

SUBJECT: Corporations

COMMITTEE: Business and Industry: favorable, with amendments

VOTE: 9 ayes--Semos, McLeod, Polumbo, Allee, Glossbrenner,
A. Hill, Lee, Robnett, Waters

0 nay

0 present, not voting

2 absent--Bush, S. Thompson

WITNESSES: For--Michael Boone, State Bar of Texas

Against--NONE

DIGEST: This bill amends the Business Corporations Act to make it clear that the sale of all or substantially all of the assets of a corporation with shareholder approval shall not be considered a "defacto merger." The bill also specifies the requirements for a shareholder's eligibility to participate in a stockholders' derivative suit against the corporation, and makes a corrective amendment to the act.

PRO: This bill makes it clear that the doctrine of "defacto merger" shall not apply to the sale of corporate assets under the act. This will protect corporations who have acquired assets of another corporation in compliance with the act from being saddled with unexpected and unknown liabilities of the other corporation.

CON: No apparent opposition

COMMENTARY: The Business Corporation Act covers both the merger and disposition of corporate assets. These are two separate and distinct transactions and are covered by different rules and regulations. A merger includes the merging of the property, assets, and stock of participating corporations. The surviving corporation inherits all of the liability of the merged corporation. A corporation may also sell or otherwise dispose of corporate property or assets, with shareholder approval. However, the acquiring corporation assumes only as much of the liabilities of the disposing corporation as it contractually agrees to accept.

The doctrine of "defacto merger" has been used to hold that the terms of an acquisition of corporate assets so closely resemble the terms of a merger that the transaction will be deemed a "defacto merger." This makes the acquiring corporation liable for all of the debts of the disposing

COMMENTARY
(continued)

corporation, notwithstanding any contractual provisions to the contrary.

The doctrine has been done away with in most states, and it was thought that the doctrine did not apply to the disposition of corporate assets under the Texas Act. However, in Western Resources Life Insurance Company v. Gerhardt, 553 SW2d 783 (Tex. Civ. App.--Austin, 1977) the court applied the doctrine of "defacto merger" to a transfer of corporate shares and assets. It prevented the corporations from avoiding liability through corporate transformations or changes in form only. This bill makes it clear that the disposition of corporate assets and property under the act is not to be considered a "defacto merger."

The other changes in the bill clarify existing law as to standing requirements for individual shareholders in stockholders suits' against the corporation, and make corrective changes in the act.

The Senate companion to this bill, SB 142, may be substituted for the House bill on the floor. The two bills are basically the same except for the committee amendments to HB 387. Further, SB 142 does not address the issue of standing for purposes of derivative suits.