaining the undertaking otherwise required by section 8.53(a)(1) or (2) (Section 33‑8‑530(a)(1) or (2)).

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comment to Section 33‑8‑500.

DERIVATION: 1984 Model Act Section 8.53.

CROSS REFERENCES

Determination of indemnification, see Section 33‑8‑550.

“Expenses” defined, see Section 33‑8‑500.

“Proceeding” defined, see Section 33‑8‑500.

Report to shareholders on indemnification, see Section 33‑16‑210.

Standard for indemnification, see Section 33‑8‑510.

Library References

Corporations 308(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 490, 530 to 532, 536.

**SECTION 33‑8‑540.** Court‑ordered indemnification.

 Unless a corporation’s articles of incorporation provide otherwise, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court after giving any notice the court considers necessary may order indemnification if it determines:

 (1) the director is entitled to mandatory indemnification under Section 33‑8‑520, in which case the court also shall order the corporation to pay the director’s reasonable expenses incurred to obtain court‑ordered indemnification; or

 (2) the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he met the standard of conduct set forth in Section 33‑8‑510 or was adjudged liable as described in Section 33‑8‑510(d), but if he was adjudged so liable his indemnification is limited to reasonable expenses incurred.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18.18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.54 (Section 33‑8‑540) permits court‑ordered indemnification in two situations: (1) a director entitled to mandatory indemnification may enforce that entitlement by judicial proceeding (in which case the court may also order the corporation to pay the reasonable expenses incurred in connection with the proceeding); and (2) indemnification at the court’s discretion is permitted in all cases whether or not the director met the requisite standard of conduct in section 8.51 (Section 33‑8‑510) or is otherwise ineligible for indemnification. But indemnification with respect to derivative suits or improper benefit is always limited to expenses by the last clause of section 8.54(2) (Section 33‑8‑540(2)).

Application for indemnification under section 8.54 (Section 33‑8‑540) may be made either to the court in which the proceeding was heard or to another court of appropriate jurisdiction. For example, a defendant in a criminal action who has been convicted but believes that indemnification would be proper could apply either to the court which heard the criminal action or bring an action against the corporation in another court. A decision by the board of directors not to oppose the request for indemnification is governed by the general standards of conduct found in section 8.30 (Section 33‑8‑300). Even if the corporation decided not to oppose the request, the court must satisfy itself that the person seeking indemnification is properly entitled to it.

A corporation may limit the right of a director under section 8.54 (Section 33‑8‑540) by a provision in its articles of incorporation. In the absence of such a provision, however, the court has general power to grant indemnification under this section.

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comment to Section 33‑8‑500.

DERIVATION: 1984 Model Act Section 8.54.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

“Expenses” defined, see Section 33‑8‑500.

Indemnification of officers, employees, and agents, see Section 33‑8‑560.

Mandatory indemnification, see Section 33‑8‑520.

“Party” defined, see Section 33‑8‑500.

“Proceeding” defined, see Section 33‑8‑500.

Report to shareholders on indemnification, see Section 33‑16‑210.

Voluntary indemnification, see Section 33‑8‑510.

Library References

Corporations 308(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 490, 530 to 532, 536.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 34, Indemnification and the Corporation’s Duty to Individuals Regarding Liability Arising Out of the Individuals’ Conduct of the Corporation’s Business.

**SECTION 33‑8‑550.** Determination and authorization of indemnification.

 (a) A corporation may not indemnify a director under Section 33‑8‑510 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because he has met the standard of conduct set forth in Section 33‑8‑510.

 (b) The determination must be made:

 (1) by the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

 (2) if a quorum cannot be obtained under subdivision (1), by majority vote of a committee duly designated by the board of directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding;

 (3) by special legal counsel:

 (i) selected by the board of directors or its committee in the manner prescribed in item (1) or (2); or

 (ii) if a quorum of the board of directors cannot be obtained under subdivision (1) and a committee cannot be designated under subdivision (2), selected by majority vote of the full board of directors (in which selection directors who are parties may participate); or

 (4) by the shareholders, but shares owned by or voted under the control of directors who are at the time parties to the proceeding may not be voted on the determination.

 (c) Authorization of indemnification and evaluation as to reasonableness of expenses must be made in the same manner as the determination that indemnification is permissible, except that, if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses must be made by those entitled under subsection (b)(3) to select counsel.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18.18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.55 (Section 33‑8‑550) provides the method for determining whether a corporation should voluntarily indemnify directors under section 8.51 (Section 33‑8‑510). In this section a distinction is made between a “determination” and an “authorization.” A “determination” involves a decision whether under the circumstances the person seeking indemnification has met the requisite standard of conduct under section 8.51 (Section 33‑8‑510) and is therefore eligible for indemnification. This decision may be made by the persons or groups described in section 8.55(b) (Section 33‑8‑550(b)). In addition, after a favorable “determination” is made, the corporation must “authorize” indemnification; this includes a review of the reasonableness of the expenses, the financial ability of the corporation to make the payment, and the judgment whether limited financial resources should be devoted to this or some other use by the corporation. Section 8.55(c) (Section 33‑8‑550(c)) provides that “authorization” of indemnification may be made only by the board of directors, by a committee of the board, or by the shareholders. While special legal counsel may make the “determination” of eligibility for indemnification, he may not “authorize” the indemnification.

Section 8.55(b) (Section 33‑8‑550(b)) establishes a procedure for selecting the person or persons who will make the determination of eligibility for indemnification. Even though directors who are parties to the proceeding may not participate in the decision determining eligibility for indemnification, they may, if necessary to permit valid action by the board of directors, participate in the decision establishing a committee of independent directors or selecting special legal counsel. Directors who are parties may also participate in the decision to “authorize” indemnification on the basis of a favorable “determination” if necessary to permit action by the board of directors. This limited participation of interested directors in the decision is justified by a principle of necessity.

Legal counsel authorized to make the required determination is referred to as “special legal counsel.” In earlier versions of the Model Act, and in the statutes of many states, he is referred to as “independent” legal counsel. The word “special” is felt to be more descriptive of the role to be performed and is not intended to indicate that the counsel selected should not be independent in accordance with governing legal precepts. “Special legal counsel” should normally be counsel having no prior professional relationship with those seeking indemnification, should be retained for the specific occasion, and should not be either inside counsel or regular outside counsel. It is important that the selection process be sufficiently flexible to permit selection of counsel in light of the particular circumstances and so that unnecessary expenses may be avoided. Hence the phrase “special legal counsel” is not defined in the statute.

Determinations by shareholders rather than by directors or special counsel are permitted by section 8.55(b)(4) (Section 33‑8‑550(b)(4)), but shares owned by or voted under the control of directors seeking indemnification may not be voted on the determination of eligibility for indemnification. This does not affect rules governing the determination of a quorum at the meeting.

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comment to Section 33‑8‑500.

DERIVATION: 1984 Model Act Section 8.55.

CROSS REFERENCES

Advance for expenses, see Section 33‑8‑530.

Committees, see Section 33‑8‑250.

“Party” defined, see Section 33‑8‑500.

“Proceeding” defined, see Section 33‑8‑500.

Quorum of directors, see Section 33‑8‑240.

Special meeting of shareholders, see Section 33‑7‑102.

Standard for indemnification, see Section 33‑8‑510.

Library References

Corporations 308(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 490, 530 to 532, 536.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 34, Indemnification and the Corporation’s Duty to Individuals Regarding Liability Arising Out of the Individuals’ Conduct of the Corporation’s Business.

**SECTION 33‑8‑560.** Indemnification of officers, employees, and agents.

 Unless a corporation’s articles of incorporation provide otherwise:

 (1) an officer of the corporation who is not a director is entitled to mandatory indemnification under Section 33‑8‑520, and is entitled to apply for court‑ordered indemnification under Section 33‑8‑540, in each case to the same extent as a director;

 (2) the corporation may indemnify and advance expenses under this subchapter to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director; and

 (3) a corporation also may indemnify and advance expenses to an officer, employee, or agent who is not a director to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18‑18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444 Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.56 (Section 33‑8‑560) correlates the general legal principles relating to the indemnification of officers, employees, and agents of the corporation with the limitations on indemnification in Article 5. This correlation may be summarized in general terms as follows:

(1) Article 5 (except for section 8.56 (Section 33‑8‑560)) applies only to, and limits the indemnification of, directors.

(2) An officer, agent or employee of a corporation who is not a director may be indemnified by the corporation on a discretionary basis to the same extent as though he were a director, and, in addition, may have additional indemnification rights apart from Article 5. (Sections 8.56(2) and (3) (Sections 33‑8‑560(2) and (3)).

(3) A director who is also an officer, employee, or agent of the corporation is limited to his indemnification rights under Article 5 and is therefore treated the same way as other directors. (Section 8.56(3) (Section 33‑8‑560(3)) by negative inference.) Such an officer‑director is limited to his rights under Article 5 even though he is sued solely in his capacity as an officer.

(4) An officer of the corporation (but not employees or agents generally) who is not a director has the mandatory right of indemnification granted to directors under section 8.52 (Section 33‑8‑520) and the right to apply for court‑ordered indemnification under section 8.54 (Section 33‑8‑540). (Section 8.56(1) (Section 33‑8‑560(1)).

1. Officers, Employees, or Agents Who Are Not Directors.

Section 8.56(3) (Section 33‑8‑560(3)) authorizes indemnification for officers, employees, and agents who are not directors, but neither requires nor prescribes standards for their indemnification and expressly states that their indemnification may be broader than the right of indemnification granted to directors by this Article. The rights of employees or agents may derive from principles of agency, the doctrine of respondeat superior, or collective bargaining or other contractual agreement, rather than from the statute. Indemnification of employees or agents may appropriately protect the person indemnified from liabilities incurred while serving at the corporation’s request as a director, officer, partner, trustee, or agent of another commercial, charitable, or nonprofit enterprise. See the definition of “director” in section 8.50(2) (Section 33‑8‑500(2)). But indemnification under section 8.56(3) (Section 33‑8‑560(3)) must ultimately be “consistent with law.” In effect, this leaves public policy determinations as to what are permissible limits, in a particular case, to the courts. For example, in Koster v. Warren, 297 F.2d 418, 423 (9th Cir. 1961), the court allowed indemnification of an officer and an employee, both of whom pleaded nolo contendere to an antitrust indictment at the corporation’s request, the court reasoning that they had foregone their personal right to defend for the corporation’s benefit. On the other hand, the court indicated in dictum that an agreement in advance by the corporation to indemnify anyone convicted of antitrust violations would be against public policy.

The board grant of indemnification in section 8.56(3) (Section 33‑8‑560(3)) may be limited by appropriate provisions in the articles of incorporation.

2. Directors Who Are Also Officers, Employees, Or Agents.

Section 8.56 (Section 33‑8‑560) provides that officers, employees, or agents who are also directors are subject to the same standards of indemnification as other directors. Consideration was given to whether these officer‑directors, if acting in their capacity as an officer but not as a director, should have the benefit of the additional flexibility afforded by section 8.56(3) (Section 33‑8‑560(3)) for officers who are not directors. It was concluded, however, that all directors should be treated alike; complications may be created if directors who are not officers have potentially less protection under the statute than directors who are officers. It would also be difficult in many instances to distinguish in what capacity an officer‑director is acting. Finally, this subchapter offers sufficient flexibility in indemnifying directors so that, as a practical matter, foreseeable problems for officer‑directors can be handled within the statutory framework.

3. Officers Who Are Not Directors.

Section 8.56(1) (Section 33‑8‑560(1)) grants non‑director officers the same mandatory rights to indemnification under section 8.52 (Section 33‑8‑520) (or to petition a court for indemnification under section 8.54 (Section 33‑8‑540)) as are granted directors. Thus, the net effect of section 8.56 (Section 33‑8‑560) is to provide officers with no less protection than is provided directors (including protection for service to third parties at the request of the corporation) and, additionally, to permit the corporation to provide broader indemnification for officers who are not directors.

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comment to Section 33‑8‑500.

DERIVATION: 1984 Model Act Section 8.56.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

“Employee” defined, see Section 33‑1‑400.

“Expenses” defined, see Section 33‑8‑500.

Official capacity, defined, see Section 33‑8‑500.

Standards of conduct for officers, see Section 33‑8‑420.

Library References

Corporations 308(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 490, 530 to 532, 536.

**SECTION 33‑8‑570.** Insurance.

 A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under Section 33‑8‑510 or 33‑8‑520.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18.18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 8.57 (Section 33‑8‑570) authorizes a corporation to purchase and maintain insurance on behalf of directors, officers, employees, or agents against liabilities imposed on them by reason of actions in their official capacity or arising from their service to the corporation or other entity at the corporation’s request. Insurance is not limited to claims against which corporations are entitled to indemnify under this Article. This insurance, usually referred to as “D & O Liability Insurance,” provides a useful supplement to the rights of indemnification created by this subchapter, providing a source of reimbursement for corporations who indemnify directors and others for conduct covered by the insurance, and protecting the insureds against the corporation’s failure to pay indemnification required or permitted by this subchapter. On the other hand, policies do not cover uninsurable events like self‑dealing, bad faith, knowing violations of the securities acts, or other willful misconduct. See generally Johnston, “Corporate Indemnification and Liability Insurance,” 33 BUS. LAW. 1993 (1978); Hinsey, “The New Lloyd’s Policy Form for Directors and Officers Liability Insurance—An Analysis,” 33 BUS. LAW. 1961 (1978).

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comment to Section 33‑8‑500.

DERIVATION: 1984 Model Act Section 8.57.

CROSS REFERENCES

“Director” defined, see Section 33‑8‑500.

“Liability” defined, see Section 33‑8‑500.

Mandatory indemnification, see Section 33‑8‑520.

“Official capacity” defined, see Section 33‑8‑500.

Standard for indemnification, see Section 33‑8‑510.

Library References

Insurance 2377.

Westlaw Topic No. 217.

C.J.S. Insurance Section 54.

**SECTION 33‑8‑580.** Application of article.

 (a) A provision treating a corporation’s indemnification of or advance for expenses to directors that is contained in its articles of incorporation, bylaws, a resolution of its shareholders or board of directors, or in a contract or otherwise is valid only if and to the extent the provision is consistent with this article. If articles of incorporation limit indemnification or advance for expenses, indemnification and advance for expenses are valid only to the extent consistent with the articles.

 (b) This article does not limit a corporation’s power to pay or reimburse expenses incurred by a director in connection with his appearance as a witness in a proceeding at a time when he has not been made a named defendant or respondent to the proceeding.

HISTORY: Derived from 1976 Code Section 33‑13‑180 [1962 Code Section 12‑18.18; 1962 (52) 1996; 1973 (58) 381; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑13‑190 [1962 Code Section 12‑18.19; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENTS

Section 8.58(a) (Section 33‑8‑580(a)) provides that a provision treating the indemnification of directors by the corporation in articles of incorporation, bylaws, shareholders’ or directors’ resolution, or contract “is valid only if and to the extent it is consistent with” this Article. Earlier versions of the Model Act and the statutes of many states provided that the statutory provisions were not “exclusive” and made no attempt to limit the nonstatutory creation of rights of indemnification. This kind of language is subject to misconstruction, however, since nonstatutory conceptions of public policy limit the power of a corporation to indemnify or to contract to indemnify directors, officers, employees, or agents.

The language of the first sentence of section 8.58(a) (Section 33‑8‑580(a)), “to the extent it is consistent with this subchapter,” is believed to be a more accurate description of the limited validity of nonstatutory indemnification provisions than the “nonexclusive” provisions of earlier versions of the Model Act. It is important to recognize that “to the extent it is consistent with” is not synonymous with “exclusive.” Situations may well develop from time to time in which indemnification is permissible under section 8.58 (Section 33‑8‑580) but would be precluded if all portions of subchapter E were viewed as exclusive. But indemnification provisions protecting against the consequences of bad faith or willful misconduct are not consistent with this subchapter and would not be valid. Furthermore, they would violate well‑understood principles of public policy and doubtless would be invalidated on that ground even under statutes purporting to make “nonexclusive” the statutory provisions for indemnification. To the extent the consistency language may preclude indemnification in circumstances where it is reasonable and violates no statutory policy, an escape valve is provided in section 8.55(2) (Section 33‑8‑550(2)) which authorizes a court to grant indemnification if a director “is fairly and reasonably entitled to indemnification to view of all the relevant circumstances,” even though he may not have fully met the standards of conduct set forth in section 8.51 (Section 33‑6‑510).

Section 8.58 (Section 33‑8‑580) does not preclude provisions in articles of incorporation, bylaws, resolutions, or contracts designed to provide procedural machinery different from that provided by section 8.55 (Section 33‑8‑550) or to make mandatory the permissive provisions of Article 5. For example, a corporation may properly obligate the board of directors to consider and act expeditiously on an application for indemnification or advances, or obligate the board of directors to cooperate in the procedural steps required to obtain a judicial determination under section 8.54 (Section 33‑8‑540).

Some corporations currently commit themselves, in one form or another, to indemnify directors to the fullest extent permitted by applicable law. These commitments are consistent with Article 5, subject to appropriate interpretation in light of the facts and circumstances of the particular case. Furthermore, a commitment to maintain liability insurance for a director, pursuant to section 8.57 (Section 33‑8‑570), is consistent with this Article.

The first sentence of section 8.58(a) (Section 33‑8‑580(a)) applies only to directors; it does not apply to officers, employees, or agents who are not directors. See section 8.56 (Section 33‑8‑560) and its Official Comment. The inherent problems of conflict of interest and the need to encourage persons to serve as directors are not present to the same degree in the case of non‑director officers, employees, or agents. The standard for permissible indemnification of these persons in section 8.56(3) (Section 33‑8‑560(3)) is “consistent with law” without regard to this subchapter.

Section 8.58(b) (Section 33‑8‑580(b)) is designed to make clear that Article 5 deals only with directors who are actual or prospective defendants or respondents in a proceeding, and that expenses incurred in connection with appearance as a witness may be indemnified without regard to the limitations of Article 5. Indeed, most of the standards described in sections 8.51 and 8.54 (Sections 33‑8‑510 and 33‑8‑540) by their own terms can have no meaningful application to a director whose only connection with a proceeding is that he has been called as a witness.

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comment to Section 33‑8‑500.

DERIVATION: 1984 Model Act Section 8.58.

CROSS REFERENCES

Advance for expenses, see Section 33‑8‑530.

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

“Director” defined, see Section 33‑8‑500.

Indemnification generally, see Sections 33‑8‑510 through 33‑8‑550.

“Party” defined, see Section 33‑8‑500.

“Proceeding” defined, see Section 33‑8‑500.

Library References

Corporations 308(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 490, 530 to 532, 536.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 34, Indemnification and the Corporation’s Duty to Individuals Regarding Liability Arising Out of the Individuals’ Conduct of the Corporation’s Business.

Forms

South Carolina Legal and Business Forms Section 1:163 , Board of Directors‑Indemnification.