Corporate Statutes—Which One Applies?

Mary Elizabeth Matthews
CORPORATE STATUTES—WHICH ONE APPLIES?

Mary Elizabeth Matthews*

I. INTRODUCTION

In a day of specialized corporate legislation, it may not be enough for an attorney to master the general corporate statutes. To determine the applicable statutory law, the Arkansas lawyer must also identify the type of corporation under consideration—medical, dental, professional corporation, cooperative, nonprofit or profit, foreign or domestic, insurance or banking corporation. Specialized statutes in Arkansas have been tailored to meet the unique requirements of particular categories of corporations, which statutes may or may not be supplemented by the general corporate law.

Furthermore, Arkansas has become a state which “grandfathers” in new business legislation.¹ That is, recent statutes have been structured to apply automatically to business organizations formed after their effective dates, but to permit entities already in existence to continue to operate under prior statutes. The Arkansas lawyer may therefore further need to know the date of incorporation of the relevant entity to ascertain which corporate statute applies.

Finally, the lawyer must consider whether the applicable statute has been amended. If so, the attorney must determine whether that amendment is part of the body of law to which the relevant corporation is subject.

In Arkansas, the specialized corporate statute may be structured as an independent body of law, or may be supplemented by the general corporate statutes. Since many of the specialized statutes incorporate by reference the general corporate law, the general statutes will be con-

* Assistant Professor of Law, University of Arkansas School of Law. B.S., J.D., University of Arkansas.

sidered first.

II. GENERAL CORPORATE STATUTES

A. Classification by Date of Incorporation

General domestic corporations in Arkansas are governed by one of two bodies of statutory law, depending upon their date of incorporation. This bifurcation results from the method by which the Arkansas legislature adopted the most recent general corporate statute. That statute, embodied in the 1987 Arkansas Business Corporation Act (ABCA),\(^2\) is mandatory only in regard to corporations formed after its effective date.

The 1987 ABCA was derived from a model act proposed by the American Bar Association.\(^3\) As originally introduced in the Arkansas legislature, the act applied both to existing corporations and to those formed after its effective date.\(^4\) However, the original bill was modified to permit pre-existing corporations to remain subject to prior law. The final version of the statute, which became effective on midnight of December 31, 1987, permitted then existing corporations to be governed by pre-existing law unless they elected to be governed by the new statute.\(^5\) Except as applicable to such nonelecting corporations, the prior 1965 statute and its amendments were specifically repealed.\(^6\)

The 1987 ABCA contains several provisions attractive to corporate boards (such as liberal limitation of director liability),\(^7\) which have en-

---

3. The Revised Model Business Corporation Act (1984) was promulgated by the Committee on Corporate Laws (Section of Corporation, Banking & Business Law) of the American Bar Association.
4. Proposed Arkansas Business Corporation Act, Draft of December 16, 1986, § 64-1701, stated that: "This Act applies to all domestic corporations in existence on its effective date that were incorporated under any general statute of this State providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved."
6. 1987 Ark. Acts 958, § 64-1705 provided that: "Except as applicable to those existing domestic corporations not irrevocably electing to be governed by the provisions of this Act, as permitted by Section 64-1701 hereof, this Act hereby repeals all laws or parts of laws contained in the following Acts, as such Acts were originally adopted and thereafter amended: Act No. 576 of 1965, all sections. . . ."
7. The statute provides that the Articles of Incorporation may include "[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director," within certain limits. Ark. Code
couraged pre-1987 corporations to elect its coverage. However, it is troublesome that Arkansas domestic corporations are subject to varying standards depending on their date of incorporation. Substantial differences exist between the two statutes, and it is questionable whether a potential shareholder will appreciate the significance of the date of formation.

Structuring the 1987 corporate statute to apply only to future corporations was a departure from the previous Arkansas approach, at least in the corporate area. The prior corporation act, adopted in 1965, applied to all corporations existing on its effective date, although chartered under the corporate acts of 1869, 1927, or 1931. However, Arkansas had enacted statutes on a similar basis in the limited partnership area. Much like the new corporate statute, both the Limited Partnership Act, adopted in 1953, and the revised version, adopted in 1979, provided that limited partnerships formed prior to the acts' effective dates would continue to be governed by prior law unless complying with filing procedures under the new acts.

B. Amendments

Once the relevant statutory body is determined, the question becomes whether amendments to that statute affect corporations already in existence. Although the case law in Arkansas indicates that current

---


corporations are subject to legislative changes, a recent Arkansas Attorney General opinion concerning nonprofit corporations suggests that only corporations created after an amendment are subject to its provisions.

It has been clear since the United States Supreme Court decided *Trustees of Dartmouth College v. Woodward* in 1819 that the charter granted to a corporation by a state constitutes a contract between the corporation and its state of incorporation. The terms of the contract include the charter itself, together with all implied terms garnered from the state corporation statutes. Since the federal constitution prohibits the state from impairing the obligations of contract, the agreement cannot be unilaterally modified by the state. Therefore, a state cannot enforce amendments to the corporate law against a corporation without first obtaining its consent to such modification.

For that reason, the majority of states have reserved by constitution or by statute the right to modify the corporate law. The reservation of that power becomes part of the contract entered into when the relevant charter is granted. The Arkansas provision, included in the Constitution of 1874, states that “[c]orporations may be formed under general laws, which laws may, from time to time, be altered or repealed.” The 1987 ABCA also includes a specific statutory provision reserving power to the legislature to amend or repeal the new statutes.

The Arkansas Supreme Court has recognized that corporations have only those powers which their charters confer upon them, and that the general laws under which a corporation is formed compose its char-
Since the Arkansas Constitution specifically provides that those laws can be altered or repealed, the Arkansas Supreme Court has acknowledged that "the amendment or repeal of them operates as an amendment or repeal of the charter." In effect, a corporation accepts its charter powers subject to the reserved right of the state to alter or revoke them. There need be no provision in the amendment for acceptance of the change or alteration in the charter by the corporation or its stockholders, for an acceptance of the alteration is made by continuation in business after the change.

It is a cardinal rule of statutory construction that substantive statutory amendments are presumed to apply only prospectively. This method affords notice to the public of the modification so that conduct may be altered accordingly. Therefore, amendments to the corporate law should apply only to actions or circumstances occurring after the amendment. Prospective application does not mean, however, that amendments should apply only to corporations formed after the effective date of the amendment.

The latter position was taken by the Arkansas Attorney General in a recent opinion regarding nonprofit corporations. The issue was whether an amendment (which increased voting rights for members

---

18. id.
20. id. at 510, 230 S.W. at 552 (1921). The Arkansas Supreme Court stated: The appellants assail the statute before us on the further ground that no provision is contained in it for an acceptance of the change or alteration in the charter by the corporation or its stockholders. This can make no difference, because, as said before, it accepted its original charter on condition that the State reserved the power to revoke or alter it, if the revocation or alteration did not have the effect of confiscating its property. An acceptance of the altered charter was clearly made by continuation in business after the change was made. Id.
21. SINGER, supra note 13, at § 22.36. See also Davis v. Moore, 130 Ark. 128, 138, 197 S.W. 295, 298 (1917).
22. In McKee v. American Trust Co., 166 Ark. 480, 266 S.W. 293 (1924), for example, an existing corporation using the term "trust company" objected to a new statute prohibiting the future use of that term in its corporate name. Among other defenses, the corporation argued that to impose that law against an existing corporation constituted an ex post facto law. The Arkansas Supreme Court rejected that argument, implicitly acknowledging that the issue is not whether corporate existence began before or after the statute was enacted, but whether the conduct prohibited took place before or after the statute was enacted. The court stated: "As to the contention that Act 627 is void as an ex post facto law, it may be said that the Act is not subject to this objection. It does not make any action taken before its passage unlawful." 166 Ark. at 489, 266 S.W. at 296.
holding multiple memberships) applied to existing nonprofit corporations. The opinion first addressed the issue of retroactive versus prospective application. Concluding that the amendment in question was one of substance rather than procedure, the Attorney General correctly determined that it was to be applied only prospectively.

However, the Attorney General interpreted "prospective application" to mean that the amendment applied only to nonprofit corporations formed after the effective date of the amendment. Rather than concluding that membership voting by nonprofit corporations (whenever formed) would be governed in the future by the amendment's new voting standards, the Attorney General stated that the modification "would in all likelihood be deemed by a court to apply only to nonprofit corporations formed after the effective date of the amendment. . . ."24

To illustrate the issue, consider the following example. Corporation A is formed on Day 1, when a particular statutory voting scheme is in effect. On Day 2, the legislature modifies the voting scheme by statutory amendment. On Day 3, Corporation B is formed. Finally, on Day 4, both Corporation A and B undertake certain action requiring a membership vote. The position indicated by the Attorney General is that only Corporation B is subject to the statutory amendment. Rather than applying the statutory amendment to membership votes held by Corporation A or B after the amendment's effective date, the Attorney General would apply it only to membership votes held by Corporation B.

The opinion did not discuss the Attorney General's choice of the date of incorporation, rather than the date of the relevant membership vote, as determining whether the amendment applied to a particular corporation. It appears that choice was suggested in the questions posed to the Attorney General.25 However, the effect of the position taken by the Attorney General must be considered. If the courts were to hold that each substantive change in the corporate law applied only to corporations thereafter formed, the body of law governing each corporation would be set on its date of incorporation. The problem would be

24. Id. at 1.
25. It appears that the line of demarcation was suggested in the phrasing of the initial questions addressed to the Attorney General. Question one was posed as follows: "Do Sections 4-28-212(a) and (b) as amended by Act 672 of 1989 apply to non-profit corporations in existence prior to the effective date of the Act? Or, is this a substantive change in the law that does not apply to non-profit corporations existing prior to the Act as the Act did not specifically provide that it would apply retroactively?" Id.
further exacerbated by the fact that corporations generally have perpetual existence. In order to modify the substantive law, the legislature would be required to await the incorporation of a new generation of corporations against which to assert its legislative power.

The Arkansas case law does not reflect such an approach. The Arkansas courts have repeatedly applied legislative amendments of the corporate law to existing corporations. For example, in *Leep v. Railway Co.* a legislative amendment making employers liable for the immediate payment of wages at the discharge of an employee was imposed against an existing corporation. In *Ozan Lumber Co. v. Biddie* an amendment imposing liability on a corporate employer for acts of its agent was applied to a previously formed corporation. Similarly, the Arkansas Supreme Court applied subsequent legislative provisions to existing corporations which placed double liability on stockholders for debts of a banking corporation, imposed liability on bank stockholders for public funds deposited in the bank and prohibited certain corporations from doing business under the name “trust company.”

Favorable, as well as detrimental, amendments are applied to existing corporations. For example, in *Wasson v. Planters’ Bank & Trust Co.* the Arkansas Supreme Court allowed an existing corporation to take advantage of an amendment permitting banking corporations to issue a new type of stock.

In each of the cited cases, the power of the legislature to amend the corporate law applicable to the relevant corporation was placed in issue. The response of the Arkansas Supreme Court is typified by *Bank of Blytheville v. State* in which liability was imposed upon bank stockholders for public funds. The court specifically recognized that the amendment altered the corporate law, acknowledging that “prior to the amendatory act of March 17, 1903, stockholders of a bank were not liable for public funds, and that the amendatory act made them liable for all public funds deposited therein. . . .” However, the court concluded that such result was sanctioned by Article 12, Section 6 of the Arkansas Constitution, stating that:

---

27. 87 Ark. 587, 113 S.W. 796 (1908).
31. 188 Ark. 343, 65 S.W.2d 528 (1933).
33. *Id.* at 508, 230 S.W. at 551-52.
Every objection urged by appellants against the constitutionality of the acts finds an answer in the fact that a corporation accepts its charter powers subject to the reserved right in the State to alter or revoke the charter whenever, in the opinion of the General Assembly, such revocation or alteration is for the protection of the citizens of the State, if done in such manner that no injustice may be done to the corporators. 34

Therefore, despite the position taken by the Attorney General, amendments to the 1987 ABCA, whenever adopted, should apply to all corporations created after December 31, 1987, and to those corporations opting for its coverage. Prior corporations should be affected only by amendments to the prior statute. 35

III. FOREIGN CORPORATIONS

Unlike the provisions applicable to domestic corporations, those sections of the 1987 ABCA applicable to foreign corporations were not covered by a grandfather clause. The new statute stated that any foreign corporation authorized to transact business in Arkansas at midnight, December 31, 1987, was subject to the new statute, 36 and the old provisions were specifically repealed. 37 Affected foreign corporations were not required to obtain a new certificate of authority to transact business.

The most significant change wrought by the new statute in regard to foreign corporations was a reduction in the penalty for doing business in Arkansas without authority. Foreign corporations are required to file certain information with the Secretary of State in order to be qualified to transact intrastate business in Arkansas. 38 The sanction for

34. Id. at 509, 230 S.W. at 552.
35. The prior statute was specifically repealed by the 1987 ABCA, except as applicable to corporations not electing to be governed by the new ABCA. See supra note 6. It therefore appears unlikely that amendments to the 1965 provisions will be forthcoming.
38. Under the prior statute, a foreign corporation was required to file in the office of the Secretary of State a copy of its articles or certificate of incorporation, a statement of assets and
failure to file under the previous statute (known as the “Wingo Act”) was a harsh one. In addition to a potential minimum penalty of $5000, the foreign corporation was not permitted to enforce any contract made in Arkansas in law or equity. This was true even if the foreign corporation subsequently complied with the statute.

The penalty under the 1987 ABCA is less severe. The foreign corporation may not maintain a proceeding in Arkansas until it obtains a certificate of authority, and may be liable for a civil penalty ranging from $100 to $5000. However, the statute expressly provides that the failure to obtain a certificate of authority does not impair the validity of the foreign entity’s corporate acts or prevent it from defending any proceeding in Arkansas. The commentary to the Revised Model Business Corporation Act on which the section is based makes clear the drafters intended a nonqualifying foreign corporation be able to enforce a contract simply by qualifying.

There may yet arise some interesting questions under the transition provisions. The 1987 ABCA clearly applies to foreign corporations qualified to do business on the transition date, but its application is somewhat more ambiguous as to nonqualifying corporations. The issue is whether a nonqualifying foreign corporation which entered into a contract prior to 1988 will be able to qualify and thereafter enforce the contract.

The 1987 ABCA transition provisions suggest that the pre-1988 contract will be enforceable. The relevant section provides that “[i]f a penalty or punishment imposed for violation of a statute repealed by this chapter is reduced by this chapter, the penalty or punishment, if liabilities and the amount of its capital employed in Arkansas, and its general place of business. Ark. Code Ann. § 4-27-104(a) (repealed 1987). Further, the foreign corporation was required to file certain information regarding its capital stock, property, sales, and payroll. Ark. Code Ann. § 4-27-106(a) (repealed 1987). The 1987 ABCA requires the foreign corporation to complete an application setting out the corporate name, date and place of incorporation, relevant addresses, and certain information regarding shares owned by Arkansas residents. This is to be filed with the Secretary of State along with a certificate of existence from the corporation’s place of incorporation. Ark. Code Ann. §§ 4-27-1503 (Supp. 1989).

43. Revised Model Business Corporation Act § 15.02 comment (1984). The comment recognizes that the sanction is not a punitive one, and that the failure of the corporation to qualify does not affect the validity of corporate acts, including contracts. The comment goes on to state: “Thus, a contract made by a nonqualified corporation may be enforced by the corporation simply by obtaining a certificate.” Id.
not already imposed, shall be imposed in accordance with this chapter." Arguably, the harsh penalty of voiding the contract is reduced by the 1987 ABCA comply-and-enforce approach, and the penalty should therefore be imposed according to the new statute.

It may take some time for the issue to arise. Since the lesser penalty does not apply if the harsher penalty has already been imposed, it appears too late for foreign corporations whose contracts have already been held unenforceable at the trial court level to argue that the new statute changes the result. The potential plaintiff who may benefit is a nonqualifying foreign corporation with a pre-1988 contract upon which no judgment has yet been entered.

Three Arkansas appellate cases have discussed Wingo Act defenses since the effective date of the 1987 ABCA. Moore v. Luxor (North America) Corp., decided in January 1988, involved an effort by a nonqualifying foreign corporation to enforce certain personal guarantees made in 1985. In that case, the supreme court refused to apply the Wingo Act to bar enforcement of the guarantees by the foreign corporation because the relevant contract was made out of state and the Arkansas provision was therefore inapplicable.

The second case, Midland Dev., Inc. v. Pine Truss, Inc., decided in May 1988, concerned a setoff claim by a nonqualifying foreign corporation arising from a transaction in 1985. The Arkansas Court of Appeals applied the Wingo Act to bar the nonqualifying foreign corporation's setoff claim because it was based upon the unenforceable contract.

The supreme court decided Germer v. Mo. Portland Cement Co. in February 1990. It involved an attempt by a noncomplying foreign corporation to enforce a guarantee entered into in 1984. The court refused to apply the Wingo Act to bar enforcement of the guarantee by the foreign corporation because the relevant contract was interstate rather than intrastate, and the Arkansas restriction was therefore inapplicable.

Although none of the opinions referred to the 1987 ABCA transi-

44. ARK. CODE ANN. § 4-27-1703(B) (Supp. 1989).
45. 294 Ark. 326, 742 S.W.2d 916 (1988).
46. Id.
48. Id.
49. 301 Ark. 277, 783 S.W.2d 359 (1990).
50. Id.
tion provisions, the 1990 decision cited the harsher penalty of the prior statute and noted that it was the relevant law "[w]hen the obligations in question here were incurred." Even had the courts specifically addressed the transition provisions, however, it does not appear any of the three results would have changed. Only in the second case was the Wingo Act applied, and the harsher penalty had been imposed by the trial court before the effective date of the new corporations act. Therefore, the statutory law applicable to foreign corporations doing business in Arkansas should be the foreign corporation provisions of the 1987 ABCA. Any amendments to those provisions should also apply to existing foreign corporations.

IV. MEDICAL AND DENTAL CORPORATIONS

Specialized statutes providing for the creation of medical and dental corporations were adopted by the Arkansas Legislature in 1961. The statutes were brief, and were basically designed to preserve the professional liability of the doctor or dentist, and to insure that only professionals could function as officers, directors, or shareholders of these specialized corporations. Both statutes stated that licensed persons could associate to form a corporation "pursuant to the Business Corporation Act (Arkansas Statutes 64-101 et seq.)" Both statutes further provided that "[t]he Business Corporation Act shall be applicable to such corporations" but made clear that in the case of any conflict, the medical/dental subchapter would take precedence.

The 1931 ABCA was the corporation code in effect when the specialized statutes were enacted. The issue is whether the medical and dental corporate statutes continue to be supplemented by that repealed statute, or whether they are supplemented by subsequent enactments.

51. Id. at 280, 783 S.W.2d at 360.
52. Summary judgment was entered by the Benton County Circuit Court on January 26, 1987.
The legal commentary included in Sutherland on Statutory Construction\(^\text{58}\) discusses the effect of a specific reference in one statute to the provisions of another. An express statutory reference results in the adoption of the designated act as it existed at the time of the reference. Such adoption does not include subsequent additions, modifications, or repeals. Only a general reference in a statute to another body of law encompasses that existing law, together with modifications occurring thereafter.

This principle of construction has been recognized in Arkansas. In Howard v. State\(^\text{59}\) the Arkansas Supreme Court acknowledged as "well-recognized" the general rule that "when a statute adopts a part or all of another statute by a specific and descriptive reference thereto, such adoption takes the statute as it exists at that time, unaffected by any subsequent modification of the statute adopted, unless a contrary intention is clearly manifested."\(^\text{60}\) The supreme court cited with approval an annotation indicating that the operation of the adopting statute would not be affected by subsequent additions or even repeal of the adopted statute, although a different legislative intent could be indicated by the adopted statute or the circumstances surrounding its enactment.\(^\text{61}\)

Because the reference to the general corporation statute in the medical and dental acts was an actual citation to a particular act, it appears to be a specific reference. The question is whether the legislature indicated some contrary intent. When the legislature enacted a new body of corporate law in 1965, the statutes specifically referred to medical and dental corporations. The 1965 statutes stated that to the extent that medical and dental corporations were subject to the prior code, they would thereafter be likewise subject to the 1965 provisions.\(^\text{62}\)

It seems clear, therefore, the legislature intended the reference incorporating the prior statute be superseded by the specific applicability lan-

\(^{58}\) 1A N. Singer, Sutherland Statutory Construction 722-23 (4th ed. 1985).

\(^{59}\) 223 Ark. 634, 267 S.W.2d 763 (1954).

\(^{60}\) Id. at 636, 267 S.W.2d at 764. The court in that case did not apply the general rule because it found that the reference in issue was general rather than specific. See also McLeod v. Commercial Nat'l Bank, 206 Ark. 1086, 178 S.W.2d 496 (1944).

\(^{61}\) 223 Ark. at 637, 267 S.W.2d at 764.

\(^{62}\) 1965 Ark. Acts 576, § 3 (codified at Ark. Code Ann. § 4-26-103(d)(1987)). One of the drafters of the 1965 corporate code has written that it was the intent of the drafting committee to subject medical and dental corporations to the provisions of the 1965 code to the same extent that they had been subjected to the 1931 code. See Meek, Drafting of the Proposed Arkansas Business Corporation Act, supra note 9, at 349.
guage of the 1965 statutes.

However, the Arkansas Legislature in adopting the 1987 ABCA did not specifically indicate that the new provisions applied to medical and dental corporations. The 1987 ABCA merely contains a general applicability section stating that “[t]his chapter applies to all domestic corporations incorporated on or after its effective date.” The statute defines “corporation” or “domestic corporation” to mean “a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this chapter.” Since medical and dental corporations are arguably “incorporated under” the appropriate specialized statute “pursuant to” the 1965 corporate code, and are “subject to” the specialized statute except as supplemented by that 1965 corporation act, they do not appear to fall within the scope of the 1987 ABCA. The legislature could have indicated a contrary intent in adopting the 1987 ABCA, but the general applicability language is arguably insufficient to do so.

The Arkansas Attorney General concluded that the 1965 corporations act continues to apply to medical and dental corporations. Acknowledging the distinction between specific and general statutory references, the Attorney General noted as “significant” the fact that the relevant specialized statutes appear to refer specifically to the corporation statutes as contained in the 1965 Act. The Attorney General concluded: “It is therefore my opinion that corporations formed pursuant to these Acts are governed by Act 576 of 1965, the pre-existing Arkansas Business Corporation Act, and not by the 1987 Act.”

If the courts adopt this approach the applicable statutory law governing medical and dental corporations in Arkansas is the relevant specialized statute as supplemented by the 1965 ABCA. Such corporations would not be affected by amendments to the 1987 ABCA, but only by amendments to the prior statute.

V. PROFESSIONAL CORPORATIONS

The Arkansas Legislature adopted a statute permitting persons offering professional services outside the medical field to form corpora-

66. Id. at 4.
67. Such appear unlikely. Supra note 35.
tions in 1963.\textsuperscript{68} The statute was similar to the medical and dental acts, but included accountants, engineers, attorneys, architects, and other licensed persons in addition to providing an alternative for medical professionals. Like the Medical and Dental Acts, the Professional Corporations Act stated that formation was "pursuant to" the Business Corporation Act, and specifically cited the 1931 statute.\textsuperscript{69} It further stated that "the Business Corporation Act" should apply to corporations formed under the specialized statute, unless conflicting with its provisions.\textsuperscript{70}

Unlike medical and dental corporations, professional corporations were not specifically mentioned in the applicability provision of the 1965 corporations act.\textsuperscript{71} However, the legislature made clear, in an amendment to the professional corporation statute in 1970, that the 1965 statute was to apply to such professional corporations,\textsuperscript{72} identifying the 1965 general corporate statute specifically by act number.

Therefore, the issue as to professional corporations, just as in the case of medical and dental corporations, is whether the specific application of the 1965 Act was superseded by the general language contained in the 1987 ABCA. Although the 1987 ABCA states that it applies to "all domestic corporations,"\textsuperscript{73} such language may be held an insufficient indication of legislative intent to overcome the specific reference by act number in the 1970 professional corporation amendment.

The aforementioned Attorney General opinion which determined that medical and dental corporations remain subject to the 1965 Act reached the same conclusion as to professional corporations.\textsuperscript{74} Noting that all three statutes appear to refer specifically to the 1965 corporation code, the Attorney General concluded that corporations formed pursuant to those statutes would be governed by the pre-existing general corporations act rather than the 1987 ABCA.

Therefore, the statutory law governing professional corporations in Arkansas should be the relevant specialized statute as supplemented by the 1965 Arkansas business corporation statutes. Such corporations would not be affected by amendments to the 1987 ABCA, but only by

\begin{itemize}
\item \textsuperscript{68} 1963 Ark. Acts 155 (codified at \textsc{Ark. Code Ann.} §§ 4-29-201 to -213 (1987)).
\item \textsuperscript{69} 1963 Ark. Acts 155, § 2(a).
\item \textsuperscript{70} 1963 Ark. Acts 155, § 3 (codified at \textsc{Ark. Code Ann.} § 4-29-204 (1987)).
\item \textsuperscript{71} 1965 Ark. Acts 576, § 3 (codified at \textsc{Ark. Code Ann.} § 4-26-103 (1987)).
\item \textsuperscript{72} 1970 Ark. Acts 13, § 2.
\item \textsuperscript{73} \textsc{Ark. Code Ann.} § 4-27-1701 (Supp. 1989).
\item \textsuperscript{74} Op. Ark. Att'y Gen., \textit{supra} note 65 at 4.
\end{itemize}
amendments to the prior statute. 76

VI. COOPERATIVES

A cooperative is a unique form of corporation generally characterized by voting on the basis of membership rather than on the number of shares held, and by participation in the returns of the enterprise on the basis of business done with it. 76 Cooperatives have often been characterized as "nonprofit" because the income in a typical cooperative is distributed to the members as part of the purchase price for the sale of their products (usually agricultural) rather than as a return on investment. 77 Such a characterization may even be imposed by statute. 78

In Arkansas, a cooperative can be incorporated under a variety of statutes. 79 The options include 1) a general cooperative statute; 80 2) a statute for marketing cooperatives; 81 3) a statute for agricultural cooperatives; 82 4) specialized statutes for rural electrification, 83 or telecommunications cooperatives; 84 and 5) the general corporation statutes.

75. Such amendment appears unlikely. Supra note 35.
76. See generally, Farmer Coop. Service, USDA, Legal Phases of Farmer Cooperatives (1976); Ark. Bar Ass'n, Agricultural Law System, Ch. 14 (Oct. 1988). A cooperative may be structured as an unincorporated association, but cooperatives generally incorporate to attain the same advantages available to other types of corporations.
77. See Legal Phases of Farmer Cooperatives, supra note 76 at 219-26.
78. See, e.g., ARK. CODE ANN. § 2-2-101(b) (1987), which provides as to cooperatives formed under the 1939 agricultural cooperative statute: "Associations organized under this subchapter shall be deemed to be nonprofit, inasmuch as they are not organized for the purpose of making profits for themselves or for their members, as proprietors, but only for their members, as patrons and employees of the associations."

A compilation of cooperative statutes indicates that 28 of the 86 state cooperative statutes include language deeming cooperatives to be nonprofit. See J. Baarda, Agricultural Coop. Serv., USDA, State Incorporation Statutes for Farmer Cooperatives 20 and Table 3.03 (1982).

Despite such statutory characterization, cooperative authorities continue to struggle with the issue of whether cooperatives should be characterized as nonprofit. Cooperatives are generally intended to generate a profit for their members, but differ from a typical corporation in that any such profit is returned directly to the members rather than being realized by the cooperative entity itself. See Legal Phases of Farmer Cooperatives, supra note 76.
84. Rural Telecommunications Cooperative Act, 1951 Ark. Acts 51 (codified at ARK. CODE
The specialized cooperative statutes may or may not be supplemented by the general corporation statutes. Courts have traditionally applied general corporate law principles to cooperative issues, either directly or by analogy, and the majority of state cooperative statutes adopt corporate law unless inconsistent with the cooperative statute. Two of the Arkansas cooperative statutes—the marketing cooperatives statute and the agricultural cooperatives statute—specifically state that “[t]he provisions of the general corporation laws of this state” apply unless conflicting with express cooperative provisions.

The Arkansas general cooperative statute was silent as to the applicability of corporate law until 1989, when the legislature adopted a provision similar to that concerning marketing and agricultural cooperatives. The provision was not enacted as an amendment to the general cooperative statute, however, and has not been codified as part of that statute. Rather, it has been noted by the Arkansas Code Revision Commission in the relevant annotations.

In contrast to the foregoing cooperative provisions, the statute concerning electric cooperatives specifically provides that it is complete in itself, and the provisions of any other law of this state shall not apply. The statute regarding telecommunications cooperatives is silent on the issue, but includes many detailed provisions dealing with such matters as consolidation, dissolution, and cooperative governance which indicate that the legislature did not intend that it be supplemented by other


85. See A. Hoberg & D. Fee, Agricultural Coop. Serv., USDA, Director Liability in Agricultural Cooperatives 1 (1984), which acknowledges that the similarities between cooperatives and for-profit corporations “have resulted in the ready application by courts of corporate law principles to cases involving cooperatives and cooperative directors” and that “in most respects corporate law is fully applicable.” See also J. Baarda, Corporate Rules Are Applied to a Cooperative, Farmer Cooperatives (March 1990) (discussion of Atwood Grain & Supply Co. v. Growmark, Inc., 712 F. Supp. 1360 (N.D. Ill. 1989)).

86. J. Baarda, supra note 78, at § 1.04 and Table 1.04.01.


88. 1989 Ark. Acts 493, § 5 states:

The provisions of the general corporation laws of this State, and all powers and rights thereunder, shall apply to the cooperative corporations created under Subchapters 1 and 2 of Chapter 30 of Title 4 of the Arkansas Code, except where such provisions are in conflict with or inconsistent with the express provisions of Subchapters 1 and 2 of Chapter 30 of Title 4 of the Arkansas Code.

89. See A.C.R.C. Notes to Subchapter 2, Chapter 30, Title 4, Arkansas Code Annotated (Supp. 1989).

The legislature in adopting recent amendments has acknowledged that the 1987 ABCA does not apply to telecommunications cooperatives.

Because the references in the marketing, agricultural, and general cooperative statutes are general rather than specific, the corporation law as it currently exists should be the supplementary body of law. The Arkansas Supreme Court in *Howard v. State* recognized as "well-established" that:

> [W]here the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof, the reference in such case includes not only the law in force at the date of the adopting act but also all subsequent amendments or laws in force on the subject at the time it is invoked.

Thus, cooperatives formed under those specialized statutes should be governed by the relevant specialized statute as supplemented by the 1987 ABCA.

The Arkansas Attorney General, in a recent opinion, concluded that the agricultural marketing cooperative statute is supplemented by the 1987 ABCA. However, the Attorney General reached this conclusion only as to cooperatives formed after the December 31, 1987 effective date of the 1987 ABCA. As for cooperatives formed prior to that date, the opinion implies that despite the cooperative statute's general reference, the 1987 Act does not supplement the specific statute.

Although the opinion appears to assume the law applicable to pre-1987 cooperatives does not include the 1987 ABCA, the basis for such a conclusion is not specifically addressed. The opinion only discusses whether a pre-1987 cooperative could elect the coverage of the 1987 ABCA pursuant to the ABCA's own election provisions. Because the election option in the 1987 ABCA was only granted to corporations for profit, the Attorney General concludes that pre-1987 cooperatives

92. The relevant statute was amended by 1989 Ark. Acts 438. The emergency clause to that statute stated: "It is hereby found and determined by the General Assembly that the Arkansas Business Corporation Act, enacted in 1987 establishes general standards for directors . . . and that the Arkansas Business Corporation Act does not apply to a corporation organized for the purpose of engaging in telephone service. . . ."
93. 223 Ark. 634, 267 S.W.2d 763 (1954).
94. 223 Ark. 636, 267 S.W.2d at 764.
could not opt for coverage.

Whether pre-1987 cooperatives could elect to be covered by the 1987 ABCA would be a moot issue if the statute applied automatically by virtue of the cooperative statute’s general reference. Therefore, the Attorney General must have concluded the 1987 ABCA simply did not apply to pre-1987 cooperatives. The implication is that such agricultural cooperatives remain supplemented by the prior law, presumably the 1965 general corporation statutes.

The problem with the approach taken by the Attorney General is that it examines the general corporate statute to determine whether it applies to an agricultural cooperative. Since by its terms the general statute only applies to for-profit corporations, one is not surprised that it does not provide agricultural cooperatives with a right to elect coverage under it.\(^7\)

The better approach is to rely upon the specific agricultural cooperative statute. The general reference in that statute to corporate law appears to encompass any new legislation in the field, including the 1987 ABCA. It is arguable, however, that the same considerations which persuaded the Arkansas Legislature to impose the 1987 ABCA on a mandatory basis only upon post-1987 corporations justify a court in imposing it only upon cooperatives thereafter formed. The rationale underlying this approach is that although the cooperative statute normally adopts corporate legislation as it is enacted, the legislature sufficiently indicated a contrary intent as to the 1987 ABCA.

A second problem with the Attorney General’s approach is that although the question was raised as to “cooperatives,” only one of the cooperative statutes—the act concerning agricultural cooperatives—was considered. Both that statute and the statute governing marketing cooperatives contain general references to the corporate law.\(^8\) The 1989 provision applicable to the general cooperative statute to such effective date under any general statute of this state providing for incorporation of corporations for profit may elect to be governed by the provisions of this chapter by amending its articles of incorporation to provide that it shall be so governed.’’ That section goes on to state: “Domestic corporations existing prior to midnight, December 31, 1987, which do not elect to be governed by its provisions shall continue to be governed by pre-existing law.” However, as the Attorney General acknowledges, “domestic corporation” is defined by the statute to mean only corporations for profit. See Ark. Code Ann. § 4-27-140(4) (Supp. 1989).

\(^7\) Despite the position of the Attorney General, a court may yet hold that a cooperative has a right to elect the supplementary coverage of 1987 ABCA by characterizing the cooperative as a profit corporation. See supra note 78.

\(^8\) A compilation of cooperative statutes indicates that 46 of the 86 cooperative statutes include language making general corporation law applicable to cooperative associations. See J.
is likewise a general reference. Presumably the Attorney General would therefore adopt the same approach for all three statutes.

The statutory law applicable to cooperatives in Arkansas, therefore, appears much more uncertain than that applicable to foreign, medical and dental, and professional corporations. For those cooperatives formed under cooperative statutes which contain a general reference to the corporate law, the statutory law applicable should be the specific cooperative statute, supplemented by the 1987 ABCA as amended from time to time. Despite the Attorney General's position, such cooperatives should be subject to the 1987 ABCA regardless of their date of incorporation.

The electric cooperative statute, which states that the provisions of other law shall not apply, should not be supplemented by general corporate provisions. The telecommunications cooperative statute is likely to be similarly interpreted. Despite its silence on the issue, its complete nature and recent legislative comments indicate that the legislature did not intend that it be supplemented by the general corporate statutes.

VII. NONPROFIT CORPORATIONS

The specialized statute governing nonprofit corporations in Arkansas is the Arkansas Nonprofit Corporation Act, adopted by the Arkansas Legislature in 1963. The Act applies to all not-for-profit domestic corporations organized under its provisions, all not-for-profit corporations organized under any act repealed by it, and all foreign not-for-profit corporations conducting affairs in this state. The new act specifically repealed the prior (1875) law for formation of nonprofit corporations.

The statute states that it would "in no way affect" any pre-existing nonprofit corporation whose primary purpose was for the education of its members. The legislature made clear by a 1973 amendment to the statute that the same policy applied to all pre-1963 nonprofits. The 1973 amendment states that the Nonprofit Corporation Act would "in no way affect any nonprofit corporation chartered" under pre-1963 law, and that such nonprofits could file a copy of the order whereby they

Baarda, State Incorporation Statutes for Farmer Cooperatives, supra note 78 at 14, and Table 1.04.01.

were incorporated and be entitled to the recognition of their legal status as if formed under the Nonprofit Corporation Act. The amendment further states that any pre-1963 nonprofit wishing to take advantage of that provision should make the required filing within two years.

The issues in regard to this 1963 statute are: 1) whether it applies to pre-1963 nonprofits; 2) whether amendments to the Act apply to nonprofits already in existence; and 3) whether the nonprofit statute is supplemented by general corporate law.

A. Application to Pre-1963 Nonprofits

The Arkansas Court of Appeals recently discussed the effect of the 1973 amendment to the Nonprofit Corporation Act in *Wye Community Club, Inc. v. Harmon.* The parties in that case disagreed as to which of two nonprofit corporations was the valid legal entity entitled to the club's real property. The original nonprofit corporation was formed in 1944 and continued to function at the time of suit. However, that corporation had failed to file its order with the Secretary of State as suggested by the 1973 amendment to the Nonprofit Corporation Act. When the problem was discovered, a group of its members arranged for the incorporation of a new entity in 1986, with substantially different bylaws. The 1986 entity then petitioned to quiet title to the club property in itself, claiming that the failure of the 1944 corporation to file its order of incorporation terminated its existence.

The Arkansas Court of Appeals held that the filing provision of the 1973 amendment was permissive rather than mandatory. It interpreted the filing language to apply only to pre-1963 corporations wishing to "take advantage of" the prima facie evidence of incorporation provided by the 1963 Act. Pre-1963 corporations foregoing that advantage were not required to file their orders of incorporation. Thus, the court concluded that the 1944 nonprofit corporation remained in existence and was entitled to have the real property in issue quieted in its name.

It appears settled that pre-1963 nonprofits continue in existence whether or not they file under the 1963 Nonprofit Corporation Act. But what statutory law governs them? The wording of the statute is some-
what ambiguous. Although the Nonprofit Act (as amended) states that the provisions of the 1963 Act “shall in no way affect” nonprofits chartered before 1963, the applicability section states that its provisions shall apply to “not-for-profit corporations heretofore organized under any act hereby repealed.” The two sections can be interpreted consistently if the former provision is interpreted to govern the entity’s status as a corporation, while the latter is interpreted to govern the law applicable to that entity.

Thus, the statement that the Nonprofit Act shall not affect pre-1963 nonprofits means that such nonprofits are validly formed as legal entities whether or not their process of incorporation met the requirements of the 1963 statute, so long as it met the requirements of law at the time of incorporation. This is true whether or not they file under the 1963 Act, as held in Wye, and is consistent with the court of appeals’ approach to the section in that case as a provision dealing with the status of the entity. The statement that the 1963 Act applies to nonprofits formed under now-repealed statutes means that any nonprofit formed under the 1875 statute (specifically repealed) is now governed by the 1963 statute.

The Arkansas Supreme Court in 1988 specifically recognized that pre-1963 nonprofits were governed by the 1963 Nonprofit Corporation Act. In Allen v. Malvern Country Club, stockholders of a nonprofit corporation formed prior to 1963 brought suit to enforce certain stockholders’ rights. The defendant Club answered that, although permitted under the general corporation statute, nonprofit corporations had no right to issue stock either under the prior nonprofit statute or under the 1963 Nonprofit Act. The Club therefore argued that the plaintiffs had no enforceable rights. The Arkansas Supreme Court agreed, and affirmed dismissal of the suit.

The court unequivocally recognized that “[n]onprofit corporations such as the Club are now governed by the 1963 Arkansas Nonprofit Corporation Act. . . .” Although the plaintiff shareholders in Allen attempted to rely on the provision of the 1963 Act which states that it would not “affect” pre-existing nonprofit corporations, the court indicated that it would make no difference whether the 1963 Act or prior law was applied, since there had never been any statutory authority for the issuance of stock by a nonprofit corporation in Arkansas. Even had

---

106. 295 Ark. 65, 746 S.W.2d 546 (1988).
107. Id. at 68, 746 S.W.2d at 548.
such authority been found, however, the court's position that the prior statutes had been "superseded" indicates that any conflicting provision of the 1963 statute would have prevailed.

The statutory law governing nonprofit corporations in Arkansas, therefore, is the 1963 Nonprofit Corporation Act. As the supreme court indicated in Wye, this should be the case whether the nonprofit corporation was created before or after 1963.

B. Amendments

Since 1963 the Nonprofit Corporation Statute has been periodically amended, and provisions relating to the merger and consolidation of nonprofit corporations were added by separate statute in 1983. The most recent amendment in 1989 provided for multiple voting by members holding more than one membership in a nonprofit corporation. The issue is whether such amendments apply only to nonprofit corporations created after the amendment, or also to nonprofits in existence on the date of the amendment.

As discussed previously, the Attorney General has recently indicated that amendments to the nonprofit statutes apply only to nonprofit corporations thereafter formed. This conclusion is questionable, and will hopefully be rejected by the courts.

It is possible that the Attorney General intended the opinion to govern only nonprofit corporations. That is, the argument may be made that while amendments to the general corporate law apply to both existing and future corporations, amendments to the nonprofit statutes apply only to future nonprofits. Although nonprofit corporations are significantly different from for-profit corporations in purpose and structure, the distinctions are not such as should change the normal rules of statutory construction. Even though nonprofit corporations are formed

108. Id.
109. 26 Ark. App. at 254, 764 S.W.2d at 59.
113. See notes 23-35 and accompanying text.
by court order for the public benefit, they are still bound by legislative will.

If the legislature has made a policy choice that the law governing nonprofit corporations should be changed, it should have the same power to enforce that decision against existing nonprofit corporations as it does against existing for-profit corporations. The different nature of the nonprofit corporation should have been considered by the legislature in adopting the amendment, and it remains free to provide that the amendment applies only to future nonprofits.

The legislative power to govern nonprofit corporations is not diminished by the fact that they are created by court order. The Arkansas Supreme Court in considering the powers of a nonprofit corporation in *Allen v. Malvern Country Club* recently recognized that "[c]orporations organized under the laws of this state are but creatures of the legislature . . . and the legislative power to create corporations cannot be delegated to the courts." As in the case of for-profit corporations, the court further acknowledged in *Allen* that "[t]he laws of a particular state which grant or restrict the powers of a corporation become part of the articles of incorporation or charter of that corporation."

Although the relevant Attorney General's opinion did not justify his conclusion on the basis of some perceived distinction between profit and nonprofit corporations, it would seem that such an attempt should fail. Both types of corporations should be immediately subject to legislative amendment of the statutes by which they are governed.

C. Supplementation by General Corporate Law

Nonprofit corporations are distinctively different from for-profit corporations. As indicated above, a nonprofit corporation is formed by court order rather than by simple filing, and only upon a finding by a circuit court that its formation is "in the best interests of the public." It must be formed for some type of charitable, educational, cultural, or similar purpose, and no part of its income can inure to the

---

115. 295 Ark. 65, 746 S.W.2d 546 (1988).
116. *Id.* at 70, 746 S.W.2d at 549.
117. *Id.* at 70, 746 S.W.2d at 550.
119. *Id.*
benefit of its members, directors, or officers.\textsuperscript{121} It issues no shares and pays no dividends.\textsuperscript{122}

Although the Nonprofit Corporation Act is silent as to supplementation by general corporate law, the unique nature of nonprofit corporations and the completeness of the nonprofit statute indicate that such supplementation was not intended. The Act includes detailed provisions concerning corporate governance,\textsuperscript{123} restrictions on the issuance of stock,\textsuperscript{124} and involuntary dissolution.\textsuperscript{125} Sections governing merger and consolidation were added by separate statute in 1983.\textsuperscript{126}

The Arkansas Supreme Court has indicated that the nonprofit statutes are \textit{not} supplemented by general corporate law. In 1988 the court in \textit{Allen v. Malvern Country Club}\textsuperscript{127} cited with approval a 1937 opinion in which “this court emphasized that the statutes governing business corporations \textit{do not} cover corporations organized under the sections governing benevolent associations (nonprofit corporations). . . .”\textsuperscript{128} The court therefore indicated that even though the general corporate law permitted the issuance of stock, it constituted no authority for nonprofit corporations to do likewise.

In determining an issue in regard to nonprofit corporations, however, the Arkansas courts may turn to general corporate law for guidance. For example, in determining the requisite vote necessary for a nonprofit corporation to sell and exchange certain real property, the Arkansas Supreme Court, in \textit{Giss v. Apple},\textsuperscript{129} cited general corporate authority for the proposition that a majority vote of the shareholders would be required.\textsuperscript{130} Although recognizing that the authority it quoted “has reference to business [c]orporations,”\textsuperscript{131} the court nevertheless applied the rule to the facts in issue. Even in \textit{Allen}, which clearly recognized that general corporate law did not directly apply, the Arkansas Supreme Court relied upon general corporate case law and legal com-

\begin{itemize}
\item \textsuperscript{121} \textsc{Ark. Code Ann.} \textsection\textsuperscript{4-28-202}(3) (1987). However, reasonable compensation may be paid to members, directors, or officers for services rendered. \textsc{Ark. Code Ann.} \textsection\textsuperscript{4-28-215} (1987).
\item \textsuperscript{122} \textsc{Ark. Code Ann.} \textsection\textsuperscript{4-28-219} (1987).
\item \textsuperscript{123} For provisions regarding members, the board of directors, voting, and officers, see \textsc{Ark. Code Ann.} \textsections\textsuperscript{4-28-210 to -213} (1987).
\item \textsuperscript{124} \textsc{Ark. Code Ann.} \textsection\textsuperscript{4-28-219(a)} (1987).
\item \textsuperscript{125} \textsc{Ark. Code Ann.} \textsection\textsuperscript{4-28-222} (1987).
\item \textsuperscript{126} 1983 \textsc{Ark. Acts} 614 (codified at \textsc{Ark. Code Ann.} \textsections\textsuperscript{4-28-301 to -309} (1987)).
\item \textsuperscript{127} 295 \textsc{Ark. 65}, 746 S.W.2d 546 (1988).
\item \textsuperscript{128} 295 \textsc{Ark. at 69}, 746 S.W.2d at 549.
\item \textsuperscript{129} 239 \textsc{Ark. 1124}, 396 S.W.2d 813 (1965).
\item \textsuperscript{130} \textit{Id.} at 1132, 396 S.W.2d at 817.
\item \textsuperscript{131} \textit{Id.}.
\end{itemize}
mentary in concluding that court approval of the nonprofit corporation's charter could not authorize an act (issuance of stock) which exceeded the authority granted by statute. 132

The statutory conclusions in regard to nonprofit corporations in Arkansas, therefore, are that: 1) all current nonprofit corporations are governed by the 1963 Nonprofit Corporation Act; 2) all amendments to that Act apply to nonprofits formed either before or after the effective date of the amendment; and 3) the Nonprofit Corporation Act is not supplemented by general corporate law, although such may be applied by analogy.

VIII. MISCELLANEOUS

Even more specific miscellaneous statutes may govern particular types of corporations. The more specific the statute, the less likely that the legislature intended supplementation by the general corporate law. For example, the general insurance statutes specifically provide that "[t]he statutes of this state relating to the powers and procedures of corporations other than insurance corporations shall not apply to domestic stock insurers and domestic mutual insurers, except as stated. . . ." 133 The provisions for the organization of financial institutions state that as to trust companies organized after 1923, "[t]he provisions of the laws governing manufacturing and other business corporations shall not apply to them." 134 A 1985 act encouraging the development of capital in Arkansas defines corporations to mean only those capital development corporations organized under its provisions. 135

IX. CONCLUSION

The statutory law applicable to corporations in Arkansas presents a complex picture. Even the basic diagram for general domestic corporations is divided into corporations formed before December 31, 1987,

and those formed thereafter or electing the coverage of the new ABCA. The initial split can be depicted thus:

1965 ABCA 1987 ABCA

(Pre-1987 Domestic (Post-1987 + Electing Corporations) Domestic Corporations)

Overlapping the basic coverage of domestic corporations are those specialized statutes which are supplemented by the general corporate statutes. In an overlapping orbit around the 1965 ABCA are the specialized statutes which have specific references to the prior 1965 statute: the medical, dental, and professional corporation statutes. In an overlapping orbit around the 1987 ABCA are the specialized statutes which have general references to the corporate law: the marketing, agricultural, and general cooperative statutes.

In independent orbits are those specialized statutes which are self-contained. These statutes include those governing nonprofit corporations, electric cooperatives, and miscellaneous specialized corporations such as certain insurance or financial corporations.

Finally, contained within the 1987 ABCA are those provisions governing foreign corporations. Although structured as a separate chapter, those provisions may be seen as a subcategory of the corporations within the scope of the 1987 ABCA.

In enacting these statutes in piecemeal fashion over a period of time, it is unlikely that the legislature had an opportunity to adequately consider the overall structure of corporate statutes. As reflected by the issues raised in regard to the recent Attorney General opinions, more extensive consideration and explanation of the applicability of newly enacted corporate statutes would provide better guidance to the courts and the practicing bar.