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TREASURY SHARES AND PRE-EMPTIVE RIGHTS: SCHWARTZ V. MARIEN

INTRODUCTION

The New York Court of Appeals has recently expanded the scope of protection available to shareholders of a close corporation. Traditionally, a shareholder had no legally recognized right to maintain proportionate stock ownership in the face of a sale of treasury stock for a valid corporate purpose. In such cases, strict application of the treasury share doctrine would have compelled a finding that the shareholder had not been injured by the resulting reduction in his proportionate ownership of the corporation. The court has now found that a shareholder sustains injury even if the sale of treasury stock furthers a valid corporate objective when there is another means of accomplishing the objective that would not disturb proportionate ownership. This note will compare the protection now offered by the court of appeals with the formal concepts of the treasury share doctrine.

I. FACTS

Plaintiff Margaret A. Schwartz owned fifty shares of the outstanding stock of the Superior Engraving Company, a closely held corporation. The fifty remaining shares of outstanding stock were held by the four members of the Marien family: Robert, Edward, August, and Clara. Another fifty shares of stock, reacquired by the corporation from a former shareholder, were held by the corporation as treasury stock.[1]

At a special meeting of the board of directors on May 6, 1968, Edward Marien was elected a director to fill the vacancy created by the death of Girard Dietrich, plaintiff's father.[2] Plaintiff abstained

1. Schwartz v. Marien, 37 N.Y.2d 487, 335 N.E.2d 334, 373 N.Y.S.2d 122 (1975). Three hundred shares of stock had been issued in 1934 to the six original shareholders. Three of these original shareholders had sold their shares back to the corporation and these 150 shares were cancelled by the corporation. A.C. Smith received 50 shares from one of the original shareholders; upon Smith's death, the corporation purchased his 50 shares. These shares are the treasury shares in question. Brief for Respondents at 6-7.

2. This election was held pursuant to N.Y. BUS. CORP. LAW § 705(a) (McKinney Supp. 1975), which provides that vacancies on the board of directors (except those

from voting and Edward was elected by the two affirmative votes of the Marien brothers.[3] The second action taken at that meeting was the approval of a resolution directing that the president of the corporation, Robert Marien, negotiate with plaintiff for the corporation's purchase of her stock. Robert Marien then proposed a resolution to accept offers by five persons to purchase one share of treasury stock each for $1200 per share. The five prospective purchasers included two employees of the company and, significantly, the three Marien brothers. This resolution passed over plaintiff's abstention.[4]

The effect of the sale of treasury stock was to reduce the proportion of outstanding stock held by plaintiff from 50 percent to approximately 48 percent. Once plaintiff's proportionate shareholding fell below 50 percent she lost the ability to regain control of two directorships at the next election. Plaintiff's loss of the opportunity to control one-half of the board and her relegation to a minority position were especially crucial, as they affected her bargaining position with respect to the contemplated sale of her holdings to the corporation.[5] In addition, the sale of the treasury stock gave control of the corporation to the Marien family even if the two employee-recipients did not vote with them.[6]

Following the meeting, plaintiff protested the sale of treasury stock and offered to purchase, at the same price, five shares of the remaining treasury stock. This offer was rejected by the other directors for the stated reason that it was not in the best interests of the

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created by the removal of a director without cause) shall be filled by a vote of the board. At the time of the election, the board of directors consisted of Margaret Schwartz, Robert Marien, and August Marien. Although Margaret Schwartz owned 50 percent of the outstanding stock and normally would have been able to appoint two out of four directors, the filling of this type of vacancy differs from the normal election of a director.

3. With one vote, Margaret Schwartz could not have influenced the outcome.

4. Again, her vote would not have been controlling, since her ownership of 50 percent of the outstanding stock was not reflected in the composition of the board of directors.

5. N.Y. BUS. CORP. LAW § 1104 (McKinney 1963) provides that holders of one-half of the outstanding stock of a corporation may petition for dissolution in the case of deadlock or internal dissension. This statutory provision provides a strong inducement for the remaining shareholders to offer a fair price to an owner of one-half of the outstanding stock when he seeks to sell his holdings. One of the characteristics of a close corporation is that often there is no outside market for the shares; thus, sale to other shareholders or to the corporation is the only viable method of disposal. 1 F.H. O'NEAL, CLOSE CORPORATIONS § 1.07 (2d ed. 1971).

6. This assumes that the Marien family would vote as a block, a conclusion that was implicit in the court opinions discussed later in the text, and one that is realistic in a close corporation context.

corporation because plaintiff was then negotiating for the sale of her present holdings. Implicit in this contention by the other directors was the recognition that if she regained ownership of 50 percent of the outstanding stock, plaintiff would be able to obtain a better purchase price for her holdings at additional cost to the corporation. At a subsequent shareholders' meeting, held on July 25, 1968, plaintiff was removed from the board of directors.

Plaintiff instituted an action against Superior Engraving and the five treasury stock recipients, requesting a judgment voiding the July 25 shareholders' meeting and compelling the sale to her of five shares of the remaining treasury stock.[7] Plaintiff did not allege a statutory preemptive right to the stock but asked that the court award her the right to purchase such stock as an equitable remedy.[8] She alleged that the directors were guilty of conspiracy and fraud in the sale of treasury stock and the subsequent refusal to accept her offer of purchase. At special term, the motions of both parties for summary judgment were denied, and plaintiff appealed from this denial. The Appellate Division for the Fourth Department, with one judge dissenting, affirmed the denial of summary judgment but noted that plaintiff would be entitled to relief if it were shown that the sale of treasury stock was solely for the purpose of reducing plaintiff's proportionate ownership.[9] In a unanimous opinion, the court of appeals affirmed the order of the fourth department and went on to state that plaintiff would be entitled to relief if it were shown that the sale of treasury stock was solely for the purpose of reducing plaintiff's proportionate interest *or* if the alleged valid corporate objective could be accomplished by means which would not have disturbed plaintiff's proportionate stock ownership.[10] Because of the modifications they signal in judicial protection of the shareholder's proportionate ownership in a closely-held corporation, the opinions of both the fourth department and the court of appeals warrant detailed examination.

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7. Plaintiff had originally requested a preliminary injunction to bar the July 25 shareholders' meeting and asked that the defendant-purchasers be ordered to return to the corporation the five shares they had purchased. Her request for an injunction was denied, and the complaint was dismissed as to defendants Kasprzak and Zimmerman, the employee-recipients. Schwartz v. Marien, 43 App. Div. 2d 307, 310-11, 351 N.Y.S.2d 216, 220 (4th Dep't 1974).

8. Schwartz v. Marien, 43 App. Div. 2d 307, 310-11, 351 N.Y.S.2d 216, 220-21 (4th Dep't 1974) (dissenting opinion).

9. 43 App. Div. 2d 307, 351 N.Y.S.2d 216 (1974).

10. 37 N.Y.2d 487, 335 N.E.2d 334, 373 N.Y.S.2d 122 (1975).

II. The Fourth Department Opinion

The fourth department affirmed the denial of plaintiff-appellant's motion for summary judgment in a per curiam opinion, with Judge Moule dissenting.[11] The court recognized that according to New York law, in the absence of a specific provision in the certificate of incorporation, there is no statutory pre-emptive right for a sale of treasury stock.[12] Even though plaintiff could not assert this statutory right, she was protected, in the court's opinion, by the principle that "directors of the corporation owe a fiduciary duty both to the corporation and to its shareholders."[13] Thus, the sale of treasury stock was not insulated from allegations that it was sold in breach of fiduciary duty merely by being exempt from a statutory pre-emptive right. According to the court, the sale of stock, if not consistent "with the established legal standards of honesty and fair dealing in the management of the corporation," would be such a breach of fiduciary duty.[14] More precisely, "[i]f the purpose of the Board of Directors was to diminish plaintiff's proportionate ownership without benefiting the corporation, then appellant is entitled to relief."[15] The court did not, however, state the exact form of relief to which plaintiff might be entitled.

Hammer v. Werner,[16] the only case cited by the court in its brief per curiam opinion, provides no clear indication of the remedy contemplated. The *Hammer* court held that "special circumstances or acts constituting the breach of duty may generate a pre-emptive right which would not otherwise exist, although the wrong *may* be redressed as a breach of duty independent of the existence of a pre-emptive

11. Schwartz v. Marien, 43 App. Div. 2d 307, 351 N.Y.S.2d 216 (4th Dep't 1974).

12. *See* N.Y. Bus. Corp. Law § 622(e)(4) (McKinney 1963).

13. 43 App. Div. 2d at 307, 351 N.Y.S.2d at 217-18.

14. *Id.* at 307-08, 351 N.Y.S.2d at 218. This possible breach of fiduciary duty reflects the well-known principle that directors are bound to act at all times in furtherance of the interests of the corporation and not for personal advantage. *See* Billings v. Shaw, 209 N.Y. 265, 103 N.E. 142 (1913); Jacobson v. Brooklyn Lumber Co., 184 N.Y. 152, 76 N.E. 1075 (1906); Hammer v. Werner, 239 App. Div. 38, 265 N.Y.S. 172 (2d Dep't 1933); H. Henn, Law of Corporations § 173 (2d ed. 1970). An analogous principle is that directors may not authorize the issuance to themselves of originally authorized but unissued stock for the primary purpose of transforming themselves from minority to majority shareholders. *See* Schwab v. Schwab-Wilson Mach. Corp., 13 Cal. App. 2d 1, 55 P.2d 1268 (Ct. App. 1936); Dunlay v. Avenue M Garage & Repair Co., 253 N.Y. 274, 278-80, 170 N.E. 917, 919-20 (1930). In such a situation, and in a situation presented by the sale of treasury stock for a similar purpose, the directors are not acting in furtherance of the interests of the corporation.

15. 43 App. Div. 2d at 308, 351 N.Y.S.2d at 218.

16. 239 App. Div. 38, 265 N.Y.S. 172 (2d Dep't 1933).

right."[17] Two alternative methods for determining relief are suggested by the court's citation to *Hammer*.

It is not apparent from the instant case whether the fourth department would permit plaintiff to recover as if a "pre-emptive right" to the treasury stock had been created, in which case she might be allowed to purchase five shares in the corporation. Another possibility is that, although a "pre-emptive right" had been generated, plaintiff would be allowed to purchase only three shares—the amount that would enable her to maintain an equality of voting power with the defendant directors. Recourse to this alternative would require a finding that plaintiff had not been injured by the issuance of stock to the two employees. The labeling of the denial of the opportunity to purchase treasury shares as a "generation of pre-emptive rights" will be discussed below.

The court recognized that both parties were concerned with the bargaining position of the plaintiff. A breach of fiduciary duty would be established if it were shown that the *sole* purpose of defendant's conduct was to diminish plaintiff's proportionate interest without benefiting the corporation. Thus, if the defendant directors were motivated *both* by a desire to diminish the plaintiff's proportionate ownership *and* by a desire to benefit the corporation, plaintiff apparently would not be entitled to relief.[18] Defendants alleged that the sale of treasury shares was justified as an attempt to insure the continued employment of key employees and that their refusal to sell to plaintiff was in the best interests of the corporation (plaintiff was then negotiating for the sale of her holdings). Because a trial was necessary to evaluate the conduct of defendants, summary judgment was denied.

III. The Court of Appeals Decision

The court of appeals unanimously affirmed the judgment of the fourth department.[19] In an opinion by Judge Jones, the court held

17. *Id.* at 42, 265 N.Y.S. at 177 (emphasis added).

18. For a criticism of the appellate division opinion as a failure to protect the reasonable expectations of shareholders of a close corporation by the invocation of the business purpose doctrine, see Weiss, *Business Associations, 1974 Survey of New York Law,* 26 Syracuse L. Rev. 197, 222-26 (1975).

19. Schwartz v. Marién, 37 N.Y.2d 487, 335 N.E.2d 334, 373 N.Y.S.2d 122 (1975). The case was remanded for trial and subsequently settled out of court. Defendants agreed to pay plaintiff $1200 per share for her fifty shares of stock, thus resolving the problem of bargaining position. The granting of summary judgment would not have

that material questions of fact existed. However, the more detailed opinion of the court of appeals stated the relative legal positions of the parties in a manner significantly different from that of the appellate division.

The court of appeals accepted the first conclusion of the appellate division that, although plaintiff did not have a statutory pre-emptive right to the treasury stock in question, she was protected by the fiduciary responsibility owed by directors to shareholders.[20] Also in accord with the reasoning of the appellate division, the court stated that a "[d]eparture from precisely uniform treatment of stockholders may be justified . . . where a bona fide business purpose indicates that the best interests of the corporation would be served . . . ."[21] This much of the opinion merely reaffirmed the principle that the directors must act in furtherance of the corporate interest.

The appellate division had been silent on the issue of the burden of proof, but the court of appeals stated that the burden should be shifted to the defendant directors because "a prima facie case of unequal stockholder treatment is made out," and because "it appears that members of the board of directors favored themselves individually over the complaining shareholder."[22] This shifting of the burden of proof recognizes the self-dealing nature of the sale.[23] Instead of merely showing that their actions were in furtherance of a valid corporate objective (as required by the appellate division), the defendants were required to show that "such objective could not have been accomplished substantially as effectively by other means which would not have disturbed proportionate stock ownership."[24] This additional requirement was said to be justified because "disturbance of equality of stock ownership in a corporation closely held for several years by

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been as effective in the resolution of the controversy, since the parties still would have faced negotiations for the purchase of plaintiff's holdings. Perhaps judicial encouragement of this type of settlement was the underlying reason for denial of summary judgment.

20. Both the court of appeals and the appellate division treated the action as one for breach of fiduciary duty although plaintiff had pleaded conspiracy and fraud.

21. 37 N.Y.2d at 492, 335 N.E.2d at 338, 373 N.Y.S.2d at 127.

22. *Id.*

23. Although there is usually a presumption that directors of a corporation have acted properly, this presumption has been held not to apply when the directors are dealing with themselves as individuals. *See* Ross Transport, Inc. v. Crothers, 185 Md. 573, 583, 45 A.2d 267, 271-72 (1946); Sage v. Culver, 147 N.Y. 241, 247, 41 N.E. 513, 514 (1895); Wohl v. Miller, 5 App. Div. 2d 126, 133, 169 N.Y.S.2d 233, 241 (1st Dep't 1957).

24. 37 N.Y.2d at 492, 335 N.E.2d at 338, 373 N.Y.S.2d at 127.

the members of two families calls for special justification in the corporate interest . . . ."[25]

By holding that plaintiff was entitled to maintain her proportionate interest in outstanding stock unless the change in proportionate ownership was required to achieve a valid corporate objective not otherwise attainable, the court has radically departed from prior doctrine in the field of treasury shares and pre-emptive rights.

IV. The Conflict Between Traditional Treasury Stock Doctrine and the Opinion of the Court of Appeals

Treasury shares are shares which have been issued to shareholders and thereafter reacquired by the corporation through donation, forfeiture, purchase, redemption, conversion, or otherwise.[26] They are not voted, nor do they participate in dividends or distribution of net assets upon dissolution.[27] If one conceives of a share of stock as a contract between the shareholder and the corporation, problems arise in the determination of the exact status of treasury shares. Ballantine has characterized treasury shares as a "masterpiece of legal magic":[28]

> When so-called treasury shares are sold by the corporation it is (by a fiction) regarded as if the shares issued to the purchaser were the old shares and as if the corporation had merely been an intermediate transferee. In reality the old contract was extinguished by merger and the new shares are new units of interest created in their place.[29]

Whether or not treasury shares are legal magic, they possess legal characteristics different from an original issue of shares. Most important to this discussion is the doctrine that treasury shares ordinarily are not subject to pre-emptive rights.[30]

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25. *Id.*

26. H. Henn, *supra* note 14, at § 158. One author has pointed out that a frequent mistake has been to apply the term "treasury shares" to those shares which have been authorized but remain unissued. Garrett, *Treasury Shares Under the Model Business Corporation Act,* 15 Bus. Law. 916, 917 (1960).

27. H. Henn, *supra* note 14, at § 158.

28. Ballantine, *The Curious Fiction of Treasury Shares,* 34 Calif. L. Rev. 536, 537 (1946).

29. *Id.* at 538 (footnotes omitted).

30. Borg v. International Silver Co., 11 F.2d 143 (S.D.N.Y. 1926); Crosby v. Stratton, 17 Colo. App. 212, 68 P. 130 (1902). For criticism of this exception, see 32 Mich. L. Rev. 110 (1933); 36 Yale L.J. 1181 (1927).

The pre-emptive right is the right possessed by a shareholder "to pre-empt (or to purchase before others) a new issue of shares in proportion to his present interests in the corporation."[31] This right was said to exist in equity to protect a shareholder's proportionate voting power and his proportionate interest in the corporate earnings and assets.[32] The rationale for the exclusion of treasury stock from the pre-emptive rights doctrine is that a shareholder's proportionate interest in the corporation is determined when stock is issued.[33] However, because the proportional interest of any stockholder is determined by reference to the number of outstanding shares, a sale-back of stock by one shareholder will increase the proportion of outstanding stock in the hands of each remaining shareholder by decreasing the total number of outstanding shares. When outstanding stock is purchased by a corporation, held as treasury stock, and finally resold to another shareholder, the resale of the stock merely restores the remaining shareholders to the proportional status they held prior to the corporate purchase. The fact that a shareholder now holds that proportion in relation to a different shareholder—that is, the purchaser of the treasury stock—is irrelevant. It must be noted that the shareholder may have had the opportunity to exercise his pre-emptive right in relation to this particular stock when it was first issued.[34]

The treasury stock exception to the pre-emptive rights doctrine is grounded in the propostion that a shareholder suffers no injury merely by reinstatement to his former proportionate stock ownership position. For example, if a shareholder owned 33 percent of the outstanding stock of a corporation, a purchase by the corporation of another shareholder's 33 percent interest would not entitle the first shareholder to maintain his resulting 50 percent interest in the future. This

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31. H. HENN, *supra* note 14, at § 174. Two old but frequently cited articles on pre-emptive rights are Drinker, *The Preemptive Right of Shareholders to Subscribe to New Shares,* 43 HARV. L. REV. 586 (1930); Frey, *Shareholder's Pre-emptive Rights,* 38 YALE L.J. 563 (1929). The doctrine is acknowledged to have originated in the case of Gray v. Portland Bank, 3 Mass. 364 (1807). The earliest New York case seems to be Stokes v. Continental Trust Co., 186 N.Y. 285, 78 N.E. 1090 (1906).

32. Comment, *Corporation Law: Exceptions to Stockholder's Preemptive Right,* 35 U. COLO. L. REV. 482, 483 (1963). Another protected interest is the opportunity to invest capital in a demonstrably profitable enterprise. Berle, *Corporate Devices for Diluting Stock Participations,* 31 COLUM. L. REV. 1239, 1257 (1931).

33. *See* Note, *The Legal Status of Treasury Shares,* 85 U. PA. L. REV. 622 (1937). *See also* 32 MICH. L. REV. 110 (1933); 36 YALE L.J. 1181 (1927).

34. Of course, this is inapplicable if the stock had been issued as part of the original incorporation.

increase in proportional interest is always subject to subsequent reduction back to 33 percent when the corporation resells the treasury stock. The doctrine has been incorporated into the New York pre-emptive rights statute by the exception made therein for treasury shares.[35]

Of course, as the instant case recognizes, a sale of treasury stock is not insulated from an allegation that it was sold in breach of fiduciary duty.[36] For example, sale of treasury stock at an inadequate price will dilute the interests of the other shareholders.[37] This dilution differs from that resulting from a new issue of stock because the shareholder's proportionate interest is reduced by an amount that is not offset by a fair increase in capital to the corporation. Another possible breach of fiduciary duty in a sale of treasury stock is the appropriation of excessive salaries by the directors, followed by a secret purchase of the stock with the funds thus acquired.[38] And, a sale of treasury stock might be in furtherance of no valid corporate objective, but solely for the purpose of shifting control to a certain faction.[39]

In such instances, if the other shareholders had been given the opportunity ratably to purchase the treasury stock that was sold, they would have been able to protect their interests. Even in the case of sale at an inadequate price, the proportionate purchase by the other shareholders at the *same* price would at least protect their interests from dilution.[40] The protection afforded shareholders by a proportionate purchase of treasury shares in such circumstances seems to underlie the discussion in *Hammer* regarding the generation of a pre-emptive right.[41] The classification of such a purchase as the exercise of a pre-emptive right, however, does not fall within the usual understanding

35. *See* N.Y. BUS. CORP. LAW § 622e(4) (McKinney 1963). The certificate of incorporation may provide otherwise. *See* text accompanying note 12 *supra*. *Compare* ABA-ALI MODEL BUS. CORP. ACT § 26A (1974).

36. "It is the duty of directors as fiduciary agents, irrespective of any rule giving preemptive rights to shareholders, to exercise a power to issue additional shares, as well as all their other powers, in good faith for the benefit of the shareholders who constitute the corporation." Morawetz, *The Preemptive Right of Shareholders*, 42 HARV. L. REV. 186, 188 (1928).

37. *See, e.g.*, Gieselmann v. Stegeman, 443 S.W.2d 127 (Mo. 1969); Johnson v. Duensing, 351 S.W.2d 27 (Mo. 1961).

38. *See, e.g.*, Hammer v. Werner, 239 App. Div. 38, 265 N.Y.S. 172 (2d Dep't 1933).

39. *See, e.g.*, Elliott v. Baker, 194 Mass. 518, 80 N.E. 450 (1907).

40. It has been held that a shareholder is not required to exercise a pre-emptive right merely to protect his economic interest from dilution (as the sale for an inadequate price) where no business purpose exists for the new issue of stock. Katzowitz v. Sidler, 24 N.Y.2d 512, 301 N.Y.S.2d 470 (1969).

41. 239 App. Div. at 42, 265 N.Y.S. at 177.

of pre-emptive rights. Traditionally, that concept has referred to the right ratably to purchase a *new* issue of stock. Instead, the *Hammer* classification includes within the scope of pre-emptive rights the opportunity ratably to purchase *any* issue of stock because the denial of such opportunity will result in harm to the shareholder.[42] Whether or not the opportunity to purchase treasury shares as equitable relief may be termed an award of a "pre-emptive right" seems to be a matter of semantics. Such terminology does, however, confuse the issues involved.[43]

The finding of a breach of fiduciary duty in a sale of treasury shares does not contradict the central proposition that, assuming directors act in furtherance of a corporate interest, a shareholder suffers no injury merely by reinstatement to his former proportionate interest when treasury stock is sold to another shareholder. However, the court of appeals in the instant case determined, first, that the plaintiff was entitled to maintain her increased proportionate interest in the corporation unless the change was not only to further a valid corporate objective but absolutely necessary as well, and, second, that she was injured by the relegation to her former status. This finding of injury is in direct contradiction to traditional treasury stock theory.

The court of appeals apparently intends to limit to certain special circumstances the right of a stockholder to maintain his increased proportionate ownership in outstanding stock when treasury stock is sold. First, the court emphasized that the case involved a close corporation wholly owned by the members of two families. Because the limited numbers of shareholders are greatly concerned with proportionate stock ownership and its relation to control, the sale of treasury stock (or of new issues) creates special problems in the close corporation context.[44] These problems are not likely to arise in a large corporation, where the sale of treasury stock ordinarily changes proportionate ownership among the many shareholders by only a very small amount.

Second, the situation in the instant case involved the sale of treasury stock to those directors who were responsible for authorizing the

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42. In his dissent from the fourth department's decision in *Schwartz v. Marien*, Judge Moule agreed with the *Hammer* approach. He stated that the plaintiff "asks in equity that a [pre-emptive] right be created for her." 43 App. Div. 2d at 313, 351 N.Y.S.2d at 223.

43. This vague distinction between a pre-emptive right and a director's fiduciary obligation is discussed in 1 U. CHI. L. REV. 645, 646 (1934).

44. 1 F.H. O'NEAL, CLOSE CORPORATIONS § 1.07 (2d ed. 1971). For a discussion of the problem of squeeze-outs in general, see F.H. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS (1975).

sale. Although sale to a neutral third party would also reduce proportionate ownership, the issue of self-dealing would not arise. The existence of self-interest among the directors is a prerequisite for a finding of breach of fiduciary duty in a situation of this kind.

V. Conclusion

The resale of treasury stock traditionally has been viewed as a reinstatement of the shareholder to his original status. Since the shareholder was always subject to this reduction, no injury was thought to flow from it. Thus, treasury shares have long been exempted from the doctrine of pre-emptive rights. The New York Court of Appeals has now rejected this position in favor of the rule that a shareholder is entitled to mainain his proportionate status in a close corporation when the directors sell treasury stock to themselves for purposes unrelated to the interests of the corporation, or to effectuate a valid corporate objective that could be accomplished without disturbing existing proportionate ownership. Although contrary to former law, this approach reaches the proper result by recognizing that technical exceptions to the doctrine of pre-emptive rights cannot be used to disadvantage shareholders in situations in which equity courts would otherwise wish to protect them.

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