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Curtis W. Huff

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CURTIS W. HUFF*

* B.A., J.D., University of New Mexico; LL.M., New York University School of Law; Attorney at Law, Fulbright & Jaworski, Houston, Texas.

I. INTRODUCTION

The Texas Legislature in its 1989 legislative session substantially amended the Texas Business Corporation Act (the "TBCA")[1] to modernize the merger provisions and to increase their usefulness in today's complex global economy. The amendments, which became effective on August 28, 1989, provide for: (1) technical changes intended to streamline and clarify the procedures necessary to effect mergers and acquisitions involving Texas corporations; and (2) the adoption of new and unprecedented provisions permitting Texas corporations to effect through the use of a statutory merger various corporate and commercial transactions that previously would have required multiple step transactions utilizing common law conveyancing procedures and share issuances and distributions.[2] Principal among the transactions now possible through the merger provisions of the TBCA include mergers with two or more resulting entities, a division of a single corporation into two or more entities, share exchanges between an acquiring corporation or entity and an acquired corporation without the requirement of an actual merger, and mergers of cor-

1. TEX. BUS. CORP. ACT ANN. arts. 1.01-5.16 (Vernon 1980 & Supp. 1990), *amended by* Tex. H.B. 472, 71st Leg. (1989). As of the date of this article, the amendments to the TBCA effected by House Bill 472 have not been published. These amendments will be included in the 1990 Cumulative Annual Pocket Part to Volume 3A of Vernon's Annotated Revised Texas Civil Statutes of the State of Texas. All references in this article to Vernon Supp. 1990 shall be to such supplement.

2. Tex. H.B. 472, 71st Leg. (1989). The amendments to the TBCA were proposed by the Business Law Section of the Texas Bar Association. *See* Annual Reports, 52 TEX. B.J. 145 (1989). In proposing these amendments, the Business Law Section emphasized the importance of maintaining modern corporation statutes in the State of Texas in order to attract and maintain the incorporation of corporations in the State. The author was a member of the subcommittee of the Corporation Law Committee of the Business Law Section of the State Bar of Texas that drafted the amendments to the merger provisions of the TBCA. Other members of that committee were J. Patrick Garrett, Thomas Baker, and T. William Porter.

porations with entities other than business corporations.[3] Other major changes to the merger provisions of the TBCA include the elimination of class voting for nonvoting shares in mergers where the class or series is not adversely affected, the elimination of the requirement of a shareholder vote for certain types of mergers, the elimination of dissenters' rights for certain types of mergers and the ability to effect downstream short-form mergers.[4] Although the benefits of many of the new Texas merger provisions may not be fully realized until such time that other jurisdictions provide for similar changes, the amendments significantly enhance the ability of Texas corporations to engage in merger and acquisition transactions and to more efficiently allocate their assets.[5] The TBCA amendments also place Texas in the forefront of all jurisdictions with respect to the laws governing merger transactions and will provide a framework under which Texas corporations can engage in commercial transactions as we move into the twenty-first century.[6]

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3. *See infra* notes 23 through 116 and accompanying text.

4. *See infra* notes 117 through 168 and accompanying text.

5. Many of the changes made to the merger provisions in the 1989 Legislative session reflect suggestions proposed by J. Patrick Garrett in *Merger Meets the Common Law*, 63 TEX. L. REV. 1509 (1985). In that article, Mr. Garrett stated most succinctly the purpose and goals of the new merger provisions as follows:

> What is important in a transaction is its effect, not the means of its accomplishment. If the effect may be accomplished, why worry about the structure? If the effect may be accomplished by one structure, why prohibit its accomplishment by others? In corporate combinations under the RMBCA [the Revised Model Business Corporation Act], a shareholder vote is required for one transaction but not for another; the number of surviving corporations may be one but not more; and all assets and all liabilities may vest in only one survivor. [footnote omitted] As alternatives to these corporate combination transactions, a corporation may make an acquisition in numerous ways without triggering a shareholder vote. By transfers of assets and assumptions of liabilities, the substance of a corporation may be placed where it makes economic sense.
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> Meaningless restrictions in a corporate combination statute prevent its complete evolution. The statute should not impose restrictions that limit the permissible breadth of transactions when substantially the same effects may be accomplished by differently denominated processes free of such restrictions.

63 TEX. LAW REV. 1509, 1519 (1985). The new Texas merger provisions embrace Mr. Garrett's proposal that the corporation statutes should provide greater flexibility and not impose meaningless restrictions on transactions that may be accomplished through other forms and provide a framework for the future evolution of the TBCA.

6. The 1989 amendments to the merger provisions of the TBCA represent a continuing recognition by the Texas Legislature of the need for the State of Texas to provide responsive laws for the needs of corporations and businesses in today's complex economic environment. Furthermore, the amendments help make Texas a more hospitable jurisdiction in which to incorporate and do business. In addition to the recent amendments to the merger provisions of

II. GENERAL STATUTORY FRAMEWORK

The new merger provisions are codified in Part 5 of the TBCA.[7] Part 5 contains 15 separate articles governing various aspects of merger and acquisition transactions involving Texas corporations and certain related matters. Article 5.01[8] authorizes Texas corporations to merge with corporations and other entities. Article 5.02[9] sets forth the primary authorization for Texas corporations to engage in share exchanges with other corporations and entities. Article 5.03[10] details the requirements for board of directors and shareholder approval of a merger or share exchange. Articles 5.04 through 5.06[11] detail the requirements for articles of merger or exchange and the effect of a merger or share exchange. Articles 5.08 through 5.10[12] govern conveyances and sales of assets, and regulate when shareholder approval is required for such transactions.[13] Articles 5.11 through 5.13[14] relate

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the TBCA, the Legislature over the last two legislative sessions has adopted various amendments to the TBCA that have modernized the law as to distributions, clarified when shareholder approval is necessary for the sale of assets by a corporation, codified the limited liability of shareholders for obligations of a corporation and permitted the limitation of liability of directors and expanded the right of indemnification thereof. TEX. BUS. CORP. ACT ANN. arts. 2.38-1 to -4 (Vernon Supp. 1989)(shareholder distributions); TEX. BUS. CORP. ACT ANN. art. 5.09 (Vernon 1980 & Supp. 1989)(sale of assets); TEX. BUS. CORP. ACT ANN. art. 2.21 (Vernon 1980 & Supp. 1989)(shareholder liability); TEX. BUS. CORP. ACT ANN. art. 2.02-1 (Vernon Supp. 1989) (indemnification); TEX. MISC. CORP. LAWS ACT art. 1302-7.06 (Vernon Supp. 1989)(limitation of liability). The Legislature has also established criteria for the enforceability of covenants not to compete and adopted the Uniform Fraudulent Transfer Act and the Texas Revised Limited Partnership Act. TEX. BUS. & COMM. CODE ANN. §§ 15.50-15.51 (Vernon Supp. 1990)(covenants not to compete); TEX. BUS. & COM. CODE ANN. §§ 24.001-24.013 (Vernon 1987)(Uniform Fraudulent Transfer Act); TEX. REV. CIV. STAT. ANN. art. 6132a-1 (Vernon Supp. 1989)(Texas Revised Limited Partnership Act). Many of these changes were sponsored or supported by Representative Steve Wollens, Chairman of the Business and Commerce Committee of the House of Representatives, and Senator O. H. Harris, Chairman of the Committee on Economic Development of the Texas Senate, whose efforts to modernize the commercial laws of the State of Texas are widely recognized.

7. TEX. BUS. CORP. ACT ANN. arts. 5.01-5.16 (Vernon 1980 & Supp. 1990).

8. *Id.* art. 5.01 (Vernon Supp. 1990).

9. *Id.* art. 5.02.

10. *Id.* art. 5.03.

11. *Id.* arts. 5.04-5.06.

12. TEX. BUS. CORP. ACT ANN. arts. 5.08-.10 (Vernon 1980 & Supp. 1989).

13. *Id.* art. 5.09. Among the more notable amendments made to the TBCA in recent years is the 1987 amendment to article 5.09 relating to when shareholder approval is necessary for the sale of all or substantially all the assets of a corporation. Prior to 1987, based primarily on Delaware case law, sales by a corporation of assets constituting more than 50% of a corporation's assets or revenues presented questions as to whether shareholder approval was necessary for the transaction even though the corporation may have intended to remain in business

to the rights of dissent and appraisal of shareholders to mergers, share exchanges, and sales of assets. Article 5.14[15] sets forth the prerequisites for shareholder derivative lawsuits. Article 5.15[16] relates to the effect of the provisions of Part 5 on the rights of creditors and the antitrust laws, while Article 5.16[17] governs short-form mergers between a corporation and a 90% or more owned subsidiary.

Article 1.02A of the TBCA contains certain definitions necessary for the application of the provisions of Part 5. Article 1.02A(11)[18] provides the definition of a "merger." This definition, which sets the foundation for Part 5 of the TBCA, includes both traditional forms of mergers and new forms of mergers involving more than one new or surviving corporation or other entity, mergers with entities other than business corporations, and mergers in the form of a division of a single corporation into two or more new or surviving corporations or other entities.[19] Article 1.02A(13)[20] defines an "other entity." This section defines the entities other than business corporations that may merge with a Texas corporation. The "other entities" include limited

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and reinvest the proceeds of the sale. *See* Gimbel v. Signal Cos., 316 A.2d 599, 605 (Del. Ch. 1974), *aff'd in part*, 316 A.2d 619 (Del. 1974); *cf.* Governing Bd. v. Pannill, 659 S.W.2d 670, 680-82 (Tex. App. 1983, writ ref'd n.r.e.). To remove this ambiguity and to provide Texas corporations with greater certainty in structuring asset transactions, article 5.09 was amended in 1987. As a result of such amendment, shareholder approval will not be necessary for a sale of all or substantially all of a corporation's assets if the corporation, after the disposition, continues to directly or indirectly engage in one or more businesses or the corporation applies a portion of the consideration received to the conduct of a business in which it engages following the transaction. TEX. BUS. CORP. ACT ANN. art. 5.09 (Vernon Supp. 1990). As a result of this amendment, the law will not require shareholder approval of an asset disposition except where the corporation liquidates and ceases to do business after the disposition.

14. TEX. BUS. CORP. ACT ANN. arts. 5.11-5.12 (Vernon Supp. 1990) & art. 5.13 (Vernon 1980 & Supp. 1989).

15. *Id.* art. 5.14 (Vernon Supp. 1990).

16. *Id.* art. 5.15.

17. *Id.* art. 5.16.

18. TEX. BUS. CORP. ACT ANN. art. 1.02A(11) (Vernon Supp. 1990).

19. *Id.* Article 1.02A(11) of the TBCA defines a merger as:

> (a) the division of a domestic corporation into two or more new domestic corporations or into a surviving corporation and one or more new domestic or foreign corporations or other entities, or (b) the combination of one or more domestic corporations with one or more domestic or foreign corporations or other entities resulting in (1) one or more surviving domestic or foreign corporations or other entities, (2) the creation of one or more new domestic or foreign corporations or other entities, or (3) one or more surviving domestic or foreign corporations or other entities and the creation of one or more new domestic or foreign corporations or other entities.

Id.

20. *Id.* art. 1.02A(13).

and general partnerships, joint ventures, joint stock companies, cooperatives, associations, banks, and insurance companies.[21] The definition also includes other legal entities organized pursuant to the laws of the State of Texas or any other state or country to the extent such laws or the constituent documents under which that entity was organized or incorporated, not inconsistent with such laws, permit that entity to enter into a merger or share exchange as permitted by Part 5 of the TBCA.[22]

III. Mergers with Multiple Surviving Corporations

A. *General Information and Purpose of Statute*

The most far reaching and innovative changes to the merger provisions of the TBCA enacted by the 1989 Texas Legislature are the amendments permitting multiple surviving or new corporations or entities in a merger. Additional related changes include provisions permitting a single corporation to adopt a plan of merger providing a division of that corporation's assets and liabilities among two or more resulting corporations or other entities. Currently, only one other United States jurisdiction, Pennsylvania,[23] provides a statutory mechanism by which more than one corporation or other entity may survive or be created in a merger or by which a single corporation may divide its assets and liabilities among two or more corporations or other entities. Traditionally, if parties to a plan of merger wanted to place certain assets and liabilities of one of the constituent corporations in another entity and distribute the ownership interests of that entity to the shareholders of one or more of the parties to the merger, the transaction had to be effected through multiple steps utilizing

21. *Id.*

22. *Id.*

23. *See* 15 PA. CONS. STAT. ANN. §§ 1951-1960 (Purdon's 1989 Pamphlet). The Pennsylvania statute, which became effective on October 1, 1989, permits the division of a single corporation into two or more corporations, but does not contemplate the possibility of a division of a corporation in connection with a merger. Although the Pennsylvania statute differs in various respects from the TBCA provisions permitting divisions and mergers with multiple survivors, their effects are substantially similar. Both the TBCA and Pennsylvania statutes permit the allocation of assets and liabilities of the constituent corporation or corporations among the surviving or new entities. They also permit the division of the equity interests in the surviving entities among the shareholders of the corporation or corporations to be divided. Furthermore, they reflect a legislative recognition that the corporation laws of those jurisdictions should not restrict transactions that may be effected through other forms and that the goals of such laws should be to provide corporations with flexibility to operate.

common law conveyancing of assets, assumption of liabilities and distributions to shareholders in connection with the merger.[24] Similarly, under prior law, if a single corporation wanted to divide its businesses and operations into two or more separate corporations or other entities and distribute the ownership interest to its shareholders, the transaction had to be effected through a traditional "spin-off" of the new corporation or entity after transferring the desired assets to the spin-off corporation or entity.[25] Both of these transactions, as well as many other complex acquisition and restructuring transactions, may now be effected under the TBCA by a statutory merger. The new provisions will no longer require separate conveyances, shareholder distributions, or the many complications previously attendant to such transactions.

The primary purpose for the TBCA's new provisions permitting mergers with multiple surviving corporations or other entities and mergers providing for a division of a single corporation into more than one corporation or other entity is to allow Texas corporations greater flexibility in structuring and effecting acquisition, restructur-

24. Parties often desire this type of transaction when a corporation is engaged in multiple businesses and the acquiring corporation for strategic, financial, antitrust or other reasons does not desire to acquire all of the businesses or assets of the corporation to be acquired. In this situation, the merger is often conditioned upon the sale of those assets that the acquiring corporation does not desire. Similarly, the acquiree may spin-off to its shareholders a new or existing subsidiary which may hold such assets. If the assets are to be sold to a third party, a separate asset purchase agreement will be entered into with respect to the assets to be sold. The closing thereof would then occur immediately prior to the merger and the consideration from the sale of the assets would be paid to either the shareholders in the merger or to the acquired corporation for the benefit of the acquiring corporation. If the assets are to be distributed to shareholders, they will generally be conveyed to a new or existing subsidiary of the corporation to be acquired in exchange for stock of that subsidiary and an assumption of certain liabilities by the subsidiary. The stock of the subsidiary will either be distributed as a distribution to shareholders or as part of the consideration in the merger. In each case, the transaction would generally involve multiple or simultaneous closings and would require the coordination of the timing of the transactions to ensure that particular assets and liabilities are acquired or excluded as desired. This type of transaction may now be accomplished under a single plan of merger under the new merger provisions.

25. This type of transaction is often a desirable way for a corporation to provide additional value to its shareholders through the direct ownership of a business that may not be fully valued in the market as part of a larger and more diversified corporation or that may be more profitably or efficiently owned directly by shareholders. For example, the value of a specialty manufacturing company may be given more value in the market as a single entity than as part of a larger financial conglomerate. Moreover, the oil and gas and real estate properties of a corporation may, by virtue of the tax laws, be operated and owned more profitably through a master limited partnership or a shareholder owned real estate investment trust than through a corporate entity.

ing, and merger transactions.[26] The TBCA provides this flexibility by allowing a plan of merger to allocate the assets and liabilities of the constituent parties to the merger among more than one surviving entity. The new provisions also allow a single corporation to adopt a plan of merger restructuring the corporation into multiple entities having certain assets and liabilities of the original corporation. The amendments to the merger provisions permitting these transactions directly through statutory mergers, rather than through asset conveyances and shareholder distributions, reflects a recognition that because no significant substantive distinction between the two forms of transactions exists, corporations and their shareholders can accomplish these transactions through a merger if a merger provides the most efficient or desirable means of accomplishing the transaction.

The transactions allowed by the new merger provisions include acquisitions of a single corporation by multiple corporations each desiring different segments of the acquired corporation, mergers conditioned on the sale or spin-off of unwanted assets or business segments of the acquired corporation, recapitalizations, leveraged buyouts, spin-offs, and creations of holding companies. Although these transactions remain complex, the new merger provisions should provide the parties to the merger with significantly greater flexibility in structuring the transactions. The TBCA amendments also eliminate the need for creating artificial structures and unnecessary steps in order to accomplish transactions within historical forms designed for a significantly different business and economic environment.[27]

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26. HOUSE BUS. & COM. COMM., BILL ANALYSIS, Tex. H.B. 472, 71st Leg. (1989); SENATE ECON. DEV. COMM., BILL ANALYSIS, Tex. S.B. 608, 71st Leg. (1989).

27. The merger provisions of the TBCA originally were adopted in 1955 based upon the 1953 draft of the Model Business Corporation Act and remained relatively unchanged until 1989. Since 1955, the economies of the United States and Texas have changed significantly and the types of transactions being effected by corporations today bear little resemblance to 1955 transactions. Corporations in today's competitive environment must seek new and innovative ways of acquiring corporations and managing their assets and businesses. This often involves the division of a corporation among different entities that may more efficiently operate such assets and businesses. It is against this backdrop that the new merger provisions of the TBCA were adopted. Although it is likely that the forms of business transactions being initiated by corporations will continue to change at a rapid pace, the flexibility provided by the new merger provisions should assist Texas corporations in responding to these changes and will serve as the foundation upon which future transactions may be structured.

B. *Procedures for Effecting Mergers with Multiple Survivors or Divisions*

To initiate a plan of merger providing for two or more surviving or new corporations or other entities or a division of a single corporation into two or more corporations or other entities, each party to the merger must adopt a plan of merger under Article 5.01 of the TBCA.[28] In addition to the traditional provisions contained in a plan of merger, the plan must specify: (1) the manner and basis of vesting and allocating the real estate and other property of each party to the merger among the surviving or new corporations or other entities in the merger, (2) the name of the surviving or new corporation or other entity "obligated for the payment of the fair value of any shares held by a shareholder" of any Texas corporation "that is a party to the merger who has complied with the requirements" for perfecting his dissenter's rights under Article 5.12 of the TBCA, and (3) "the manner and basis of allocating all other liabilities and obligations of each" party to the merger or making adequate provision for the payment and discharge thereof "among one or more of the surviving" or new corporations or other entities in the merger.[29] The plan of merger must also set forth the manner and basis of converting any of the shares or other evidences of ownership of each party to the merger into cash, shares, obligations, evidences of ownership, rights to purchase securities and other securities of one or more of the surviving or new corporations or other entities, other property, or any combination of the foregoing.[30] If the merger results in the creation of a

28. TEX. BUS. CORP. ACT ANN. art. 5.01 (Vernon Supp. 1990). Under article 5.01A(1) of the TBCA, a plan of merger involving a Texas corporation must be acted upon by the board of directors of the corporation and must be approved by shareholders in the manner prescribed by article 5.03 of the TBCA. Under article 5.03, action by a board of directors on a plan of merger requires the adoption of a resolution recommending that the plan of merger be approved by shareholders. However, if the board of directors determines that for any reason it should not make that recommendation, article 5.03 requires the adoption of a resolution directing that the plan of merger be submitted to shareholders for approval without recommendation. *Id.* art. 5.03. If a plan of merger is submitted to shareholders without a recommendation, the board of directors must communicate the basis for its determination that the plan be so submitted. Once presented to shareholders for approval, the plan of merger will be considered to be adopted if approved by a vote by the holders of at least two-thirds of the outstanding shares of each class entitled to vote thereon or such other vote as may be required by the corporation's articles of incorporation to the extent permitted by article 2.28D of the TBCA.

29. TEX. BUS. CORP. ACT ANN. art. 5.01B(2) (Vernon Supp. 1990).

30. *Id.* art. 5.01B(3).

new corporation or other entity, or provides for an amendment to the articles of incorporation or other organizational document of one of the parties to the merger, the plan of merger must also set forth those items.[31]

In the case of a merger with multiple survivors, the most important aspect of the plan of merger will be its allocation of assets and liabilities among the surviving or new corporations and other entities in the merger. The allocation should identify the particular assets and liabilities or groups of assets and liabilities to the same extent that such assets and liabilities would have been identified in an asset transaction. Additionally, the plan of merger should specifically set forth the mechanism under which contingent assets and contingent liabilities of the parties are to be allocated and satisfied. Under Article 5.06 of the TBCA, upon the effectiveness of the plan of merger all rights, title and interest to the real estate and other property owned by each corporation and by each other entity that is a party to the merger will be allocated to and vested in one or more of the surviving or new corporations or entities as provided in the plan of merger.[32] This allocation will occur by operation of law without reservation or impairment, "without further act or deed, and without any transfer or assignment for purposes of property law having occurred."[33] All property that is

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31. *Id.* art. 5.01B(4), (5).

32. *Id.* art. 5.06A(2).

33. *Id.* art. 5.06A(1). Article 5.06A(2) of the TBCA is based upon a similar provision contained in section 11.06(a)(2) of the Revised Model Business Corporation Act (the "RMBCA") and is intended to statutorially provide that a merger will not constitute a transfer or assignment that will give rise to a claim of reverter or impairment of title based on a prohibited conveyance or transfer. *See* REVISED MODEL BUSINESS CORP. ACT § 11.06 official comment (1985). This provision is intended to be interpreted broadly to prevent a merger from resulting in unintended reversions and impairments of property rights and the necessity of numerous consents that might otherwise impair the ability of corporations to engage in merger and acquisition transactions. However, it is not intended to provide a means by which corporations may circumvent existing contractual or legal rights. Thus, while a merger should not constitute a transfer or assignment of property for purposes of property law in violation of a typical prohibition relating to the sale or assignment of the property or the interests therein; a merger with multiple survivors may, under certain circumstances, constitute a transfer or assignment for purposes of a contractual restriction on the disposition of assets depending upon the nature of the restriction and the intention of the parties to the contract. For example, if a loan agreement or indenture prohibits all sales, transfers, or other dispositions of assets outside the ordinary course of business, a merger with multiple survivors could be considered an "other disposition" of assets in violation of this provision whereas a merger with a single surviving corporation would not. The difference between the two situations is that in the former case there is a diminution of the asset base of the corporation while in the latter situation there is no such diminution. In both cases, however, the vesting of the ownership of property from

allocated in the merger, however, will continue to be subject to existing liens thereon.[34] Article 5.06 also provides for the allocation of all liabilities and obligations of each party to the merger to one or more of the surviving or new corporations and other entities in the manner set forth in the plan of merger.[35] Under Article 5.06, each entity to which a liability or other obligation is allocated will, as between the parties to the merger, constitute the primary obligor for that liability, and except to the extent provided in the plan of merger or otherwise provided by law or contract, no other party will be liable therefor.[36]

If, for any reason, the plan of merger fails to provide for the allocation or vesting of any particular item of property or any liability or obligation of any party to the merger, Article 5.06C of the TBCA provides for a statutory allocation thereof. Under Article 5.06C, all unallocated property will be owned by operation of law in an undivided interest by, and all unallocated liabilities and obligations will be the joint and several liabilities and obligations of, each of the surviving or new entities pro rata to the total number of the surviving or new entities in the merger.[37] Because unallocated assets and liabilities will be allocated pro rata based upon the number of surviving or new

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one entity to another would not be considered a transfer or conveyance of the property for purposes of a right of reversion or impairment of such property. The reason for this result is the ownership of the property itself will have been deemed to have been changed without a transfer or assignment. *Cf.* PA. CONS. STAT. ANN. § 1952(g) (Purdon's 1989 Pamphlet) (division of assets treated as sale of assets for contractual restrictions). In addition, the statutory finding that a merger does not constitute a transfer or assignment will not prohibit the merger from being considered a fraudulent transfer or conveyance under laws such as the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act and other laws for the protection of creditors because of the purposes of such laws. *See infra* notes 52 through 75 and accompanying text.

34. TEX. BUS. CORP. ACT ANN. art. 5.06A(2) (Vernon Supp. 1990).

35. *Id.* art. 5.06A(3).

36. *Id.* The references in article 5.06 to the party to which a liability or obligation is allocated becoming the primary obligor therefor is not intended to infer that all of the surviving parties in a merger will be obligated for the liabilities of the other parties. Instead, the references address the situation in which the original obligor continues in existence after the merger but is not allocated the liability, and where the liability is not allocated to any party in the merger and the liability becomes the joint and several liability of all of the parties to the merger with each party being the primary obligor for its pro rata portion.

37. *Compare* TEX. BUS. CORP. ACT ANN. art. 5.06C (Vernon Supp. 1990)(effect of merger or share exchange) *with* PA. CONS. STAT. ANN. § 1957(b) (Purdon's 1989 Pamphlet) (if no specification for allocation of assets provided in plan of division, assets will be transferred and vested in resulting corporations on "per capita" basis among resulting corporations as "tenants in common").

entities in the merger and not on the basis of the asset value of the parties to the merger, the consideration paid to shareholders or any other criteria, the failure to provide in a plan of merger for the allocation of an asset or liability, whether fixed or contingent, will likely result in an undesirable allocation of such assets and liabilities with potential significant detrimental effects to one or more of the resulting corporations or other entities.[38] Accordingly, every plan of merger with more than one surviving corporation or other entity should contain a specific provision outlining in detail the manner of allocating contingent assets and liabilities and unallocated assets and liabilities.[39]

Upon the approval of a plan of merger by the parties thereto,[40] articles of merger containing a copy of the plan of merger and such other information required by Article 5.04 of the TBCA must be filed with the Secretary of State of the State of Texas.[41] This filing will serve as

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38. For example, if a merger between two or more corporations results in two surviving corporations with one corporation being allocated 90% of the known and identified assets and liabilities and the other corporation being allocated 10% of the known and identified assets and liabilities, the failure of a plan of merger to allocate a contingent or unspecified liability will result in the corporation to which 10% of the assets and liabilities was allocated being primarily liable for 50% of the contingent and unspecified liability. Furthermore, the 10% corporation to which 10% of the assets was allocated will be jointly and severally liable for the remaining portion of that liability with only a right of contribution from the other corporation. This result could materially affect the financial position of the corporation to which only 10% of the assets were allocated, particularly if the unallocated liability is of any significant amount.

39. An example of such an allocation might be as follows:

> Section 12.05. *Allocation of Unallocated and Contingent Assets and Liabilities.* To the extent any asset or liability of Old A Corp or Old B Corp shall not have been allocated pursuant to Section 12.01 hereof to either A Corp or B Corp and to the extent there exist any contingent assets or liabilities of Old A Corp or Old B Corp, such assets and liabilities shall (i) be allocated to A Corp to the extent they primarily relate to, are used by or arise out of the Widget business of Old A Corp, (ii) be allocated to B Corp to the extent they primarily relate to, are used by or arise out of the tire business of Old A Corp, (iii) be allocated to A Corp to the extent they relate to, are used by or arise out of the business or assets of the Old B Corp and (iv) be allocated 70% to A Corp and 30% to B Corp with respect to all assets and liabilities of Old A Corp and Old B Corp not otherwise allocated. All assets allocated pursuant to clause (iv) of this Section 12.05 shall be deemed to be owned by A Corp and B Corp as a percentage of an undivided interest in the assets so allocated and all liabilities allocated pursuant to clause (iv) of this Section 12.05 shall be the several, but not joint, liability of A Corp or B Corp to the extent such liability is so allocated.

Provisions as to agreements for the subsequent disposition of unallocated assets owned in an undivided interest between the surviving entities and indemnification for any liability with respect to a liability allocated to another entity should also be included in any plan of merger with multiple survivors.

40. *See supra* note 28.

41. TEX. BUS. CORP. ACT ANN. art. 5.04 (Vernon Supp. 1990). Under article 5.04 of the

notice to all persons dealing with the parties to the merger as to the names of the surviving entities in the merger and to the allocation of particular assets and liabilities among those entities. Although not required by the statute, the surviving entities in the merger should file copies of the articles and plan of merger in the real property records in each county or jurisdiction where property of the parties not previously owned by such parties is located. This filing will alleviate confusion as to the ownership of any real property allocated to an entity other than the original owner.[42]

TBCA, the Articles of Merger must be executed on behalf of each Texas corporation that is a party thereto by an officer thereof and must set forth:

> (A) The plan of merger . . .
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> (B) If shareholder approval is not required by Article 5.03 of [the TBCA], a statement to that effect.
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> (C) As to each corporation the approval of whose shareholders is required, the number of shares outstanding, and, if the shares of any class or series are entitled to vote as a class, the designation and number of outstanding shares of each such class or series.
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> (D) As to each corporation the approval of whose shareholders is required, the number of shares voted for and against the plan [of merger], respectively, and if the shares of any class or series are entitled to vote as a class, the number of shares of each such class or series voted for and against the plan, respectively; and
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> (E) As to each . . . foreign corporation or other entity . . . [that is a party to the plan of merger], a statement that the plan [of merger was] duly authorized by all action required by the laws under which it was incorporated or organized and by its constituent documents.

Id. art. 5.04(1)-(5). Forms of Articles of Merger for standard mergers, mergers with multiple surviors, and mergers providing for divisions complying with the new requirements of article 5.04 are set forth in Appendix A hereto.

42. The filing of a plan of merger in the real property records to reflect the change in ownership of real property allocated in a merger should assist in expediting subsequent transfers of property and in obtaining title insurance policies with respect thereto. Such a filing should also contain specific references to the recording information of the property being allocated. This approach is consistent with the statutory approach adopted in Pennsylvania for divisions of a single corporation. Under the Pennsylvania statute:

> [T]he transfer of any fee or freehold interest or leasehold having a remaining term of 30 years or more in any tract or parcel of real property . . . [located in Pennsylvania] owned by a dividing corporation . . . [will not] be effective until one of the following documents is filed in the office for the recording of deeds of the county . . . in which the tract or parcel is situated:
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> (A) A deed, lease or other instrument of confirmation describing the tract or parcel.
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> (B) A duly executed duplicate original copy of the articles of division.
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> (C) A copy of the articles of division certified by the Department of State.
>
> (D) A declaration of acquisition setting forth the value of real estate holdings in such county of the corporation as an acquired company.

15 PA. CONS. STAT. ANN. § 1957(b)(2) (Purdon's 1989 Pamphlet).

C. *Creditor's Rights in Mergers with Multiple Survivors*

1. General Background

While the provisions permitting multiple surviving entities in a merger were intended to provide corporations with greater flexibility in structuring acquisition and restructuring transactions, they were not intended to have any material effect on the existing rights of creditors of the parties to a merger. The legislative history with respect to the 1989 TBCA amendments, as reflected in the bill analysis of the merger amendments of both the House and Senate of the Texas Legislature, notes that "[c]reditor's rights would not be adversely affected by the proposed amendment, and creditors would continue to have the protection afforded by the Uniform Fraudulent Transfer Act and other existing statutes that protect the rights of creditors."[43] To reflect this intent, the Legislature adopted an amendment to Article 5.15 of the TBCA which specifically states that "nothing contained in Part 5 of this Act shall ever be construed as affecting, nullifying or repealing the Anti-trust laws or as abridging any right or rights of any creditor under existing laws."[44]

The fact that the new merger provisions were not intended to materially affect the existing rights of creditors does not mean that creditors will not be affected by a merger under the TBCA. To the contrary, as in any merger or restructuring transaction involving the distribution to shareholders of cash, property, or indebtedness or in any other transaction involving distributions to shareholders of assets or obligations through stock purchases, dividends, or other distributions, a merger or restructuring transaction under the new merger provisions may alter and reduce the pool of assets to which a creditor may look to for repayment.[45] In this regard, if a claim of a creditor of

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43. HOUSE BUS. & COM. COMM., BILL ANALYSIS, Tex. H.B. 472, 71st Leg. (1989); SENATE ECON. & DEV. COMM., BILL ANALYSIS, Tex. S.B. 608 71st Leg. (1989).

44. TEX. BUS. CORP. ACT ANN. art. 5.15 (Vernon Supp. 1990).

45. For example, many merger and acquisition transactions involve the acquisition of a corporation through what is commonly referred to as a leveraged buyout. In these transactions, the acquiring corporation generally will have nominal assets compared to the assets of the corporation to be acquired. The consideration for the shares acquired in the merger will in effect come from or be financed with the assets of the acquired corporation itself through existing cash or additional incurrences of indebtedness. An illustration of the economic effect to a creditor of an acquired corporation in this type of transaction would be as follows: An acquiring corporation forms an acquisition subsidiary with $1,000,000 in cash and no other assets or source of income. The corporation to be acquired has assets of $10,000,000 consisting of $3,000,000 in cash and $7,000,000 in fixed assets and unsecured liabilities of $3,000,000.

one corporation in a merger with multiple surviving entities is allocated to a different or new corporation in the merger, that creditor will generally only be entitled to look to the corporation or entity to which its claim is allocated and not to each surviving entity.[46] This result follows from the express language in Article 5.06 of the TBCA, which provides that, except as provided in the plan of merger or otherwise provided by law or contract, the party to which an obliga-

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The acquiring corporation and the corporation to be acquired agree that the acquisition subsidiary will merge with the corporation to be acquired with the acquiring corporation's shareholders receiving $7,500,000 and the acquiring corporation receiving all the shares in the surviving corporation. To finance the merger, the acquisition subsidiary borrows $7,500,000 from a financial institution through a short-term "bridge" loan to be refinanced upon the consummation of the merger. Upon the consummation of the merger, the surviving corporation repays $2,000,000 of the bridge loan, refinances the remaining $5,500,000 of the bridge loan on a long-term basis and grants a mortgage on all of its assets to secure the repayment of the refinanced loan. As a result of the merger and the leveraged financing thereof, the combined net worth of the surviving corporation is reduced from $7,000,000 to $500,000 with the new creditors having a prior interest over the previous creditors and the shareholders of the acquired corporation receiving $7,500,000 from the assets of the acquired corporation. Although the acquired corporation's assets still exceed the existing claims against it, the transaction reduces the protective margin for the previous creditors and the cash or assets available for the operation of the business of the surviving corporation. Similar reductions in the assets available for the payment of creditors occur when a corporation spins off to its shareholders segments of its businesses having material assets or engages in a financial restructuring through substantial purchases of stock, extraordinary cash dividends or spin-offs of assets. The only difference in these situations from that of the leveraged buyout example above is that the assets distributed to shareholders are provided directly from the corporation, and the corporation itself borrows the funds that are distributed to shareholders rather than a third party. The effect on creditors, however, is the same in each case in that the pool of assets available for the payment of prior creditors is reduced. Although creditors are affected in each of these cases, their legal rights are not and the protections provided to them are those covenants and agreements which they may have negotiated to limit such transactions and material changes in the business of the corporation.

46. One significant exception to this result is where a liability of a corporation that survives a merger is allocated to another corporation. In this case, absent a novation by the creditor against the surviving corporation, both the surviving corporation and the entity to which the liability is allocated will be liable for the payment of the obligation. This result follows by virtue of the express language of articles 5.06 and 5.15 of the TBCA. These articles provide, in effect, that the existing rights of creditors will not be affected by the merger and a liability of a continuing entity to a creditor will not be extinguished as a result of a merger absent the consent of the creditor. However, as between the original debtor corporation and the entity to which the liability is allocated, the entity to which the liability is allocated will be the primary obligor. Thus, any repayment of the obligation by the original debtor corporation will be subject to a right of subrogation and repayment against the corporation to which liability was allocated and primarily liable by virtue of the merger. *See* TEX. BUS. CORP. ACT ANN. arts. 5.06A(3), 5.15 (Vernon Supp. 1990).

tion is allocated will be the party liable for that obligation.[47] That is not to say that the merger will adversely affect the legal rights of such a creditor or that the rights of that creditor would have been materially different if the transaction had been executed through a conveyance of assets and merger under prior law.[48] Rather, the creditor will continue to possess all the rights available to it under law and contract, including all interests in the property of the debtor securing the payment of the creditor's claim.[49] Additionally, all negative cove-

47. *Id.* art. 5.06A(3); *cf.* PA. CONS. STAT. ANN. § 1957(b)(2) (Purdon's 1989 Pamphlet). The Pennsylvania statute states:

> [R]esulting corporations shall be free of the liabilities of the dividing corporation to the extent, if any, specified in the plan, if no fraud of corporate creditors, or of minority shareholders or shareholders without voting rights or violation of law shall be effected thereby, and if all applicable provisions of 13 Pa. Cons. Stat. Div. 6 (relating to bulk transfers) and all other applicable provisions of law are complied with.

PA. CONS. STAT. ANN. § 1957(b)(2) (Purdon's 1989 Pamphlet). The exceptions provided for in the Pennsylvania statute are implicit in the TBCA and are in effect incorporated therein through the laws prohibiting fraudulent transfers and conveyances. Consideration should be given, however, in the next legislative session to incorporate language in the TBCA similar to the above language in the Pennsylvania statute to remove any ambiguity as to such matters.

48. *See supra* note 45. The provisions of article 5.06 of the TBCA permitting the allocation of liabilities among multiple surviving entities in a merger is one of the most revolutionary aspects of the new Texas merger provisions and presents the possibility for structuring a broader range of transactions than were previously possible. A creditor whose liability is allocated to another corporation in a merger with multiple survivors could argue that the allocation of its liability to another entity adversely affects its interest. Such a creditor, however, is no more affected by such a merger than it would have been in a transaction where a portion of the assets of the corporation are sold or transferred to another entity and the liabilities of the corporation other than the liabilities owed to that creditor are paid by the corporation or assumed by another entity in connection with the transfer. The new merger provisions permit this type of transaction to occur directly without the necessity of having multiple conveyances of assets and assumptions of liabilities. In analyzing the rights of a particular creditor in a merger with multiple survivors, the transaction should not be viewed as a transfer of that creditor's claim to another entity. Rather, the transaction should be seen as an allocation and transfer of certain assets of the original corporation and the assumption of certain of the claims of other creditors by another entity with the entity to which the creditor's liability is allocated being considered for purposes of the creditor as the successor of the original corporation. Thus, as to any particular creditor, the effect of the merger is the same as if there were transfers of assets and payments of indebtedness by a single corporation. The protections that will be provided to a creditor in such a merger will include the applicable fraudulent transfer and conveyance laws as well as any covenants or agreements negotiated by such creditor with respect to mergers, dispositions of assets, changes in the character of the corporation's business and corporate existence, and the maintenance of minimum financial requirements by the corporation.

49. *See* TEX. BUS. CORP. ACT ANN. art. 5.06A(2) (Vernon Supp. 1990). Article 5.06A(2) of the TBCA provides that property allocated pursuant to a plan of merger will be allocated subject to any existing lien thereon. *Id.* Accordingly, notwithstanding the fact that an entity may not be allocated a particular liability, if that entity is allocated an asset which is

nants and agreements relating to mergers and dispositions of assets, material changes in businesses and maintenance of corporate existence,[50] and all laws protecting the rights of creditors with respect to fraudulent conveyances, preferences and insolvency will remain in force and apply.[51]

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subject to a lien securing the payment of that liability, the asset will remain subject to the lien and the creditor's rights with respect thereto. *Cf.* PA. CONS. STAT. ANN. § 1957(b) (Purdon's 1989 Pamphlet)(liens upon property of dividing corporation not impaired by division).

50. The primary protection provided to a creditor concerned about a possible diminution of assets through a distribution to shareholders, whether it be through a merger, spin-off, dividend, restructuring or leveraged buyout, is through the negotiation of adequate covenants and agreements restricting sales of assets and distributions and material changes in the business of the corporation and financial covenants assuring that the corporation will maintain minimum ratios sufficient to protect the interests of the creditor. While a negative covenant that solely restricts the sale of assets may not be breached if the corporation's assets are allocated pursuant to a merger, a covenant that would restrict the sale, conveyance or "other disposition" of an asset, would likely be violated through an allocation of assets to another entity in a merger. *See infra* note 69. Similarly, a covenant restricting mergers unless the successor corporation expressly assumes the liability owed to the creditor would not be violated solely by virtue of there being multiple survivors in the merger as long as one of the surviving entities assumes the liability in the merger. A violation, however, would occur if the successor corporation to which the liability is allocated does not satisfy the minimum requirements to be met by the "successor corporation." A merger in which different businesses of a corporation are split up among multiple entities or in which a surviving entity is an entity other than a corporation likely would violate a traditional covenant restricting material changes in the corporation's business. In the case of the creation of a noncorporate entity, the traditional covenant requiring the corporation to maintain its corporate existence would likely be violated. Thus, although existing contractual restrictions with respect to sales of assets, corporate existence and distributions and mergers should be reviewed in light of the possibility of multiple surviving corporations and entities in mergers, such restrictions generally should provide protection to creditors in a merger with multiple survivors to substantially the same extent such provisions would have provided them with protection had the same transaction been effected in a different form. Of course situations will exist where a transaction may be able to be effected through a merger with multiple survivors that could not have otherwise been effected as a sale of assets or a distribution to shareholders under the creditor's agreement with the debtor. These situations, however, are likely to be the exception rather than the rule.

51. In this regard, it should be noted that in the author's view the primary purpose of corporation laws should be to provide a flexible structure under which capital may be obtained and business organizations operated and not to provide additional protection for creditors. The protection of creditors' rights should be left to other statutes outside of the corporation laws that have been specifically adopted for that purpose. The imposition of restrictions in corporation laws aimed at protecting creditors whose interests are otherwise protected by contract and other statutes only results in undue restrictions on the organization and operations of corporations and the creation by corporations and investment bankers of complex transactions that ultimately avoid those restrictions. *See* Garrett, *Merger Meets the Common Law*, 63 TEX. L. REV. 1509, 1521 (1985). It is for these reasons that modern corporation laws generally have eliminated many of the provisions that were originally adopted to protect creditors. Examples include the elimination of the concept of par value and the requirement that dividends and distributions may only be paid from earned surplus. *See, e.g.*, TEX. BUS. CORP. ACT ANN.

2. UFTA, UFCA and Bankruptcy Code Protections

Principal among the laws available to protect creditors in mergers with multiple survivors are the Uniform Fraudulent Transfer Act (the "UFTA"),[52] the Uniform Fraudulent Conveyance Act (the "UFCA")[53] and the United States Bankruptcy Code of 1978, as amended (the "Bankruptcy Code").[54] Currently 20 states, including Texas,[55] have adopted the UFTA,[56] 14 states have adopted the UFCA,[57] and the others have retained older forms of statutes patterned on the Statute of Elizabeth.[58]

Although the specific standards vary between the UFTA, the UFCA, and the Bankruptcy Code as to when a transaction will constitute a fraudulent transfer or conveyance, a transfer or conveyance of assets, or the incurrence of an obligation, will generally be subject to challenge as a fraudulent transfer or conveyance under three circumstances. First, if the debtor transfers assets or incurs an obliga-

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arts. 2.38-1 to -4 (Vernon Supp. 1989)(changes in corporate share dividends and surplus requirements); DEL. CODE ANN. tit. 8, §§ 154, 170 (1974 & Supp. 1989)(corporate requirement changes); REVISED MODEL BUSINESS CORP. ACT § 6.01, 6.40 (1985)(authorized shares and distribution to shareholders).

52. UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 639 (1985) [hereinafter UFTA].

53. UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 427 (1985) [hereinafter UFCA].

54. 11 U.S.C. §§ 101-1330 (1982 & Supp. V 1987). Section 548 of the Bankruptcy Code relates and applies to fraudulent conveyances. *Id.* § 548.

55. *See* TEX. BUS. & COM. CODE ANN. §§ 24.001-.013 (Vernon 1987). Although the Texas UFTA version differs in certain respects from the UFTA, such differences are not material for purposes of the analysis of its application to merger transactions. Accordingly, references in this article to the application of the UFTA to various merger transactions shall be equally applicable to the application of the Texas version of such act.

56. UFTA table of jurisdictions wherein the UFTA has been adopted, 7A U.L.A. 120, 120 (Supp. 1989).

57. UFCA table of jurisdictions wherein the UFCA has been adopted, 7A U.L.A. 100, 100 (Supp. 1989).

58. The Statute of Elizabeth generally condemns conveyances by debtors as fraudulent only when made with the "intent" to "hinder, delay or defraud" creditors. However, many conveyances may harm creditors where there does not exist an actual intent to defraud on the part of the debtor. Thus, the courts in those jurisdictions which have adopted a form of the Statute of Elizabeth have utilized presumptions of law as to intent for circumstances that may not in fact warrant a finding of an intent to defraud. It is for this reason, that the drafters of the UFCA and the UFTA have sought to delineate those transactions which may harm creditors but which may not involve an actual fraud against creditors. *See* UFTA, 7A U.L.A. 427, 428 (1985); *see also* COLO. REV. STAT. § 38-10.117 (1982); CONN. GEN. STAT. ANN. § 52-552 (West 1960); ILL. ANN. STAT. ch. 59, ¶ 4 (Smith-Hurd Supp. 1989)(statutes which contain form of Statute of Elizabeth).

tion with the intent to "hinder, delay or defraud" creditors.[59] Second, if the debtor transfers assets or incurs an obligation without receiving "reasonably equivalent value"[60] or "fair consideration"[61] and the debtor (1) was engaged or about to engage in a business or transaction for which its remaining assets were unreasonably small in relationship to the business or transaction conducted or contemplated to be conducted or (2) intended to incur, or believed that it would incur, debts beyond its ability to pay as they become due and mature.[62] Third, if the transfer of assets by the debtor or the incurrence of the obligation by the debtor was made without "reasonably equivalent value" or "fair consideration" and the debtor was "insolvent."[63] In each of these cases, a transfer of assets or the incurrence of an obligation[64]

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59. *See* UFTA § 4(a)(1), 7A U.L.A. 639, 652 (1985); UFCA § 7, 7A U.L.A. 427, 509 (1985); 11 U.S.C. § 548(a)(1) (1982 & Supp. V 1987).

60. "Reasonably equivalent value" is not defined under either the UFTA or the Bankruptcy Code. However, the commentary to the UFTA indicates that "value" is to be determined in light of the purpose of the act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors and that consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. *See* UFTA § 3, 7A U.L.A. 639, 650 official comment (1985).

61. Under the UFCA,

> Fair consideration is given for property or an obligation:
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> (a) when in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
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> (b) when such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

UFCA § 3, 7A U.L.A. 427, 448 (1985).

62. *See* 11 U.S.C. § 548(a)(2) (1982 & Supp. V 1987); UFTA § 4(a)(2), 7A U.L.A. 639, 652 (1985); UFCA §§ 5, 6, 7A U.L.A. 427, 504, 507 (1985).

63. *See* 11 U.S.C. § 548(a)(2) (1982 & Supp. V 1987); UFTA § 5, 7A U.L.A. 639, 657 (1985); UFCA § 4, 7A U.L.A. 427, 474 (1985). Under the UFTA, the UFCA, and the Bankruptcy Code, a corporation generally will be considered insolvent if the sum of its debts is greater than all of its assets or the present salable value of its assets is less than the amount that would be required to pay its probable liability on its existing debts as they become absolute and mature. *See* 11 U.S.C. § 101(31)(1982 & Supp. V 1987); UFTA § 2, 7A U.L.A. 639, 648 (1985); UFCA § 2, 7A U.L.A. 427, 442-443 (1985).

64. Although each of the UFTA, the UFCA, and the Bankruptcy Code apply to the incurrence of an obligation, the provisions of the UFCA are more limited than those of the UFTA and the Bankruptcy Code. Each of the UFTA, the UFCA, and the Bankruptcy Code provide that the incurrence of an obligation without reasonably equivalent value or in the case of the UFCA, without fair consideration, will be subject to challenge if the debtor is insolvent or would be rendered insolvent or intends to incur or believes it will incur debts beyond its ability to pay as they mature or if the debt is incurred with the intent to hinder, delay or defraud present or future creditors. UFTA §§ 4, 5, 7A U.L.A. 639, 650, 652 (1985); UFCA §§ 4, 6, 7, 7A U.L.A. 427, 474, 507, 509 (1985); 11 U.S.C. § 548(a)(b) (1982 & Supp. V 1987).

would generally constitute a fraudulent transfer or conveyance, and a creditor of the debtor or a trustee in bankruptcy could seek various remedies against the debtor and the transferee of any assets transferred as part of the fraudulent transfer or conveyance. The available remedies include: (1) avoidance of the transfer or obligation, (2) an attachment or other proceeding against the assets transferred, (3) an injunctive action from a further disposition of the assets transferred, and (4) an appointment of a receiver.[65]

Whether a merger will constitute a fraudulent transfer or conveyance under the UFTA, the UFCA, or the Bankruptcy Code will depend upon whether the merger constituted a transfer or conveyance of assets or an incurrence of an obligation, and, if so, whether any of the parties satisfies the applicable tests under such laws. Under the UFTA and the Bankruptcy Code, a "transfer" will include "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or departing with an asset or an interest in an

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The UFTA and the Bankruptcy Code, however, also subject the incurrence of an obligation to challenge where the obligation is incurred without reasonably equivalent value and where the property remaining in the hands of the debtor is unreasonably small for the business or transactions contemplated. UFTA § 4(a)(2)(i), 7A U.L.A. 639, 652 (1985); 11 U.S.C. § 548(a)(2)(13)(ii) (1982 & Supp. V 1987). The UFCA does not contain a similar provision. UFCA § 5, 7A U.L.A. 427, 504 (1985).

65. *See* UFTA § 7, 7A U.L.A. 639, 660 (1985); UFCA § 10, 7A U.L.A. 427, 630 (1985); 11 U.S.C. §§ 548(a)-(b), 550(a) (1982 & Supp. V 1987). The remedies provided to creditors under the UFTA and the UFCA generally will depend upon whether the creditor is a current or future creditor. Under section 5 of the UFTA, a transfer of an asset or the incurrence of an obligation by a debtor without receiving reasonably equivalent value where the debtor is insolvent or where the debtor became insolvent as a result of the transfer or incurrence may only be challenged by present creditors. UFTA § 5, 7A U.L.A. 639, 657 (1985). Similarly, under section 4 of the UFCA, a conveyance made or obligation incurred by a debtor without fair consideration where the debtor is or was rendered insolvent by virtue of the transaction may only be challenged by creditors at the time of the transaction. UFCA § 4, 7A U.L.A. 437, 474 (1985). Creditors whose claims arise after the transfer of assets or the incurrence of an obligation can generally only challenge the transaction as a fraudulent transfer under the UFTA and the UFCA where the transfer or conveyance or the incurrence of the obligation was made with actual intent to hinder, delay or defraud creditors. Additional situations where the transaction may be challenged will include when the transfer or conveyance was without reasonably equivalent value or, in the case of the UFCA, fair consideration, and the debtor is engaged or about to engage in a business or transaction for which the property remaining in his hands after the transaction is unreasonably small. A transfer and conveyance or incurrence of an obligation without reasonably equivalent value or fair consideration where the debtor intends or believes that it will incur debts beyond its ability to pay as they mature will also justify a challenge. *See* UFTA § 4(a), 7A U.L.A. 639, 652 (1985); UFCA §§ 5-7, 7A U.L.A. 427, 504, 507, 509 (1985).

asset."[66] Similarly, under the UFCA, a "conveyance" includes "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of a lien or encumbrance."[67] Although a merger will not involve a "transfer" of assets in the traditional sense, and in fact Article 5.06A(2) of the TBCA provides that the allocation of assets in a merger occurs "without transfer or assignment having occurred,"[68] the allocation of assets in a merger should constitute both a "transfer" and "conveyance" of assets under both the letter and spirit of the UFTA, the UFCA and the Bankruptcy Code.[69] The allocation of liabilities of the

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66. UFTA § 1(12), 7A U.L.A. 639, 645 (1985); 11 U.S.C. § 101(50) (1982 & Supp. V 1987).

67. UFCA § 1, 7A U.L.A. 427, 430 (1985). Although the definition of a "conveyance" for purposes of the UFCA is different than the definition of a "transfer" for the UFTA and the Bankruptcy Code, the commentary to the UFTA with respect to the definition of "transfer" states that the definition of a "conveyance" was intended to be similarly comprehensive. Accordingly, a disposition of assets that would constitute a "transfer" under the UFTA and the Bankruptcy Code should generally constitute a "conveyance" for purpose of the UFCA. *See* UFTA § 1, 7A U.L.A. 427, 647 comment 12 (1985).

68. TEX. BUS. CORP. ACT ANN. art. 5.06A(2) (Vernon Supp. 1990). The reference in article 5.06A(2) of the TBCA that the allocation of assets in a merger occurs "without transfer or assignment having occurred" was added to the merger provisions of the TBCA in 1987. This addition sought to clarify that for purposes of property law a merger is not a conveyance or transfer and does not give rise to claims of reverter or impairment of title based upon a prohibitive conveyance or transfer. Specifically, the addition of the language was intended to make clear that where there is a prohibition on the conveyance or transfer of property in an agreement or instrument such as a lease relating to the property, the vesting of the rights, privileges, immunities, and franchises of the surviving corporation in a merger is not effected in violation of such provision. This concept is carried forward in the new merger provisions to assure that such result will remain. It is not, however, intended in any way to abrogate the rights of creditors under the UFTA, the UFCA, and the Bankruptcy Code to the extent there is a fraudulent transfer or conveyance for purposes of those laws.

69. The allocation of assets in a merger with multiple survivors should constitute a "transfer" or "conveyance" under the UFTA, the UFCA, and the Bankruptcy Code because of the broad nature of what constitutes a transfer or conveyance under such statutes. There exists some ambiguity, however, as to whether the allocation of assets in such a merger would be in violation of a contractual prohibition on transfers and conveyances of all or certain types of property under certain circumstances. Presumably, the language of article 5.06 is broad enough to permit an allocation of assets from violating a negative covenant that only restricts "transfers and conveyances" of property. However, such an allocation could be prohibited under a more expansive negative covenant that restricts "all transfers, sales, conveyances, or other dispositions of assets" on the theory the allocation is a form of disposition of assets. The ultimate determination as to whether a merger with multiple survivors would be in violation of a prohibition on the transfer or other disposition of assets will, of course, be dependent upon the intent of the parties and the specific language of the contract. This approach, which is reflected in the TBCA, varies from the approach adopted under the Pennsylvania statute relating to divisions, which imposes a statutory gloss on when a division of a corporation will be

parties to a merger among the surviving entities in the merger should also constitute the incurrence of obligations under the UFTA and the Bankruptcy Code by the surviving entities. These results follow by reason of the reference in Article 5.15 of the TBCA to the maintenance of creditors' rights, the expanded definitions of a transfer and conveyance under the UFTA, the UFCA, and the Bankruptcy Code, and the legislative history as to the relationship of the merger provisions and the rights of creditors.[70]

To determine the debtor's identity for purposes of applying the UFTA, the UFCA, and the Bankruptcy Code to a merger transaction, the "debtor" should refer to the entity that was originally liable on the claim and the entity that became liable on the claim by reason of the merger.[71] In the case of a merger with only one surviving entity, the debtor will embody both the original debtor corporation and

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treated as a transfer of assets. Under the new Pennsylvania division statute, a plan of division will require approval of creditors if the division were to have been effected as an asset transaction and the transaction would have been prohibited under any indenture or contract by which the dividing corporation is bound. *See* PA. CONS. STAT. ANN. § 1952(g) (Purdon's 1989 Pamphlet). The apparent intent of the Pennsylvania restriction on divisions represents a reasonable policy determination that a division should be treated substantially the same as an asset transaction for purpose of contractual restrictions on sales of assets. However, the statute's implicit requirement for creditor approval of the transaction appears too broad and apparently permits a single creditor to which an immaterial debt is owed to block an otherwise valid transaction in addition to any contractual rights the creditor may have. A more reasonable approach and alternative to the Pennsylvania restrictions might be to provide by statute that a division of a corporation or merger with multiple survivors will constitute a "transfer" for all purposes other than for determining the ownership and other interests in property. Such a restriction would preserve the contractual rights of creditors to restrict asset transactions effected through a division or merger with multiple survivors but would not result in such a transaction violating an anti-assignment clause in a lease or other property interest providing for a right of reversion on assignment or transfer. Such a provision, however, would need to be carefully drafted to assure that it will only apply to divisions and mergers with multiple survivors and under no circumstances permit a right of reversion or impairment of title to occur as a result of the transaction. Consideration would also have to be given as to whether the benefits of such a provision would outweigh the potential detriments of such a provision in light of the ability of parties to freely negotiate their own contractual restrictions.

70. *See supra* notes 43, 44, & 67.

71. Under section 1(6) of the UFTA, the term "debtor" is defined as "a person who is liable on a claim." UFTA § 1(6), 7A U.L.A. 639, 644 (1985). The UFCA does not contain a similar definition of the term "debtor" and a "debtor" is defined under the Bankruptcy Code as the person subject to the case under the Bankruptcy Code. However, the analysis for determining which party is the debtor for purposes of a fraudulent transfer or conveyance under the UFTA, the UFCA, and the Bankruptcy Code should be the same. In the case of a merger with multiple survivors, that entity always will be the original debtor corporation and the entity to which the liability is allocated.

the resulting entity that became liable for the claim as a result of the merger. In the case of a merger with multiple surviving entities, the debtor will again comprise the original corporation or entity liable on the claim prior to the merger and the corporation or other entity to which the claim was allocated in the merger. Thus, if in a merger between two or more corporations the liabilities of the corporations are allocated to two or more of the surviving corporations or other entities, there will always comprise at least two debtors for purposes of determining the rights of a particular creditor under the UFTA, the UFCA and the Bankruptcy Code. These entities consist of the original corporation that was liable with respect to the creditor's claim and each of the surviving or new corporations or entities to which that claim is allocated in the merger. For example, if Corporation A owes $1,000 to each of Creditor A and Creditor B, and Corporation A enters into a merger agreement in which the claim of Creditor A is allocated to new Corporation A, and the claim of Creditor B is allocated to new Corporation B, Corporation A and new Corporation A will each be considered the debtor for purposes of determining the rights of Creditor A under the UFTA, the UFCA and the Bankruptcy Code. Furthermore, Corporation A and new Corporation B will be considered the debtor for purposes of Creditor B under the UFTA, the UFCA and the Bankruptcy Code. New Corporation A, however, will not be considered the debtor with respect to Creditor B, and new Corporation B will not be considered the debtor with respect to Creditor A because neither such new corporations is a person who is or was liable on the claim of such creditors. A similar analysis would apply where there are more than two corporations that are a party to the merger and where a single corporation adopts a plan of merger that effects a division of that corporation's assets and liabilities among two or more surviving entities.

Under the foregoing analysis, the allocation of a creditor's claim to another corporation in a merger with multiple survivors will allow the creditor to challenge the merger and the "transfer" and "conveyance" of assets of the original corporation to the other resulting entity in the merger if: (1) the original corporation was insolvent and the transfer of assets to the other resulting corporation or entity was not for reasonably equivalent value or for fair consideration, (2) the transfer of assets to the resulting entity was not for reasonably equivalent value or fair consideration, and the resulting entity has an unreasonably small amount of assets in relationship to the business or transactions conducted or contemplated to be conducted by it or the resulting entity intended to incur, or believed that it would incur, debts beyond its ability to pay as they become due and absolute, or (3) the merger was effected with an actual intent to hinder, delay or defraud any creditor of the original corporation or the resulting entity. The allocation of a liability of one entity to another entity in a merger with multiple survivors should also constitute a fraudulent transfer under the UFTA, the UFCA and the Bankruptcy Code if: (1) allocation of the liability occurs without reasonably equivalent value or fair consideration and the entity to which the liability is allocated is insolvent, has an unreasonably small amount of assets in relationship to the business or transactions conducted or contemplated to be conducted by it or the resulting entity intended to incur or believed that it would incur debts beyond its ability to pay as they become due and absolute, or (2) the allocation was effected with the intent to hinder, delay or defraud any creditor.

In any of the above situations, a creditor to which the transfer of assets or the incurrence of a liability is considered fraudulent may exercise all of its available remedies under the UFTA, the UFCA and the Bankruptcy Code. These remedies will include the avoidance of the transfer or the allocation of the liability, an attachment of the allocated assets and any other appropriate equitable remedy.[72] The remedy most likely granted, however, would be for the assets of all the entities to the merger to become subject to the claims of the creditors of the other entities to the merger.[73] This remedy is substantially

72. UFTA § 7, 7A U.L.A. 639, 660 (1985); UFCA § 10, 7A U.L.A 427, 630 (1985); 11 U.S.C. §§ 548(a)-(b), 550(a) (1982 & Supp. V 1987); *see also supra* note 65.

73. While the allocation of a liability to an entity in a merger with multiple survivors should be considered when the incurrence of a liability by the entity to which the liability is allocated, the remedy that would be available to a creditor or trustee in bankruptcy if the liability is allocated in a transaction subject to challenge under the UFTA, the UFCA, or the Bankruptcy Code is more difficult to fashion than where the transaction only involves a fraudulent transfer or conveyance of assets. Although various remedies are possible where the allocation of a liability in a merger constitutes a fraudulent transfer, the most appropriate remedy in such a case would generally be to reallocate all or a portion of the allocated liability to one or more of the surviving entities in the merger or to make some or all of the resulting entities liable for all or a portion of the liabilities of the predecessor debtor corporation. This remedy will place the creditors of the original corporation in substantially the same position they would have been in had the transaction not occurred. Additionally, this remedy will provide for substantially the same remedy that would have been granted to a creditor or trustee in bankruptcy if the allocation of assets in the merger also constituted a fraudulent transfer or conveyance of assets. Further, because it is likely that there will have been a fraudulent trans-

the same remedy that likely would have been granted if the transaction were to have been structured as a purchase of assets with stock followed by a distribution of that stock to the shareholders of the selling corporation.[74]

Thus, if in a merger with multiple survivors, the parties allocate a creditor's claim to an inadequately capitalized or insolvent corporation, that creditor will have the right to challenge the merger as a fraudulent transfer. The ability to challenge the merger in this instance mirrors the creditor's right to challenge the creation and distribution to shareholders of a spin-off corporation if the creation and spin-off of such a corporation would result in the corporation being insolvent, inadequately capitalized, or unable to pay its debts as they become due. Conversely, if the corporation to which the creditor's claim is allocated is solvent, has adequate capital, and can pay its

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fer or conveyance of assets in any merger where the allocation of a liability in the merger constitutes a fraudulent transfer or conveyance, the most appropriate and equitable remedy will be one based on the assets transferred rather than the liability incurred. This remedy will avoid affecting the rights of the original creditors holding the claims which constitutes the fraudulent transfer or conveyance while preserving the rights of the creditors to which the merger constitutes a fraudulent transfer or conveyance.

74. For example, a corporation has $1,000,000 in assets and $800,000 in liabilities and enters into a merger agreement with a newly formed corporation with $100,000 in assets and no liabilities. Pursuant to the merger, if $400,000 of assets of the corporation to be acquired are distributed to shareholders immediately prior to the merger or concurrent with the merger through the spin-off to shareholders of a newly created subsidiary to which the assets to be distributed are to be contributed for stock in that subsidiary, the distribution to shareholders of the stock of the subsidiary could be challenged as a fraudulent transfer or conveyance to shareholders under the UFTA, the UFCA, and the Bankruptcy Code. This result follows because the distribution to shareholders was not for reasonably equivalent value or fair consideration, and the surviving corporation in the merger was, under the above example, insolvent after the merger. Similarly, if a corporation was acquired through a cash merger by a shell corporation with nominal assets whereby the surviving corporation is inadequately capitalized or insolvent by virtue of a distribution of cash to shareholders and the incurrence of indebtedness for the acquisition, the distribution of cash to shareholders and the incurrence of indebtedness be challenged as a fraudulent transfer or conveyance under the UFTA, the UFCA, and the Bankruptcy Code. *See* United States v. Gleneagles Inv. Co., 565 F. Supp. 556, 577-82 (M.D. Pa. 1983), *aff'd sub nom.* United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3rd Cir. 1986), *cert. denied*, __ U.S. __, 107 S. Ct. 3229, 97 L. Ed. 2d 735 (1987). For a discussion of the application of the fraudulent transfer laws to merger transactions and leveraged buyouts, see generally Levin & Ginsburg, *Corporate Mergers, Acquisition, and Leveraged Buyouts: Summary of the Basic Tax, SEC, Corporate and Accounting Considerations*, 1 ACQUISITION AND MERGERS 1989 20, 720-56 (1989); Sherwin, *Creditors Rights Against Participants In a Leverage Buyout*, 72 MINN. L. REV. 449 (1988); Murdoch, Sartin, & Zadek, *Fraudulent Conveyances and Leverage Buyouts*, 43 BUS. LAW. 1, 1-49 (1987)(discusses leveraged buyouts and fraudulent transfers).

debts as they become due, a creditor would not be permitted to challenge the merger any more than a creditor of a solvent corporation could challenge a spin-off by that corporation as a fraudulent transfer. In either case, a creditor of any of the merging entities will possess all of the contractual rights that it may have bargained for as well as the right to maintain any liens on the properties of any of the entities securing the payment of the creditor's claim.[75]

D. *Current and Future Applications*

Although the new merger provisions permitting multiple surviving entities should provide immediate benefits to Texas corporations, the benefits of these provisions will not be fully realized until such time that the corporation laws of other jurisdictions, in particular the State of Delaware, permit similar transactions.[76] Currently, the corporation laws of most jurisdictions, including Delaware, provide that corporations incorporated under their laws may only merge with other corporations when the merger results in a single resulting or new corporation.[77] Accordingly, a merger between a Texas corporation and a non-Texas corporation where the parties desire that there be more than one resulting corporation or entity must be accomplished through a combined merger and asset transaction or through some other form of multi-step transaction. Whether and when such other jurisdictions will take action to modernize their merger provisions in line with the Texas statute to permit mergers with multiple surviving corporations is currently unknown.

IV. SHARE EXCHANGES

The 1989 amendments to the TBCA adopted a new procedure for acquiring a corporation through a transaction known as a "share exchange." In a share exchange, the share interests of a corporation are acquired by another corporation or entity without the necessity of a merger of the two entities. A share exchange possesses advantages

75. *See supra* notes 51 & 69.

76. Currently, a substantial number of corporations are incorporated under the laws of the State of Delaware because that jurisdiction has historically had laws responsive to the needs of corporations as well as a sophisticated judiciary in corporate law matters. Accordingly, until such time as similar provisions are adopted or incorporated in Delaware, merger transactions involving Texas corporations and Delaware corporations may not be able to fully utilize the new provisions of the TBCA.

77. DEL. CODE ANN. tit. 8, §§ 251-258 (1974 & Supp. 1989).

over a traditional merger transaction in that it permits the acquisition of all of the share interests of one or more classes or series of stock of a corporation without the acquired corporation going out of existence and with the acquired corporation becoming a subsidiary of the acquiring entity. This form of transaction is often desirable where the acquiring entity is a holding company operating through its subsidiaries or where the acquiring entity desires to acquire only the common equity of the acquired corporation and leave outstanding one or more classes or series of shares of the acquired corporation. Prior to the 1989 amendments, this type of transaction had to be accomplished through a "reverse triangular merger" in which a new subsidiary of the acquiring corporation merged with the acquired corporation and the holders of the shares of the acquired corporation received cash, securities or other property of the acquiring corporation's parent. A share exchange under the TBCA will now permit this type of transaction to be directly accomplished without the necessity of using a "shell" corporation. The approval procedures and the rights of shareholders in a share exchange closely follow those provided for in mergers.[78]

Article 5.02 of the TBCA sets forth the share exchange provisions.[79] The TBCA provisions are primarily based on the share exchange provisions contained in Section 11.02 of the Revised Model Business Corporation Act (the "RMBCA").[80] The corporation laws of a majority of the states currently provide for a procedure for share exchanges similar to those of the TBCA.[81] The principal differences

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78. TEX. BUS. CORP. ACT. ANN. arts. 5.02A, 5.03, 5.11 (Vernon Supp. 1990).

79. *Id.* art. 5.02.

80. REVISED MODEL BUSINESS CORP. ACT § 11.02 (1985).

81. *See, e.g.*, ALA. CODE § 10-2A-170 (1987)(domestic and foreign corporations); ALASKA STAT. § 10.06.538 (1989)(domestic corporations); ALASKA STAT. § 10.06.562 (1989)(foreign corporations); CAL. CORP. CODE § 181 (Deering 1977)(defines reorganization); CAL. CORP. CODE § 1200, 1201 (Deering 1977 & Supp. 1988)(allows exchange reorganizations); COLO. REV. STAT. § 7-7-102.5 (1986)(domestic corporations); COLO. REV. STAT. § 7-7-107 (1986)(foreign corporations); GA. CODE ANN. § 14-2-1102 (Supp. 1988)(domestic corporations); GA. CODE ANN. § 14-2-1106 (Supp. 1988)(foreign corporations); GA. CODE ANN. § 14-2-1108 (Supp. 1988)(allows mergers or share exchanges with corporations chartered by Secretary of State under other provisions); GA. CODE ANN. § 14-2-1109 (Supp. 1988)(allows mergers or share exchanges with joint-stock or unincorporated associations or trusts); HAW. REV. STAT. § 415-472 (Supp. 1987)(domestic corporations); HAW. REV. STAT. § 415-477 (Supp. 1987)(foreign corporations); IDAHO CODE § 30-1-72A (1980)(domestic corporations); IDAHO CODE § 30-1-77 (1980 & Supp. 1989)(foreign corporations); ILL. ANN. STAT. ch. 32, para. 11.10 (Smith-Hurd 1989)(domestic corporations); ILL. ANN. STAT. ch. 32, para. 11.35

between the TBCA's share exchange provisions and those of the RMBCA and other jurisdictions are that the TBCA provisions permit more than one acquiring or acquired entity in a share exchange and permit the acquiror to be an entity other than a business corporation.[82] The Texas statute also permits a share exchange to be incorporated as part of a plan of merger.[83]

The TBCA's provisions permitting more than one acquiring or acquired entity in a share exchange and those permitting acquiring entities other than business corporations were intended to simplify the procedures necessary to effect a share exchange and to provide additional flexibility. Because a share exchange could easily involve more than one acquiring entity or an entity other than a business corporation by using a multi-step transaction involving a corporate subsidiary owned by multiple acquiring entities or by an entity other than a busi-

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(foreign corporations); IND. CODE ANN. § 23-1-40-3 (Burns Supp. 1988)(domestic corporations); IND. CODE ANN. § 23-1-40-7 (Burns Supp. 1988)(foreign corporations); KEN. REV. STAT. ANN. § 271B.11-020 (Michie/Bobbs-Merrill Supp. 1988)(domestic corporations); KEN. REV. STAT. ANN. § 271B.11-020 (Michie/Bobbs-Merrill Supp. 1988)(foreign corporations); MD. CORPS. & ASS'NS CODE ANN. § 3-102 (1985 & Supp. 1988)(allows share exchanges); MINN. STAT. ANN. § 302A.601 (West 1985 & Supp. 1989)(allows share exchanges); MINN. STAT. ANN. § 302A.651 (West 1985)(foreign corporations); MISS. CODE ANN. § 79-4-11.02 (Supp. 1988)(domestic corporations); MISS. CODE ANN. § 79-4-11.07 (Supp. 1988)(foreign corporations); MONT. CODE ANN. § 35-1-801 (1987)(domestic corporations); MONT. CODE ANN. § 35-1-807 (1987)(foreign corporations); NEB. REV. STAT. § 21-2071.01 (1987)(domestic corporations); NEB. REV. STAT. § 21-2076 (1987)(foreign corporations); N.H. REV. STAT. ANN. § 293-A:73 (1987)(domestic corporations); N.H. REV. STAT. ANN. § 293-A:78 (1987)(foreign corporations); N.J. STAT. ANN. § 14A:10-9 (West 1974)(allows share exchange with domestic corporations); N.M. STAT. ANN. § 53-13-13 (Supp. 1988)(domestic corporations); N.M. STAT. ANN. § 53-14-7 (Supp. 1988)(foreign corporations); N.Y. BUS. CORP. LAW § 913 (McKinney Supp. 1988)(allows share exchanges for domestic and foreign corporations); N.D. CENT. CODE § 10-19.1-96 (1985)(domestic corporations); N.D. CENT. CODE § 10-19.1-103 (1985)(foreign corporations); OR. REV. STAT. § 60.484 (1987)(domestic corporations); OR. REV. STAT. § 60.501 (1987)(foreign corporations); S.C. CODE ANN. § 33-11-102 (Law. Co-op. Supp. 1988)(domestic corporations); S.C. CODE ANN. § 33-11-107 (Law. Co-op. Supp. 1988)(foreign corporations); S.D. CODIFIED LAWS ANN. § 47-6-2.1 (Supp. 1989)(allows share exchanges); TENN. CODE ANN. § 48-21-102 (1988)(domestic corporations); TENN. CODE ANN. § 48-21-107 (1988)(foreign corporations); TEX. BUS. CORP. ACT ANN. art. 5.02 (Vernon Supp. 1990)(allows share exchanges or acquisitions among domestic or foreign corporations); VA. CODE ANN. § 13.1-717 (Michie 1988)(domestic corporations); VA. CODE ANN. § 13.1-722 (Michie 1988)(foreign corporations); WA. REV. CODE ANN. § 23A.20.025 (Supp. 1989)(domestic corporations); WA. REV. CODE ANN. § 23A.20.070 (Supp. 1989)(foreign corporations); WYO. STAT. § 17-1-402.1 (1987)(domestic corporations); WYO. STAT. § 17-1-406 (1987)(foreign corporations).

82. TEX. BUS. CORP. ACT ANN. art. 5.02A (Vernon Supp. 1990).

83. *Id.* arts. 5.01C(2), 5.02C.

ness corporation, no logical reason exists why the parties should not be permitted to directly effect such a share exchange. Similarly, because the acquisition of shares of one or more corporations through a share exchange may be accomplished through two or more separate share exchanges, no logical reason exists why multiple share exchanges should not be permitted to be effected as part of a single share exchange. Further, unlike mergers with multiple survivors, a division of the ownership of shares of a corporation acquired in a share exchange among more than one acquiring entity presents no questions with respect to the allocation of assets and liabilities of the acquired corporation or corporations and the rights of creditors thereof.

To effect a share exchange under the TBCA, the parties must adopt a plan of exchange in accordance with the provisions of Article 5.02 of the TBCA.[84] The plan of exchange must set forth:

> (1) the name of the corporation or corporations whose shares will be acquired and the name of each acquiring [entity] . . .;
> (2) the terms and conditions of the exchange including, if there is more than one acquiring [entity] . . . , the shares to be acquired by each such entity; and
> (3) the manner and basis of exchanging the shares to be acquired for shares, obligations, evidences of ownership, rights to purchase securities or other securities . . . cash or other property, or for any combination of the foregoing.[85]

Under Article 5.03 of the TBCA, the board of directors of the corporation to be acquired must submit a plan of exchange to the holders of each class or series of shares that are to be acquired in the share exchange, and those shareholders must approve the exchange by a vote of the holders of at least two-thirds of the outstanding shares of each class or series to be acquired.[86] The articles of incorporation of the corporation to be acquired may provide for a greater or lesser vote for approval of a share exchange as long as the vote that is required is not less than a majority of the holders of each class or series entitled to vote on the share exchange.[87] The required vote may also be increased by the board of directors of the corporation to be acquired. The holders of a class or series of the acquired corporation's stock not

84. *Id.* art. 5.02A.
85. *Id.* art. 5.02B.
86. *Id.* art. 5.03E.
87. TEX. BUS. CORP. ACT ANN. art. 2.28D (Vernon Supp. 1990).

exchanged in a share exchange will not be entitled to vote on the exchange unless otherwise provided in the corporation's articles of incorporation.[88] No vote of the shareholders or owners of the acquiring corporation or entity will be necessary to effect a share exchange unless the constituent documents of that entity or the laws applicable to that entity require such a vote.[89]

Upon approval of a share exchange by the shareholders of the corporation to be acquired and by any necessary action by the acquiring entity, the parties to the share exchange must file articles of exchange containing the plan of exchange with the Secretary of State of the State of Texas.[90] Upon the effectiveness of the share exchange, the shares of each acquired corporation will be deemed to have been exchanged as provided in the plan of exchange, and the former holders of the exchanged shares will only possess the exchange rights provided in the plan of exchange or their rights of dissent under Article 5.11 of the TBCA.[91] The entities acquiring the shares in the share exchange will be entitled to all rights, title and interest with respect to the exchanged shares subject to any applicable provisions in the plan of exchange.[92] Under Article 5.11A(3) of the TBCA, holders of the shares of the class or series of the corporation acquired in the share

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88. *Id.* art. 5.03F(2).

89. *Id.* art 5.04A(5), (6). Although not required by statute, corporations whose shares are listed on the New York Stock Exchange or the American Stock Exchange are required to seek shareholder approval for certain share issuances. Under the rules of these exchanges, corporations must obtain shareholder approval for any acquisition involving the issuance of 18-1/2% or more of corporation's outstanding shares. NEW YORK STOCK EXCHANGE, LISTED COMPANY MANUAL § 312.00 (1988); AMERICAN STOCK EXCHANGE, COMPANY GUIDE §§ 712, 713 (1988).

90. TEX. BUS. CORP. ACT ANN. art. 5.04 (Vernon Supp. 1990). Under article 5.04 of the TBCA, the Articles of Exchange must be executed on behalf of each Texas corporation that is a party thereto by an officer thereof and must set forth: (1) the plan of exchange, (2) as to each corporation the approval of whose shareholders is required, "the number of shares outstanding, and, if the shares of any classes or series" may vote as a class, "the designation and number of outstanding shares of each such class or series," (3) as to each corporation the approval of whose shareholders is required, the number of shares voted for and against the plan of exchange, respectively, "and if the shares of any class or series are entitled to vote as a class, the number of shares of each such class or series voted for and against the plan, respectively," and (4) as to each acquiring corporation or entity that is a party to the plan of exchange, "a statement that the plan and the performance of its terms are duly authorized by all action required by the laws under which it was incorporated or organized and by its constituent documents." *Id.* A form of Articles of Exchange complying with the requirements of article 5.04 of the TBCA is set forth in Appendix B hereto.

91. *Id.* art. 5.06B.

92. *Id.*

exchange may dissent from the transaction and obtain the "fair value" for their shares pursuant to the procedures set forth in Articles 5.12 and 5.13 of the TBCA.[93]

V. Mergers and Share Exchanges with Entities Other Than Business Corporations

Prior to the 1989 TBCA amendments, the only entities permitted under the TBCA to merge with a Texas corporation were other Texas corporations and for profit corporations organized under the laws of other jurisdictions.[94] As a result of the 1989 amendments to the TBCA, a Texas corporation may now merge and engage in a share exchange with any other business entity as long as the laws under which that entity was organized permit such a merger or exchange or the constituent documents of that entity permit such a merger or exchange and such a merger or exchange does not conflict with the laws under which such entity was organized.[95]

The kinds of entities, other than business corporations themselves, most likely to merge with Texas business corporations, include non-profit corporations, limited partnerships, real estate investment trusts, and general partnerships. Transactions facilitated through a merger of a Texas corporation with an "other entity" include: (1) the acquisition by a Texas corporation of a real estate investment trust or partnership, (2) the conversion of a Texas corporation into a master limited partnership or vice versa, and (3) the restructuring of a Texas corporation pursuant to a plan under which the corporation's assets and liabilities are allocated among itself and several other corporations and non-corporate entities. Another possible transaction might include a merger of a Texas corporation with a state or federally chartered bank or savings and loan association.[96] Such a merger, however, would be subject to the receipt of appropriate and regula-

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93. *Id.* arts. 5.11A(3), 5.12-.13 (Vernon 1980 & Supp. 1990).

94. Article 1.02A(7) of the TBCA defines a corporation as an entity organized for profit subject to the provisions of the TBCA other than a foreign corporation. TEX. BUS. CORP. ACT ANN. art. 1.02A(7) (Vernon Supp. 1990).

95. *Id.* arts. 1.02A(13), 5.01A(2), 5.02A, 5.04A(5), (6).

96. For example, subject to regulatory approval, the recapitalization of an ailing savings and loan association or bank could be effected through a merger with a Texas corporation with two surviving entities. One surviving entity would be the recapitalized savings and loan association or bank. The other surviving entity would be a real estate investment trust, partnership or other corporation holding assets consisting solely of the nonperforming loans and real estate and other property obtained through foreclosure by the savings and loan association or bank.

tory interpretations so there will not be a conflict with the statutes under which such entities are created.[97]

The provisions permitting mergers and share exchanges between Texas corporations and other entities are derived from similar provisions under the Delaware General Corporation Law (the "DGCL").[98] Under the DGCL, a Delaware corporation may merge with any other form of business corporation as well as various other entities including joint stock associations, banks and limited partnerships.[99] Although the Texas and Delaware statutes permitting mergers with other entities are similar in purpose and effect, the Texas provisions vary from those in Delaware in three significant ways.

First, the TBCA allows a slightly more expansive group of entities to merge with a Texas corporation than the group of entities that may merge with a Delaware corporation. Unlike the DGCL, a Texas corporation may merge with a general partnership while a Delaware corporation may not do so.[100] Presumably, the Delaware exclusion is based upon a concern that a shareholder of a Delaware corporation could be required to accept in a merger an interest in an entity that would not provide the shareholder with continued limited liability. The TBCA recognizes and addresses this concern and provides in Articles 5.01 and 5.02 that a merger or share exchange may not proceed with any entity if a shareholder of one of the entities to the transaction would, as a result of the merger or share exchange, "become personally liable, without his consent, for the liabilities or obligations of any other person or entity."[101] The inclusion of this provision assures a shareholder of a Texas corporation that the limited liability offered

97. TEX. BUS. CORP. ACT ANN. art. 5.01A(2) (Vernon Supp. 1990).

98. DEL. CODE ANN. tit. 8, §§ 101-398 (1974 & Supp. 1989).

99. *Id.* §§ 251, 252, 254, 263.

100. This distinction is based on the difference between the definition in Texas of an "other entity" and the definition in Delaware of a "joint stock association", with the former specifically including partnerships and the latter specifically excluding partnerships. *Compare* TEX. BUS. CORP. ACT ANN. art. 1.02A(13) (Vernon Supp. 1990) *with* DEL. CODE ANN. tit. 8, § 254 (1974 & Supp. 1989). Under section 254(a) of the DGCL, a "joint-stock association" is defined as:

> [A]ny association of the kind commonly known as joint-stock association of joint-stock company and any unincorporated association, trust or enterprise having members or having outstanding shares of stock or other evidences of financial or beneficial interest therein, whether formed by agreement or under statutory authority or otherwise, but does not include a corporation or partnership.

Id. § 254(a).

101. TEX. BUS. CORP. ACT ANN. arts. 5.01A(3), 5.02D (Vernon Supp. 1990).

to him under the corporate form may not in any way be abridged as a result of a merger or share exchange with a non-corporate entity.

Second, the TBCA permits the resulting entity in a merger or share exchange to be a corporation or any other entity permitted to merge or engage in a share exchange with a Texas corporation. Under the DGCL, the resulting entity in a merger may only be a United States corporation (profit or nonprofit) or limited partnership.[102] This limitation would appear to be based upon the previously discussed concern that a shareholder of a Delaware corporation might lose the limited liability provided by the corporate form, or that the shareholder might be required to accept in a merger an interest in an entity fundamentally different than his prior interest. The TBCA addresses the first concern by providing that no merger or share exchange may proceed if a shareholder would be liable for the obligations of any other person without his consent.[103] As to the second concern, a shareholder of any corporation can never be assured that he will not have fundamentally different rights after a merger than he had before the merger. This is because in a merger a shareholder may be required to accept for his shares cash, securities or property other than shares in a corporation if the other shareholders approve the merger by the requisite vote. The protection of a shareholder against such fundamental changes to his investment in a merger is, as in any merger, provided through the requirement of shareholder approval and the shareholder's right to obtain the "fair value" for his shares.

Third, the Texas and Delaware statutes differ in the standard for determining whether the laws under which an entity other than a business corporation is organized permit a merger of a business corporation or exchange with such an entity. Under the DGCL, a Delaware corporation may merge with a nonstock, nonprofit or other corporation organized under the laws of any jurisdiction if the laws of that jurisdiction permit a corporation to merge with a corporation of another jurisdiction.[104] A Delaware corporation may also merge with any "joint-stock corporation," defined to include most noncorporate entities other than partnerships, and may merge with a limited partnership organized under the laws of any jurisdiction unless the laws of

102. DEL. CODE ANN. tit. 8, §§ 251, 252-258, 263 (1974 & Supp. 1989).

103. TEX. BUS. CORP. ACT ANN. arts. 5.01A(3) and 5.02D (Vernon Supp. 1990).

104. DEL. CODE ANN. tit. 8, §§ 257-258 (1974 & Supp. 1989).

that jurisdiction forbid the merger.[105] Under the TBCA, a Texas corporation may merge or engage in a share exchange with any entity as long as the laws under which that entity was organized permit a merger or share exchange with that entity or the constituent documents of that entity, not inconsistent with such laws, permit the transaction.[106]

The distinction between the Texas and Delaware formulations of when an entity other than a business corporation may merge with a corporation depends upon whether a meaningful distinction exists between laws which "permit" a merger, laws that do not "forbid" a merger, and provisions in constituent documents that permit a merger and that are not "inconsistent" with the laws governing the merging entity. With respect to the meaning of a law or constituent document that "permits" a merger between a corporation and an other entity, this requirement could require either a specific authorization for the merger or that the merger be within the general powers of the other entity. Because the purpose of the restrictions under the TBCA and the DGCL regarding the type of entities that will be permitted to merge with corporations is to ensure that the merger will be legally permissible under the laws under which the other entity is organized, the most appropriate construction of this requirement is that no express provision authorizing the merger is required as long as the merger would be consistent with the general powers of that entity under applicable law. In the case of any corporation, entity, or limited partnership which has the express power under statute to merge with certain types of entities, a merger with an entity other than one permitted by statute likely would be inconsistent with the laws under which that entity was organized or the general powers of that entity.[107]

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105. *Id.* § 254.

106. TEX. BUS. CORP. ACT ANN. arts. 1.02A(13), 5.01A(2), 5.02A, 5.04A(5)-(6) (Vernon Supp. 1990).

107. It is a fundamental principle of corporation and partnership law that entities such as corporations and limited partnerships are creatures of the state and the scope of their powers and privileges are governed by the statutes under which they were organized. Where the statute under which an entity is organized permits that entity to merge or consolidate with another entity, a merger of that entity with an entity other than one which is specifically permitted by statute would likely be inconsistent with the laws under which the merging entity was organized. The reason for this result is that no procedures will exist by which the merger may be initiated and there will not exist any of the protections provided to shareholders or interest holders in the merger as are provided for under statute. Further, the absence of the inclusion

As to mergers with entities other than corporations or entities permitted by statute to merge with other entities, the analysis should focus on whether such a merger accords with the powers of that entity with respect to conveyances of assets, sales of new ownership interests, and admissions of new partners. For such an entity, the distinction between whether the laws under which it was organized "forbid" such a merger or whether the merger is not "inconsistent" with such laws will likely be more synonymics than substance because the merger will either be permissible under the laws under which the entity was organized or it will not be permissible.[108] Just because the laws under which an entity is organized do not expressly forbid such a merger, this fact should not by itself make a merger permissible.

It should, however, be noted that there may be a distinction under the TBCA between whether a corporation will be able to merge with another entity and whether another entity may be created by virtue of a merger. In the former case, one must look to whether the merger is permitted or consistent with law while in the latter case one must only look to whether the creation of such an entity through a merger complies with the requirements of the organization of such an entity. Thus, although a corporation may not be able to merge with a nonprofit corporation or limited partnership organized under certain jurisdictions, it may nevertheless be able to adopt a plan of merger pursuant to which one of such entities is created and becomes the resulting entity by virtue of the merger. Compliance with all other requirements of law for the incorporation or organization of such entity will, of course, always be required.[109]

With respect to which entities may engage in a share exchange with a Texas corporation, the sole issue relates to whether the entity has the general authority under law to issue additional shares or owner-

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of the other merging entity as an entity with which it may merge will be indicative of a legislative intent that the merger is not permitted. Accordingly, if an entity is permitted to merge with other entities by statute, a merger with another form of entity than is specifically authorized by statute will likely be inconsistent with the laws under which that entity was organized.

108. A list of those jurisdictions which permit mergers of corporations with entities other than business corporations is set forth in Appendix C hereto. Although a review of the specific statute under which an entity is organized must be made prior to concluding that such an entity may merge with a Texas corporation, it is likely that a Texas corporation could merge with a nonprofit corporation, association, or limited partnership organized under the laws of those jurisdictions reflected in Appendix C. These entities generally are empowered to merge with corporations under their laws.

109. *See* TEX. BUS. CORP. ACT ANN. art. 5.06A(6) (Vernon Supp. 1990).

ship interests for consideration consisting of shares in the corporation to be acquired and to hold those shares once acquired.[110] If an entity has this authority, whether express or implied, the entity will be authorized to engage in a share exchange as long as it complies with any applicable requirements for the issuance of share or ownership interests in it. Thus, most entities will be able to engage in a share exchange with a Texas corporation under the TBCA regardless of whether or not they could merge with a corporation under the TBCA.

The benefits of the new merger provisions of the TBCA permitting mergers of Texas corporations with other entities will not be fully realized until other jurisdictions permit, or a reasonable interpretation of their laws would permit, noncorporate entities to merge with corporations. In this regard, it is interesting to note that among the entities other than business corporations with which a Texas corporation currently may merge with are nonprofit and non-stock corporations and limited partnerships organized under Delaware law.[111] Whereas, among the entities that a Texas corporation could not likely merge with include Texas nonprofit corporations and limited partnerships.[112] In fact, the only Texas entities other than another Texas corporation that a Texas corporation may now clearly merge with are a Texas real estate investment trust, partnership, or unincorporated association.[113] Accordingly, the legislature should consider during the next legislative session amending the Texas Non-Profit Corpora-

110. This result follows because a share exchange does not involve any change in the organizational structure of the acquiring entity and only involves the issuance of additional equity interest or other ownership interests of such entity. Accordingly, if an entity has the power under the laws under which it was organized or its constituent instruments to issue additional ownership interests, an acquisition by such an entity of a Texas corporation through a share exchange should be consistent with the laws under which that entity was organized.

111. *See* DEL. CODE ANN. tit. 8, §§ 256, 263 (1974 & Supp. 1989).

112. Although the Texas Legislature amended the merger provisions of the TBCA to permit mergers of corporations with other entities, a similar change to the Texas Non-Profit Corporation Act, the Texas Uniform Limited Partnership Act, and the Texas Revised Limited Partnership Act were not made. Under the Texas Non-Profit Corporation Act and the Texas Revised Limited Partnership Act, entities organized under such acts are specifically empowered to merge with certain entities but not with for profit corporations. Furthermore, the Texas Uniform Limited Partnership Act provides no mechanism for mergers of such entities with any other entities. Accordingly, a merger between a Texas corporation and a Texas nonprofit corporation or limited partnership likely would not be consistent with the laws under which such entities are organized.

113. TEX. REV. CIV. STAT. ANN. art. 6138A, § 23.1(2) (Vernon Supp. 1990)(real estate investment trust).

tion Act,[114] the Texas Uniform Limited Partnership Act,[115] and the Texas Revised Limited Partnership Act[116] to specifically authorize mergers of entities organized under those acts with corporations. Until these amendments occur, a Texas corporation should still be able to take advantage of many of the benefits provided by the TBCA's provisions permitting Texas corporations to merge with other entities by structuring such transactions with entities in those jurisdictions which permit such mergers.

VI. Changes in Voting Requirements for Mergers

The 1989 amendments to the TBCA enacted various changes to the shareholder voting requirements for approval of mergers. One of the principal changes is the elimination of the right of nonvoting shares to vote on a merger except under certain circumstances. Additionally, the amendments eliminate the requirement of a vote of shareholders of a surviving corporation in a merger where 20% or less of the voting and participating shares of the surviving corporation are issued in the merger and the rights of the existing shareholders of the corporation are not affected. The amendments also codify the right of a board of directors to condition a merger on the receipt of a vote of shareholders in excess of the vote required by the corporation's articles of incorporation or by law. These changes to the voting requirements of the TBCA were based primarily upon similar provisions contained in the RMBCA[117] and were adopted in an attempt to further modernize the TBCA and provide flexibility to Texas corporations in structuring merger and acquisition transactions.[118]

A. *Elimination of Voting Rights of Nonvoting Shares in a Merger*

Under Article 5.03E of the TBCA, the vote of shareholders of a Texas corporation required for approval of a plan of merger or exchange is the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote thereon.[119]

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114. TEX. REV. CIV. STAT. ANN. art. 1396-1.01 to -11.01 (Vernon 1980 & Supp. 1989).
115. TEX. REV. CIV. STAT. ANN. art. 6132a (Vernon 1970 & Supp. 1989).
116. TEX. REV. CIV. STAT. ANN. art. 6132a-1 (Vernon Supp. 1989).
117. REVISED MODEL BUSINESS CORP. ACT § 11.03 (1985).
118. HOUSE BUS. & COM. COMM., BILL ANALYSIS, Tex. H.B. 472, 71st Leg. (1989); SENATE ECON. & DEV. COMM., BILL ANALYSIS, Tex. S.B. 608 71st Leg. (1989).
119. TEX. BUS. CORP. ACT ANN. art. 5.03E (Vernon Supp. 1990).

In addition, if any class or series of shares of a corporation is entitled to vote as a class on a merger, approval of the merger requires an affirmative vote of the holders of at least two-thirds of the outstanding shares of each class or series entitled to vote on the merger and the holders of at least two-thirds of the outstanding shares of stock generally entitled to vote thereon.[120] Article 5.03F of the TBCA provides that separate voting by the holders of a class or series of shares for approval of a plan of merger will only be required if the plan of merger contains a provision that if contained in a proposed amendment to that corporation's articles of incorporation would require approval of that class or series or if that class or series is entitled under the articles of incorporation to vote as a class thereon.[121] Similarly, separate voting by the holders of a class or series of shares of a corporation for approval of a share exchange will only be required if the shares of that class or series are to be exchanged pursuant to the terms of the plan of exchange or that the class is entitled under the articles of incorporation to vote as a class on the share exchange.[122] Article 4.03 of the TBCA requires the holders of a class or series of shares to vote as a class on an amendment to the articles of incorporation of the corporation if the amendment would change the relative rights and preferences of that class or series or result in one of a number of specifically identified events adversely affecting the rights of the holders of such a class or series of shares.[123] Accordingly, nonvoting shares of

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120. *Id.*

121. *Id.* art. 5.03F(1).

122. *Id.* art. 5.03F(2).

123. TEX. BUS. CORP. ACT ANN. art. 4.03 (Vernon 1980 & Supp. 1989). Under article 4.03 of the TBCA, the holders of an outstanding class or series of shares will be considered to be adversely affected and have a right to vote as a class on a proposed amendment to the articles of incorporation of the corporation if the amendment would:

(1) increase or decrease the aggregate number of authorized shares of such class;

(2) increase or decrease the par value of the shares of such class;

(3) effect an exchange, reclassification or cancellation of all or part of the shares of such class;

(4) effect an exchange, or create a right of exchange, of shares of another class into the shares of all or any part of the such class;

(5) change the designations, preferences, limitations or relative rights of the shares of such class;

(6) change the shares of such class . . . into the same or a different number of shares of the same class . . . or another class . . .;

(7) create a new class of shares having rights and preferences equal, prior, or superior to the shares of such class, or increase the rights and preferences of any class having rights and preferences equal, prior, or superior to the shares of such class, or increase the rights

a Texas corporation only will be entitled to vote on a merger or exchange if the plan of merger or exchange results in such a change to the shares or the rights of the holders thereof.

Prior to the 1989 amendments, the holders of all outstanding shares of a corporation were entitled to vote on a proposed plan of merger regardless of whether or not such shares had voting rights under the articles of incorporation.[124] Such holders were also entitled to a separate class vote if the plan of merger contained any provision which, if contained in a proposed amendment to the articles of incorporation, would have entitled that class of shares to vote as a class.[125] The elimination of the right of a class or series of nonvoting shares from voting on a merger except where the merger effects a change in the rights of that class or series was intended to limit the shares entitled to vote on a merger to only those shares actually affected by the merger or which were specifically entitled to vote on the merger.[126] This change also removes the possibility that a class or series of shares not adversely affected by a merger could block the merger through its right to vote on the merger with all other shares that are affected. The rights of the holders of such a class or series, however, will remain protected under the new provisions of the TBCA because the holders of such shares will continue to have the right to vote as a separate class on any merger if the articles of incorporation so provide or if the merger would adversely affect the rights of such holders.[127]

> and preferences of any class having rights and later on preferences inferior to the shares of such class in such a manner as to become equal, or prior, or superior to the shares of such class . . . ;
>
> (8) . . . divide the shares of such class;
>
> (9) limit or deny the existing preemptive rights of the shares of such class . . .;
>
> (10) cancel . . . dividends on the shares of such class which had accrued but [have] not been declared; and
>
> (11) include in or delete from the articles of incorporation any provisions required or permitted to be included in the articles of incorporation of a [closed] corporation . . .

Id.

124. *Id.* art. 4.03B(1)-(11) (Supp. 1989); TEX. BUS. CORP. ACT ANN. art. 5.03 (Vernon 1980), *amended by* TEX. BUS. CORP. ACT ANN. art. 5.03 (Vernon Supp. 1990).

125. TEX. BUS. CORP. ACT ANN. art. 5.03 (Vernon Supp. 1990).

126. HOUSE BUS. & COM. COMM., BILL ANALYSIS, Tex. H.B. 472, 71st. Leg. (1989); SENATE ECON. & DEV., BILL ANALYSIS, Tex. S.B. 608, 71st Leg. (1989).

127. TEX. BUS. CORP. ACT ANN. art. 5.03F (Vernon Supp. 1990). It should be noted, however, that if a class or series of shares can vote on a merger, the holders thereof only will be entitled to vote as a class and not with the holders of any other class. *See id.* art. 5.03E.

B. *Elimination of Vote of Shareholders Where 20% or Less of Outstanding Participating and Voting Shares Are Issued in the Merger*

Under Article 5.03G of the TBCA, "unless the articles of incorporation otherwise require," shareholder approval of a plan of merger will not be required if:

> (1) the corporation is the sole surviving corporation in the merger;
> (2) the articles of incorporation of the corporation will not differ from its articles of incorporation before the merger;
> (3) each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after the effective date of the merger;
> (4) the voting power of the . . . ["voting shares" of the corporation will not increase by more than 20% as a result of the merger; and];
> (5) the number of . . . ["participating shares" of the corporation will not increase] by more than [20%] . . . [as a result of the merger];
> (6) the board of directors of the corporation adopts a resolution approving the plan of merger.[128]

For purposes of this provision, "participating shares"[129] constitute those shares that entitle the holders to participate without limitation in distributions by the corporation. The term "voting shares"[130] means those shares that entitle the holders to vote unconditionally in the election of directors. Securities issued in the merger that are convertible into or exercisable for voting or participating shares are treated as if converted or exercised for purpose of testing the 20% requirement.[131]

Under the foregoing provisions, a corporation may now merge with another corporation under the TBCA without a vote of its shareholders if the merger does not result in any change in the rights of the corporation's outstanding shares and 20% or less of the voting and participating shares of the corporation are issued in the merger. Previously, if a corporation wished to merge with another corporation without a vote of its shareholders, it had to create a separate subsidiary that would merge with the corporation to be acquired and thereaf-

128. *Id.* art. 5.03G.
129. *Id.* art. 5.03H(1).
130. *Id.* art. 5.03H(2).
131. *Id.* art. 5.03G(5), (6).

ter merge the subsidiary with the corporation in a short-form merger. Corporations may now directly effect such a merger without a shareholder vote as long as the corporation meets the above requirements.

The elimination of the requirement of a shareholder vote in a merger involving an increase of 20% or less in the outstanding participating and voting shares is based on the theory that a shareholder vote should only be required if "the transaction fundamentally alters the character of the enterprise or substantially reduces the shareholder's participation" in the distributions and voting of the corporation.[132] A merger transaction involving the issuance of 20% or less of the outstanding participating and voting shares of the corporation is generally not considered to be of a nature that would alter the character of the investor's investment in the corporation any more than other ordinary management decisions.[133] This reasoning is also supported by the fact that a corporation may acquire another corporation through a merger of the corporation to be acquired with a subsidiary of the acquiring corporation and issue in the merger any number of the authorized and unissued shares of the acquiring corporation without a shareholder vote.[134] The 20% limitation provided in Article 5.03 reflects a compromise among conflicting points of view as to the desirability of a shareholder vote for such transactions and is consistent with the statutes of several states including Delaware, Michigan, and New Jersey; furthermore, this limitation accords with the New York Stock Exchange and American Stock Exchange requirements that shareholders be consulted if the number of outstanding shares increases in an acquisition by more than 20%.[135]

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132. REVISED MODEL BUSINESS CORP. ACT § 11.03 official comment (1985).

133. *Id.*

134. For example, it has historically been possible for a corporation with a sufficient number of authorized and unissued shares of common stock to acquire another corporation through the creation of a subsidiary corporation that will merge with the corporation to be acquired. The consideration to be paid to the shareholders of the corporation to be acquired will consist of the shares of the parent corporation. In this circumstance, absent a requirement in the articles of incorporation of the parent corporation or an applicable rule, such as the rules of the New York Stock Exchange for certain acquisitions, no approval of shareholders would be required for the acquisition.

135. *See* REVISED MODEL BUSINESS CORP. ACT § 11.03 official comment (1985); DEL. CODE ANN. tit. 8, § 251(f) (1974 & Supp. 1989)(20%); MICH. STAT. ANN. § 21.200(704) (Callaghan 1983)(20%); N.J. REV. STAT. § 14A-10-3(4) (West Supp. 1989) (40%); NEW YORK STOCK EXCHANGE, LISTED COMPANY MANUAL § 312 (1988)(18.5%); AMERICAN STOCK EXCHANGE, COMPANY GUIDE §§ 712, 713 (1988) (18.5%).

C. *Increase by the Board of Directors of the Required Vote for a Merger*

Often in a merger and acquisition transaction between a corporation and an affiliated shareholder, the board of directors of the corporation will condition the transaction on the receipt of an affirmative vote of shareholders greater than that required by statute or the articles of incorporation. Typically, such a vote would be in the form of a requirement that a majority of the unaffiliated shareholders approve the merger or transaction.[136] Although the ability to require the approval of a merger by a greater vote than required by statute or by the corporation's articles of incorporation was permitted under prior law by virtue of the ability of a plan of merger to contain such provisions as are deemed necessary or desirable, this right was specifically codified in the 1989 amendments in Article 5.03E of the TBCA.[137] As a result of such amendments, the board of directors of a Texas corporation can now statutorily require a greater vote of shareholders on a merger or exchange than required by the statute or the articles of incorporation. The board may also require a vote of a class or series of shares not otherwise entitled to vote on the merger or exchange. The right of a board of directors to require such a greater vote derives from a similar provision contained in Section 11.03 of the RMBCA.[138]

VII. ELIMINATION OF DISSENTERS' RIGHTS FOR CERTAIN MERGERS

The Texas Legislature amended Article 5.11 of the TBCA[139] in the 1989 legislative session to eliminate the right of dissent by shareholders to certain mergers involving public corporations. Under Article 5.11 of the TBCA, shareholders of a Texas corporation may dissent to certain transactions, including mergers and share exchanges, and may demand that they receive the "fair value" of their shares through an appraisal procedure.[140] This right of dissent provides shareholders

136. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983) (corporate action approved by majority of unaffiliated shareholders).

137. TEX. BUS. CORP. ACT ANN. arts. 5.03C, 5.03E (Vernon Supp. 1990); *see also* REVISED MODEL BUSINESS CORP. ACT. § 11.03 official comment (1985).

138. REVISED MODEL BUSINESS CORP. ACT § 11.03 (1985).

139. TEX. BUS. CORP. ACT ANN. art. 5.11 (Vernon Supp. 1990).

140. TEX. BUS. CORP. ACT ANN. art. 5.11-.12 (Vernon 1980 & Supp. 1990).

with the ability to receive the fair value of their shares in cash if they believe that the consideration they will receive in the merger does not represent the fair value of their shares. This right of dissent, however, is the sole remedy provided to shareholders under Texas law for monetary damages in a merger absent fraud in the transaction.[141] Historically, Texas has not had an exception to the right of dissent in a merger other than for shareholders of a parent corporation in a short-form merger.[142] A number of states, however, including Delaware, also have permitted a limited exception to the right of dissent of a shareholder in a public corporation where the shareholders will only receive in the merger equity securities of another public corporation.[143] These statutes are based on the premise that a shareholder of a public corporation can freely dispose of his shares in the market before or after the effective time of the merger, that the shareholder maintains an equity interest in the continuing corporation, and that the market price of the shares of the public corporation provides the best indication of the "fair value" of the shareholder's shares. As a result, a shareholder in such a corporation does not need the protection of the right of dissent and appraisal for his shares.[144]

Under Article 5.11B of the TBCA, as amended, a shareholder can no longer dissent to a merger if:

> (1) the shares held by the shareholder are part of a class of shares of which are listed on a national securities exchange, or are held of record by not less than 2,000 holders, on the record date fixed to determine the shareholders entitled to vote on the plan of merger . . . and
> (2) the . . . terms of the plan of merger . . . [do not require the shareholder] to accept for his shares any consideration other than shares of a corporation that, immediately after the effective time of the merger . . ., will [constitute] part of a class of shares of which are [either] (a) listed, or authorized for listing upon official notice of issuance, on a national securities exchange, or (b) held of record by not less than 2,000 holders.[145]

The TBCA's elimination of the right of dissent to mergers under the above circumstances also applies to any plan of exchange in which the

141. TEX. BUS. CORP. ACT ANN. art. 5.12G (Vernon Supp. 1990).

142. *See* TEX. BUS. CORP. ACT ANN. art. 5.16 (Vernon 1980 & Supp. 1990).

143. *See* DEL. CODE ANN. tit. 8, § 262(b) (1974 & Supp. 1989).

144. HOUSE BUS. & COM. COMM., BILL ANALYSIS, Tex. H.B. 472, 71st. Leg. (1989); SENATE ECON. & DEV. COMM., BILL ANALYSIS, Tex. S.B. 608, 71st Leg. (1989).

145. TEX. BUS. CORP. ACT ANN. art. 5.11B (Vernon Supp. 1990).

same conditions are met.[146] Accordingly, if in a plan of merger or exchange a shareholder of a corporation whose shares are listed on a national securities exchange or are held by more than 2,000 holders of record receives in the merger or exchange shares of another corporation that are listed or that are to be listed on a national securities exchange or that will be held of record by not less than 2,000 holders immediately after the merger, that shareholder will not be entitled to the right of dissent and appraisal under the TBCA. It should be noted, however, that the elimination of the right of dissent to such a merger or share exchange only applies if the consideration consists "solely" of shares so listed or held. This consideration may not consist of any amount of cash or other property. Convertible debt securities or rights or interests in entities other than a corporation will not satisfy this requirement.[147] The shares issued in the merger or share exchange in accordance with this provision, however, do not need to be of a pre-existing public corporation or of a corporation with more than 2,000 holders prior to the merger as long as the conditions are met immediately after the effective time of the merger.[148]

The TBCA's elimination of dissenters' rights in mergers and share exchanges involving public corporations was not in any way intended to affect the exclusivity of the remedies provided to dissenting share-

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146. *Id.*

147. The requirement under article 5.11B that the consideration in the merger consist only of shares is absolute and will not permit the payment of cash in exchange for fractional shares in a merger. Accordingly, in a merger where there may be the possibility of the issuance of fractional shares, an alternative method to cash for settling fractional shares should be adopted to assure an exception to the provision of dissenter's rights under article 5.11. One such alternative is to provide for the rounding of fractional share interests. Another alternative is to issue fractional shares in the merger, which may not be marketable, and to authorize an aggregation agent to sell such fractional shares on behalf of the shareholders in the market through an election procedure.

148. It should be noted that although the Texas exception for the elimination of dissenter's rights involving mergers of public corporations is based primarily on § 262(b) of the DGCL, the Texas statute clarifies an ambiguity contained in the Delaware statute as to whether the shares to be received in the merger must have been issued by a pre-existing public corporation or have been listed on an exchange prior to the merger. It is the view of certain Delaware practitioners that the Delaware statute requires the corporation whose shares are issued in the merger to have been either a pre-existing public corporation or that the shares to be issued in the merger be listed on a national securities exchange prior to effective time of the merger. The TBCA does not contain this requirement and specifically contemplates that the surviving corporation need not have been a pre-existing corporation and that the shares to be issued in the merger need not have been previously listed.

holders by reason of Article 5.12G of the TBCA.[149] Nor was this elimination intended to imply that a shareholder not wishing to exchange his shares in a merger or share exchange could seek monetary relief against the corporation absent fraud.[150] Such a shareholder could, of course, seek equitable relief prior to the transaction as long as his action does not seek monetary damages for the value of his shares.[151] Accordingly, absent fraud in the transaction, a shareholder

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149. *See* TEX. BUS. CORP. ACT ANN. art. 5.12G (Vernon Supp. 1990). Article 5.12G of the TBCA states:

> In the absence of fraud in the transaction, the remedy provided by this Article to a shareholder objecting to any corporate action referred to in Article 5.11 of this Act is the exclusive remedy for the recovery of the value of his shares or money damages to the shareholders with respect to the corporate actions. If the existing, surviving or new corporation . . . , as the case may be, complies with the requirements of this Article, any such shareholder who fails to comply with the requirements of this Article shall not be entitled to bring suit for the recovery of the value of his shares or money damages to [such] shareholder with respect to [the corporate] action.

Id.

150. *Id.* Section G of Article 5.12 of the TBCA was added to the TBCA in 1967 in response to the holding of the Texas Supreme Court in *Farnsworth v. Massey*. In that case, the court held that a dissenting shareholder who had not followed the appraisal procedure provided in article 5.12 of the TBCA had the right to have a jury determine the value of his shares. Farnsworth v. Massey, 365 S.W.2d 1, 3-4 (Tex. 1963). The addition of section G to article 5.12 was intended to make clear that the appraisal procedure provided in the TBCA was, as is the case in many other jurisdictions, the exclusive remedy of a dissenting shareholder to a merger or other similar transaction. The commentary of the State Bar of Texas to such change indicates that the committee that had proposed the change "was of the opinion that in a case where the dissenting shareholder is seeking to recover only the fair value of his shares (even though he might label his remedy as suit for damages), then in the absence of fraud, the appraisal proceeding should be his only remedy." *See* TEX. BUS. CORP. ACT ANN. art. 5.12 (Vernon 1980)(comment of Bar committee-1967). "The committee, however, did not feel that any statutory limitation or penalty should be placed on the right of the dissenting shareholder to challenge the validity or the regularity of the procedure by which the corporate reorganization was accomplished." *Id.* These purposes were carried forward in the most recent changes to articles 5.11 and 5.12 of the TBCA. Although a shareholder under the new provisions may not have the right to seek an appraisal of the fair value of his shares where the merger complies with the provisions of article 5.11B, the amendment reflects a legislative view that such an appraisal is not necessary and that a shareholder who wishes to receive the fair value of his shares in cash in such a transaction will always be free to sell his shares in the market and receive the fair value thereof. *See* HOUSE BUS. & COM. COMM., BILL ANALYSIS, Tex. H.B. 472, 71st Leg. (1989); SENATE ECON. & DEV. COMM., BILL ANALYSIS, Tex. S.B. 608, 71st Leg. (1989). Accordingly, the elimination of the right to an appraisal proceeding in such a circumstance is in no way intended to eliminate the exclusivity of the provisions of Article 5.11, 5.12, and 5.13 of the TBCA as the sole method under which a shareholder may recover the fair value of his shares in the absence of fraud.

151. For example, a minority shareholder who believes that a proposed merger constitutes a violation of the board of directors' fiduciary duty because the merger is being effected for the sole purpose of eliminating the minority shareholders may seek to enjoin the transac-

in a merger or share exchange in which dissenters' rights are not provided by virtue of the provisions of Article 5.11B of the TBCA should only receive his shares as provided in the plan of merger or exchange, and he is not entitled to any other consideration with respect to his shares or monetary damages due to the merger or exchange.[152]

VIII. EFFECTIVE TIME OF MERGER

The effective time of a merger under the prior provisions of Article 5.05 of the TCBA occurred when the Texas Secretary of State issued a certificate of merger following the filing of the articles of merger by the merging corporations.[153] The 1989 TBCA amendments revise article 5.05 to permit corporations to fix an effective time for the merger or exchange in the articles other than the time of issuance of a certificate of merger or exchange by the Secretary of State.[154] This amendment to article 5.05 was derived from a similar provision contained in the RMBCA.[155] It is often desirable in many merger and acquisition transactions that the parties to the transactions be able to fix a particular time as the effective time of the transaction. In that regard, the ability to fix the effective time of a merger or share exchange particularly will aid corporations or entities that have entered into a plan of merger or exchange but wish to delay the effective time of the merger or exchange until the listing of the securities to be issued in the merger or exchange or until certain regulatory requirements or rulings have been met or obtained. The effective time, however, may not

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tion based on such breach of fiduciary duty. As long as such shareholder is only seeking to prevent the consummation of the transaction and is not in effect seeking damages or the fair value of his shares, such a case could be appropriately heard by the courts.

152. It should also be noted that in addition to the elimination of the right of shareholders to dissent to certain mergers involving public corporations, the 1989 TBCA amendments also eliminated the right of dissent by shareholders in a merger where those shareholders are not entitled to vote. Under article 5.11A of the TBCA, a shareholder will only be entitled to dissent to a merger or share exchange if he is entitled to vote on the transaction. *See* TEX. BUS. CORP. ACT ANN. art. 5.11A (Vernon Supp. 1990). Accordingly, a shareholder will not be entitled to dissent to a merger that involves the issuance of 20% or less of the voting and participating shares in accordance with article 5.03G. Moreover, a holder of nonvoting shares will not be entitled to dissent to a merger unless he is provided with a class vote on the merger by virtue of the articles of incorporation or because he will be adversely affected by the merger. *See id.* art. 5.03.

153. TEX. BUS. CORP. ACT ANN. art. 5.05 (Vernon 1980), *amended by* TEX. BUS. CORP. ACT ANN. art. 5.05 (Vernon Supp. 1990).

154. TEX. BUS. CORP. ACT ANN. art. 5.05 (Vernon Supp. 1990).

155. REVISED MODEL BUSINESS CORP. ACT § 1.23 (1985).

be prior to filing the articles of merger or exchange with the Texas Secretary of State.[156]

IX. Approval of Board of Directors of Plan of Merger

Prior to the 1989 amendments to the TBCA, a board of directors of a Texas corporation that was a party to a merger had to specifically adopt a resolution approving the proposed plan of merger and direct that the plan of merger be submitted to a vote of the corporation's shareholders.[157] This requirement for board approval is amended by the 1989 amendments to the TBCA to conform to the requirements for board approval of mergers under the RMBCA.[158] Under Article 5.03 of the TBCA, the board of directors of a corporation that is a party to a merger or exchange must adopt a resolution recommending that the plan of merger or exchange be approved by shareholders or, if the board of directors determines that for any reason it should not make such a recommendation, adopt a resolution directing that the plan be submitted to shareholders for approval without recommendation.[159] If a board of directors elects not to make a recommendation as to a plan of merger or exchange, it must communicate to the shareholders of the corporation the reason why the plan is being submitted to shareholders without a recommendation.[160]

The ability of a corporation to submit a plan of merger or exchange without a recommendation by its board of directors will facilitate those situations where a board of directors believes that the plan should be submitted to shareholders but, for any reason, is unable to recommend the approval of the plan. The most common circumstance will occur when the plan of merger or exchange is proposed by an affiliated entity which exercises a controlling influence over the corporation. Another circumstance, although unlikely, under which

156. *See* TEX. BUS. CORP. ACT ANN. art. 5.04B (Vernon 1990). It should be noted that the effective time of a merger may only be a particular time and date and may not be fixed by reference to a particular event that may be subject to future conditions. Accordingly, if the parties were to seek to delay the effective time of a merger until certain approvals have been obtained, the parties would need to set a time that is sufficiently in advance of the date on which such approvals are expected to be obtained. The merger agreement could not provide that it will be effective upon the receipt of all governmental approvals. *See id.* art. 5.05.

157. TEX. BUS. CORP. ACT ANN. art. 5.03A (Vernon 1980).

158. *See* REVISED MODEL BUSINESS CORP. ACT § 11.03 (1985); *see also* TEX. BUS. CORP. ACT ANN. art. 5.03B(1) (Vernon 1990)(board approval of plan of merger or exchange).

159. TEX. BUS. CORP. ACT ANN. art. 5.03B(1) (Vernon Supp. 1990).

160. *Id.*

this situation may exist is where there is an acquisition proposal at a price above market that management believes is nevertheless inadequate but agrees to present the proposal to shareholders for their consideration. The requirement that the board communicate its reason for not making a recommendation to shareholders on the plan of merger or exchange will provide adequate information to shareholders about the existence of any conflicts of interests of the members of the board of directors in the transaction. Additionally, this requirement will help ensure that the stockholders receive any other material information that results in the board deciding to submit the plan of merger or exchange without a recommendation.

X. DOWNSTREAM SHORT-FORM MERGERS

Article 5.16 of the TBCA and the corporation laws of most jurisdictions have for many years provided a mechanism for a merger referred to as a "short-form merger."[161] The short-form merger provisions of the TBCA substantially follow those of other jurisdictions and the RMBCA.[162] A short-form merger occurs when a corporation holds 90% or more of the voting shares of another corporation and merges the subsidiary corporation into the parent corporation without a vote of the shareholders of either corporation and without any action by the board of directors of the subsidiary. The rationale for the absence of any requirement for director or shareholder approval of the subsidiary corporation for a short-form merger is that the 90% share ownership of the parent corporation normally will allow the parent corporation to elect or remove the board of directors of the subsidiary and approve of the merger.[163] The rationale for the absence of any vote by the shareholders of the parent corporation is that the transaction will not materially change their rights.[164]

The 1989 amendments to the TBCA amended the short-form merger provisions of Article 5.16 to permit the possibility of a "downstream" short-form merger without a vote of the shareholders of the subsidiary corporation or its board of directors if any vote required of

161. TEX. BUS. CORP. ACT ANN. art. 5.16 (Vernon 1980), *amended by* TEX. BUS. CORP. ACT ANN. art. 5.16 (Vernon Supp. 1990).

162. *See* DEL. CODE ANN. tit. 8, § 253 (1974 & Supp. 1989); REVISED MODEL BUSINESS CORP. ACT § 11.04 (1985).

163. *See* REVISED MODEL BUSINESS CORP. ACT § 11.04 official comment (1985).

164. *Id.*

the shareholders of the parent corporation is obtained.[165] A "downstream" short-form merger is a merger where the parent corporation merges into the subsidiary rather than the subsidiary merging into the parent corporation. Currently, the laws of certain other jurisdictions, including Delaware, permit "downstream" short-form mergers without a vote of shareholders of the subsidiary corporation.[166] The ability to effect a downstream short-form merger will facilitate those transactions where it is desirable that the subsidiary corporation remain in existence after the merger. Shareholders of the parent corporation in such a merger will continue to have the same rights provided to them in any other form of merger, including the right to vote on the merger[167] and the right of dissent and appraisal, if available.[168]

XI. CONCLUSION

The 1989 amendments to the merger provisions of the TBCA represent the first of a new generation of state laws governing mergers. The amendments remove many of the obstructions that have complicated modern transactions and permit transactions that have historically been effected through multiple transactions to be effected directly through a statutory merger if that form makes the most economic sense. Although many of the benefits that are made possible by the new merger provisions of the TBCA will not be fully realized until such time as similar changes are made to the merger statutes of other

165. TEX. BUS. CORP. ACT ANN. art. 5.16A (Vernon Supp. 1990).

166. *See, e.g.,* COLO. REV. STAT. § 7-7-106 (Supp. 1988)(allows short-form mergers of parent into subsidiary); DEL. CODE ANN. tit. 8, § 253 (1983)(statute will allow short-form merger of parent into subsidiary); IND. CODE ANN. § 23-1-40-4 (Burns Supp. 1988)(allows merger of parent into subsidiary); IOWA CODE ANN. § 499.61 (West Supp. 1990)(allows short-form merger of parent into subsidiary); KAN. STAT. ANN. § 17-6703 (1988)(allows merger of parent into subsidiary); LA. REV. STAT. ANN. § 12:112G (West Supp. 1989)(parent may merge into subsidiary company); MICH. STAT. ANN. § 21.200(711) (Callaghan 1983 & Supp. 1989)(short-form merger will allow merger of parent corporation into subsidiary corporation); MO. ANN. STAT. § 351.447 (Vernon Supp. 1989)(parent corporation may merge into subsidiary corporation); NEV. REV. STAT. § 78.486 (1987)(short-form merger of parent corporation into subsidiary allowed); N.J. STAT. ANN. § 14A:10-5 (West Supp. 1989)(statute allows merger of parent corporation into subsidiary corporation); OHIO REV. CODE ANN. § 1701.801 (Baldwin 1989)(parent corporation may merge into subsidiary); OKLA. STAT. ANN. tit. 18, § 1083 (West Supp. 1989) (allows short-form merger of parent into subsidiary); S.C. CODE ANN. § 33-11-108 (Law. Co-op. Supp. 1988)(parent corporation may merge into subsidiary corporation); TEX. BUS. CORP. ACT ANN. art. 5.16 (Vernon Supp. 1990)(allows merger of subsidiary or subsidiaries with parent corporation).

167. TEX. BUS. CORP. ACT ANN. art. 5.16E(5) (Vernon Supp. 1990).

168. *Id.* art. 5.16F.

jurisdictions, the new merger provisions of the TBCA place Texas in the forefront with respect to the laws governing merger transactions. The TBCA amendments also will provide a model for future statutes and a framework under which Texas corporations will be able to engage in commercial transactions into the next century.

APPENDIX A-1
ARTICLES OF MERGER—COMBINATION OF MULTIPLE ENTITIES

Pursuant to the provisions of Article 5.04 of the Texas Business Corporation Act, the undersigned [corporations] [corporations and other entities] adopt the following Articles of Merger for the purpose of effecting a merger in accordance with the provisions of Article 5.01 of the Texas Business Corporation Act.

1. A Plan of Merger adopted in accordance with the provisions of Article 5.03 of the Texas Business Corporation Act providing for the combination of ________, __________ and ___________ [insert names of merging parties] and resulting in ______________, ____________ and ____________ [insert names of each of the surviving or new domestic or foreign corporations and other entity in the merger] being the surviving and/or new corporations and other entities in the merger is set forth below: [is attached hereto as Exhibit A and is hereby incorporated herein by reference.]

2. The name of each of the undersigned corporation(s) and other entity or entities, the type of such corporation or other entity and the laws under which such corporation or other entity was organized are:

NAME OF CORPORATION OR OTHER ENTITY	TYPE OF ENTITY	STATE

3. Shareholder approval of the following domestic corporations that are a party to the Plan of Merger is not required pursuant to Article 5.03 of the Texas Business Corporation Act:

____

____

4. As to each of the undersigned domestic corporations, the approval of whose shareholders is required, the number of outstanding shares of each class or series of stock of such corporation entitled to vote, with other shares or as a class, on the Plan of Merger are as follows:

		Entitled to Vote as a Class or Series	
Name of Corporation	Number of Shares Outstanding	Designation of Class or Series	Number of Shares

5. As to each of the undersigned domestic corporations, the approval of whose shareholders is required, the number of shares voted for and against the Plan of Merger, respectively, and, if the shares of any class or series are entitled to vote as a class, the number of shares of each such class or series voted for and against the Plan of Merger, are as follows:

	Number of Shares				
			Entitled to Vote as a Class or Series		
Name of Corporation	Total Voted For	Total Voted Against	Class or Series	Voted For	Voted Against

6. The Plan of Merger and the performance of its terms were duly authorized by all action required by the laws under which each foreign corporation or other entity that is a party to the Plan of Merger was incorporated or organized and by its constituent documents.

7. The merger will become effective on __________, ________, ______ in accordance with the provision of Article 5.05 of the Texas Business Corporation Act.

[NOTE: If an effective time is not specified, the merger will become effective upon the issuance of the certificate of merger by the Secretary of State in accordance with Article 5.05 of the Texas Business Corporation Act.]

Dated ______________, 19____.

______________________________	______________________________
(Name of Corporation or Other Entity)	(Name of Corporation or Other Entity)
By ___________________________	By ___________________________
Its ________________________	Its ________________________
______________________________	______________________________
(Name of Corporation or Other Entity)	(Name of Corporation or Other Entity)
By ___________________________	By ___________________________
Its ________________________	Its ________________________
______________________________	______________________________
(Name of Corporation or Other Entity)	(Name of Corporation or Other Entity)
By ___________________________	By ___________________________
Its ________________________	Its ________________________

APPENDIX A-2
ARTICLES OF MERGER—DIVISION OF A SINGLE DOMESTIC CORPORATION

Pursuant to the provisions of Article 5.04 of the Texas Business Corporation Act, the undersigned corporation adopts the following Articles of Merger for the purpose of effecting a merger in accordance with the provisions of Article 5.01 of the Texas Business Corporation Act.

1. A Plan of Merger adopted in accordance with the provisions of Article 5.03 of the Texas Business Corporation Act providing for the division of ____________________ [insert name of domestic dividing corporation] into __________, ____________ and ___________ [insert name of the surviving corporation and the name or names of each new domestic or foreign corporation and other entity to be created in the merger] as the surviving corporation and the new corporations and other entities in the merger is set forth below: [is attached hereto as Exhibit A and is hereby incorporated herein by reference.]

2. The number of outstanding shares of each class or series of stock of the undersigned corporation entitled to vote, with other shares or as a class, on the Plan of Merger are as follows:

ENTITLED TO VOTE AS A CLASS OR SERIES

DESIGNATION OF CLASS OR SERIES	NUMBER OF SHARES
____________	__________
____________	__________
____________	__________
____________	__________

3. The number of outstanding shares of the undersigned corporation that voted for and against the Plan of Merger, respectively, and, if the shares of any class or series are entitled to vote as a class, the number of shares of each such class or series voted for and against the Plan of Merger, are as follows:

Number of Shares				
		Entitled to Vote as a Class or Series		
Total Voted For	Total Voted Against	Class or Series	Voted For	Voted Against
______	______	______	______	______
______	______	______	______	______
______	______	______	______	______
______	______	______	______	______
______	______	______	______	______

4. The merger will become effective on ____________, ______ ______, ____ in accordance with the provisions of Article 5.05 of the Texas Business Corporation Act.

[Note: If an effective time is not specified, the merger will become effective upon the issuance of the certificate of merger by the Secretary of State in accordance with Article 5.05 of the Texas Business Corporation Act.]

Date ____________, 19____.

____
(Name of Corporation or Other Entity)

By ______________________
Its ______________________

____
(Name of Corporation or Other Entity)

By ______________________
Its ______________________

____
(Name of Corporation or Other Entity)

By ______________________
Its ______________________

____
(Name of Corporation or Other Entity)

By ______________________
Its ______________________

____
(Name of Corporation or Other Entity)

By ______________________
Its ______________________

____
(Name of Corporation or Other Entity)

By ______________________
Its ______________________

APPENDIX B
ARTICLES OF EXCHANGE

Pursuant to the provisions of Article 5.04 of the Texas Business Corporation Act, the undersigned [corporations] [corporations and other entities] adopt the following Articles of Exchange for the purpose of effecting a share exchange in accordance with the provisions of Article 5.02 of the Texas Business Corporation Act.

1. A Plan of Exchange adopted in accordance with the provisions of Article 5.03 of the Texas Business Corporation Act providing for the acquisition of the shares of ____________ of ______________ and the shares of ________________ of ______________, [insert names of the corporation or corporations to be acquired and the shares of each to be acquired] by [insert names of acquiring entities] is set forth below [is attached hereto as Exhibit A and is hereby incorporated herein by reference.]

2. The name of each of the undersigned acquiring corporation(s) and other entity or entities, the type of such acquiring corporation or other entity, and the laws under which such acquiring corporation or other entity was organized are:

NAME OF ACQUIRING CORPORATION OR OTHER ENTITY	TYPE OF ENTITY	STATE
______________________________	________________	________
______________________________	________________	________
______________________________	________________	________
______________________________	________________	________
______________________________	________________	________

3. As to each of the undersigned domestic corporations whose shares are to be acquired pursuant to the Plan of Exchange, the number of oustanding shares of each class or series of stock of such corporation entitled to vote, with other shares or as a class, on the Plan of Exchange are as follows:

NAME OF CORPORATION	NUMBER OF SHARES OUTSTANDING	ENTITLED TO VOTE AS A CLASS OR SERIES	
		DESIGNATION OF CLASS OR SERIES	NUMBER OF SHARES

4. As to each of the undersigned domestic corporations whose shares are to be acquired pursuant to the Plan of Exchange, the number of shares voted for and against the Plan of Exchange, respectively, and, if the shares of any class or series are entitled to vote as a class, the number of shares of each such class or series voted for and against the Plan of Exchange, are as follows:

NAME OF CORPORATION	NUMBER OF SHARES				
	TOTAL VOTED FOR	TOTAL VOTED AGAINST	ENTITLED TO VOTE AS A CLASS OR SERIES		
			CLASS OR SERIES	VOTED FOR	VOTED AGAINST

5. The Plan of Exchange and the performance of its terms were duly authorized by all action required by the laws under which each acquiring domestic or foreign corporation or other entity was incorporated or organized and by its constituent documents.

6. This exchange will become effective on ________________, ____________, ____ in accordance with the provisions of Article 5.05 of the Texas Business Corporation Act.

[Note: If an effective time is not specified, the exchange will become effective upon the issuance of the certificate of merger by the Secretary of State in accordance with Article 5.05 of the Texas Business Act.]

Date ______________, 19____.

____________________	____________________
(Name of Corporation or Other Entity)	(Name of Corporation or Other Entity)
By __________________	By __________________
Its __________________	Its __________________
____________________	____________________
(Name of Corporation or Other Entity)	(Name of Corporation or Other Entity)
By __________________	By __________________
Its __________________	Its __________________
____________________	____________________
(Name of Corporation or Other Entity)	(Name of Corporation or Other Entity)
By __________________	By __________________
Its __________________	Its __________________

APPENDIX C
JURISDICTIONS PROVIDING FOR MERGERS WITH ENTITIES OTHER THAN CORPORATIONS

Jurisdiction and Citation	*Comments*
California	
CAL. CORP. CODE § 1112 (Deering 1979)	Allows mergers with nonprofit corps.
Delaware	
DEL. CODE ANN. tit. 8, § 254 (1983)	Allows mergers with joint-stock associations.
DEL. CODE ANN. tit. 8, § 256 (1983)	Allows mergers between domestic and foreign nonstock and nonprofit corps.
DEL. CODE ANN. tit. 8, § 257 (1983)	Allows mergers or consolidations between domestic stock and nonstock corps.
DEL. CODE ANN. tit. 8, § 258 (1983)	Allows mergers of domestic and foreign stock and nonstock corps.
DEL. CODE ANN. tit. 8, § 263 (Supp. 1988)	Allows mergers or consolidations between corps. and limited partnerships.

Georgia	
GA. CODE ANN. § 14-2-1108 (Supp. 1988)	Allows mergers or share exchanges with corps. chartered by the Secretary of State under other provisions.
GA. CODE ANN. § 14-2-1109 (Supp. 1988)	Allows mergers or share exchanges with joint-stock or unincorporated associations or trusts.
Illinois	
ILL. REV. STAT. ch. 32, § 11.37 (Supp. 1989)	Allows mergers or consolidations of domestic or foreign corps. and domestic nonprofit corps.
Kansas	
KAN. STAT. ANN. § 17-6704 (1988)	Allows mergers of domestic corps. and joint-stock or other associations.
KAN. STAT. ANN. § 17-6705 (1988)	Merger or consolidation of domestic nonstock and nonprofit corps.

KAN. STAT. ANN. § 17-6706 (1988)	Merger or consolidation of domestic and foreign nonstock and nonprofit corps.
KAN. STAT. ANN. § 17-6707 (1988)	Allows merger or consolidation of domestic stock and nonstock corps.
KAN. STAT. ANN. § 17-6708 (1988)	Merger or consolidation of domestic and foreign stock and nonstock corps.
Louisiana	
LA. REV. STAT. ANN. § 12:111 (West 1969)	Allows foreign and domestic corps. to merge with nonprofit corps.
Maryland	
MD. CORPS. & ASS'NS CODE ANN. § 3-102 (1985 & Supp. 1988)	Allows merger of Md. corp. into Md. or foreign business trust.
Oklahoma	
OKLA. STAT. ANN. tit. 18, § 1084 (West 1986 & Supp. 1989)	Merger or consolidation of domestic nonstock and nonprofit corps.

OKLA. STAT. ANN. tit. 18, § 1085 (West 1986)	Merger or consolidation of domestic or foreign stock and nonprofit corps.
OKLA. STAT. ANN. tit. 18, § 1086 (West 1986)	Merger or consolidation of domestic stock and nonstock corps.
OKLA. STAT. ANN. tit. 18, § 1087 (West 1986)	Merger or consolidation of domestic and foreign stock and nonstock corps.
Tennessee	
TENN. CODE ANN. § 48-21-101 (1988)	Allows mergers into nonprofit corps.
Texas	
TEX. BUS. CORP. ACT ANN. art. 5.01 (Vernon Supp. 1990)	Allows mergers of domestic corps. with any other entity if permitted by the laws under which that entity is organized or by the constituent documents of that entity not inconsistent with such laws.

TEX. BUS. CORP. ACT ANN. ART. 5.02 (Vernon Supp. 1990)	Allows share exchanges under the same restrictions as article 5.01.
West Virginia	
W. VA. CODE § 31-1-34 (1988)	Allows mergers of domestic nonstock and profit or nonprofit corps.
W. VA. CODE § 31-1-38 (1988)	Allows mergers of foreign and domestic stock or nonstock and profit or nonprofit corps.