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Superior Court of Washington for Clark County

Save Columbia CU Committee, John Bucholtz, Steve Straub, and Robert Tice,
Plaintiffs,

vs.

Columbia Community Credit Union, Karen Martel, Edwin C. Bell, Dale Magers, William F. Byrd III, Robert M. Byrd, Dennis McLachlan, Mark L. Ail, Connie Jones, and Bruce Davidson, Defendants.

No. 04-2-01341-4

Response to Director Defendants’ Motion for Reconsideration

I. Introduction

This is the Plaintiffs’ response to the *motion for reconsideration* (the “**Motion for Reconsideration**”), filed on or about May 10, 2004, by the Director Defendants of the Court’s “Ruling on CR 12(b)(6) Motions and Motion for Partial Summary Judgment” (the “**Ruling**”) entered on May 10, 2004. *That Motion for Reconsideration comprised the first paragraph* of a 2-page pleading titled, “Director Defendants’s Motion for Reconsideration, to Dismiss, and for Partial Summary Judgment,” the *second paragraph* of which presented a conditional motion pursuant to CR 12(b)(6) and conditional motion pursuant to CR 56, and the *third paragraph* of which presented a different conditional motion pursuant to CR 12(b)(6) and a different conditional motion pursuant to CR 56. The state and local civil rules governing motions for reconsideration under CR 59 are quite distinct and different from those under CR 12(b)(6) and CR 56, so only the Director Defendants’ motion for reconsideration under CR 59 is here being addressed; the other motions will be addressed in subsequent pleadings.

Director Defendants supported their Motion for Reconsideration with an 18-page memorandum titled, “Director Defendants’ Memorandum in Support of Motion for

1 Reconsideration, to Dismiss, and for Partial Summary Judgment” (the “**Supporting**
2 **Memorandum**”), but only Part II (pages 2 - 4) of the Supporting Memorandum related to the
3 Motion for Reconsideration.

4 **II. Responsive Arguments**

5 Civil Rule 59(b) states in part:

6 “A motion for a new trial or for reconsideration shall identify the specific reasons
7 in fact and law as to each ground on which the motion is based.”

8 CR 59(a) lists nine grounds upon which a motion for reconsideration may be based. The Motion
9 for Reconsideration fails to identify what parts of the Ruling the movants wish to be
10 reconsidered, and fails to even reference CR 59, much less any of the grounds listed in CR 59(a).
11 The Motion for Reconsideration could be dismissed on that basis alone.

12 The Supporting Memorandum, however, suggests that the movants are seeking
13 reconsideration of those portions of the Ruling subtitled “Breach of Fiduciary Duty” (Ruling
14 pages 5 - 9) and “Access to Records Claim” (Ruling page 9), and that their sole asserted ground
15 is “because the Nonprofit Corporation Act, by its express terms, does not apply to credit unions.”

16 As a threshold matter, the Court’s decisions on the Breach of Fiduciary Duty Claim and
17 the Access to Records Claim are amply supported by the governing case law that the Plaintiffs’
18 had briefed in the many pleadings filed prior to the Ruling. And the Director Defendants have
19 even acknowledged that governing corporate common law in their Supporting Memorandum,
20 saying at page 17, lines 10-12:

21 “Also, the common law requires that any request to inspect corporate books and
22 records must be made for a “proper purpose.” *See, e.g., State ex rel. Grismer v.*
23 *Merger Mines Corp.*, 3 Wn.2d 417, 420, 101 P.2d 308 (1940).”

24 In their Supporting Memorandum, the Director Defendants make assorted arguments that
25 the Washington Nonprofit Corporation Act (RCW Chapter 24.03) does not apply to Columbia
26 Community Credit Union. But they fail to address the most obvious issue of statutory
27 construction: Why does RCW 31.12.015 state that “[a] credit union is a cooperative society
organized under this chapter *as a nonprofit corporation*” [emphasis added].

In 1997, the state legislature made the following specific changes to RCW 31.12.015 by
enacting Section 3 of Chapter 397, Laws of 1997 (additions underlined, deletions lined-out):

A credit union is a cooperative society organized under this chapter as a nonprofit
corporation for the purposes of promoting thrift among its members and creating
a source of credit for them at fair and reasonable rates of interest.

1 The director is the state's credit union regulatory authority whose purpose
2 is to protect the members' financial interests, the integrity of credit unions as
3 cooperative institutions, and the interests of the general public, and to ensure that
4 ~~state-chartered~~ credit unions remain viable and competitive in this state.

5 Presumably there was a reason why the legislature in 1997 inserted the word "nonprofit"
6 front of "corporation" in RCW 31.12.015. Presumably the drafters of that legislation intended
7 by that language to cause credit union officials, and governmental officials (including judges) to
8 look to and be guided by the laws governing Washington nonprofit corporations when state
9 credit union law is silent or unclear on any particular issue.

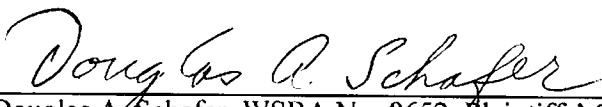
10 Prior to that legislation and even subsequent to it, the Washington Department of
11 Financial Institutions, Division of Credit Unions on many occasions has looked to and been
12 guided by the Washington Business Corporation Act (RCW Title 23A) on questions of corporate
13 law when the Washington Credit Union Act (RCW Ch. 31.12) was silent or unclear on a
14 particular issue. DCU Opinion Nos. 96-20, 97-17, 98-10, and 00-4 are attached as Exhibits A to
15 this response. And the Washington State Supreme Court has recognized, on multiple occasions,
16 that the common law of corporations governs many issues that arise, particularly in matters of
17 corporate governance. *See, e.g. Grismer, supra; In re the Monks Club, Inc.*, 64 Wn.2d 845, 394
18 P.2d 804 (1964).

19 To the extent that the 1997 credit union legislation might appear to conflict with much
20 earlier enacted general provisions of the Washington Nonprofit Corporation Act, as noted on
21 page 3 of the Supporting Memorandum, recognized canons of statutory construction give
22 priority both to more recent and to more specific legislation. *In re Guardianship of Atkins*, 57
23 Wn. App. 771, 776, 790 P.2d 210 (1990) ("When statutes conflict, the more specific and recent
24 enactment takes precedence over the earlier, more general one. The special act is construed as an
25 exception to, or qualification of, the general statute.")

26 VII. Conclusion.

27 For the reasons discussed above, the Court should deny the Motion for Reconsideration..

28 Date: May 27, 2004

29 
30 Douglas A. Schafer, WSBA No. 8652, Plaintiffs' Counsel

[source: <http://www.dfi.wa.gov/cu/opinions1996.htm>]

Washington State Dept. of Financial Institutions, Division of Credit Unions

REDACTED OPINION NUMBER 96-20

December 31, 1996

"A"

Subject: Counting mail ballots to reach quorum at membership meeting

Dear _____:

You have inquired how a quorum should be counted for a meeting of members. In your particular case, members will be voting on a merger proposal at a special meeting. They may vote by mail ballot or may attend the meeting in person to cast their vote. Your specific question is whether those members present in person as well as those voting by mail ballot should be counted for establishing a quorum.

The sections of state law which deal with special membership meetings and mergers are RCW 31.12.195 and .695, respectively. However, neither of these sections specify a minimum quorum level, let alone how a quorum should be counted.

Section 4, Article V of your Bylaws specifies quorum requirements for membership meetings. It states in part that if a quorum is not "present" at the appointed date of the meeting, the meeting may be recessed until a later date. However, like the statute, it also does not specify how a quorum should be counted.

In reviewing this issue, I looked to the analogous situation with general business corporations to see how they count a quorum for stockholder meetings. Stock corporations are permitted by general corporate law to count those persons voting by proxy as well as those persons present in person at a stockholders meeting to determine whether a quorum has been reached.

As noted above, there is no statutory direction in the Washington State Credit Union Act (Chapter 31.12 RCW) on this point. However, I believe that the general corporate law position is a rational one and that the same position should be adopted for credit unions. Accordingly, I have concluded that for the purpose of establishing a quorum at a membership meeting, you should count each member attending the meeting personally, as well as each member voting by mail ballot on an issue presented at the meeting.

[source: <http://www.dfi.wa.gov/cu/opinions1997.htm>]

Washington State Dept. of Financial Institutions, Division of Credit Unions

OPINION NUMBER 97-17

September 10, 1997

To: Opinion file

From: J. Parker Cann, Assistant Director

Subject: Effective date of merger of state credit unions or merger of federal into state credit union

If the surviving credit union in a merger is a Washington State-chartered credit union, when does the merger become legally effective? We have observed that in many cases the books of the credit unions are merged before the credit unions have submitted their merger agreement to the Division for filing with the Secretary of State.

The Washington State Credit Union Act (CU Act) addresses certain aspects of mergers. RCW 31.12.461, .464(4), 467(3). However, the CU Act does not specify when a credit union merger becomes effective.

In analyzing this issue, I reviewed the analogous provisions under the Washington Business Corporation Act (Business Corporation Act). The Business Corporation Act provides that a merger becomes effective when articles of merger are filed with the Washington Secretary of State, or at a later date as specified in the articles. RCW 23B.11.050, 23B.01.230. Although these sections of the Business Corporation Act are not applicable to credit unions, they do establish legislative policy on this issue in the context of general business corporations.

The Business Corporation Act policy is a reasonable one which would provide certainty if adopted in the credit union context. There do not appear to be any reasons why this policy should not be adopted by the Division for credit unions.

In the absence of direction in the CU Act, the Division has determined to adopt the reasoning of the Business Corporation Act on the effective date of credit union mergers. Accordingly, credit union mergers will become legally effective on the date the Division files the merger agreement with the Secretary of State, or a later date as specified in the filed agreement itself. The best practice, therefore, is for the credit unions to merge their books on the legal effective date of the merger.

[source: <http://www.dfi.wa.gov/cu/opinions1998.htm>]

Washington State Dept. of Financial Institutions, Division of Credit Unions

OPINION NUMBER 98-10

August 14, 1998

To: Opinion File

From: J. Parker Cann, Assistant Director

Subject: Effective Date of Credit Union Mergers

Overview

If the surviving credit union in a merger is a Washington State-chartered credit union, when does the merger become legally effective? The Washington State Credit Union Act (Credit Union Act) is unclear on this point.

The effective date can impact whether another Division assessment is due and other significant matters. We believe that there would be value in providing more certainty for credit unions on the effective date of mergers.

Analysis

The Credit Union Act addresses certain aspects of mergers. RCW 31.12.461, .464(4), 467(3). However, the CU Act does not specify when a credit union merger becomes effective.

The NCUA form Merger Agreement (NCUA 6304) - that most credit unions use - provides that the merger will be effective on the date entered on the first line of the Agreement. The instructions on the second page of the form direct credit unions not to fill in the date or sign the Agreement until the merger is completed.

In analyzing this issue, we reviewed the parallel provisions under the Washington Business Corporation Act. The Business Corporation Act provides that a merger becomes effective when articles of merger are filed with the Washington Secretary of State, or at a later date as specified in the articles (not to exceed 90 days). RCW 23B.11.050, 23B.01.230. The rationale appears to be that the merger takes effect on the date provided in the public record maintained by the Secretary of State. In the credit union context, credit unions do not file articles of merger, but do file the signed merger agreement with the Secretary of State (through the Division).

Conclusion

In the absence of direction in the Credit Union Act, the Division has determined to adopt the rationale of the Business Corporation Act - that mergers become effective as provided in the public record maintained by the Secretary of State. Accordingly, credit union mergers will

become legally effective on the date the Division files the merger agreement with the Secretary of State, or a later date as specified in the agreement itself (not to exceed 90 days).

Coordination with the Division

The credit union submitting the merger agreement to the Division should contact the Division prior to submission to coordinate the date inserted by the credit union in the first line of the agreement. The date should be the future date that the merging credit unions want the merger to take legal effect - either the date the Division will file the merger agreement with the Secretary of State, or a later date (not to exceed 90 days). The credit union should make sure that the merger agreement is received by the Division at least 5 business days before the date that the Division intends to file the agreement with the Secretary of State.

Merger of books

We have observed that in many cases the books of the credit unions are merged before the credit unions have submitted their signed merger agreement to the Division for filing with the Secretary of State. In the future, credit unions may merge their books no sooner than the legal effective date of the merger.

[source: <http://www.dfi.wa.gov/cu/opinions2000.htm>]

Washington State Dept. of Financial Institutions, Division of Credit Unions

DCU Opinion Number 00-4

Date: October 24, 2000

From: Parker Cann, Director

Subject: Interim Director Appointed To Fill A New Board Seat May Serve Only Until The Next Annual Meeting Of Members

Issue

The Board of Directors of a credit union wants to expand the number of Board members from 13 to 15. The Board intends to appoint two interim directors to fill the vacancies created by the expansion of the Board. The directors' terms are staggered and members serve three-year terms.

How long may the interim directors serve before standing for re-election? More specifically, may they serve out their full term of office (three years), or may they serve only until the next annual meeting of members?

Analysis

The Washington State Credit Union Act (Act), Chapter 31.12 RCW, provides that directors must be elected at the credit union's annual membership meeting. RCW 31.12.225(2). However, the Act specifies that the Board must appoint interim directors to fill vacancies on the Board, unless the director would serve a term of fewer than 90 days. RCW 31.12.225(4). This provision permits (but does not require) the Board to appoint an interim director if the director would serve a term of fewer than 90 days.

The Act also provides that an interim director will serve out the term of the director they replace, unless the credit union's bylaws state otherwise. RCW 31.12.225(4). However, the Act does not explicitly address the current issue, where the interim directors are filling vacancies created by an increase in the number of Board members. For ease of reference, the remainder of this opinion refers to "interim replacement directors" as those appointed to fill an existing seat, and "interim new directors" as those appointed to fill vacancies on a Board created by an increase in the number of directors.

In the absence of clear direction in the Act, we looked to see how the legislature has dealt with this issue in parallel contexts. The Washington Business Corporation Act (WBCA), Title 23B RCW, provides that interim directors serve until the next annual meeting of shareholders. RCW 23B.08.050(4). The WBCA does not differentiate between the two types of interim directors we have distinguished above. Other state statutes governing financial institutions with elected directors have similar provisions. See RCW 33.16.010 [savings and loan associations]; RCW 32.32.495(4) [savings banks]; compare RCW 30.12.010 [commercial banks].

It appears that the legislature has generally concluded that interim new directors should serve only until the next regularly scheduled election of directors. We believe that the same conclusion is appropriate for credit unions.

Conclusion

Interim new directors of a credit union may serve only until the next annual meeting of members.