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Shareholder Pre-emptive Rights in Florida

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SHAREHOLDER PRE-EMPTIVE RIGHTS IN FLORIDA

It has long been established in the United States that, in the absence of any statutory restrictions to the contrary, a shareholder in a corporation has a pre-emptive right to subscribe to his proportionate share of any issuance of newly authorized capital stock.[1] This gives the stockholder an opportunity to maintain his relative position in the corporation. The holder of stock originally issued is thus entitled to purchase shares of any new issue in proportion to his holdings in the original stock.[2] This general principle is codified in section 608.42 (2) of Florida Statutes 1959:

> "Unless otherwise provided by the certificate of incorporation, every stockholder, upon the sale for cash of any new stock of the same kind, class or series as that which he already holds, shall have the right to purchase his pro rata share thereof . . . ."

The underlying theory of pre-emptive rights is that the shareholder has established his interest in the corporation in relation to the total number of authorized shares, and is entitled to maintain that same relationship in the event of an increase in the capital stock. By use of his voting power the shareholder influences the election of corporate directors. If he is not allowed to purchase his proportionate share of the new issue this relationship will change, because the new stock will have the same voting, dividend, and dissolution rights as his original shares.[3] He will find it more difficult to influence the direction of the corporation if his voting interest is diluted. Therefore it is the rule that the stockholder cannot be deprived of this pre-emptive right without his consent,[4] but, on the

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[1]*E.g.*, Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156 (1807); Hammond v. Edison Illuminating Co., 131 Mich. 79, 90 N.W. 1040 (1902); Stokes v. Continental Trust Co., 186 N.Y. 285, 78 N.E. 1090 (1906); Reese v. Bank of Montgomery County, 31 Pa. 78, 72 Am. Dec. 726 (1855); Bonnet v. First Nat'l Bank, 24 Tex. Civ. App. 613, 60 S.W. 325 (1900).

[2]"Otherwise the majority could deprive the minority of their proportionate power in the election of directors and of their proportionate right to share in the surplus, each of which is an inherent, pre-emptive, and vested right of property." Stokes v. Continental Trust Co., 186 N.Y. 285, 298, 78 N.E. 1090, 1094 (1906). The court in such a case will protect the inherent right of the minority to have their status preserved against invasion even by the bona fide admission of new interests.

[3]See Jones v. Morrison, 31 Minn. 140, 16 N.W. 854 (1883).

[4]Stokes v. Continental Trust Co., 186 N.Y. 285, 78 N.E. 1090 (1906).

other hand, the corporation cannot force him to take a proportionate share of the new issue.[5] Thus it is a right but not an obligation.

There is little doubt that the general principle will be followed by Florida as long as the statute is in effect. It seems likely, however, that the statute will be interpreted to allow the sale of a new issue of stock to outsiders after there has been an offer to existing shareholders if they do not purchase within a reasonable time. The Court may base this decision on waiver,[6] laches, or acquiescence.[7] Further, the corporation can probably prescribe the terms upon which an increase of stock will be offered to shareholders,[8] or the reasonable conditions under which the offer is made.[9] These restrictions will not violate the basic principle that the stockholder must have the *opportunity* to purchase his pro rata share.

In some situations a shareholder may get protection without resort to his pre-emptive right. The court may find that there is an abuse of power by the majority shareholders or directors in allotting shares to themselves. It is the duty of directors as fiduciary agents, irrespective of any rule of pre-emptive rights to shareholders, to exercise their power to issue additional shares in good faith for the benefit of all the shareholders. However, even if the second issue of stock is for a legitimate purpose, the shareholder can still be protected by his pre-emptive right.

EXCEPTIONS TO PRE-EMPTIVE RIGHTS

The first notable exception to a shareholder's pre-emptive right in a new issue of stock is that the right does not exist in regard to stock issued for the purchase of property that becomes an asset of the corporation.[10] Originally, one purpose of the pre-emptive right was

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[5]Schramme v. Cowin, 205 App. Div. 20, 199 N.Y. Supp. 98 (1st Dep't 1923).

[6]See Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130 (1902); Canada So. Oils, Ltd. v. Manabi Exploration Co., 33 Del. Ch. 537, 96 A.2d 810 (Ch. 1953). In Hoyt v. Shenango Valley Steel Co., 207 Pa. 208, 56 Atl. 422 (1903), the shareholder failed to buy stock for 6 months after notification.

[7]See Bonnet v. First Nat'l Bank, 24 Tex. Civ. App. 613, 60 S.W. 325 (1900).

[8]See Sewall v. Eastern R.R., 63 Mass. (9 Cush.) 5 (1851).

[9]See Hoyt v. Great American Ins. Co., 201 App. Div. 352, 194 N.Y. Supp. 449 (1st Dep't 1922); Noble v. Great American Ins. Co., 200 App. Div. 773, 194 N.Y. Supp. 60 (1st Dep't 1922).

[10]Hart v. St. Charles St. R.R., 30 La. Ann. 758 (1878). "Stock issued for services or property, then, would not be subject to pre-emptive rights unless appropriate restrictions were included in the by-laws or in a separate stockholders agreement."

to prevent any one stockholder or group of stockholders from transferring such stock to themselves without giving the other shareholders an equal chance to buy. If the privilege to buy is valuable, the shareholders are deprived of an opportunity to profit. Since the property to be purchased by the corporation will inure to the benefit of the shareholders according to the shares they hold in the corporation, there is less need for the pre-emptive right to exist, since no one shareholder will be benefited over the others.[11] The incorporators may include in the corporate charter a provision allowing or authorizing the issuance of shares for the purchase of property. This provision can be treated as a term of the contract to which the shareholder agreed when he purchased the stock. If property is purchased with more stock than the obvious fair market value of the property indicates is necessary and a loss to the corporation results, it would seem that the shareholder's right to protection would more correctly fall under the theory of a violation of fiduciary duty than of deprivation of a pre-emptive right, since all the stockholders would suffer an equal loss. It is advantageous for the corporation to be able to use stock to purchase property without being required to offer it first to the existing shareholders. Delay in closing an important agreement can thus be avoided and corporate business facilitated.

It has been held that a shareholder's pre-emptive right does not extend to stock issued for considerations other than cash, such as shares issued to satisfy conversion or option rights granted by the corporation.[12] Since conversion or option rights are an obligation of the corporation, the shareholders' interest will not be unjustly diluted, because they must have realized when they purchased the stock that these conversion rights might be exercised. Similarly, shares that the corporation uses for purposes of consolidation or merger with another business concern are outside the rule of pre-emptive rights.[13] It seems unlikely that the Florida legislature intended a pre-emptive right to exist as to shares used to effect a consolidation or merger, or shares

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Trau, *Florida's Corporate Code*, 12 MIAMI L. REV. 63, 72 (1957).

[11]Meredith v. New Jersey Zinc & Iron Co., 55 N.J. Eq. 211, 37 Atl. 539 (Ch.), *aff'd*, 56 N.J. Eq. 454, 41 Atl. 1116 (Ct. Err. & App. 1897); Bonnet v. First Nat'l Bank, *supra* note 7.

[12]Kingston v. Home Life Ins. Co., 11 Del. Ch. 258, 101 Atl. 898 (Ch. 1917), *aff'd*, 11 Del. Ch. 428, 104 Atl. 25 (Sup. Ct. 1918); Venner v. American Tel. & Tel. Co., 110 Misc. 118, 181 N.Y. Supp. 45 (County Ct. 1920), *aff'd*, 196 App. Div. 960, 188 N.Y. Supp. 956 (1st Dep't 1921).

[13]Thom v. Baltimore Trust Co., 158 Md. 352, 148 Atl. 234 (1930).

used to satisfy option rights. First, the statute states that the pre-emptive right is to exist "upon the *sale* for *cash*" of new stock.[14] This would not constitute a sale "for cash." Second, the lawmakers have provided other relief when a stockholder is dissatisfied with consolidation or merger. Statutory authority has been granted to consolidate with either another Florida corporation[15] or a foreign corporation.[16] In the case of consolidation or merger of domestic corporations, either the board of directors or a person designated by a majority of the shareholders present at the meeting may sign the agreement. Any shareholder who is dissatisfied with the merger or consolidation and who voted against it may object in writing and demand to be paid the fair market value of his stock.[17] After the shareholder has made his demand he "shall cease to be a stockholder" in the corporation and "shall have no rights with respect to his stock except the right to receive payment therefor."[18] If the stockholder does not vote against it and object to the consolidation he becomes a shareholder in the new corporation and is "entitled to receive in exchange for his stock, the consideration specified in the agreement of consolidation or merger."[19] These provisions seem to refer to the old stock; they do not specifically discuss the creation of new stock in the consolidation situation. The Florida Court may follow the general view and hold that there are no pre-emptive rights upon consolidation or merger. This provision, however, will allow some relief to the stockholder, since he can demand to be paid for his shares by the corporation. Whether this affords more protection than selling the shares upon the open market probably will depend upon each individual fact situation. This provision will give the dissatisfied stockholder at least a minimum of protection. The statute was not meant to change the exception that no pre-emptive right is recognized upon consolidation, however, since pre-emptive rights are limited to a sale "for cash."

The pre-emptive rights of shareholders have not generally been extended to treasury shares.[20] Stock that has been issued and later

[14]FLA. STAT. §608.42 (2) (1959). (Emphasis added.)

[15]FLA. STAT. §608.20 (1) (1959).

[16]FLA. STAT. §608.21 (1) (1959); however, the foreign corporation must have been granted consent to consolidate under its act of incorporation or other laws of the state of incorporation.

[17]FLA. STAT. §608.23 (1) (1959).

[18]FLA. STAT. §608.23 (3) (1959).

[19]FLA. STAT. §608.22 (2) (1959).

[20]See, *e.g.*, Borg v. International Silver Co., *infra* note 22; Hammer v. Werner, *infra* note 21; Runswick v. Floor, 116 Utah 91, 208 P.2d 948 (1949); Dunn v. Acme

transferred back to the corporation as a part of its assets can therefore generally be sold without being subject to prior rights of stockholders. Stockholders will be protected from any inequitable conduct in respect to treasury shares that amounts to a breach of the directors' fiduciary duty. Usually when courts have denied the shareholder a pre-emptive right to participate in a reissue of treasury stock it has been because there was no breach of fiduciary obligation by the directors.[21] Since the shares were once issued and affected voting rights, a shareholder cannot properly complain when the corporation resells the stock, since it merely restores him to the status that he originally accepted.[22]

In Florida, treasury stock is not subject to the pre-emptive right. The stock, having once been issued, is in the "used" category when reacquired by the corporation. Consequently the pre-emptive rights statute will not be applicable when the corporation reissues the stock, because such rights are limited to new stock.[23]

Another recognized exception is that there is no pre-emptive right in shares originally authorized but not issued.[24] The stockholder is said to have purchased in relation to the total number of shares authorized by the charter and not to the number originally issued. He is deemed to have known that the remaining authorized stock might be issued later; therefore he is not injured by not being accorded a chance to buy stock in preference to non-stockholders, because this was part of his purchase contract. Incorporators can effectively do away with pre-emptive rights under this theory by authorizing a tremendously large number of shares originally in the charter; when the corporation needs to issue more stock it can be done without according the shareholder first chance to purchase.

Some courts have not limited pre-emptive rights to newly authorized shares. In *Crosby v. Stratton*[25] a Colorado court said that the pre-emptive right exists in relation to authorized but unissued shares.

Auto & Garage Co., 168 Wis. 128, 169 N.W. 297 (1918). In the *Dunn* case it was pointed out that when a corporation buys its own stock to retire it or hold it indefinitely, the stock may cease to be true treasury stock with regard to the pre-emptive right.

[21]See Hammer v. Werner, 239 App. Div. 38, 265 N.Y. Supp. 172 (2d Dep't 1933).

[22]Borg v. International Silver Co., 11 F.2d 147 (2d Cir.), *aff'g* 11 F.2d 143 (S.D.N.Y. 1925).

[23]FLA. STAT. §608.42 (2) (1959).

[24]Archer v. Hesse, 164 App. Div. 493, 150 N.Y. Supp. 296 (1st Dep't 1914); Curry v. Scott, 54 Pa. 270 (1867).

[25]17 Colo. App. 212, 68 Pac. 130 (1902).

This position has received considerable support.[26] The shareholder may not have had an opportunity to buy in proportion to the authorized number of shares; hence in later years, after the corporation has become established as a going business concern with regular profits being distributed in dividends, there will be a dilution of the shareholder's voting interest if he is not allowed to advance capital and thus retain his status. There may be a disadvantage, however, in following this construction. If the corporation needs a large amount of capital that cannot be obtained from existing shareholders it may want to transfer a large block of unissued stock to one business concern at a stated price. If the shareholders are accorded pre-emptive rights the delay that this creates may cause the deal to fall through to the detriment of all the stockholders. Some middle ground between these two positions seems in order. In a New York case, *Hammer v. Werner*,[27] a particular block of stock was treated as generating, in effect, a pre-emptive right because of the breach of the fiduciary duty to the shareholders. The conduct of the directors was characterized as a personal wrong to the shareholder. Thus, in situations in which there may not be an apparent pre-emptive right, the court may accord the shareholder protection based on violation of the directors' fiduciary duty to him. When the directors' action directly benefits the entire corporation, however, there is little reason for protecting existing shareholders to the extent of possible harm to the corporation itself unless the court finds a pre-emptive right.

The Florida legislature has said that a pre-emptive right arises upon "the sale of any *new stock*."[28] This language seems to permit the court to construe "new stock" as meaning newly authorized stock, on the theory that when stock has once been authorized it is no longer new merely because the corporation fails to issue it immediately. Stock is new when it is created, and it is created when authorized — not when issued. It is submitted, however, that the stock should be treated as *new* until it is used by the corporation. The corporation does not put the stock to use until it is transferred in

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[26] *E.g.*, Trask v. Chase, 107 Me. 137, 77 Atl. 698 (1910); Jones v. Morrison, 31 Minn. 140, 16 N.W. 854 (1883); Humboldt Driving Park Ass'n v. Stevens, 34 Neb. 528, 52 N.W. 568 (1892); Whitaker v. Kilby, 55 Misc. 337, 106 N.Y. Supp. 511 (Sup. Ct. 1907); Reese v. Bank of Montgomery County, 31 Pa. 78, 72 Am. Dec. 726 (1855); Thurmond v. Paragon Colliery Co., 82 W. Va. 49, 95 S.E. 816 (1918); Hammer v. Cash, 172 Wis. 185, 178 N.W. 465 (1920).

[27] 239 App. Div. 38, 265 N.Y. Supp. 172 (2d Dep't 1933).

[28] FLA. STAT. §608.53 (2) (1959). (Emphasis added.)

exchange for money, services, or property; and, since the stock has never been issued, it is still "new" stock. The shareholders are therefore entitled to their proportionate shares. It has been stated that the effect of the statute is to extend the pre-emptive right to the situation in which directors permit the sale of authorized capital stock that had not been previously issued.[29] There have been two Florida cases in which the sale of unissued stock by the directors was considered.[30]

In *Rowland v. Times Pub. Co.*[31] the directors of the corporation sold previously authorized but unissued stock to a friend in order to gain control of the corporation. They wanted to prevent the sale of the corporation's main asset, a commercial building. The majority shareholder of the corporation had negotiated the sale of the building for $200,000. The minority shareholders, who were tenants of the building, composed the board of directors. They believed the building to be worth $250,000, as evidenced by a bona fide offer. As directors they canceled the agreement to sell. The majority shareholder demanded that there be a shareholders' meeting to elect new directors. The directors transferred a sufficient number of originally authorized but unissued shares to a friend. The plaintiff majority shareholder brought an action to set aside the sale. On appeal, the Florida Supreme Court held the transfer of the stock to be invalid. The Court quoted the pre-emptive rights statute to the effect that every stockholder shall have a right to purchase his pro rata share of a new stock issue.[32] The Court added that the fiduciary duty owed by the directors to the stockholders had been violated. This decision is in accord with determinations made by other jurisdictions that invalidate transfers of stock to gain control.[33]

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[29]See FLA. JUR., *Corporations* §82 (1956). See also Powers, *Cross Fire on Close Corporations*, 11 U. FLA. L. REV. 433, 445, n.35 (1958).

[30]Rowland v. Times Pub. Co., *infra* note 31; Brown v. Florida So. Ry., 19 Fla. 472 (1882). For a discussion of the *Brown* case see note 36 *infra*.

[31]160 Fla. 465, 35 So.2d 399 (1948).

[32]*Id.* at 470, 35 So.2d at 402; see FLA. STAT. §612.20 (1951), the predecessor of FLA. STAT. §608.42 (2) (1959).

[33]See Petre v. Bruce, 157 Tenn. 131, 7 S.W.2d 43 (1928), in which the court sustained a perpetual injunction enjoining certain directors of the corporation from selling unissued shares to their friends so as to enable them to control the corporation. In Dunlay v. Avenue M Garage & Repair Co., 253 N.Y. 274, 170 N.E. 917 (1930), the court pointed out that directors may not issue to themselves unissued shares in order to convert themselves into majority shareholders. See also Kingston v. Home Life Ins. Co., 11 Del. Ch. 258, 263, 101 Atl. 898, 900 (Ch. 1917), "New

The *Rowland* case is the most important Florida case decided in this area of the law, in that it placed Florida with the minority of jurisdictions in recognizing pre-emptive rights in previously authorized but newly issued stock. In quoting provisions of the pre-emptive rights statute the Court must have meant that the stock that was issued was "new stock." It therefore followed that the plaintiff had a right to purchase his proportionate share. Hence, in absence of limitations in the articles of incorporation, unissued stock will be considered to be new stock and thus subject to pre-emptive rights.[34]

It may be contended that the Court in the *Rowland* case did not squarely adopt the minority view, on the grounds that the Court merely quoted the statute without expressly stating it to be the basis of its opinion and, further, that the Court seemed to place more emphasis on the breach of a fiduciary duty than on pre-emptive rights. There seems to be little weight to this contention in view of the manner in which the opinion was written. The Court without discussion quoted the pre-emptive rights statute and a case from another jurisdiction in which a similar transfer had been set aside because it violated a fiduciary duty.[35] To conclude that the Court did not reach its decision on both grounds would be to imply that the

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shares cannot be issued for an improper purpose, as for instance, to maintain control of the corporation"; Archer v. Hesse, 164 App. Div. 493, 497, 150 N.Y. Supp. 296, 299 (1st Dep't 1914), "a corporation may use its original unissued authorized capital stock for any *legitimate* or lawful purpose it sees fit . . . . Before making such use, it is not obligated to give existing stockholders an opportunity to purchase" (emphasis added).

[34]"The word *new* in FLA. STAT. §608.42(2) (1957) apparently refers not only to newly authorized stock but also to previously authorized but newly issued stock . . . ." Powers, *supra* note 29. "In holding this transaction [in the *Rowland* case] invalid . . . the Supreme Court of Florida, in effect, extended pre-emptive right protection to new issues of originally authorized shares." Trau, *supra* note 10, at 73.

[35]Luther v. The C. J. Luther Co., 118 Wis. 112, 122, 94 N.W. 69, 72 (1903). The directors sold 36 shares of unissued stock to a friend in order to gain control of the corporation. The court said that the main contention of the plaintiff was that "in an already established and going corporation, an increase of capital stock, accomplished either by formal increase of the amount originally authorized or by issue of what had originally been withheld, . . . without first giving opportunity to all existing stockholders to take their proportionate shares of such increase, is wholly beyond the power, not only of the directors, but of any mere majority of stockholders." The court concluded, however, that it was not necessary to determine the case on this point. The court held that a fiduciary duty had been violated; issuance of the stock was declared to be unlawful.

quoting of the pre-emptive rights statute was mere surplusage. However, the Court adopted the words of the statute as its own, thus finding a pre-emptive right.[36]

Price of Newly Issued Stock to Shareholders

Jurisdictions have differed as to the price per share that an existing stockholder must pay for newly issued stock when a pre-emptive right is recognized. Some cases have held that the shareholder need pay only the par value of the stock as an outside limit in lieu of a payment above par.[37] However, in Florida unless a provision is made in the corporate charter to the contrary, the shareholder will have to pay the price which the corporation asks of outsiders.[38] In the case of par value shares this price must be paid even though it is in excess of the par value of the stock.[39]

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[36]In an earlier case, Brown v. Florida So. Ry., 19 Fla. 472 (1882), the Court also had occasion to consider a transfer of newly issued stock. Plaintiff Brown, a shareholder-director who was one of the original incorporators, was left out when the remainder of the originally authorized stock was distributed. He claimed that the acts of the company and its officers were in violation of his rights as an original incorporator. The Court stated that the charter contemplated a subscription of stock by people other than the original incorporators; it provided that the directors might receive the subscriptions, and Brown had agreed to this by signing the articles. Since he did not apply for a subscription of stock, the Court could not order the directors to issue stock to him. The right that Brown claimed was said not to be in existence, hence he could not be defrauded of it. The Court held, in effect, that Brown had no pre-emptive right, thus taking the position that such rights do not extend to unissued stock. C.J., *Corporations* §522 (1919), states that the pre-emptive right "as applied to *original* stock . . . is not universally recognized," citing the *Brown* case as authority. (Emphasis added.) This case, if it were the law today, would place Florida with the majority view that pre-emptive rights do not extend to authorized but unissued stock. The pre-emptive rights statute, however, was enacted in 1925. Fla. Laws 1925, ch. 10096, §20, now Fla. Stat. §608.42 (2) (1959). For a compilation of the general corporation laws in Florida in effect in 1881 see McClellan, Digest of Laws of Florida, 1822-1881, p. 226 (1881). The result in the *Brown* case may have been one of the reasons for its enactment.

[37]*E.g.*, Scheirich v. Otis-Hidden Co., 204 Ky. 289, 264 S.W. 755 (1924); Hammond v. Edison Illuminating Co., 131 Mich. 79, 90 N.W. 1040 (1902); Cunningham's Appeal, 108 Pa. 546 (1885). In New York, however, the rule seems to be that the stockholders will have to pay the price that the corporation established for outsiders, even though it is in excess of par. Stokes v. Continental Trust Co., 186 N.Y. 285, 78 N.E. 1090 (1906).

[38]Fla. Stat. §608.42 (2) (1959).

[39]*Ibid.* When the statute was first enacted it stated that the price "may be in

There would seem to be great utility in requiring shareholders to pay the price that outsiders must pay. The pre-emptive right is designed to permit a shareholder to retain a relative position in the corporation. It is not meant to enable him to purchase stock at a lower price. The shareholders benefit by having a price set above par; it will effectively increase the value of their own stock. To give them an individual advantage is unnecessary, since they receive an over-all benefit through the expansion of the corporation.

AVOIDANCE OF PRE-EMPTIVE RIGHTS

The avoidance of pre-emptive rights in Florida is not difficult. The statute leaves it to the incorporators to determine whether pre-emptive rights will be beneficial to the corporation. If such rights will be a disadvantage, all that need be done is to insert an appropriate provision in the charter. The shareholder in a closely held corporation should make sure that this is not done, because his relative voting power may be changed if there is a subsequent issuance of stock and he is unable to obtain his pro rata share.[40] When the shareholder is an employee of the corporation this may result in loss of employment. The growth of the corporation may be a direct result of the energy and personality of the shareholder; however, since he may not have on hand at the time of a new issue sufficient funds to purchase his proportionate share, the attorney might consider other methods of protection.[41] As indicated previously, however, in large publicly held corporations this right may not be desirable, since it causes delay that may be costly to the corporation when at-

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excess of par if the Board of Directors shall so determine." Fla. Laws 1925, ch. 10096, §20. The phrase *if the Board of Directors shall so determine* was deleted in 1953. FLA. STAT. §608.42 (2) (1953). However, it is submitted that this change did not affect the character of the statute because the use of "may" shows that the legislature intended merely to allow a price above par to be charged for the new stock; it is not a requirement of this statute.

[40]"This consideration is not peculiar to close corporations; it is more important in such a context as a practical matter, however, because there are more compelling reasons for maintaining voting positions in the close corporation." Powers, *supra* note 29, at 445.

[41]*E.g.*, the use of a charter clause prohibiting any increase in the amount of capital stock or any allotment or reissue of stock without unanimous consent of the shareholders. See O'Neal, *Molding the Corporate Form to Particular Business Situations*, 10 VAND. L. REV. 1, 42 (1956). See also Powers, *supra* note 29, at 445.

tempting to acquire funds through sales of large blocks of stock.[42]

Even if there is no provision in the charter abolishing pre-emptive rights, the statute can be avoided by varying the kind, class, or series of new stock in the certificate. The statute requires that the new stock be the same "kind, class, or series as that which he [the stockholder] already holds,"[43] in order for the right to exist. A slight change in kind, class, or series might abolish the effect of this statute and the rights it establishes. When stock has a par value of $100, perhaps a Florida corporation could avoid the statute by issuance of stock with a par value of $75, since this might be construed as rendering the stock different in kind. Likewise, the pre-emptive right would not be accorded to preferred shareholders when the corporation issued more common stock. The new issue would be a different class from that which the stockholder held. However, this result seems harsh when preferred stock is given a preference only as to dividends and there is no difference in voting or dissolution rights. If this statute were not in effect, a strong contention could be made for a pre-emptive right when in respects other than dividends all the stockholders were treated alike.[44] There is little reason for a difference of treatment when preferred shares differ from common only in one aspect. The preferred stockholder should have a right to maintain his relative economic position in the corporation by investing in the new stock. Under the statute, however, the right is not extended to him.

To say the least, the pre-emptive right statute leaves something to be desired. Any amendment to this act should specify that "new stock" includes stock originally authorized. This would remove any doubt that might exist after reading the *Rowland* case. Careful consideration should be given to preventing avoidance of the statute by

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[42]"[I]t is usually best to waive [the pre-emptive right] initially in the articles when future public offerings may be contemplated and when later agreement for waiver might be difficult to obtain." Richardson, *Formation of Corporations in Florida*, 11 U. FLA. L. REV. 395, 410 (1958). See also Trau, *supra* note 10, at 73-74.

[43]FLA. STAT. §608.42(2) (1959). As originally enacted the statute referred only to stock "of the same class as that which he already holds." Fla. Laws 1925, ch. 10096, §20. However, in 1953 this was changed to read "of the same kind, class or series." FLA. STAT. §608.42(2) (1953). The effect of such a change is to weaken the pre-emptive right.

[44]See Jones v. Concord & Montreal R.R., 67 N.H. 234, 30 Atl. 614 (1892); Thomas Branch & Co. v. Riverside & Dan River Cotton Mills Co., 139 Va. 291, 123 S.E. 542 (1924).