
Seth Barrett Tillman, None
THE LAW OF CORPORATIONS

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a certain number of shares of stock in the corporation. It is ordinarily documentary evidence of the holder’s ownership of shares and a convenient instrument for the transfer of title. The one-time paper crunch on Wall Street has been a major impetus behind the recent move to recognize uncertificated shares. A certificate of stock is in “street name” when it has been issued in the name of an individual or firm and endorsed in blank so that it can be negotiated without further endorsement.

§ 16:13 Issuance, creation, or allotment of shares

Shares of stock are contracts created by mutual assent of the corporation and its shareholders. The shares must first be “authorized” by appropriate provisions in the corporation’s charter, which detail the rights attaching to ownership. Once shares are authorized, the power to issue them lies with the board of directors. When shares are sold by the corporation, they are “issued,” and those shares are thereafter referred to as “authorized

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Shares that are not duly authorized confer no corporate-based rights on their holder. Liebmann v. Frangiosa, 844 A.2d 992 (Del. Ch. 2002). The failure to obtain shareholder approval to authorize sufficient common shares to enable full conversion of newly issued convertible preferred stock does not invalidate the authorization or issuance of such convertible preferred stock. See, Hildreth v. Castle Dental Centers, Inc., 939 A.2d 1281 (Del. 2007).

and issued." As long as they are not reacquired by the corporation—that is, they remain in the hands of shareholders—they are also "outstanding" (that is, "authorized, issued, and outstanding"); shares that are "authorized, issued, but not outstanding" are shares that were previously issued by the corporation but subsequent to their issuance have been reacquired by the corporation. Such shares are more commonly referred to as "treasury shares" or "treasury stock." Shares issued in excess of the amount authorized, or issued that are not of a type authorized, are void.  

The word "issue" is generally employed to indicate the making of a share contract—that is, a transaction by which the directors create new shares and a person becomes the owner of the shares. Share ownership can result either from subscription to an original issue of shares by the corporation or from the transfer of shares from a prior owner and the substitution of the transferee in the place of the prior owner. A corporation usually may resell treasury shares—that is, shares that have already been issued and have been reacquired by the corporation but not retired. Such a resale has the same market impact as the issue or creation of new shares, although the transaction generally gives rise to a different accounting treatment by the corporation. Shares issued cannot be cancelled without following the procedures set forth in the governing corporate statute which of necessity includes amendment of the articles of incorporation.

"Issue" is often associated with the execution and delivery of a

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Gingras, 687 N.E.2d 1342 (N.Y. 1997) (distinguishing between two complainants with respect to clear intent to convey shares to one, but no evidence as to the other).

See, e.g., Waggoner v. Laster, 581 A.2d 1127, 1137 (Del. 1990); Barter v. Diodato, 771 A.2d 855, 843–844 (Pa. Super. 2001) (denying that even a bona fide purchaser for value obtains any rights through unauthorized shares). In contrast, shares issued before their issuance was approved by the board and whose holders thereafter elected a board of directors, were deemed validly issued by virtue of the board’s subsequent ratification of their issuance since the ratifying directors were carrying over from their term that began before the shares had been placed without their approval. See Kalageorgi v. Victor Kamkin, Inc., 750 A.2d 531 (Del. Ch. 1999).


See § 21:9 to 21:11.

share certificate, but the issue of the shares is not dependent on delivery. To become shareholders, in the sense of becoming owners of shares, subscribers need not receive a certificate. However, until the subscriber becomes a holder of record, she ordinarily has no right to vote, to receive notice of shareholders' meetings, and to inspect corporate books; she also has no right against the corporation to participate in dividends.

(2008) (speculating that filing amendment to certificate after shares were issued could "cure" the failure of shares to have been duly authorized when initially issued).

7Golden v. Osbe Enterprises, Inc., 240 N.W.2d 102 (S.D. 1976) (once corporate stock is paid for, it is issued regardless of whether share certificate is executed and delivered). See also San Joaquin Land & Water Co. v. Beecher, 35 P. 349 (Cal. 1894); Mitchell v. Beckman, 28 P. 110 (Cal. 1883). See Gorissen's Case, 8 L.R. Ch. App. 507, 515 (1873) ("If a person agrees to take shares he does at that moment become a shareholder, and the company [is] entitled, and [is] indeed bound, to put him on the register."). But see Graham v. Commercial Credit Co., 200 A.2d 828 (Del. 1964) (stating that delivery, either actual or constructive, is essential before stock certificate can be said to be issued).


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the property given by the promoters° or on inadequate disclosure, which may also give rise to federal securities law violations.10

Some courts hold that, when promoters have in form owned the treasury shares, their sale by the company has the same effect as if sold by promoters themselves.11 Most decisions have thus held that the sale of "treasury stock" under such circumstances will give a corporate right of action against the promoters for the promoters' secret profits to the same extent as if the shares had been issued by original subscription.12

§ 16:17 No-par shares; advantages, issue price

New York1 initiated the movement to authorize the use of shares without par value. No-par shares have since been authorized in nearly every state.2 The comparative advantages of using no-par and par value shares should be weighed in drafting the stock clauses of a corporation's charter.3

The number of no-par shares that may be issued must be speci-

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8Cf. San Juan Uranium Corp. v. Wolfe, 241 F.2d 121 (10th Cir. 1957).
9See John Frohling, The Promoter and Rule 10b-5: Basis for Accountability, 48 Cornell L. Rev. 274 (1962).
11California-Calaveras Mining Co. v. Walls, 149 P. 596 (Cal. 1915) ("The court will look beyond the form which the transaction took to its substance, and the obvious intent of the parties in the entire matter for the purpose of preserving and securing the rights of the real parties of interest and to circumvent fraud."); Torrey v. Toledo Portland Cement Co., 122 N.W. 614 (Mich. 1909); Anderson v. Johnson, 119 A. 642 (R.I. 1923). See also Annot., 85 A.L.R. 1262 (1933). For a discussion of promoters' liability, see § 5:14.

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3Floyd Franklin Burchett, Corporation Finance, 81–84 (4th ed. 1964); Dewing, supra § 16.10 note 1, at 59–65; Henry W. Ballantine, Non Par Stock—Its Use and Abuse, 57 Am. L. Rev. 233 (1923); Adolf A. Berle, Problems of Non Par Stock, 25 Colum. L. Rev. 43 (1925); James Cummings Bonbright, Dangers of No-Par Shares, 24 Colum. L. Rev. 449 (1924); Goodbar, supra note 2; Hills, supra § 16.13 note 4, at 1336–1337, 1356, 1361–1362; Israels, supra note 2; William E. Masterson, Consideration for Non-Par Shares and Liability of Subscribers and Stockholders, 17 Tex. L. Rev. 247 (1939).
fied in the articles of incorporation, or the shares will be void. The great feature of no-par shares is price flexibility in that they require no fixed minimum capital contribution, although the same kind of quality of consideration is required as for par value shares. No-par shares may be issued from time to time at different prices, yet the subscribers and holders of the same class and series of shares will be entitled to participate equally share-for-share in the distribution of dividends and assets. The issue price of no-par shares may ordinarily be fixed by the directors.

4Triplex Shoe Co. v. Hutchins, 152 A. 342 (Del. 1930). See also Staar Surgical Co. v. Waggoner, 588 A.2d 1130 (Del. 1991) ("stock issued without authority of law is void and a nullity"). See C. Stephen Bigler & Seth Barrett Tillman, Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law, 63 Bus. Law. 1109 (2008) (speculating that Triplex may have been changed by subsequent enactment in Delaware of UCC provisions that can be interpreted to provide that filing amendment to certificate after shares were issued "cures" the failure of shares to have been duly authorized when initially issued).


61 Dewing, supra § 16.10 note 1, at 66–67. 68; Adolf A. Berle, Corporate Devices for Diluting Stock Participations, 31 Colum. L. Rev. 1239, 1242 (1931).

7See G. Loewus & Co. v. Highland Queen Packing Co., 6 A.2d 545 (N.J. Ch. 1939). Watered stock is discussed in Chapter 17.


9Johnson v. Louisville Trust Co., 293 F. 857 (6th Cir. 1923).