Michigan Law Review

Volume 46 | Issue 6

1948

CORPORATIONS - CERTIFICATE OF AMENDMENT CONFERRING VOTING RIGHTS ON OUTSTANDING PREFERRED STOCK-REMEDY OF NON-ASSENTING COMMON STOCKHOLDER UNDER NEW YORK APPRAISAL STATUTE

Edwin F. Uhl S.Ed.
University of Michigan Law School

CORPORATIONS — CERTIFICATE OF AMENDMENT CONFERRING VOTING RIGHTS ON OUTSTANDING PREFERRED STOCK—REMEDY OF NON-ASSENTING COMMON STOCKHOLDER UNDER NEW YORK APPRAISAL STATUTE — By amendment of its certificate of incorporation, defendant conferred upon its outstanding preferred stock voting rights equal to those of the common. This alteration reduced the voting interest of the plaintiff's fifty shares of common stock from an approximately 1/33,000 to 1/36,000 part. Plaintiff, who at all times had opposed adoption of the amendment, instituted proceedings under a provision of the New York Stock Corporation Law awarding to dissenting stockholders the right to an appraisal of and payment for their stock "if the certificate . . . abolishes any voting right of the holders of shares of any class or limits their voting rights," except as such rights "may be limited by the voting rights given to new shares of any class authorized by the certificate." [1] The Appellate Division unanimously affirmed an order of the Supreme Court at Special Term denying the appraisal on the ground that any limitation of the plaintiff's voting rights was so insignificant as to be described as de minimus. On appeal, *held*, reversed. Granting the preferred stock voting rights altered, diminished and thus limited the voting power of the common; consequently an appraisal must be granted. *Marcus v. R. H. Macy & Co.*, (N.Y. Ct. App. 1947) 74 N.E. (2d) 228.

Statutory schemes for stock appraisal and legislation permitting basic changes in corporate charters by less than unanimous assent were designed to satisfy the legitimate demands of two competing factions.[2] The requirement of unanimous assent often compelled the corporation to abandon the proposed change or acquire dissenters' holdings at inflated values. But simple majority control, unless safeguards were devised, might require dissenters to change the character of their investment, or unload their holdings on the market at a time when the speculative character of the corporate action had adversely affected the value of its stock. On the whole, statutory appraisal seems to solve this dilemma appropriately and the basic problem becomes one of policy.[3] Most jurisdictions permit appraisal in cases of merger, consolidation, or the sale of the entire corporate assets; [4] and a few allow the remedy when an entry into a new field of

[1] N.Y. Stock Corp. Law (McKinney, 1940) § 38, subd. 9, par. (d) as amended by N.Y. Laws (1943) c. 600, § 5.

[2] Matter of Timmis, 200 N.Y. 177, 93 N.E. 522 (1910); Levy, "Rights of Dissenting Shareholders to Appraisal and Payment," 15 CORN. L.Q. 420 at 421 (1930); and Weiner, "Payment of Dissenting Stockholders," 27 COL. L. REV. 547 at 548 (1927).

[3] In general on the problems involved see Dodd, "Dissenting Shareholders and Amendment to Corporate Charters," 75 UNIV. PA. L. REV. 585, 723 (1927); Lattin, "Remedies of Dissenting Stockholders under Appraisal Statutes," 45 HARV. L. REV. 233 (1931); Ballantine and Sterling, "Upsetting Mergers and Consolidations: Alternative Remedies of Dissenting Shareholders in California," 27 CAL. L. REV. 644 (1939); and Lattin, "A Reappraisal of Appraisal Statutes," 38 MICH. L. REV. 1165 (1940).

[4] Detailed analysis of the various statutes is beyond the scope of this note. The corporation laws of the different states are collected in PARKER, CORPORATION MANUAL, 48th ed. (1947).

corporate enterprise is contemplated.[5] Should an appraisal right be given where a change in capital structure affects the rights, privileges or preferences of an outstanding stock issue, unless the holders of such stock can make an affirmative showing of injury? [6] As a matter of legislative policy the result in the instant case seems hardly defensible. One can but sympathize with the lower courts' attempt to avoid the implication of the statute by denominating any limitation on plaintiff's voting rights as de minimis. Nonetheless, the decision of the court of appeals seems sound. Any error is that of the legislature. As the court pointed out, there was "no legislative declaration of a minimum percentage or value of stock which must be owned by a non-consenting stockholder to qualify him to invoke the prescribed statutory procedure." [7] A contrary holding would lead to uncertainty and litigation, for if the court should deny relief because of the insignificance of the effect upon a stockholder's voting rights, other parties litigant would surely seek to raise the same issue.[8]

Edwin F. Uhl, S.Ed.

[5] Appraisal allowed: Mass. Gen Laws (1932) c. 156, § 46; and Ohio Gen. Code (Page, 1947 Supp.) § 8623-14(3), (Page, 1937) § 8623-72. There are no appraisal provisions for this situation in Delaware, Illinois, Michigan, New York or New Jersey.

[6] Appraisal allowed: N.Y. Stock Corp. Law (McKinney, 1940) § 38, subd. 9, as amended by N.Y. Laws (1943) c. 600, § 5; and Ohio Gen. Code (Page, 1947 Supp.) § 8623-14(1)(2), (Page, 1937) § 8623-72 subject, however, to the requirement of substantial prejudice to the stockholder, and subject, also, to the possibility of eliminating the right in the articles of incorporation). Several other states do not permit appraisal. Adoption of the amendment requires the affirmative vote of a certain proportion of each class entitled to vote thereon, and shares, ordinarily non-voting, must be afforded this right if they are affected by the proposed change. This seems the more desirable solution. The "preferential" rights must have been of nominal value when abrogating or limiting them appears appropriate to a substantial number of persons thereby affected.

[7] Principal case at 231.

[8] As the New York Court announced in Matter of Silberkraus, 250 N.Y. 242 at 246, 165 N.E. 279 (1929), "When the result of the alteration is not entirely clear, the wishes of the stockholder rather than the conception of the courts should prevail."