

To: New Jersey Law Revision Commission
From: Staff
Re: 14A:5-28 Books and records, rights of inspection
Date: March 7, 2011

Introduction

Commission Staff monitors case law for decisions that may require legislative review. One case inviting statutory clarification appears to be *Cain v. Merck & Co., Inc.*, 415 *N.J. Super.* 319 (App. Div. 2009). The case arose from a dispute over access to minutes from corporate meetings needed for a shareholder derivative action against Merck, then known as Schering-Plough. One of two major issues on appeal was whether the reference to “minutes” in 14A:5-28(4) of the New Jersey Business Corporation Act is meant to broadly cover minutes of board and executive committee meetings or limited only to shareholder meetings. 415 *N.J. Super.* at 323. The New Jersey Business Corporation Act includes no definition for “minutes” in its definition section. *N.J.S.* 14A:1-2.1. The court held, in part, that a shareholder’s right of inspection pursuant to *N.J.S.* 14A:5-28(4) includes inspecting the minutes of the board of directors and, as applicable, the executive committee. 415 *N.J. Super.* at 323. The right of inspection is, however, limited to shareholders showing a “proper purpose” and other limitations or conditions that may be imposed within the court’s discretion, irrespective of the shareholder’s quantity of shares owned or longevity of ownership. *N.J.S.* 14A:5-28(4).

The trial court granted the plaintiff’s application to examine the minutes of Schering’s board and its executive committees involved in the alleged wrongdoing, determining that the plaintiff’s showed a proper purpose for examination. *Id.* at 324. Schering, on appeal, argued that the statute “does not permit shareholders to examine the minutes of a corporate board of directors or its executive committee.” *Cain v. Merck*, 415 *N.J. Super.* at 324-25. The corporation argued that the court should construe “minutes” narrowly to only apply to minutes of shareholder meetings. *Id.* at 327. On review, the Appellate Division agreed with the trial court’s grant of plaintiff’s application, disagreed with the corporation’s reading of “minutes,” and read the statute to allow a court to compel production of the “minutes” of meetings of the board, executive committee, *and* shareholders (the court agreed with Schering’s other argument—that a court may circumscribe an examination of minutes to a relevant proper purpose—and reversed in part).

In analyzing the statute, the court noted that New Jersey common law prior to the statute’s enactment recognized a shareholder’s qualified right to “examine the books and records of [a] corporation.” *Id.* at 328. The court reviewed the materials surrounding enactment, noting that the sentence at issue in the case (the first sentence of subsection (4)) has remained essentially unchanged since enactment. *Id.* at 328-29 (in 1973 “the” was substituted for “said”).

The court looked at each subsection of the statute relative to the others. Subsection (1) of the statute references corporate records in a broad sense: “[e]ach corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any.” *N.J.S.* 14A:5-28(1). Subsection (3), on the other hand, specifically limits shareholder access to “minutes of the proceedings of its shareholders” based on a shareholder’s

percentage of holdings and longevity, but rests the burden of proof of an improper purpose on the corporation . Subsection (4), applicable to all shareholders, preserves a court's power to allow shareholder access to "the books and records of account, minutes, and record of shareholders of a corporation" provided the shareholder shows a proper purpose. *N.J.S.* 14A:5-28(4).

The court considered the Legislature's use of the word "minutes" in subsection (4) "to refer to the shareholder, board, and executive committee minutes referred to in subsection (1)." 415 *N.J. Super.* at 331. To avoid any future confusion or misinterpretation of subsection (4)'s reference to "minutes," Staff proposes to the Commission a project to clarify the statutory language. The sample revision below may, subject to further research, serve to ameliorate any confusion. The existing language is show below with the proposed revisions indicated by underlining and strikethrough. The proposed new language in subsection (4) is lifted from subsection (1).

***N.J.S.* 14A:5-28. Books and records; right of inspection.**

(1) Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. Unless otherwise provided in the bylaws, such books, records and minutes may be kept outside this State. The corporation shall keep at its principal office, its registered office, or at the office of its transfer agent , a record or records containing the names and addresses of all shareholders, the number, class and series of shares held by each and the dates when they respectively became the owners of record thereof. Any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into readable form within a reasonable time. A corporation shall convert into readable form without charge any such records not in such form, upon the written request of any person entitled to inspect them.

(2) Upon the written request of any shareholder, the corporation shall mail to such shareholder its balance sheet as at the end of the preceding fiscal year, and its profit and loss and surplus statement for such fiscal year.

(3) Any person who shall have been a shareholder of record of a corporation for at least six months immediately preceding his demand, or any person holding, or so authorized in writing by the holders of, at least 5% of the outstanding shares of any class or series, upon at least five days' written demand shall have the right for any proper purpose to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom, at the places where the same are kept pursuant to subsection 14A:5-28(1).

(4) Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which the shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account,~~and~~ minutes of the proceedings of its shareholders, board

and executive committee, if any, and record of shareholders of a corporation. The court may, in its discretion prescribe any limitations or conditions with reference to the inspection, or award any other or further relief as the court may deem just and proper. The court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon whatever terms and conditions as the order may prescribe. In any action for inspection the court may proceed summarily.

(5) Holders of voting trust certificates representing shares of the corporation shall be regarded as shareholders for the purpose of this section.