CHAPTER THREE

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Section 3.01 Generally

The incorporation process generally proceeds along the following path:

1. The incorporators or the promoters obtain subscriptions from prospective shareholders, choose a corporate name, identify initial directors, cause the articles of incorporation to be drafted, and cause the articles of incorporation to be filed with the Secretary of State.

2. After the articles of incorporation have been filed, the initial directors (generally named in the articles of incorporation) hold an organizational meeting. At that meeting, the initial directors accept subscriptions from prospective shareholders and call for payment thereon, authorize the issuance of shares to these subscribers, adopt bylaws, appoint officers & agents, authorize the officers and agents to undertake certain tasks on behalf of the corporation, and take the other steps necessary to start business.

3. Contemporaneous with the organizational meeting, (i) the incorporator ceases to have any status with the corporation, (ii) the shareholders become owners of the corporation's stock, (iii) the corporation becomes the owner of the property contributed for its shares, and (iv) the board of directors ratifies any actions previously taken by the incorporator/promoter.

4. After the organizational meeting, officers and other corporate agents begin carrying out day-to-day corporate operations under authority conferred upon them by the board of directors.

Section 3.02 Incorporator

The "incorporator" is a person whose limited role involves filing the articles of incorporation. If initial directors are not included in the articles

of incorporation, the incorporator also has the job of appointing directors and sometimes conducting the organizational meeting. "Their office is to start the corporation and proceed to perfect its organization." *Coyote Gold & Silver Mining Co. v. Ruble*, 8 Or 285, 292 (1880).

The topic of "promoters" is discussed in Chapter Two of this book.

***A. Qualifications*.**

RCW 23B.02.010 provides:

> One or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the secretary of state for filing.

Older case law held that a corporation could not serve as an incorporator for another corporation, absent express statutory authority. *Denny Hotel Co. v. Schram*, 6 Wash 134, 32 P 1002 (1893); 1953 *Op Ind Atty Gen* 440. But under the current Act, an incorporator can be a natural person, a corporation, a partnership or any other entity. RCW 23B.01.400(18) and RCW 23B.02.010. *See also:* Official Comment to RMBCA § 2.01.

Some state statutes specifically provide that an incorporator must have capacity to contract or otherwise impose a qualification requirement on the incorporator. *See, for example:* Louisiana Rev. Stat. 12:21. The Washington Act contains no requirements concerning who can serve as an incorporator. RCW 23B.02.010. Neither does the Washington constitution. *Hastings v. Anacortes Packing Co.*, 29 Wash 224, 69 P 776 (1902). However, older case law indicates that a person must have legal capacity in order to serve as an incorporator. *See: The Liberty Township Draining Association v. Watkins*, 72 Ind 459 (1880); 1A FLETCHER CYC CORP §§ 82-84 (Perm Ed 1993).

While a corporation may have more than one incorporator, in practice, it usually only has one.

At one time, the incorporator and the promoter were often the same person. The term "promoter" is not a statutory term, but rather, it is a term generally applied to the person or persons who instigate a corporation's formation. *See:* Section 2.01 herein.

Since an incorporator's role is now so ministerial, and since an incorporator's involvement is now so transitory, the role of incorporator frequently falls on the corporation's attorney or on another person whose principal attribute is that such person is readily available to sign the articles of incorporation.

B. Duties.

An incorporator's role is short-lived. While the Act never actually states that the office of incorporator ceases to exist, the incorporator only has limited statutory duties, all of which are over once the organizational meeting has occurred.

RCW 23B.02.010 provides that the incorporator is to deliver the "articles of incorporation to the Secretary of State's office for filing." RCW 23B.02.050(1)(b) provides that, if initial directors are not named in the articles of incorporation, the incorporator is to hold an organizational meeting to elect directors and complete the organization of the corporation.

In lieu of actually conducting the organizational meeting in person, the incorporator(s) may conduct the organizational meeting by written consent. RCW 23B.02.050(2).

The incorporator has no other duties, statutory or otherwise.

> From the time of the first meeting of the directors, that is to say, from the time of the organization of the board, "the powers vested in the corporation are exercised by them, or by their officers or agents under their direction" (Hill's Code, § 3225), thus relieving the incorporators of further duty or power in the premises, or, rather, their functions then cease because their duties have been fulfilled and their powers executed. *Nickum v. Burckhardt*, 30 Or 464, 468-9, 47 P 788, 789 (1897).

For all practical purposes, the position of incorporator ceases to exist once the organizational meeting has occurred.

Section 3.03 Organizational Meeting

The organizational meeting may take place only after the articles of incorporation have been filed with the Secretary of State's office. RCW 23B.02.050.

> **NOTE:** RCW 23B.02.050 states that the organizational shall occur in "after incorporation." "[I]ncorporation cannot exist prior to the filing of corporate papers." *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 365, 950 P2d 451, 455 (1997). *See also:* RCW 23B.02.030(1).

If the articles of incorporation do not include the names of the initial directors, the incorporator must elect the director(s) and may conduct the organizational meeting and otherwise organize the corporation. RCW 23B.02.050(1)(b).

If, as is more often the case, the names of the initial directors are set forth in the articles of incorporation, these initial directors conduct the organizational meeting. At this meeting, these directors appoint officers,

adopt bylaws, and carry on any other business brought before the meeting. RCW 23B.02.050(1)(a).

Although not specifically described in RCW 23B.02.050, a number of other acts must necessarily take place at the organizational meeting, or soon thereafter. For example, the board of directors must authorize the corporation to accept subscriptions from the persons who wish to purchase the corporation's shares, call for the payment of the subscription price of such shares, and authorize the issuance of the corporation's shares upon receipt of such payment.

> **NOTE:** In order to conduct business, a corporation must be owned by someone and it must own something. Before a corporation begins doing business, it must have shareholders and it should own the assets these shareholders have contributed for their shares.
>
> For example, after operating Frank's Franks as a sole proprietorship for several years, Frank decides to incorporate his business. Frank has not necessarily transferred his business to the corporation simply by forming a corporation named "Frank's Franks, Inc." Unless Frank goes through the formalities of contributing his business to the corporation (and, in exchange, receiving its stock), there will be doubt as to whether Frank is still conducting the business as a sole proprietorship. The mere existence of a similarly-named corporation does not mean that corporation owns Frank's Franks.

While not required, it is common for the board of initial directors to authorize a number of other corporate actions at, or soon after, the organizational meeting. These actions include authorization to open bank accounts, authorization of officer and employee compensation, authorization for the officers to enter into real and personal property leases, authorization of equipment and inventory purchases, authorization for the officers to apply for government licenses, authorization to retain attorneys and accountants, authorization to conduct business in other states, and authorization of such other matters as are necessary for the corporation to begin its business. If "S Corporation" status under the federal tax code is desired, the board of directors should approve adoption of such status and should authorize the filing of the appropriate form with the Internal Revenue Service. Prior acts of the corporation's promoters and attorneys should be ratified, where appropriate.

Section 3.04 *De Facto* Corporations & Corporations by Estoppel

One of the principal reasons for incorporating a business is to obtain the benefits of limited liability for its owners. Case law suggests that there is a tendency for owners to technically jump the gun by entering into corporate contracts before all of the requirements of incorporation take place, but for the owners to still want the benefits of limited liability.

Back when incorporation was a cumbersome process, courts recognized two defenses for owners of defective corporations who nevertheless wanted to enjoy the benefit of limited liability: the "*de facto* corporation" defense and the "corporation by estoppel" defense.

Today, neither of these defenses are viable in Washington. Today, liability for defective corporations is largely governed by RCW 23B.02.040 which makes personally liable "[a]ll persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this title, are jointly and severally liable for liabilities created while so acting except for any liability to any person who also knew that there was no incorporation." *See: Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997); *Silvers v. R&F Capital Corp.*, 123 Or App 35, 858 P2d 895 (1993), *review denied*, 318 Or 351, 870 P2d 220 (1994).

RCW 23B.02.040 applies both before the articles of incorporation are filed with the Secretary of State and after a corporation is dissolved. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997).

A. Overview.

Originally, the incorporation process was a cumbersome one. Compliance with many technical requirements was necessary. For instance, the articles of incorporation were required to be executed in triplicate. *Kwapil v. Bell Tower Co.*, 55 Wash 583, 104 P 824 (1909). Copies were required to be filed with the Secretary of State and with the auditor of the county in which the corporation's principal place of business was located, and one copy was required to be kept at the corporation's principal place of business. *Id.*; *First Nat. Bank of Everett v. Wilcox*, 72 Wash 473, 131 P 203 (1913).

As a result, it is not surprising that many early corporations failed to comply with one or more of these technical requirements. Yet, the courts considered it unfair to impose personal liability in such cases,

particularly where the shareholders and the third parties with whom the purported corporation dealt all believed that the corporation existed and where the third parties were dealing with the corporation, not the shareholders.

The courts avoided applying such a harsh penalty to the shareholders by developing the concepts of *de jure* corporations, *de facto* corporations, and corporations by estoppel.

> Corporations (using that term to designate organizations merely claiming or alleged to be corporations, as well as those which are in all respect legally constituted) have been divided into three classes,--corporations de jure, corporations de facto, and corporations by estoppel. Corporations de jure have been defined to be those whose legal right to exist cannot be questioned even by the state itself. The expression "de facto corporations" is generally used to denote associations exercising corporate powers under color of a more or less legal organization. One who has contracted with a corporation as such is estopped to deny its existence as a corporation at the date of the contract in any suit arising thereunder, and such a corporation has been, it seems to us with great propriety, designated a "corporation by estoppel." *Brown v. Atlanta Ry. & Power Co.*, 113 Ga 462, 39 SE 71, 73 (1901).

At one time in Washington and in most other states, a person acting for a technically defective corporation had a defense from personal liability, the defense that the corporation was a *de facto* corporation. *Mootz v. Spokane Racing & Fair Ass'n.*, 189 Wash 225, 64 P2d 516 (1937). As discussed below, Washington no longer recognizes this defense. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997).

Many states also once recognized another defense by such persons, an estoppel defense. Case law refers to this defense as a "corporation by estoppel" defense. *Brandtjen & Kluge v. Biggs*, 205 Or 473, 288 P2d 1025 (1955). As discussed below, it is unlikely that this defense is still viable in Washington. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997).

For a more discussion of the liability of promoters for their acts on behalf of *de facto* corporations, see Section 2.06 of this book.

B. De facto corporation defense.

A *de jure* corporation is a corporation which has observed all of the formal requirements of the incorporation process. A *de facto* corporation is a purported corporation which has substantially complied with the statutory requirements of incorporation, but nevertheless, has failed to strictly observe some technical requirement necessary for it to qualify as a *de jure* corporation.

Section 3.04

> A corporation *de jure* is one created in strict or substantial conformity to the governing corporation statutes, and whose right to exist and act as such can not be successfully attacked in a direct proceeding by the state.
>
> The *de facto* corporation is so defectively incorporated as not to be *de jure*. (citations omitted) *Kidd v. Hilton of San Juan, Inc.*, 251 F Supp 465, 468 (D PR 1966).

Back when Washington recognized this defense, its courts imposed three requirements for qualifying as a *de facto* corporation: (i) there must have been a corporation statute; (ii) there must have been an attempt to organize under that statute; and (iii) there must have been actual use of the corporate franchise. *Mootz v. Spokane Racing & Fair Ass'n.*, 189 Wash 225, 64 P2d 516 (1937). If all three of these elements were present, shareholders of the *de facto* corporation were not personally liable to third parties for corporate acts. Only the state could successfully attacked a *de facto* corporation.

There could be no *de facto* corporation prior to the filing of the articles of incorporation. *Mootz v. Spokane Racing & Fair Ass'n.*, 189 Wash 225, 64 P2d 516 (1937).

As the Legislature simplified the incorporation process, the need for a *de facto* corporation defense lessened.

Today, RCW 23B.02.030(2) provides:

> The secretary of state's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to the incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

RCW 23B.02.040 provides:

> All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this title, are jointly and severally liable for liabilities created while so acting except for any liability to any person who also knew that there was no incorporation.

It would appear that these two provisions have eliminated the *de facto* corporation defense in Washington.

> When the Legislature enacted the WBCA, it considered comments to the legislation which had been prepared by the Corporate Act Revision Committee of the Washington State Bar Association. Those comments are included in the *Senate Journal*, 51st Leg. 2977-3112 (1989), and are indicative of legislative intent. The comment on RCW 23B.02.040 states:
>
> > The combined effect of Proposed sections 2.03 and 2.04 is to abolish in Washington the de facto corporation and the corporation-by-estoppel (or "loose" estoppel) doctrine. The ABA Committee Comment (REVISED MODEL BUSINESS CORPORATION ACT, Official Text 44-46 (1984) concludes from a review of recent cases that the principal equitable consideration running through recent applications of de facto and estoppel doctrines relates to the desire to protect persons

> who acted with the good faith belief that a corporation existed. Once the equity of that ground is acknowledged, as it is expressly in Proposed section 2.04 (now RCW 23B.02.040), there is no reason not to impose liability on parties who fail to take advantage of the simple and inexpensive process of incorporation. (citations omitted) *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 366-7, 950 P2d 451, 456 (1997).

Similar Model Act language has been adopted in other states and most courts, but not all, have likewise held that this Model Act language eliminates the *de facto* corporation defense. *Timberline Equipment Company, Inc. v. Davenport*, 267 Or 64, 514 P2d 1109 (1973); *Swindel v. Kelly*, 499 P2d 291 (Alaska 1972); *Robertson v. Levy*, 197 A2d 443 (Del Ct of App 1964); *but see: Vincent Drug Co. v. Utah State Tax Commission*, 17 Utah 2d 202, 407 P2d 683 (1965); *Harry Rich Corp v. Feinberg*, 518 So2d 377, 379 n 2 (Fla App 1987).

Under the current Washington Act, a third party may hold liable a person who acts for a purported corporation only if the actor had "actual knowledge" that no incorporation exists; constructive knowledge is not enough. *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997); *Silvers v. R&F Capital Corp.*, 123 Or App 35, 858 P2d 895 (1993), *review denied*, 318 Or 351, 870 P2d 220 (1994).

Thus RCW 23B.02.030(2), read in conjunction with RCW 23B.02.040, appears to draw a bright line in conjunction with the filing of the articles of incorporation with the Secretary of State: promoters and purported shareholders are liable for any corporate acts taken before such filing (unless the have actual knowledge that the filing has not occurred); shareholders are generally not liable for any corporate acts taken after such filing.

C. Corporation by estoppel.

Separate from the *de facto* corporation defense, some courts have held that a person who believes that he/she is dealing with a corporation, when in truth no corporation exists, may be estopped from holding the "entity's" owners personally liable. *Edward Shoes, Inc. v. Orenstein*, 333 F Supp 39, 42 (ND Ind 1971).

> It is generally accepted as a settled principle that persons who deal and contract "with a corporation in its corporate name and character" are estopped to deny the corporate character of such association, organization, or group of persons so styling themselves and so doing business, if such purported corporate body claim their corporate right under some color of law or appropriate authority for their corporate existence. This principle of law, together with the cognate principles, may be found in our Code Annotated, § 22-714, which declares: "the existence of a corporation, claiming a charter under color of law, can not

> be collaterally attacked by persons who have dealt with it as a corporation. Such persons are estopped from denying its corporate existence." (citations omitted) *City of Jefferson v. Holder*, 195 Ga 346, 352, 24 SE2d 187, 191 (1943).

Another court has pointed out that the term "corporation by estoppel" is a misnomer.

> "Corporation by estoppel" is actually a misnomer for the result of applying the policy whereby private litigants may, by their agreements, admissions, or conduct, place themselves in a position where they will not be permitted to deny the existence of a corporation. Because estoppel as a doctrine is concerned with the acts of the parties, as opposed to the legality of the corporation itself, we think the better rule is that the corporation by estoppel doctrine may be employed even when the corporation has not achieved *de*
>
> *facto* corporation existence. (footnotes omitted) *Willis v. City of Valdez*, 546 P2d 570, 574 (Alaska 1976).

One early Washington case alludes to corporation by estoppel. *Bash v. Culver Gold Mining Co.*, 7 Wash 122, 34 P 462 (1893).

In dicta, one recent case indicates that the corporation by estoppel defense may no longer be available in Washington.

> When the Legislature enacted the WBCA, it considered comments to the legislation which had been prepared by the Corporate Act Revision Committee of the Washington State Bar Association. Those comments are included in the *Senate Journal*, 51st Leg. 2977-3112 (1989), and are indicative of legislative intent. The comment on RCW 23B.02.040 states:
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Despite adoption of Model Act language, some courts have held that the corporation by estoppel defense still exists. *See, for example: Harry Rich Corp v. Feinberg*, 518 So2d 377 (Fla App 1987); *Spurlock v. Santa Fe Pacific Railroad Co.*, 143 Ariz 469, 694 P2d 299 (Ariz App 1984); *Edward Shoes, Inc. v. Orenstein*, 333 F Supp 39, 42 (ND Ind 1971); *Brandtjen & Kluge v. Biggs*, 205 Or 473, 288 P2d 1025 (1955). Other courts have held similarly-worded statutes to have eliminated the

corporation by estoppel defense. *See, for example: Cahoon v. Ward*, 231 Ga 872, 875, 204 SE2d 622, 625 (1974).

The Official Comments to RMBCA § 2.04, upon which the Washington section is based, assumes that the corporation by estoppel defense continues for innocent "shareholders." *See also:* 8 FLETCHER CYC CORP § 3890 (Perm Ed 1992).

Section 3.05 Articles of Incorporation

Articles of incorporation are a corporation's most important document. The articles of incorporation are sometimes referred to as the corporate "charter."

The articles of incorporation constitute a contract between the corporation and the state, between the state and the shareholders, between the corporation and its shareholders, and among the shareholders themselves. *Walden Investment Group v. Pier 67, Inc.*, 29 Wash App 28, 627 P2d 129 (1981); *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948); *Dentel v.Fidelity Savings and Loan Association*, 273 Or 31, 539 P2d 649 (1975). As such, the articles of incorporation "should be interpreted in accordance with accepted rule of contract construction." *Walden Investment Group v. Pier 67, Inc.*, 29 Wash App 28, 31, 627 P2d 129, 131 (1981).

The laws of the state of a corporation's incorporation becomes part of its articles of incorporation. *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948).

Over time, the importance of the articles of incorporation as a contract has diminished, supplanted by statutory provisions, the bylaws, and shareholder agreements.

A. History.

As discussed in Chapter One, in the Nineteenth Century, corporations were specifically chartered by a state's legislature. This practice was subject to abuse and corruption. Eventually, the process of incorporation became an administrative function, a process which was more open to the general population.

> Formerly, legislatures having power to grant charters could place such restrictions upon the corporation at the time of its creation as legislative wisdom should suggest; but whatever right or power was then unconditionally conferred became inherent or vested in the corporation. Concessions to corporations are in the nature of grants. So our legislature, acting under this provision of the constitution, has the power to provide by general law to confer such rights and powers on corporations.

> The object and effect of the constitutional provision is, not to change the nature or character of the corporate body, but to place all men on an equality in obtaining these privileges, and to disconnect the business of granting charters from the business of legislation.
>
> The legislature, in passing such general law, can undoubtedly place upon corporations such restrictions as the public good may require, and may provide by general law for conferring powers similar to those formerly conferred by acts of special grant. The evidence of the powers of a corporation is now to be found in the general law, and in the articles of incorporation filed by the company, as formerly this was contained in the charter. *Oregon Cascade R. R. Co. v. Bailey*, 3 Or 164, 174 (1869).

The state laws under which a corporation is organized becomes part of the corporation's articles of incorporation. Any limitations set out in these statutes become limitations on any corporation formed pursuant to such laws. *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948); *Bryant Realty Corp. v. Lorberbaum*, 221 Ga 820, 147 SE2d 420 (1966); *Bajdek v. Board of Trustees of the American Legion Pulaski Post No. 357 Trust*, 132 Ind App 116, 173 NE2d 61 (1961).

Early courts interpreted the grant of corporate power quite narrowly, generally holding that a corporation had no powers beyond those specifically set forth in its charter or articles. *Moore v. Los Lugos Gold Mines*, 172 Wash 570, 21 P2d 253 (1933).

> Outside of the powers conferred and the privileges granted to those organizations by the statutes under which they exist, they are in all of the states of the Union which, like Oregon, have the common law as the foundation of the jurisprudence, governed by that common law; and it is the established doctrine of this court, and, with some exceptions, of the states in which that common law prevails, as well as of Great Britain, from which it is derived, that such corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislation which granted that charter. *The City of Spokane v. The Amsterdamsch Trustees Kantoor*, 22 Wash 172, 179, 60 P 141, 143 (1900).

Gradually, this narrow construction of corporate powers gave way. Courts held that certain powers were to be construed as being "incidental" to the powers actually set out in a corporation's articles of incorporation. *A.M. Castle & Co. v. Public Service Underwriters*, 198 Wash 576, 89 P2d 506 (1939).

B. Corporate purpose.

Initially, a corporation only had such powers as were granted to it by statute and as were set out in its own articles of incorporation. Early case law narrowly interpreted this grant of corporate power, generally holding that a corporation had no power to act beyond those powers specifically set forth in its articles of incorporation.

> Outside of the powers conferred and the privileges granted to those organizations by the statutes under which they exist, they are in all of the

> states of the Union which, like Oregon, have the common law as the foundation of the jurisprudence, governed by that common law; and it is the established doctrine of this court, and, with some exceptions, of the states in which that common law prevails, as well as of Great Britain, from which it is derived, that such corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislation which granted that charter. *The City of Spokane v. The Amsterdamsch Trustees Kantoor*, 22 Wash 172, 179, 60 P 141, 143 (1900).

See also: Caviness v. La Grande Irr. Co., 60 Or 410, 425, 119 P 731, 737 (1911)("The powers of a corporation are defined and limited by its articles. Especially as against a stranger, it cannot go beyond them.")

Over time, the courts relaxed this rule. More and more corporate acts were found to be "incidental" to the purpose described in a corporation's articles of incorporation. *A.M. Castle & Co. v. Public Service Underwriters*, 198 Wash 576, 89 P2d 506 (1939).

> The power to purchase lands was incident to corporations at common law. And a corporation may do many things incidentally, although the power is not in the particular instance expressly conferred. (citations omitted) *Kelly v. People's Transportation Co.*, 3 Or 189, 194 (1870).

Simultaneously, corporations expanded the list of "purposes" which they included in their articles of incorporation. The practice of stating that a corporation was organized "for any lawful purpose" developed. Eventually, this practice became commonplace and was specifically recognized by statute.

Under current law, the articles of incorporation may, but no longer need, state a purpose. RCW 23B.02.020(3)(b). All Washington corporations now are deemed to have the purpose of engaging in any lawful business, unless a specific corporation's articles of incorporation specifically provide for a more limited purpose. RCW 23B.02.020(3)(b) and RCW 23B.03.010(1).

C. Contents of articles of incorporation: mandatory provisions.

Over time, the number of items which **must** be included in the articles of incorporation has decreased. Today, the articles of incorporation must include only the five items described in RCW 23B.02.020(1):

> (a) A corporate name for the corporation that satisfies the requirements of RCW 23B.04.010;
>
> (b) The number of shares the corporation is authorized to issue in accordance with RCW 23B.06.010 and 23B.06.020;
>
> (c) The street address of the corporation's initial registered office

> and the name of its initial registered agent at that office in accordance with RCW 23B.05.010; and
>
> (d) The name and address of each incorporator in accordance with RCW 23B.02.010.

In addition, if the articles of incorporation authorize more than one class of shares, RCW 23B.06.010(1) requires that the articles of incorporation describe the classes of shares and set out the number of authorized shares for of each such class. In such case, each class must have a distinguishing designation (*e.g.*, common, preferred, Class A common, Class B preferred) and the articles of incorporation must describe the preferences, limitations, and relative rights of each class. RCW 23B.06.010(1)(a). Together, one or more of these classes must have unlimited voting rights and, together, one or more of these classes must be entitled to receive the net assets of the corporation upon dissolution. RCW 23B.06.010(2).

***D. Contents of articles of incorporation: optional provisions*.**

The articles of incorporation may include other provisions not inconsistent with law related to the management of the business and the regulation of the affairs of the corporation. RCW 23B.02.020(5)(c). The following are examples of provisions which are commonly included in the articles of incorporation:

(i) Initial directors. The articles of incorporation may include the names and addresses of the initial directors. RCW 23B.02.020(5)(a). If the articles do not include the names of the initial directors, the incorporator(s) must elect the initial directors, usually at the organizational meeting. RCW 23B.02.050(1)(b). *See:* Sections 3.03 and 5.03 of this book.

(ii) Provisions limiting personal liability and indemnity. RCW 23B.08.320 provides that the articles of incorporation may contain a provision eliminating or limiting the personal liability of the directors to the corporation or to its shareholders, provided such a provision is not otherwise inconsistent with law. Unless its articles of incorporation provide otherwise, a corporation is required to indemnify officers and directors under certain circumstances. RCW 23B.08.520, RCW 23B.08.540, and RCW 23B.08.570.

(iii) A corporate purpose. The articles of incorporation may include a corporate purpose. This corporate purpose may limit the powers of the corporation (*e.g.*, the corporation exists only to own and manage

Blackacre) or, for those nervous about cutting ties with the past, the articles of incorporation may state that the corporation exists for any specific purpose, including "any lawful purpose." If no corporate purpose is set forth, a corporation "has the purpose of engaging in any lawful business." RCW 23B.03.010(1)

(iv) A par value. A corporation may, but no longer must, assign a par value to its shares. RCW 23B.02.020(5)(b). Even if a par value is assigned, older case law, which formerly made a shareholder liable for the difference between the par value of the shares and the consideration paid, is no longer applicable. RCW 23B.06.220. *See also:* Sections 3.09 and 10.11 of this book.

(v) Internal management procedures. The articles of incorporation may include any lawful provision concerning internal management, the powers of the directors, election procedures, etc. RCW 23B.02.020. For instance, cumulative voting for directors may be adopted. RCW 23B.02.020(3)(v) and 23B.07.280(1).

(vi) Preemptive Rights. Preemptive rights may be eliminated. RCW 23B.02.020(3)(l) and 23B.06.300(1). The articles of incorporation can, and should, specifically state whether or not preemptive rights exist in order to minimize later confusion (and legal fees) on this issue. *See:* Section 7.07 of this book.

(vii) Terms of any class or series of stock. If a corporation has more than one class or series of stock, the preferences, limitations and relative rights may be set out in the articles of incorporation. If classes or series exist and such preferences, limitations and relative rights are not set out in the articles of incorporation, then the directors may determine the preferences, limitations and relative rights without shareholder action. RCW 23B.06.010. Preferences, limitations and relative rights appearing in the articles of incorporation may only be amended with the shareholder approval of each class affected thereby. RCW 23B.10.200.

(viii) Bylaw amendments. The articles of incorporation may require shareholder approval of any amendment of the bylaws. RCW 23B.10.200(a). Unless such a limitation appears either in the articles of incorporation or in the bylaws, either the directors or the shareholders will be entitled to amend the bylaws. RCW 23B.10.200. *See also:* Section 3.08 of this book.

(ix) Action by non-unanimous shareholder consent. If a corporation desires to permit less than all shareholders to approve actions

by written consent, rather than by meeting or by unanimous consent, a provision in accordance with RCW 23B.07.040 should be included in the articles of incorporation. RCW 23B.02.020(5)(f).

(x) Staggered terms for directors. If a corporation desires to elect directors to staggered terms in accordance with RCW 23B.08.060, a provision to such effect should be included in the articles of incorporation. RCW 23B.02.020(5)(h).

RCW 23B.02.020(3) sets forth forty-one provisions which apply to a corporation unless the articles of incorporation provide otherwise. These include provisions related to cumulative voting, preemptive rights, quorum requirements, and indemnification of officers and directors.

RCW 23B.02.020(4) sets forth twelve provisions which apply to the corporation unless the articles **or** the bylaws provide otherwise. These include provisions related to the directors and to director meetings.

RCW 23B.02.020(6) sets forth five provisions which may be included either in the articles of incorporation or in the bylaws: specified restrictions on the transfer of shares; the right of a shareholder to participate at meetings by telephone; and a reduction in the quorum requirement for directors (but to no less than one-third of the directors).

***E. Filing requirements*.**

The corporation's existence begins when the articles of incorporation are filed with the Secretary of State's office, unless a delayed effective date is specified in the articles. RCW 23B.02.030(1); *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997); *Rodway v. Arrow Light Truck Parts, Inc.*, 96 Or App 232, 235, n 2, 772 P2d 1349, 1351 (1989).

An original and one exact or conformed copy of the articles of incorporation must be delivered to the Secretary of State's office together with the appropriate fee. RCW 23B.01.200(9). In January 2000, that fee was $175. RCW 23B.01.220(2)(a). The expedited fee was $20 more.

***F. Secretary of State information*.**

The address of the Washington Secretary of State, Corporation Division is 505 E. Union Avenue, Second Floor, Olympia, WA 98504. Its mailing address is PO Box 40234, Olympia, WA 98504-0234. Its telephone numbers are (360) 753-7115 and (360) 753-7120. Business hours are from 8:00 am to 5:00 pm, pacific time, Monday through Friday. WAC 434-110-030.

Documents, including the articles of incorporation, may be filed with

the Secretary of State by facsimile. WAC 434-110-060(3). For facsimile filings, a credit card authorization form must be submitted authorizing payment by credit card.

Emergency services needed outside regular business hours are available for an extra fee of $150 per hour, which the customer must agree to pay in advance. WAC 434-110-060(5)(b).

The Secretary of State, Corporation Division web site address is http://www.secstate.wa.gov/corps. This site includes information about filing, current filing fees and some sample forms.

Section 3.06 Constitutional Limits on Statutory Changes

Early case law held the articles of incorporation to be a contract between the state and the corporation. Since a party to a contract cannot unilaterally change the contract, these cases held that a state could not unilaterally change the rules for an existing corporation.

Washington and other states have responded to these cases by including authority in their constitutions and/or statutes which permits the state to unilaterally change the rules for corporations created under its statutes. In Washington today, this authority can be found in Article XII, Section 1 of the Washington Constitution and in RCW 23B.01.020.

This issue has its roots to *Dartmouth College v. Woodward*, 17 US 518 (4 Wheat 518)(1819) in which the United States Supreme Court held that the charter of Dartmouth College, granted in 1769, was a contract between the corporation and the state which could not be unilaterally changed by the state of New Hampshire. The United States Constitution prohibited laws which impaired contracts.

Following this case, many state courts held that the corporate statutes in effect at the time a corporation was created constitute a contract between the state and the corporation which could not be unilaterally changed by the state.

> Under this statute the defendant was organized as a corporation, and has since then conducted its affairs using the corporate name there specified. The substance of the situation is that through this statute the state offered certain corporate privileges and immunities to those who accepted its terms, which offer was accepted in this instance by the filing of articles of incorporation and organization of the defendant.
>
> From *Dartmouth College v. Woodward*, 4 Wheat 518, 4 L Ed 629, down to the present time the principle has been maintained that such an offer and acceptance constitute a contract between the state and the corporation, the obligation of which cannot be impaired by any subsequent legislation. It is a compact which is within the protection of section 10, art. 1 of the national Constitution forbidding any state to pass any law impairing the obligation of contracts, and section 21, art. 1, of

> our state Constitution, containing the same prohibition. *Lorntsen v. Union Fishermen's Co-op Packing Co.*, 71 Or 540, 544, 143 P 621, 622 (1914).

Justice Story's concurring opinion in *Dartmouth College* indicated that a state could unilaterally change the rules for its corporations, however, if the state reserved such authority in its statutes. *State ex rel Starkey v. Alaska Airlines, Inc.*, 68 Wash 2d 318, 413 P2d 352 (1966). Such a statute placed a corporation created under it on notice of the state's authority to later change the rules. Thus, a retroactive change would not constitute a breach of contract.

> In his concurring opinion in [the Dartmouth College case], Mr. Justice Story took occasion to say:
>
> > "If the legislature mean [sic] to claim such an authority, it must be reserved in the grant."
>
> Following the decision of the *Dartmouth College* case, and acting upon the suggestion of Justice Story, many, if not most, of the states of the Union in course of time incorporated in their constitutions, or else enacted by statute, provisions reserving to the state, through its legislature, the right to alter, amend, or repeal laws which granted corporate charters or authorized the creation of corporations under general laws. That practice was followed in this state in 1889 by the framing and ratification of our constitution, which included Art. XII, § 1, *supra*. *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 373-4, 191 P2d 689, 692-3 (1948).

As a consequence, many states have enacted statutory or constitutional provisions which give the state the right to subsequently alter, amend, or repeal corporate laws.

In 1889, Washington adopted Article XII, Section 1 to its Constitution which provides:

> All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law.

The various versions of the Washington Business Corporation Act which have been adopted have included similar language reserving the power to amend or repeal such acts. For instance, the current Act provides:

> The legislature has the power to amend or repeal all or part of this title at any time and all domestic and foreign corporations subject to this title are governed by the amendment or repeal. RCW 23B.01.020.

The effect of these provisions is to give the state the right to unilaterally change its contract with corporations created under such statutes.

When Washington adopted new business corporation acts, which became effective in 1933, 1967, and 1990, each contained a savings

clause which provided that the new act did not affect rights under the prior act. *See, for example:* RCW 23A.44.145 and 23B.900.010.

An early decision held that under such savings clauses, certain rights did not automatically change with the passage of the new statute, but rather, changed only when the shareholders subsequently amended the articles of incorporation. *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948)(holding that a corporation's method of voting for directors was not changed by passage of a statute requiring cumulative voting until the corporation's articles of incorporation were amended).

A later decision held that once a corporation amends its articles of incorporation in a manner deemed to have conferred on it significant benefits made available by the new statute, the amended articles of incorporation are deemed to have adopted all of the provisions of the new statute. *Golconda Mining Corp. v. Hecla Mining Co.*, 80 Wash 2d 372, 494 P2d 1365 (1972).

Perham has been overruled. In *Seattle Trust & Savings Bank v. McCarthy*, 94 Wash 2d 605, 617 P2d 1023 (1980), the Washington Supreme Court held that the statutory reservation of amendment power was deemed to be part of the shareholder's contract. Thus, the shareholders are deemed to have consented in advance to statutory changes to the articles of incorporation.

Section 3.07 Amendment of Articles of Incorporation

A. Old rule - unanimous consent.

The articles of incorporation have been described as a contract between the state and the corporation, between the state and the shareholders, between the corporation and its shareholders, and among the shareholders. *Walden Investment Group v. Pier 67, Inc.*, 29 Wash App 28, 627 P2d 129 (1981); *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948); *Scott v. Anderson Newspapers, Inc.*, 477 NE2d 553 (Ind App 1985); *Dentel v.Fidelity Savings and Loan Association*, 273 Or 31, 539 P2d 649 (1975); *Stroh v. Blackhawk Holding Corp.*, 48 Ill 2d 471, 272 NE2d 1 (1971). Since the articles of incorporation were considered a contract, early cases held that the articles of incorporation could only be changed with the unanimous consent of the shareholders. As a contract, the articles of incorporation were considered to create a vested property right which could not be unilaterally taken away from an individual shareholder, even by majority vote of the

shareholders. *See, for example: McConnell v. Owyhee Ditch Co.*, 132 Or 128, 283 P 755 (1930). A unanimous vote was required to amend. *Martin Orchard Co. v. Fruit Growers' Canning Co.*, 203 Wis 97, 233 NW 603 (1930).

B. New rule - majority vote & fairness.

The articles of incorporation have been described as a contract between the state and the corporation, between the state and the shareholders, between the corporation and its shareholders, and among the shareholders. *Walden Investment Group v. Pier 67, Inc.*, 29 Wash App 28, 627 P2d 129 (1981); *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948).

RCW 23B.10.010(2) now provides that a shareholder "does not have a vested property right resulting from any provision of the articles of incorporation." Unless the articles of incorporation provide otherwise, two-thirds of the shareholders may now amend the articles over the objections of the other one-third. RCW 23B.10.030. Washington no longer requires all parties to agree in order to a change this contract among the shareholders. *See: Seattle Trust & Savings Bank v. McCarthy*, 94 Wash 2d 605, 617 P2d 1023 (1980).

The Comment to Revised Model Act § 10.01, the section from which RCW 23B.10.010(2) is taken, states that:

> Section 10.01(b) restates explicitly the policy embodied in earlier versions of the Model Act and in all modern state corporation statutes, that a shareholder "does not have a vested property right" in any provision of the articles of incorporation. Corporations and their shareholders are also subject to amendments of the governing statute by the state under section 1.02.
>
> Section 10.01(b) should be construed liberally and without qualification or restriction to achieve the fundamental purpose of this chapter of permitting corporate adjustment and change by majority vote. Section 10.01(b) rejects decisions by a few courts that have applied a "vested rights" or "property right" doctrine to restrict or invalidate amendments to articles of incorporation because they modified particular rights conferred on shareholders by the original articles of incorporation. These holdings are rejected because their effect often is to create a tyranny of the minority: the individual consent of each shareholder becomes necessary to adopt any important change, and each shareholder, no matter how small his holding, can prevent the change.

Some courts, in interpreting similar wording in earlier versions of the Model Act, still imposed a standard of fairness on amendments approved by the majority which adversely affected the rights of the minority. Some courts have required a degree of fairness when the majority amends the articles of incorporation over the objection of the minority:

> Whether a corporation can amend its articles or its bylaws and thereby change the rights of its members has been the subject of numerous judicial opinions and writings. For many years state statutes have provided that a corporation is authorized to amend its articles. Also for many years, statutes, articles, or bylaws have provided that the corporation could amend its bylaws. Despite this universal authorization, the courts have held that certain rights granted members or stockholders by the articles or the bylaws cannot be eliminated through the amendment of articles or bylaws.
>
> Some years ago when a court held that a right granted by the articles or bylaws could not be taken away by an amendment, the court stated that the right could not be taken because it was a "vested right," a "property right," or a "contract right." This court used that terminology.
>
> The "vested rights" terminology has been attacked as being confusing and meaningless. A corporation scholar has stated: "Vestedness" is the legal conclusion rather than the reason." Latty, *Fairness - The Focal Point in Preferred Stock Arrearage Elimination*, 29 VA L Rev 1,4 (1942). Section 58 of the Model Business Corporation Act has, in essence, swept away the "vested rights" doctrine. That section was adopted [in Oregon].
>
> * * *
>
> The Model Act swept away the vested rights doctrine by providing in detail what amendments a corporation can make to its articles.
>
> * * *
>
> However, even with the decline of the "vested rights" approach, the courts have not held that a member of a corporation can be deprived, by amendment, of all rights created in the articles or bylaws. No definitive terminology has been developed. The courts and the writers have turned to the more indefinite tests of "fairness," "good faith," "reasonableness," and lack of "constructive fraud." (footnotes & citations omitted) *Dentel v. Fidelity Savings and Loan Association*, 273 Or 31, 33-36, 539 P2d 649, 651 (1975).

In a Washington case which involved the issue of whether an amendment to the articles of incorporation could be approved by less than unanimous consent of the shareholders, the Washington Supreme Court reiterated the principal that majority shareholder must at all times exercise good faith toward the minority. *Hay v. Big Bend Land Co.*, 32 Wash 2d 887, 204 P2d 488 (1949).

While the theory of vested rights is no longer viable, other theories have been use to limit the right of controlling shareholder to amend the articles of incorporation over the objection of the minority.

For instance, an Indiana decision held that even if the articles of incorporation do not divide the corporation's shares into voting groups, the court could find that the shareholders intended to be treated as distinct groups. In such a case, the separate approval of the affected group may be required. *Scott v. Anderson Newspapers, Inc.*, 477 NE2d 553 (Ind App

1985).

A more detailed discussion of the majority's fiduciary duty to minority shareholders appears in Section 7.10 of this book.

***C. Current law - majority rule & fairness*.**

Amendments to the articles of incorporation are now governed by RCW 23B.10.010 through RCW 23B.10.090.

Under current law, the articles of incorporation may be amended by two-third (sometimes less) of the shareholders. RCW 23B.10.010(2) provides that a shareholder "does not have a vested property right resulting from any provision of the articles of incorporation. . . ." A two-third majority (sometimes less) of the shareholders may amend the corporation's articles of incorporation over the objections of a minority of shareholders, unless the articles provide otherwise. RCW 23B.10.030. All shareholders need not agree in order to change this "contract" among the shareholders.

The Comment to Revised Model Act § 10.01, the section from which RCW 23B.10.010 is taken, states that:

> Section 10.01(b) restates explicitly the policy embodied in earlier versions of the Model Act and in all modern state corporation statutes, that a shareholder "does not have a vested property right" in any provision of the articles of incorporation. Corporations and their shareholders are also subject to amendments of the governing statute by the state under section 1.02.
>
> Section 10.01(b) should be construed liberally and without qualification or restriction to achieve the fundamental purpose of this chapter of permitting corporate adjustment and change by majority vote. Section 10.01(b) rejects decisions by a few courts that have applied a "vested rights" or "property right" doctrine to restrict or invalidate amendments to articles of incorporation because they modified particular rights conferred on shareholders by the original articles of incorporation. These holdings are rejected because their effect often is to create a tyranny of the minority: the individual consent of each shareholder becomes necessary to adopt any important change, and each shareholder, no matter how small his holding, can prevent the change.

Even though a majority can vote to amend, older case law which required "fairness" still applies.

***D. Mechanics*.**

The steps necessary to amend the articles of incorporation are set forth in RCW 23B.10.010 through 23B.10.090.

In general, a board of directors must first recommend the shareholder approval of any amendment to the articles of incorporation and then refer the proposed amendment to the shareholders for their approval. RCW 23B.10.030. Each voting group must then vote to approve the amendment. RCW 23B.10.030(5).

For a public corporation, the vote may be by a simple majority, unless the articles of incorporation provide for a greater vote. For other corporations, the amendment must be approved by a two-third vote, unless the articles of incorporation provide for a greater or lesser vote (but not less than a majority). RCW 23B.10.030(5).

RCW 23B.10.020 provides that certain housekeeping amendments may be made by the directors alone, unless the articles of incorporation provide otherwise. These amendments include certain technical changes to the corporate name, changes to par value, deletion of the names and addresses of the initial directors, deletion of the name of the initial registered agent or registered office, and certain other narrowly define matters.

Until the date upon which a corporation first issues shares, the board of directors (or if there are not yet any directors, then the incorporator) may amend the articles of incorporation without shareholder approval. RCW 23B.10.050.

Articles of amendment must be filed with the Secretary of State's office. RCW 23B.10.060. The filing must include an original copy, an exact or confirmed copy, and the appropriate filing fee. RCW 23B.01.200(9) and RCW 23B.01.220(3)(c). In January 2000, the filing fee was $30. WAC 434-110-070(1)(a).

The current fees can be obtained from the Secretary of State, Corporation Division's web site, whose address is http://www.secstate.wa.gov/corps, or by telephoning (360) 753-7115.

Section 3.08 Bylaws

The bylaws are permanent rules adopted by a corporation to govern its management and internal affairs. The bylaws are adopted:

> to regulate, govern and control its own actions, affairs and concerns of its stockholders or members and directors and officers with relation thereto and among themselves in their relation to it. *Kendler v. Rutledge*, 78 Ill App 3d 312, 396 NE2d 1309, 1312 (1979).

Another court has described a corporation's bylaws as follows:

> A by-law of a private corporation is a permanent rule of action adopted by the shareholders, in accordance with which the corporate affairs are to be conducted. *Griffith v. Klamath Water Assn.*, 68 Or 402, 405, 137 P 226, 227 (1913).

The bylaws are a contract between the corporation and its shareholders, and among the shareholders themselves. *Garvey v. Seattle Tennis Club*, 60 Wash App 930, 808 P2d 1155 (1991); *Dentel v. Fidelity Savings and Loan Association*, 273 Or 31, 539 P2d 649 (1975).

Section 3.08

As discussed below, the Washington Business Corporation Act offers little guidance regarding the contents of a corporation's bylaws. Other than the few matters required by the Act, corporations have great discretion as to their internal rules. The bylaws may not, however, violate the corporation's articles of incorporation, existing law, or public policy. *Howe v. Washington Land Yacht Harbor, Inc.*, 77 Wash 2d 73, 459 P2d 798 (1969).

> A bylaw of a corporation may not conflict with the articles of incorporation and, if a conflict exists, the bylaw is void. *Sabre Farms, Inc. v. Jordan*, 78 Or App 323, 331, 717 P2d 156, 161 (1986).

Another court has stated the rule as follows:

> It is a general rule that a corporation may enact any bylaw for its internal management so long as such bylaws are not contrary to its charter, a controlling statute, its articles of incorporation, or violative of any general law or public policy. *Booker v. First Federal Savings and Loan Association*, 215 Ga 277, 280, 110 SE2d 360, 361, *cert denied*, 361 US 916 (1959).

The bylaws are a corporation's internal rules which are intended to be relatively permanent in nature.

> By-laws being continuing or permanent rules in accordance with which the corporate affairs on all occasions to which their provisions relate are to be conducted, they must not be in conflict with the charter; and when, by their terms, they do so conflict, the charter prevails. They must be reasonable, and "must not interfere with the vested and substantial rights of the stockholders; and they must not be contrary to public policy or the established law of the land." They cannot modify the articles of incorporation in any of the particulars required by statute to be stated in the articles of incorporation. A by-law which limits or regulates the corporate powers which the charter confers on the directors may be disregarded by them. No by-law is valid which either enlarges or restricts the rights and powers conferred by the charter or governing statue. When the charter gives the stockholders the power to elect the directors, the corporation cannot, by a by-law, take away this power. A by-law restricting the right of members of a church to vote as authorized by statute was void. A by-law, if divisible, may be good in part, though invalid in another part. So, a provision inserted in the articles of association, which is in conflict with the requirements of the enabling statute, cannot be applied either as a part of the charter or as a by-law. (citations omitted) *State v. Anderson*, 31 Ind App 34, 67 NE 207, 211 (1902).

Bylaws must be general, that is, they must be directed at affecting all shareholders of each class in a similar manner. The bylaws are not the proper place to single out a particular shareholder for special treatment. *Griffith v. Klamath Water Assn.*, 68 Or 402, 137 P 226 (1913).

> That resolution is in no sense a by-law. It is directed especially against the interests of a single stockholder.
>
> * * *
>
> I think that any by-law enacted under this section of the Code to be reasonable ought to be general; that is, it ought to affect every delinquent

> subscriber and all delinquent stock alike, and it ought not to be directed against the stock or interests of a particular stockholder. These are essential requisites to a valid by-law. *Budd v. Multnomah Street Railway Co.*, 15 Or 413, 418, 15 P 659, 662 (1887).

Bylaws exist to regulate internal corporate action. Shareholders, officers and directors are generally presumed to have knowledge of the provisions of the bylaws. *State ex rel Carriger v. Campbell Food Markets, Inc.*, 60 Wash 2d 478, 374 P2d 435 (1962); *Schroeder v. Meridian Improvement Club*, 36 Wash 925, 221 P2d 544 (1950); *Gwin v. Thunderbird Motor Hotels, Inc.*, 216 Ga 652, 658, 119 SE2d 14, 18 (1961).

Outside parties are not presumed to know the terms of the bylaws and the bylaws are generally not the proper place to regulate the dealings of the corporation with outside parties. *Fresh & Fancy Produce, Inc. v. Brantley*, 190 Ga App 128, 378 SE2d 379 (1989). In fact, even though the bylaws may require a particular officer to sign contracts, a contract signed by a different officer is still valid, as long as the outside party did not know of the bylaw provision before the contract was signed. *Kelley, Glover & Vale v. Heitman*, 220 Ind 625, 44 NE2d 982, 985 (1942); *Doehler v. Lansdon*, 135 Or 87, 298 P 200 (1931). However, if an outside party enters into a contract with the corporation with knowledge of terms of the corporation's bylaws, the outside party may be bound by those terms. *Burgin v. Pendleton Country Club*, 208 Or 241, 300 P2d 444 (1956).

When a meeting of a nonprofit corporation is held in a manner which conflicts with its bylaws, the results of the proceedings are void. *East Lake Water Association v. Rogers*, 52 Wash App 425, 761 P2d 627 (1988); *State Bank v. Wilbur Mission Church*, 44 Wash 2d 80, 265 P2d 821 (1954).

***A. Content of bylaws - mandatory provisions*.**

The Washington Business Corporation Act offers little guidance as to the items which must be included in the bylaws. The Act only requires the bylaws to address the following:

(i) The time, or method for fixing the time, of the annual shareholders meeting. RCW 23B.07.010(1).

(ii) The number of directors, or a procedure for fixing the number of directors, unless the articles of incorporation sets out the number of directors. RCW 23B.02.060(2) and RCW 23B.08.030.

(iii) A description of corporate officers and the manner of their appointment by the directors. RCW 23B.08.400(1). In addition, the

bylaws may permit an officer to appoint another officer and may delegate to one officer the responsibility for preparing minutes and authenticating corporate records. RCW 23B.08.400(2) and (3).

B. Content of bylaws - recommended provisions.

Although not required by statute, the bylaws can and should contain the following:

(i) The place, or method for fixing the place, of annual and special shareholders meetings. If no place is stated or fixed in the bylaws, then such meetings are to be held at the corporation's principal office. RCW 23B.07.010(2) and RCW 23B.07.020(5).

(ii) The manner of fixing the record date for shareholder voting purposes. RCW 23B.07.070.

(iii) Provisions related to managing corporate business and regulating corporate affairs. RCW 23B.02.060(4). These provisions may include certain restrictions on the transfer of shares, provisions concerning the right of a shareholder to participate at meetings by telephone and provisions reducing the quorum for directors meetings to no less than one-third of the directors. RCW 23B.02.060(4).

In addition, RCW 23B.02.060(3) describes twelve provisions which apply to the corporation unless the bylaws or articles of incorporation provide otherwise.

Since the directors have greater access to the bylaws than to the statutes, it is common practice to set out statutory requirements in the bylaws. In addition, there are a substantial number of statutory procedures and rights which may be limited or expanded by means of the bylaws.

C. Emergency bylaws.

The directors may adopt bylaws which are effective only in case of an emergency, unless the articles of incorporation provide otherwise. RCW 23B.02.070.

D. Amendment.

Under the Washington Act, a board of directors may amend the bylaws without shareholder approval, unless the articles of incorporation provide otherwise or unless the shareholders, in amending or repealing a particular bylaw provision, expressly provide that the directors may not amend or repeal that bylaw provision. RCW 23B.10.200(1).

Shareholders may also amend the bylaws, even though the directors likewise possess that power. RCW 23B.10.200(2).

Special rules exist for amending bylaw provisions dealing with quorums. RCW 23B.10.210.

The bylaws may be amended by custom, usage, acquiescence, or waiver. *St. Yves v. Mid State Bank,* 50 Wash App 95, 748 P2d 633 (1987); *Bay City Lumber v. Anderson*, 8 Wash 2d 191, 111 P2d 771 (1941); *Johnson v. Busby*, 278 F Supp 235 (ND Ga 1967); *The Mutual Fire Insurance Company of Montgomery County v. Farquhar*, 86 Md 668, 39 A 527 (1898). There is authority to the contrary. *Powers v. Marine Engineers' Beneficial Ass'n., No. 35*, 52 Cal App 551, 199 P 353 (1921); *District Grand Lodge No. 4 v. Cohn*, 20 Ill App 335 (1886).

At common law, shareholders had the sole power to adopt and amend the bylaws as this right was deemed an incident of the ownership of the corporation's shares. *Rogers v. Hill*, 289 US 582 (1933). However, courts soon recognized the right of directors to adopt and amend the bylaws. *State v. Day*, 189 Ind 243, 123 NE 402 (1919); *Gray v. National Benefit Association*, 111 Ind 531, 11 NE 477 (1887).

At one time, Washington law required unanimous shareholder approval to amend the bylaws, *Bay City Lumber v. Anderson*, 8 Wash 2d 191, 111 P2d 771 (1941). This is no longer true. Today, bylaws may generally be amended by majority vote of the directors or of the shareholders. RCW 23B.10.200. Washington no longer recognizes the doctrine of vested rights as applied to the bylaws or the articles of incorporation. *See:* Section 3.07 of this book.

Section 3.09 Par Value

Under Washington law, par value is no longer important, other than as a historical footnote.

At one time, corporations were required to obtain a minimum amount of consideration for each of its shares of stock issued to its shareholders. This minimum amount was called the "par value" of the share. A corporation generally could not sell one of its shares for less than its par value (although it was not uncommon for a portion of the payment to be deferred).

In addition to any statutory requirement, since 1889, Article 12, Section 6 of the Washington Constitution has provided:

> Corporations shall not issue stock, except to *bona fide* subscribers therefor, or their assignees; nor shall any corporation issue any bond, or other obligation, for he payment of money, except for money or property received or labor done. . . . All fictitious increase of stock or indebtedness shall be void.

A more detailed discussion of Article 12, Section 6 appears in

Section 2.07 of this book.

The par value of all issued shares constituted the "stated capital" of a corporation. Thus, if a corporation had one million shares of $2 par value stock outstanding, its stated capital was $2 million.

The par value and the market value of a share were not same. The par value of a share was an "arbitrary amount" set by the corporation. *Gulf Oil Corp. v. State Tax Commission*, 65 AD2d 157, 411 NYS 2d 698, 699 (1978). "Par value and actual value of issued stock are not synonymous and there is often a wide disparity between them." *New York v. Latrobe*, 279 US 421, 426 (1929). *See also: Arkota Industries, Inc. v. Naekel*, 623 SW2d 194 (Ark 1981).

At one time, a shareholder was liable to the corporation, and ultimately to corporate creditors, for the difference between the par value of shares purchased by the shareholder and any lesser amount actually paid for those shares. *Eubanks v. Allstate Insurance Co.*, 441 F2d 7 (5th Cir 1971); *McAllister v. American Hospital Ass'n*, 62 Or 530, 125 P 286 (1912).

In one Washington case, $1 par value stock was issued for $0.07 and the transaction was declared unconstitutional and void under Article XII, Section 6 of the Washington Constitution. *Fox v. Seattle Contract Copper Co.*, 98 Wash 557, 168 P 185 (1917).

Over time, both corporations and the public placed less emphasis on the par value of shares and on a corporation's stated capital. In 1912, New York became the first state to permit "no par value" stock to be issued. *No-Par Stock and Its Effect on Washington Law*, 2 WASH L REV 33 (1926).

Although a corporation may still assign a par value to its shares, Washington no longer requires it. RCW 23B.02.020(5)(b). Shareholders are now liable only for the consideration for which their shares were authorized to be issued, not the difference between the par value of the share and any lesser amount of consideration paid. RCW 23B.06.220. *See also:* Article XII, Section 4 of the Washington Constitution.

Not only is cash an acceptable form of consideration for shares, pre-incorporation services and contracts for future services are also acceptable as consideration for shares. RCW 23B.06.210(2).

RCW 23B.06.210(3) provides that the board's determination as to the adequacy of the consideration received for shares is conclusive, provided the determination is made in good faith. The business judgment

rule applies to that determination. *In the Matter of Delk Road Associates, Ltd.*, 37 BR 354 (ND Ga 1984); *Garbe v. Excel Mold, Inc.*, 397 NE2d 296 (Ind App 1979); *Smith v. Schmitt*, 112 Or 687, 699, 231 P 176 (1924).

A more detailed discussion of shareholder liability for unpaid subscriptions appears in Section 10.11 of this book.

A more detailed discussion of par value appears in Art, *Corporate Shares and Distributions in a System Beyond Par Value: Financial Provisions of Oregon's New Corporation Act*, 24 WILL L REV 203 (1988).

Section 3.10 Stock Certificates

Most corporations issue stock certificates. A stock certificate represent a shareholder's ownership interest or property right in the corporation. *Seiden v. Southland Chenilles', Inc.*, 195 F2d 899 (5th Cir 1952). "Stock certificates are not the property at issue but are only symbols representing the underlying shares of stock. *Lucas v. Lucas*, 946 F2d 1318, 1323 (8th Cir 1991).

> A stock certificate is a written acknowledgement by the corporation of the interest of the shareholder in the corporate property, and occupies a position similar to other muniments of title. *Markle v. Burgess*, 176 Ind 25, 95 NE 308, 309 (1911).

A stock certificate is authentic evidence of title to the stock and of its holder's underlying property interest in the corporation. *Johnson v. Busby*, 278 F Supp 235 (ND Ga 1967). But a shareholder's status does not depend on the issuance of a stock certificate "since the certificate is merely evidence of ownership." *Cabintaxi Corp. v. C.I.R.*, 63 F3d 614, 618 (7th Cir 1995).

A. Shareholder rights if certificates not delivered.

At common law, a person whose subscription was accepted acquired all of the rights of a shareholder, even though the corporation never actually issued a stock certificate. *Child v. Idaho Hewer Mines*, 155 Wash 280, 284 P 80 (1930); *Babbitt v. Pacco Investors Corp.*, 246 Or 261, 425 P2d 489 (1967). "One who has subscribed and paid for corporate stock is entitled to all the rights and responsibilities of ownership, whether the stock certificates have been issued to him or not." *Haas v. Koskey*, 138 Ga App 448, 226 SE2d 279, 283 (1976). Once a subscription is accepted, the subscriber possesses all the rights of a shareholder, even if the subscriber has not yet paid for the shares. *Pfeifer v. DME Liquidating, Inc.*, 91 Or App 47, 753 P2d 1389 (1988), *appeal after remand*, 101 Or App 106, 753 P2d 266 (1990).

> There can be no question that an actual subscription is not always necessary in order to establish a stockholder's status as that of a

subscriber.

> "Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation. When one accepts or assumes the position and duties, and claims the rights and privileges and emoluments, of a stockholder, and the corporation accepts or acquiesces therein, such person is estopped to deny that he is a subscriber, even though there may have been something irregular or defective in the form or manner of his subscription, or there may have been no formal subscription at all." *Davies v. Ball*, 64 Wash 292, 299, 116 P 833, 835 (1922)(quoting Cook on Stock & Stockholders).

If a subscriber pays for the stock but, despite demand, the corporation refuses to deliver a certificate, the subscriber may elect one of three remedies:

> (1) He may, is some jurisdictions, maintain a suit in equity for specific performance, and compel delivery of the stock; (2) he may treat the executory agreement as subsisting and recover the damages occasioned by the breach; or (3) he may rescind the contract and maintain an action in *assumpsit* for the recovery of the sum paid as money had and received. *Watkins v. Record Photographing Abstract Co.*, 76 Or 421, 426, 149 P 478, 480 (1915).

A subscriber's obligation to pay for the accepted subscription attaches even if the subscriber's name is not entered on the transfer ledger or even if a certificate is not issued. *Shiffer, Trustee v. Okenbrook*, 75 Ind App 149, 130 NE 241, 244 (1921).

B. Uncertificated shares.

Under the Washington Act, a board of directors may cause the corporation to issue some or all of the corporation's shares without certificates, unless the articles or bylaws provide otherwise. RCW 23B.06.260. A corporation may issue certificates for some classes of shares, but not for others. RCW 23B.06.260(1).

If a corporation chooses not to issue certificates, it is required to send shareholders a written statement containing information which would otherwise appear on the certificate. RCW 23B.06.260(2).

C. Form and content of certificate.

If a corporation issues certificates (as most corporation do), RCW 23B.06.250(2) requires that the certificate state on its face:

> (a) The name of the issuing corporation and that it is organized under the law of this state;
>
> (b) The name of the person to whom the share is issued; and
>
> (c) The number and class of shares and the designation of the series, if any, the certificate represents.

In addition, "[e]ach share certificate must be signed, either manually or in facsimile, by two officers designated in the bylaws or by the board of directors." RCW 23B.06.250(4). A certificate may, but are not

required to "bear the corporate seal or its facsimile." *Id*.

If a corporation issues a fractional share, it may issue script entitling the holder to receive a full share if the holder surrenders enough scrip to equal a full share. RCW 23B.06.040(c). Any such scrip must be conspicuously labeled "script" and must contain the information required by RCW 23B.06.250(2). RCW 23B.06.040(2).

If the shareholders enter into an agreement permitted by RCW 23B.07.320 which is otherwise inconsistent with the Washington Business Corporation Act, share certificates must conspicuously note the existence of such an agreement on the front or back of the certificate. RCW 23B.07.320(3).

***D. Classes or series*.**

If a corporation is authorized to issue shares of more than one class or series, any certificate representing such shares must summarize, on its front or back, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences, and limitations determined for each series. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder with this information upon request and without charge. RCW 23B.06.250(3).

***E. Miscellaneous*.**

In Washington, the fact that a stock certificate is issued in the name of only one spouse is not enough to rebut the presumption that the certificate is community property. *In re Marriage of Glass*, 67 Wash App 378, 835 P2d 1054 (1992).

Stock certificates are the subject of Article Eight of the Uniform Commercial Code. RCW 62A.8-101 *et seq*. Analysis of Article Eight is beyond the scope of this book.

Subscriptions for stock and stock certificates are also discussed in Section 7.02 of this book.

Section 3.11 Principal Office

RCW 23B.01.400(19) defines "principal office" to mean:

> the office, in or out of this state, so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

The "residence" of a corporation for purposes of certain types of service is its "principal place of business." *CHG Intern, Inc. v. Platt Electric Supply, Inc.*, 23 Wash App 425, 597 P2d 412 (1979). The terms "principal office" and "principal place of business" are likely synonymous.

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State ex rel Willamette National Lumber Co. v. Circuit Court for Multnomah County, 187 Or 591, 211 P2d 994 (1949).

RCW 23B.16.010(5) requires a corporation to keep a number of specified records at its principal office. These records include: copies of its articles of incorporation, bylaws, minutes of shareholder meetings, certain financial statements, and "[a]ll written communications to shareholders generally within the past three years."

If no other place is stated in, or fixed in accordance with, the bylaws, the annual shareholder meeting is required to be held at the principal office. RCW 23B.07.010(2). The same is true of a special shareholder meeting. RCW 23B.07.020(5). Beginning ten days before any shareholder meeting, and through the end of such meeting, a shareholders' list must be available for inspection by shareholders at the principal office or at the place of the meeting. RCW 23B.07.200(2).

Section 3.12 Corporate Seal

Today, corporate seals are permitted, but are not required.

Since earliest times, corporations have used seals to indicate that the corporation intended to be bound by the signatures of its officers and agents on a contract. *Oldfield v. Angeles Brewing & Malting Co.*, 77 Wash 158, 137 P 469 (1913); *Ellison v. Branstrator*, 153 Ind 146, 54 NE 433 (1899); *Altschul v. Casey*, 45 Or 182, 76 P 1083 (1904); *Guthrie v. Imbrie*, 12 Or 182, 6 P 664 (1885); *Eagle Woolen Mills Co. v. Monteith*, 2 Or 277 (1868). Originally, corporations had a right to acquire and use a seal under common law. *Bank of United States v. Dandridge*, 25 US 64, 67 (1827). By statute, every state now gives a corporation the power to own and use a seal. 6 FLETCHER CYC CORP § 2462 (Perm Ed 1996).

RCW 23B.03.020(2)(b), which is taken from § 3.02(2) of the Revised Model Corporation Act, permits a corporation to use a corporate seal.

A corporation may alter the form of its seal at will.

At one time, many states required a corporation to use a corporate seal in connection with the execution of certain documents. *Oldfield v. Angeles Brewing & Malting Co.*, 77 Wash 158, 137 P 469 (1913); *Ellison v. Branstrator*, 153 Ind 146, 54 NE 433 (1899); *Lowe v. Morris*, 13 Ga 147 (which includes a discussion of the history of seals). Eventually, the courts held that Washington corporations were not required to use a corporate seal. *Bradley Distributing Co. v. Seattle-First Nat. Bank*, 34 Wash 2d 63, 208 P2d 141 (1949).

If an officer uses the corporate seal to execute a document, there is a rebuttable presumption that the officer had authority to sign the document on behalf of the corporation. *Hamilton v. Hamilton Mammoth Mines*, 110 Or 546, 223 P 926 (1924).

RCW 23B.01.200(7) provides that documents filed with the Secretary of State "may, but is not required to contain" the corporate seal. Likewise, RCW 23B.06.250(4) permits, but does not require, that share certificates bear the corporate seal or its facsimile.

Today, the use of a corporate seal has become uncommon, particularly in closely-held corporations.

Section 3.13 Classes or Series of Shares

Corporations may have more than one class of stock, absent a statute prohibiting such practice. *Walden Investment Group v. Pier 67, Inc.*, 29 Wash App 28, 627 P2d 129 (1981); *Feero v. Housley*, 205 Or 404, 288 P2d 1052 (1955). Washington does not prohibit such practice. In fact, RCW 23B.06.010(1) specifically provides that a business corporation may authorize one or more classes of stock in its articles of incorporation.

Together, one or more classes must have unlimited voting rights and the right to receive the net assets of the corporation after dissolution. RCW 23B.06.010(2).

RCW 23B.06.010(3) sets forth examples of attributes which classes are permitted to possess. Examples include shares which have no voting rights, shares which are convertible or redeemable, and shares which have a preference to distributions or upon dissolution. The examples listed in the statute are not intended to be an exhaustive. RCW 23B.06.010(4).

If there are two or more classes or series of shares, the preferences, limitations and relative rights of each may be set out in the articles of incorporation. Alternatively, if such classes or series exist, and if the differences are not set out in the articles of incorporation, the board of directors may determine the preferences, limitations and relative rights without shareholder action. RCW 23B.06.020(1). In such case, the terms of the class or series must be filed with the Secretary of State's office before the shares are issued. RCW 23B.06.020(4).

Preferences, limitations and relative rights which appear in the articles of incorporation can only be amended with the shareholder approval of each class affected thereby. RCW 23B.10.040.

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If a corporation issues shares of more than one class or series, all stock certificates issued must conspicuously state on the front or back the following:

> the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences, and limitations determined for each series, and the authority of the board of directors to determine variations for future series. RCW 23B.06.250(3).

Alternatively the specified information may actually appear on the front or back of the certificate, in full or in a summarized fashion. RCW 23B.06.250(3).

Section 3.14 Name

Every corporation must have a name. *Glass v. The Tipton, Tetersburg, and Berlin Turnpike Co.*, 32 Ind 376 (1869). A corporation's name must be unique to that corporation in its state of incorporation. *United States v. D.K.G. Appaloosas, Inc.*, 630 F Supp 1540 (ED Tex 1986).

A corporation's name must appear in its articles of incorporation. RCW 23B.02.020(1)(a). The name must contain one or more of the following words - corporation, incorporated, company, or limited - or one or more of the following abbreviations - corp., inc., co., or ltd. RCW 23B.04.010(1)(a).

A corporation, created pursuant to the Washington Act, is specifically prohibited from using in its name the words or phrases "bank", "banking", "banker", "trust", "cooperative", or any combination of the words "industrial" and "loan", on any combination of any two or more of the following words: "building", "savings", "loan", "home", "association", and "society." RCW 23B.04.010(1)(c).

Other statutory provisions may also act to prohibit certain names. For instance, RCW 48.30.060 forbids any person who is not an insurer from assuming or using "any name which deceptively infers or suggests that it is an insurer." Early case law held that such a provision did not have retroactive effect on corporations formed prior to enactment of this prohibition. *Lorntsen v. Union Fisherman's Co.*, 71 Or 540, 143 P 621 (1914).

A. Reserving name.

Prior to incorporation, a person may reserve a corporate name with the Secretary of State's office for a 180-day period. RCW 23B.04.020. The application must contain the name and address of the applicant and the proposed name to be reserved. In January 2000, the filing fee was

$30. WAC 434-110-070(g); RCW 23B.01.220(3)(h).

A person who has reserved a corporate name may transfer the reservation to another person by delivering to the secretary of state a signed notice of the transfer which contains the name and address of the transferee. RCW 23B.04.020(2). In January 2000, the filing fee for such a transfer was $30. WAC 434-110-070(g); RCW 23B.01.220(3)(h).

The current fees can be obtained from the Secretary of State, Corporation Division's web site, whose address is http://www.secstate.wa.gov/corps, or by telephoning (360) 753-7115.

Merely reserving a corporate name does not always confer upon the registrant the exclusive right to use the name once the corporation is formed. *Elite Personnel, Inc. v. Elite Personnel Services, Inc.*, 259 Ga 192, 378 SE2d 117 (1989). For instance, merely reserving a name does not give the registrant the right to incorporate under a name previously used by another business.

> Persons, desiring to incorporate under a name they have previously used as the name of an organization not incorporated, are not barred from so doing because of the fact that others had incorporated under that name subsequent to the time they began to use it as the name of an unincorporated organization. If they were the first to use the name and to become known by it, they cannot be denied the right to incorporate under that name because others have adopted their name, and preceded them in incorporating under it. Any damage resulting to the plaintiff from such incorporation is chargeable to their folly in choosing a name already in use. *Umpqua Broccoli Exchange v. Um-qua Valley Broccoli Growers*, 117 Or 678, 686, 245 P 324, 327 (1926).

See also: Lawyers Title Ins. Co. v. Lawyers Title Ins. Corp., 109 F2d 35 (DC Cir 1939), *cert denied*, 309 US 684 (1940).

As discussed briefly below, common law principles of unfair competition and unfair trade practices apply.

B. Assumed business name.

A corporation may file for an assumed or trade name pursuant to RCW 19.80.010. *Seattle Ass'n. of Credit Men v. Green*, 45 Wash 2d 139, 273 P2d 513 (1954). Thus ABC, Inc. can operate a restaurant called "Frank's Franks," and hold itself out to the world using this assumed name, after properly registering this name as a trade name pursuant to RCW 19.80.010. Thus, after appropriately filing for an assumed business name, ABC, Inc. can operate a restaurant called Frank's Franks and hold itself out to the world using this trade name.

Corporations may also obtain federal and state trademarks and service marks for their products and services. A discussion of this topic is beyond the scope of this book.

C. Name must be distinguishable.

Early case law provides that it is the duty of the secretary of state to refuse to file articles of incorporation where the proposed name is so similar to an existing corporation as to lead to the possibility of confusion. *State ex rel Collins v. Howell*, 80 Wash 649, 141 P 1157 (1914). Today, RCW 23B.04.010(1)(d) requires that each corporate name sought to be used "must be distinguishable upon the records of the secretary of state from" other corporate or fictitious names previously filed or reserved. This would include corporations which have been administratively dissolved, but are within the period during which such corporations are eligible for reinstatement. *State ex rel New Arlington Hotel Co. v. Hinkle*, 115 Wash 298, 197 P 4 (1921).

This language in RCW 23B.04.010(1)(d) is drawn from § 102(a)(1) of the Delaware General Corporation Law. Comment to RMBCA § 4.01. In interpreting § 102(a)(1), the Delaware Supreme Court declined to reverse a state agency determination that "Transamerica Airlines, Inc." is distinguishable from "Trans-Americas Airlines, Inc." stating that the agency official "has only one statutory duty: to ensure, in the exercise of his discretion, that a new corporate name can be distinguished on" its records "from those names previously registered" and that the agency official has no duty "to determine whether similar corporate names already registered carry with them property rights on which other parties may not infringe." *Trans-Americas Airlines, Inc. v. Kenton*, 491 A2d 1139, 1142-3 (Del 1985).

A discussion of this topic appears in Guilbert, *Corporate Names and Assumed Business Names: "Deceptively Similar" Creates a Likelihood of Confusion*, 62 OR L REV 151 (1983).

D. Unfair competition & unfair trade practices.

A corporation cannot adopt a name which is so similar to the business name of another that the public is deceived. Justice Holmes long ago stated:

> Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field, may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom. *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass 85, 53 NE 141, 142 (1899).

Even though the general rule is that the first to file a business name with the Secretary of State is the person with the first right to that name, this is not always true. The issue is intertwined with the law of unfair

competition. *Olympia Brewing Co. v. Northwest Brewing Co.*, 178 Wash 533, 35 P2d 104 (1934); *Armed Forces Service Co. v. Petree*, 211 Ga 867, 89 SE2d 486 (1955).

Under older case law, where two businesses were using similar names innocently and without knowledge of each other, the first to register that name, not the first to use that name, is the business legally entitled to keep the name. *San Francisco Oyster House v. Mihich*, 75 Wash 274, 134 P 921 (1913).

More recently, the Washington courts have repeatedly described eight guidelines, first set out in *Seattle Street Railway & Municipal Employees Relief Ass'n v. Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America*, 3 Wash 520, 531-4, 101 P2d 338, 343-4 (1940). These guidelines are:

> [1] The right to use a particular name as a trade name belongs to the one who first appropriates and uses it in connection with a particular business.
>
> [2] A person, whether individual or corporate, may not use any name, not even his or its own, which is the distinctive feature of a trade name already in use by another, if such use by the one person tends to confuse, in the public mind, the business of such person with that of the other.
>
> [3] The prior user may be entitled to relief regardless of actual fraud or intent to deceive on the part of a subsequent appropriator.
>
> [4] To acquire the right to use a particular name, it is not necessary that the name be used for any considerable length of time. It is enough to show that one was in the actual use of it before it was begun to be used by another.
>
> [5] A trade name may be abandoned or given up by the original appropriator, and, when it is so abandoned or given up, any other person has the right to seize upon it immediately, and make use of it, and thus acquire a right to it superior not only to the right of the original user, but of all the world.
>
> [6] A trade name, in order to be an infringement upon another, need not be exactly like it in form and sound. It is enough if the one so resembles another as to deceive or mislead persons of ordinary caution into the belief that they are dealing with the one concern when in fact they are dealing with the other.
>
> [7] The rule is no different when the name, or some part thereof, is a geographical name, or contains descriptive words which have acquired a secondary meaning.
>
> [8] Prior right to the use of a name will be protected by injunction against others using it unfairly. *Bishop v. Hanenburg*, 39 Wash App 734, 736, 695 P2d 607, 610 (1985).

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See also: Money Savers Pharmacy, Inc. v. Koffler Stores (Western), Ltd., 37 Wash App 602, 682 P2d 960 (1984); *Holmes v. Border Brokerage Co.*, 51 Wash 2d 746, 321 P2d 898 (1958); *Foss v. Culbertson*, 17 Wash 2d 610, 136 P2d 711 (1943).

The principal test of unfair competition is whether use of a name tends to confuse the public:

> [t]he test of unfair competition is whether it is probable that an ordinary buyer in the ordinary course of business will be deceived into believing that the product of one party is actually that of another. *Dial Temporary Help Service, Inc. v. Shrock*, 946 F Supp 847, 857 (D Or 1996).

Most courts have followed this rule, holding that a corporation may not adopt a name that serves as an artifice to deceive the public.

> No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by defendant has previously come to indicate and designate plaintiff's goods, or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business. The universal test question is whether the public is likely to be deceived. *Olympia Brewing Co. v. Northwest Brewing Co.*, 178 Wash 533, 538, 35 P2d 104, 107 (1934).

Most courts have applied a "likelihood of confusion" test to determine whether the public is confused by the similarity in names. *Ernst Hardware Co. v. Ernst Home Center, Inc.*, 134 Or App 560, 895 P2d 1363, *review denied*, 321 Or 512, 900 P2d 509 (1995); *Frostig v. Saga Enterprises, Inc.*, 272 Or 565, 539 P2d 154 (1975).

> The appropriate legal test for these claims is the "likelihood of confusion" test. To determine whether a likelihood of confusion exists as to the two yard signs, a number of elements must be examined including: the strength or distinctiveness of the trademark at issue; similarity or overall impression created by the designs; similarity of product; identity of retail outlets and purchasers; identity of advertising media used; defendant's intent; and actual confusion. The weight to be accorded to individual factors varies with the circumstances of the case. (citations omitted) *Ackerman Security Systems, Inc. v. Design Security Systems, Inc.*, 201 Ga App 805, 806, 412 SE2d 588, 589 (1991).

When two names are so similar as to deceive the public, a court of equity has the power to intervene.

> When a person or business corporation has assumed the name of some other firm or corporation in the same line of business, or has adopted a name which so closely resembles that of a business rival, previously established, that the business of the latter is liable to be diverted and the public deceived on account of it, it has always been recognized as within the power or jurisdiction of a court of equity to restrain such person or new company from conducting business under the name assumed, to the detriment of the older company. *Computing Cheese Cutter Co. v. Dunn*, 45 Ind App 20, 88 NE 93, 94 (1909)(quoting from *Plant Seed Co. v. Michel Plant, Co.*, 37 Mo App 313 (1889)).

***E. Foreign corporations*.**

A foreign corporation seeking a certificate to do business in Washington must meet the same name requirements as a domestic corporation; *e.g.*, it must contain one of the same words or abbreviations required of a domestic corporation (*i.e.*, corporation, inc., etc.); it may not contain a prohibited word (*i.e.*, bank, cooperative, etc.); and it must be distinguishable upon the records of the Secretary of State. RCW 23B.15.060(1).

A foreign corporation seeking authority to do business in Washington, but whose name is not distinguishable upon the records of the Secretary of State, may obtain such authority by (i) adding the words corporation, incorporated, company, or limited, or adding the abbreviations corp., inc., co., or ltd. to its corporate name for use in Washington, or (ii) using a "fictitious name to transact business" in Washington. RCW 23B.15.060(3).

***F. Changing corporate name*.**

Amending a corporation's articles of incorporation to change its name does not change any rights or liabilities of the corporation. For instance, it "does not abate a proceeding brought by or against the corporation in its former name." RCW 23B.10.090. The mere fact that a corporation has changed its name does not mean that a new corporation comes into existence, nor does it effect the legal existence or nature of the corporation. *In re VHA diagnostic Services, Inc.*, 65 Ohio St3d 210, 602 NE2d 647 (1992); *Goodwyne v. Moore*, 170 Ga App 305, 316 SE2d 601 (1984). A name change "has no effect on the corporation's property, rights, or liabilities." *Alley v. Miramon*, 614 F Supp 1372, 1384 (5th Cir 1980). *See also: Lindenborg v. M & L Builders & Brokers, Inc.*, 158 Ind App 311, 302 NE2d 816 (1973).