

5-1-1970

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FLORIDA SECURITIES REGULATION AND CORPORATE LAW*

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The years 1967 and 1969 marked the enactment of significant amendments to and the adoption of important rule changes under Florida's Sale of Securities Law.¹ At the outset, it should be noted that the Florida Securities Commission, which formerly administered chapter 517 of the Florida Statutes, was replaced in this function by the Division of Securities of the Department of Banking and Finance.² The Department of Banking and Finance is an agency under the Comptroller of Florida.

I. NEW LEGISLATION AND RULES—SECURITIES REGULATION

A. Limited Offering Exemption

Since the last survey of Florida securities regulation,³ the post-incorporation limited offering exemption⁴ has undergone significant re-

* The securities section of this survey includes cases reported in 177 So.2d through 225 So.2d and laws enacted by the 1967 and 1969 sessions of the Florida Legislature.

The corporate section includes cases reported in 200 So.2d through 225 So.2d and laws enacted by the 1969 session of the Florida Legislature.

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1. FLA. STAT. ch. 517 (1967).

2. Fla. Laws 1969, ch. 69-106.

3. Sowards, *Florida Securities Regulation*, 20 U. MIAMI L. REV. 546 (1966) (Florida survey).

4. FLA. STAT. § 517.06(11) (1967).

vision. The exemption was originally applicable only to "a corporation organized and existing under the laws" of Florida.⁵ Thus, a partnership, trust or non-Florida corporation offering interests, participations, or shares which amounted to a "security" within the meaning of chapter 517 of the Florida Statutes could not avail itself of this exemption and, absent some other exemption, such securities had to be registered with the Florida Securities Commission. This exemption has been expanded to permit its use by trusts,⁶ partnerships,⁷ and non-Florida corporations.⁸

This exemption, as amended in 1965, was applicable to "shares" of a Florida corporation sold during any period of 12 consecutive months to not more than 15 persons.⁹ In 1967, the exemption was amended to replace the word "shares" with the word "securities."¹⁰ By virtue of this amendment, business firms may utilize the exemption for the private placement of debt securities as well as shares of stock. The exemption was further amended to limit the 15 purchasers during a 12-month period to include sales made pursuant to the preincorporation limited offering exemption.¹¹ Accordingly, if the promoters of the company secured 25 preincorporation subscriptions and thereafter caused the firm to be incorporated, the firm could not employ the postincorporation exemption for any additional capital until a 12-month period had elapsed from the time that the preincorporation financing was completed. In 1969, the exemption was expanded to permit the sale of securities during any 12-month period to not more than 20 persons including sales made pursuant to the preincorporation exemption.¹²

Prior to the 1969 amendments, "no commission or other remuneration" was permitted to be paid in connection with the private placement of securities under the exemption.¹³ This restriction precluded the employment of investment bankers or other financial intermediaries in the private placement of securities for a fee. To circumvent this restriction, organizers of new businesses often went to New York investment bankers who privately placed the securities with residents of New York or other jurisdictions where there was no restriction on the payment of such commissions. In an effort to meet the business realities of private placements, the post-incorporation exemption was amended in 1969 to permit payment of commissions to securities dealers registered with the Florida Securities Division.¹⁴

5. FLA. STAT. § 517.06(11) (1965).

6. Fla. Laws 1967, ch. 67-114, *amending* FLA. STAT. § 517.06(11) (1965).

7. Fla. Laws 1969, ch. 69-327, *amending* FLA. STAT. § 517.06(11) (1967).

8. *Id.*

9. FLA. STAT. § 517.06(11) (1965).

10. Fla. Laws 1967, ch. 67-114, *amending* FLA. STAT. § 517.06(11) (1965).

11. *Id.* (a maximum of 25 preincorporation subscriptions).

12. Fla. Laws 1969, ch. 69-327, *amending* FLA. STAT. § 517.06(11) (1967).

13. FLA. STAT. § 517.06(11) (1967).

14. Fla. Laws 1969, ch. 69-327, *amending* FLA. STAT. § 517.06(11) (1967).

B. *Mergers, Consolidations, and Sale of Assets*

For some time, there had been confusion with respect to the meaning of the exemption from registration dealing with mergers and consolidations. The exemption applied only to the "exchange by one corporation to another corporation of their own securities in connection with a consolidation or merger of such corporations."¹⁵ This language did not expressly exempt the issuance of securities to the *shareholders* of constituent corporations. Furthermore, the exemption applied to mergers and consolidations but not to a sale of assets. Finally, the exemption was limited to the exchange of securities issued by the constituent corporations themselves. Therefore, the acquiring company could not effect the merger of the acquired company into the acquiring company's subsidiary, using the acquiring company's securities rather than those of the subsidiary.

To remedy the foregoing limitations and clarify the meaning of the exemption, section 517.06(6) of the Florida Statutes was amended in 1969 to provide an exemption for:

The issue, transfer, or exchange of securities from one corporation to another corporation or to security holders thereof pursuant to a vote of such security holders as may be provided by the certificate of corporation and the applicable corporate statutes in connection with mergers, consolidations, or sale of corporate assets.¹⁶

Although the amended exemption remedies many of the objections to the prior provision, the section still does not expressly exempt from registration the submission to the vote of shareholders of a plan or agreement for a merger, consolidation, or sale of assets. The submission of such a plan could be interpreted to mean an "attempt to sell" a security within the meaning of "sale,"¹⁷ thus necessitating registration before the plan may be submitted to the shareholders for voting. In this connection, rule 133¹⁸ under the Securities Act of 1933 is phrased in terms of the submission of a plan of reorganization. It would certainly seem, however, that the policy underlying the 1969 amendment was to exempt every part of the transaction resulting in the reorganization, otherwise the exemption would be of little benefit. Thus, the exemption should be interpreted to include the submission of the reorganization plan to the vote of shareholders.

C. *Other Exempt Transactions*

Two entirely new exempt transactions were added to chapter 517 of the Florida Statutes by the 1969 amendments. These exemptions per-

15. FLA. STAT. § 517.06(6) (1967).

16. Fla. Laws 1969, ch. 69-327, *amending* FLA. STAT. § 517.06(6) (1967).

17. FLA. STAT. § 517.02(3) (1967). For a definition of "sale," see p. 507 *infra*.

18. 17 C.F.R. § 230.13 (rev. ed. 1964).

tain to the sales of securities to employees pursuant to a qualified stock option plan or pursuant to an employer-sponsored pension or profit-sharing plan or trust when "offered only to employees of the sponsoring organization or to employees of its controlled subsidiaries."¹⁹ Unlike the federal regulatory scheme in this area, offers or sales of securities pursuant to such plans would be exempt regardless of the number of offerees or the identity of the employees. It should be noted, however, that this exemption applies only to registration with the Florida Securities Division, and unless an exemption exists, registration of such plans may be required under the Securities Act of 1933.²⁰

D. *Exempt Securities*

Since 1931, the Florida Statutes have provided an exemption for securities issued by corporations organized for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit.²¹ In 1967, this exemption was amended to condition its availability upon the delivery to each offeree of a "written report as to the feasibility of the project and the full disclosure of the method of financing."²² The effect of this change will be the requirement of some disclosure, although the exemption precludes the Florida Securities Division from judging the merits of the issue.

The exemption with respect to the securities of agricultural cooperatives was liberalized significantly in 1969.²³ The prior exemption applied only to agricultural cooperatives operating wholly within Florida, having only Florida residents as stockholders, and promoted only by Florida residents. The limitations with respect to Florida residence and operations wholly within Florida have been removed, and now such securities are exempt if the nonprofit agricultural cooperative is organized under the laws of Florida and if the "securities are sold to persons principally engaged in agricultural production or selling agricultural products."²⁴

E. *Definition of "Sale"*

In 1967, the definition of "sale" in section 517.02(3) of the Florida Statutes was amended to provide that the circulation of a preliminary prospectus would not be deemed a "sale" if an application to register the securities offered by the prospectus was pending with the Florida Securities Commission [now Division].²⁵ Prior to the amendment, the Florida Securities Commission had a long-standing informal policy permitting

19. Fla. Laws 1969, ch. 69-327.

20. 15 U.S.C. § 77(e) (1964).

21. FLA. STAT. § 517.05(5) (1967).

22. Fla. Laws 1967, ch. 67-115, amending FLA. STAT. § 517.05(5) (1965).

23. Fla. Laws 1969, ch. 69-327, amending FLA. STAT. § 517.05(10) (1967).

24. *Id.*

25. Fla. Laws 1967, ch. 67-113, amending FLA. STAT. § 517.02(3) (1965).

such circulation. This policy was codified in the form of a rule in 1966.²⁶ Thus, the amendment does not alter the rights and liabilities of offerors of securities who circulate a preliminary prospectus in Florida.

F. Other Legislation

The application for registration by qualification must include a balance sheet of the issuer as of a certain day. Prior to 1967, that day could not be more than 60 days prior to the time of the filing of the balance sheet with the Florida Securities Commission [Division], unless the Commission decided to extend the time for a period not exceeding 6 months, if the issuer showed good cause, in writing.²⁷ In 1967, the 60-day time period was extended to 90 days.²⁸ The provision granting the Commission discretion to extend the time period to 6 months was not altered.

Prior to 1967, chapter 517 of the Florida Statutes did not give the Commission authority to revoke a registration of securities if the issuer violated any regulation adopted by the Commission pursuant to the statute. This gap was filled in 1967, and the Commission [Division] presently has authority to revoke a registration of securities if the issuer: "Has violated any provisions of this chapter or any regulation made hereinunder or any order of the commission of which such issuer has notice."²⁹

G. Rule Changes

A rule which provided that the Florida Securities Commission would not permit the public sale of securities unless the issuer had a net worth of approximately 25 percent of the amount sought to be raised in the public offering had been a thorn in the side of the promoters of new business since its inception.³⁰ To comply with this rule, promoters were required either to contribute the necessary capital themselves or to sell sufficient shares privately to raise the requisite amount. If the promoter did not have sufficient capital himself, he was forced to raise it privately, and the inclusion of private offerees could cause the promoter to lose control of the new venture. Furthermore, if the promoter could not raise sufficient capital privately, he would be effectively precluded from a public offering in Florida. Such a rule was tantamount to a restriction of such entrepreneurial services to only the affluent.

This rule was replaced in 1969 with a new regulation which provides that:

In offerings where the issuer is in a promotional or development phase and the ratio of equity investment by promoters

26. Rules, Fla. Sec. Comm'n 330-2.06, 1 BLUE SKY L. REP. ¶ 13,619 (1968).

27. FLA. STAT. § 517.09 (1965).

28. Fla. Laws 1967, ch. 67-112, amending FLA. STAT. § 517.09 (1965).

29. Fla. Laws 1967, ch. 67-111, amending FLA. STAT. § 517.11(2) (1965).

30. Rules, Fla. Sec. Comm'n 330-1.04 (1968).

or insiders is less than fifteen percent (15%) of the total equity investment resulting from the sale of the entire offering, the offering will not be considered fair, just and equitable to the new investor unless (1) the offering is supported by a firm commitment of an underwriter duly registered under the Securities Exchange Act of 1934 and (2) the net worth of the issuer is in excess of \$100,000.⁸¹

Thus, if the issuer has a net worth in excess of \$100,000 and the offering is underwritten by a firm commitment, the insiders need not make equity investments. But if either one of the above criteria is not met, then the insiders must make an equity investment of at least 15 percent of the amount sought to be raised publicly. While this new rule may be preferable to the prior 25 percent limitation, it still benefits the affluent and restricts the organizer of a new venture who has no assets. For example, the assetless promoter cannot qualify under the new rule unless his company has a net worth in excess of \$100,000. If his firm has a net worth under \$100,000, he is stymied. It makes little sense to provide that a firm with a net worth of \$105,000 will qualify and that one with a net worth of \$95,000 will not. Furthermore, protective devices can be used to assure as much public protection in a best efforts underwriting as in a firm commitment.

A new rule interpreting "fair, just and equitable" was adopted in 1969.⁸² While the interpretation is still vague and the Division still has the opportunity to arbitrarily reject registration, it is nevertheless an improvement.

31. Rules, Fla. Sec. Comm'n 330-1.04, 1 BLUE SKY L. REP. ¶ 13,604 (1970).

32. Rules, Fla. Sec. Comm'n 330-1.15, 1 BLUE SKY L. REP. ¶ 13,613-1 (1970):

330-1.15 *Administrative Interpretation of Fair, Just and Equitable*.—The phrase "fair, just and equitable," as used in Section 517.09(7), Florida Statutes, with reference to the terms of sale of securities submitted for registration, means fair, just and equitable to the new investor. Such words shall be accorded their generally recognized meaning and shall not be used in any narrow, technical sense.

(a) The current market price of securities in a proposed public offering will ordinarily be considered fair, just and equitable where there is an established market for securities of the same class as that proposed to be offered or where the class of securities proposed to be offered has a value related to securities of the issuer with an established market price. Likewise, the price of securities in a proposed public offering will ordinarily be considered fair, just and equitable where the issuer has a consistent record of earnings and the proposed price reflects a price earnings ratio which is reasonably related to the price earnings ratio of securities of similar issuers in the same industry which have established market prices.

(b) In offerings where there is no established market price for either the securities of the issuer or similar securities of other issuers or the issuer is in the development phase and does not have a record of earnings, primary consideration will be given to the proposed offering price established by the underwriter if there is a firm commitment by the underwriter and the underwriter is duly registered under the Securities and Exchange Act of 1934 and has the financial ability to perform its commitment in the light of its net capital position. If in the judgment of the Commissioner, doubt exists as to the fair, just and equitable nature of the offering, the underwriter shall present to the Commissioner an analysis supporting the determination of the underwriter in arriving at the proposed offering price. Upon receipt of the analysis, the Commissioner will make a determination, based on all factors which may be deemed appropriate as to whether such

II. RECENT DECISIONS—SECURITIES REGULATION

If a security is offered to a limited number of financially sophisticated persons who comprise a related and restricted group, the offer may be exempt from the registration provisions of the Securities Act of 1933.³³ There are comparable transactions exempted from the registration provisions of a majority of state blue sky statutes. The Florida exemptions are contained in sections 517.06(10) and 517.06(11) of the Florida Statutes. These exemptions place restrictions on the specific numbers of offerees (20 postincorporation purchasers or 25 preincorporation subscriptions). In *Strahan v. Pedroni*,³⁴ the court held that the defendant's transactions violated both the federal and Florida private offering exemptions, inasmuch as the defendants hired an agent to sell fractional interests in oil wells to their friends without limitation on the number and identity of such offerees. Under both Florida and federal law, the purchaser of such unregistered shares may compel rescission of the contract,³⁵ making the seller liable for the purchase price less income paid on such securities. Florida also permits recovery of attorney's fees.³⁶

The doctrine of estoppel can prevent a stockholder from claiming that his purchase is void where he has participated in corporate affairs as an officer and director. The court has, in a decision which seems to negate the civil remedy offered by Florida Statutes section 517.21, held that a stockholder who participates in corporate affairs through an agent can likewise be estopped.³⁷

In the case of *Florida Discount Centers, Inc. v. Antinori*,³⁸ the court was confronted with the question of whether a promotional plan came within the definition of "security." If the plan amounted to a security, its offer was in violation of the Florida Statutes because it was not registered. The plan provided that each person who purchased a sewing machine or a set of aluminum cookware became a "founder." This status

price is fair, just and equitable to new investors.

(c) In offerings where there is no established market price for either the securities of the issuer or similar securities of other issuers or the issuer is in the development phase and does not have an established record of earnings and the proposed offering price set by the issuer is not supported by a firm commitment of an underwriter, consideration will be given by the Commissioner to all well-recognized standards of valuation applicable to the nature of the business of the issuer, such as net asset value, price earnings ratios, managements ability, and any other tangible factors which may be deemed appropriate. The Commissioner will make a determination as to whether the price is fair, just and equitable to new investors after due consideration of all such factors.

(d) In circumstances under subparagraphs (b) and (c) in which there is a substantial disparity between the proposed offering price and the consideration paid or to be paid by promoters or insiders for such securities, the Commissioner may require as a condition to the registration of the securities an escrow of all or part of the securities issued to such promoters or insiders. The escrow agreement shall be in a form suitable to the Comptroller and shall provide for the impoundment of such securities for a reasonable length of time.

33. 15 U.S.C. § 77(d) (1964).

34. 387 F.2d 730 (5th Cir. 1967).

35. FLA. STAT. § 517.21 (1967); 15 U.S.C. § 77(1) (1964).

36. FLA. STAT. § 517.21 (1967).

37. *Krasny v. Richter*, 211 So.2d 612 (Fla. 3d Dist. 1968).

38. 226 So.2d 693 (Fla. 2d Dist. 1969).

made him eligible to earn \$60 if he could induce another person to become a "founder." According to this plan, after 3000 "founders" had been admitted, the net amounts paid in by them would be used to open a discount store from which each founder would earn a commission. On the basis of the elements established in *SEC v. W.J. Howey Co.*,³⁹ the court found this scheme to be a security.

Florida Statutes section 517.06 exempts from registration the isolated sale of securities by the owner thereof when he is not the issuer or underwriter and when the sale is not made directly or indirectly for the benefit of the issuer or underwriter. In the recent Florida case of *Cain v. Solomon*,⁴⁰ the benefit derived by the issuer was given a quantitative interpretation. The court allowed the isolated sale exemption in a sale of securities by an individual owner to another individual even where, in addition to the price of the securities, the contract called for a loan to the corporation. The court reasoned that the amount of benefit received by the issuer should only be a factor in determining if the sale was for the issuer so as to fall outside the exemption.

Is notice of a hearing necessary prior to the issuance of an injunction restraining the sale of securities by an issuer? The court in *Florida Peach Orchards, Inc. v. State*⁴¹ answered this question in the negative. Notice as required by the Administrative Procedure Act⁴² is intended to afford due process only to those parties whose legal rights may be determined by an administrative agency at the agency level. Since an injunction is issued merely at the investigatory stage, the court held that no right was being impaired.

In another case, the court has held that allegations in a complaint by the Florida Securities Commission that a corporation is engaged in a conspiracy with a second corporation is sufficient to sustain an injunction and the appointment of a receiver for the property, assets, and business of the second corporation.⁴³

A bank, in merely lending its name as escrow agent in a stock transaction which is in violation of the blue sky laws, did not participate so as to make the note held by it voidable at the election of the purchaser.⁴⁴

In a suit for commissions on the sale of registered stock by an unregistered dealer, it has been held that a contract between the owner of such stock and a person who is not a registered dealer or salesman in Florida is contrary to public policy and therefore void ab initio.⁴⁵

In *Fowler v. Matheny*,⁴⁶ the defendant sold corporate bonds to the plaintiff in violation of the Florida blue sky laws. Suit was not brought within the two-year statute of limitations. The court, in dismissing the

39. 328 U.S. 293 (1946).

40. 213 So.2d 35 (Fla. 3d Dist. 1968).

41. 190 So.2d 796 (Fla. 1st Dist. 1966).

42. FLA. STAT. § 120.22-23 (1965).

43. Tower Credit Corp. v. State, 187 So.2d 923 (Fla. 4th Dist. 1966).

44. Baraban v. Manatee Nat'l Bank, 212 So.2d 341 (Fla. 2d Dist. 1968).

45. Edwards v. Trulis, 212 So.2d 893 (Fla. 1st Dist. 1968).

46. 184 So.2d 676 (Fla. 4th Dist. 1966).

appeal, stated that section 517.21 of the Florida Statutes is not similar to an ordinary statute of limitations which affects only the remedy. "[I]t enters into and becomes a part of the right of action itself, and if allowed to elapse without the institution of the action, such right of action becomes extinguished and is gone forever."⁴⁷ Allegations of fraudulent concealment or of plaintiff's lack of knowledge can not revive the right of action.⁴⁸

III. NEW LEGISLATION—CORPORATE LAW

The law concerning corporate mergers was changed in two significant aspects at the 1969 legislative session. First, it is no longer necessary for the shareholders of the surviving corporation to authorize a merger if the merger agreement does not change the name or authorized shares of any class or otherwise amend the certificate of incorporation of the surviving corporation and if the authorized, unissued shares to be issued under the merger agreement do not exceed 15 percent of the shares of the surviving corporation of the same class outstanding immediately prior to the effective date of the merger.⁴⁹

Although this amendment facilitates the merger process, one wonders about its possible ramifications. One such ramification is, that under certain circumstances, the amendment deprives shareholders of their dissenting appraisal rights.⁵⁰ Such a change might well jeopardize investor protection. Similarly, rule 133 of the Securities Act of 1933⁵¹ requires a vote of shareholders in effecting a corporate readjustment. If the vote of the shareholders is not required, the exemption afforded by the rule is unavailable. In turn, this might mean that the transaction of merger would be subject to the registration requirements of the 1933 Act, a time-consuming and expensive process.⁵²

The legislature's second change was in section 608.20 of the Florida Statutes, which was amended to provide additional means of payment with respect to consolidations and mergers of domestic corporations. Now, in addition to the traditional mode of payment by cash, bonds, notes, or stock of the consolidated or merged corporation, the legislature has allowed payment to be made with other property or assets of the proposed consolidated or merged corporation or with cash, bonds, notes, stock, or other property of any other corporation.⁵³ This change will represent a welcome innovation to corporate counsel and their clients.

It is regrettable that the legislature did not see fit to further amend

47. *Id.* at 677.

48. *Id.* at 678.

49. Fla. Laws 1969, ch. 69-23, amending FLA. STAT. § 608.20 (1967). However, the certificate of incorporation may provide for a vote by shareholders.

50. Where the corporation is either "(1) registered on a national securities exchange, or (2) held of record by not less than 2,000 stockholders, unless the certificate of incorporation . . . shall otherwise provide. . . ." Fla. Laws 1969, ch. 69-23, amending FLA. STAT. § 608.23(4) (1967).

51. 17 C.F.R. § 230.13 (rev. ed. 1964).

52. See note 18 and accompanying text *infra*.

53. Fla. Laws 1969, ch. 69-23, amending FLA. STAT. §§ 608.20(1), .21(1) (1967).

the merger statute to provide that a Florida corporation may merge or consolidate with a nondomestic corporation. Although it seems incredible, under existing Florida statutes, Florida corporations have no authority to merge or consolidate with Brazilian corporations, German corporations, or corporations of any other country. Finally, it is also regrettable that, in Florida, it still takes three persons to incorporate. It is a well-known fact that corporate counsel commonly use nominees to satisfy this ancient and outmoded requirement of the Florida law. It seems high time that the legislature act to permit incorporation by one man.^{53a}

IV. RECENT DECISIONS—CORPORATE LAW

A. *Separate Corporate Entity Privilege*

Florida courts have continued to hold that the corporate veil will not be brushed aside absent a showing that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them. In *Delta Air Lines, Inc. v. Wilson*, the fact that a Florida corporation was inadequately capitalized and had even transferred its assets to a corporate officer while it was insolvent was not sufficient to hold the officer personally liable absent a showing that there was fraud in the organization of the corporation or in the transferring of the assets.⁵⁴ Although this case was actually decided on other grounds, it may present an undesirable opportunity for future abuse of the corporate entity privilege.

The federal courts have reaffirmed the position that caution will be used before piercing the corporate veil, holding that service of process on a subsidiary doing business in Florida was not valid as against its Delaware parent.⁵⁵ Where the corporation was the alter ego of its sole owner, however, the Florida court rejected the argument that since its sole

53a. Since the above text was written, the Florida Legislature at its special session in 1970 amended section 608.03 to permit corporate formation by one or more natural persons and to simplify the statement of corporate powers in the articles of incorporation. Additionally, section 608.09(1) was amended to permit boards of directors to be composed of one or more persons; section 608.031 was amended to permit reservation of corporate names for a period of 120 days; section 608.061 was amended to provide for restatement of the corporation's certificate of incorporation by the board of directors; sections 608.04 and 608.041 were amended relating to the time corporate existence begins; section 608.21(1) was amended to authorize Florida corporations to merge or consolidate with nondomestic corporations; section 608.13 was amended to expand the powers of corporations to indemnify and purchase and maintain insurance for their directors, officers, employees and agents; section 608.09 was amended to provide that directors may serve on the executive committee of the corporation in the place of absent or disqualified members and that executive meetings may take official action relating to the affairs of the corporation by conference telephone or similar communication; section 608.10(2) was amended to provide that the record date of shareholders' meetings for the purpose of determining stockholders shall be not more than 60 days rather than 40 days prior to the meeting and deletes the requirement of newspaper publication of the record date; section 608.14(2) was amended to restate the authority of the board of directors or executive committee to issue shares of stock.

A new section, 608.13(16), was created to authorize corporations to enter into general or limited partnerships and similar business associations.

54. 210 So.2d 761 (Fla. 3d Dist. 1968).

55. *Hermetic Seal Corp. v. Savoy Electronics, Inc.*, 290 F. Supp. 240 (S.D. Fla. 1967).

stockholder was not an agent or an officer of the corporation, his deposition should not be admissible.⁵⁶

B. *Preincorporation Agreement*

In *Bean v. Harris*,⁵⁷ a promoter was held personally liable under a contract made for the benefit of a corporation not yet in existence because there was insufficient evidence that the plaintiff had agreed to look to the corporation to be formed for payment rather than to the contracting parties. The case is in line with current authority to the effect that, in order to relieve the promoter of liability, the contractual language must evidence strong intent to look only to the corporation upon the commencement of its corporate existence.

C. *Directors' Compensation*

In *Coleman v. Plantation Golf Club, Inc.*,⁵⁸ the court answered two important questions. First, whether the directors of a corporation can vote for and pay themselves a salary? Citing *Redstone v. Redstone Lumber & Supply Co.*,⁵⁹ the court held that unless the directors are authorized to do so by the corporate charter or the shareholders, they are precluded from fixing their own compensation for services to be rendered by them as officers. It is the opinion of these writers, however, that such a rule will not meet the realities of modern corporate practice where, for the most part, the corporation's directors are its officers. In this dual capacity, they should be able to fix reasonable salaries.

Secondly, the court answered the question of who should bear the burden of proof as to the reasonableness of the salaries, holding that the burden would be on the dissatisfied shareholder to show that the salary was excessive and wasteful as against the minority. Although the decision represents the view of previous Florida cases, it would seem more in accord with equitable principles to place the burden of proof of fairness upon the internal directors rather than upon the complaining shareholders.

D. *Capital Stock Tax*

Section 608.35 of the Florida Statutes provides that any corporation which fails to file its annual report with the State Revenue Commission and pay the required capital stock tax shall not be permitted to maintain or defend any action in any Florida court. Accordingly, the court properly dismissed the appeal of a surviving director of a corporation dissolved pursuant to the Florida Statutes in a suit to quiet title against the corporation.⁶⁰ Similarly, in an action to recover lost assets of a corporation which is dilinquent in paying its capital stock tax, shareholders are precluded from maintaining a derivative suit since the cause of action

56. *Ennis v. Warm Mineral Springs, Inc.*, 203 So.2d 514 (Fla. 2d Dist. 1967).

57. 212 So.2d 368 (Fla. 3d Dist. 1968).

58. 212 So.2d 806 (Fla. 4th Dist. 1968).

59. 101 Fla. 226, 133 So. 882 (1931).

60. *Marinelli v. Weaver*, 208 So.2d 489 (Fla. 2d Dist. 1968).

resides in the corporate entity and not in the individual shareholders.⁶¹

E. Directors' Liability

When directors transferred corporate assets to another of their corporations to the detriment of a judgment creditor, they were held liable under Florida Statutes section 608.55 to the full extent of any loss suffered and not for only a pro rata amount.⁶²

F. Stock Split and Stock Dividend

"In a 'stock dividend' there is a capitalization of earnings or profit and distribution of shares which represent assets transferred to capital, whereas in a 'stock split' there is a mere increase in the number of shares without altering the amount of capital or surplus."⁶³ This differentiation was applied to the following factual pattern. In 1964, Keller entered into an agreement to purchase all of the stock of Silby-Dolcourt Chemical Industry, Inc. The agreement provided that Keller would deliver 15,000 shares of Keller to one seller, that two years later Keller would make up the difference in stock which, including the already delivered shares, would not exceed a dollar equivalent of \$600,000 or a total of 30,000 shares (which number would be adjusted proportionately for any stock split). Keller subsequently declared a 20-percent stock dividend. Thus, the seller got 3,000 shares in addition to the original 15,000. The court properly held that the stock split contingency of the contract did not encompass a stock dividend.

G. Removal of Corporate Officers

Generally speaking, corporate *officers* serve at the pleasure of the board of directors and are removable with or without cause. In fact, section 608.0106 of the Florida Statutes provides that even *directors* of close corporations may be removed with or without cause. Therefore, it is indeed surprising that a recent Florida case held that officers (in a closely held family corporation) may be removed only for cause.⁶⁴

Where there was reasonable doubt as to whether corporate bylaws or a conflicting stockholders' agreement controlled, a removed corporate president was not entitled to a mandatory injunction until the final hearing.⁶⁵

H. Shareholders' Action

In a suit by a corporation against a director for breach of fiduciary duty, shareholders were not permitted to intervene. For intervention purposes, the interest must be direct.⁶⁶

61. *Nelson v. Miller*, 212 So.2d 66 (Fla. 3d Dist. 1968).

62. *Blank v. Yoo Hoo Corp.*, 213 So.2d 464 (Fla. 3d Dist. 1968).

63. *Keller Indus., Inc. v. Fineberg.*, 203 So.2d 644, 646 (Fla. 3d Dist. 1967).

64. *Collins Fruit Co. v. Collins*, 214 So.2d 779, 780 (Fla. 2d Dist. 1968). Moreover, the case cites as authority for this proposition the case of *Etheredge v. Barrow*, 102 So.2d 660 (Fla. 2d Dist. 1958), which does not so hold.

65. *Montgomery Pipe & Tube Co. v. Mann*, 205 So.2d 660 (Fla. 3d Dist. 1968).

66. *Oster v. Cay Constr. Co.*, 204 So.2d 539 (Fla. 4th Dist. 1967).