

In early December 2020, Vice Chancellor Laster of the Delaware Court of Chancery held that the authority of directors at common law to sell substantially all the assets of an insolvent or failing Delaware corporation was not abridged or abrogated by the 1917 legislative enactment of the predecessor to Section 271 of today's Delaware General Corporation Law (DGCL).¹

In that case, a secured creditor of an insolvent Delaware corporation was permitted to acquire substantially all that corporation's assets without the stockholder vote otherwise required under Section 271 of the DGCL.

Ohio first enacted a statute authorizing the sale of all a corporation's assets on less than a unanimous shareholder vote in 1906.² There is no indication that the Ohio legislature intended, either in 1906 or subsequently in 1927 (when the first "modern" Ohio General Corporation Act (OGCA) was enacted), to limit or abrogate the common law rule that directors of an insolvent or failing Ohio corporation could sell the business without a shareholder vote. The secretary to the Ohio State Bar Association committee that drafted the 1927 OGCA indicated in his 1942 treatise the continuing viability of the insolvent or failing corporation exception to the stockholder approval requirement.

"It is generally held that the board of directors may sell the corporation's entire assets without the vote or consent of its shareholders where the corporation is insolvent or on the verge of insolvency and where the assets must be sold to pay [the corporation's] debts."³

Given this history, in an appropriately presented case, an Ohio court should hold that the insolvent/failing corporation exception to the shareholder approval requirement for sales of substantially all an Ohio corporation's assets survived the legislative adoption of statutes – currently, Ohio Revised Code § 1701.76 – that regulate sales of substantially all a corporation's assets.

Ohio's statutes make reliance on the common law exception unnecessary except in a limited number of circumstances. Section 1701.76 of the OGCA expressly provides, at subsection (E),⁴ as follows:

"If a resolution of dissolution [by directors] is adopted pursuant to section 1701.86 of the [Ohio] Revised Code, the directors may dispose of all, or substantially all, of the corporation's assets without the necessity of a shareholders' authorization under this section."

Section 1701.86 of the OGCA authorizes the directors to adopt a resolution of dissolution:

- When the corporation has been adjudged bankrupt or has made a general assignment for the benefit of creditors⁵
- When substantially all the corporation's assets have been sold at a judicial sale or otherwise
- By leave of the court, when a receiver has been appointed in a general creditors' suit or in any suit in which the affairs of the corporation are to be wound up⁶

1 *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2020 Del. Ch. LEXIS 358.

2 "In Ohio the first statutes of general application were enacted in 1906 ... These sections permitted a[n] [Ohio] corporation to sell 'its entire property and assets ... [for] money, stocks, bonds, or other instruments for the payment of money, or any valuable consideration, provided the sale was authorized by three-fourths of the directors and the holders of three-fourths of the corporation's outstanding shares, and provided provision was made for the appraisal and payment of the shares of dissenting shareholders.'" 1 A Treatise of the Law of Corporations E.G. Davies § 8623-65 (4) at 927 (1942).

3 *Id.*, at § 8623-65 (4) at 927. There is no indication in the text of, or committee notes to, Section 65 of the 1927 OGCA that the insolvent corporation exception from the requirement of stockholder approval sale of assets sales was intended to be limited or abrogated. Indeed, the text of Section 65 evinces an intent to limit the stockholder approval requirement, at least when the selling incorporation is left with an operating business. "Nothing in this section is intended to restrict the power of any corporation to sell, lease, exchange or otherwise dispose of, without authorization thereof by the stockholders, of any of its property if thereby the corporate business be not substantially limited, or if the proceeds of such property [sale] be appropriated to the conduct or development of its remaining business." Interestingly, the Revised Model Business Corporation Act was amended in 1999 to eliminate the shareholder approval requirement when the selling corporation was left post-sale with a "significant continuing business" (representing at least 25% of the pre-sale assets or 25% of the corporation's pre-sale income). But see *Mills v. Penn-Lox Co.*, 1940 Ohio App. LEXIS 1163 (sale of the solvent corporation's assets was not effected in dissolution authorized by directors when no certificate of dissolution filed under then-applicable law: stockholder vote was required to authorize the sale). Current Ohio statutory law effectively overrules *Mills*. See Ohio Revised Code § 1701.76 (E) (only a director resolution of dissolution, not a certificate of dissolution, required to avoid stockholder vote).

4 Section 1701.76(E) was added to the OGCA in 1984. There was no Ohio State Bar Association Corporation Law Committee commentary.

5 Typically, only a board of directors' resolution is required to file for relief under federal bankruptcy law. Whether a general assignment for the benefit of creditors can be authorized without shareholder approval is an open question. See C. Landon, "Making Assignments for the Benefit of Creditors as Easy as A-B-C," 41 *FORDHAM URB. L.J.* 1451, 1458 n.49 (2014). But see *Dunbar v. Wiener*, 100 Ohio Misc. 2d 1, 10 and n.7, 1998 Ohio Misc. LEXIS 66 (holding no shareholder vote required under Ohio Revised Code § 1701.76 where sole director dissolved the corporation by resolution for the benefit of creditors).

6 Ohio Revised Code § 1701.86(D).

Accordingly, no shareholder approval of a sale of all, or substantially all, an Ohio corporation's assets is required under Ohio Revised Code § 1701.76 if the corporation is bankrupt or has made a general assignment for the benefit of creditors, if the assets are subject to disposition in a judicial sale "or otherwise" or, if the court permits, in a receivership situation. These provisions make reliance on the vestigial common law exception for insolvent or failing corporations unnecessary outside a limited set of circumstances involving failing (but not failed) corporations not addressed in Ohio Revised Code §1701.86(D).

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