

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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SENATE BILL 892
House Committee Substitute Favorable 5/28/97

Short Title: Dissenters' Rights.

(Public)

Sponsors:

Referred to:

April 16, 1997

A BILL TO BE ENTITLED

AN ACT TO LIMIT THE RIGHT OF CERTAIN SHAREHOLDERS TO DISSENT FROM CORPORATE ACTIONS AND TO AMEND THE LAW GOVERNING OFFERS OF PAYMENT TO DISSENTERS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 55-13-02 is amended by adding a new subsection to read:

"(c) Notwithstanding any other provision of this Article, there shall be no right of dissent in favor of holders of shares of any class or series which, at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting at which the plan of merger or share exchange or the sale or exchange of property is to be acted on, were (i) listed on a national securities exchange or (ii) held by at least 2,000 record shareholders, unless in either case:

(1) The articles of incorporation of the corporation issuing the shares provide otherwise;

(2) In the case of a plan of merger or share exchange, the holders of the class or series are required under the plan of merger or share exchange to accept for the shares anything except:

a. Cash;

- 1 b. Shares, or shares and cash in lieu of fractional shares of the
2 surviving or acquiring corporation, or of any other corporation
3 which, at the record date fixed to determine the shareholders
4 entitled to receive notice of and vote at the meeting at which the
5 plan of merger or share exchange is to be acted on, were either
6 listed subject to notice of issuance on a national securities
7 exchange or held of record by at least 2,000 record shareholders;
8 or
9 c. A combination of cash and shares as set forth in sub-subdivisions
10 a. and b. of this subdivision."

11 Section 2. G.S. 55-13-25 reads as rewritten:

12 **"§ 55-13-25. ~~Offer of payment.~~ Payment.**

13 (a) As soon as the proposed corporate action is taken, or ~~upon~~ within 30 days after
14 receipt of a payment demand, the corporation shall ~~offer to pay~~ each dissenter who
15 complied with G.S. 55-13-23 the amount the corporation estimates to be the fair value of
16 his shares, plus interest accrued to the date of ~~payment, and shall pay this amount to each~~
17 ~~dissenter who agrees in writing to accept it in full satisfaction of his demand.~~ payment.

18 (b) The ~~offer of payment~~ must shall be accompanied by:

- 19 (1) The corporation's most recent available balance sheet as of the end of a
20 fiscal year ending not more than 16 months before the date of ~~offer of~~
21 payment, an income statement for that year, a statement of cash flows
22 for that year, and the latest available interim financial statements, if any;
23 (2) ~~A statement of the corporation's estimate of~~ An explanation of how the
24 corporation estimated the fair value of the shares;
25 (3) An explanation of how the interest was calculated;
26 (4) A statement of the dissenter's right to demand payment under G.S. 55-
27 13-28; and
28 (5) A copy of this Article."

29 Section 3. G.S. 55-13-28 reads as rewritten:

30 **"§ 55-13-28. Procedure if shareholder dissatisfied with corporation's offer-payment**
31 **or failure to perform.**

32 (a) A dissenter may notify the corporation in writing of his own estimate of the
33 fair value of his shares and amount of interest due, and demand payment of the amount in
34 excess of the payment by the corporation under G.S. 55-13-25 for his estimate or reject the
35 ~~corporation's offer under G.S. 55-13-25 and demand payment of~~ the fair value of his shares
36 and interest due, if:

- 37 (1) The dissenter believes that the amount ~~offered paid~~ under G.S. 55-13-25
38 is less than the fair value of his shares or that the interest due is
39 incorrectly calculated;
40 (2) The corporation fails to make payment ~~to a dissenter who accepts the~~
41 ~~corporation's offer~~ under G.S. 55-13-25 ~~within 30 days after the~~
42 ~~dissenter's acceptance;~~ G.S. 55-13-25; or

1 (3) The corporation, having failed to take the proposed action, does not
2 return the deposited certificates or release the transfer restrictions
3 imposed on uncertificated shares within 60 days after the date set for
4 demanding payment.

5 (b) A dissenter waives his right to demand payment under this section unless he
6 notifies the corporation of his demand in writing (i) under subdivision (a)(1) within 30
7 days after the corporation ~~offered~~ made payment for his shares or (ii) under subdivisions
8 (a)(2) and (a)(3) within 30 days after the corporation has failed to perform timely. A
9 dissenter who fails to notify the corporation of his demand under subsection (a) within
10 such 30-day period shall be deemed to have withdrawn his dissent and demand for
11 payment."

12 Section 4. G.S. 55-13-30 reads as rewritten:

13 "**§ 55-13-30. Court action.**

14 (a) If a demand for payment under G.S. 55-13-28 remains unsettled, the dissenter
15 may commence a proceeding within 60 days after the earlier of (i) the date of his payment
16 ~~demand is made under G.S. 55-13-28~~ G.S. 55-13-25, or (ii) the date of the dissenter's
17 payment demand under G.S. 55-13-28 and petition the court to determine the fair value of
18 the shares and accrued interest. ~~Upon service upon it of the petition filed with the court, the~~
19 ~~corporation shall pay to the dissenter the amount offered by the corporation under G.S. 55-13-25.~~
20 A dissenter who takes no action within the 60-day period shall be deemed to have
21 withdrawn his dissent and demand for payment.

22 ~~(a1) If the dissenter does not commence the proceeding within the 60-day period,~~
23 ~~the dissenter shall have an additional 30 days to either (i) accept in writing the amount~~
24 ~~offered by the corporation under G.S. 55-13-25, upon which the corporation shall pay~~
25 ~~such amount to the dissenter in full satisfaction of his demand, or (ii) withdraw his~~
26 ~~demand for payment and resume the status of a nondissenting shareholder. A dissenter~~
27 ~~who takes no action within such 30-day period shall be deemed to have withdrawn his~~
28 ~~dissent and demand for payment.~~

29 (b) Reserved for future codification purposes.

30 (c) The court shall have the discretion to make all dissenters (whether or not
31 residents of this State) whose demands remain unsettled parties to the proceeding as in an
32 action against their shares and all parties must be served with a copy of the petition.
33 Nonresidents may be served by registered or certified mail or by publication as provided
34 by law.

35 (d) The jurisdiction of the court in which the proceeding is commenced under
36 subsection (b) is plenary and exclusive. The court may appoint one or more persons as
37 appraisers to receive evidence and recommend decision on the question of fair value.
38 The appraisers have the powers described in the order appointing them, or in any
39 amendment to it. The parties are entitled to the same discovery rights as parties in other
40 civil proceedings. However, in a proceeding by a dissenter in a public corporation, there
41 is no right to a trial by jury.

1 (e) Each dissenter made a party to the proceeding is entitled to judgment for the
2 amount, if any, by which the court finds the fair value of his shares, plus interest, exceeds
3 the amount paid by the corporation."

4 Section 5. This act becomes effective October 1, 1997, and applies to
5 corporate actions to which shareholders may dissent occurring on or after that date.