



94TH GENERAL ASSEMBLY

State of Illinois

2005 and 2006

SB0533

Introduced 2/17/2005, by Sen. Ira I. Silverstein

SYNOPSIS AS INTRODUCED:

805 ILCS 5/7.90 new
805 ILCS 5/12.56

Amends the Business Corporation Act of 1983. Provides that unless otherwise provided in the articles of incorporation, a shareholder who executes and delivers to the corporation a written instrument irrevocably waiving the right (i) to vote any shares held by such shareholder, whether for the election of directors or otherwise, (ii) to be a director or officer of the corporation, and (iii) in any other manner to control, directly or indirectly, corporate actions or the election or removal of any director or officer of the corporation, and who at the time of such waiver is not a director or officer of the corporation, shall have no fiduciary duty to the corporation or any of its shareholders arising out of the fact that such person is a shareholder of the corporation. Provides that the corporation shall give prompt notice of such waiver to the remaining shareholders, except that no such notice need be given by a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association. Effective July 1, 2005.

LRB094 09955 RXD 40213 b

1 AN ACT concerning business.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 5. The Business Corporation Act of 1983 is amended
5 by changing Section 12.56 and adding Section 7.90 as follows:

6 (805 ILCS 5/7.90 new)

7 Sec. 7.90. Waiver.

8 (a) Unless otherwise provided in the articles of
9 incorporation, a shareholder who executes and delivers to the
10 corporation a written instrument irrevocably waiving the right
11 (i) to vote any shares held by such shareholder, whether for
12 the election of directors or otherwise, (ii) to be a director
13 or officer of the corporation, and (iii) in any other manner to
14 control, directly or indirectly, corporate actions or the
15 election or removal of any director or officer of the
16 corporation, and who at the time of such waiver is not a
17 director or officer of the corporation, shall have no fiduciary
18 duty to the corporation or any of its shareholders arising out
19 of the fact that such person is a shareholder of the
20 corporation. No such waiver shall affect any breach of
21 fiduciary duty arising prior to the effective date of the
22 waiver.

23 (b) The corporation shall give prompt notice of such waiver
24 to the remaining shareholders, except that no such notice need
25 be given by a corporation that has shares listed on a national
26 securities exchange or regularly traded in a market maintained
27 by one or more members of a national or affiliated securities
28 association.

29 (c) The waiver referred to in this Section shall not affect
30 any other rights or obligations of the shareholder, including
31 but not limited to the rights under Sections 7.80, 11.65,
32 11.70, 12.55 and 12.56 of this Act.

1 (d) Shares that cannot be voted because of a waiver under
2 this Section shall not be counted in determining the number of
3 shares necessary for a quorum or for shareholder action under
4 Section 7.60 of this Act. A waiver under this Section shall not
5 apply to any transferee of the shares.

6 (e) The waiver referred to in this Section is specifically
7 enforceable in accordance with the principles of equity.

8 (f) This Section is not intended to describe or suggest the
9 circumstances under which any fiduciary duty arises or exists,
10 including with respect to any shareholder who fails to make a
11 waiver under this Section.

12 (805 ILCS 5/12.56)

13 Sec. 12.56. Shareholder remedies: non-public corporations.

14 (a) In an action by a shareholder in a corporation that has
15 no shares listed on a national securities exchange or regularly
16 traded in a market maintained by one or more members of a
17 national or affiliated securities association, the Circuit
18 Court may order one or more of the remedies listed in
19 subsection (b) if it is established that:

20 (1) The directors are deadlocked, whether because of
21 even division in the number of directors or because of
22 greater than majority voting requirements in the articles
23 of incorporation or the by-laws or otherwise, in the
24 management of the corporate affairs; the shareholders are
25 unable to break the deadlock; and either irreparable injury
26 to the corporation is thereby caused or threatened or the
27 business of the corporation can no longer be conducted to
28 the general advantage of the shareholders; or

29 (2) The shareholders are deadlocked in voting power and
30 have failed, for a period that includes at least 2
31 consecutive annual meeting dates, to elect successors to
32 directors whose terms have expired and either irreparable
33 injury to the corporation is thereby caused or threatened
34 or the business of the corporation can no longer be
35 conducted to the general advantage of the shareholders; or

1 (3) The directors or those in control of the
2 corporation have acted, are acting, or will act in a manner
3 that is illegal, oppressive, or fraudulent with respect to
4 the petitioning shareholder whether in his or her capacity
5 as a shareholder, director, or officer; or

6 (4) The corporation assets are being misapplied or
7 wasted.

8 (b) The relief which the court may order in an action under
9 subsection (a) includes but is not limited to the following:

10 (1) The performance, prohibition, alteration, or
11 setting aside of any action of the corporation or of its
12 shareholders, directors, or officers of or any other party
13 to the proceedings;

14 (2) The cancellation or alteration of any provision in
15 the corporation's articles of incorporation or by-laws;

16 (3) The removal from office of any director or officer;

17 (4) The appointment of any individual as a director or
18 officer;

19 (5) An accounting with respect to any matter in
20 dispute;

21 (6) The appointment of a custodian to manage the
22 business and affairs of the corporation to serve for the
23 term and under the conditions prescribed by the court;

24 (7) The appointment of a provisional director to serve
25 for the term and under the conditions prescribed by the
26 court;

27 (8) The submission of the dispute to mediation or other
28 forms of non-binding alternative dispute resolution;

29 (9) The payment of dividends;

30 (10) The award of damages to any aggrieved party;

31 (11) The purchase by the corporation or one or more
32 other shareholders of all, but not less than all, of the
33 shares of the petitioning shareholder for their fair value
34 and on the terms determined under subsection (e); or

35 (12) The dissolution of the corporation if the court
36 determines that no remedy specified in subdivisions (1)

1 through (11) or other alternative remedy is sufficient to
2 resolve the matters in dispute. In determining whether to
3 dissolve the corporation, the court shall consider among
4 other relevant evidence the financial condition of the
5 corporation but may not refuse to dissolve the corporation
6 solely because it has accumulated earnings or current
7 operating profits.

8 (c) The remedies set forth in subsection (b) shall not be
9 exclusive of other legal and equitable remedies which the court
10 may impose.

11 (d) In determining the appropriate relief to order pursuant
12 to this Section, the court may take into consideration the
13 reasonable expectations of the corporation's shareholders as
14 they existed at the time the corporation was formed and
15 developed during the course of the shareholders' relationship
16 with the corporation and with each other.

17 (e) If the court orders a share purchase, it shall:

18 (i) Determine the fair value of the shares, with or
19 without the assistance of appraisers, taking into
20 account any impact on the value of the shares resulting
21 from the actions giving rise to a petition under this
22 Section;

23 (ii) Consider any financial or legal constraints
24 on the ability of the corporation or the purchasing
25 shareholder to purchase the shares;

26 (iii) Specify the terms of the purchase,
27 including, if appropriate, terms for installment
28 payments, interest at the rate and from the date
29 determined by the court to be equitable, subordination
30 of the purchase obligation to the rights of the
31 corporation's other creditors, security for a deferred
32 purchase price, and a covenant not to compete or other
33 restriction on the seller;

34 (iv) Require the seller to deliver all of his or
35 her shares to the purchaser upon receipt of the
36 purchase price or the first installment of the purchase

1 price; and

2 (v) Retain jurisdiction to enforce the purchase
3 order by, among other remedies, ordering the
4 corporation to be dissolved if the purchase is not
5 completed in accordance with the terms of the purchase
6 order.

7 The purchase ordered pursuant to this subsection (e) shall
8 be consummated within 20 days after the date the order becomes
9 final unless before that time the corporation files with the
10 court a notice of its intention to dissolve and articles of
11 dissolution are properly filed with the Secretary of State
12 within 50 days after filing the notice with the court.

13 After the purchase order is entered and before the purchase
14 price is fully paid, any party may petition the court to modify
15 the terms of the purchase and the court may do so if it finds
16 that such changes are equitable.

17 Unless the purchase order is modified by the court, the
18 selling shareholder shall have no further rights as a
19 shareholder from the date the seller delivers all of his or her
20 shares to the purchaser or such other date specified by the
21 court.

22 If the court orders shares to be purchased by one or more
23 other shareholders, in allocating the shares to be purchased by
24 the other shareholders, unless equity requires otherwise, the
25 court shall attempt to preserve the existing distribution of
26 voting rights and other designations, preferences,
27 qualifications, limitations, restrictions and special or
28 relative rights among the holders of the class or classes and
29 may direct that holders of a specific class or classes shall
30 not participate in the purchase.

31 (f) When the relief requested by the petition includes the
32 purchase of the petitioner's shares, then at ~~At~~ any time within
33 90 days after the filing of the petition under this Section, or
34 at such time determined by the court to be equitable, the
35 corporation or one or more shareholders may elect to purchase
36 all, but not less than all, of the shares owned by the

1 petitioning shareholder for their fair value. An election
2 pursuant to this Section shall state in writing the amount
3 which the electing party will pay for the shares.

4 (1) The election shall be irrevocable unless the court
5 determines that it is equitable to set aside or modify the
6 election.

7 (2) If the election to purchase is filed by one or more
8 shareholders, the corporation shall, within 10 days
9 thereafter, give written notice to all shareholders. The
10 notice must state: (i) the name and number of shares owned
11 by the petitioner; (ii) the name and number of shares owned
12 by each electing shareholder; and (iii) the amount which
13 each electing party will pay for the shares and must advise
14 the recipients of their right to join in the election to
15 purchase shares. Shareholders who wish to participate must
16 file notice of their intention to join in a purchase no
17 later than 30 days after the date of the notice to them or
18 at such time as the court in its discretion may allow. All
19 shareholders who have filed an election or notice of their
20 intention to participate in the election to purchase
21 thereby become parties to the proceeding and shall
22 participate in the purchase in proportion to their
23 ownership of shares as of the date the first election was
24 filed, unless they otherwise agree or the court otherwise
25 directs.

26 (3) The court in its discretion may allow the
27 corporation and all non-petitioning shareholders to file
28 an election to purchase the petitioning shareholder's
29 shares at a higher price. If the court does so, it shall
30 allow other shareholders an opportunity to join in the
31 purchase at the higher price in accordance with their
32 proportionate ownership interest.

33 (4) After an election has been filed by the corporation
34 or one or more shareholders, the proceeding filed under
35 this Section may not be discontinued or settled, nor may
36 the petitioning shareholder sell or otherwise dispose of

1 his or her shares, unless the court determines that it
2 would be equitable to the corporation and the shareholders,
3 other than the petitioner, to permit the discontinuance,
4 settlement, sale, or other disposition. In considering
5 whether equity exists to approve any settlement, the court
6 may take into consideration the reasonable expectations of
7 the shareholders as set forth in subsection (d), including
8 any existing agreement among the shareholders.

9 (5) If, within 30 days of the filing of the latest
10 election allowed by the court, the parties reach agreement
11 as to the fair value and terms of purchase of the
12 petitioner's shares, the court shall enter an order
13 directing the purchase of petitioner's shares upon the
14 terms and conditions agreed to by the parties.

15 (6) If the parties are unable to reach an agreement as
16 provided for in paragraph (5) of this subsection (f), the
17 court, upon application of any party, shall stay the
18 proceeding under subsection (a) and shall determine the
19 fair value of the petitioner's shares pursuant to
20 subsection (e) as of the day before the date on which the
21 petition under subsection (a) was filed or as of such other
22 date as the court deems appropriate under the
23 circumstances.

24 (g) In any proceeding under this Section, the court shall
25 allow reasonable compensation to the custodian, provisional
26 director, appraiser, or other such person appointed by the
27 court for services rendered and reimbursement or direct payment
28 of reasonable costs and expenses, which amounts shall be paid
29 by the corporation.

30 (Source: P.A. 89-169, eff. 7-19-95; 89-364, eff. 8-18-95;
31 89-626, eff. 8-9-96.)

32 Section 99. Effective date. This Act takes effect July 1,
33 2005.