

National University of Ireland, Maynooth

From the Selected Works of Seth Barrett Tillman

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Donald W. Glazer, Recent Developments, Opinions on DGCL Section 204 Stock: A Rose is a Rose is a Rose, In Our Opinion: The Newsletter of the Legal Opinions Committee (ABA Business Law Section, Chicago, IL), Spring 2014, citing Bigler & Tillman's Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law

Seth Barrett Tillman



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IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

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**Opinions on DGCL Section 204 Stock:
A Rose is a Rose is a Rose**

Section 204 of the Delaware General Corporation Law, which became effective on April 1 of this year, provides Delaware corporations a procedure by which they can ratify stock whose issuance did not satisfy statutory requirements. (In this article I will refer to stock that has been ratified under Section 204 as "Section 204 stock.")

Section 204 permits corporations to convert lead to gold, deeming, as if by alchemy, stock whose approval initially was defective to have been validly issued from the date it originally was issued.

In cases challenging the validity of stock, the Delaware courts have insisted on punctilious compliance with statutory requirements and, for stock whose issuance was not approved in accordance with those requirements, have compounded the difficulty of validating it by blurring the distinction between voidable stock, which can be ratified as of the date the stock originally was issued, and void stock, which cannot be ratified and hence whose issuance cannot be corrected retroactively. See *"Recent Developments — Caveat Opinion Givers: Opinions on the Status of Stock"* in the Summer 2011 issue (vol. 10, no. 4) of the Newsletter (at pages 13-14); *"Notes from the Listserve — Postscript: Curing Prior Deficiencies in Authorizations of Share Issuances"* in the Spring 2011 issue (vol. 10, no. 3) of the Newsletter (at pages 10-12); S. Bigler and S. Tillman, *"Void or Voidable? — Curing Defects in Stock Issuances Under Delaware Law,"* 63 Bus. Law. 1109 (2008). By permitting ratification of stock that is void as well as voidable, Delaware in adopting Section 204 has provided corporations a knife to cut the Gordian knot when their counsel is unable to assure them that stock they are seeking to validate is voidable and not void. An article by Steve Bigler and John Mark Zeberkiewicz, *"Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts,"* in the February 2014 issue of *The Business Lawyer* is must reading for anyone advising a corporation regarding compliance with Section 204.

- Donald W. Glazer
dglazer@goodwinprocter.com

[Editors' Note: We understand that major Delaware law firms are taking the approach described in Don's article, for the reasons he has outlined, and are not hedging their opinions on Section 204 stock.]

***Nomura Asset Capital Corp v.
Cadwalader, Wickersham & Taft LLP***

On February 13, 2014, the Appellate Division of the New York State Supreme Court affirmed, as modified, the trial court's dismissal of Cadwalader's motion for summary judgment on Nomura's claim of malpractice. 980 N.Y.S.2d 95. (The trial court's decision can be found at 2012 WL 1647308 (January 11, 2012).) Nomura, Cadwalader's former client, claims the firm committed malpractice in connection with its representation of Nomura in a 1997 structuring and issuance of interests in a REMIC trust. The claim has two components, one asserting that Cadwalader did not adequately advise Nomura about the applicable REMIC regulations pertaining to the determination of the fair market value of real property, and the second asserting that the firm failed to perform necessary due diligence before issuing its opinion letter to the purchasers of the securities of the trust.

On the first point, the Appellate Division concluded that the trial court should have granted summary judgment for Cadwalader and modified the order accordingly. The testimony and evidence submitted by the firm convinced