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October 16, 1987

The Honorable Jim Skelly  
Arizona State Representative  
State Capitol - House Wing  
Phoenix, Arizona 85007

Re: I87-136 (R87-128)

Dear Representative Skelly:

You have asked whether two provisions of the Arizona Corporation Act ("Act"), A.R.S. §§ 10-016(C) and 10-058(B)(10), are consistent with each other. Specifically, you request an opinion on whether a corporation by resolution under A.R.S. § 10-016(D), may issue a series of preferred stock subordinate to a prior series of the same class of stock with respect to amounts available upon dissolution of the corporation.

The Act provides that articles of incorporation may be adopted permitting the issuance of different series of preferred stock of the same class. A.R.S. § 10-016(B). It also allows the articles of incorporation to vest that authority in the board of directors. A.R.S. § 10-016(D). The articles may be amended to allow the issuance of subordinated series of preferred stock. A.R.S. § 10-058(B)(10) and (14). A.R.S. § 10-016(B) also gives corporations the discretion to fix preferences, and itemizes certain matters which may be the subject of special rights and preferences. Among these rights and preferences are the amounts to be received by shareholders if the corporation is liquidated. A.R.S. § 10-016(B)(4).

However, A.R.S. § 10-016(C), which applies to the relative rights and preferences of a series within a single class of stock, raises a question as to the authority to issue a subordinated series of preferred stock where other series of such stock would have preferred rights upon the liquidation of the corporation. A.R.S. § 10-016(C) provides as follows:

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If the stated dividends and amounts payable on liquidation are not paid in full, the shares of all series of the same class shall share ratably in the payment of dividends including accumulations, if any, in accordance with the sums which would be payable on said shares if all dividends were declared and paid in full, and in any distribution of assets other than by way of dividends in accordance with the sums which would be payable on such distribution if all sums payable were discharged in full.

The question is whether A.R.S. § 10-016(C) permits a liquidating corporation to honor preferences, or, requires a prorata distribution among the entire class of preferred stockholders.

If A.R.S. § 10-016(C) requires parity under all circumstances, there would be a conflict with A.R.S. § 10-058(B)(10) which authorizes a corporation to amend its articles of incorporation for the following purpose:

To create new classes or series of shares having rights and preferences either prior and superior or subordinate and inferior to the shares of any class or series then authorized, whether issued or unissued.

In permitting the subordination among any class or series of stock, this section permits the creation of different preferences among the same class of stock issued in different series. However, we conclude that a conflict between the applicable statutes does not exist.

In concluding that a conflict does not exist, we apply the principle of statutory construction that each part of a statute must be considered in the context of the whole, in order to ascertain the legislative intent when it appears that its provision may be inconsistent. One Hundred Eighteen Members of Blue Sky Mobile Home Owners Association v. Murdock, 140 Ariz. 417, 682 P.2d 422 (1984); Greyhound Parks of Arizona v. Waitman, 105 Ariz. 374, 464 P.2d 966 (1970); Pinto Valley Copper Corporation v. Arizona Department Economic Security, 146 Ariz. 484, 706 P.2d 1251 (App. 1985). The purpose of a statute

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should not be frustrated by a literal application of its terms when its provisions may be construed in harmony with each other. State v. Arizona Corporation Commission, 94 Ariz. 107, 110-111, 382 P.2d 222, 224 (1963).

Here the issue is the relative rights and privileges among series of stock within the same class with regard to distributions upon the liquidation of a corporation. In a liquidation, distributions are to be prorated "in accordance with the sums which would be payable on such distribution if all sums payable were discharged in full." A.R.S. § 10-016(C). In the ordinary course of business, a subordinated series is not entitled to the payment of dividends, unless preferential dividends are paid first. This principle also applies upon the liquidation of corporate assets. If the funds available are insufficient to pay both the senior and junior series in full, then a ratable share would not include an equal payment to the junior series. Under those circumstances, a liquidation payment would not be a "sum payable," until the senior series are paid in full.

Thus, it is our opinion that "ratably," as used in A.R.S. § 10-016(C), allows an adjustment to be made upon liquidation to effectuate the different preferences among series of preferred stock. This interpretation follows what appears to be the legislative intent in allowing corporations' discretion in creating different classes and series of preferred stock, while directing that shareholders of the same class and series be treated equitably.

In conclusion, A.R.S. § 10-016(C) permits a corporation to issue a series of preferred stock subordinated to other series of the same class of stock regarding dividend and liquidation rights, and, thus, there is no inconsistency with A.R.S. § 10-058(B)(10).

Very truly yours,



BOB CORBIN  
Attorney General

BC:WMS:dg