

## Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law

By C. Stephen Bigler and Seth Barrett Tillman\*

*It is not unusual for a Delaware corporation's stock records to have omissions or procedural defects raising questions as to the valid authorization of some of the outstanding stock. Confronted with such irregularities, most corporate lawyers would likely attempt to cure the defect through board and, if necessary, stockholder ratification. However, in a number of leading cases, the Delaware Supreme Court has treated the statutory formalities for the issuance of stock as substantive prerequisites to the validity of the stock being issued, and the court has determined that failure to comply with such formalities renders the stock in question void, i.e., not curable by ratification. Unfortunately, the decisions issued by the Delaware courts have not afforded the necessary certainty to allow practitioners to decide whether a particular defect in stock issuance is a substantive defect that renders stock void or a mere technical defect that renders stock voidable. This Article analyzes the cases giving rise to this lack of clarity and proposes that the Delaware courts apply the policy underlying Article 8 of the Delaware Uniform Commercial Code to validate stock in the hands of innocent purchasers for value in determining whether stock is void or voidable.*

The Delaware Supreme Court has stated that “[t]he issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly requires certainty in such matters.”<sup>1</sup> Accordingly, Delaware courts demand compliance with the statutory formalities governing the issuance of stock.<sup>2</sup> Where corporations comply with such formalities, the law affords certainty that the stock is valid. Where corporations do not comply with such formalities, however, the consequences can be far less certain.

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\* C. Stephen Bigler is a director, and Seth Barrett Tillman is an associate, at Richards, Layton & Finger, P.A., Wilmington, Delaware. Richards, Layton & Finger acted as counsel in some of the cases discussed herein, but the opinions expressed in this Article are those of the authors and do not represent the views of Richards, Layton & Finger or its clients. The authors thank Donald A. Bussard for his helpful comments on earlier drafts of this Article.

1. *Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991), *rev'g* C.A. No. 11185, 1990 WL 28979 (Del. Ch. Mar. 15, 1990).

2. *See, e.g., id.*; *MBKS Co. Ltd. v. Reddy*, 924 A.2d 965, 972 (Del. Ch. 2007), *aff'd*, 945 A.2d 1080 (Del. 2008); *see also infra* notes 159–74 and accompanying text (discussing fiduciary duties of the board in regard to stock issuance).

issuance of some of the outstanding stock. Examples of such omissions and defects are limitless, but not infrequently found examples include the absence of board resolutions authorizing the issuance of stock shown by the transfer books to have been issued, the absence of evidence that issuances were properly authorized by the requisite votes of the board or, if required, by the stockholders, the absence of evidence that the consideration due to the corporation in exchange for the stock was in fact received, the issuance of more shares than were authorized by the certificate of incorporation at the time, the issuance of stock prior to the filing of the charter amendment or certificate of designations authorizing or creating the stock, and similar procedural and substantive irregularities. Not infrequently, these defects occurred some time ago, and the stock in question may have changed hands multiple times since issuance.

Confronted with such irregularities, most corporate lawyers' first instinct would likely be to attempt to correct the defect through board and, if necessary, stockholder ratification of the defective issuance, with the intent of putting the parties in the positions they thought they were in prior to discovering the irregularity. However, Delaware courts have not always viewed defects in stock issuances as being curable by ratification. In a number of leading cases, the Delaware Supreme Court has treated the statutory formalities for the issuance of stock as substantive prerequisites to the validity of the stock being issued, and the court has determined that failure to comply with such formalities renders the stock in question void.<sup>3</sup> A finding that stock is void means that defects in it cannot be cured, whether by ratification or otherwise.<sup>4</sup> Thus, practitioners finding defects in stock issuances are put in the uncomfortable position of having to make a judgment whether the defect is one that renders the stock void, in which case ratification is not an option, or voidable, in which case ratification is an option. Unfortunately, the decisions issued by the Delaware courts have not afforded certainty in this critical area. Indeed, the Court of Chancery acknowledged in a recent decision that although "Delaware law is replete with cases" discussing the void-voidable distinction, the law as to when and whether a defective stock issuance is curable "is not as clear as it could be."<sup>5</sup>

This Article analyzes the reasons for this lack of clarity and proposes some solutions that would benefit buyers and sellers of corporate stock. We begin by examining the legal requirements applicable to stock issuances. Next, we discuss the foundation of the doctrinal distinction between void and voidable stock. We then discuss the cases where courts have found stock to have *not* been issued in accordance with the legal requirements applicable to stock issuances, and whether such finding has resulted in the stock being found void or voidable. We also consider the purposes, principles, and policies of certain provisions of Article 8 of the

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3. See, e.g., *infra* notes 114–36 and accompanying text (discussing *Staar Surgical Co. v. Waggoner*, *supra* note 1).

4. See, e.g., *infra* note 75 and accompanying text (quoting holding of *Triplex Shoe Co. v. Rice & Hutchins, Inc.*, 152 A. 342, 347–48 (Del. 1930)).

5. *MBKS*, 924 A.2d at 973.

Delaware Uniform Commercial Code (the “DUCC”) designed to validate, in most circumstances, certain defects in stock in the hands of innocent purchasers for value. Interestingly, these provisions of the DUCC have not been frequently discussed in the court cases that have considered whether stock is void or voidable, and the courts that have discussed them refer to them as setting forth an equitable rather than a legal principle—which is ultimately not helpful to corporate lawyers who opine on legal, not equitable, matters.<sup>6</sup>

In conclusion, we suggest that the policy underlying Article 8 of the DUCC to validate stock in the hands of innocent purchasers for value, notwithstanding technical defects in its issuance, should be recognized as a principle of law, not solely as a principle of equity, and should be applied by the Delaware courts as such. As a result, in situations covered by the DUCC, technical defects relating to statutory formalities should not lead to a finding of void stock, but at worst to a finding of voidable stock. Cure or ratification should be permitted except in cases where the issuance violates the directors’ duty of loyalty or otherwise would be inequitable. Such a rule would allow practitioners to opine as to the validity of a corporation’s outstanding stock where the stock was issued defectively but the defect cured, subject to a standard exception for breaches of fiduciary duties and other inequitable circumstances, and would eliminate the risk that stock held in the trading markets or otherwise held by innocent purchasers for value might be deemed void.

#### DELAWARE LAW APPLICABLE TO STOCK ISSUANCES

The statutory framework providing for the issuance of stock in a Delaware corporation is found in sections 151 through 169 of the General Corporation Law of the State of Delaware (the “DGCL”). However, those provisions must be read “*pari materia*” with section 141(a),<sup>7</sup> providing that the “business and affairs of every corporation . . . shall be managed by or under the direction of . . . [the] board of directors.”<sup>8</sup> “Taken together,” these provisions of the DGCL “are calculated to advance two fundamental policies of the [c]orporation [l]aw: (1) to consolidate in [the corporation’s] board of directors the exclusive authority to govern and regulate a

6. See DONALD W. GLAZER ET AL., *GLAZER AND FITZGIBBON ON LEGAL OPINIONS* § 9.9, at 260–61 (2d ed. 2001) (“Equitable Principles Limitation”). As Glazer and Fitzgibbon write:

Even if as a legal matter a party’s rights under an agreement are valid and binding, a court might decline to enforce them if to do so would be inequitable under the circumstances. Because the opinion preparers cannot reasonably be expected to address those circumstances, the equitable principles limitation excludes from the opinion the possibility that a court might not enforce the agreement based on general principles of equity.

*Id.* For a further discussion of the equitable principles limitation in opinion writing, see *Third-Party “Closing” Opinions: A Report of the TriBar Opinion Committee*, 53 BUS. LAW. 591, 625 (1998) (section 3.3.4). See also *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (holding that a board’s facially legal use of a bylaw to shorten the time available for stockholders to conduct a proxy contest was inequitable, and thus impermissible).

7. *Grimes v. Alton, Inc.*, 804 A.2d 256, 260 (Del. 2002).

8. DEL. CODE ANN. tit. 8, § 141(a) (2001).

corporation's capital structure; and (2) to ensure certainty in the instruments upon which the corporation's capital structure is based.<sup>9</sup> As a result, Delaware courts require "strict adherence to statutory formality in matters relating to the issuance of capital stock. . . . Delaware's statutory structure implements these policies through a clear and easily followed legal roadmap of statutory provisions."<sup>10</sup>

A Delaware corporation may "issue [one] or more classes of stock or [one] or more series of stock within any class."<sup>11</sup> The characteristics of the various classes and series of stock, including voting rights and economic rights—e.g., dividend rights, liquidation rights, conversion rights, and redemption rights—must be set forth in the certificate of incorporation,<sup>12</sup> in amendments to the certificate,<sup>13</sup> or in resolutions "adopted by the board of directors pursuant to authority expressly vested in [the board] by the provisions of its certificate of incorporation" (i.e., so-called blank check authority).<sup>14</sup> Where the certificate (or any amendment to the certificate) provides for the creation of a class of stock, the certificate (or any amendment) must state the number of authorized shares for that class (and if more than one class, the total number of authorized shares of all classes of stock collectively).<sup>15</sup> Where the board is expressly granted blank check authority in its certificate, the board adopts a resolution setting forth the "powers, designations, preferences and relative, participating, optional or other rights, if any, or the qualifications, limitations or restrictions thereof, if any" of the stock, and then files a

9. *Grimes*, 804 A.2d at 260 (citing *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531, 538–39 (Del. Ch. 1999), *aff'd*, 748 A.2d 913 (Del. 2000) (unpublished table decision)). For a discussion of *Kalageorgi*, see *infra* notes 137–58 and accompanying text.

10. *Grimes*, 804 A.2d at 260 (internal quotation marks omitted). Because the failure to comply with the statutory framework (and, possibly, equitable considerations, see *Adlerstein v. Wertheimer, C.A. No. 19101*, 2002 WL 205684, at \*11 (Del. Ch. Jan. 25, 2002)) might lead to a judicial finding that issued stock is invalid, would-be stockholders, before parting with consideration, frequently demand opinions in regard to whether an issuance of stock is "duly authorized," "validly issued," "fully paid," and "nonassessable." See generally *Third-Party "Closing" Opinions*, *supra* note 6. Such opinions may be requested in regard to initial offerings or in regard to previously issued shares. *Id.* at 1 n.1. For a discussion of *Adlerstein*, see *infra* notes 159–74 and accompanying text.

11. DEL. CODE ANN. tit. 8, § 151(a) (2001); see also *id.* § 102(a)(4).

12. See *id.* The certificate of incorporation is sometimes referred to as the "charter." The terms are interchangeable.

13. See DEL. CODE ANN. tit. 8, § 151(a) (2001); see also *id.* § 102(a)(4).

14. DEL. CODE ANN. tit. 8, § 151(a) (2001). In the first instance, the characteristics of the various classes and series of stock are set by the incorporator or incorporators with their initial filing of the certificate of incorporation. *Id.* §§ 102, 103 (2001 & Supp. 2006).

15. See DEL. CODE ANN. tit. 8, § 102(a)(4) (2001); see also *infra* note 136. If the corporation has not received any payment for any of its stock, and if directors were neither named in the original certificate nor elected, then a majority of the incorporators may amend the certificate. See DEL. CODE ANN. tit. 8, § 241 (2001). Furthermore, if the corporation has not received any payment for any of its stock, and if directors either were named in the original certificate or have been elected and qualified, then a majority of the directors may amend the certificate. See *id.* On the other hand, once the corporation has received payment for any of its capital stock, amendments to the certificate must conform to the (more complex) procedures mandated in section 242. See *id.* § 242(a). Procedurally, in order to amend the certificate, the board must adopt a resolution setting forth the proposed amendment, declare its advisability, and provide for stockholder consideration either at a special meeting or at the next annual meeting. See *id.* § 242. If a majority of the voting power of the outstanding stock entitled to vote (and a majority of any class or series having a right to vote separately) votes in favor of the proposed amendment, then the amendment is filed in compliance with section 103. *Id.*

certificate of designations setting forth the resolution and the number of authorized shares as to which the resolution applies.<sup>16</sup> “This statutory scheme consistently requires board approval and a writing” when the board exercises its blank check authority.<sup>17</sup> The original certificate and any amendments thereto, and any certificate of designations adopted pursuant to the board’s blank check authority, must be filed with the Delaware Secretary of State in compliance with section 103.<sup>18</sup> The absence of a board resolution or the section 103 filing has been described as a fundamental defect.<sup>19</sup>

Having created a class or series of stock, the board proceeds to issue the stock to prospective purchasers.<sup>20</sup> The directors have a non-delegable duty<sup>21</sup> to fix the consideration for the sale of any company stock.<sup>22</sup> The board has discretion<sup>23</sup> in regard to the timing of such sales, and it may sell as many shares as are authorized in the governing certificate, amendment to the certificate, or certificate of designations (or amendment thereto) and that have not been issued, subscribed for, or otherwise committed to be issued.<sup>24</sup> Where the corporation has sold or granted stock options, warrants, or other convertible securities, the number of shares available for issuance is reduced by the number of shares reserved for issuance upon conversion or exercise of these securities.<sup>25</sup>

16. DEL. CODE ANN. tit. 8, § 151(g) (2001).

17. *Grimes v. Alton, Inc.*, 804 A.2d 256, 260 (Del. 2002).

18. See DEL. CODE ANN. tit. 8, § 103 (2001 & Supp. 2006); see also *supra* note 16. The simple overview provided in *supra* notes 11–17 and the accompanying text does not deal with notice, quorum, or majority voting requirements for either valid board action or valid stockholder action. Nor does it describe board or stockholder action by written consent.

19. See *Liebermann v. Frangiosa*, 844 A.2d 992, 1006 (Del. Ch. 2002).

20. See DEL. CODE ANN. tit. 8, §§ 152, 153 (2001 & Supp. 2006).

21. See *id.*; *Grimes*, 804 A.2d at 261 & nn.9–10 (listing authorities). But cf. DEL. CODE ANN. tit. 8, § 153(d) (2001) (providing for stockholders to determine the consideration to be received for capital stock if that power is reserved to the stockholders in the certificate).

22. Pre-2004 Delaware case law relating to stock issuances was influenced by former Article 9, section 3, of the Delaware Constitution, which provided: “No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation.” DEL. CONST. OF 1897 art. IX, § 3, *repealed by* 74 Del. Laws ch. 281, § 1 (H.B. 399) (June 16, 2004). Under this prior constitutional provision, stock could only be issued for cash, property, or services rendered, i.e., past services. This constitutional provision was repealed in 2004. Contemporaneous with the repeal, section 152 of the DGCL was amended and provides that the “board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof.” DEL. CODE ANN. tit. 8, § 152 (Supp. 2006). Moreover, where the board elects to receive non-cash consideration for stock, its judgment in regard to the value of the non-cash consideration received is “conclusive” in the absence of “actual fraud.” *Id.*

23. Board exercise of statutory discretion is, of course, bounded by judicial glosses as to the exercise of such discretion in conformity with common law fiduciary duties running to stockholders and to the corporation. See generally *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (holding that a board’s facially legal use of a bylaw to shorten the time available for stockholders to conduct a proxy contest was inequitable, and thus impermissible); Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 DEL. L. REV. 1, 9 (2005) (“[By the 1990s, it] was no longer sufficient to ask if the exercise of power by corporate fiduciaries conformed to the corporate statute, the certificate of incorporation or the by-laws. Now it also was necessary to ask whether that exercise of power was fair and equitable to the investors who were adversely affected by the decision.”).

24. See DEL. CODE ANN. tit. 8, § 161 (2001).

25. *Id.*; see also *Hildreth v. Castle Dental Ctrs., Inc.*, 939 A.2d 1281, 1283–84 (Del. 2007) (holding

With regard to every step described above, the corporation, its board, or its stockholders may fail to adhere to these statutory formalities. For example, the corporation might create or issue a series or class of stock having rights, powers and preferences, and qualifications, limitations, and restrictions that are inconsistent with the statutory framework or inconsistent with the corporation's certificate.<sup>26</sup> Alternatively, the series or class may be of a type that is authorized, but the corporation sold stock in excess of the number of authorized shares.<sup>27</sup> The directors or stockholders or both may fail to comply with the procedural formalities for valid board or stockholder action to authorize the stock.<sup>28</sup> The directors and stockholders may act as required, but an officer may not make the required filing with the Delaware Secretary of State certifying that the required actions were taken.<sup>29</sup> The corporation's certificate might lack substantive terms providing for the creation of stock or may otherwise be inconsistent with the DGCL.<sup>30</sup> As explained below, failure to comply with these formalities may put the validity of the stock into doubt. In some circumstances, courts have declared stock void for failing to conform with the formalities of the DGCL.<sup>31</sup> In other circumstances, the stock remains valid, but some limitation or right associated with the stock is voided.<sup>32</sup> It also has been possible in some cases to ratify or cure retroactively

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that preferred stock was not void, although preferred shares were unable to convert into common stock because of the absence of authorized (non-issued) common shares, thereby rendering the conversion rights of the stock unenforceable).

26. See, e.g., *Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) (finding stock "invalid and void" where the stock purportedly had supermajority voting rights but the power of the board to issue stock with such rights was not provided for in the charter), *rev'g* C.A. No. 11185, 1990 WL 28979 (Del. Ch. Mar. 15, 1990). See generally *Waggoner v. Laster*, 581 A.2d 1127 (Del. 1990).

27. Cf. 1 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 292 (1923) ("Certificates of stock issued in excess of . . . the full authorized capital stock of the corporation represent overissued stock. Such stock is spurious and wholly void. . . . Overissued or spurious stock may, however, it seems, be legalized by a subsequent legal increase of the capital stock.")

28. See, e.g., *Liebermann v. Frangiosa*, 844 A.2d 992, 1004–07 (Del. Ch. 2002) (holding preferred stock "invalid" for failure to comply with section 151(g), i.e., absence of board vote approving certificate amendment or certificate of designations).

29. See, e.g., DEL. CODE ANN. tit. 8, § 242(b)(1) (2001) (requiring a filing with the Delaware Secretary of State before a charter amendment "become[s] effective"); *id.* § 151(g) (requiring a filing with the Delaware Secretary of State before board resolutions designating stock pursuant to blank check authority "become effective"); *cf.* *Siegman v. Palomar Med. Techs., Inc.*, C.A. No. 15894, 1998 WL 118201, at \*4–6 (Del. Ch. Mar. 9, 1998) (permitting section 103(f) certificate of correction filing to take retroactive effect, thereby validating preferred stock initially issued by the board in excess of express authority granted in the charter); *Rice & Hutchins, Inc. v. Triplex Shoe Co.*, 147 A. 317, 321 (Del. Ch. 1929) ("Those who had charge of the corporation proceeded correctly upon the theory that the amendment was not a part of the corporate charter until it was filed in January, 1922, for in the interval they continued to issue more of the original preferred and common stock."), *aff'd*, 152 A. 342 (Del. 1930).

30. See generally TriBar Opinion Comm., *Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock*, 63 BUS. LAW. 921, 921–23 (2008).

31. See, e.g., *infra* note 128 (finding stock void where granted without conforming to section 151).

32. Compare *Loew's Theatres, Inc. v. Commercial Credit Co.*, 243 A.2d 78, 81 (Del. Ch. 1968) (finding void a charter provision purporting to eliminate section 220 inspection rights, thereby expanding the stockholders' rights), with *Hildreth v. Castle Dental Ctrs., Inc.*, 939 A.2d 1281, 1283–84 (Del. 2007) (holding that preferred stock was not void, although preferred shares were unable to convert into common stock because of the absence of authorized (non-issued) common shares, thereby limiting the preferred stockholders' rights).

the prior failure to comply with the formalities.<sup>33</sup> The case law in this area is unsettled.

### THE VOID-VOIDABLE DISTINCTION UNDER DELAWARE LAW

Void acts include illegal acts, acts against public policy, and actions beyond the authority of the corporation under its charter.<sup>34</sup> Such actions are often described as “ultra vires.”<sup>35</sup> Voidable acts, on the other hand, are corporate actions that are within the ambit of the corporation’s power or authority but were taken absent compliance with corporate formalities.<sup>36</sup> “If the stock is voidable, the corporation normally has the right [or power] to void and cancel the shares. If the stock is void, [cancellation] is not necessary as the stock is usually considered void *ab initio*.”<sup>37</sup> Where the corporation cancels voidable stock, the corporation must return to the (non-stockholder) party “all monies paid . . . for those shares.”<sup>38</sup> Generally, a party who paid for void stock is likewise entitled to a similar recovery.<sup>39</sup>

33. See, e.g., *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531, 539–40 (Del. Ch. 1999), *aff’d*, 748 A.2d 913 (Del. 2000).

34. See *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 896 & n.59 (Del. Ch. 1999). Although a void act is a nullity and incapable (as a doctrinal matter) of ratification, a corporation whose charter is declared “void” for failure to pay state franchise taxes is not an absolute nullity, and the corporation’s charter may be reinstated after-the-fact when taxes are paid. See DEL. CODE ANN. tit. 8, § 510 (Supp. 2006); *Wax v. Riverview Cemetery Co.*, 24 A.2d 431, 436 (Del. Super. Ct. 1942); see also *infra* notes 35–39 and 64–74 and accompanying text.

35. See, e.g., *Harbor Fin. Partners*, 751 A.2d at 894–98; cf. DEL. CODE ANN. tit. 8, § 124 (2001) (placing procedural and standing-related restrictions on who may bring an action to enjoin corporate action or who may seek damages for corporate action where the corporation allegedly lacked capacity or allegedly lacked the power to take the contested action).

36. See, e.g., *Harbor Fin. Partners*, 751 A.2d at 896 (“[I]f directors who could not lawfully effect a transaction without stockholder approval did so anyway, and the requisite approval of the stockholders was later attained, the transaction is deemed fully ratified because the subsequent approval of the stockholders cured the defect.”).

37. *MBKS Co. Ltd. v. Reddy*, 924 A.2d 965, 973 (Del. Ch. 2007), *aff’d*, 945 A.2d 1080 (Del. 2008). *But cf. id.* at 976 (explaining that where the company has made clear its intent to void a party’s stock, and where the court has held that that stock is either void or voidable, the company must actively move the court to cancel the shares); *id.* (noting that “cancellation is the proper remedy” for void stock (internal quotation marks omitted)).

38. *Id.* at 976; *Rice & Hutchins, Inc. v. Triplex Shoe Co.*, 147 A. 317, 324 (Del. Ch. 1929), *aff’d*, 152 A. 342 (Del. 1930). Whether one conceives of this payment as recoupment, restitution, or righting the unjust enrichment that the corporation might otherwise receive, it would seem to follow that the (non-stockholder) claimant is entitled to interest on the monies paid for the cancelled stock, although from when interest would run might depend on the equities. See *infra* note 39; cf. DEL. CODE ANN. tit. 6, § 8-210(d) (2005) (mandating that interest runs from the demand in the overissuance context).

There is a statutory basis for the position that the stockholder could recover *more* than what it paid. See 8 LARRY LAWRENCE, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 8-104:7, at 59 (3d ed. 1996) (“The buyer [of overissued shares where the overissuance is not cured] has the right to tender the overissued stock to the corporation, obtain a refund of the purchase price that he or she last purchaser paid as well as any other damages suffered thereby.” (emphasis added)). The treatise was discussing U.C.C. section 8-104. For the substance of this provision, see DEL. CODE ANN. tit. 6, § 8-210 (2005), which we discuss *infra* at notes 218–21 and accompanying text.

39. See *Triplex Shoe Co. v. Rice & Hutchins, Inc.*, 152 A. 342, 348 (Del. 1930) (“A person may rescind his contract to subscribe for or purchase [void] stock and recover back what he has paid for it . . . .” (quoting FLETCHER’S CYCLOPEDIA)). On the other hand, if the party who purchased the void stock was a corporate insider, particularly one with control over the stock issuance process, if the

One key difference between void and voidable stock is that the former cannot vote, but the latter can, at least in some instances.<sup>40</sup> However, from the practitioner's standpoint in the context of reviewing stock issuances, the most important distinction<sup>41</sup> between void and voidable acts is that void acts, as a general matter, are not ratifiable for the simple reason that neither stockholders nor directors nor both acting together can consent to do what was beyond the power of the corporation to do in the first instance.<sup>42</sup> Voidable acts, on the other hand, are ratifiable, the theory being that the act of ratification cures a procedural defect in an act that was otherwise within the power of the corporation to take had the relevant corporate actor or actors complied with their statutory and fiduciary duties in the first instance.<sup>43</sup> Thus, if a problem is one that renders the stock void, it cannot be cured. In a public company, the conclusion that publicly traded stock may be void can lead to difficult, expensive, and complicated choices.<sup>44</sup>

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party purchasing the void stock acted in violation of its fiduciary duties (or aided and abetted others in doing so), or if the party who purchased the void stock had notice of its dubious bona fides at the time it made the purchase, the party's claim for recoupment or restitution may be difficult to vindicate. See *Liebermann v. Frangiosa*, 844 A.2d 992, 1005, 1009 (Del. Ch. 2002) (holding that although equitable claims will not validate stock "issued and sold" absent statutory compliance, "the claimant might . . . have other recompense if, for example, he believed he had purchased valid stock and had not in fact done so" (emphasis added)); *infra* note 129; *cf. infra* note 41 (quoting *MBKS*, 924 A.2d at 973); *Triplex*, 152 A. at 349 (noting that party would not be estopped from seeking a determination that stock is void where it "did not participate in the illegal issuance"). *But see* *Reich Family L.P. v. McDermott, Will & Emery, C.A. No. 101921-03* (N.Y. Sup. Ct. Oct. 29, 2003), available at <http://www.abanet.org/buslaw/newsletter/0018/materials/20031001000000.pdf> (denominating limited partnership's investment in void stock, in reliance on law firm's opinion letter, "worthless," indicating that the investor had no remedy against the issuer).

40. See *Byrne v. Lord*, C.A. No. 14824, 1996 WL 361503, at \*4 (Del. Ch. June 11, 1996). The court stated:

It is true, as plaintiffs contend, if the stock is void, then cancellation is the proper remedy. However, . . . if the stock is voidable then a Court may grant that form of relief that is to be most in accord with all of the equities of the case. Thus, the key question in determining whether BAI had the right to vote the BAI Shares is whether the stock is void or voidable.

*Id.* (citations and quotation marks omitted).

41. *But see* *MBKS*, 924 A.2d at 973 ("Whether the [status of] stock [disputed in litigation] is void or voidable is frequently of no consequence.").

42. *But cf.* 1 *RODMAN WARD, JR. ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW* § 144.8.2.1, at GCL-IV-263 (Supp. 2007) (stating "[o]ther than void acts precluded by public policy concerns, fully informed [unanimous] stockholder ratification will insulate a board action from subsequent legal attack by stockholders") [hereinafter "*WARD, FOLK ON THE DGCL*"]. The effect of a stockholder vote, as described here, might be better described as estoppel, rather than ratification.

43. See *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 898 (Del. Ch. 1999). *But cf.* *WARD, FOLK ON THE DGCL*, *supra* note 42, § 144.8.2.2, at GCL-IV-259 ("[V]oidable acts are generally defined as acts performed in the corporation's interest but beyond management's explicit authority. For example, breaches of the duty of care are voidable rather than void and can be entirely extinguished by informed stockholder ratification.").

44. See, e.g., *VASCO DATA SECURITY INT'L, INC., PROSPECTUS: OFFER TO EXCHANGE SHARES, OPTIONS AND WARRANTS FOR VASCO CORP. SHARES, OPTIONS AND WARRANTS (AND ASSOCIATED CORPORATE MATTER CLAIMS)* (Feb. 9, 1998); see also *Vasco Data Security Int'l, Inc., Amendment No. 3 to Form S-4 Registration Statement Under the Securities Act of 1933 (Form S-4)* (Jan. 27, 1998) (describing exchange offer). An exchange offer for all the outstanding stock, such as was used by Vasco to attempt to resolve questions as to the validity of its outstanding stock after defects in its issuance were discovered, is an expensive and cumbersome procedure for a company with more than a few stockholders and only provides a



### THE FUZZY APPLICATION OF THE VOID-VOIDABLE DISTINCTION IN THE CASE LAW

Given the critical importance of the void-voidable distinction to the validity of stock, one would hope that the case law would provide practitioner clear guidelines from which to determine what types of defects render issuances void and thus cannot be cured and what types of defects only render issuances voidable and thus can be cured. As the cases discussed below reveal, however, the courts do not establish clear lines.

Some courts attempt to distinguish procedural defects where the corporation has the power to issue the stock but that power is exercised irregularly from situations where the corporation has no power to issue the stock at all. These courts have found stock voidable where they have perceived the first set of circumstances and void where they have perceived the latter. However, the cases do not provide clear guidance as to what types of irregularities in the issuance of stock are substantive, thus rendering the stock void, and what types of irregularities are procedural, thus rendering the stock voidable.

#### *TRIPLEX SHOE CO. v. RICE & HUTCHINS, INC.*

The leading decision of the Delaware courts addressing the void-voidable distinction with respect to stock is *Triplex Shoe Co. v. Rice & Hutchins, Inc.*<sup>45</sup> In *Triplex*, the Delaware Supreme Court affirmed the decision of the Court of Chancery that all shares of common stock issued by Triplex Shoe Company (“Triplex” or the “corporation”) were invalid. In *Triplex*, petitioner-appellee Rice & Hutchins, the purchaser of shares of preferred stock of the corporation, contested the election of the corporation’s board of directors at its 1929 annual meeting. At the center of the challenge were the shares of common stock voted at that meeting. If that common stock was valid, then the “Dillman” block of directors was rightfully elected (as declared at the meeting). On the other hand, if the common stock was invalid, then voting control (ostensibly) resided in the holders of the preferred stock (the only remaining class of stockholders), and the Rice & Hutchins block of directors belonged in office. The Court of Chancery held for the Rice & Hutchins slate; its decision was affirmed on appeal to the Delaware Supreme Court.

In *Triplex*, the original certificate of incorporation of the corporation provided “that its total authorized capital stock should be one hundred and fifty thousand dollars, ‘divided into seven hundred and fifty preferred shares, of the par value

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complete solution to the extent all stockholders participate. Generally, an exchange offer of this type takes the invalid (or purportedly invalid) class or series of stock off the market by asking the holders to voluntarily exchange their defective stock for a *valid* newly issued class or series of stock having characteristics identical to the class or series being surrendered, except with regard to validity. As part of this exchange, the holder of the defective stock gives the issuer a release of claims relating to the issuance to it of defective stock, which serves as independent consideration for the valid issuance of the new stock.

45. 152 A. 342 (Del. 1930), *aff’g* 147 A. 317 (Del. Ch. 1929).

of one hundred dollars (\$100) each. And the remaining seventy-five thousand dollars in shares of common stock without any par value.”<sup>46</sup> The certificate failed to state any of the preferred stock’s preferences.<sup>47</sup> Over the course of the next fourteen months, shares of common stock were issued to corporate officers and others.<sup>48</sup> Thereafter, at a special meeting of stockholders in 1921, the stockholders, including all outstanding common and preferred, unanimously adopted a resolution amending the certificate.<sup>49</sup> The amended certificate specified the preferences of the preferred shares and vested all voting power in the holders of the common stock. Further, the amended certificate specified that 1,075 shares of common stock were authorized. However, the amended certificate was not filed with the Secretary of State until nearly a year later.<sup>50</sup> Roughly two months after the stockholders’ meeting at which the stockholders approved the amended certificate but prior to its filing with the Delaware Secretary of State, Rice & Hutchins purchased its first block of preferred stock (and received some shares of common stock as a bonus).<sup>51</sup> After the amended certificate was filed, Rice & Hutchins on three separate occasions purchased additional blocks of preferred stock (and each time it received some shares of common stock as a bonus).<sup>52</sup>

Because the original certificate specified neither the number of authorized shares of common stock nor the par value of those shares, it was impossible, based on the language of the certificate, to determine, at the time of incorporation and prior to the certificate amendment, how many shares of common stock the corporation had been authorized to issue. The absence of such language was highly significant in light of the fact that, at that time, the DGCL mandated that “with respect to no par value stock [such as that at issue in *Triplex*], the certificate shall state the total number of shares authorized.”<sup>53</sup> Thus, the charter in *Triplex* did not contain the

46. 152 A. at 343 (quoting Article Four of the certificate of incorporation). *Triplex* was incorporated on December 13, 1919. *Id.*

47. *Id.*

48. *Id.* at 343–44.

49. *Id.* at 344. The special meeting was on February 28, 1921. *See id.* With regard to this meeting, the court explained that:

It is reasonable to believe that the appellants knew that all the no par value stock attempted to be issued under the original certificate of incorporation was invalid because the stockholders . . . authorized an amendment to the certificate [fourteen months later], and manifestly one reason for the amendment was to validate the stock that had been issued without corporate authority.

*Id.* at 347.

50. *Id.* at 344. The amended certificate was filed with the Delaware Secretary of State on January 20, 1922. *See id.* On January 24, 1922, the stockholders held another annual meeting. According to one set of minutes, the stockholders adopted a resolution ratifying the distribution of shares made prior to the amendment of the certificate at the special meeting in 1921. *See id.* There was some dispute in the record as to whether this stockholder vote passed. The Court of Chancery held that the resolution had not been adopted. *See Triplex*, 147 A. at 322. This factual finding was not disturbed on appeal.

51. *See Triplex*, 152 A. at 344. Rice & Hutchins purchased its first block of stock on April 5, 1921. *See id.*

52. *See id.* (noting April 1, 1922, May 15, 1922, and January 1, 1925, purchases by Rice & Hutchins).

53. *Id.* at 345 (citing 35 Del. Laws ch. 85, § 4(4) (H.B. 226) (Mar. 2, 1927), amended by DEL. CODE ANN. tit. 8, § 102(a)(4) (2001)); *See infra* note 136. The *Triplex* court also noted that the certificate’s

provisions necessary to properly authorize stock under the DGCL.<sup>54</sup> As such, there was no properly authorized common stock to issue.<sup>55</sup>

Rice & Hutchins discovered this defect in the common stock shortly before the 1929 meeting, objected to the holders of common stock voting at the meeting, but were overruled by those conducting the meeting.<sup>56</sup> The lawsuit followed.<sup>57</sup> Rice & Hutchins had a powerful motive to argue for the invalidity of the common shares. Rice & Hutchins owned 263 of 943 outstanding shares of (what was ultimately determined to be invalid) common stock (with 1,075 shares of common stock purportedly authorized).<sup>58</sup> On the other hand, in regard to the preferred stock, Rice & Hutchins owned 1,149 of 1,560 outstanding shares (with 2,375 such shares authorized).<sup>59</sup> In other words, because the common stock was determined to be invalid, Rice & Hutchins became the majority stockholder.<sup>60</sup>

The Delaware Supreme Court ruled for Rice & Hutchins on three separate grounds. First, the court ruled that no common stock was “legally issued by the corporation under its original certificate of incorporation.”<sup>61</sup> Second, the court ruled that “the amendment to the certificate of incorporation which was authorized February 28, 1921 [at the stockholders’ special meeting], [failed to] validate the

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failure to state any preferences in regard to the preferred stock was also a violation of law. *See id.* Yet this defect did not lead to any declaration that the preferred stock was either void or voidable.

54. In *Hildreth v. Castle Dental Centers, Inc.*, 939 A.2d 1281, 1283 (Del. 2007), the Delaware Supreme Court restated the holdings of *Triplex* and *Waggoner*, discussed *infra*, as “stock issued without satisfying the requirements of 8 Del. C. § 151 is void.”

55. *See CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 170–71 (D.C. Cir.) (explaining that *Triplex* centered on the certificate’s failure to authorize the issuance and not on any statutory violation), supplemented by 331 F.3d 999 (D.C. Cir. 2003); *see also infra* notes 96 & 158; Edward B. Rock, *Encountering the Scarlet Woman of Wall Street: Speculative Comments at the End of the Century*, 2 THEORETICAL INQUIRIES L. 237, 251–52 (2001). Professor Rock wrote:

On the one hand, one can argue that the issuance of shares that are not authorized in the certificate of incorporation should be considered a legal nullity. . . . As it happens, under Delaware law, the first argument prevails [as opposed to an argument supporting the validation of stock, issued in contravention to the charter, in reliance on the apparent authority of the board]. Stock issued in violation of the certificate of incorporation is stock issued without authority of law and is, therefore, void and a nullity.

*Id.* at 251–52 (citing *Triplex*).

56. *Triplex*, 147 A. at 321–22.

57. *See id.*

58. *Triplex*, 152 A. at 344 (quoting certificate amendment providing for 1,075 authorized shares of common stock); *see also id.* at 320 (reporting 943 “alleged [outstanding] shares of no par common stock” appeared on the “stock register”). Rice and Hutchins were given, as bonuses for concurrent purchases of preferred stock, eighty-three shares of common stock on April 5, 1921, fifty on April 1, 1922, eighty on May 15, 1922, and fifty on January 1, 1925—a total of 263 shares of common stock. *Id.* at 344.

59. *Triplex*, 152 A. at 344 (quoting certificate amendment providing for 2,375 authorized preferred shares); *see also Triplex*, 147 A. at 320 (reporting 1,560 “shares of [outstanding] preferred stock” appeared on the “stock register”). Rice & Hutchins purchased 249 shares of preferred on April 5, 1921, 250 on April 1, 1922, 400 on May 15, 1922, and 250 on January 1, 1925—a total of 1,149 shares of preferred stock. *Id.* at 344.

60. *See id.*

61. *Triplex*, 152 A. at 345.

no par value [common] stock that was issued” prior to the amendment.<sup>62</sup> Third, no “[common] stock [was] legally issued after the amendment.”<sup>63</sup>

With regard to the shares of common stock issued prior to the certificate amendment, the court explained:

This was the law [with regard to no par stock] at the time the original certificate of incorporation was granted and we can see no answer to [petitioner’s] contention that the language of the certificate respecting the shares of common stock without par value was unauthorized by law, and therefore, inoperative. Certainly no authority or argument is needed to support the proposition that the authority of a corporation to issue stock is fixed by the law of the State which grants the authority, and neither the incorporators [n]or any other officers can change, modify or supplement the law in that regard. *The provision, therefore, in the certificate of incorporation that a certain part of the capital of the incorporation is in shares of common stock without any par value, without stating the number of [authorized] shares is not only unauthorized by any law of the State, and inoperative, but it is also meaningless in view of the law.*

Such being the case, we can see no escape from holding that the no par value stock attempted to be issued under the original certificate of incorporation was invalid stock.<sup>64</sup>

In other words, because the charter provision providing for the issuance of common stock did not comply with the DGCL, the corporation had no authority under the charter to issue common stock prior to the certificate’s amendment. All such stock was invalid.

Having found the common stock issued prior to the certificate amendment invalid, the court rejected the appellants’ defenses. The appellants argued that even if the stock were invalid, their voting rights could be asserted because the stock was de facto stock.<sup>65</sup> To this the court responded:

As to this point we think that if there is such stock as de facto stock, recognized by the law in any case, there could not be and has not been, in a case where the charter provision respecting the issuance of no par stock was wholly unauthorized by the law of the State which granted the charter, and where there has not been a compliance with the law under which the corporation was organized. If there was no authority at all for the issuance of the stock, certainly its purported or attempted issue could not impress upon it the character of any kind of stock that the law would recognize. It may be that appellants think there can be de facto stock because the law recognizes, under some circumstances, de facto corporations. But being clear that there was no de facto stock in the present case it would be unprofitable to state at length the reasons for the recognition of de facto corporations. . . .<sup>66</sup>

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62. *Id.* at 345, 347.

63. *Id.* at 345, 348–49.

64. *Id.* at 345 (emphasis added).

65. *See id.*

66. *Id.* at 345–46. Later courts have focused on the *Triplex* court’s “no authority at all for the issuance of the stock” language used here. But it is worth pointing out that the *Triplex* court seemed to recognize

The Court also found the stock invalid as a matter of public policy:

There is a very good reason for requiring a Delaware corporation to specify in its charter the number of no par value shares it is authorized to issue. The franchise tax law . . . calculates the tax due from corporations which are authorized to issue no par value shares, at a certain rate upon each share of stock which the corporation is authorized in its charter to issue. This is a sufficient reason for holding that the doctrine of de facto stock, if any there be, could not apply to this case where the charter is silent or meaningless in its reference to the number of such shares the corporation was authorized to issue.<sup>67</sup>

While the tax code may well be the reason for the statutory requirement at issue, such concerns could have been addressed by assessing the corporation retroactively; voiding the stock in the hands of third parties seems unnecessary.<sup>68</sup>

With regard to the void-voidable distinction, the court explained that:

[A] distinction [has been] recognized [in the case law] between declaring the issue of stock to be void and declaring that the contract to issue stock without statutory consideration is void. In [those latter cases], the company had the corporate power to issue the stock, the Court holding that the only act that was unlawful was its issuance for an inadequate consideration.

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... We have seen no case in which it was held that stock issued contrary to law might be regarded as valid outstanding stock when there was no grant from the state to issue the kind of stock that was issued. Such stock, when attempted to be issued, must be treated as void, and is a nullity.<sup>69</sup>

In other words, a failure to pay lawful consideration, although illegal, is problematic only with respect to contract law, as it is not indicative of any absence of corporate power under the authorizing statute to issue the stock. Illegalities with respect to contract law make stock voidable, but illegalities with respect to corporate law (at least with respect to issuance issues governed by corporate law), as in *Triplex*, may, depending on the nature of the violation, make stock

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that the conduct at issue here was both a charter violation and a statutory violation. The corporation's conduct violated the charter because it issued stock absent operative authority in the charter. The corporation's conduct violated the statute because the charter failed to comply with the statute.

<sup>67</sup>. *Id.* at 346.

<sup>68</sup>. Indeed, under the current statute, a corporation voided for nonpayment of taxes can be revived if it pays the back taxes and files a certificate of revival, and such revival should render stock issued during the void period valid. *See* DEL. CODE ANN. tit. 8, § 312 (2001 & Supp. 2006).

<sup>69</sup>. *Triplex*, 152 A. at 347. The court's suggested distinction between contract law and corporate law violations as determinative of whether stock is void or voidable is confusing. The DGCL has provisions governing the consideration that stockholders must pay for (non-treasury) stock issued by the corporation. One could fairly characterize violations of these provisions as either: (1) contract law violations in regard to lawful consideration, per *Triplex*, 152 A. 342; or (2) statutory violations of DGCL provisions controlling the issuance of stock. To put it another way, if one characterizes the wrong involved in inadequate consideration cases as one relating strictly to consideration and concomitantly characterizes the stock issued as a type the corporation has authority to issue, then such stock is merely voidable. On the other hand, if inadequate consideration is fixed by the board, bargained for, and paid, then one could characterize the issuance as a type the corporation has no authority to issue, i.e., stock issued absent compliance with the DGCL provisions governing consideration.

void.<sup>70</sup> It is interesting to note that the class of voidable contracts described by the *Triplex* court would have included (among others) contracts in violation of what were then certain constitutional requirements relating to inadequate or unlawful consideration.<sup>71</sup> Under *Triplex*, such contracts, in violation of (what were then) state constitutional requirements, may result in voidable stock.<sup>72</sup> In contrast, under *Triplex*, violations of statutory or charter norms—including those created by the legislature, by the charter, or by judicial decisions—in regard to fixing the number of authorized shares in the charter result in void stock.<sup>73</sup> Thus, the court determined that all the stock issued under the original *Triplex* certificate was invalid and void.<sup>74</sup>

The court then addressed the appellants' argument that the subsequent amendment to the certificate cured the prior irregularity caused by the poorly constructed provision of the original certificate governing the number of authorized shares of common stock. Here, too, the court found the stock void. The court held:

We are unable to see how the amendment could have made stock valid that was void because issued without any authority from the State. Such an amendment might cure certain irregularities, imperfections and defects in a stock issue that is authorized by the charter and laws of the State, but it does not seem to us that it can possibly relate back and validate a stock that was issued without any corporate authority. If the stock issue was void, a nullity, there was nothing to validate, nothing upon which the amendment could operate.

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The cases relied on by appellants to show the curative effect of an amendment to a charter are distinguishable, we think, either on the ground that in such cases the corporation had the power to issue the kind of stock that was issued, or on the ground of estoppel.<sup>75</sup>

While the words used by the Delaware Supreme Court are relatively clear, the court's reasoning is less clear. Because Rice & Hutchins purchased its shares after the *Triplex* certificate had been amended unanimously by all extant outstanding shares, common and preferred, one might think that the amendment by all interested parties should have been viewed as curing any problem with the stock

70. See *id.* at 346–47; see also *id.* at 349 (determining, in *Triplex*, that stock issued for unlawful consideration after the certificate amendment was “invalid” but not describing it as void).

71. See *supra* note 22 (describing pre- and post-2004 Delaware constitutional and statutory provisions governing the consideration required to be paid for corporate stock); cf. *Clark v. Airavada Corp.*, 12 F Supp. 2d 1114, 1120 (D. Nev. 1998) (holding that, where stock was issued for future services in violation of constitutional consideration requirements but par value was paid, the “stock was voidable, not void, because [the initial purchaser] paid valid consideration for the stated capital, but invalid consideration for the remainder”).

72. See *id.* (referring to Delaware constitutional provision governing the consideration to be paid for stock); *Triplex*, 152 A. at 346–47.

73. See *Triplex*, 152 A. at 347–48.

74. See *id.* at 348.

75. *Triplex*, 152 A. at 347–48 (emphasis added). Later courts have focused on the *Triplex* court's “issued without any corporate authority” language used here.

issue. It is true that Rice & Hutchins purchased its first block of shares after the stockholder vote on the certificate amendment but before the amendment had been filed. However, the court's analysis above states a categorical rule to the effect that void stock cannot be cured; it does not appear that the timing of the purchase of stock by Rice & Hutchins played any role in the legal analysis.<sup>76</sup> Moreover, Rice & Hutchins purchased two further blocks of (preferred and common) stock after the certificate amendment was filed. Certainly, at that point, it knew, or should have known, exactly what fractional interest in the equity of the corporation it had purchased under the then in-force as-amended certificate.<sup>77</sup> Absent inequitable circumstances, if there had been a fully informed unanimous stockholder vote, it

76. The lower court's opinion strongly suggests that its result was influenced by the self-interested nature of the vote, i.e., the vote may have been unanimous, but only insiders knew the purpose and legal consequences of the vote (or the vote's failure) vis-à-vis the shares held by the insiders. See *Triplex*, 147 A. at 317.

There is no evidence which contradicts that adduced by the petitioner to the effect that it never had knowledge of the facts upon which its present contentions touching [on] the invalidity of the common stock are based, until just preceding the annual meeting now under review, and that as soon as it became advised thereof objection to the validity of the common stock and its right to vote was presented by it and overruled by those conducting the meeting.

*Id.* at 321–22. The Delaware Supreme Court was less equivocal about what the petitioner might have known when it purchased its stock. See *Triplex*, 152 A. at 348 (“The resolution of amendment [to the certificate] . . . recited ‘that a question has arisen as to the validity of the stock by reason of the imperfections in the original certificate of incorporation.’”). However, the *Triplex* court also stated that it “is reasonable to believe that the appellants knew that all the no par value stock . . . was invalid” in light of the subsequent stockholders’ meeting to rectify the problem. *Id.* at 347. The court did not explain the significance of this fact. *Cf. id.* at 349 (“[T]he appellees did not participate in the illegal issuance of stock to the appellants under the original certificate of incorporation.”). Perhaps the court’s point was that although the stockholders (preferred and common) knew that the charter failed to conform to the DGCL, the preferred stockholders were not fully informed, i.e., they were not told that they were the only holders capable of voting on the proposed certificate amendment, or that, by allowing the common stockholders to vote on the amendment at the meeting, the preferred stockholders had been, in effect, misinformed in regard to their actual voting power. *Triplex*, 147 A. at 321 (“Such [common] stock had no right to vote.”). See also *supra* note 49; *infra* note 85.

77. This assumes that the as-amended certificate was actually in force. See *Triplex*, 152 A. at 347 (“We will assume then, that the amendment was legally adopted by the vote of the ‘preferred’ stock which was the only valid stock then outstanding.”). It is unclear why the court put *preferred* in quotation marks. Perhaps it was because, in contravention of the DGCL, no preferences with regard to the preferred stock were in the certificate prior to its amendment. See, e.g., *Telvest, Inc. v. Olson*, C.A. No. 5798, 1979 WL 1759 (Del. Ch. Mar. 8, 1979), *appeal denied*, 1979 WL 178117 (Del. Ch. Mar. 22, 1979). The court in *Telvest* stated:

Thus any supposed preference as to dividends or liquidation rights seems illusory at best. If any preference is created, it would seem to lie almost entirely in the voting rights. In this regard, *Staring v. Am. Hair & Felt Co.*, . . . 191 A. 887[1, 890–91] ([Del. Ch.] 1937) casts some doubt on the proposition that a stock can be classified as ‘special’ or ‘preferred’ under § 151 solely because it is given a favored voting position [i.e., absent preferential dividends or liquidation rights].

*Telvest*, 1979 WL 1759, at \*5. In other words, the *Triplex* preferred stock was a class of stock issued absent any grant from the state to issue that kind of stock. But the court was unwilling to hold that the preferred (like the common) was void or voidable. The two cases are distinguishable: at least with regard to the preferred stock, a calculation of the franchise tax owed the state was possible. *But cf. Shintom Co., Ltd. v. Audiovox Corp.*, C.A. No. 693-N, 2005 WL 1138740, at \*3 n.7 (Del. Ch. May 4, 2005) (“[T]he preferred stockholders must have some preferred right over the common, otherwise the stock is considered illusory.”), *aff’d*, 888 A.2d 225, 230 (Del. 2005) (same).

would have been a sensible result for the court to have held that the petitioner, which had purchased the corporation's stock after the stockholders had approved an amendment designed to cure prior defects, was estopped from seeking any remedy that voided its and others' shares.<sup>78</sup>

Appellants made the argument that courts have permitted corporations to cure or ratify overissuances, and that such overissuances were analogous to the facts of *Triplex*, where the stock was issued absent any authority under the charter and, therefore, in violation of the DGCL.<sup>79</sup> The court rejected this argument and held:

The following authorities cited by appellants hold that an unauthorized over-issue may afterwards be rendered valid by a duly authorized increase. 14 C.J. 404; Thompson on Corp. 3561; Cook on Corporations [§] 292 [(1923)]; *In re New Zealand Banking Corp.*, [(1868)] 3 Ch. 131 [(Ch. App.)], and *Murphy v. Braker*, 89 Hun. 387, 35 N.Y.S. 387 [(Sup. Ct. 1895)].

*But in the present case* the corporation had no power to issue the kind of stock that was attempted to be issued; the act was void and not merely voidable, and under practically all the authorities, it is incapable of being cured or validated by an attempted ratification by amendment or other subsequent proceeding.<sup>80</sup>

Here, the court explained that although overissuances relating strictly to the number of authorized shares can be cured, *Triplex*-type issuances of stock, an issuance where the corporation has no power at all to issue the disputed stock in the first instance, cannot be cured because such stock is void.

The *Triplex* court's holding is difficult to understand on several levels. First, the court provided no normative basis for holding, as a matter of law, that ratification is categorically impermissible in the context of facts and circumstances like those in *Triplex*. Particularly where, as in *Triplex*, the attempted ratification received unanimous stockholder support, it is difficult to understand what, if any, purposes, principles, or policies were advanced by the holding. Assuming the ratification was fully informed, who was being protected? From what?<sup>81</sup> Moreover, if the basis of such holding is legal and not equitable, it is difficult to understand the conceptual difference between the two types of issuance errors discussed by the court: overissuances and issuances absent any operative charter provision. Both situations involve issuance of more shares than are authorized—the only difference is that in one case some shares of the class purported to be issued are

78. See, e.g., *Brown v. Fenimore*, C.A. No. 4097, 1977 WL 2566, at \*3 n.1 (Del. Ch. Jan. 11, 1977) ("Shares which are not issued for adequate consideration [as required by statute] are not entitled to vote. However, Brown's acquiescence and participation in the issuance of stock to the Fenimores precludes consideration of this issue." (citing *Triplex*, 152 A. 342)); see also *Finch v. Warrior Cement Corp.*, 141 A. 54, 61 (Del. Ch. 1928) ("Acquiescence [or] participation in an issue of stock, without consideration or for an insufficient consideration, will bar the right of the assenting stockholder to complain against its issuance.").

79. *Triplex*, 152 A. at 348.

80. *Id.* (emphasis added).

81. As noted above, the lower court's decision strongly suggests that ratification was ineffective because of the equities. See *supra* note 76. However, the Delaware Supreme Court did not base its holding on equitable principles.



authorized, just not enough, and in the other case no shares of the class are authorized. It is not clear why legally that should make a difference. Every overissuance exceeding the number of authorized shares is beyond the authority of the corporation and, therefore, could be just as well characterized as an issuance absent any authority under the charter and under the DGCL.

Indeed, the authorities cited by the *Triplex* court do not rely on the void-voidable distinction at all. The *Cook* treatise, for instance, states:

Certificates of stock issued in excess of . . . the full authorized capital stock of the corporation represent overissued stock. Such stock is spurious and wholly void. . . . Overissued or spurious stock may, however, it seems, be legalized by a subsequent legal increase of the capital stock.<sup>82</sup>

The *Cook* treatise states that overissued stock could be validated notwithstanding that it was void (as opposed to voidable). Likewise, in *Murphy v. Baker*, the court examined a “fraudulent overissue of shares.”<sup>83</sup> In *Murphy*, the court explained that a stockholder possessing overissued shares would have his claim “cut off” either if “the number of shares which the corporation was authorized to issue [had] been increased according to law [subsequent to the overissuance] and [the stockholder possessing shares arising from the prior overissuance] had consented,” or if the number of issued shares had been reduced by the surrender of shares in conjunction with a waiver of the stockholder’s fraud claim.<sup>84</sup> The *Murphy* court’s dicta indicates that the overissuance could have been (in some circumstances) cured. The validity of overissued shares did not turn on the void-voidable distinction; rather, it turned on the consent of the holder of the overissued stock. These authorities thus seem to support the proposition that the unanimously passed certificate amendments in *Triplex* should have operated as a consent or a waiver in regard to any claim arising from the issuance and, concomitantly, cured the defects surrounding the issuance of the shares, at least where (as in *Triplex*) the stockholders were on notice of the purported defect being cured by stockholder action.<sup>85</sup> Indeed, in *In re New Zealand Banking Corp.*, the remaining case cited by the *Triplex* court, the court held that precisely such

82. 1 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 292 (1923) (citing *In re N.Z. Banking Corp.*, (1868) 3 Ch. 131, 138 (Ch. App.)—a case cited by the *Triplex* court); accord 14 C.J. Corporations § 547 (1919) (“Stock sought to be created in excess of the legalized capital stock is ultra vires and wholly void, and certificates therefor are void even in the hands of bona fide holders.] . . . An unauthorized overissue may afterward be rendered valid by a duly authorized increase . . .”). Thus, neither of these treatises is consistent with the court’s position in *Triplex*.

83. 35 N.Y.S. 387, 388 (Gen. Term 1895).

84. *Id.* at 389.

85. 18 C.J.S. Corporations § 143 (1990) (“Ratification is valid only if all material facts are known.”). It is not clear if the material facts include only the history of purported defects and the efforts made at curing the defects, or if the material facts extend also to the legal consequences that might take effect as a consequence of ratification by stockholders. For further discussion of what constitutes material facts, see *supra* notes 49 & 76; *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531, 536 n.6 (Del. Ch. 1999) (noting that plaintiff understood the “legal significance” of the fact that stock was issued without a unanimous written board consent, i.e., it was not validly authorized), *aff’d*, 748 A.2d 913 (Del. 2000).

knowledge *must* be imputed to stockholders as a matter of law.<sup>86</sup> And in that case too, there was no discussion of the void-voidable distinction in regard to stock overissuances.

Having found all common stock issued prior to the certificate's amendment "void," the court proceeded to find "invalid" all the common issued *after* the amendment.<sup>87</sup> Here the court noted two statutory violations in regard to the stock issued after the charter amendment. First, the DGCL (then in effect) required that the consideration for no par stock be fixed (either by the board if authorized by the certificate or by the stockholders) prior to the stock's issuance.<sup>88</sup> Because the price of the no par common stock had never been fixed by the board or by the stockholders, the entire issuance of common stock, both that issued before and after the amendment to the certificate, was "invalid."<sup>89</sup> The court explained, "It is a wise provision of the law that the consideration which must be paid for no par value stock shall be fixed by proper authority, because persons who have become stockholders, and have furnished the capital of the corporation, should know what must be paid for the no par value stock that is to be issued."<sup>90</sup> Second, the court determined that the stock issued to the defendants-appellants was "invalid"<sup>91</sup> because it was issued for unlawful consideration, i.e., future services, a form of consideration that was not then legal.<sup>92</sup>

With regard to these two statutory violations, which were unrelated to any charter provision, the court used the term "invalid" as opposed to "void." It is not clear that the two terms are co-extensive; it is possible that invalid stock (as opposed to void stock) *may* be capable of validation. "Void," as in "void" stock, is a term of art.<sup>93</sup> The *Triplex* court never expressly reached the question of whether the stock issued after the certificate amendment was capable of being cured or ratified by subsequent stockholder action.<sup>94</sup> The court's expansive language—that "the act [of issuance]

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86. See *N.Z. Banking Corp.*, 3 Ch. at 140 ("It is impossible not to impute to every shareholder [including the plaintiff] . . . the knowledge of what has been called the charter of documents under which the company was trading."). In *Triplex*, the resolution amending the charter put stockholders on express notice of possible defects in the charter. See *supra* note 76.

87. *Triplex*, 152 A. at 348–49.

88. See *id.* at 348.

89. *Id.* at 348–49.

90. *Id.* at 349.

91. *Id.*

92. See *supra* notes 22 & 71.

93. Cf. *Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) ("[I]t is clear that the preferred convertible shares originally issued to the Waggoners were *invalid* and *void* under Delaware law." (emphasis added)), *rev'g* C.A. No. 11185, 1990 WL 28979 (Del. Ch. Mar. 15, 1990).

94. Defendants-appellants asserted defenses grounded in estoppel, waiver, and laches; all of which the court rejected on the particular facts in *Triplex*. See 152 A. at 349–50. But the fact that the court addressed these arguments at all suggests that under other circumstances these arguments or ratification-type arguments might have succeeded. The appellants also asserted ratification and acquiescence-based defenses in regard to the statutory violations. See *id.* at 349. These arguments were not discussed in the Delaware Supreme Court's opinion. Ratification was discussed in the Court of Chancery's opinion. See *Triplex*, 147 A. at 322. There the ratification argument was rejected, not as a matter of law, but on the particular facts of the case, i.e., the petitioner's conduct did not amount to ratification. *Id.* at 322. This, too, is a reason to believe that, under proper factual circumstances, ratification could have cured certain issuance defects relating strictly to statutory compliance failures. Cf. *Triplex*, 147 A. at 324

was void and not merely voidable, and under practically all the authorities, it is incapable of being cured or validated by an attempted ratification by amendment or other subsequent proceeding<sup>95</sup>—addressed only stock issued under the original charter and prior to the time of its amendment. On the other hand, with regard to the stock issued after the certificate was amended, the court only held that the stock was invalid and not capable of being voted in that particular case.<sup>96</sup>

As a consequence of the court's holding, voting control of the corporation was transferred to the holders of the preferred stock, i.e., Rice & Hutchins, notwithstanding the fact that the amended certificate had vested all voting power in the holders of the common stock (i.e., the stock that had been declared void). In a recent case, the Court of Chancery suggested that the Delaware Supreme Court reached this result because of the equities involved where a board is in essence issuing stock to itself.<sup>97</sup> Likewise, there is a suggestion in the lower court's opinion that ratification might have barred the petitioner's claim had the equities been different.<sup>98</sup> If the equities were the reason for the supreme court's decision, the result would be understandable. However, the supreme court barely mentions the equities in its opinion and instead seems to decide the case solely on technical legal grounds.

Despite the ambiguities in the supreme court's opinion, practitioners took some comfort in *Triplex* because it could be read to hold that only stock issued without any authority under a charter is void—and that so long as the stock being issued is otherwise within the authority of the corporation to issue, the fact that the power to issue the stock was exercised defectively would not render the stock void. Instead such stock would be voidable, and the defects in issuance could be cured by appropriate board or stockholder action so long as the holder of the questionable stock consented. While what types of defects would render stock void versus

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(“If facts existed in this case from which a ratification of the common stock's issuance could be found, it would be necessary to proceed to consider whether or not the situation is one which ratification could validate.”).

95. *Triplex*, 152 A. at 348.

96. *Id.* at 349–50. This is the interpretation applied by the U.S. Court of Appeals for the D.C. Circuit. *Compare* CarrAmerica Realty Corp. v. Kaidanow, 321 F.3d 165, 170–71, 173 (D.C. Cir.) (applying Delaware law, and holding that board failure to fix the consideration to be received for capital stock, see DEL. CODE ANN. tit. 8, §§ 152, 153 (2001 & Supp. 2006), rendered stock voidable, not void, and was cured by subsequent board action ratifying extant conversion price), *supplemented by* 331 F.3d 999 (D.C. Cir. 2003), with *Byrne v. Lord*, C.A. No. 14824, 1996 WL 361503, at \*3–4 (Del. Ch. June 11, 1996) (suggesting in dicta that stock with par value that was issued for consideration of less than par—if newly issued shares as opposed to treasury shares—is “void” because it was issued in violation of section 153(a) and it is therefore incapable of being voted), and *Superwire.Com, Inc. v. Hampton*, 805 A.2d 904, 909 (Del. Ch. 2002) (citing *Triplex* for the proposition that stock issued absent a determination of the consideration to be received in exchange is “void”). See also *infra* note 158.

97. *MBKS Co. Ltd. v. Reddy*, 924 A.2d 965, 975 n.34 (Del. Ch. 2007) (stating holding of *Triplex* as “where stock was issued for invalid consideration by directors to themselves, such stock had no right to vote” (internal quotation marks omitted) (emphasis added) (citing *Triplex*, 147 A. at 321)), *aff'd*, 945 A.2d 1080 (Del. 2008).

98. See *Triplex*, 147 A. at 322 (holding petitioner's claim was not barred by adoption of resolutions ratifying the issuance because “[i]t would be flying in the face of the simplest conception of justice to say that an agent could, without informing his principal, use the authority of his agency to commit the principal to an act done by the agent solely in his own peculiar personal interest.”).

voidable was a bit unclear, arguably only where the issuance of the stock was *ultra vires* would the stock be void. And to the extent that the result could be explained by the equities involved in insiders issuing stock to themselves, the circumstances where stock potentially would be void as a result of technical defects could be substantially narrowed.

**WAGGONER v. LASTER AND STAAR  
SURGICAL CO. v. WAGGONER**

It took almost sixty years for the Delaware Supreme Court to revisit *Triplex*. In *Waggoner v. Laster* (“*Waggoner I*”),<sup>99</sup> Mr. Thomas and Mrs. Patricia Waggoner (the “Waggoners”), holders of preferred stock with supermajority voting rights, executed a written consent purportedly removing four of the five members of the board of Staar Surgical Company (“Staar” or the “corporation”), the remaining board member being Thomas Waggoner.<sup>100</sup> The four board members brought a section 225 action to contest the removal.<sup>101</sup> The factual record that led to the issuance of the preferred stock was complex and disputed. The Waggoners argued that the board of directors of Staar had issued the preferred stock, with its concomitant supermajority voting rights, in exchange for Thomas Waggoner personally guaranteeing certain corporate debt and pledging his Staar stock.<sup>102</sup> The Court of Chancery assumed without deciding that the Waggoner’s preferred stock was validly issued but nonetheless held that the supermajority provisions were “*ultra vires*” and “invalid”<sup>103</sup> (and, therefore, that the subsequent removal of the four board members was improper).<sup>104</sup> The Court of Chancery explained that section 102(a)(4)<sup>105</sup> of the DGCL permits a corporation to authorize more than one

99. 581 A.2d 1127 (Del. 1990), *affg* C.A. Nos. 11063, 11067, 1989 WL 126670 (Del. Ch. Oct. 24, 1989) (revised) [hereinafter “*Waggoner I*”]. For subsequent related history, see *infra* note 114.

100. *Id.* at 1128.

101. See DEL. CODE ANN. tit. 8, § 225(a) (2001 & Supp. 2006). This section states:

Upon application of any stockholder or director, or any officer whose title to office is contested, or any member of a corporation without capital stock, the Court of Chancery may hear and determine the validity of any election, appointment, removal or resignation of any director, member of the governing body, or officer of any corporation, and the right of any person to hold or continue to hold such office . . . .

*Id.*

102. *Laster v. Waggoner*, Nos. 11063, 11067, 1989 WL 126670, at \*5 (Del. Ch. Oct. 24, 1989) (revised).

103. *Id.* at \*11 (holding that “the Preferred stock voting powers described by the Certificate of Designation were *ultra vires* and, therefore, invalid”). The Delaware Supreme Court understood this to mean that the Court of Chancery found the voting rights “void.” *Waggoner I*, 581 A.2d at 1128 (“The Court of Chancery assumed without deciding that the preferred stock held by Waggoner was validly issued, but nonetheless ruled that the super-majority voting rights were void.”).

104. *Laster*, 1989 WL 126670, at \*14 (holding that Waggoner’s removal of the four directors was improper); see also *id.* at \*13 n.14 (noting that the decision did not “determin[e] . . . the validity of the Preferred stock itself”).

105. See DEL. CODE ANN. tit. 8, § 102(a)(4) (2001); see *supra* notes 11–25 and accompanying text (describing section 102(a)(4) procedures); see *infra* note 136 (same).

class of stock.<sup>106</sup> The attributes of each class of stock must be fixed either in the charter or in a board resolution.<sup>107</sup> However, where the board fixes the attributes of stock by resolution, it must have an express grant of authority to do so in the charter.<sup>108</sup> The *Staar* charter granted the board the power to issue preferred stock with certain particular attributes; however, there was no express authority to issue stock with supermajority voting rights.<sup>109</sup> Hence, the supermajority voting rights were invalid.<sup>110</sup> On appeal, the Delaware Supreme Court adopted the same line of reasoning and affirmed the decision of the Court of Chancery.<sup>111</sup>

The Waggoners also argued that even if the supermajority voting provision was void (i.e., the *Staar* charter failed expressly to provide the board with the authority to grant such rights), *Staar* should be estopped from asserting such a defense because the Waggoners were induced to provide guarantees and pledges in exchange for the bargained-for supermajority voting rights.<sup>112</sup> This position was rejected by the Delaware Supreme Court, which held:

Estoppel, however, has no application in cases where the corporation lacks the inherent power to issue certain stock or where the corporate contract or action approved by the directors or stockholders is illegal or void. . . . That rule is recognized in Delaware. In *Triplex Shoe Co. v. Rice & Hutchins, Inc.*, . . . 152 A. 342, 347–48 ([Del.] 1930), this Court considered whether an amendment to the certificate of incorporation authorizing an exchange of shares could validate previously-issued and illegal no par value stock. It stated:

We are unable to see how the amendment could have made stock valid that was void because issued without any authority from the State. Such an amendment might cure certain irregularities, imperfections, and defects in a stock issue that is authorized . . . , but it does not seem to us that it can possibly relate back and validate a stock that was issued without any corporate authority. If the stock issue was void, a nullity, there was nothing to validate, nothing upon which the amendment could operate.

. . . .

Waggoner argues that *Triplex* should be limited on its facts to cases involving illegal issuances of stock and should not be extended to deny estoppel for other corporate

106. *Laster*, 1989 WL 126670, at \*10.

107. *Id.*

108. *Id.*

109. *Id.* at \*11.

110. *Id.*

111. See *Waggoner I*, 581 A.2d at 1133–34. Notably, at this stage of the proceedings, neither court adjudicating *Waggoner I* reached the question of whether the Waggoners' stock was valid. See *Laster*, 1989 WL 126670, at \*13 n.14 (“This ruling affects only the voting rights aspect of the Preferred, and is not a determination of the validity of the Preferred stock itself or of any of the Preferred stock’s other attributes.”), *aff’d*, *Waggoner I*, 581 A.2d at 1137 (“The Court of Chancery has assumed without deciding in separate actions that the issuance of preferred stock to Waggoner was valid . . . but that the board was not authorized to endow the preferred stock with super-majority voting rights. . . . The former determination [with regard to the validity of the stock] is now before us in a separate appeal.”).

112. See *Waggoner I*, 581 A.2d at 1137.

actions such as the granting of super-majority voting rights. We see no logical basis for adopting such a limitation [on the holding of *Triplex*] as a matter of law.<sup>113</sup>

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In *Staar Surgical Co. v. Waggoner* (“*Waggoner II*”),<sup>114</sup> the Court of Chancery and the Delaware Supreme Court reached an issue that they had not addressed in *Waggoner I*—the validity of the preferred stock to which was attached the super-majority voting rights that had already been determined to be void in *Waggoner I*. The Waggoners converted their preferred stock into 2,000,000 shares of common stock and brought a section 227<sup>115</sup> action to determine whether they had the right to vote the common stock at the next annual meeting.<sup>116</sup> In the Court of Chancery, Staar took the position that section 151(g)<sup>117</sup> of the DGCL mandates that in creating preferred stock, the board must adopt a resolution setting forth the stock’s attributes and that resolution must be set forth in a certificate of designations.<sup>118</sup> Here the board failed to “formally approve or adopt”<sup>119</sup> the resolution (although it seems to have had been put on notice of and to have agreed to the resolution’s major terms). Additionally, the resolution in the certificate of designations differed “materially”<sup>120</sup> from the resolution that, according to the minutes, had been agreed to by the board.<sup>121</sup> Given these defects, Staar argued that the preferred stock was invalid and could not be converted into voting common stock.<sup>122</sup> The Waggoners argued that even if the issuance were technically defective, the contract—the exchange of the Waggoners’ guarantee and pledge in return for the preferred stock—should be given effect in equity. In other words,

the Waggoners argue that they are validly entitled, on contractual grounds, to two million validly issued common shares, and that, because they have fulfilled their part of the bargain, they are entitled to a decree validating the two million shares that STAAR issued to them. The Waggoners contend that they guaranteed STAAR’s debt with the specific understanding that the two million shares would be the *quid pro quo* for those guarantees. Stated differently, the Waggoners assert that even if the issuance of those shares were technically invalid as a matter of corporate law, they are equitably entitled

113. *Id.* at 1137 (citations omitted) (third omission in original). The *Waggoner I* court did not find the stock void. Instead, it only found that the supermajority voting rights at issue were void because such rights could not be granted by the board under the certificate. *See supra* note 111.

114. 588 A.2d 1130 (Del. 1991), *rev’g* C.A. No. 11185, 1990 WL 28979 (Del. Ch. Mar. 15, 1990) [hereinafter “*Waggoner II*”].

115. *See* DEL. CODE ANN. tit. 8, § 227(a) (2001) (“The Court of Chancery, in any proceeding instituted under [§]§ 211, 215 or 225 of this title may determine the right and power of persons claiming to own stock. . . .”).

116. *Waggoner v. Staar Surgical Co.*, C.A. No. 11185, 1990 WL 28979, at \*1 (Del. Ch. Mar. 15, 1990).

117. *See* DEL. CODE ANN. tit. 8, § 151(g) (2001) (mandating process for the exercise of a board’s blank check authority).

118. *Staar Surgical*, 1990 WL 28979, at \*2.

119. *Id.*

120. *Id.*

121. *Id.* at \*1–2.

122. *Id.* at \*2.

to an order, *akin to specific performance*, treating the common stock as if it were validly issued, and declaring them entitled to vote those shares.<sup>123</sup>

The Court of Chancery adopted the Waggoner's legal position and held that "for [the] purposes of this proceeding under 8 *Del. C.* § 227," the 2,000,000 shares of common stock had been "validly issued."<sup>124</sup> The Court of Chancery did not actually declare the stock (preferred or common) valid; rather, it "grant[ed] equitable relief to vindicate established principles of *contract law*."<sup>125</sup>

On appeal, the Delaware Supreme Court reversed. Citing *Triplex*, the court held that "[s]tock issued without authority of law is void and a nullity."<sup>126</sup> Thereafter, the court explained that Staar failed to comply with DGCL section 151 and that such non-compliance cannot be trivialized as "mere technicalities,"<sup>127</sup> and the court held that "[s]tock issued in violation of 8 *Del. C.* § 151 is void and not merely voidable."<sup>128</sup> Finally, the court concluded that because the stock was void, there was no basis for the Court of Chancery to grant equitable relief.<sup>129</sup> Indeed, the Court of Chancery in a later decision restated the holding of *Waggoner II* as: "our case law has refused to overlook the statutory invalidity of stock even in situations when that might generate an inequitable result."<sup>130</sup>

Perhaps because the Court of Chancery had determined after trial that the equities supported validating the stock, a determination which would have been subject to an abuse of discretion review on appeal,<sup>131</sup> the supreme court's analysis

123. *Id.* at \*3 (emphasis added) (footnote omitted).

124. *Id.* at \*6.

125. See Jacobs, *supra* note 23, at 13.

126. *Waggoner II*, 588 A.2d at 1136.

127. *Id.* (internal quotation marks omitted).

128. *Id.* at 1136–37. In *Hildreth v. Castle Dental Centers, Inc.*, 939 A.2d 1281, 1283 (Del. 2007), the Delaware Supreme Court restated the holdings of *Triplex* and *Waggoner* as: "stock issued without satisfying the requirements of 8 *Del. C.* § 151 is void." Similarly, in *Starring v. American Hair & Felt Co.*, 191 A. 887, 890–92 (Del. Ch.), *aff'd*, 2 A.2d 249 (Del. 1937), the Court of Chancery preliminarily enjoined the redemption and immediate reissuance of stock where the redemption, as contemplated by the transaction, was not in compliance with Rev. Code 1935, section 2059, the predecessor to the now in-force section 151(b). It appears that the injunction was authorized prior to any redemption or reissuance, thus obviating the need to determine the validity of any outstanding stock.

129. See *Waggoner II*, 588 A.2d at 1137. Notwithstanding reversal by the Delaware Supreme Court in *Waggoner II*, Vice Chancellor Jacobs several years later suggested that equitable relief in similar circumstances might be permissible. See *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531, 539 n.10 (Del. Ch. 1999), *aff'd*, 748 A.2d 913 (Del. 2000) (unpublished table decision); see also *Liebermann v. Frangiosa*, 844 A.2d 992, 1006 (Del. Ch. 2002) (holding that although equitable claims will not validate stock "issued and sold" absent statutory compliance, "the claimant might . . . have other recompense, if, for example, he *believed* he had purchased valid stock and had not in fact done so. The claimant might have a claim for equitable rescission or other damages . . ." (emphasis added)); *id.* at 1009 (suggesting viability of an unjust enrichment claim against company and "perhaps its directors" in such circumstances); cf. *supra* notes 38, 39 & 218–21.

130. *Liebermann*, 844 A.2d at 1004; *id.* at 1000, 1006–07 (holding preferred stock "invalid" for failure to comply with section 151(g), i.e., absence of board vote approving certificate amendment or certificate of designations).

131. See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006). The court in *Walt Disney* stated:

On appeal from a decision granting summary judgment, this Court reviews the entire record to determine whether the Chancellor's findings are clearly supported by the record and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning

focused on the legal issues involved, which was subject to plenary review.<sup>132</sup> The supreme court was unwilling to treat the failure to comply with section 151 as a mere technicality. The court reasoned, “The issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly requires certainty in such matters.”<sup>133</sup> The supreme court’s decision thus arguably extended the holding of *Triplex*—that stock issued without any authority from the state is void—to include stock of a type the corporation has authority (under its charter) to issue if that stock is issued without the corporation complying with the statutory formalities for issuing stock.<sup>134</sup> At one level, the *Waggoner II* analysis seems to contradict the dicta in *Triplex* that overissuances are not void, but merely voidable.<sup>135</sup> The court in *Waggoner II* held that failure to comply with statutory formalities (or at least those, such as section 151, which cannot be trivialized as mere technicalities) results in void stock. To the extent that section 161 of DGCL, the section prohibiting overissuances, is equally nontrivial, a *Waggoner II* analysis would seem to lead to the conclusion that overissued stock is void, not merely voidable,<sup>136</sup> notwithstanding the contrary dicta of *Triplex*. The supreme court in

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process. This Court does not draw its own conclusions with respect to those facts unless the record shows that the trial court’s findings are clearly wrong and justice so requires.

*Id.* at 48 (footnote omitted).

132. See *Waggoner II*, 588 A.2d at 1131 (“This Court, however, exercises plenary review of the trial court’s determination of purely legal conclusions including the proper legal standard to judge the validity of shares in a 8 *Del. C.* § 227 action.”).

133. *Id.* at 1136; see also *supra* note 1.

134. See *Waggoner II*, 588 A.2d at 1136 (“There was no compliance with the terms of 8 *Del. C.* § 151. The directors never *formally* adopted either the December 17, 1987 resolution or the certificate of designation.” (emphasis added)). Obviously, procedural formalities are designed to protect substantive values and policies. But here the focus of the court’s concern was on “formal” compliance. In *Triplex*, by contrast, there was no compliance at all with the statutory provision requiring stockholders to determine the price to be received in consideration for corporate stock; nor was there compliance with the statutory provision requiring that the certificate state the number of authorized shares.

135. See *supra* notes 75–81. Indeed, it appears that the dicta in *Triplex* to the effect that stock overissuances are voidable is a minority view. See 18 C.J.S. *Corporations* § 142 (1990) (“Stock sought to be created in excess of the legalized capital stock is ultra vires and void, even in the hands of a bona fide holder for value.”); *id.* (noting that an overissuance cannot be ratified). But see 18 C.J.S. *Corporations* § 141 (1990) (“[A] failure to comply with a particular statutory requirement in issuing stock will not render the stock illegal and void if a contrary intention on the part of the legislature appears from the statute.”).

136. See, e.g., DEL. CODE ANN. tit. 8, § 102(a)(4) (2001). This code section, the predecessor of which was at issue in *Triplex*, states:

(a) The certificate of incorporation shall set forth:

....

(4) If the corporation is to be authorized to issue only 1 class of stock, the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. If the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class and shall specify each class the shares of which are to be without par value and each class the shares of which are to have par value and the par value of the shares of each such class.

*Id.*; see *supra* note 53 (describing history of this provision); see also DEL. CODE ANN. tit. 8, § 161 (2001) (requiring board not to issue shares in excess of authorized number). There is no reason to believe that compliance with these provisions is a “mere technicality.”



*Waggoner II* also appeared to reject the possibility that the basis for the holding in *Triplex* was equitable. The lower court found the equities supported validating the stock. The supreme court, on the other hand, determined that the equities could not override the statutory violations that rendered the stock void.

The rejection of equitable principles as a basis to validate defectively issued stock and the extension of *Triplex* in *Waggoner II* to statutory procedural defects in issuances were troubling because the supreme court raised the specter that a procedural violation in issuing stock (even a type of stock that the corporation otherwise has the authority to issue) can render that stock void and incurable, even in circumstances where such a result is inequitable. Practitioners were thus left trying to determine which procedures were “mere technicalities” and which were more than mere technicalities, thus potentially rendering the stock void. The case law afforded little clarity in how to make that “technicality” distinction. Which statutes were technicalities and which were substantive? Should violations of section 151 be treated differently than violations of, for example, section 161 (providing that the board only has the power to issue stock up to the number of shares authorized and which have not been subscribed for or otherwise committed to being issued) and section 152 (permitting the board to issue stock for consideration having a value at least equal to the par value of the stock being issued). Since all of the corporation statutes are to some extent technical, the court raised the possibility that any statutory violation could render stock void. For example, if stock is issued prior to the filing of the certificate of amendment or the filing of the certificate of designations creating the stock that otherwise has received all proper board and stockholder approvals, is it void or voidable? If stock is issued prior to the last director’s signature being placed on a board consent authorizing the issuance or the filing of such consent with the board’s minutes, is it void or voidable? Is the statement in *Triplex* about overissuances being curable still good law since such an issuance would violate section 161, which goes to the power of the board to issue stock? From the practitioner’s standpoint, in light of the broad language used in *Waggoner II*, it was very difficult to have confidence that a defect was so trivial as not potentially to render stock void.

Ten years after *Waggoner II*, the Delaware Court of Chancery issued, and the Delaware Supreme Court affirmed without opinion, a decision that permitted a defective stock issuance to be ratified.

#### *KALAGEORGI V. VICTOR KAMKIN, INC.*

Like *Waggoner I* and *Waggoner II*, *Kalageorgi v. Victor Kamkin, Inc.*,<sup>137</sup> was a section 225 action. Thirty-nine shares were held by plaintiff Kalageorgi; sixty-one shares had been issued to the defendants.<sup>138</sup> The plaintiff claimed to be the sole de jure stockholder because the sixty-one shares purportedly issued in 1990 and 1991 to the defendants had not been validly authorized by the board of Victor Kamkin, Inc. (“VKI” or the “corporation”).<sup>139</sup> If the shares were validly issued, then

137. 750 A.2d 531 (Del. Ch. 1999), *aff’d*, 748 A.2d 913 (Del. 2000) (unpublished table decision).

138. *Id.* at 532.

139. *Id.* at 536.

the slate of directors elected by the defendants in 1999 was on the board; otherwise, the plaintiff was the sole stockholder and, arguably, the sole director.<sup>140</sup>

Under section 141 of the DGCL, board action may be taken either by a vote at a meeting or without a meeting by unanimous consent of the board in writing so long as the writing is filed with the board's minutes.<sup>141</sup> Here the sixty-one shares held by the defendants were issued absent any vote of the board, and although a unanimous written consent document had been prepared by VKI's attorney, it was never signed, nor was it filed with the corporation's minutes.<sup>142</sup> Nevertheless, the certificates for the shares were signed by the corporation's president and secretary and issued in conformity with the unsigned unanimous written consent.<sup>143</sup> For the following eight years, those shares were voted and "no one ever questioned the[ir] validity."<sup>144</sup> By 1998, the plaintiff was on actual notice that the unanimous written consent had not been signed.<sup>145</sup> In 1999, the defendants, voting their sixty-one shares, elected a slate of five directors (one of whom was the plaintiff); these were the same five directors who had been elected in 1998.<sup>146</sup> In 1999, the plaintiff only voted his thirty-nine shares to elect himself, although in 1998 those same thirty-nine shares were voted in support of the entire slate of five directors, the same directors ostensibly reelected in 1999.<sup>147</sup> Following the 1999 election, the plaintiff took no action to remove any of his four co-directors.<sup>148</sup> Immediately after the 1999 election, the defendant-stockholders passed resolutions ratifying the 1991 stock issuance, and the defendant-directors passed similar resolutions.<sup>149</sup> The plaintiff voted against both sets of resolutions.<sup>150</sup>

The Court of Chancery never reached the question of whether the shares were validly issued ab initio. In dicta, the court noted that compliance with the formalities of board authorization has "important functional significance" and

140. *Id.* at 536–37.

141. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(b) (2001 & Supp. 2006) ("The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number."); *id.* § 141(f) (2001) ("[A]ny action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing... and the writing or writings... are filed with the minutes of proceedings of the board, or committee."). Although a valid board decision was required to issue the shares in *Kalageorgi*, there was no need for the board to amend the charter or file any certificate of designations. Only one class of shares was part of the corporation's capital structure and 100 shares were already authorized at the time the contested shares were distributed to the defendants. *Kalageorgi*, 750 A.2d at 532–34. The only action the board had to take was to issue the shares; it had authority under the charter to do so if it complied with the procedural formalities.

142. *See id.* at 537 (noting that the VKI board had blank check authority, granted in the charter, to issue stock absent stockholder consent).

143. *Id.* at 535.

144. *Id.*

145. *Id.* at 535–36.

146. *Id.*

147. *Id.* at 536.

148. *Id.*

149. *Id.*

150. *Id.*

praised the benefits of “bright line” rules that protect vital “economic interests” relating to our “capital supply system.”<sup>151</sup> On the other hand, the court recognized:

Corporate securities are a species of property right that represent not only a firm’s fundamental source for raising capital, but also now a publicly traded commodity that is a critical component for creating both institutional and individual wealth that may affect the economic well-being of entire societies. Given the foundational importance of such securities to our economic system, it is critical that the validity of those securities, especially those that are widely traded, not be easily or capriciously called into question. Otherwise, the resulting economic uncertainty to investors and institutions that relied upon the integrity of those securities would be destabilizing.<sup>152</sup>

Certainly under the *Waggoner II* analysis strong arguments existed that the stock was void. Like in *Waggoner II*, the stock was issued without the required board formalities. As such the issuance violated DGCL section 141. Yet the Court of Chancery did not hold that the disputed shares of stock were incapable of being cured, i.e., void stock. Rather, the court determined that the four director-defendants had been validly elected in 1998 because the shares held by the plaintiff voted to elect those directors in 1998.<sup>153</sup> Therefore, even if the defendant-stockholders’ shares were invalid at the time of the 1999 election, and even if that election failed to elect the four director-defendants, those four directors remained in office as holdover directors until a successor qualified, or until they resigned or were removed.<sup>154</sup> As such, those director-defendants were in office in 1999 at the time they passed resolutions to cure the 1991 stock issuance.<sup>155</sup> The court held that because the director-defendants were in office, the board had the power retroactively to cure the prior defective stock issuance.<sup>156</sup> Ratification was allowed.

While the holding in *Kalageorgi* that a defective stock issuance can be ratified by after-the-fact board action was welcome to practitioners, the ruling was not as helpful as it could have been because the court did not cite to or distinguish either *Triplex* or *Waggoner II*. Thus, practitioners were left without clear guidance why in *Kalageorgi* ratification worked and why in *Waggoner II* it (presumably) could not (given that the stock was held to be void, not voidable).<sup>157</sup> Unfortunately, given

151. *Id.* at 538.

152. *Id.*

153. *Id.* at 539.

154. *See id.* at 540.

155. *See id.*

156. *Id.* at 539.

157. In *Liberis v. Europa Cruises Corp.*, C.A. No. 13103, 1996 WL 73567, at \*6 (Del. Ch. Feb. 8, 1996), *aff’d*, 702 A.2d 926 (Del. 1997) (unpublished table decision), the Delaware Court of Chancery examined whether the issuance and repricing of stock options pursuant to a transaction that was not expressly authorized by the board of directors was void. The court found that the board of directors, acting at a meeting that was not duly called and at which a quorum was not present, did not comply with the requirements of section 157 of the DGCL when it purportedly issued and repriced certain previously granted stock options. *Id.* at \*8. The court stated that “the complete absence of board action [in the first instance] is not an irregularity correctable by routine ratification. In other words, the purported authorization was void, not voidable.” *Id.* (emphasis added). In *Kalageorgi*, the board failed to hold the requisite vote or act by written consent. Thus, *Kalageorgi* seems to be a break with prior precedent, including *Liberis*. Likewise, in the merger context, the Court of Chancery has noted that the

the broad language used in *Waggoner II* about the effect of statutory violations in issuing stock on the validity of the stock and the inability to take into account the equities in deciding whether stock is void or voidable, practitioners are left with little clear authority on which to base advice.<sup>158</sup>

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failure to follow the statutorily required sequence in approving a merger agreement renders the merger void. See *Tansey v. Trade Show News Networks, Inc.*, C.A. No. 18796, 2001 WL 1526306, at \*7 (Del. Ch. Nov. 27, 2001).

158. The only court we are aware of that has tried to reconcile these cases is a federal court outside of Delaware. See *CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165 (D.C. Cir.), supplemented by 331 F.3d 999 (D.C. Cir. 2003) (distinguishing *Triplex*, *Waggoner II*, and *Kalageorgi*), rev'g sub nom. *OmniOffices, Inc. v. Kaidanow*, C.A. No. 99-0260, 2001 WL 1701683 (D.D.C. Sept. 12, 2001). In *CarrAmerica*, the Omni board approved a resolution authorizing a convertible loan which permitted CarrAmerica, the lender and Omni's "controlling shareholder," to convert its loan into Omni equity at a price of "not less than \$20 per share." *CarrAmerica*, 321 F.3d at 166, 167 (emphasis added). Afterward, the loan agreement was executed using a conversion price of exactly \$20 per share. *Id.* at 168. CarrAmerica "immediately exercised its rights and converted" the loan into shares. *Id.* Several months thereafter, the Omni board approved a set of resolutions providing for the issuance of additional stock at \$20 per share and expressly referred to the prior issuance of Omni stock to CarrAmerica at \$20 per share. *Id.* at 168-69. Minority stockholders objected to the \$20 per share price as unfair and sought a determination that the stock was void because no price had been "determined" by the board; rather, the conversion price had been fixed in the loan agreement. The district court agreed and held that "a board's statutory duty [under section 153(a) of the DGCL] to determine the price of its stock is not discharged by setting [a] floor price per share." *OmniOffices*, 2001 WL 1701683, at \*11. Moreover, the district court held that the stock was void, not merely voidable, *id.* at \*12-13, and therefore was not cured by ratification arising from the final set of Omni board resolutions, *id.* at \*13-15. The D.C. Circuit reversed, holding that CarrAmerica's stock was voidable and that the Omni board's final set of resolutions cured the invalidity. See *CarrAmerica*, 321 F.3d at 171, 173.

The D.C. Circuit explained that *Triplex* and *Waggoner II* stood for the proposition that stock issued in excess of authority granted in the corporate charter is void, whereas *Kalageorgi* focused on statutory violations, as opposed to charter violations. *Id.* at 170-71. The D.C. Circuit's attempt to reconcile the cases is (at least) partially correct: *Triplex* can be read for the proposition that stock issued absent authority under the charter is void. See *supra* note 74. But that analysis is incomplete. *Triplex* also stands for the proposition that stock is invalid when issued contrary to statute, i.e., absent a determination (by the stockholders or by the board) of the consideration to be received by the corporation in return for the stock. Compare *Triplex*, 152 A. at 349 (finding stock "invalid" "because no consideration . . . was fixed by proper authority" as required by statute), and *Superwire.Com, Inc. v. Hampton*, 805 A.2d 904, 909 (Del. Ch. 2002) (citing *Triplex* for the proposition that stock issued absent a determination of the consideration to be received by the corporation in exchange for the stock is "void," as opposed to voidable), with *CarrAmerica*, 312 F.3d at 170 (holding that failure to determine price of security by the board is a statutory violation rendering stock merely voidable, not void, and finding effective board ratification on the facts). Arguably, *Triplex*'s holding was also grounded (in the alternative) on a pure statutory violation irrespective of any charter violation.

Furthermore, the D.C. Circuit read *Waggoner II* to stand for the proposition that where a board fails to follow the formalities for amending its charter, stock issued under the authority of the failed amendment is void. *CarrAmerica*, 321 F.3d at 171. *Kalageorgi*, by contrast, did not involve any charter violation or failed charter amendment; rather, it involved the board's failure to "full[y] compl[y]" with statutory requirements in regard to board decision-making. *Id.* In other words, *Kalageorgi* involved a board that failed to comply with statutory formalities for board decision-making (where it otherwise had authority to act under its charter); *Triplex* and *Waggoner II* involved boards that issued shares without authority under the charter. *Id.* The distinction between charter and statutory violations seems to be that the charter is the corporation's "fundamental document" such that errors in regard to it cannot be treated as "mere technical error[s]" capable of correction after-the-fact. *Id.* (citing *Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1135 (Del. 1991), rev'g C.A. No. 11185, 1990 WL 28979 (Del. Ch. Mar. 15, 1990)).

While at first glance the distinction between lack of corporate power and defective exercise of that power suggested by the D.C. Circuit is precisely the line practitioners were trying to draw after *Triplex*, the court in *Waggoner II* muddied this line. While at times the *Waggoner II* court's decision focuses on the

In the next significant void stock case, the Court of Chancery, applying its traditional equitable power, held stock void based on the board's inequitable conduct in regard to its issuance, notwithstanding actual compliance with the statutory formalities for board decision-making.

*ADLERSTEIN v. WERTHEIMER*

In *Adlerstein v. Wertheimer*,<sup>159</sup> Adlerstein was the controlling stockholder, chief executive officer, a director, and chairman of the board of SpectruMedix Corporation.<sup>160</sup> The remaining two directors were Wertheimer and Mencher.<sup>161</sup> These latter directors believed the company was in “dire financial circumstances and actual or impending insolvency.”<sup>162</sup> Without notifying Adlerstein, Wertheimer and Mencher negotiated a deal with Ilan Reich and the Reich Partnership to “save the Company.”<sup>163</sup> The terms of the deal were that the Reich Partnership would invest \$1 million in the company in return for Series C preferred stock carrying voting control, Adlerstein would be removed, and Ilan Reich would assume control of the company.<sup>164</sup>

The deal was effectuated at a July 9, 2001, meeting called by Adlerstein—a meeting absent any written agenda or notice from Wertheimer and Mencher as to any plan to take any board vote to effectuate a change in management.<sup>165</sup> At that meeting, Wertheimer and Mencher voted to issue the control block of

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lack of corporate power, at other times the decision focuses on the lack of an authorizing resolution creating the stock in question, which the court viewed as a substantive defect. One can argue that the lack of an authorizing resolution for blank check preferred stock means that no stock has been properly created and thus the facts were the same as those in *Triplex*—i.e., the stock purportedly issued was not authorized under the charter. However, the broad language in *Waggoner II* makes it difficult to conclude the distinction between statutory violations going to the corporate power to issue the stock versus statutory violations going to the irregular exercise of that power is dispositive:

We cited to *Triplex* in *Waggoner I* for the proposition that [stock is void and] the equitable doctrine of estoppel is inapplicable to agreements or instruments that violate *either express law or public policy*. We also rejected the Waggoners' argument that *Triplex* was limited only to instances where a corporation illegally issued stock.

*Waggoner II*, 588 A.2d at 1137 (citation omitted) (emphasis added). Moreover, there does not seem to be any conceptual or policy reason explaining why a statutory violation going to board formalities unrelated to charter amendments are curable, but a board with blank check authority that mistakenly ignores decision-making formalities involving a certificate of designations (i.e., a decision not involving stockholders) cannot afterward cure a mistake involving its own decision-making procedures. See *Superwire.Com, Inc.*, 805 A.2d at 909–10 (restating the holdings of *Triplex* and *Waggoner II* as standing for the proposition that stock is void when the board fails to comply with section 151, as opposed to the “broader principle that shares issued in contravention of an express prohibition in the certificate of incorporation are void”).

159. C.A. No. 19101, 2002 WL 205684 (Del. Ch. Jan. 25, 2002).

160. *Id.* at \*1.

161. *Id.*

162. *Id.* at \*11.

163. *Id.*

164. *See id.* at \*6.

165. *Id.* at \*8–9.

preferred shares to the Reich Partnership, thereby diluting Adlerstein's interest.<sup>166</sup> Wertheimer and Mencher voted "to remove Adlerstein for cause as Chief Executive Officer of the Company, to strip him of his title as Chairman of the Board, and to appoint Reich to serve as Chief Executive Officer and as Chairman of the Board."<sup>167</sup> Immediately after the board meeting, the Reich Partnership, the new controlling shareholder, acting by written consent, removed Adlerstein from the board and filled the vacancy with Ilan Reich.<sup>168</sup> In response, Adlerstein brought a section 225 action.<sup>169</sup>

The Court of Chancery held that "Adlerstein had a right to . . . advance notice in order that he might have taken steps to protect his interests."<sup>170</sup> The court reasoned that "[h]ad he known beforehand that Wertheimer and Mencher intended to . . . remove him from office at the July 9 meeting, he could have exercised his legal right [as controlling stockholder] to remove one or both of them and, thus, prevented the completion of those plans."<sup>171</sup> The secret conduct of Wertheimer and Mencher "disadvantaged" Adlerstein and amounted to "trickery or deceit." In these circumstances, the court held "that the actions taken at the July 9, 2001 meeting must be undone."<sup>172</sup> As a result, all the actions taken at the meeting, including the issuance of the stock, were void.

*Adlerstein* thus focused primarily on the circumstances surrounding the meeting at which the stock in question was approved, rather than the charter or statutory formalities in regard to stock issuances. Applying its traditional equitable power, the court concluded that Adlerstein had been tricked into attending the meeting, and thus the meeting and everything that happened at it, including the stock issuance, were void.<sup>173</sup> The result is consistent with prior law holding that meetings at which one or more directors' attendance has been compelled by trickery are invalid.<sup>174</sup> The court did not address the void-voidable issue with respect to the

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166. *Id.* at \*1, \*7.

167. *Id.* at \*1.

168. *See id.*

169. *See id.*

170. *Id.* at \*11.

171. *Id.*

172. *Id.* at \*12; *see also* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1784 n.158 (2006) ("Perhaps the most striking Delaware court opinions are those which invalidate managerial behavior that literally and technically complies with the governing statutes, but which is deemed to operate inequitably."); Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 51, 55-57 (2006) (suggesting that the holding in *Adlerstein* is best understood as a violation of the duty of good faith, rather than loyalty). *But see* *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006) (explaining that the requirement to act in good faith "is a subsidiary element" of a duty of loyalty claim (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003))).

173. Of course, notice of a meeting can be waived, and such a waiver validates the meeting. *See* DEL. CODE ANN. tit. 8, § 229 (2001 & Supp. 2006).

174. *See, e.g., Fogel v. U.S. Energy Sys., Inc.*, C.A. No. 3271-CC, 2007 WL 4438978, at \*3 (Del. Ch. Dec. 13, 2007) ("Where a director is tricked or deceived about the true purpose of a board meeting, and where that director subsequently does not participate in that meeting, any action purportedly taken there is invalid and void."); *see also* *VGS, Inc. v. Castiel*, C.A. No. 17995, 2000 WL 1277372, at \*1 (Del. Ch. Aug. 31, 2000) ("Because the two managers acted without notice to the third manager under circumstances where they knew that with notice that he could have acted to protect

stock purportedly issued at the improperly noticed meeting. Neither *Triplex* nor *Waggoner* was discussed.

*SUPERWIRE.COM, INC. v. HAMPTON*

The Court of Chancery next discussed *Triplex* and *Waggoner* in *Superwire.Com, Inc. v. Hampton*.<sup>175</sup> There, plaintiff Superwire sought summary judgment in a section 225 action to determine the composition of the Entrata board of directors, an entity in which Superwire held shares.<sup>176</sup> Superwire had, on December 12, 2001, taken action by written consent to remove the defendants from Entrata's board and to place Superwire's designees on the board in their place.<sup>177</sup> Superwire's position was that it had majority voting control of Entrata, contending that certain preferred voting stock issued by the Entrata board was void because the board (allegedly) had failed to comply with anti-dilution provisions protecting Superwire in a certificate of designations.<sup>178</sup> If the contested preferred stock was void, then Superwire had sufficient voting power to act by written consent on December 12, 2001.<sup>179</sup> "If [the stock was] not [void], the December 12 consent was ineffective" because Superwire lacked sufficient voting power to remove the defendant-directors.<sup>180</sup>

The court noted that *Waggoner II* stands for the proposition that stock issued absent compliance with section 151 (and perhaps the DGCL generally) is "void."<sup>181</sup> The court distinguished this more limited position from the "broader principle [asserted by Superwire] that shares issued in contravention of an express prohibition found in the certificate of incorporation are void."<sup>182</sup> The court did

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his majority interest, they breached their duty of loyalty to the original member and their fellow manager by failing to act in good faith."), *aff'd*, 781 A.2d 696 (2001) (unpublished table decision); *Koch v. Stearn, C.A. No. 12515*, 1992 WL 181717, at \*5 (Del. Ch. July 28, 1992) ("I find that Stearn was disadvantaged by the other directors' failure to communicate their plans to him."), *appeal dismissed*, 628 A.2d 44 (Del. 1993); *cf. supra* note 172.

175. 805 A.2d 904 (Del. Ch. 2002).

176. *Id.* at 904–05, 908.

177. *Id.* at 907.

178. *Id.* at 907–09.

179. *Id.* at 907.

180. *Id.*

181. *Id.* at 909.

182. *Id.* at 909–10; *id.* at 911 (same). Indeed, one authority, cited in *Triplex*, took a position supporting plaintiff *Superwire's* position:

There is a clear distinction between overissued stock and an irregular increase of stock. The former is where an attempted increase of the stock is made, although no increase is authorized by the charter or by statute. The latter occurs when there is a statutory or charter provision authorizing an increase in the stock, but the formalities prescribed for making that increase have not been strictly complied with. Overissued stock is void, while an irregular increase of stock is merely voidable.

1 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 291 (1923) (footnote omitted) (emphasis added). According to the Cook treatise, the relevant distinction is not drawn between statutory and charter violations, but between issuances that are entirely prohibited (by statute or by charter) irrespective of compliance with any formalities, and issuances that are otherwise permitted (under the statute and under the charter) but lack compliance with procedural formalities. The former is void; the latter is voidable. *Superwire* presented an intermediate case: the corporation

not actually reject Superwire's position; rather, the court ruled that the issuance of preferred stock was not in violation of an express provision of the charter:

[E]ven assuming that Superwire is correct in arguing that shares issued in contravention of an express prohibition found in the charter . . . of a Delaware corporation are void, that rule would not serve to invalidate the Extra Shares [in dispute]. The plain wording of . . . the Certificate of Designation does not expressly prohibit anything. That language [in the certificate] might support a contract claim by Superwire either to receive or to be afforded the opportunity to purchase additional shares when Entrata issues additional voting shares, such as the Extra Shares.<sup>183</sup>

Because the disputed charter provision did not prohibit the creation of the class of stock or prohibit its issuance per se, but related only to ancillary post-issuance matters such as distributions to extant stockholders, the provision, at most, created a contract claim. In short, because the stock was not "issued" in contravention of an express charter provision precluding issuance of such shares (or, alternatively, shares of that type), it was not void.

#### *MBKS Co. Ltd. v. Reddy*

The most recent case in which a Delaware court discussed the void-voidable distinction in depth is *MBKS Co. Ltd. v. Reddy*,<sup>184</sup> issued by the Court of Chancery in 2007. Like *Kalageorgi* and *Superwire*, *MBKS Co. Ltd. v. Reddy* was a section 225 action with regard to the identity of the company's directors. In *Kalageorgi*, the dispute focused on the formalities by which voting stock had been issued. In *MBKS*, the dispute went to the sufficiency of the consideration paid for the stock.

MBKS Company Limited ("BVI"), a British Virgin Islands corporation, had a 100 percent interest in MBKS I and MBKS II (collectively "MBKS"), two Delaware corporations.<sup>185</sup> Reddy, as the purported sole director of MBKS, passed resolutions: (1) cancelling MBKS stock held by BVI; and (2) issuing stock in MBKS to himself.<sup>186</sup> Reddy maintained that he was entitled to take this action based on

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(arguably) failed to comply with a substantive right of stockholders granted in the charter, not merely a statute governing intra-corporate procedural formalities for the approval of stock issuance. One could characterize the issuance in *Superwire* either as: (1) an issuance that was authorized under the charter but carried out defectively (voidable); or (2) an issuance that was not authorized by the charter under any circumstance because it was prohibited for failure to comply with the anti-dilution provision (void). Clearly, the court chose the prior characterization.

183. *Superwire*, 805 A.2d at 911; *id.* at 910 (same). *See also* *Matulich v. Aegis Commc'ns Group, Inc.*, 942 A.2d 596, 600 (Del. 2008) ("[T]he special rights and limitations of preferred stock are created by the corporate charter or a certificate of designation, which acts as an amendment to a certificate of incorporation. Consequently, rights of preferred shareholders are primarily contractual in nature." (footnote omitted)); *id.* at 601–02 (distinguishing, in the context of preferred stock, statutory voting rights from contractual consent and approval rights).

184. 924 A.2d 965 (Del. Ch. 2007), *aff'd*, 945 A.2d 1080 (Del. 2008). This Article focuses on the decision of the Court of Chancery, as the appellate opinion did not focus on the void-voidable distinction. *But see* *Reddy v. MBKS Co. Ltd.*, 945 A.2d 1080, 1087 n.15 (Del. 2008) (noting that, where a director stands on both sides of a transaction and cannot establish that the transaction was fair to the corporation, the agreement is "void").

185. *MBKS*, 924 A.2d at 967.

186. *Id.*



a series of oral and poorly memorialized written agreements that Reddy had struck with Sami Baarma who, prior to his death, was (purportedly) the equitable owner of MBKS.<sup>187</sup> In short, the agreements provided that Reddy would be granted equity in MBKS in exchange for his making a payment to parties designated by Baarma upon Baarma's death.

In response to Reddy purportedly cancelling BVI's shares and granting himself equity in MBKS, BVI took action by written consent: (1) to remove Reddy as a director; and (2) to elect two new directors of BVI's choice.<sup>188</sup> The Court of Chancery held that Reddy's resolutions purportedly cancelling the outstanding stock held by BVI were ineffective because the resolutions failed to conform to the requirements of section 242(a) of the DGCL.<sup>189</sup>

As to the stock Reddy had issued to himself, the Court of Chancery noted that stock may be issued for "any benefit to the corporation."<sup>190</sup> Reddy, however, paid MBKS no consideration at all prior to the time he issued the stock. Furthermore, the oral agreement between Baarma and Reddy provided that Reddy's "payment," such as it was, was to go to Baarma's designees, not to MBKS. The Court of Chancery explained that "[t]his case is simply a matter, analogous to contract law, where the issuance is unenforceable for want of *any* consideration."<sup>191</sup> The Court of Chancery concluded that Reddy's stock was "at least voidable, if not totally void, and was not entitled to vote."<sup>192</sup> If the stock was void, it was a nullity and

187. *Id.* at 968–69.

188. *Id.* at 970–71.

189. *See id.* at 972 & n.19; *see also* DEL. CODE ANN. tit. 8, § 242(a) (2001) (governing certificate amendment procedures "[a]fter a corporation has received payment for any of its capital stock"); *id.* § 242(b) (mandating board and stockholder approval process to amend the certificate). The issue of the propriety of the share cancellation, outside of compliance with section 242, was the precise issue that was heard on appeal and on which the Delaware Supreme Court affirmed. *See MBKS*, 945 A.2d at 1081, 1087–88.

190. DEL. CODE ANN. tit. 8, § 152 (Supp. 2006).

191. *MBKS*, 924 A.2d at 975 (emphasis added). *Cf. Scully v. Auto. Fin. Co.*, 109 A. 49, 52–53 (Del. Ch. 1920). In *Scully*, the court stated:

This means that the subscription is enforceable [sic]; that the part which contemplates the issuance of shares of stock for nothing is void; and that the subscription stands as though the bonus feature had been omitted. The distinction drawn is between declaring the issue of stock to be void and declaring that the contract to issue stock without statutory consideration is unlawful and void, the latter leaving unimpaired the obligation to pay for the stock when and as required by the corporation, or when needed to pay creditors. It is true this decision was made in a case where the corporation was insolvent, but the principle there adopted is equally applicable to all cases and to a case where the corporation is a solvent, going, prosperous concern.

*Id.* at 52–53.

Interestingly, Reddy never actually paid Baarma's designees the agreed to amount. Reddy claimed impossibility. *See MBKS*, 924 A.2d at 971. Instead, Reddy made the payments to MBKS in 2006, i.e., only after he issued the stock to himself and the litigation had started. *Id.* Reddy's post-start-of-litigation payments were too little, too late, and the Court of Chancery held that these payments did not act retroactively to validate Reddy's attempts to vote their shares. *Id.* at 973 ("Here, as things stood [in 2005, at the time BVI acted by written consent and after Reddy had issued the shares to himself], the shares in question had been issued for no consideration at all to the corporation.").

192. *MBKS*, 924 A.2d at 975; *see also* *Byrne v. Lord*, C.A. No. 14824, 1996 WL 361503, at \*3–4 (Del. Ch. June 11, 1996) (suggesting in dicta that stock with par value that was issued for consideration of less than par—if newly issued shares as opposed to treasury shares—is "void" because it was

could not vote; if the stock was voidable, it could be cancelled at the election of MBKS, which had made “clear [its] intent” to do so.<sup>193</sup>

Moreover, there were no equitable considerations supporting Reddy’s position. Reddy was not a third party who took stock without knowledge of the defect, a protected purchaser,<sup>194</sup> or a stockholder who had yet to “make additional payment up to par value.”<sup>195</sup> In response to Reddy’s argument to the effect that Baarma had been the equitable owner of MBKS and had discretion to run it “as he [i.e., Baarma] saw fit” such that it was a “mere technicality” whether consideration ran to MBKS or to Baarma’s designees, the Court of Chancery explained that “[t]echnicalities, however, are vital in transactions that affect the corporate form. . . . The law therefore requires certainty and precision in such matters.”<sup>196</sup>

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issued in violation of section 153(a) and it is therefore incapable of being voted). The implication here appears to be that compliance with section 153(a) is not a “mere technicality.”

193. *MBKS*, 924 A.2d at 976.

194. *See id.* at 974 n.30. The court stated:

The court’s decision in the present case is limited to the facts. Consistent with existing case law, under different circumstances equitable considerations may require stock issued without consideration to be treated as voidable rather than void. This is particularly the case when the stock was transferred to a protected purchaser under 6 *Del. C.* § 8-302-03. Since Reddy did not transfer the stock to any third party, the issue is not before the court and the court, does not opine on it.

*Id.* In *MBKS*, Reddy’s stock was issued absent consideration paid to the corporation, i.e., the stock was issued in violation of section 152. *See supra* notes 190–91. The Court of Chancery’s statement in *MBKS*—that equitable principles in some circumstances could override invalidation of stock caused by statutory violations—was rejected by the Delaware Supreme Court in *Waggoner II*. Thus, it is not clear to what “case law” the Court of Chancery was referring to here. *See supra* notes 114–36 and accompanying text (discussing *Waggoner II*). On the principle that statutory law trumps equity, it would seem to follow that if stock would otherwise be declared void or voidable because it was issued in violation of fiduciary duties, but the express provisions of the DUCC mandate *validating* the stock, it seems that here too statutory law should trump equitable remedies customarily employed by the courts. *See infra* notes 205–21 and accompanying text (discussing relevant DUCC provisions). Admittedly, our view is not the only one that may be drawn from the Court of Chancery’s language here. The Court of Chancery’s opinion may be read to mean that the application of the protected purchaser provision of the DUCC (and by implication other such provisions) is a matter of equitable discretion for a court.

As an aside, we note that we do not understand the Court of Chancery’s *MBKS* opinion to mean that Reddy’s stock was invalid because he was not a third-party transferee. The “protected purchaser” protections of the DUCC extend to third-party transferees and to those who purchase original issue, if they give value, do not have notice of any adverse claim, and have obtained control of the security. *See generally* DEL. CODE ANN. tit. 6, § 8-303(a) (2005); U.C.C. § 8-303 cmt. 1 (2002) (noting that protected purchaser provision may apply to one who takes “by issue”). We assume that Reddy was excluded from the protection of these provisions because he had notice of an “adverse claim.” *See* DEL. CODE ANN. tit. 6, § 8-303(a)(2) (2005); *id.* § 8-105(b) (“[A] person who knows that a representative has transferred a financial asset. . . in breach of duty has notice of an adverse claim.”). *See also id.* § 8-102(a)(1) (“Adverse claim” means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.”).

195. *MBKS*, 924 A.2d at 974; *cf.* *Bowen v. Imperial Theatres*, 115 A. 918, 922–23 (Del. Ch. 1922) (holding that, where transferee was on actual or inquiry notice of defect in transferor’s stock arising from transferor’s failure to pay adequate consideration, the company need not issue new certificates to transferee). *But cf. supra* note 191 (indicating the Reddy made post-issuance payments to the issuing corporations for the stock he issued to himself).

196. *MBKS*, 924 A.2d at 975–76. At first glance, the Court of Chancery’s dicta that “technicalities” are “vital” is a departure from prior case law that indicated that “mere technicalities” will not render stock invalid. *See supra* note 127. However we believe the better reading is that that the Court of Chancery

In *MBKS*, the distinction between whether the stock was void or voidable did not matter because the corporation wanted to void the stock and the purchaser was not an *innocent* third-party, i.e., a “protected purchaser”<sup>197</sup> or a purchaser for value without notice of the defect.<sup>198</sup> One noteworthy, and from a practitioner’s standpoint helpful, aspect of *MBKS* is the Court of Chancery’s suggestion that where void or voidable stock is transferred to a third-party protected purchaser, equitable considerations may require that the stock *not* be treated as void.<sup>199</sup> The Court of Chancery cites to two provisions of the DUCC for this proposition, and this is the first Delaware case to cite to these provisions in considering the validity of outstanding stock.<sup>200</sup> Interestingly, however, the Court of Chancery refers to this as an “equitable” principle, rather than as a statutory provision containing a mandatory rule of law binding on the parties and on the courts.<sup>201</sup> While this view is consistent with the Court of Chancery’s holdings in *Waggoner II* and in *Kalageorgi* (which was affirmed without opinion on appeal), it is in tension with the Delaware Supreme Court’s *Waggoner II* opinion, in which the court held that void stock cannot be validated based on equitable considerations.<sup>202</sup> Of course, where an on-point provision of the DUCC operates to validate stock, the Delaware Supreme Court’s *Waggoner II* holding has no application.<sup>203</sup>

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As recently noted by the Court of Chancery in *MBKS*, the Delaware case law on when stock is void and when stock is voidable is not “as clear as it could be.”<sup>204</sup> The line between which issuance related defects are and are not mere technicalities has not been clearly drawn by Delaware’s courts. While an inference can be drawn that

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was merely indicating, by example, that failure to pay consideration and comply with section 152 is not a “mere technicality.”

197. *MBKS*, 924 A.2d at 974 (“Another potential equitable consideration is found where the stock has been transferred to a ‘protected purchaser’ under the Uniform Commercial Code.... Third parties without knowledge of the defect in the stock should be permitted to rely on what appears to be validly issued stock.”); DEL. CODE ANN. tit. 6, § 8-303(a) (2005) (“‘Protected purchaser’ means a purchaser of a certificated or uncertificated security, or of an interest therein, who: (1) gives value; (2) does not have notice of any adverse claim to the security; and (3) obtains control of the certificated or uncertificated security.”); *see also supra* note 194; *cf.* U.C.C. § 8-303 cmt. 4 (2002) (“The term ‘protected purchaser’... replaces the term ‘bona fide purchaser’ used in the prior version of Article 8....”).

198. *See* DEL. CODE ANN. tit. 6, § 8-202(b)(1) (2005); *see also infra* note 207 and accompanying text (discussing purchaser for value without notice of defect).

199. *See supra* note 194.

200. *See id.*

201. *MBKS*, 924 A.2d at 974 n.30; *see supra* note 194.

202. *See supra* note 194; *supra* notes 114–36 and accompanying text (discussing *Waggoner II*).

203. In *Waggoner II*, the Delaware Supreme Court held that the *Waggoners*’ preferred stock was not issued in compliance with the governing statutory formalities. *See supra* notes 114–36 and accompanying text (discussing the *Staar* board’s failure to comply with section 151(g) of the DGCL). However, the concomitant decision by the court to deem such stock void (for statutory nonconformity) was not expressly controlled by statute; rather, it was a judicial gloss on the DGCL, and, as such, the applicability of the holding to future cases can be superseded by a statute, including the DUCC. To put it another way, the DGCL is a statute, and, as a result, judicial decisions interpreting that statute can be superseded (in future cases) by amendments to the DGCL or by *other* on-point statutes. *But cf. infra* note 206 and accompanying text (explaining that DGCL controls against any inconsistent provision in the DUCC).

204. *MBKS*, 924 A.2d at 973.

the courts were attempting to effect what they viewed as equitable results in each of the cases, the Delaware Supreme Court has based its rulings on the lack of compliance with the applicable provisions of the DGCL and, at least in *Waggoner II*, rejected the resulting inequity as a basis for excusing noncompliance. Thus, the decisions do not provide the clear guidance needed to allow practitioners to predict with reasonable confidence how courts will decide future cases in this important area.

In addition, the courts in the above cases discuss conflicts between stockholders or between stockholders and the corporation where the arguably invalid stock was in the hands of a party who purchased (or took) the stock directly from the corporation. Delaware courts have not discussed the void-voidable distinction in any detail where the arguably invalid stock was put into the stream of commerce and subsequently purchased by a purchaser for value without notice of the defect. Such circumstances have to some extent been provided for in the Uniform Commercial Code, which (as amended) has been adopted by the Delaware legislature.

#### UNIFORM COMMERCIAL CODE PROVISIONS RELEVANT TO THE VOID-VOIDABLE INQUIRY

Until *MBKS*, Delaware courts addressing the void-voidable distinction did not cite to the relevant DUCC provisions. The provisions of the DUCC are incorporated into the DGCL by section 201 of the DGCL which provides, inter alia, that except as otherwise provided in the DGCL, Article 8 of Subtitle 1 of Title 6, the DUCC, governs the transfer of stock and the certificates of stock that represent stock or uncertificated stock.<sup>205</sup> In the event of a conflict between the provisions of the DGCL and the DUCC, the DGCL controls.<sup>206</sup> Two provisions of the DUCC, sections 202 and 210, are particularly relevant to any consideration of the validity of stock in the hands of third parties.

Section 202 protects purchasers for value without notice of defects. Section 202 provides:

The following rules apply if an issuer asserts that a security is not valid:

(1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case [where there is a constitutional defect relating to the stock's validity], the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.<sup>207</sup>

205. See DEL. CODE ANN. tit. 8, § 201 (2001).

206. See *id.*

207. DEL. CODE ANN. tit. 6, § 8-202(b)(1) (2005). There are only a handful of cases in which a court discusses this U.C.C. provision. See *Ramette v. Al & Alma's Supper Club Corp.* (*In re Bame*), 252 B.R. 148 (Bankr. D. Minn. 2000). In *Ramette*, the court stated:

Thus, if a purchaser for value presents a certificated security to the issuer for registration of a transfer, the issuer must register the transfer, notwithstanding the validity of the initial issuance of the certificated security or any defense of the issuer, so long as the purchaser took without notice.

“Th[is] Code provision is operative without regard to whether the security is declared ‘void’ by the law which creates the requirement which has been violated.”<sup>208</sup> However, there are three exceptions to this provision.<sup>209</sup> One exception relates to overissuances; such cases are controlled by a separate statutory provision discussed below.<sup>210</sup> A second exception relates to governmental issuers; a subject beyond the scope of this Article.<sup>211</sup> The third relates to constitutional defects in the stock’s validity, i.e., a failure to comply with some state constitutional provision regulating the issuance of stock. Official Comment 3 to the Uniform Commercial Code provision explains:

Subsection (b) gives to a purchaser for value without notice of the defect the right to enforce the security against the issuer despite the presence of a [constitutional] defect that otherwise would render the security invalid. . . . [I]f the defect involves a violation of constitutional provisions, these rights accrue only to a subsequent purchaser, that is, one who takes other than by original issue. This Article leaves to the law of each particular State the rights of a purchaser on original issue of a security with a constitutional defect. No negative implication [with regard to a purchaser on original issue] is intended by the explicit grant of rights to a subsequent purchaser.<sup>212</sup>

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Moreover, § 8-104 implicitly recognizes that an issuer’s responsibilities may require it to issue additional certificated securities representing new interests in the issuer.

*Id.* at 156 (citation omitted). For another case, see *In re Seacoast Anti-Pollution League*, 490 A.2d 1329 (N.H. 1984). In *Seacoast Anti-Pollution League*, the court said:

The mere possibility that a [judicial or administrative] order authorizing the issuance of [governmental] securities may, many months later, be overturned on appeal, when neither the commission nor this court has suspended the order, or when no suspension was sought, does not amount to notice of a defect *per se*. A purchaser for value who has notice only of the appeal is thus protected by the statute.

*Id.* at 1339; see also *N.J. Bank, N.A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 342–47 (3d Cir. 1982); *Johns-Manville Corp. v. Village of DeKalb*, 439 F.2d 656, 664–65 (8th Cir. 1971); *E. Okla. Television Co. v. Ameco, Inc.*, 437 F.2d 138, 144 (10th Cir. 1971); *Am. Sec. Transfer, Inc. v. Pantheon Indus., Inc.*, 871 F. Supp. 400, 405–06 (D. Colo. 1994); *Dean Witter & Co., Inc. v. Educ. Computer Corp.*, 369 F. Supp. 757, 762–64 (E.D. Pa. 1974); *Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp.*, 293 F. Supp. 1383, 1386–88 (D. Colo. 1968); *Farmers State Bank & Trust Co. v. City of Yates Ctr.*, 624 P.2d 971, 979–81 (Kan. 1981); *Sanitary & Imp. Dist. No. 272 v. Marquardt*, 443 N.W.2d 877, 881–82 (Neb. 1989); *id.* at 883 (Caporale, J., dissenting in part); *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 691 P.2d 524, 528, 542–44 (Wash. 1984), *cert. denied sub nom. Haberman v. Chem. Bank*, 471 U.S. 1065 (1985); *id.* at 555 (Utter, J., dissenting).

208. 8 LARRY LAWRENCE, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 8-202:11, at 106 n.20 (3d ed. 1996) (citing Official Comment 4 to U.C.C. section 8-202, as it read at that time).

209. See U.C.C. § 8-202 cmt. 3 (2002).

210. See *id.*; see also DEL. CODE ANN. tit. 6, § 8-210 (2005).

211. See DEL. CODE ANN. tit. 6, § 8-202(b)(2) (2005). This section states:

Paragraph (1) [of section 8-202(b)] applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

*Id.*

212. U.C.C. § 8-202 cmt. 3 (2002). For further discussion of a security issued with a constitutional defect, see *supra* notes 22 & 71 and accompanying text.

Section 202(b) should prevent a court from holding that stock issued in contravention of a constitutional provision void, i.e., a nullity<sup>213</sup>—at least with respect to those state constitutional provisions that do not expressly mandate that the penalty for violating the provision is that the stock be declared void. If such stock were a nullity, then its purchase by a subsequent purchaser for value without notice of the defect would presumably leave the new holder with no rights vis-à-vis the corporation.<sup>214</sup> The statute mandates precisely the opposite result. Moreover, in regard to *any* statutory defect in the issuance process, excepting overissuances (discussed below) and issuances by governmental entities, the statute protects a purchaser for value without notice of the defect, irrespective of whether the purchaser took by original issue or subsequently.<sup>215</sup> From the perspective of the purchaser, *the Delaware legislature's policy is to validate such stock, not to void it*. This policy is in tension with the holdings of the Delaware Supreme Court in *Triplex* and *Waggoner II* that stock was void due to the corporation's failure to comply with statutory formalities in the stock issuance process, regardless of the equitable circumstances involved.<sup>216</sup> Where the effect of this statute is to “validate” a security issued absent compliance with statutory formalities, it is unclear if the board or stockholders, as the case may be, should take action after-the-fact to comply. Arguably such action would be unnecessary because the stock is deemed valid and thus the action would accomplish nothing. One scholarly authority states that no such action is necessary.<sup>217</sup>

213. *Cf.* *Montgomery v. Hughes Developers, Inc.*, 873 So. 2d 1109, 1115 (Ala. 2003) (“Therefore, if Montgomery is a bona fide purchaser [who did not take on original issue], he may be entitled to a remedy against the corporation even if the stock was also void because it violated § 234, Ala. Const. 1901.”).

214. *Cf. supra* note 39 (citing *Reich Family L.P. v. McDermott, Will & Emery, C.A. No. 101921-03* (N.Y. Sup. Ct. Oct. 29, 2003)). Furthermore, on its face, section 8-202 only applies when an issuer attempts to assert the invalidity of (purported) stock. However, this section also applies in certain disputes between a guarantor and a stockholder. *See* DEL. CODE ANN. tit. 6, § 8-201(b) (2005). Likewise, in certain situations, a transfer agent acting for an issuer will be estopped from asserting the invalidity of (purported) stock. *See* DEL. CODE ANN. tit. 6, § 8-407 (2005). The statute does *not* clearly apply where one stockholder asserts the invalidity of another stockholder's (purported) stock. Where the corporation is estopped from asserting the invalidity of (purported) stock, the holder of the stock should be similarly estopped, and so should other holders of corporate securities (whether of that class or series or of another class or series). *Cf.* DEL. CODE ANN. tit. 8, § 124 (2001) (limiting those with standing to claim that a corporate act is ultra vires); *infra* note 224 (quoting a part of section 124).

215. *See* 8 LAWRENCE, LAWRENCE'S ANDERSON ON THE U.C.C., *supra* note 208, § 8-202:11, at 106. The treatise states:

As to defects not involving a violation of constitutional provisions, a non-governmental security is valid in favor of an immediate purchaser for value who is without notice of the defect; such a purchaser takes free of *statutory* invalidation, but not of constitutional invalidation. As to subsequent purchasers for value who are without notice of the defect, neither *statutory* nor *constitutional* invalidities may be raised

*Id.* (footnote omitted) (emphasis added).

216. *See id.* § 8-202:20, at 110 (“Even if stock had been issued without the corporation's receiving payment in money, goods, or services, the stock could not be cancelled when, at the time in question, it was held by unknown third persons who might come within the protection of UCC § 8-202.”).

217. *See id.* § 8-202:10, at 105–06 (“It is to be noted that there is no formal act which ‘validates’ or makes the security valid; the defect or invalidity is merely ignored and the security regarded as valid when the question is raised in the courts.”).

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The Delaware Uniform Commercial Code contains a specific provision dealing with the overissue of stock. In particular, section 210 of the DUCC, titled “Over-issue,” provides, in pertinent part, as follows:

(a) In this section, “overissue” means the issue of securities in excess of the amount the issuer has corporate power to issue, but an overissue does not occur if appropriate action has *cured* the overissue.

(b) Except as otherwise provided in subsections (c) and (d), the provisions of this Article which validate a security or compel its issue or reissue do not apply to the extent that the validation, issue, or reissue would result in overissue.

(c) If an identical security not constituting an overissue is reasonably available for purchase, a person entitled to issue or validation may compel the issuer to purchase the security and deliver it if certificated or register its transfer if uncertificated, against surrender of any security certificate the person holds.

(d) If a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person’s demand.<sup>218</sup>

No Delaware court has addressed the meaning of “cured” and whether an overissue of stock can be “cured,” per section 210, by filing a certificate of amendment to increase the number of authorized shares of stock (or otherwise).<sup>219</sup> As a matter of first impression, it would appear that an after-the-fact increase in the number of authorized shares by a certificate amendment (or by an amendment to a certificate of designations where the board has blank check authority) should “cure” an overissue.<sup>220</sup> Indeed, if a certificate amendment cannot “cure” an “overissue,” what could? Any other view would seem to render the statute meaningless. Arguably, the statute supersedes the Delaware Supreme Court’s holding in *Triplex*, at least that aspect of the holding that a certificate amendment cannot validate stock initially issued under a defective charter. While the position that a certificate amendment can cure an overissue has not been adopted by any Delaware court, that may be

218. DEL. CODE ANN. tit. 6, § 8-210 (2005) (emphasis added). Again, there are only a handful of cases discussing this and related DUCC provisions. See *supra* notes 194, 207 & 213; Hughes Developers, Inc. v. Montgomery, 903 So. 2d 94, 100–02 (Ala. 2004) (suggesting that stock issued in excess of authorized number is ultra vires and void but quoting U.C.C. provision in regard to remedies available to purported stockholder (citing Crawford v. Twin City Oil Co., 113 So. 61, 63 (Ala. 1927))); cf. *supra* notes 38, 39 & 129.

219. Official Comment 1 to U.C.C. section 8-210 provides that an “overissue may be a relatively minor technical problem that can be cured by appropriate action under governing corporate law.” U.C.C. § 8-210 cmt. 1 (2002). In a treatise on the Uniform Commercial Code as it stood prior to the existence of what is now section 8-210, the author notes that “Article 8 does not permit validation of ‘invalid’ securities... when an overissue would result.” 8 LAWRENCE, LAWRENCE’S ANDERSON ON THE U.C.C., *supra* note 208, § 8-202:13, at 107. Arguably, the intent of section 210’s “cure” provision was to change that conclusion.

220. In certain circumstances, particularly where the statutory error arose from a misfiling, a certificate of correction filed in compliance with section 103 might cure the invalidity. See DEL. CODE ANN. tit. 8, § 103(f) (2001).

because no party has presented this argument to any court for adjudication. The little non-Delaware judicial and scholarly authority that exists is divided.<sup>221</sup>

### A PATH TO CLARITY

In conclusion, we suggest that the policy underlying the DUCC to validate stock, notwithstanding technical defects in its issuance, in the hands of innocent purchasers for value should be recognized as a principle of law, not solely as a principle of equity, and should be applied by the Delaware courts as such. As a result, where stock is held by an innocent third-party purchaser, technical defects relating to statutory formalities should not lead to a finding of void stock, but at worst to a finding of voidable stock. Cure or ratification should be permitted except in cases where the issuance violates the directors' duty of loyalty or where finding the stock valid would yield inequitable results. Such a rule would allow practitioners to opine as to the validity of a corporation's outstanding stock where the stock was issued defectively but the defect was cured, subject to a standard exception for breaches of fiduciary duties and other inequitable circumstances, and would eliminate the risk that stock in the trading markets or otherwise held by innocent purchasers for value might be deemed void. Such a result puts the parties in the position that was intended and is more efficient than giving the purchaser a rescission claim against the company.

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221. Pennsylvania has adopted U.C.C. section 8-210. See 13 PA. CON. STAT. ANN. § 8210 (West 2003). In *Barter v. Diodoardo*, the Superior Court of Pennsylvania held, as a matter of Pennsylvania law, that the later filing of an amendment to the articles of incorporation increasing the number of authorized shares was not sufficient to "cure" the overissue, and that, in such circumstances, the overissue is void rather than voidable. Compare *Barter v. Diodoardo*, 771 A.2d 835, 842-44 (Pa. Super. Ct. 2001) (citing Delaware case law), with GLAZER ET AL., GLAZER AND FITZGIBBON ON LEGAL OPINIONS, *supra* note 6, § 10.4.5.3, at 348 (suggesting that a charter amendment may cure defects in previously overissued shares but whether it does depends upon such matters as the knowledge and intent of stockholders in subsequently adopting the charter amendment), and U.C.C. § 8-210 cmt. 1 (2002) (noting that "[t]his section does not give a person entitled to validation, issue, or reissue of a security, the right to compel amendment of the charter to authorize additional shares," indicating that it may be done at the option of the issuer).

With regard to the alternative remedies provided in section 210(c) and (d), compare *Hughes Developers*, 903 So. 2d at 100-02 (holding that the stockholder does not have access to the section 210(d) remedy if the remedy provided under section 210(c) is offered by the issuer), with *Tuggle v. American Finance System, Inc.*, C.A. No. 450, 1978 WL 21995, at \*4 (Del. Ch. June 22, 1978) (holding that a party-stockholder has the right to elect remedies where stockholder demanded security for five years, it was unjustly withheld, and the stockholder was subsequently offered only "a like security of greatly diminished value") (applying precursor to the current U.C.C. section 8-210).

In *MBKS*, Vice Chancellor Lamb suggested that the DUCC provisions may trump determinations that stock is void. See *MBKS Co. Ltd. v. Reddy*, 924 A.2d 965, 974 n.30 (Del. Ch. 2007), *aff'd*, 945 A.2d 1080 (Del. 2008). He wrote:

The court's decision in the present case is limited to the facts. Consistent with existing case law, under different circumstances *equitable* considerations may require stock issued without consideration to be treated as voidable rather than void. This is particularly the case when the stock was transferred to a protected purchaser under 6 Del. C. § 8-302-03.

*Id.* at 974 n.30 (emphasis added). The Vice Chancellor's use of "equitable" may indicate that he does not believe a finding of validity is statutorily mandated in all cases in which it is asserted that stock is invalid against a subsequent purchaser for value without notice of the defect. See generally DEL. CODE ANN. tit. 6, § 8-202 (2005).



The Court of Chancery, at least, seems to be moving in this direction. In both *Waggoner II* and in *Kalageorgi*, the Court of Chancery demonstrated a willingness to look beyond statutory violations to the equitable result caused by voiding the stock. Likewise, in *MBKS*, the Court of Chancery indicated a willingness to look to the equities, though in that case the equities compelled voiding the stock. To the extent the decision of the Delaware Supreme Court in *Waggoner II* suggests that the policy underlying the DUCC can never be applied to validate stock issued in violation of statute, it is inconsistent with express statutory law.<sup>222</sup>

From a policy standpoint, where all relevant stockholder constituencies have spoken (and most certainly where unanimity is present), and a certificate amendment purports to correct an overissuance of shares, for example, ratification should be permitted absent inequitable circumstances. Stockholders take their stock knowing the charter can be amended to increase the number of authorized shares and thereby to dilute their proportionate interest in the corporation.<sup>223</sup> The void-voidable distinction is not expressly commanded by the DGCL but rather is a judicial gloss on the DGCL much like other equitable doctrines.<sup>224</sup> If the application of this doctrine does not protect disinterested stockholders (as expressed by the corporate ballot), then it serves no useful purpose.

222. While it may not be appropriate to use equitable principles to overcome legal requirements, *but cf.* DEL. CODE ANN. tit. 8, § 124 (2001) (allowing the court to take equitable principles into account in determining whether performance of ultra vires contract should be enjoined under this section), the reliance on a statutory provision is not subject to criticism on this ground. *See Ala. By-Products Corp. v. Neal*, 588 A.2d 255, 258 n.1 (Del. 1991). The court in *Ala. By-Products* stated:

This Court has consistently held that there is no basis for expanding the limited remedy which is provided for in the Delaware appraisal statute by the invocation of equitable principles. The invocation of equitable principles to override established precepts of Delaware corporate law must be exercised with caution and restraint. Otherwise, the stability of Delaware law is imperiled. While th[is] doctrine . . . is an important part of our jurisprudence, its application, or that of similar concepts, should be reserved for those instances that threaten the fabric of the law, or which by an improper manipulation of the law, would deprive a person of a clear right. Since claims of unfair dealing cannot be litigated in a statutory appraisal proceeding, an act of unfair dealing cannot be the equitable basis for independently attributing value to stock in such an action. [Nevertheless,] [i]n a statutory appraisal proceeding, an act of unfair dealing is . . . relevant to assess the credibility of those supplying information in support of a [statutory] valuation contention.

*Id.* at 258 n.1 (citations omitted).

223. *Cf.* *Fed. United Corp. v. Havender*, 11 A.2d 331, 342 (Del. 1940) (holding that stockholders' interests are defeasible by merger); *Rothschild Int'l Corp. v. Liggett Group Inc.*, 474 A.2d 133, 136–37 (Del. 1984) (same); *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 615 (Del. Ch. 1999) (“The contractual rights vested in corporate stockholders by a certificate of incorporation are subject to amendment by vote of those stockholders or by merger.”).

224. *See* DEL. CODE ANN. tit. 8, § 124 (2001) (“No act of a corporation . . . shall be invalid by reason of the fact that the corporation was without capacity or power to do such act . . . but such lack of capacity or power may be asserted: (1) In a proceeding by a stockholder against the corporation to enjoin the doing of any act or acts . . . If the unauthorized acts . . . sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in doing so may allow to the corporation or to the other parties to the contract, as the case may be, such compensation as may be equitable for the loss or damage sustained by any of them which may result from the action of the court in setting aside and enjoining the performance of such contract . . .” (emphasis added)).

Likewise, if the board had the power to issue the shares in the first place but failed to comply with procedural formalities, stockholders have no reliance interest in regard to the remedy of judicial invalidation. Absent inequitable circumstances, there is no reason not to allow the board the opportunity to correct its prior error. Such action puts all relevant corporate constituencies in the position for which they had bargained.

In a dispute between a corporation and a stockholder whose stock is arguably invalid because the corporation or its board failed to comply with procedural formalities, the DUCS suggests the more efficient result is for the corporation to be permitted to deliver to the stockholder the valid stock for which the stockholder had bargained, rather than leaving that stockholder with a rescission claim against the corporation. Such a result avoids potential gamesmanship based on the increase or decrease in the value of the stock post sale.<sup>225</sup>

While it could be argued that mandating strict compliance affords certainty—that stock not issued in compliance with law is void—and encourages vigilant compliance,<sup>226</sup> such argument assumes that errors are conscious and advertent and that people will choose noncompliance if the consequences are not sufficiently severe. Our experience is to the contrary. It is a rare case where a defect in a stock issuance was intentional. Virtually all cases we have seen involve unintentional errors due to a mistaken understanding of law or fact, or an unintentional failure to properly document or execute an action. In all these cases, the parties' intent was that the stock be valid, and the parties were under the impression that the stock had been validly issued. In such cases, the in terrorem effect of a strict compliance rule is not likely to produce more systemic compliance with corporate formalities. Furthermore, where the compliance errors occurred in the past, the parties, the corporate directors and officers, and the corporate records (board minutes, etc.) involved are often long gone by the time the error is discovered. Given that the evidentiary basis for establishing statutory compliance often hinges on the availability of these people and records, a strict compliance rule injects uncertainty into the process with no consequent benefit.

As noted at the beginning of this Article, the Delaware Supreme Court has stated that “[t]he issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly requires certainty

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225. See, e.g., *Highland Crusader Offshore Partners, L.P. v. Motient Corp.*, No. 05-7996-E (Tex. Dist. Ct. Nov. 30, 2007) (order granting summary judgment) (dismissing rescission claim by a stockholder against issuing corporation where stock with no voting rights was issued to the stockholder at its request to avoid regulatory review, but where the charter prohibited issuing nonvoting securities).

226. See Elizabeth A. Wilburn, Commentary, *Jackson v. Turnbull: Is Statutory Compliance the Threshold to Fair Dealing?*, 20 DEL. J. CORP. L. 608, 608, 621 (1995) (noting that “[a]fter *Jackson v. Turnbull*, C.A. No. 13042, 1994 WL 174668 (Del. Ch. Feb. 8, 1994)], it appears that failure to conform with statutory requirements may render harsh results for corporations seeking affirmation of a merger. Such mistakes may no longer be excused as simple technical errors,” and “a more vigilant judiciary . . . [may in the future] confer statutory compliance the same level of deference as awarded the substantive aspects of the Delaware laws of corporate governance,” thereby “encourag[ing] corporate compliance with the DGCL”).

in such matters.”<sup>227</sup> For this reason, Delaware courts require “strict adherence to statutory formality in matters relating to the issuance of capital stock . . . . Delaware’s statutory structure implements these policies through a clear and easily followed legal roadmap of statutory provisions.”<sup>228</sup> No one doubts the centrality of stock issuance to corporate governance, and no one doubts the desirability of certainty. However, the harsh and unforgiving application of legal standards to stock issuances with unintentional statutory violations, without regard to the equity of the consequences, has resulted in less certainty rather than more. Given that the state legislature has spoken by addressing this issue in the Delaware Uniform Commercial Code, there is no good reason to continue down the path of judicially mandated strict compliance. The Court of Chancery appears to have recognized this in *Waggoner II*, *Kalageorgi*, and *MBKS*, and hopefully the Delaware Supreme Court will agree the next time it has an opportunity to do so.<sup>229</sup>

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227. *Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991), *rev’g* C.A. No. 11185, 1990 WL 28979 (Del. Ch. Mar. 15, 1990).

228. *Grimes v. Alton, Inc.*, 804 A.2d 256, 260 (Del. 2002) (internal quotations marks omitted).

229. *Cf. MBKS Co. Ltd. v. Reddy*, 924 A.2d 965, 974 n.30 (Del. Ch. 2007) (failing to address either the void-voidable distinction in detail or the DUCC), *aff’d*, 945 A.2d 1080 (Del. 2008).

