

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1035 w/CS Florida Business Corporation Act
SPONSOR(S): Seiler and Goodlette
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2718

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Commerce</u>	<u>14 Y, 0 N w/CS</u>	<u>Billmeier</u>	<u>Billmeier</u>
2) <u>Judiciary</u>	<u>16 Y, 0 N</u>	<u>Thomas</u>	<u>Havlicak</u>
3) <u>Appropriations</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Chapter 607, Florida Statutes, is the "Florida Business Corporation Act". During the 2003 session, the Act was substantially amended. The 2003 legislation was developed by a Task Group of the Business Law Section of the Florida Bar. The group included practitioners, law professors, and representatives of the Division of Corporations of the Department of State. HB 1035 amends three sections of chapter 607, F.S., to deal with issues raised by the 2003 changes to the chapter.

HB 1035 amends the Act to clarify that shares of a corporation of the same class issued before or after October 1, 2003, will be subject to the same appraisal rights. It provides a mechanism for the courts to dispose of actions relating to appraisal rights. This bill provides for notice of dissolved corporations by publication.

This bill does not appear to have a significant fiscal impact on state or local governments.

This bill takes effect upon becoming a law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1035c.ju.doc
DATE: April 13, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Chapter 607, Florida Statutes, is the “Florida Business Corporation Act” (Act).¹ During the 2003 session, the Act was substantially amended.² The 2003 legislation was developed by a Task Group of the Business Law Section of the Florida Bar.³ The group included practitioners, law professors, and representatives of the Division of Corporations of the Department of State. HB 1035 amends three sections of chapter 607, F.S., to deal with issues raised by the 2003 changes to the chapter.

Changes Relating to Appraisal Rights

“Dissenters’ rights” allow shareholders who object to a major corporate transaction to elect to obtain payment for the fair value of their shares in cash rather than continue as shareholders.⁴ Chapter 2003-283, Laws of Florida, changed the term “dissenters’ rights” to “appraisal rights”. Appraisal rights are only permitted in matters of substantial corporate importance, such as mergers and other actions.⁵ Chapter 2003-283, Laws of Florida, contained a substantial rewrite of the law relating to the initiation of judicial proceedings for appraisal rights. The original version of HB 1623, filed in 2003, contained the proposed s. 607.1330, F.S. This section required the corporation to initiate judicial proceedings within 60 days after receiving the shareholder’s demand.⁶ This section was removed by floor amendment before the bill passed the House.⁷

The removal of the proposed s. 607.1330, F.S., has caused confusion among practitioners because s. 607.1331, F.S., references the non-existent section of law.⁸ This bill creates s. 607.1330, F.S., to create a mechanism for the determination of appraisal rights. The bill requires the corporation to commence a proceeding within 60 days of a shareholder’s demand for payment to determine the value of the shares and interest. If the corporation does not commence the proceeding within the 60-day period, any shareholder who has made a demand may commence the proceeding.⁹ The proceeding shall be commenced in the appropriate court of the county in which the corporation’s principal office or registered office is located. If the corporation is a foreign corporation without a registered office in this

¹ See s. 607.0101, F.S.

² See ch. 2003-283, Laws of Florida

³ Letter from Bill Wiley to Representative Kottkamp, dated March 19, 2003.

⁴ See Fla.Jur.2d. s. 257.

⁵ See s. 607.1302(1), F.S.

⁶ See HB 1623, filed during the 2003 session.

⁷ See Amendment 452199 to HB 1623 adopted April 29, 2004.

⁸ See s. 607.1331(1), F.S.

⁹ The original version of HB 1623 contained a penalty provision if the corporation did not commence the proceeding within 60 days. Neither prior versions of the law nor HB 1035 contain a penalty provision. The language in this portion of this bill is similar to the statute as it existed in 2002.

state, the proceeding shall be commenced in the county in this state in which the principal office or registered office of the domestic corporation merged with the foreign corporation was located at the time of the transaction.¹⁰

This bill creates s. 607.1330, F.S., requiring a corporation to serve a copy of the initial pleading in such proceeding upon each shareholder party. It permits the court to appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. This bill provides that there is no right to a jury trial in these cases.¹¹ This bill requires that each shareholder made a party to the proceeding is entitled to judgment for the amount of the fair value of such shareholder's shares, plus interest, as found by the court. The corporation shall pay each such shareholder the amount found to be due within 10 days after final determination of the proceedings. Upon payment of the judgment, the shareholder shall cease to have any interest in the shares.

Section 607.1302(1)(e), F.S., provides appraisal rights "with regard to shares issued prior to October 1, 2003," if there is any amendment to the articles of incorporation which would adversely affect the shareholder in one or more enumerated ways¹² and the shareholder is entitled to vote on the amendment. According to Business Law Section of the Florida Bar, the statute creates two classes of shares - shares issued prior to October 1, 2003 and shares issued after October 1, 2003 - and gives appraisal rights to one class of shares but not the other.¹³ This bill amends s. 607.1302, F.S., to treat both classes of shares in the same manner.

Other Revisions

This bill amends s. 607.1407, F.S., to provide that a dissolved corporation may publish notice of dissolution within 10 days after filing with the Department of State. The statute currently permits publication of notice within 10 days after adoption of the articles of dissolution. This provision is similar to the procedure in the Model Business Corporation Act.¹⁴

C. SECTION DIRECTORY:

Section 1. Amends s. 607.1302, F.S., relating to right of shareholders to appraisal.

Section 2. Creates s. 607.1330, F.S., relating to court action in shareholder appraisal matters.

Section 3. Amends s. 607.1407, F.S., relating to unknown claims against a dissolved corporation.

Section 4. Provides that the bill becomes effective upon becoming a law.

¹⁰ The language in this portion of this bill is substantially similar to the predecessor statute, s. 607.1320(7), F.S. (2002).

¹¹ There does not appear to be a state constitutional right to a jury trial in shareholder actions. In an appeal of a shareholder derivative action, the 5th District Court of Appeal, holding that the federal constitutional right to a jury in civil trials is not incorporated in the fourteenth amendment and is not applicable to state proceedings, found that "Florida's constitutional right to jury trial guarantees a right to trial by jury in those cases in which such right was recognized when Florida's first constitution became effective in 1845. (cite omitted)... As the common law did not confer a right to jury trial in equity action," the court held that there was not a right to a jury trial in the shareholder derivative case at hand. However, the Court did write in a footnote that the trial judge could grant a jury trial as a matter of discretion. Lanman Lithotech, Inc. v. Gurwitz, 478 So. 2d 425, 427, fn. 4 (Fla. 5th DCA 1985).

¹² Actions establishing appraisal rights include abolishing or altering preemptive rights or voting rights attached to shares, reducing the redemption value of shares, or making dividends which had been cumulative into dividends which are non-cumulative.

¹³ See White Paper submitted by the Business Law Section to Senator Klein and Representatives Seiler and Goodlette, February 19, 2004 (on file with the Committee on Commerce).

¹⁴ See Id.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a significant fiscal impact on state government.

2. Expenditures:

This bill does not appear to have a significant fiscal impact on state government.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a significant fiscal impact on local government.

2. Expenditures:

This bill does not appear to have a significant fiscal impact on local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a significant fiscal impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Committee on Commerce considered the bill on March 22, 2004. The committee adopted a technical amendment to clarify the meaning of section 1. The bill, as amended, was reported favorably, with a committee substitute.