FILLING IN THE GAPS: SHAREHOLDER OPPRESSION AFTER *RITCHIE V. RUPE*:

Part 2

Eric Fryar

I. Introduction

The purpose of this article is to explore the common-law protection of minority shareholder rights in closely-held corporations in light of the monumental change in Texas law resulting from the *Ritchie v. Rupe*[1] decision. In Part One,[2] we explored the development of the shareholder oppression doctrine in Texas as a judicial remedy to the inherent problem in closely-held corporations of oppressive conduct directed toward minority shareholders. That doctrine focused on the relationship between the controlling shareholders in closely-held corporations—those who wield power—and individual minority shareholders—those who are vulnerable to abuse of power. The shareholder oppression doctrine imposed legal duties on majority shareholder not to defeat reasonable expectations of minority shareholders and created a judicial compulsory buy-out remedy that minority shareholders could assert individually to escape oppressive conduct.[3] The Texas Supreme Court's decision in *Ritchie v. Rupe* rejected the creation of such duties on individual shareholders and made clear that majority shareholders owe no legal duties to minority shareholders arising solely by virtue of shareholder status and corporate control.[4]

The Texas Supreme Court acknowledged that "the foreseeability, likelihood, and magnitude of harm sustained by minority shareholders due to the abuse of power by those in control of a closely held corporation is significant, and Texas law should ensure that remedies exist to appropriately address such harm when the underlying actions are wrongful."[5] However, the Texas Supreme Court concluded that existing common-law duties and remedies "are sufficient."[6] The Court expressly recognized that "our conclusion leaves a 'gap' in the protection that the law affords to individual minority shareholders,"[7] and the Court did "not foreclose the possibility that a proper case might justify our recognition of a new common-law cause of action to address a 'gap' in protection for minority shareholders."[8] The primary remedial mechanism in existing law identified by the Court is the shareholder derivative action, by which the minority shareholder may assert a claim on behalf of the corporation when the oppressive conduct of officers and directors acting on behalf of a majority shareholder causes injury to or violates duties owed to the corporation, and thus "protect[s] the legitimate interests of a minority shareholder by protecting the well-being of the corporation."[9]

In Part One, we argued that reliance on the derivative action is not adequate to address the "harm sustained by minority shareholders due to the abuse of power by those in control of a closely held corporation" for several reasons, including the need to recognize a duty owed to shareholders individually, the need for an individual remedy, the inadequacy of a piecemeal approach to a pattern of oppressive conduct, and the superiority of the compulsory buy-out as a remedy to oppression.[10] However, while the Texas Supreme Court focused on the derivative action as a remedy to many types of oppressive conduct, it certainly did not preclude other legal remedies already existing in the common law. Part One analyzed existing property rights of shareholders that arise from share ownership and existing duties that corporations owe to all shareholders by virtue of the legal relationship between corporation and shareholder—a relationship analogized by

our courts as a kind of trust.[11] Drawing on these rights and duties and on the holdings and analysis of cases, such as *Cates v. Sparkman*,[12] *Yeaman v. Galveston City Co.*,[13] and *Patton v. Nicholas*,[14] we argued for the rediscovery and development of a breach of trust cause of action that individual shareholders could assert against the corporation when majority shareholders abuse their power over the corporation to harm the interests of minority shareholders.[15] In this part, we continue that analysis, looking at a different cause of action, the common law tort of conversion as applied to stock. Conversion is a tort claim that protects property rights in personal property, such as stock ownership. However, our courts have adapted this tort in very special ways when the personal property rights in a shareholder's stock in a corporation are impaired by that same corporation. The development of this judicial doctrine, in light of the specific duties that corporations owe to shareholders, may provide another potent judicial remedy to minority shareholders against corporate abuse of power.

II. Concept of Stock Ownership

A. Stock Is Personal Property

Stock is personal property, and the stockholder is a property owner.[16] Texas law has long recognized "the property right which a share in such a company creates."[17]

B. Defining the Stockholder's Property Rights

All property ownership ultimately consist of an intangible "bundle of rights."[18] The concept of "property" does not refer to a thing but rather to the legal relationship between a person and a thing.[19] The stock that a shareholder owns confers on the shareholder a set of rights and interests with respect to the corporate enterprise.[20] In the context of stock ownership, Texas courts recognize that "[t]here are certain rights, powers, and privileges that accrue to a stockholder in a corporation."[21] The shareholder's bundle of rights that have been developed in the common law derive "from the nature of the organization, and the relation of the stockholders to the corporation and its property."[22] In Part One, we focused on five basic components of the "bundle" or "array" of rights and interests that constitute stock ownership and are subject to legal protections: (1) security in ownership and the duty of the corporation to acknowledge ownership status, (2) "voice" or voting and meeting rights, (3) information rights, (4) rights of alienation or transferability of shares, and (5) the right to a proportional share in the profits.[23]

C. Corporate Duties Arising From Property Rights

The "stock" of a corporation constitutes the ownership of the corporate entity and everything in which that entity has an interest, which the courts analogize to a trust fund made up of the assets, opportunities, and business operations of the corporate enterprise.[24] Each share of stock is an undivided, proportional ownership interest in the trust fund.[25] However, ownership of the trust fund itself and ownership of the partial interest in that fund are completely different things.[26] The corporation owns the corpus of the trust fund[27] but does so as trustee[28] for the benefit of the shareholders.[29]

In *Yeaman v. Galveston City Co.*, the Texas Supreme Court held that a corporation "is a trustee for the interests of its shareholders in its property."[30] "[T]he trusteeship of a corporation for its

stockholders is that of an acknowledged and continuing trust. It cannot be regarded of a different character. It arises out of the contractual relation whereby the corporation acquires and holds the stockholder's investment under express recognition of his right and for a specific purpose. It has all the nature of a direct trust."[31] Because the law imposes on the corporation the duties of a trustee, the Court held: "Its possession is friendly, and not adverse, and the shareholder is entitled to rely upon its not attempting to impair his interest."[32] Because the shareholder is the beneficiary of the trust, "[h]e is chargeable with no vigilance to preserve his stock or its fruits from appropriation by the corporation, but may confide in its protection for their security."[33] The proposition that the legal relationship between a corporation and its shareholders as a particular type of trust has been often repeated, never denied or limited, and is very well established in Texas case law.[34]

While property rights are protected from infringement against any party, the corporation's duties as trustee to its shareholders impose a heightened obligation on the corporation both to preserve and not to impair rights and interests of its shareholder.[35] Absent some statutory or charter power, or the express consent of the shareholder, a corporation has no authority to forfeit a shareholder's stock.[36] The corporation's duty to its shareholders is to "to observe its trust for their benefit"[37] and to preserve both the stock and its "fruits."[38] With respect to a shareholder's right to participate in a corporation's profits through dividends, the *Yeaman* Court wrote: "There can be no substantial difference between the trusteeship of a corporation as it relates to the stock of a shareholder and its duty to him in respect to the profits or dividends upon his stock."[39]

III. Acquiring an Ownership Interest in Stock

A shareholder may acquire an ownership interest in a corporation's stock in one of two ways: issuance of new (or treasury) shares or transfer of existing shares from another shareholder. Issued shares are termed "outstanding" unless they are treasury shares."[40] Treasury shares are shares that the corporation has issued and subsequently re-acquired and not cancelled.[41]

A. Issuance

Shares are issued by the corporation when authorized by the board of directors.[42] The board may issue as many shares as are authorized in the certificate of formation.[43] All shares issued "are considered fully paid and nonassessable"[44]—meaning that, once issued, a corporation may not require any additional payment. There is no such thing as a "cash call" in a corporation.[45]

The issuance of shares must be for consideration received by the company.[46] However, a broad range of consideration is permissible. Shares with or without par value may be issued for cash, promissory note, services performed or a contract for services to be performed, a security of the corporation or other organization, any other property "of any kind or nature," or any "tangible or intangible benefit to the corporation."[47] Unless reserved to the shareholders in the certificate of formation,[48] the consideration to be received by the corporation for shares is determined by the board of directors[49]—so long as the value is at least the par value for shares with par value.[50] The amount of consideration may also be determined by a formula adopted by the board of directors.[51] In the absence of fraud in the transaction, the judgment of the board is "conclusive in determining the value and sufficiency of the consideration received for the shares."[52] Likewise, the corporation may sell treasury shares for any consideration determined by the board of directors.[53]

B. Transfer

Issued shares may be freely transferred from an existing shareholder to another person,[54] absent valid transfer restrictions.[55] As a general rule, the mechanics of stock transfers are governed by Article 8 of the Uniform Commercial Code,[56] which provides that the acquisition of stock is complete upon the delivery of the share certificate to the transferee.[57] However, Article 8 "is not the exclusive mechanism for resolving disputes involving the ownership and transfer of securities."[58]

C. Possession or Delivery of the Stock Certificate

Ownership interests in a for-profit corporation must be certificated, unless otherwise provided by the governing documents of the corporation or by resolution of the board of directors.[59] A share certificate must state on the front of the certificate (1) that it represents shares in a Texas corporation, (2) the name of the person to whom the shares were issued, (3) the number and class of shares and series designation, if any, and (4) the par value of each share or a statement that the shares are without par value.[60] A share certificate may not be issued in bearer form.[61] The certificate must be signed by an officer of the corporation.[62] The corporation is required to deliver a share certificate representing the ownership interest to which the shareholder is entitled.[63]

A corporation may elect to have outstanding shares that are wholly or partly uncertificated or to have any class or series of shares be uncertificated; and may have both certificated and uncertificated shares or classes or series of shares.[64] However, if the corporation changes from certificated to uncertificated shares, those share certificates already issued become uncertificated only after surrender to the corporation.[65] The rights and obligations of the owner of uncertificated shares are exactly the same as those holding share certificates.[66] After issuing or transferring an uncertificated ownership interest, the corporation shall notify the shareholder in writing of any information required to be stated on a share certificate,[67] except that a corporation may satisfy this duty by providing the shareholder with a copy of the corporation's governing documents which contain the required disclosures.[68]

Even when the corporation's certificate of formation does not provide for uncertificated shares, quite often the shareholder will not possess, and may never have received, the share certificate. However, possession or non-possession of the certificate does not determine stock ownership. "Complete ownership of stock may exist without the issuance of a certificate or its delivery, and a shareholder can transfer shares without signing, endorsing, or delivering stock certificates, and without memorializing the transfer in the corporation's records."[69] It is important to understand that "owning stock" does not mean possessing a stock certificate. Texas law has long held that the certificate is not the "stock."[70] The certificate is merely evidence of the ownership of the stock.[71] A stockholder owns the stock whether or not he possesses the certificate and regardless of whether a certificate was ever even issued.[72]

1. Relevance of the Certificate to Ownership Issued Shares

The issuance of the stock certificate has no relevance whatsoever with respect to acquisition of ownership of newly-issued shares. Where there was an agreement as to what the plaintiff needed

to do to become a shareholder, then the plaintiff "becomes a full stockholder, certainly where he has performed his obligation."[73]

> In order to bring into existence the relationship of stockholder to a corporation there must be some sort of contract in which the subscriber obtains the right to demand and exercise the privileges of a shareholder. But the issuance of a certificate is not essential in order to create the relation of shareholder, which may arise by reason of the contract duly made, and to vest in the subscriber the privileges attendant upon the relationship of stockholder which he may exercise and enjoy with the consent of the company. The certificate is not the stock, but is only evidence in the hands of the shareholder that the corporation recognizes him as owning an interest therein. The certificate is not necessary to the existence of the stock, nor to the transfer of it by the shareholder.[74]

Once the consideration has been paid to the corporation (including the receipt of a promise to make future payments or to render future services or to confer future benefits), the shares are deemed issued without any further action, the right to the shares vests in the person paying the consideration, and the shares are considered "fully paid and nonassessable."[75] Thereafter, the corporation has the obligation to deliver the share certificates,[76] but that duty follows from the fact of ownership; it is not a condition of ownership.[77] In essence, when the consideration is received by the corporation, the stock certificate is deemed to be the possession of the corporation, which has an obligation to deliver it to the shareholder. Therefore, an argument that the shareholder is not in possession of the stock certificate is simply immaterial in the case of issued shares.[78]

2. Possession of the Certificate to Transferred Stock

The possession of the share certificate is slightly more complex in the case of a gift or a sale of existing stock from one shareholder to a transferee. The corporation is typically not a party to the transfer. Unlike with the issuance of new stock, the corporation is not deemed by operation of law to possess the certificate. Rather, the transferor is presumably in possession of the certificate and must deliver it to the purchaser.[79] Although Article 8 provides for accomplishing the transfer by a delivery of the certificate, the transfer of ownership may occur without such delivery.[80] "The upshot is that, although Article 8 requires issuers and holders of securities to observe certain formalities when transferring securities, parties can transfer securities without observing these formalities if they clearly intend that the transfer take place."[81]

IV. Litigating Stock Ownership

A. Proof Required to Demonstrate Ownership

1. Proof of Issuance

In the case of the issuance of new stock, the plaintiff must prove only the payment or delivery of the consideration.[82] The issuance of stock must authorized by the board of directors.[83] However, a specific board vote or resolution or formal entry in the stock ledger issuing the stock is not necessary. Once the board has authorized the issuance of stock in exchange for specified consideration, the stock is deemed issued when the consideration is paid. Moreover, the board

authorization for issuance of stock may be done by an officer or agent acting with the board's actual or apparent authority.[84]

2. Proof of Sale

If the plaintiff has received his shares by purchase from an existing shareholder, then the plaintiff must prove an agreement between buyer and seller providing for the transfer and that the buyer has performed.[85]

> It seems reasonably clear from the texts and the decisions that less formality will be required in the transfer where the controversy is between transferor and transferee than in any other case. As between transferor and transferee, it seems to be the rule that transfer of title may take place though there is no delivery of the certificates themselves, nor endorsement of them, nor transfer of them on the books of the corporation, and even though the sale be by parol. In each case the inquiry is whether the minds of transferor and transferee met, whether there was an intention that the stock should then and there be vested in the transferee, and whether there were acts in the nature of a symbolical delivery of the property.[86]

Where that agreement is in dispute, "Texas common law permits courts to consider the intent of the parties in determining what, if any, securities were transferred."[87] "Courts often imply such agreements or contracts from the parties' acts and the surrounding circumstances."[88]

3. Proof of Gift

A transfer may also occur by gift. If disputed, "[a]ctual ownership is determined from all the facts and circumstances of a case."[89]

> Furthermore, physical delivery of the stock certificates and possession thereof is not the only method by which a donor may make a gift of corporate stock to a donee. What will constitute delivery depends upon the nature of the corpus and the circumstances of the case. Actual delivery is not always necessary; rather, where the circumstances make actual delivery impractical, delivery may be symbolical or constructive. The controlling issue is not who had possession of the certificates, but who had actual ownership of the stock, as evidenced by all the circumstances.[90]

Thus, "establishing ownership . . . depends on the evidence presented, including the nature of the parties, the nature of their relationship, and their representations to each other."[91]

B. Evidence of Ownership

If the plaintiff has possession of a valid stock certificate[92] and is registered as a stockholder on the corporate records,[93] then ownership is established.[94] However, that is frequently not the case. In small closely-held corporations, it is extremely common for share certificates never to be issued at all. Many small corporations purchase a "corporate book," with a blank stock ledger and blank certificates, and never bother to open it; many more don't even bother to buy the book.

Often, majority shareholders confronted with demands for corporate information or other complaints by an angry minority shareholder will reflexively attempt to take advantage of the absence of proper records and certificates by falsely claiming that the complaining party is not or never was a shareholder.[95] Of course, the failure to possess—or even the non-existence—of a share certificate is irrelevant to the issue of share ownership.[96] Therefore, this litigation tactic is not only legally futile but can create an independent basis for liability against the majority shareholder—but, of course, the plaintiff must first prove that the defendant is lying.

Proof of ownership is usually a matter of proving up an agreement.[97] Either the shareholders jointly founded the corporation and agreed that each would own shares, or the plaintiff acquired his shares at some point as a result of an agreement either with the corporation or with another shareholder. In every case, there was some sort of an agreement whereby the plaintiff would become a shareholder.[98] The plaintiff must show "whether the minds of transferor and transferee met, whether there was an intention that the stock should then and there be vested in the transferee, and whether there were acts in the nature of a symbolical delivery of the property."[99]

A shareholder may also prove share ownership by demonstrating his exercise of the "rights, powers, and privileges that accrue to a stockholder in a corporation," such as "the right to attend stockholders' meetings and vote on matters under consideration by shareholders; the right to hold official position of trust in the corporation; and the right to receive dividends from the profits and gains made by the common fund."[100] "The exercise of these rights by the stockholder is a manifestation of his recognition of ownership of stock in the corporate enterprise. So, also, on the part of the corporation."[101] The corporation manifests its recognition of the shareholder's stock ownership through "certain concessions which it makes to a shareholder . . . For instance, the acceptance of the subscription contract; the entry upon its stockbook of the subscriber as a shareholder; the permission accorded to him of attending shareholders' meetings and voting in matters relative to the management of the corporation-exercising directory judgment of his choice in the selection of agencies who may act for him and for the corporation in management of its business; setting aside and paying over to him the proportionate shares of the profits and gains of the corporation to which he may be entitled by reason of his status as a stockholder."[102]

Typically, there will be documentary evidence of ownership. In S-corporations, the shareholders are issued a Form K-1 by the corporation each year stating their ownership percentage, and the K-1s are part of the corporation's tax return, which a corporate officer signs under penalties of perjury. Also correspondence among the parties and minutes, resolutions, or other documents in the corporate records may evidence ownership. In *Greenspun v. Greenspun*,[103] the defendant owned all of the stock in a corporation. The defendant, Morris Greenspun, hired his brother, Max Greenspun, as general manager in 1918 and promised that Max would receive stock for his services.[104] On December 9, 1920, a stockholder's meeting was held, the minutes of which recited that all stockholders were present, and that Morris held 6,100 shares of the stock, that Max held 500 shares, and that Max's stock was in consideration "for services rendered and to be rendered."[105] No certificates of stock were endorsed or delivered, and no new certificates were issued to the plaintiff; nor was there any written conveyance of the stock,[106] although one other document in the corporate records also indicated that the plaintiff owned 500 shares.[107] At trial, the defendant argued "with vigor" that there was never an agreement to give plaintiff a definite amount of stock or as to how long he would have to serve as general manager before becoming

entitled to stock,[108] and "stoutly maintained throughout the trial that he and he alone owned all of the stock of the company from 1918 until the time of the dissolution of the corporation in 1941."[109] The jury found, on what the court of appeals held was sufficient evidence, that the defendant had transferred the 500 shares to the plaintiff at the December 9, 1920 shareholders' meeting.[110]

In *Davis v. Sheerin*,[111] the "precipitating cause" of the lawsuit in 1985 was the defendants' refusal to permit the plaintiff to inspect the corporate books, unless he produced his stock certificate[112]—in all likelihood because no certificates had ever been issued and the defendant knew that the plaintiff would therefore be unable to produce such a certificate. The defendants claimed that the plaintiff gifted his stock to them in the late 1960s.[113] However, the records of the corporation and income tax returns through 1986 clearly showed the plaintiff as a 45% stockholder, and there was evidence of several attempts by the defendants to purchase plaintiff's stock in the 1970s and 1980s.[114] The jury found that the plaintiff did not make a gift of his stock, represent that he would, or agree to do so in the future,[115] and the trial court rendered a declaratory judgment that the plaintiff owned a 45% interest in the corporation.[116]

C. Litigating Consideration

Another tactic sometimes employed by corporations and majority shareholders is, in essence, to attempt to rescind plaintiff's stock ownership on the grounds that he failed to pay adequate consideration for his shares. In small, closely-held corporations, the minority shareholder very frequently comes in as a sort of "junior partner" solely to work in the business and does not invest any money into the venture in consideration for his shares. When dissension later arises, the controlling shareholder will claim that, even thought the plaintiff was clearly recognized as a shareholder for years, his shares were never validly issued because he paid nothing for them. Prior to 1993, this tactic was sometimes successful because the Texas Constitution provided that "[n]o corporation shall issue stock . . . except for money paid, labor done or property actually received, and all fictitious increase of stock . . . shall be void."[117] However, that provision was repealed in 1993; and, although the Business Organizations Code does require that shares be issued for consideration, that consideration may include any "tangible or intangible benefit to the corporation," cash, debt, "services performed or a contract for services to be performed," or "any other property of any kind or nature."[118] Therefore, past or future services, or even skills and knowledge can be adequate consideration.[119] "In the absence of fraud in the transaction, the judgment of the board of directors. . ." as to the value and sufficiency of the consideration is conclusive.[120] Where a corporation has accepted the consideration, issued the shares, and recognized the validity of those shares, it may not later "question the adequacy of the consideration for the issuance of the stock certificates," in the absence of fraud on the part of the shareholder.[121]

Where the consideration consists entirely or partly of the right to receive future payments under a promissory note or future services, the corporation may require that the shares, although deemed fully paid and nonassessable, be placed into escrow or make other arrangements to restrict transfer and to credit distributions against the purchase price until the debt is paid or the services are performed.[122] "If the services are not performed, the note is not paid, or the benefits are not received, the corporation may pursue remedies provided or afforded under law or in the contract or note, including causing the shares that are placed in escrow or restricted to be forfeited or returned to or reacquired by the corporation and the distributions that have been credited to be wholly or partly returned to the corporation."[123]

It is important to note that when the stock is issued, the consideration must have already been paid to the corporation, even if in the form of receipt of a promise of future payments, services, or benefits. The stock is issued as fully paid and non-assessable. It becomes the personal property of the shareholder. If the shareholder defaults on the obligation, then the remedy is to enforce the obligation, not to forfeit the stock. The one exception is when the stock is placed into escrow or made subject to restrictions that permit the forfeiture, which would have to be agreed to by the shareholder. If the escrow arrangement is not made up front, then there is no legal mechanism to forfeit or rescind the issuance of shares.

If there is fraud on the part of the shareholder in the initial transaction, a corporation could presumably assert a claim against the shareholder for fraudulently inducing it to issue shares for inadequate consideration.[124] However, unlike the usual common law rule that "fraud vitiates whatever it touches,"[125] it would seem that no claim could be brought against the shareholder to cancel or forfeit his share ownership or for any relief other than payment of adequate consideration. Section 21.233 provides that a shareholder, beneficial owner, or subscriber may not be held liable to the corporation or its creditors "with respect to the shares," other than on the obligation to pay to the corporation the full amount of the consideration.[126] This limitation of liability is exclusive and preempts any other liability under the common law or otherwise.[127]

V. The Tort of Corporate Stock Conversion

A. Common Law Protection of Property Rights

The common law cause of action that protects personal property rights is the tort of conversion.[128] Prior to the advent of the shareholder oppression doctrine, Texas jurisprudence had a relatively well-developed body of law applying the conversion cause of action to protect property rights of minority shareholders in closely-held corporations against wrongful impairment by the corporation.[129] In eliminating the shareholder oppression doctrine from Texas law, the Texas Supreme Court specifically pointed to the conversion cause of action as one of the "common-law causes of action [that] already exist[s] to address misconduct by corporate directors and officers."[130] A claim of corporate stock conversion "is a personal cause of action and a personal injury" and may be asserted directly by the shareholder.[131]

B. Tort of Conversion Generally

> Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.[132]

Traditionally, when a defendant unlawfully detained property, the owner might sue him either in "detinue," to recover his property together with damages for its unlawful detention, or in "trover," to treat the detention as a conversion of the property by defendant, whereby the title would pass to defendant as of the time of the conversion, and the the plaintiff would be entitled to recover the value of the property at the time it was converted.[133] The modern tort of conversion merges the two common law causes of action into a single claim with an election of remedies.[134]

Common law conversion applies only to ownership or possessory interests in personal property.[135] Only property that is personal,[136] as opposed to real property,[137] and tangible[138] or physical[139] may be converted. Generally, intangible property cannot be converted unless the underlying intangible right has been "merged" into a document that has been converted.[140] The "merger doctrine" departed from the common law and allowed conversion "to encompass a different class of property, such as shares of stock, [and] was motivated by society's growing dependence on intangibles."[141] Under this doctrine a legal instrument, such as a certificate of title, can be converted,[142] but a purely intangible interest, such as a trade name, cannot.[143]

To establish a claim for conversion, a plaintiff must prove that (1) the plaintiff owned or had possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion or control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; (4) the defendant refused to return the property; and (5) the plaintiff was injured by the conversion.[144]

The plaintiff must prove either ownership, legal possession, or the right to immediate possession of the property at the time of conversion.[145] The plaintiff may introduce testimony or other evidence that the property was acquired by purchase or otherwise.[146]

The defendant must exercise dominion or control over the property in a manner inconsistent with the plaintiff's rights.[147] Any act that interferes with the owner's right to the property and deprives the owner of its free use and enjoyment constitutes dominion and control.[148] There is no requirement of a physical taking,[149] and the interference may be temporary,[150] but the act of control or dominion must be positive and affirmative, mere non-feasance is insufficient.[151]

If the property was initially taken lawfully, then conversion occurs when the plaintiff demands its return, and the defendant refuses,[152] but demand and refusal are unnecessary if the property was initially taken wrongfully without the owner's consent,[153] or if the circumstances indicate that the defendant has clearly repudiated the plaintiff's right or otherwise demonstrate that a demand would be futile.[154]

The unique feature of the conversion cause of action is its remedy:

> The importance of the distinction between trespass to chattels and conversion, which has justified its survival long after the forms of action of trespass and trover have become obsolete, lies in the measure of damages. In trespass the plaintiff may recover for the diminished value of his chattel because of any damage to it, or for the damage to his interest in its possession or use. Usually, although not necessarily, such damages are less than the full value of the chattel itself. In conversion the measure of damages is the full value of the chattel, at the time and place of the tort.[155]

The remedy for conversion is generally either (1) the lost value of the personal property converted or (2) return of the property plus special damages for loss of use during the period of wrongful detention.[156] The measure of damages is fair market value at the time and place of the

conversion.[157] The plaintiff must make the election before the case is submitted to the jury and may not change it after submission.[158]

C. Cause of Action for Corporate Stock Conversion

In Texas, a shareholder may sue a corporation for conversion of his shares.[159] The cases that we will examine in this section deal with actions by corporations that interfere with or are inconsistent with the shareholder's ownership right in his stock, such as where a corporation refuses to record the share ownership of a stockholder in the corporate books. Texas courts have uniformally held that the proper defendant in these cases is the corporate entity.[160]

The Fifth Circuit has defined the elements of the conversion cause of action asserted under Texas law against the corporation with regard to stock in that corporation as follows:

1. Plaintiff's ownership or right to the stock;[161]
2. A corporate act that destroys or impairs the stock's value;[162]
3. Demand;[163]
4. Refusal.[164]

The plaintiff on a corporate stock conversion claim bears the burden of proving stock ownership.[165] The third and fourth elements may be excused "if it was apparent that the defendant would not reverse its conduct."[166]

1. Failure to Acknowledge Shareholder Status

"Conversion is the wrongful exercise of dominion or control over the property of another in denial of, or inconsistent with, the other's rights in the property."[167] The most obvious interference with a stockholder's property rights is corporate action that results in the complete loss of share ownership or is an attempt to deny that plaintiff is an owner. Most corporate stock conversion cases deal with this sort of interference with property rights and arise in several different situations.

a. Cancellation of shares

The simplest and most self-evidence case of corporate stock conversion would be one in which the plaintiff is undeniably acknowledged as a shareholder, and the corporation wrongfully cancels those shares on the corporate books. In *Gulf States Abrasive Manufacturing Inc. v. Oertel*,[168] the plaintiff was issued 25,000 shares to set up the company and get it into production.[169] The plaintiff also executed a $25,000 promissory note that was to be paid through future bonuses.[170] Apparently, dissension arose among the shareholders, and the plaintiff quit and started a competing company.[171] In response, the company cancelled the plaintiff's shares, and the plaintiff sued for conversion.[172] The company maintained that the shares had been issued in consideration for the note, which had only been reduced $3,400 at the time he terminated his employment.[173] Under then-existing law, a promissory note did not constitute valid consideration.[174] Therefore, the company contended that the shares were void from the outset, had been prematurely issued, and that the company had appropriately cancelled the stock upon "discovery of the issuance of the certificate in error."[175] "In response to Special Issue No. 1 the jury found that the 25,000 shares in question had been issued to Oertel in exchange for his work and expertise, contributed prior to

issuance of the stock on September 28, 1965, in organizing the company and getting its product on the market."[176] The jury was not required to answer any other questions[177]—meaning that, having found that the plaintiff owned the stock, the court found the remaining elements of conversion as a matter of law. Damages of $2 per share were awarded based on the report of a special master, appointed by agreement.[178] The company objected that the bylaws, which had been approved by the plaintiff, set the price at $1 per share. The bylaws provided the company with the option to purchase the shares of any shareholder upon separation from the company for that price (an option the company had not exercised), but the court held that the bylaws were irrelevant to the issue of damages for conversion: "[T]he trial court's judgment fixes the damages based on the value of the shares; it does not order a sale of them."[179]

b. Refusal to issue share certificates or recognize a transfer

Probably the most common corporate stock conversion claim is where the plaintiff has acquired shares, typically purchased from another shareholder, and the corporation, for whatever reason, refuses to reissue the share certificates in the plaintiff's name or to recognize the transfer on its books. The corporation's refusal to transfer stock ownership after a presentment of the stock and request for change of ownership has been made constitutes a conversion of the stock.[180]

In *Rio Grande Cattle Co. v. Burns*, [181] the Texas Supreme Court held that the stock the plaintiff had acquired "was clearly assignable, and his assignment thereof to the appellee, under the circumstances, vested at least the equitable title to the stock or interest of Glasscock in the appellee, and entitled it to demand recognition at the hands of the corporation."[182] "A refusal to transfer record ownership of corporate stock in the circumstances here presented results in liability as for a conversion thereof, at election of the complaining party."[183] "Thus, the unreasonable refusal to transfer stock ownership in a corporation amounts to the wrongful assumption of and exercise of dominion and control over that stock. Once a presentment of the stock and request for change of ownership has been made, coupled with some proof of ownership, then the unreasonable refusal to transfer is a conversion of the stock."[184]

In *Arthur W. Tifford, PA v. Tandem Energy Corp.*,[185] the Fifth Circuit, applying Texas law, reversed a summary judgment in favor of the defendant in a corporate stock conversion case. The case involved stock issued by a Nevada corporation to a promoter in consideration for his assistance in a deal. The deal did not go as expected, and the corporation cancelled the stock, claiming that it had been issued as a result of fraud and without consideration.[186] The plaintiff recovered one of the cancelled certificates in satisfaction of an unrelated judgment against the promoter, and requested that the stock be transferred and reissued in the plaintiff's name, which request the defendant corporation refused.[187] "It is well-established that an unreasonable refusal to acknowledge a lawful transfer of corporate stock is conversion."[188] The Fifth Circuit held that the plaintiff had raised a valid claim for conversion of the stock because refusal to transfer the shares constituted "a corporate act that destroys or impairs the stock's value."[189]

c. Denial of share ownership

All reported cases of corporate stock conversion involve the corporation's denial of share ownership in one way or another. Perhaps the most obvious and central right of ownership is the assurance that the law will protect the existence and continuation of that ownership—that the

owner has "the right to exclusive possession" and "the right to security."[190] The stockholder is a property owner. The stock is his property. It cannot be taken away without his consent.[191] The stockholder is "entitled to demand recognition at the hands of the corporation"[192] and has the right to have his ownership recorded on the books of the corporation[193] and to have issued and delivered a stock certificate as written evidence of that ownership.[194]

In *Neyland v. Brammer*,[195] the defendant's husband contracted with the plaintiff to have the plaintiff locate, acquire, and develop sand and gravel deposits in the vicinity of Victoria, Texas, promising to pay him "$400.00 per month and 10% interest in the profits of such business, as compensation for his services,"[196] which was later modified to provide for issuance of 10% of the stock in the corporation that defendant formed. The plaintiff later sued the defendant for conversion of his stock based on the failure to issue the stock agreed to by her late husband. The trial court rendered judgment for the defendant; the court of appeals reversed, holding: Plaintiff "conclusively showed himself to be the owner, under the terms of his original contract of late 1927 or early 1928 with J. L. Brammer for 10% of the latter's interest in a holding corporation to be thereafter created for their joint sand and gravel business at Victoria" and that defendant "converted to her individual benefit the interest so belonging to him, became in consequence liable in both her capacities to him for its reasonable value as of that date."[197] The court reversed and rendered a judgment for the plaintiff for the value of the stock found by the trial court, but then on rehearing remanded the case for a new determination of damages.[198]

In cases involving oppressive conduct in a closely-held corporation, the objective factual record is often ambiguous as to whether and when the plaintiff became a shareholder or whether the plaintiff transferred his shares to the majority shareholder prior to the lawsuit. In these cases, the majority shareholder uses his power over the corporation to cause the corporation to deny the plaintiff's share ownership. Often, the stock certificates are never formally issued, and the blank stock certificates simply sits in the corporate book. Frequently, the owners even neglect to create a stock ledger showing the names and number of shares held by each shareholder, or the owners fail to keep the ledger up to date with subsequent transfers or issuances. When disputes arise later, the majority shareholder is tempted to claim that the minority shareholder is not a shareholder because the minority shareholder does not have a share certificate or because the minority shareholder's interest is not recorded in the corporate books. As a legal matter, the issuance of the stock certificate is not necessary for a person to be a shareholder.[199] The same is true with regard to the stock ledger.[200]

As a practical matter, there is no real difference between the corporation cancelling the plaintiff's shares on its books or refusing to record a transfer to the plaintiff and the corporation taking a position in court that the plaintiff is no longer or never was a shareholder. Both situations equally result in the conversion of the plaintiff's shares.

Nevertheless, there is the problem of proof. Very frequently, the majority shareholder will play dumb, taking a definite position through his actions that the plaintiff is not a shareholder, while maintaining in court that "we are here to determine whether or not the plaintiff is a shareholder." For the plaintiff to have a remedy for denial of share ownership, the denial must be unambiguous. The defendant's pleading in the alternative probably won't satisfy the elements necessary to prove fraud or conversion. Therefore, the plaintiff should create as many opportunities as possible for the defendant to take the position of non- ownership. These would include demanding

the delivery of stock certificates and recording of ownership on the share ledger, demanding a shareholder's meeting, demanding to examine the shareholder's list, demanding inspection of the share ledger or other books and records, and demanding issuance of share certificates. The defendant's negative response to any of these demands will provide evidence of a denial of ownership. Furthermore, a small derivative claim for, say, misappropriation of corporate funds, or claims to enforce a demand for inspection of books and records may be defended by a denial of share ownership. A motion for summary judgment on the defense to these actions can smoke out an affidavit taking an unequivocal position.

Most useful will be requests for admission and the deposition of the majority shareholder. The goal is to pin down an unequivocal statement that the plaintiff is not a shareholder. Often, the defendant will attempt to hedge and state that he is not sure whether the plaintiff is a shareholder and that the court will decide that issue.[201] Every effort must be made to force the defendant to take a position as to whether in his mind the plaintiff was or was not a shareholder. If the defendant states that he doesn't know whether the plaintiff was a shareholder, then he must surely know that he never believed that the plaintiff was a shareholder. Witnesses are often loathe to disavow the legal positions stated in pleadings or motion papers. Inevitably, the witness will claim not to be a lawyer and not able to offer a legal opinion on the question of the plaintiff's share ownership, but the witness will have to admit that he at all times believed himself to be an owner in the business and could not have believed that the plaintiff was his co-owner at the same time. In the end, an admission that the defendant will not admit that the plaintiff is a shareholder and consequently will not treat him as such is probably good enough. Juries don't like gamesmanship.

Finally, care must be taken in forcing a clear position as to whether the plaintiff was a shareholder at one time and subsequently ceased to be a shareholder or whether the plaintiff never was a shareholder. If the defendant's position is that the plaintiff ceased to be a shareholder, then all aspects of the transaction must be nailed down. When did the plaintiff cease to be a shareholder? What was the nature of the transaction? What was the consideration paid? How was the change documented? What were the understandings of the parties regarding the transactions? What representations were made? How did the way that the parties treated each other, or referred to each other differ before and after the supposed transfer?

If the issue is whether the plaintiff was ever a shareholder, then the usual contention is that there was some sort of agreement or understanding that the plaintiff would become a shareholder, but that a final agreement was never reached or that the plaintiff never satisfied the conditions necessary to become a shareholder. Often the claim is made that there was a vague intent to transfer shares to the plaintiff, but that this simply never got done. Sometimes the claim is that the plaintiff was supposed to pay for the shares and never did. Sometimes the claim is there were discussions about making the plaintiff a shareholder, but that no final agreement was ever reached. Again, unless the defendant's position is simply that plaintiff was never a shareholder and the defendant cannot imagine why the plaintiff would think that he was, care must be taken to prove up the specifics of what conditions were necessary for ownership to transfer to the plaintiff. What were the specific terms of the agreement? When was plaintiff supposed to have performed? What did the plaintiff do and what was left undone?

Courts have recognized that positions taken in the defendants' pleadings can conclusively prove conversion. In *Neylan v. Brammer*, the defendant's pleadings:

> [N]ot only admitted that no such request [for issuance of the stock certificates] would have been complied with, but further denied any right in [plaintiff], asserted [the defendant's] own exclusive ownership thereof, and declared her purpose to at all times maintain the same. Hence any necessity for a demand had been obviated; the conversion having become complete. ."[202]

Similarly, deferring to the court as to whether or not the plaintiff is really a shareholder does not prevent a finding of conversion: "Application to a court for guidance in determining whether property should be returned, while it may show good intentions, does not defeat a suit for conversion."[203]

d. *Davis v. Sheerin* as a conversion claim

If *Davis v. Sheerin*,[204] had been decided as a conversion claim, the result would have been almost identical—perhaps even more favorable to the plaintiff.[205] The court of appeals held that the defendant in *Davis* committed oppressive conduct justifying a compulsory buy-out based primarily on a false denial that the plaintiff was a shareholder and a false claim that the plaintiff had "gifted" his shares to the defendant decades prior to the trial—"conspiring to deprive one of his ownership of stock in a corporation, especially when the corporate records clearly indicate such ownership."[206]

Actually, *Davis* was tried on a conversion claim; however, the jury found that the defendants did not convert appellee's stock.[207] While the jury found that the defendants conspired to deprive the plaintiff of his stock ownership in the corporation,[208] it also found that the conspiracy was not the proximate cause of any damages.[209] The findings seem inconsistent on their face and irreconcilable with what the appellate court characterized as undisputed facts conclusively demonstrating a denial of share ownership.[210] The answer probably has more to do with the inconsistency in the plaintiff's theories of liability in the presentation of the case. Ordinarily, in a conversion claim, the plaintiff must make an election before the case is submitted to the jury as to whether the plaintiff continues to own the property and is entitled to equitable remedies for its wrongful detention or whether the plaintiff ceased to own the property as a result of the conversion and is entitled to damages, and the plaintiff may not change the election after submission.[211] This election should have been made in *Davis* as to whether the plaintiff was seeking conversion damages for loss of the stock or the shareholder oppression remedy of a buy out, which would have required continued ownership of the stock. It seems that no election was made, and the case was submitted to the jury on an inconsistent theory of stock ownership.

The case seems to have been tried primarily on the theory that the plaintiff was a shareholder and was entitled to a buy-out. The trial court granted a declaratory judgment that plaintiff was a 45% shareholder.[212] From the jury's perspective, the claim that plaintiff was still a shareholder (oppression) and was no longer a shareholder (conversion) must have seemed fatally inconsistent.[213] Given that the jury otherwise found in favor of the plaintiff, it must have resolved this apparent contradiction by finding that the defendants unsuccessfully attempted to convert plaintiff's shares—so, yes, the defendants conspired to deprive plaintiff of his stock ownership; but, no, the defendants did not actually succeed in converting those shares; and, no, the unsuccessful conspiracy did not cause any actual damages.[214] The court should probably have

ruled that the jury's affirmative answer that the plaintiff "did not make a gift of his stock to appellants, represent that he would, nor agree to do so in the future"[215] established liability for conversion as a matter of law based on the undisputed facts.[216]

2. Corporate Interference With Stock Ownership

a. Unperformed agreement to issue shares

Prior to incorporation, the founders or "promoters" of a future corporation sometimes may make vague promises to employees or attorneys that if the business is successful, they will give the employee or attorney an "interest in the business."[217] Also very frequently, the owner of a corporation agrees that an employee will earn an ownership interest over time. After the employee performs his part of the agreement, the majority shareholder may regret the deal and delay or refuse to issue the shares. This was the situation in *Neyland v. Brammer*,[218] discussed above. It was also the situation in *Willis v. Donnelly*,[219] in which the defendant was the sole shareholder of a corporation that was established to operate a day spa. The defendant contracted with the plaintiff, who owned a successful hair salon, to give up his existing business and to transfer his staff and customers, for which the plaintiff would receive a 25% ownership in the corporation as soon as the new business reached a certain revenue goal.[220] However, the defendant soon regretted this agreement because the costs and capital requirements were much greater than anticipated, and when the revenue targets were reached the corporation was still losing money.[221] The defendant demanded that the plaintiff "act like an owner" by contributing capital or assuming some of the debt and was frustrated when the plaintiff refused to do so.[222] Therefore, the defendant delayed issuing the stock and later persuaded the plaintiff to consent to the delay so that the defendant could get all the tax benefits of the losses from the S corporation.[223] Ultimately, the plaintiff was fired without ever having received his shares.[224] The Supreme Court reversed a judgment for the plaintiff for breach of fiduciary duty, holding that no duties arose because the plaintiff was never a shareholder.[225]

When does one become a shareholder? The transfer of share ownership is a matter of contract. When there is a "manifest intention of the parties to this enterprise" that a person is a shareholder, and therefore he is a shareholder.[226] The Texas Supreme Court has held: "He becomes a full stockholder, certainly where he has performed his obligation, and possession all of a stockholder's right, even if no certificate is issued to him at all."[227] In *Greenspun v. Greenspun*,[228] the Court of Appeals held that, as a legal matter, "transfer of title may take place though there is no delivery of the certificates themselves, nor endorsement of them, nor transfer of them on the books of the corporation, and even though the sale be by parol."[229] In affirming the lower court's opinion, the Texas Supreme Court specifically adopted this portion of the opinion.[230] In *Neyland v. Brammer*,[231] the plaintiff's claim was that he had performed his obligations under the contract and therefore was a shareholder, and the court of appeals held the plaintiff had "conclusively showed himself to be the owner," and that the refusal by the corporation to honor the contract was not merely a breach of contract but a conversion of the shares.[232]

The plaintiff in *Willis v. Donnelly* should probably have argued that he became a shareholder by virtue of the letter agreement the moment that the revenue target was reached, that the agreement to transfer ownership was essentially self-executing. However, that theory would have been inconsistent with the plaintiff's claim that the defendant breached the letter agreement by not

issuing the shares, which the jury found to be the fact.[233] Furthermore, the undisputed evidence was that the transfer of ownership was delayed (not merely the issuance of share certificates) so that the defendant could continue to enjoy the tax benefits of the corporation's losses, which would have to be shared with the plaintiff once the plaintiff became a shareholder.[234] Therefore, in *Willis v. Donnelly*, it was clear on that record that ownership had not been transferred to the plaintiff.

b. Wrongful or fraudulent transfer

A corporation can also convert stock by wrongfully transferring ownership on the company books from the true owner to someone else.[235] This might be done innocently by a corporation where there are competing claims to the same stock, or it might be done by a majority shareholder intentionally trying to squeeze out a minority. "If a corporation recognizes a forged or unauthorized assignment of a certificate of stock and power of attorney to transfer, and registers the transfer on its books, or if it registers a transfer without any assignment or authority from the owner, it is guilty of a conversion of the shares, and the registered owner may maintain an action against it for damages."[236]

One other factual situation is not uncommon. The majority owner and the minority owner might have had an agreement that the plaintiff was actually a shareholder, but just not one of record. Perhaps the plaintiff was subject to a non-compete or was working for a competitor at the time that the plaintiff and defendant decided to start their venture so that there was some need to keep plaintiff as a "silent partner." Perhaps plaintiff's credit was poor, and the parties worried that having the plaintiff as a shareholder of record would harm the company's ability to borrow. In these cases, the defendant is acting in the capacity as a trustee with both parties acknowledging the plaintiff's equitable ownership interest. However, when the parties come into conflict later, the defendant takes advantage of the situation and denies that plaintiff is (or ever was) a shareholder.[237]

3. Unique Nature of the Corporate Stock Conversion Cause of Action

What may be apparent from the foregoing discussion is that the cause of action for corporate stock conversion—corporate conduct interfering with ownership rights of one of the corporation's own stockholders—is an imperfect fit with the traditional common law tort of conversion. Consider the classic scenarios in which the tort of conversion applies:

> 1. On leaving a restaurant, A by mistake takes B's hat from the rack, believing it to be his own. When he reaches the sidewalk A puts on the hat, discovers his mistake, and immediately re-enters the restaurant and returns the hat to the rack. This is not a conversion.
>
> 2. The same facts as in Illustration 1, except that A keeps the hat for three months before discovering his mistake and returning it. This is a conversion.
>
> 3. The same facts as in Illustration 1, except that as A reaches the sidewalk and puts on the hat a sudden gust of wind blows it from his head, and it goes down an open manhole and is lost. This is a conversion.

> 4. Leaving a restaurant, A takes B's hat from the rack, intending to steal it. As he approaches the door he sees a policeman outside, and immediately returns the hat to the rack. This is a conversion.[238]

In each of these examples, B has an item of personal property, and A takes it away. In each example, B loses ownership or at least possession of the item. In what way is a corporation's failure to make an entry on the stock ledger recognizing an otherwise valid transfer of stock analogous to A walking off with B's hat? It really isn't. Texas law is clear that the refusal by a corporation to transfer record ownership of stock on the corporate books constitutes conversion of the shareholder's stock by the corporation—but why? When A walks off with B's hat, B can no longer wear the hat, but in the cases where a corporation is found to have "converted" the shareholder's stock, entitling the shareholder to an award of damages against the corporation for the value of the stock, the shareholder did not lose "possession" of the stock—the shareholder may still have been in possession of the transferred certificates that the corporation refused to record or there may never have been any certificates to possess in the first place. In no event did the shareholder cease to own the stock as a result of the corporate action. In none of these cases did the corporation become the owner of the stock or seek to enjoy for itself the plaintiff's rights and privileges of share ownership. Furthermore, how can it be said that denying that the plaintiff is a shareholder is the same as exercising dominion or control over the shares? A defendant who denies that a plaintiff owns a certain tract of land may have committed slander of title, but he has not committed trespass.

When the corporation refuses to make the ledger entry, the shareholder has not necessarily lost the use and enjoyment of his shares. Shares are intangible interests, so the shareholder does not have the ability to use and enjoy them directly. The shareholder may hold share certificates, in which case the corporation's refusal does not dispossess the shareholder of the physical certificates. Similarly, when there are no physical certificates, the corporate refusal would not seem to have any actual effect on the shareholder at all. Moreover, the corporation's refusal to record the ownership in the share ledger does not have any effect whatsoever on the question of whether or not the shareholder owns the shares. If there is a legal dispute or uncertainty regarding the shareholder's ownership, then one might expect that the shareholder's remedy is simply to obtain a judicial declaration that he is a shareholder, and he would be made whole. But that is not the way the law works. The law treats the corporation's refusal to recognize the shareholder's ownership as the equivalent of dispossessing the shareholder of his ownership interest and subjects the corporation to the same legal consequences with respect to the shares as would be the case if the corporation had stolen the shareholder's hat. Why?

Something else is clearly going on. That something else is a judicial innovation extending a common law tort to deal with corporate wrongdoing toward individual shareholders—and that innovation occurred more than a century before the advent of the shareholder oppression doctrine. At least since the late nineteenth century, Texas courts have consistently applied the common law tort of conversion to deal with corporate wrongdoing that isn't really conversion of personal property. Let us drill down on the peculiarities of the corporate stock conversion cause of action to see what possibilities exist for further development of this judicial innovation in light of the gaps left in the common law by *Ritchie v. Rupe*.

a. Conversion cause of action applied to stock

The cause of action for conversion of stock is something of an anomaly as it developed in Texas. "Texas law has never recognized a cause of action for conversion of intangible property."[239] Tangible property is "capable of being handled or touched and may be evaluated by the physical senses;" whereas intangible property "has no physical existence."[240] Therefore, it would seem that the tort of conversion would not apply to stock, which is an undivided interest in the corporate "trust fund"[241] and is separate and independent of whatever tangible property is owned by the corporation. [242] The exception to the tangible property requirement is "where an underlying intangible right has been merged into a document."[243] The courts reason that the intangible "rights had been merged" into a tangible document, and the action is for the conversion of "the value of the rights represented by [the document]."[244] Although the property rights represented by the document are intangible, the document itself is tangible and may be converted.[245] The application of this "merger doctrine" to make the intangible property rights of stock ownership into a tangible piece of property subject to a claim for conversion is puzzling. Obviously, the stock certificate is a document that represents the stockholder's ownership rights, and which is capable of being converted. Yet, Texas law is very clear that the ownership rights in the stock do not merge with the stock certificate.[246] Under Texas law, a plaintiff may recover for conversion of his "stock" even if no stock certificates were ever issued.[247]

> In *Watts v. Miles*, [248] no certificates evidencing ownership of stock in the corporation were ever issued to any of the shareholders. The San Antonio Court of Appeals held that the "fact that certificates evidencing ownership of shares of stock were never issued is irrelevant."[249] The plaintiff could recover for the conversion of his stock if he could prove that he performed his obligation but that, despite demands by plaintiff, the corporation had refused to transfer the stock to plaintiff.[250] Conversely, in *Davidson v. Atmar*, [251] the defendant did take unauthorized possession of the plaintiff's stock certificates, but the court held that the plaintiff did not have a conversion claim for the value of the stock: The six stock certificates themselves, as distinguished from the stock in the corporation which they represented, were property. But as these certificates were not indorsed by appellee, he could acquire no right in the stock in the corporation, nor could he make any use of the certificates. He had no right, by reason of his possession of the unindorsed certificates, to interfere with appellee in his status as a stockholder, and, in fact, did not attempt to assert any such rights. . . . Appellee remained all the while the owner of his shares of stock, as distinguished from his stock certificates, and was in full control and enjoyment of the same. Consequently, he had no cause of action for the conversion of the stock. The conversion of an unindorsed certificate of stock is not a conversion of the stock.[252]

No Texas appellate opinion attempted any explanation of the peculiarities of this application of the merger doctrine to the conversion of corporate stock.[253] It may be that the physical stock certificate, evidencing to the stock ownership, is presumed to exist by law [254] and that the corporation is deemed at all times to be in possession of the certificate,[255] with a duty to deliver a copy to the shareholder upon demand,[256] so that by means of the same legal fiction that treats the corporation as an actual, separate person,[257] any interference with the stockholder's property rights

in his stock is deemed by the law to be the wrongful possession by the fictitious corporate person of the fictitious tangible document. No court ever made this argument in Texas; nevertheless, Texas law is well-settled that stock ownership is subject to a claim for conversion, without regard to any proof as to the handling or possession of the actual certificate, as the Texas Supreme Court has recognized for well over a century.[258]

b. Dominion and control over a shareholder's stock

How is the refusal of the corporation to recognize the plaintiff as one of its shareholders an act of "dominion or control" over the shareholder's stock? The law is clear that such conduct does not in any way deprive the shareholder of his ownership—neither the issuance of the stock certificate[259] nor the notation in the stock ledger[260] are necessary for ownership. Moreover, the defendant must ordinarily intend to assert some right in the property to be held liable.[261] The refusal to record the proper ownership of shares necessarily involves the corporation's denial of the plaintiff's ownership rights, but hardly involves any claim of right by the corporation to the plaintiff's stock.

Furthermore, as traditionally developed, the tort of conversion is an offense against possession and not title; it may be committed against one who has legal possession, regardless of the question of title.[262] Yet Texas law clearly holds that the shareholder never actually possesses his stock. "Upon the issuance of a certificate evidencing the definite interest in the common fund existing in the individual, the possession of the stock evidenced by the certificate does not pass from, but is retained by, the corporation. The certificate is simply the evidence in the hand of the subscriber on which he may be able to base an assertion of interest in the common fund."[263] The stock at all time remains "in the possession of the corporation."[264] Yet, it is indisputably settled in Texas law that shares of stock in a corporation, which "are a species of personal property, belonging to the holder thereof, entirely separate and distinct from the property of the corporation itself,"[265] are subject to a claim for conversion claim.[266]

A corporation, in order to be liable for stock conversion, must be exercising dominion and control over something other than the stock certificate or the claim to ownership. An interesting New York case demonstrates the converse of this principle. In *Silverstein v. Marine Midland Trust Co. of N.Y.*,[267] the defendant wrongfully withheld possession of the plaintiff's share certificates in a corporation of which the plaintiff was the 100% shareholder. The court held that, at that point, the plaintiff had the option of abandoning title to the stock and suing for its value.[268] However, notwithstanding the wrongful detention of the certificates, the plaintiff continued to exercise "rights of ownership over the stock by transferring the assets of the corporation to a partnership formed by them, by executing as stockholders, and thereafter filing, a certificate of dissolution of the corporation, and by receiving the return of a substantial portion of their capital investment in the corporation."[269] The court held that the plaintiff's "dominion over the stock" precluded his right to recover the value of the stock in an action for conversion[270]—notwithstanding the loss of the written evidence of title.

c. Putting it all together: conversion of stock by a corporation

The answers to the questions posed above have to do with the legal nature of share ownership and the function of the corporation and the relationship between corporation and shareholder with respect to that ownership. While the law recognizes the corporation as a separate person, [271] that

personhood is a fiction,[272] a legal abstraction. The actual "stuff" of the corporation consists of the entire corporate enterprise—all the assets, ongoing operations, employee relationships, business goodwill, reputation, know-how, opportunities, and competitive advantage of a corporation—everything what makes ownership of the corporation valuable. All that value is owned through the corporate entity and constitutes something like a trust fund.[273] The legal fiction of a corporation allows the creation of an "ownership vessel" for all that value, which is permanent[274] and independently managed,[275] so that numerous owners may invest their capital, with no responsibility for management,[276] risking only their capital investment,[277] and may buy, sell, or transfer their ownership interests without any effect on the continuity or integrity of the corporate entity or enterprise.[278] The "stock" collectively is the capital of the corporation—meaning the entirety of the value within the corporate enterprise—the corpus of the trust fund. The ownership of the stock is divided into any number of shares, and each share of stock is an undivided beneficial interest in the corpus trust fund.[279] However, ownership of the trust fund itself and ownership of the partial interest in that fund are completely different things.[280] The corporation owns the trust fund[281] but does so as trustee[282] for the benefit of the shareholders.[283] The "share," as such, is completely intangible and constitutes the shareholder's claim on the corporation and the corporation's obligation to the shareholder, and has been likened to a "chose in action."[284] That ownership "share" may be evidenced by a tangible, written stock certificate and by notations in the corporation's tangible, written stock ledger. However, that written evidence of title is not the "stock,"[285] and the existence or non-existence of the certificate is "irrelevant"[286] as to the fact of stock ownership and the rights and duties flowing from such ownership. Yet the ownership interest is capable of being bought, sold, taxed, garnished, executed upon, and most importantly stolen.[287] The stock itself is at all times possessed by the corporation and held for the benefit of the shareholder.[288] The law considers the corporation to be acting as trustee in its possession of the shareholder's stock for the benefit of the shareholder and imposes on the corporation affirmative duties of trustees in the preservation of the shareholder's stock and its bundle of rights.[289] Therefore, the corporation, as a legal necessity, is at all times exercising dominion and control over the shareholder's stock in its capacity as trustee. When the corporation acts in conformity with its duties, then the dominion and control it exercises over the shareholder's stock is consistent with the shareholder's rights and ownership. When the corporation violates its duties to preserve the shareholder's stock and its fruit, when it wrongfully impairs the shareholder's interests, it necessarily exercises dominion and control over the stock in a manner inconsistent with the shareholder's rights.

The distinction between conversion of personal property, the liability for which is imposed any wrongfully interfering with the possession of one's personal property, and conversion of stock in a corporation as applied specifically to the corporate entity is clearly stated in the 1880 Texas Supreme Court case of *Baker v. Wasson.*[290] The plaintiff brought a conversion claim alleging two non-corporate defendants who had fraudulently obtained a transfer on the corporation's book of ten shares of Houston & Texas Central Railway Company belonged to the plaintiff.[291] Judgment was rendered for plaintiff for $4,000 and interest, as damages for value of the stock.[292] In acknowledging the usual requirement that converted property be tangible, the Supreme Court seems to say that stock is just an exception: "Shares in incorporated companies, though not visible or tangible and capable of actual, manual delivery, have, nevertheless, long been recognized as having value and many other characteristics of property."[293] The Court noted that because the "company only, had the power to cancel the old stock and issue new," ordinarily the corporation

would be liable to the true owner "if this was done illegally and wrongfully, whether through negligence or fraud."[294] The wrongful transferee of the plaintiff's shares would ordinarily have no liability "if he did not have notice, or was not in law charged with notice, of the invalidity, if any, of his own title" unless he had engaged in a "fraudulent combination between the company and [the transferee], by which the new stock was wrongfully issued to him," in which case the plaintiff "would have his remedy against both for damages."[295] The company's liability arises from "its undertaking to hold the stock for the benefit of the true owner of the certificate"[296]—the same "contractual relation whereby the corporation acquires and holds the stockholder's investment under express recognition of his right and for a specific purpose"[297] that gives rise to the corporation's duties as a trustee[298]—and more "than upon that of a technical tort."[299] Therefore, the cause of action for corporate conversion of stock developed in Texas from the very beginning as something of a hybrid between a claim for breach of the corporation's fiduciary duties to its shareholders and the traditional tort remedy, in which the corporation's duty as trustee to preserve the shareholder's property rights is enforced by means of the damages remedy of the tort of conversion, without strictly complying with the technical requirements of the common law tort.

It is not relevant that the corporation committing acts of stock conversion make no claim to the plaintiff's stock and does not, as a legal matter, dispossess the plaintiff of such ownership. The definition of conversion is in the disjuntive: "The unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another to the exclusion of ***or inconsistent with the ownership rights*** . . . ."[300] Because the corporation has control over the records evidencing the shareholder's ownership, and the corporation has a duty of loyalty to the beneficiaries of its trust to acknowledge their ownership, and each shareholder has a fundamental right in the recognition of such ownership,[301] and in the delivery of a share certificate,[302] and the proper recording of ownership on the company book.[303] When the corporation impairs these rights and violates its correlative duties, the corporation is not claiming ownership of the stock, but the corporation is exercising its dominance and control in a manner that is ***inconsistent with the shareholder's rights of ownership***; therefore, the corporation has committed conversion of the shares. However, the fundamental right to recognition of ownership is only one of many such fundamental rights of stock ownership in the shareholder's "bundle" of property rights. It would seem that the corporation could equally commit conversion by exercising dominion and control over the stock in violation of other fundamental property rights.

D. Extending the Corporate Stock Conversion Cause of Action

1. Interference with rights of alienation

Another fundamental right of property ownership is the right to sell, transfer, assign, or give it away.[304] The rights of property ownership include, "the right to the capital value, including alienation. . . [and] the power of transmissibility by gift, devise, or descent."[305] "Transferability is the primary value-imparting characteristic of most property interests,"[306] including stock ownership.[307] "Alienability is a legal incident of property, and restraints against it are generally contrary to public policy."[308]

a. Right of Alienation

The "ownership of the stock and [the] right to sell or transfer it" is a "vested right and interest, subject only to the right of the corporation to manage and regulate its affairs under the laws of this state and under the provisions of its charter and bylaws."[309] For this reason, the general policy of the law opposes restraints on the alienation of personal property, including stock.[310] Absent permissible transfer restrictions, unrestricted shares are freely transferable.[311] While some restrictions on the transferability of stock are permitted, they must be reasonable, consented to by the stockholder, clearly disclosed, and not violative of public policy.[312]

b. Permissible Transfer Restrictions

Transfer restrictions are enforceable if the shareholder consents to the restriction[313] and the restriction is reasonable.[314] A restriction on the transfer or registration of transfer of a security, or on the amount of securities that may be owned by a person or group of persons may be imposed by the certificate of formation or bylaws, or by a written agreement among one or more owners of the securities subject to the restrictions.[315] The restriction may also be contained in a written agreement among one or more holders of the securities and the corporation, but the corporation must file a copy of the agreement at the principal place of business or registered office and make it available for examination by the shareholders.[316] In each of these instances the shareholder either actually or constructively consents to the restriction, either expressly by entering into a written agreement with other shareholders or the corporation, or implicitly by accepting shares issued already subject to existing restrictions in the certificate or bylaw, or by transfer from a shareholder who did consent to the restriction. Restrictions adopted by agreement or by amending the certificate or bylaws do not apply to already outstanding stock, unless the shareholder votes in favor of the restriction or is a party to the agreement.[317]

A corporation that has adopted a transfer restriction by bylaw or agreement may file the restriction with the secretary of state, attaching a copy of the bylaw or agreement and stating the name of the corporation, that the attachment is a true and correct copy, and that it has been properly adopted.[318] The restriction becomes a public document, but must also be disclosed on the share certificate.[319] The filing alone does not establish constructive notice. An agreement to which the corporation is a party may also be made a part of the certificate of formation by filing a certificate of amendment, attaching a copy of the restriction, that either identifies the portions of the certificate that are changed, or that no change was made[320] and includes the name of the corporation and statements that the attached restriction is a true and correct copy and was properly adopted.[321] In any event, the transfer restrictions contained in the certificate or bylaws or in an agreement to which the corporation is a party must be either set out or summarized conspicuously on the front or back of the share certificate, or the existence of the restriction must be conspicuously disclosed on the front or back with a statement that a free copy will be provided on written request, or that a complete statement of the restriction has been filed with the secretary of state.[322]

The restriction is specifically enforceable against the shareholder and any successor or transferee if the restriction is reasonable and noted conspicuously on the share certificate or in a notice for uncertificated shares.[323] If not disclosed on the share certificate, then the restriction is not enforceable against a transferee for value (or any subsequent transferee) without actual knowledge of the restriction at the time of the transfer.[324] Against all other persons, the restriction is

specifically enforceable after they have knowledge of it.[325] A corporation may also lose the right to enforce a restriction if it does not file a copy with the secretary of state and does not furnish a copy within a reasonable time after written request.[326]

Section 21.211 gives a non-exclusive list of the types of restrictions that are otherwise valid:

> (1) a right of first refusal in favor of the corporation or other person;
>
> (2) a put option obligating the corporation or other person to buy the shares;
>
> (3) a requirement of consent by the corporation or other person prior to transfer;
>
> (4 prohibition against sale to specific persons or groups, if "not manifestly unreasonable";
>
> (5) prohibition against transfer that would endanger subchapter S tax status;
>
> (6) a restriction that otherwise maintains a tax advantage to the corporation;
>
> (7) a restriction that maintains the statutory close corporation status;
>
> (8) a call option requiring the shareholder to sell to the corporation or others; or
>
> (9) a restriction causes or results in the automatic sale or transfer of an amount of restricted securities.[327]

However, these restrictions, even if expressly permitted by statute and consented to by the shareholder, must still be reasonable as applied. The Code states in two separate provisions that transfer restrictions may be enforced only if they are "reasonable."[328]

The restriction is conclusively reasonable if it maintains a local, state, federal, or foreign tax advantage to the corporation or its shareholders, such as Subchapter S status, or otherwise maintains a statutory or regulatory advantage or complies with a statutory or regulatory requirement.[329] Otherwise, the "reasonableness of such a restriction is ordinarily to be determined by applying the test of whether the provision is sufficiently necessary to the particular corporate enterprise to justify overruling the usual policy of the law in opposition to restraints on the alienability of personal property."[330] In *Dixie Pipeline Sales, Inc. v. Perry*, the Houston Court of Appeals held a right of first refusal applying to stock in a family corporation was reasonable because it was calculated "to advance legitimate objectives of both the corporation and its individual stockholders, that is, to keep the stock in the family. Such a restriction is inherently more 'reasonable' when applied to the stock of a corporation having only a few shareholders who are active in the business and members of the same family, than when imposed on the stock of a corporation that has many shareholders who are not only unrelated to one another, but who, ordinarily, do not participate actively in the day-to-day management of the corporation."[331] Such provisions are narrowly construed.[332] One would hope that the use of allowable types of restrictions would be held unreasonable if used to deny fundamental shareholder rights or otherwise accomplish by means of a restriction what could not be accomplished directly. For example, a transfer restriction providing for the automatic sale or transfer of a minority

shareholder's shares in the event that the shareholder exercised his right to inspect corporate records or voted in a particular way would seem to be unreasonable on its face.

c. Sandor Petroleum Corp. v. Williams

In *Sandor Petroleum Corp. v. Williams*,[333] the plaintiff was issued two stock certificates for 1,250 shares each in consideration for assisting the corporation in obtaining certain oil and gas leases. Thereafter, a disagreement regarding the management of the corporation arose between the plaintiff and Mr. Sabo, who was an officer and director and presumably a controlling shareholder, and the plaintiff indicated his wish to sell his shares.[334] The plaintiff first offered to sell his shares to Sabo and then later made the same offer to another officer/director; both refused.[335] At about the same time, the board held a special meeting and amended the bylaws, restricting the sale and transfer of stock and giving the corporation the "option to purchase any of its stock offered for sale at a price to be fixed by appraisers."[336] The corporation then cancelled the plaintiff's stock certificates and reissued new certificates that stated the restriction on transfer, as required by law.[337] The plaintiff refused the new certificates and continued to attempt to market his shares; however, the corporation notified the prospective buyers that it would not recognize a sale or transfer on its books unless the restrictions contained in the amended bylaws were first complied with.[338] The plaintiff sued the corporation and Sabo, individually, for conversion of his stock, and the trial court entered a judgment for $27,500, the value of the stock found by the jury.[339]

The court of appeals held: "[C]orporate shares of stock are property which may be freely sold and delivered."[340] "However, reasonable restrictions upon the sale and transfer of shares may be imposed by agreement between stockholders, by statutory enactment and by corporate charters or bylaws or amendments thereto."[341] At the time *Sandor* was decided the relevant provisions of the Texas Business Corporations Act provided that restrictions on the sale or transfer of shares, "which do not unreasonably restrain or prohibit transferability," may be set forth either in the articles of incorporation or bylaws, including specifically a right of first refusal.[342] Furthermore, the board of directors had the power to amend or adopt new bylaws.[343] Therefore, the appellees argued that they had validly adopted an amendment to the bylaws that imposed a valid restriction on transfer, and that these completely legal and authorized acts could not constitute "conversion" of stock.[344]

Prior to the amendment of the bylaws, there "was no provision in the articles of incorporation, in the original bylaws or in the shares for a restriction on the sale or transfer of the stock except a provision that a transfer must be made on the stock transfer books of the corporation."[345] The court reasoned that the issue was not whether the amendment of the bylaws was valid or whether the restrictions were reasonable but whether the corporation could, without the owner's consent, "restrict[] the sale of its previously unrestricted stock."[346] The court rejected the notion that the plaintiff's agreement to the original bylaws, which permitted the board to amend its provisions, constituted consent to whatever amendment the board chose to pass; rather, "this bylaw should be interpreted in light of the existing law and the articles of incorporation. Neither the law nor the articles of incorporation are consistent with a restriction depriving the holder of previously unrestricted stock of its full value."[347] The court noted that "Appellants have cited no case and we have not been able to find one holding such a restriction on previously unrestricted stock to be valid."[348] Therefore, the court held that amending the bylaws to restrict the transferability of previously unrestricted stock constituted conversion—the "wrongfully asserting and exercising an

authority over a right in the stock which was adverse to and destructive of the vested property right and interest" of the plaintiff.[349]

The appellees also argued that the plaintiff had not proved a demand and refusal in that, after the restrictions on the transfer were adopted, neither the plaintiff, nor any assignee of his, ever presented the certificates for transfer.[350] The court rejected that argument on the grounds that a formal demand "would have been a useless thing" because the corporation had already stated unequivocally that it would not recognize any transfer that did not comply with the transfer restrictions.[351] "[D]emand and a refusal was not necessary to constitute a conversion. It was shown that a demand would have been useless or unavailing if it had been made."[352]

The *Sandor* opinion clearly recognized that violating rights of alienation by means of invalid transfer restrictions is corporate stock conversion. However, the conversion in *Sandor* also involved the actual cancellation of the share certificates.[353] Would interference with the right of alienation that does not involve the actual cancellation of the certificate would constitute conversion? While the *Sandor* appellate opinion did state: "Actually the cancellation of his original shares was in effect a taking of his stock and was an unauthorized and unlawful act amounting to conversion,"[354] the court's reasoning clearly indicates that the cancelling of the certificate was only an incidental factor. The court almost exclusively focuses its analysis on the transfer restrictions, which were "an unauthorized alteration of the condition" of the stock.[355] The defendants *never* questioned or disputed or refused to recognize the plaintiff's ownership, and on appeal apparently argued that their actions could not constitute conversion because they always acknowledged the plaintiff as a shareholder and the cancellation was merely the substitution of a "a new certificate to [the plaintiff] in lieu of the old ones in compliance with a valid bylaw."[356] The court rejected that argument and focused on the plaintiff's loss of a "vested property right and interest" in having unrestricted stock.[357] "[R]estricting the sale of its previously unrestricted stock was, therefore, unauthorized and invalid in so far as it denied appellee's right to sell at a price which he could have secured on the open market."[358] In *Schwartz v. NMS Industries, Inc.*,[359] the plaintiffs had received unregistered shares in a public company and had an agreement with the company to register a portion of those shares. Subsequently, the corporation refused to register the shares, leaving the shareholders without the ability to sell their shares on the open market. The Fifth Circuit, applying Texas law, held: "By maintaining the restrictive legend on the shares, NMS prevented Schwartz and Rosenbaum from selling the stock, and, in effect, converted the shares."[360]

d. *Ritchie v. Rupe* as a conversion case

Would *Ritchie v. Rupe*[361] have been affirmed if it had been tried on a conversion claim? Perhaps. The reasoning of the appellate opinion in *Ritchie* was certainly consistent with *Sandor* with respect to the interference with a fundamental property right of the plaintiff. However, the actual interference in *Ritchie* did not involve the attempt to impose formal transfer restrictions on previously unrestricted stock. Rather, the court of appeals concluded that the defendants "acted oppressively toward [the plaintiff] by refusing to meet or allow any officer or director of RIC to meet with prospective purchasers of the Stock because that conduct in this case substantially defeated Ann's general reasonable expectation of marketing the Stock."[362]

The court of appeals held that

> Because often no ready market exists [for the sale of shares in a closely-held corporation], to sell her stock to third parties [a minority shareholder] must market her stock by (1) identifying potential third-party buyers through means such as advertising, networking through brokers and others, and meeting with potential buyers, and then (2) providing to those potential buyers sufficient information about the corporation and its businesses, assets, and management as to allow them to conduct a reasonable investigation as to the proposed transaction.[363]

The *Sandor* court recognized a property right inherent in ownership of unrestricted stock to be the "right to sell at a price which he could have secured on the open market."[364] In *Sandor*, the plaintiff had actually been negotiating with prospective purchasers of his stock, and the defendants "by letter advised such prospective purchasers that the corporation would not recognize a sale of Williams' stock and would not enter a transfer on its books unless the requirements of the amended bylaw were first complied with."[365] The court held that this active interference with efforts to sell, "wrongfully asserting and exercising an authority over a right in the stock, was adverse to and destructive of the vested property right and interest of Williams therein."[366] The defendants in *Ritchie* do not appear to have actively interfered, but merely failed to cooperate. "Generally, before there can be a conversion of property, there must be an act of malfeasance and not a mere nonfeasance; a positive wrong and not the mere omission of what was right."[367] Nevertheless, the *Ritchie* court of appeals reasoned that "[c]orporate policies that constructively prohibit the shareholder from performing these activities" would interfere with a right to sell at a price the shareholder could secure on the open market.[368] The *Ritchie* court concluded that conduct at issue was active—not a mere failure of corporate officers to do something that the plaintiff desired, but an actual policy adopted, it seems, in specific response to the plaintiff's efforts to market her shares.[369]

If the *Ritchie* case had been tried as a conversion case, one would expect expert testimony that meeting with a potential purchaser would be a customary practice of management that one would expect, absent a specific policy prohibiting such contact or a specific decision to interfere with the plaintiff's attempts to sell. The court of appeal's opinion cites testimony, which although not expert testimony regarding customary corporate practices, comes extremely close.[370] On the basis of that evidence, the court of appeals held that it would be "reasonable to expect that the corporation and its management . . . will consent to a shareholder's reasonable requests for cooperation with respect to her efforts to sell the stock."[371] The *Ritchie* opinion does not discuss the content of information that the plaintiff was expecting management to convey to potential purchasers. It would be helpful in establishing a conversion case if the information being requested was the sort of information that the corporation had a duty to provide to shareholders in any event, so that the refusal to meet with potential purchasers also constituted a violation of the duties to provide information to the shareholder.

The *Ritchie* court held that "there is substantial evidence that refusing [plaintiff's] request to meet with potential purchasers had the practical effect of precluding her from the opportunity to market the Stock to third parties."[372] Conversion may be constructive.[373] Therefore, if the jury had found that the defendants intended their conduct to assert control over the plaintiff's right to sell her property,[374] then it is quite likely that a court would have held that the conduct of the defendants in *Ritchie* interfered with the stockholder's rights in the property[375] and "wrongfully assert[ed] and

exercise[ed] an authority over a right in the stock which was adverse to and destructive of the vested property right and interest" of the plaintiff.[376]

2. Interference With Other Property Rights

Refusal to acknowledge a shareholder's ownership and wrongful interference with alienation rights are not the only way in which a corporation may wrongfully exercise "dominion or control" over a shareholder's stock in a manner adverse to and destructive of vested property rights. The denial or impairment of other ownership rights would also seem to fit the definition of "some repudiation of the owner's right or an exercise of dominion over the property, wrongfully and in denial of or inconsistent with that right."[377]

The *Sandor* opinion makes clear that the tort of corporate stock conversion reaches wrongful acts that involve "some repudiation" of the shareholder's property rights or that are "in denial of or inconsistent with that right" even when there is no denial or impairment of share ownership. The right of alienation is a fundamental property right of shareholders, but it is not the only, or even arguably the most significant such property right. As was more fully developed in Part One of this Article,[378] other such fundamental property rights include the shareholder's right to voice in corporate affairs, that is "the right to attend stockholders' meetings and vote on matters under consideration by shareholders; the right to hold official position of trust in the corporation,"[379] the shareholder's right to corporate information so as to "ascertain whether the affairs of the corporation are properly conducted and that he may vote intelligently on questions of corporate policy and management,"[380] and the shareholder's right to share "protanto" in the corporation's "profits and, upon dissolution, its assets," which are among the "incidents of stock ownership."[381] The wrongful impairment by the corporation of other fundamental rights should also satisfy the "dominion or control" element of the tort of corporate stock conversion.

In *Bower v. Yellow Cab Co.*,[382] the plaintiff had signed agreements conclusively proving that the plaintiff's husband had purchased shares in the corporation.[383] Those shares were never issued. After her husband's death, the plaintiff made several requests for the share certificates and was ignored.[384] The defendants never denied plaintiff's share ownership; but they also never issued the stock to her on the company's books and never "allowed [plaintiff] to exercise any rights of a stockholder"—most notably, never notified her of a stockholders' meeting or gave her the opportunity to be present. [385] Based primarily on the corporation's impairment of the shareholder's voting rights, rather than any express denial of ownership, the court held that the evidence demonstrated that "her rights as a stockholder were ignored" and held that both the corporation and its directors were liable for conversion of her shares.[386] Similarly, in *Goodrich v. Malowney*,[387] the plaintiff was a 23% shareholder, president, and director of the corporation. The remaining shareholders convened a secret meeting and purported to vote the plaintiff's shares by proxy to change the bylaws, replace the board of directors, and oust the plaintiff as an officer and director. The Florida court of appeals held that the "exercise of dominion and control by appellants over his stock through voting it without his knowledge to destroy his official and directorial connection with the corporation" constituted conversion of his shares as a matter of law and affirmed an award of compensatory damages for the value of his shares and punitive damages.[388]

a. Squeeze-out as conversion

Returning to

> The foreseeability, likelihood, and magnitude of harm sustained by minority shareholders due to the abuse of power by those in control of a closely held corporation [for which] Texas law should ensure that remedies exist to appropriately address such harm when the underlying actions are wrongful,[389]

oppressive conduct may act to "squeeze out"[390] a minority shareholder, forcing that shareholder to leave the corporation and sell his shares usually at an unfairly low price, or to "freeze out"[391] the minority shareholder by structuring corporate governance and distribution of economic benefits so as to render the minority shareholder's ownership essentially irrelevant. In either a freeze-out scenario or a squeeze-out attempt, the majority typically manipulates the finances of the corporation so that profits are not distributed as dividends but are diverted to the majority through excessive salaries, bonuses, or other personal benefits. When all of the shareholders work in the corporation and all corporate profits are paid out as salary and personal benefits, the majority shareholder refuses to pay dividends, jacks up his own compensation, and fires or induces the minority shareholder to quit.[392] That abuse of power is the functional equivalent of cancelling the plaintiff's stock. [393] If a minority shareholder receives no more benefit from being a stockholder than a non-owner, how can anyone argue with a straight face that his ownership has not been impaired? Both the typical freeze-out and squeeze-out result in an exercise of dominion and control over the minority shareholder's ownership interests to a much greater and more devasting degree than mere failure to record a valid transfer.

Where a majority shareholder causes the corporation to cancel a minority shareholder's stock, or does the functional equivalent and denies that the minority is a stockholder, then the fact pattern most neatly fits with a traditional corporate stock conversion claim. The only shareholder oppression case in Texas that fits cleanly into that fact pattern is *Davis v. Sheerin*. In most cases of shareholder oppression, the majority does not deny that the minority is a shareholder but uses his control over the corporation to render the minority shareholder effectively a non-owner by denying the minority any of the benefits of stock ownership. The corporate stock conversion cause of action, as it has been developed in Texas courts, is certainly flexible enough to address wrongful dominion or control over minority shareholders' stock interests by means of oppressive conduction. Conversion is "the wrongful exercise of dominion and control over another's property in denial of or inconsistent with his rights."[394] The conversion may be "actual or constructive."[395] It is not necessary that there be a "manual taking of the property in question."[396] Any act that interferes with impairs the owner's property rights constitutes dominion and control.[397]

The cases developing the corporation's duties and the remedies for corporate stock conversion make clear that the law protects the rights and benefits of share ownership, as well as the title. In *Yeaman*, the Texas Supreme Court held that a corporation is required to protect both the shareholders title to his stock and "its fruits from appropriation by the corporation."[398] In *Sandor*, the court held that the minority shareholder "had a vested property right in the value of his stock."[399] The conduct of the majority in *Sandor* constituted conversion because it "depriv[ed] the owner of the full value of his stock."[400] The Fifth Circuit held that proof of the "wrongful exercise of dominion and control" element in the context of the Texas cause of action for corporate stock

conversion "requires a corporate act that destroys or impairs the stock's value."[401] A typical squeeze-out scenario, where the majority shareholder cuts off the minority shareholder's rights to information, participation, and proportionate sharing in profits, particularly in an attempt to force the minority to give up ownership for an unfairly low price, is a much more extreme example of "wrongfully asserting and exercising an authority over a right in the stock which was adverse to and destructive of the vested property right and interest"[402] of the owner than mere attempts to prevent the minority from selling to a stranger, and these efforts that "substantially defeat" the minority shareholder's property rights in his shares should also establish liability for conversion of the shares.

As we have seen in this discussion, Texas courts have already held corporations liable for stock conversion for violating three of the five fundamental shareholder rights discussed in Part One.[403] Most of the Texas corporate stock conversion cases do not involve any claim by the corporation to ownership of the plaintiff's shares, but impose liability for violating the shareholder's right to recognition by the corporation.[404] *Bower v. Yellow Cab Co.* was essentially a freeze-out scenario. The widow established her right to the shares purchased by her husband. While "[n]one of the defendants ever denied to the witness that she owned the stock,"[405] the company never refused to issue her shares (although it did ignore her requests), and although no defendant ever asserted ownership over the shares, the court emphasized that what established the claim of conversion was the violation of the plaintiff's rights of voice and voting: "[S]he had never up to the time of trial been allowed to exercise any rights of a stockholder and had never been notified of a single stockholders' meeting, or given an opportunity to be present."[406] In *Sandor*, the plaintiff's stock ownership was never disputed, but the defendants impaired a specific right associated with that stock: the right to sell it to third parties. The court held that the imposition of transfer restrictions "was an unauthorized alteration of the condition of Williams' stock,"[407] which deprived "the holder of previously unrestricted stock of its full value."[408] Oppressive conduct denying the rights of information and proportionate share of the profits should likewise serve as a basis for a claim of corporate stock conversion.

As will be explored in greater depth below, the corporate stock conversion cause of action as applied to the denial of shareholder rights through oppressive conduct would be particularly effective in filling in the gaps left by the Texas Supreme Court's *Ritchie v. Rupe* opinion because of the remedy available to minority shareholders. As the Supreme Court acknowledged in the *Ritchie* opinion, minority shareholders in closely-held corporations have no statutory right to exit the venture and receive a return of capital like partners in a partnership do, and usually have no ability to sell their shares like shareholders in a publicly-held corporation do; thus, if they fail to contract for shareholder rights in advance of difficulties, they will be uniquely subject to potential abuse by a controlling shareholder or group.[409] "Unhappy with the situation and unable to change it, [minority shareholders] are often unable to extract themselves from the business relationship, at least without financial loss."[410] However, the damages remedy available for corporate stock conversion is the full value of the shares and operates like a "forced judicial sale,"[411] similar to the lost buy-out remedy provided by the former shareholder oppression doctrine.

b. *Earthman's, Inc. v. Earthman*

The Texas corporate stock conversion case that most closely resembles a classic shareholder oppression squeeze-out is *Earthman's, Inc. v. Earthman.*[412] That case was cited by the

leading treatise on shareholder oppression as an example of a "dividend squeeze in which a majority shareholder attempted to force a minority shareholder to sell 'by telling her that dividends would never be paid on stock.'"[413] In *Earthman*, the wife was awarded in their divorce 65% of the couple's stock in three corporations controlled by her husband, and the husband was ordered to "forthwith" transfer the shares to his ex-wife.[414] After entry of the divorce decree, the wife and her attorneys sought to have stock transferred into her name on the corporate books of the three corporations. The plaintiff's attorney sent a written demand to the corporations to re-issue the shares in the ex-wife's name, and the attorney for the corporations wrote back stating that the shares would not be transferred until the certificates were properly presented and that certain of the shares could not be transferred under a provision of the company's articles of incorporation.[415] The plaintiff filed suit alleging that the three corporations had refused to transfer the shares and requested a declaratory judgment as to her ownership and an order that the certificates be delivered to her, together with a derivative action for property allegedly misappropriated by her ex-husband.[416] As a result of the filing of the lawsuit, the corporations tendered the certificates into the registry of the court.[417] The parties reached some preliminary agreement (not disclosed in the opinion), and the share certificates were released back to the corporations pursuant to a joint motion.[418] After the stock was released, the ex-husband and other corporate officers held a meeting with the plaintiff at which she was told "that her stock was worth $200,000.00 and that that was the amount she was to be offered for it," that "she would never be paid a salary or a dividend on her stock and that if she didn't take the offer, false charges would be trumped up against her."[419] Thereafter, the corporate attorney wrote another letter refusing to transfer the shares on the basis of the corporations' exercise of an option in the articles of incorporation to purchase the shares, and stating, "Since Earthman's, Inc. has elected to exercise its right of purchase as to its stock which J. B. Earthman, III has now attempted to transfer to your client, it would appear that this is an appropriate time for you and your client to consider the sale of all of the stock which you will receive as a result of the divorce."[420]

Plaintiff then amended her petition to assert a claim for conversion based on the second letter and seeking damages for the value of her shares and exemplary damages against both the corporations and her ex-husband and other officers of the corporations on a conspiracy theory and claiming that "the defendants had embarked upon a malicious and fraudulent course of action deliberately designed to force her to accept the sum of $200,000 for her stock, knowing such amount to be far below its value and that the defendants had conspired to harass and intimidate her to accept such amount for her interest."[421] The jury found that the corporations, the ex-husband, and each of the officers named in the amended petition converted the plaintiff's stock,[422] and awarded the plaintiff approximately $650,000 as the full market value of the shares and exemplary damages in the same amount.[423] The jury also found that the "defendants had harassed and attempted to intimidate Mrs. Earthman with the intent of forcing her to accept less than the fair value of her stock; that such actions were done wilfully and maliciously."[424]

The court of appeals noted that "[t]his case with all its facets is essentially a suit to recover damages for conversion of corporate stock."[425] On appeal, the defendants contended that there was no conversion because a "corporation is not liable for damages for conversion where it refuses to issue or transfer stock, unless its refusal is without legal justification or excuse," and the corporations had a legal justification based on the transfer restrictions and purchase option in the articles of incorporation.[426] The court of appeals rejected the claims that there was any legal

impediment to the transfer of the shares or that the corporations had any right to purchase the shares.[427] The corporations argued that the defendants could not be liable for conversion of the wife's ownership interest because "beneficial ownership of Mrs. Earthman in the three corporations was never denied by the Earthman defendants, who at all times conceded her ownership of the stock."[428] Having ruled that the corporation had no right of first refusal on the stock, it would seem that the stock now conclusively belonged to the plaintiff and that the defendants were guilty of no more than a delay in delivering the share certificates. One might expect that the court would hold that there was "no diminution in the value of the property during the [delay]; the detention relative thereto amounting to no more than a technical conversion for which nominal damages may be recovered, plus such other special items constituting legal injury that plaintiffs may establish as having been suffered during the stated period of detention."[429] However, that was not the holding.

The court held: "A refusal of a corporation to transfer record ownership of corporate stock may, under appropriate circumstances, result in liability of the corporation for damages as a conversion of the stock," and restated the general rule that

> To constitute conversion, there must be an intent on the part of the defendant to assert some right in the property. Wrongful intention is not essential, however; nor is it material, except as to the question of damages, that the defendant acted in good faith or under a mistaken belief as to his rights.[430]

Therefore, the plaintiff had established a prima facia case of conversion. Nevertheless, because the defendants had never denied the plaintiff's ownership, the court held that the refusal was not absolute and that the defendants had raised a fact issue as to a sort of qualified refusal that would permit them to offer proof of their good faith.[431] The jury had been instructed: "Fraudulent intent or purpose is not required, and the question of good faith of the convertor is relevant only on the issue of exemplary damages."[432] The defendants had objected to this instruction.[433]

The court of appeals held that the instruction was erroneous and reversed and remanded for new trial to allow the defendant the opportunity to offer proof that they acted in good faith.[434] However, the court also made clear that the evidence of the defendant's threats and intimidation and efforts to coerce the plaintiff to sell at an insufficient price "was an appropriate consideration for the jury" as to whether or not the defendants acted in good faith.[435] "Whether, after the filing of this action and during its pendency the Earthman defendants acted arbitrarily and without reasonable basis in refusing the requested transfer is a question requiring a factual consideration of the entire relationship between the parties," and "[t]his determination required the jury to consider not only the legal relationship of the parties but as well the entire set of circumstances affecting their relationship at the time of the letter of April 5, 1972."[436]

The *Earthman* case demonstrates how a typical shareholder squeeze-out situation may be addressed in the context of a claim for corporate stock conversion; however, because the court's analysis of the prima facia case was based solely on the refusal to issue share certificates, rather than on the other oppressive conduct, the opinion offers little guidance on applying the conversion cause of action where the plaintiff's stock ownership is not at issue. The court's holding, essentially, was that the corporate stock conversion was the result of refusal to issue certificates and that the defendants' claim to have never denied stock ownership was not relevant to the

plaintiff's case but was relevant to the affirmative defense of good faith. *Earthman* does demonstrate that stock may be converted without any denial of ownership, and cases such as *Sandor* and *Boxer* show that oppressive conduct in violation of fundamental shareholder rights, but without an express refusal to issue certificates, may establish corporate stock conversion. *Earthman*'s application of the affirmative defense of good faith in the oppression context will be dealt with separately.

c. How much impairment of shareholder rights is enough?

"[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[437] Not every interference with property rights in stock would constitute a conversion of the stock. In the case of an outright denial of share ownership, the issue is simple. In more typical cases of oppressive conduct, the issue is one of degree and is much more complex. The existing jurisprudence provides some clues as to the limits of the cause of action. First, conduct that is the functional equivalent of a denial of share ownership constitutes conversion. In *Boxer*, the plaintiff's share ownership was not denied, but it was completely ignored. In *Earthman*, the plaintiff's share ownership was not denied, but the defendants engaged in a concerted effort to dispossess the plaintiff through a squeeze-out. In *Sandor*, the defendants did not deny the plaintiff's share ownership or attempt to squeeze the plaintiff out, but they completely denied one fundamental right of share ownership—transferability—which the court held impaired the value of the stock to the plaintiff. Following the analysis in *Sandor*, the Fifth Circuit in defined the "dominion and control" element of conversion as applied to stock as a "corporate act that destroys or impairs the stock's value."[438] One can imagine a wide range of wrongful activity by majority shareholders that would diminish the value of the minority shareholder's stock. Corporate stock is certainly less valuable to the shareholder if the shareholder is unable to express his voice in shareholder meetings in a meaningful way, unable to obtain information regarding the management of the company and the value of his investment, and unable to share in the corporation's profits because of suppression of dividends or manipulation of the corporation's finances so as to divert the profits to the majority shareholder. Stock that is substantially diluted is less valuable if adequate consideration has not been paid.

We would suggest that the Fifth Circuit's statement of the element is not sufficiently qualified. A better statement of the second element might be "a corporate act in denial of or inconsistent with the rights of the shareholder that destroys or substantially impairs the stock's value to the shareholder." The degree of harm is the key. Courts have held that minor interference that produces "no diminution" in value, although technically a conversion, does not entitle the plaintiff to the value of the converted property.[439] For this reason, it is difficult to imagine that mere refusal to provide information, other than in the most egregious cases, would satisfy the requirement of that the wrongful conduct destroy or substantially impair the value of the plaintiff's stock—particularly given the existing statutory remedies for denial of inspection rights.[440] However, most shareholder oppression cases involved violation of a number of rights—information, proportional share in profits, voice—all in an effort to render the minority shareholder effectively a non-owner. The kinds of fact patterns that typically resulted in buy-out orders under the shareholder oppression doctrine would seem to fit within the tort of corporate stock conversion.[441]

Finally, it is important to note that the corporate stock conversion cause of action is based on conduct directed toward the plaintiff, that violates the plaintiff's rights, that destroys or

substantially impairs the value of the plaintiff's stock. Claims for mismanagement or misappropriation that "may result indirectly in loss of earnings to the stockholders"[442] would not state a claim for conversion, even though there may have been a diminution in value to all of the corporation's stock suffered indirectly by all shareholders, and would continue to be claims that could be asserted only by the corporation or by shareholders derivatively.

3. Defenses

a. Defense of good faith

Ordinarily, in an action for conversion, it is no defense that the defendant acted in complete innocence and perfect good faith.[443] "To constitute conversion, there must be an intent on the part of the defendant to assert some right in the property. Wrongful intention is not essential, however; nor is it material, except as to the question of damages, that the defendant acted in good faith or under a mistaken belief as to his rights."[444] A mistake as to ownership is not a defense to a claim of conversion.[445] "It is a conversion suit, and in such a case it is no defense that the defendant was not negligent, or that the plaintiff was negligent, or that the defendant acquired the plaintiff's property through the plaintiff's unilateral mistake, or that the defendant acted in complete innocence and perfect good faith."[446]

However, reason that good faith is not a defense is that "[t]he requisite intent is only one to assert a right in the property."[447] In most cases of corporate stock conversion, the corporation does not assert any right in the shares of stock themselves. This is particularly true when ownership is not contested, but the conversion claim is based on the corporation's exercise of its dominion or control over the stock in a manner in denial of or inconsistent with the plaintiff's rights. In such cases, particularly in cases where the wrongful dominion or control is based on allegedly oppressive conduct, it is conceivable that fact situations would arise in which the corporation could be acting completely in good faith in pursuit of completely legitimate needs of the corporation, but the circumstances are such that the interests of the corporation are in conflict with what the shareholder perceives as his individual ownership interests. Let us hasten to clarify that we are not talking about the situation described in *Ritchie v. Rupe*, when "the best interests of an individual shareholder [are] not in the best interests of the corporation."[448] The Supreme Court declined to create "common-law dut[ies] on directors in closely held corporations not to take oppressive actions against an individual shareholder even if doing so is in the best interest of the corporation."[449] The corporate stock conversion cause of action does not do so either. A claim for stock conversion arises against the corporation only where the corporation has exercised its control over the stock in denial of or inconsistent with fundamental shareholder rights arising from property ownership. The issue is not the "best interests" of the shareholder but the rights of the shareholder that the corporation has a duty to preserve and not impair.[450] Decisions by corporate management that the shareholder thinks are ill-considered and result in damage to the corporation would not give rise to a claim for conversion; however, suppression of dividends or significant dilution of a stockholder's ownership might. In those instances, it is entirely conceivable that a corporate act that is inconsistent with the rights of the shareholder and that substantially impairs the stock's value to the shareholder might nevertheless be taken in absolute good faith and for compelling reasons, such as the need to retain earnings for necessary capital expenditures or the raising of capital by selling new shares to investors. In these instances, the corporation should

certainly have an affirmative defense to avoid liability even when its conduct impairs shareholder rights.

Such an affirmative defense of good faith on the part of the corporation would be drawn from the common law defense to conversion of "qualified refusal," made in good faith, where the defendant had a reasonable doubt about the plaintiff's right to immediate possession.[451] "Where the refusal is not absolute, but is qualified by certain conditions which are reasonable and justifiable, and which are imposed in good faith, and in recognition of the rights of plaintiff, it will not serve as a sufficient basis for an action for conversion."[452] If the qualified refusal is not reasonable or justifiable under the circumstances, it amounts to a denial of the claimant's rights in the property.[453] As applied, "qualified refusal" is an affirmative defense on which the defendant bears the burden of proof.[454] This qualified refusal imposes a duty on the defendant to make a reasonable inquiry into the right of the claimant to possession.[455] Cases involving corporate stock conversion have held that a qualified refusal by the corporation is a defense—the corporation may refuse to issue certificates or to record the stock transfer for a reasonable length of time when it has a reasonable doubt about the claimant's right to the stock.[456] A corporation may "delay transfer for a reasonable period of time in order to ascertain whether the transfer was authorized or whether it would result in some violation of a law, by-law or of its articles of incorporation."[457]

The elements of the common law defense are as follows: (1) the refusal must be qualified, rather than absolute;[458] (2) the basis for the qualified refusal must have a valid legal justification and be reasonable under the circumstances;[459] (3) the defendant must state the reason to the plaintiff, or the defense is waived,[460] (4) the defendant must act in good faith;[461] and (5) the defendant's actions following the qualified refusal must be reasonable and in recognition of the plaintiff's rights.[462]

Let us consider two hypothetical situations. First, the case of A taking B's hat:[463] On leaving a restaurant, A by mistake takes B's hat from the rack, believing it to be his own—let's say A and B own nearly identical hats and wear the same hat size. At the end of the block, B catches up with A and demands his hat. A explains to B that A believes that the hat belongs to A, but acknowledges that he could be mistaken. A invites B to return to the restaurant, retains possession of the hat, walks back to the restaurant, discovers his own hat, and immediately surrenders B's hat back to the owner. At this point, B (who has been planning to sell the hat on eBay) states that A has converted the hat and demands that A keep the hat and pay B the value. Technically, B is correct. A intended to assert a right in the hat and did not return it when demand was made. However, A clearly has a defense of qualified refusal: (1) A's refusal to return the hat was not absolute, but was qualified by the invitation to return to the restaurant to ascertain who was correct; (2) A's basis for the refusal was legally justifiable (the hat may have been his own) and was reasonable under the circumstances; (3) A stated the reason to B; (4) A acted in good faith; and (5) A's conduct after becoming aware of B's claim of ownership was reasonable and in recognition of B's rights.

Second, a typical situation in which a corporation refuses to recognize a transfer: C is a closely-held corporation in which all the shareholders know each other. D, a shareholder, transfers his shares to E without any notice to the corporation. E presents to C an agreement transferring the shares, signed by D, but no endorsed share certificates. C refuses to record the transfer immediately, explaining to E that it would have expected to see indorsed share certificates and to have received notice from D if there had been a transfer and that it intended to contact D to verify the transfer. C contacts D, who verifies the transfer, and C records the transfer and issues

new share certificates in E's name. At this point, E (having second thoughts about buying into a closely-held corporation and seeing an opportunity to make a profit) claims that C converted the shares and demands payment of their value. C has a valid defense of qualified refusal: (1) C did not absolutely refuse to record the transfer but stated its concern and a reasonable condition; (2) C's refusal had a valid legal basis (D's known legal rights to ownership and C's wish to avoid liability to D) and was reasonable under the circumstances; (3) C stated the basis of the refusal to E; (4) C acted in good faith; and (5) C's conduct in resolving its doubts about E's claim of ownership was both reasonable and in recognition of E's rights.

The "qualified refusal" defense was developed for a fact situation in which a defendant obtained possession of the plaintiff's property without knowledge that it belonged to the plaintiff. When the plaintiff demanded its return, the defendant would not be liable for conversion if his refusal to return the property was properly qualified by an expression of doubt about the plaintiff's claim of ownership and followed up by a reasonable course of action to resolve the doubt. In cases of corporate stock conversion, the traditional statement of the defense is not a precise fit, because the corporation is never in a position where it must "return" the stock to the rightful owner. The application of the defense is fairly straightforward in cases where the plaintiff is a transferee and demands that the corporation record the transfer and his ownership on the corporate books. In these cases, the corporation is not liable for conversion when it makes a "qualified refusal" to record the transfer based on a justifiable doubt as to the plaintiff's claim of ownership and thereafter takes reasonable steps to resolve the controversy.

In *Earthman's Inc. v. Earthman*, the corporation and its directors delayed the transfer of stock awarded to a wife in a divorce while they attempted to enforce a right of first refusal in the court and while her husband and the other individual defendants attempted to intimidate and harass her into selling for an unfair price by threatening to withhold dividends and not to offer her employment.[464] The defendants maintained that they never denied the plaintiff's ownership but had delayed the transfer in good faith and on a reasonable basis.[465] However, the trial court instructed the jury that the question of good faith was relevant only on the issue of exemplary damages and that good faith was not a defense to the conversion action.[466] The court of appeals held that this instruction was in error and remanded for a new trial.[467]

In the *Earthman's* case, the court struggled to fit the qualified refusal defense to a fairly typical squeeze-out situation. In *Earthman's*, there was absolutely no question of the plaintiff's ownership. The corporation was not in the position of an innocent party having two conflicting claims of ownership, but was clearly attempting to coerce the plaintiff into selling her shares. The corporation in *Earthman's* had no reasonable doubt as to the plaintiff's claim of ownership and was never in a position to take reasonable steps to resolve such a doubt. Rather, the corporation was controlled by a majority shareholder who had lost 65% of his stock in divorce proceedings and desparately did not want his ex-wife to become the new majority shareholder. The corporation, under the control of the majority shareholder and his sons, lawyered-up and interposed every conceivable legal impediment to effectuating the transfer, including demanding documentation that it did not need, claiming that the Insurance Code prohibited part of the transfer, claiming that the articles of incorporation prohibited the transfer, and claiming that the corporation could prevent the transfer by exercising a right of first refusal to acquire the shares—all the while attempting to induce the plaintiff to sell her shares by means of intimidation and threats that she would never

receive any economic benefit from her ownership. The trial court and court of appeals found that all of the corporation's excuses for not transferring ownership had absolutely no basis in law. The court could, and arguably should have, held that conversion took place based on the fact that the corporation clearly exercised its inherent dominion and control over the plaintiff's stock in a manner in denial of or inconsistent with her fundamental rights as a shareholder, including its duty of loyalty to her, its duty of impartiality as between the plaintiff and her ex-husband, its duty to recognize her ownership and not to attempt to impair her interests, and its threatened violation of her fundamental rights in the alienability of her shares and in sharing proportionally in the profits of the corporation. Because the court focused it analysis on the failure to transfer ownership, rather than the other manifest violations of the shareholder's rights and the corporation's duties, the court held that corporation's failure ever to deny absolutely her ownership interests created a fact issue as to the qualified refusal defense and permitted the defendants the opportunity to attempt to prove their good faith on remand. However, the issue in the new trial would not be the reasonableness of the defendant's conduct, as would normally be the case, but the purity of the defendant's motives.

In *Earthman's* issue of good faith and reasonable grounds was clearly an affirmative defense on which the defendants would have the burden.[468] And the *Earthman's* court noted that the jury would be required to consider "not only the legal relationship of the parties but as well the entire set of circumstances affecting their relationship."[469] Additionally, the jury would need to consider the fact that the defendants met with the plaintiff and told her "that it had been decided at such meeting that her stock was worth $200,000.00 and that that was the amount she was to be offered for it. She testified that she was also told she would never be paid a salary or a dividend on her stock and that if she didn't take the offer, false charges would be trumped up against her. This testimony was relevant and material to the jury's determination of whether Earthman's, Inc. was guilty of conversion in refusing to transfer the stock as requested."[470]

In both *Sandor* and *Boxer*, the defendants did not expressly deny the plaintiffs' share ownership, but neither court held that such conduct gave rise to an affirmative defense. In *Sandor*, the defendants seemed to make an argument very similar to that raised in *Earthman's*, but the *Sandor* court held that the conduct of the defendants had no legal justification,[471] and in effect held that any affirmative defense of good faith was precluded as a matter of law. The *Earthman's* court likewise held that the legal justifications offered by the defendants had no validity,[472] but nevertheless held that a fact issue as to the good faith defense had been raised. Certainly, where the corporation's actions violate the law and are not in pursuit of a legitimate corporate purpose as a matter of law, no defense is available; however, the result in *Earthman's* raises the possibility that the assertion of an incorrect, though arguable, legal basis that is made in good faith might give rise to a fact issue as to the defense.

Using *Earthman's* as a guide, the defense is really one of good faith, rather than qualified refusal, because the issue is the wrongful nature of violations of the plaintiff's shareholder rights and the corporation's duties rather than any nature of a refusal to return property. While acknowledging that the source of the affirmative defense is the traditional defense of "qualified refusal," the *Earthman's* court used repeatedly the term "good faith" to describe the real issue to be decided in the new trial. When a plaintiff can demonstrate violations of the corporation's duties and/or violation's of the shareholder's fundamental rights as a basis for a claim of corporate stock conversion, then the corporation may plead and prove its good faith as an affirmative defense.

Translated to the corporate stock conversion context, the defendant asserting the good faith defense would be required to prove, first, that its actions were not an absolute denial of the shareholder's ownership. If the corporation absolutely expressed that the plaintiff was not a shareholder, then there would be no basis for proving good faith. The plaintiff either is or is not a shareholder. If the plaintiff is a shareholder, the corporation has committed conversion. However, if the corporation acknowledges the plaintiff's share ownership, but has nonetheless violated its duties to the shareholder or violated the shareholders rights arising out of that share ownership, then the defendant may have an affirmative defense.

Second, the actions of the defendant must have an valid legal basis (or at least an arguable such basis) and must be reasonable under the circumstances—i.e., the corporation must be exercising a lawful corporate function utilizing powers granted by law for a reasonable corporate objective. In *Sandor*, the defendants claimed to be exercising a lawful corporate function in amending the bylaws, but the court held that doing so to impose transfer restrictions without the consent of the shareholder was prohibited by law. In *Earthman's*, the court rejected each of the legal justifications put forth by the corporations as unfounded, but nevertheless held that a fact issue was raised as to whether they were asserted in good faith. Furthermore, the actions of the corporation that are adverse to the plaintiff must be reasonable under the circumstances. The corporation violating the shareholder's rights must demonstrate some reasonable business purpose served by the adverse action. The action cannot have been taken arbitrarily or for the purpose of benefiting another shareholder, as opposed to the corporate entity.[473]

Third, the basis for the adverse action must have been stated to the plaintiff. The corporation's fiduciary duty to each shareholder is to preserve and not impair each shareholder's fundamental interests arising from ownership status. Therefore, the corporation is required to be cognizant of the effect of its actions on its shareholders. Actions taken that violate shareholder rights may not be excused on the grounds that the action was necessary to preserve corporate interests if those actions were taken in secret. Hidden conduct is presumptively in bad faith.

Fourth, the corporation must have acted entirely in good faith. The motives of the corporation must have been to act solely in the best interests of the corporation as a whole and must not have been tainted by a desire to harm the interests of the plaintiff or benefit the controlling shareholder. The decision regarding the defendant's true motives,[474] whether the defendant acted in good faith and reasonably toward the shareholder,[475] must be determined by the jury[476] in light of the entire legal relationship of the parties and all the facts and circumstances.[477]

Finally, the corporation must have acted reasonably and in recognition of the plaintiff's ownership rights. In other words, there must not have been a way to preserve the interests of the corporation without harming the interests of the plaintiff, and all reasonable steps must have been taken to minimize the adverse impact on the plaintiff.

b. Business Judgment Rule

The business judgment rule is a defense to a claim that an officer or director has breached fiduciary duties to the corporation.[478] Unlike the defense of good faith, the business judgment rule is not so much an affirmative defense as a judicial policy not to interfere in the management of corporations and not to scrutinize disinterested management decisions no matter how imprudent.[479] The rule

does not apply to a claim by a shareholder against the corporation for impairing the plaintiff's vested property rights in his stock. In *Sandor*, the court held that the minority shareholder "had a vested property right in the value of his stock."[480] The conduct of the majority in *Sandor* constituted conversion because it "depriv[ed] the owner of the full value of his stock."[481] The court held that the "right of the corporation to regulate and to manage its affairs does not include the power to impair that vested contractual right and to take from holders of unrestricted stock the value of their stock."[482]

c. Lack of Demand and Refusal

Most cases of corporate stock conversion would not require a demand on the part of the shareholder that the corporation cease or reverse its conduct in violation of the shareholder's rights of ownership because such conduct usually manifests a clear repudiation of the plaintiff's rights.[483] The defendants in *Sandor* argued that no demand and refusal had taken place after the invalid transfer restrictions were imposed, and the court held that none was necessary.[484] Conceivably, a situation might arise in which the corporation's actions were taken without any intent to impair the plaintiff's ownership rights and would have been altered had the plaintiff notified the corporation of his objections. In such a case, the corporation might have a valid argument that a conversion suit was premature and that demand and refusal were necessary. If the corporation claims that it was entitled to demand and refusal, then it must plead the lack of such demand and refusal as an affirmative defense.[485]

d. Reliance on counsel

Abuse of corporate power by majority shareholders to squeeze out minority shareholders is seldom taken without at least some participation by corporate counsel, and many times lawyers for the oppressive defendants give appallingly incorrect legal advice, such as that the corporation may deny the plaintiff's share ownership because of the absence of a certificate, or that the corporation may amend its bylaws to impose invalid transfer restrictions, as in *Sandor*, or that the corporation may avoid a court-ordered transfer of shares by exercising an invalid right of first refusal, as in *Earthman's*. However, the issue in cases of corporate stock conversion is always the intent to take actions in denial of or inconsistent with the plaintiff's ownership rights. Reliance on the advice of counsel in the innocent belief that the defendant's position is justified "would not constitute a legal defense to an action for conversion."[486] In *Rodriguez v. Ortegon*, the defendant cited the safe harbor provision of the Texas Business Corporations Act[487] protecting a director from liability when he acts in reliance on the advice of counsel.[488] The record clearly indicated that the defendant knew that the plaintiff was a shareholder,[489] and the court of appeals held that "a party may not assert the legal defense of reliance of corporate counsel when no legal justification for the refusal exists."[490]

In *Earthman's*, the court of appeals did indicate that tendering the stock into the registry of the court was one of the factors that raised a fact issue as to the defendants' good faith; however, the court noted as significant that the declaratory judgment action to determine the plaintiff's rights in the stock had been initiated by the plaintiff.[491] The *Earthman's* court also indicated that the corporation's interpleading of the stock and seeking a judicial determination might avoid liability for corporate stock conversion.[492] However, in most instances, even the defendant's immediate filing of a declaratory judgment action to determine the ownership of the stock will not defeat

liability—"Application to a court for guidance in determining whether property should be returned, while it may show good intentions, does not defeat a suit for conversion."[493]

e. Statute of Limitations

The limitations period for conversion is two years.[494] Limitations ordinarity accrues on property wrongfully taken when the property was taken.[495] On property legally possessed by the defendant, limitations accrues when the defendant either refuses a demand for its return or otherwise clearly repudiates the plaintiff's rights.[496] The discovery rule applies when the defendant's initial possession is lawful.[497] Because the corporation, in its role as trustee, always possesses the stock lawfully, the discovery rule always applies to corporate conduct that constitutes corporate stock conversion. As the Texas Supreme Court held in *Yeaman*, because the shareholder is the beneficiary of a trust, "[h]e is chargeable with no vigilance to preserve his stock or its fruits from appropriation by the corporation, but may confide in its protection for their security."[498] The must be a "distinct and unequivocal"[499] denial of ownership or refusal to effectuate a transfer or other repudiation of the plaintiff's rights as a stockholder.[500] "And when a corporate act is invoked as a repudiation of a shareholder's stock or a conversion of its profits, before affecting his rights with limitation, it is only just to require that he or those standing in his stead have notice of it."[501] "Statutes of limitation have no application until there is a clear and unequivocal disavowal of the trust, and notice of it brought to the cestui que trust."[502]

E. Majority Shareholder/Officer and Director Liability

In corporate stock conversion cases, the wrongful action by the corporation is frequently caused by the majority shareholder who is trying to get rid of the minority shareholder for personal gain. An award against only the corporation may work an injustice to the plaintiff if the majority shareholder has already taken all the money or to other innocent shareholders if he has not. However, even though the primary duties to the shareholder are owed by the corporate entity, in almost every corporate stock conversion case decided in Texas, the controlling shareholder is also held individually liable.[503] In some cases, the act on which the conversion claim is based was actually committed by the majority shareholder in his capacity as officer. Corporate agents are individually liable for their own torts, even when acting in the course and scope of their agency.[504] "A corporate officer who converts the property of another to the use of the corporation, or who misapplies private funds in the hands of the corporation, is personally liable to the person whose property or funds have been so misappropriated."[505] Other cases hold individual defendants jointly and severally liable with the corporation based on an aiding and abetting or knowing participation theory.[506] A corporate officer may be held individually liable for conversion by the corporation, "if he participated in, or had knowledge of and assented to, the wrongful conduct."[507] In *Sandor Petroleum Corp. v. Williams*, the court of appeals affirmed a conversion of stock judgment against a director who voted for invalid stock transfer restrictions.[508] Finally, where the conversion of stock by the corporation resulted from an agreement by two or more individuals,[509] such as two directors, courts have upheld judgments against the individuals based on civil conspiracy.[510]

F. Remedies for Corporate Stock Conversion

A plaintiff who establishes conversion is entitled to either (1) damages for the value of the property, or (2) equitable relief providing for the return of the property and any special damages

for its loss of use during the time of its detention.[511] When property has been converted, the owner is generally under no obligation to take it back.[512] "[H]e has two rights and remedies. He may recover one but not both."[513] "The plaintiff must elect to recover the property itself or the fair market value in damages."[514] The election must be made before submission of the case to the jury and may not be changed.[515]

1. Damages for the value of the shares

"The measure of damages was the value of the property at the time and place of the conversion."[516] The value is usually defined as the "fair market value."[517] In order to recover, the plaintiff must introduce sufficient evidence of fair market value.[518] "Market value is the price property would bring if it were offered for a sale by a willing but not obligated seller and purchased by a willing but not obligated buyer."[519]

In a corporate conversion of stock case, it is important to understand that the plaintiff's election to recover damages for the value of the shares is functionally the same remedy as would be awarded under the pre-*Ritchie* shareholder oppression doctrine of a compulsory buy-out. Imagine a shareholder oppression case in which the majority shareholder, in an effort to squeeze out the minority shareholder, cancels the minority shares on the company's books and falsely denies the ownership of the minority shareholder.[520] The trial court holds that the majority has acted oppressively and orders the company to buy out the minority shareholder's stock.[521] When the court's order is enforced, then title to the stock would pass to the corporation,[522] and the former minority shareholder would have a sum of money representing the value of his stock ownership interest. Exactly the same result would be reached if the corporation is sued for conversion.[523] The cancellation of the shares on the company's books or refusal to recognize the minority shareholder as an owner would constitute conversion of his stock by the corporation. By electing his damages remedy, the minority shareholder would "legalize the wrongful detention by vesting the defendant with title" to the stock, and the minority shareholder would receive a sum of money representing the value of his stock interest.[524]

a. Proof of fair market value of stock in a closely-held corporation

"Generally, the fair market value of closed corporation stock, or stock having no public market, as here, is 'what a willing purchaser would pay to a willing seller who was not acting under compulsion to sell.'"[525] One of the defining characteristic of stock ownership in a small closely-held corporation is the absence of any market for minority shares.[526] It is the absence of any ability to exit the venture that give the majority shareholder the power to oppress the minority.[527] This situation creates a problem when the law defines the measure of damages for conversion of the stock as the "fair market value" of the stock. Because no market exists, there will be no evidence of the market price, and a defendant might argue with some degree of credibility that the actual "fair market value" is essentially zero. There is very little Texas case law dealing with this issue. None of the corporate stock conversion cases that have been discussed so far in this article explained the basis of the damages calculations made by the jury or resolved any challenges on appeal based on measure of damages or methodology. One Texas opinion has noted that, based on authority in other jurisdictions, the rule would probably be "that when the plaintiff establishes that no market exists for the stock or that it has never been offered for sale, the measure of damages is

the stock's actual value, i.e. the price a buyer would pay taking into consideration the original capital, assets and liabilities, and similar factors."[528]

> Determining actual value of the stock, a party is permitted to prove the value of the [party's] assets, the amount of its liabilities, and its earning power for a number of years prior to the conversion. As the stock admittedly had no market value, this was a proper method to purusue to determine the actual value of the stock. In arriving at the actual value of the stock, appellees were permitted to prove, and the court took into consideration, the value of appellant's assets, the amount of its liabilities, and its earning power for a number of years prior to the conversion. As the stock admittedly had no market value, this was a proper method to pursue to determine the actual value of the stock.[529]

In other damages contexts, courts have utilized other methods of assessing fair market value such as the asset approach and the earnings, or income, approach.[530] One court noted a variety of relevant factors:

> When too few stock sales exist to establish a market price, other factors to assess fair market value include:
>
> (a) The nature of the business and the history of the enterprise from its inception.
>
> (b) The economic outlook in general and the condition and outlook of the specific industry in particular.
>
> (c) The book value of the stock and the financial condition of the business.
>
> (d) The earning capacity of the company.
>
> (e) The dividend paying capacity.
>
> (f) Whether or not the enterprise has good will or other intangible values.
>
> (g) Sales of stock and the size of the block of the stock to be valued.
>
> (h) The market price of stocks of corporations engaged in the same or similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.[531]

A combination of determining the value of the assets net of liability (asset approach) and a discounted cash flow analysis that measures the present value of the cashflow that the company generates for its owners (income approach), together with a comparison of any available market transactions for sales of similar companies (market approach) is widely acknowledged in academic literature as the appropriate methodology for valuing closely-held companies.[532] From this evidence, the finder of fact may derive the value of the entire enterprise and multiply that number by the plaintiff's percentage ownership. However, this exercise yields the "enterprise value" of the plaintiff's stock, which is not the same this as the "fair market value."[533] The difference being that no rational buyer would pay the full proportional price for a minority interest in a closely-held

company due to the illiquidity or lack of marketability of the investment and due to the lack of an ability to control the investment inherent in minority status.[534] Appraisers typically back into the "fair market value" of a minority interest by applying "discounts" for lack of marketability and lack of control to the enterprise value.[535]

b. Application of Minority Discounts

In the context of converted minority shares, the notion of discounts is extremely ironic. The market rationale for the discount is that a third party stepping into the shoes of an existing minority shareholder is taking a substantial risk—the risk that the majority will act to diminish the value or economic return of the minority. A majority shareholder is not subject to that risk, so majority shares are not discounted. Assume the facts of *Davis v. Sheerin* in which there are two shareholders, a 55% shareholder and a 45% shareholder. The value of the majority shares is exactly 55% of the value of the corporation as a whole, but the value of the 45% shareholder is something less that 45% of the value of the enterprise, due to the application of a minority discount. If the majority shareholder causes the corporation to convert the minority shares, then the majority shareholder's percentage of ownership effectively goes to 100%—the majority shareholder is now entitled to 100% of all dividends, rather than 55%; the majority shareholder is now entitled to 100% of the proceeds of a sale or 100% of the profits available for distribution. If the majority shareholder must compensate the minority for the conversion based on the price a third party might pay, then the majority shareholder receives a significant windfall from the discount because the majority shareholder is not a third party. The majority shareholder has control and is subject to none of the risks that would cause a third party to discount the price. Unlike a third party, the majority will actually receive the full economic benefit of the wrongfully acquired shares.[536] It is for this reason that the Texas courts who ordered buy-outs under the shareholder oppression doctrine typically excluded consideration of discounts.[537]

Fortunately, Texas case law applying the fair market value measure of damages in conversion cases have developed equitable doctrines to deal with this sort of injustice. The purpose of damages in a conversion case is to "to compensate for the injury."[538] Where the measure of damages works an injustice, the court has "the discretion required to fashion an equitable remedy."[539] The rule of damages for the tort of conversion is that a "conversion should not unjustly enrich either the wrongdoer or the complaining party."[540] This rule has been applied to award the plaintiff the price actually received by the defendant on the sale of converted gas, where the defendant had been able to sell for greater than the market value.[541] Therefore, in oppression-type conversion cases, we should expect that courts would apply this equitable doctrine to preclude discounts in cases where the corporation or the majority shareholder has effectively appropriated the value of the minority interest.[542]

However, the "same rule should apply to the aggrieved party."[543] In cases where the plaintiff will receive a significant windfall, "damages are limited to the amount necessary to compensate the plaintiff for the actual losses or injuries sustained as a natural and proximate result of the defendant's conversion."[544] In a case where the conversion was based only on interference with the right of alienation, then the plaintiff should probably only receive damages based on the specific right taken away—the right to sell to a third party. The inequity of overcompensating a plaintiff was the reason for the court of appeals in *Ritchie* remanding the case for new trial requiring the application of discounts for purposes of a buy-out.[545]

2. Exemplary Damages

Exemplary damages may be recovered for conversion provided that the plaintiff proves malice.[546] The *Earthman* court specifically pointed out that "in an appropriate case and upon proper pleading and proof[,] exemplary damages may properly be awarded in a stock conversion case."[547] Such damages would depend "the degree of malice," malice need not be shown if damages occurred because of "some willful or wanton act based upon improper motive."[548] Evidence of any mental suffering is also proper.[549]

3. Recovery of attorneys' fees

Generally, attorney's fees cannot be awarded for a conversion cause of action.[550] However, there is an exception when the conversion claim is so intertwined with the contract which underlies the cause of action such that the action is "intrinsically founded on the interpretation of the contract."[551] In several conversion cases, courts have allowed recovery of attorney's fees under Section 38.001 of the Civil Practice and Remedies Code,[552] notwithstanding the fact that the liability is based on a tort.[553] The plaintiff must make written presentment of the claim and otherwise comply with the statute.[554] This doctrine is likely to be extremely valuable to plaintiffs asserting corporate stock conversion claims. Courts have characterized the property rights incident to stock ownership as fundamentally contractual.[555]

Most cases involving interference with rights of stock ownership necessarily involve interpretation of the corporation's bylaws or governing documents or other agreements among the shareholders. In *Sandor*, the court held that plaintiff's stock had been converted as a result of the defendants' amendment of the bylaws to impose transfer restrictions on the shares of the corporation, which the court of appeals characterized as an impairment of a "vested contractual right."[556] Conversion cases in which attorney's fees are awarded involve a contract—either verbal or written, require—the court to interpret necessary contractual provisions to determine the outcome of the case.

For example, in *High Plains Wire Line Services, Inc. v. Hysell Wire Line Service*, Hysell brought no breach of contract claim, only conversion.[557] The claim centered on High Plains' conversion of shelving, sign letters, and related items. The contract at issue was the Sale and Purchase Agreement in which Plains would buy equipment from Hysell and whether the Agreement included the sign letters and other items Hysell claims High Plains converted.[558] If Hysell would have complied with the presentment requirement, fees likely would have been awarded on the conversion claim, "since the resolution for Hysell's claims depended on the interpretation of the contract, his cause of action was sufficiently grounded on contract to support an award of attorney's fees."[559]

G. *Boehringer v. Konkel* as a conversion case

In *Boehringer v. Konkel*,[560] the plaintiff was a 49.9% shareholder, and the defendant was the 50.1% shareholder.[561] After seven years of business success, relations between the shareholders deteriorated, and the defendant repeatedly refused the plaintiff's requests for information about corporate finances.[562] After significantly abusive treatment by the majority shareholder, including a shareholders' meeting at which the defendant promised to make the plaintiff's ""fucking life miserable," the plaintiff resigned his employment, "stating that his only remaining connection to the corporation was as a shareholder."[563] The defendant refused to issue dividends and secretly

doubled his salary.[564] The court of appeals held that the defendant had wrongfully refused to allow inspection of books and records[565] and had wrongfully denied plaintiff's right to "proportionate participation in the company's earnings as a shareholder"[566] by withholding dividends while granting himself "a de facto dividend"[567] through excessive compensation. Had *Boehringer v. Konkel* been tried as a conversion case, the court would have started with the principle that the plaintiff "had a vested property right in the value of his stock."[568] The defendant's conduct in denying a shareholder his rights to information and proportional participation in earnings—in fact, any prospect of economic return or benefit whatsoever—certainly was a wrongful exercise of "authority over a right in the stock which was adverse to and destructive of the vested property right[s]" of the plaintiff.[569]

Having been hounded into resigning his employment, the only value to the plaintiff of owning stock was his right to participate proportionately in the earnings of a successful corporation through dividends. The defendant's refusal to pay dividends and actions to funnel the corporate profits only to himself through increasing his salary effectively destroyed the value of the plaintiff's shares. Had the defendant cut off the plaintiff from any economic return on his share ownership by cancelling his stock on the corporate books, there would undoubtedly have been a conversion.[570] Had the defendant cut off the plaintiff from any economic return on his share ownership by substituting the plaintiff shares with shares of a different class that did not pay dividends, the "unauthorized alteration of the condition" of the stock would undoubtedly been a conversion.[571] Instead, the defendant accomplished exactly the same result and the plaintiff suffered the exact same injury through abuse of majority power that is the functional equivalent of cancellation of the shares. Based on the existing case law development of the tort of corporate stock conversion, Texas courts should hold that such "corporate acts" that "destroy[] or impair[] the stock's value"[572] constitute corporate stock conversion.

The court in *Boehringer* held that the plaintiff had a "general and reasonable expectation to have the right to proportionate participation in the earnings of the company"[573]—read "fundamental shareholder property right." But the court also noted that no shareholder rights exists as to the declaration of specific dividends or a specific level of compensation.[574] However, the court held that the non-payment of dividends, coupled with the secret increase in the defendants' salary, constituted a "defacto dividend" to the defendant and thus violated the minority shareholder's right to a proportionate share in corporate profits.[575] Had the case been tried on a conversion theory, we would expect the defendant to have argued the good faith defense, that there was no denial of the plaintiff's share ownership and that the amount of executive compensation for the corporate president and the decision not to pay dividends when cash was in short supply were valid exercises of corporate power and were reasonable under the circumstances.[576] The defendant would have had the burden of proving the affirmative defense of good faith, which the defendant would not have been able to do on the record as related in the *Boehringer* opinion. First, the pay increases and decision to withhold dividends were done in secret and the reasons for the corporate actions adverse to the plaintiff were never stated to the plaintiff.[577] Second, the court held that "there is no evidence of a significant shift in the nature, extent, or scope of their work" that would have justified the changes and disparities in salary.[578] Finally, the jury expressly found that both the compensation and dividend decisions were made "maliciously"—i.e., in very bad faith.[579]

The trial court ordered that the corporation be liquidated and the proceeds split according to share percentages.[580] That relief would not have been the remedy on a conversion claim. However, the plaintiff would have been entitled to actual damages in the amount of the value of his shares, which would have been at least the liquidation value and probably more. The plaintiff would have been entitled to exemplary damages based on the jury's findings of malice. Finally, because an important part of the case involved an agreement of the parties to share equally in corporate profits, which had been recorded in minutes of the first shareholder meeting,[581] the plaintiff would have been entitled to an award of attorney's fees.

VI. Conclusion

To recap, the shareholder's stock is personal property. When the corporation violates its duties to the shareholder by impairing his ownership rights of recognition, voice, information, proportional share in profits, or alienation, the corporation wrongfully exercises dominion or control of the plaintiff's stock in denial of or inconsistent with the plaintiff's rights of ownership. Such conduct constitutes conversion of the shareholder's stock. The shareholder's remedy is an election between equitable relief to restore his ownership rights or to convey that ownership to the corporation and receive as damages the value of the stock. The cause of action for corporate stock conversion is a direct claim brought by the shareholder in his individual capacity based on legal duties that the corporation owes to the shareholder.

That recap sounds a lot like the shareholder oppression doctrine. The conversion cause of action protects the stockholder's ownership rights in the stock. The shareholder oppression doctrine protected a shareholder's reasonable expectations in stock ownership. General reasonable expectations are expectations that the law recognizes are inherent in the nature of share ownership and belong to every shareholder merely by virtue of being a shareholder, such as the expectations that their ownership will be acknowledged, that they will receive a voice in corporate affairs, receive information relating to their investment, have the right to sell their shares, and to receive their proportional share of the profits. These same general expectations which arise by operation of law, we have argued here, are actually property rights that the law recognizes as inherent in stock ownership. Shareholder oppression was found by the court where majority shareholders used their power over the corporation to extinguish or diminish the value of the minority shareholder's ownership, but that conduct would be exactly the kind of conduct that would constitute conversion. The buy-out remedy for shareholder oppression transfers the title to the minority shareholder's stock either to the majority shareholder or back to the corporation (resulting in an increase in the majority's percentage ownership) in exchange for the value of those shares being paid to the minority shareholder. The damages remedy for corporate stock conversion operates in exactly the same way, just by means of a money judgment that terminates the plaintiff's title by operation of law rather than a mandatory injunction that the parties enter into a purchase transaction. The largest difference is that shareholder oppression is based on a duty imposed on the majority shareholder, whereas the conversion duties are on the corporation. However, as a practical matter, that is a distinction without a difference. Buy-out orders frequently require the corporation to do the buying, and even when they don't, the majority shareholder will almost certainly utilize the corporation's assets. Furthermore, most corporate stock conversion cases also impose personal liability on the majority shareholder or directors responsible for the corporation's misconduct.

We have proposed the development of individual causes of action for oppressive conduct toward minority shareholders based on existing, recognized legal duties and remedies: the cause of action for corporate breach of trust explored in Part One and corporate stock conversion cause of action descriped in the part. Both remedies are logical extentions of existing, traditional, common-law causes of action. Both are suggested by existing case law and are completely consistent with the approach mandated by the *Ritchie* opinion to fill in the "gaps" left by the demise of the shareholder oppression doctrine. The application and effect of both remedies would be very similar.

Why two causes of action, and how do they compare? A California appellate opinion explored this issue, recognizing that when a corporation wrongfully cancels or transfers a shareholder's stock, "it commits an action which is both one of conversion and breach of trust."[582] The plaintiff has an election of remedies.[583] "If he sues for conversion, his damages are measured by the value of his stock as of the date of the wrongful transfer or refusal to transfer, with interest from that time."[584] If he elects his equitable remedy, then the Court may fashion appropriate relief, which might include "a new certificate as evidence of his stock ownership, together with all dividends declared thereon from and after the date of the wrongful transfer or refusal to transfer, with interest."[585]

There is nothing unusual about multiple causes of action that may apply to the same wrongful conduct. In the case of the two oppression remedies suggested here, they arise out of distinct, although overlapping, legal duties: fundamental property rights of stock ownership, and the corporation's duties as trustee of those rights. One is a legal remedy; one is equitable. The limitations periods would be different. The burden of proof would likely be different. The valuation date for a buy-out would also likely be different, for which the value of converted property measured as of the date of the conversion,[586] and equitable buy-outs are presumptively measured as of the date the lawsuit was filed.[587]

In any event, these individual claims for breach of trust and corporate stock conversion, together with the dividend causes of action, fraud causes of action, and ultra vires claims discussed in Part One, and the shareholder's derivative action favored in most situations by the *Ritchie* court, should be adequate to fill in the perceived "gaps" in Texas corporate law dealing with the protection of minority shareholder interests. If this analysis is correct and accepted in post-*Ritchie* jurisprudence, then the Texas Supreme Court's conclusion in *Ritchie* would be entirely correct correct: existing legal duties and remedies are "sufficient." [588]

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[1] Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014).

[2] *Ritchie v. Rupe* in Eric Fryar, *Filling in the Gaps: Shareholder Oppression After Ritchie v. Rupe*, 47:1 TEX. J. BUS. L. 1, 13 (2017).

[3] *Id.*

[4] *Id.* at 26, *see* discussion of *Ritchie v. Rupe.*

[5] *Ritchie*, 443 S.W.3d at 879.

[6] *Id.* at 888.

[7] *Id.* at 889.

[8] *Id.* at 890.

[9] *Id.* at 888–89.

[10] *See* discussion of implications of *Ritchie v. Rupe* in Eric Fryar, *Filling in the Gaps: Shareholder Oppression After Ritchie v. Rupe*, 47:1 TEX. J. BUS. L. 1, 13 (2017).

[11] *Id.* at 40.

[12] 11 S.W. 846 (Tex. 1889).

[13] Yeaman v. Galveston City Co., 167 S.W. 710 (1914).

[14] 279 S.W.2d 848 (Tex. 1955).

[15] *See Filling in the Gaps: Part One* at 113, discussion of breach of trust cause of action.

[16] TEX. BUS. ORGS. CODE ANN. § 21.801 (West 2006) ("Except as otherwise provided by this code, the shares and other securities of a corporation are personal property."); Engel v. Teleprompter Corp., 703 F.2d 127, 131 (5th Cir. 1983) ("Under Texas law, shares of corporate stock are personal property."); Capital Parks, Inc. v. Se. Advert. & Sales Sys., Inc., 864 F. Supp. 14, 16 (W.D. Tex. 1993) ("The shares of corporate stock, on the other hand, are the personal property of the shareholders."), *aff'd sub nom.*, 30 F.3d 627 (5th Cir. 1994); Barnhill v. Automated Shrimp Corp., 222 S.W.3d 756, 764 (Tex. App.—Waco 2007, no pet.) ("By virtue of owning shares of stock in a Texas corporation, Barnhill maintains personal property in Texas."); Brosseau v. Ranzau, 81 S.W.3d 381, 387 (Tex. App.—Beaumont 2002, pet. denied) ("In Texas, stock is considered personal property, even when the underlying corporation itself owns real property."); Evans v. Prufrock Rests., Inc., 757 S.W.2d 804, 805–806 (Tex. App.—Dallas 1988, writ denied) ("[T]he transaction was the sale of a personalty rather than realty. . . . It is a well established fact that the sale of stock is personalty not real estate."); Griffith v. Jones, 518 S.W.2d 435, 437 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) ("Shares of corporate stock are personal property in the nature of choses in action."); Benson v. Greenville Nat'l Exch. Bank, 253 S.W.2d 918, 928 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.) ("Without any attempt at historical review, we think it is now well settled that shares of corporate stock are personal property in the nature of choses in action"); Auto. Mortgage Co. v. Ayub, 266 S.W. 134, 135 (Tex. Comm'n—App. 1924) ("While not negotiable, shares are freely assignable, and in this respect resemble negotiable choses in action and tangible property rather than other nonnegotiable choses in action."); Bergin v. Bergin, 312 S.W.2d 409, 412 (Tex. Civ. App.—Texarkana 1958), *rev'd on other grounds*, 315 S.W.2d 943 (Tex. 1958) ("Corporate stock, which is personalty, is involved.").

[17] Yeaman v. Galveston City Co., 167 S.W. 710, 719 (1914).

[18] *E.g.*, Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 382 (Tex. 2012) ("We have referred to property as a 'bundle of rights.'").

[19] *Id.* at 382–83.

[20] Turner v. Cattleman's Trust Co., 215 S.W. 831, 832 (Tex. Comm'n App. 1919, judgm't adopted) ("The tangible property belongs to the corporation. The shares of stock are the intangible interests in the corporate business owned by the individual shareholders."); Presnall v. Stockyards Nat'l Bank, 151 S.W. 873, 876 (Tex. Civ. App.—Texarkana 1912), aff'd, 194 S.W. 384 (Tex. 1917) ("by a 'share of stock' and 'share' in a corporation, as used in the statute, is meant an intangible interest or right, in legal contemplation, of the owner in the corporation property or fund").

[21] *Turner*, 215 S.W. at 833.

[22] Moroney v. Moroney, 286 S.W. 167, 169 (Tex. Comm'n App. 1926, judgm't affirmed). However, it should be noted that because corporations are set up differently, these rights and interests "may well vary from one corporation to the next." Schautteet v. Chester State Bank, 707 F. Supp. 885, 888 (E.D. Tex. 1988).

[23] Eric Fryar, *Filling in the Gaps: Shareholder Oppression After Ritchie v. Rupe*, 47:1 TEX. J. BUS. L. 1, 87 (2017), *see* discussion of shareholder rights.

[24] *See, e.g.*, Dewing v. Perdicaries, 96 U.S. 193, 196 (1877) ("The capital stock and all the other property and effects of a corporation are a trust fund.").

[25] *Id.* (shares represent "aliquot parts of the trust fund"); Farrington v. State of Tennessee, 95 U.S. 679, 687 (1877) ("Each share represents an aliquot part of the capital stock."). *See also Auto. Mortg. Co.*, 266 S.W. at 135 ("It is generally agreed that shares in an incorporated company are the aliquot parts of the capital stock, and merely give to the owner a right to his share of the profits of the corporation, while it is a going concern, and to a share of the proceeds of its assets, when sold for distribution in case of its dissolution and winding up.") (quoting Presnall v. Stockyards Nat'l Bank, 151 S. W. 873, 876 (Tex. Civ. App.—Texarkana 1912), *aff'd*, 194 S. W. 384 (Tex. 1917)).

[26] *Auto. Mortg. Co.*, 266 S.W. at 135 ("Shares of stock in a corporation are a species of personal property, belonging to the holder thereof, entirely separate and distinct from the property of the corporation itself."); Farrington, 95 U.S. at 686 ("The capital stock [i.e., the corpus of the trust fund] and the shares of the capital stock are distinct things.").

[27] Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 645 (Tex. 1996); *see also* McAlister v. Eclipse Oil Co., 98 S.W.2d 171, 176 (Tex. 1936) ("Under our authorities the corporation is a legal entity, distinct from its stockholders. In this regard, strictly speaking, the ownership of the corporate assets is vested in the corporation itself and not in its stockholders."); Hicks v. State, 419 S.W.3d 555, 558 (Tex. App.—Amarillo 2013, no pet.) ("It has long been the law that a stockholder owns an interest in the company but not the assets of the company. Rather, the assets, including the cash residing in corporate bank accounts, are owned by the corporation, and the latter is a separate legal entity from its shareholders.").

[28] *Dewing*, 96 U.S. at 196 ("The corporation owns and holds [the trust fund] as a trustee."); *Farrington*, 95 U.S. at 686 ("It is a trust fund, held by the corporation as a trustee.").

[29] *Farrington*, 95 U.S. at 687 ("Every [stock]holder is a cestui que trust to the extent of his ownership."); *McAlister*, 98 S.W.2d at 176 ("Also, strictly speaking, the ownership of the stock does not carry with it the equitable title to the corporate property. This simply means, however, that the stockholders have no right to require the corporation to convey to them the legal title to the corporate property. In a larger or real sense the stockholders of a corporation are the beneficial owners of its corporate properties.").

[30] Yeaman v. Galveston City Co., 167 S.W. 710, 723 (1914).

[31] *Id. See also* Disco Mach. of Liberal Co. v. Payton, 900 S.W.2d 124, 126 n.2 (Tex. App.—Amarillo 1995, writ denied) ("[T]he relationship of corporation and shareholder is "akin to one of trust" because of "the contractual relation whereby the corporation acquired and held the stockholder's investment for a specific purpose and under express recognition of his rights accruing in the investment."); Graham v. Turner, 472 S.W.2d 831, 836 (Tex. Civ. App.—Waco 1971, no writ) ([T]he Supreme Court held that the four-year statute applies, because the relation of a corporation to his stockholders is that of a trustee of a direct trust. It arises out of the contractual relation whereby the corporation aquires and holds the stockholder's investments under expressed recognition of his right and for specific purpose.").

[32] *Yeaman,* 167 S.W. at 723.

[33] *Id.*

[34] *See Disco Mach. of Liberal Co.*, 900 S.W.2d at 126 n.2 ("Historically, the relationship between corporation and shareholder was akin to one of trust."); Hinds v. Sw. Sav. Ass'n of Houston, 562 S.W.2d 4, 5 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) ("[T]rusteeship of a corporation for its stockholders is that of an acknowledged and continuing trust . . . ."); *Graham*, 472 S.W.2d at 836 ("the relation of a corporation to its stockholders is that of a trustee of a direct trust."); Rex Ref. Co. v. Morris, 72 S.W.2d 687, 691 (Tex. Civ. App.—Dallas 1934, no writ) ("A corporation stands in the relation of a trustee to its stockholders, so where it appears that a stockholder's ownership is challenged by the company, he may maintain an action to establish his ownership."); Green v. Galveston City Co., 191 S.W. 182, 185 (Tex. Civ. App.—Galveston 1916, writ ref'd) ("It is also true that a corporation stands in the relation of trustee to the owners of its stock.").

[35] *Yeaman*, 167 S.W. at 723.

[36] *See id.* ("We are unwilling to affirm that, in the absence of some statutory or charter power, or express consent to that effect, a corporation has any authority to forfeit a stockholder's shares upon such a ground.").

[37] *Id.*

[38] *Id.*

[39] *Id.* at 724.

[40] TEX. BUS. ORGS. CODE ANN. § 21.171(a) (West 2017) ("Shares that are issued are outstanding shares unless the shares are treasury shares or are canceled.").

[41] *Id.* § 21.002(13) (""Treasury shares' means shares of a corporation that have been issued, and subsequently acquired by the corporation, that belong to the corporation and that have not been canceled. The term does not include shares held by a corporation in a fiduciary capacity, whether directly or through a trust or similar arrangement."). Treasury shares are owned by the corporation, *Id.* § 21.002(13), and are considered outstanding shares, *Id.* § 21.171(c) ("Treasury shares are considered to be issued shares and not outstanding shares."), but are not voted and do not receive distributions. See *Id.* § 6.152(a) ("Except as provided by Subsection (b), an ownership interest owned by the domestic entity that is the issuer of the interest, or by its direct or indirect subsidiary, may not be: (1) directly or indirectly voted at a meeting; or (2) included in determining at any time the total number of outstanding ownership interests of the domestic entity."). The value of the treasury shares are not considered in determining net assets of the corporation. *Id.* § 21.171(d).The board of directors may cancel all or part of the corporation's treasury shares. *Id.* § 21.252(a) ("A corporation, by resolution of the board of

directors of the corporation, may cancel all or part of the corporation's treasury shares at any time."). Cancelled treasury shares become authorized but unissued shares, and the corporation's stated capital is reduced by the amount represented by the treasury shares. *Id.* § 21.252(b) ("Upon the cancellation of treasury shares, the stated capital of the corporation shall be reduced by that part of the stated capital that was, at the time of the cancellation, represented by the canceled shares, and the canceled shares shall be restored to the status of authorized but unissued shares.").

[42] *Id.* § 21.157(a) ("Except as provided by Section 21.158, a corporation may issue shares for consideration if authorized by the board of directors of the corporation.").

[43] *Id.* § 21.151 ("A corporation may issue the number of authorized shares stated in the corporation's certificate of formation.").

[44] *Id.* § 21.157(b)(3).

[45] See, e.g., Hollis v. Hill, 232 F.3d 460, 464 (5th Cir. 2000) ("The court cited the capital call and the firing of Hollis as the 'easiest objective data' supporting the claim of oppression, and added that the 'more egregious' act of moving the annuity business to the Hill-sole proprietorships should not have occurred without the approval of the board of directors.").

[46] BUS. ORGS. § 21.157(b) ("Shares may not be issued until the consideration, determined in accordance with this subchapter, has been paid or delivered as required in connection with the authorization of the shares.").

[47] *Id.* § 21.159.

[48] *Id.* § 21.106(b) ("If the corporation's certificate of formation reserves to the shareholders the right to determine the consideration to be received for shares without par value, the shareholders shall determine the consideration for those shares before the shares are issued. The board of directors may not determine the consideration for shares under this subsection.").

[49] *Id.* § 21.160 (a)(1) ("Subject to Subsection (b), consideration to be received for shares must be determined: (1) by the board of directors").

[50] *Id.* § 21.161(a) ("Consideration to be received by a corporation for the issuance of shares with par value may not be less than the par value of the shares.").

[51] *Id.* § 21.160(d) ("The amount of the consideration to be received for shares may be determined in accordance with Subsection (a) by the approval of a formula to determine that amount.").

[52] *Id.* § 21.162 ("In the absence of fraud in the transaction, the judgment of the board of directors, the shareholders, or the party approving the plan of conversion or the plan of merger, as appropriate, is conclusive in determining the value and sufficiency of the consideration received for the shares.").

[53] *Id.* § 21.160(c) ("A corporation may dispose of treasury shares for consideration that may be determined by the board of directors.").

[54] *Id.* § 21.209 ("Except as otherwise provided by this code, the shares and other securities of a corporation are transferable in accordance with Chapter 8, Business & Commerce Code.").

[55] *Id.* § 21.210(b) ("A restriction imposed under Subsection (a) is not valid with respect to a security issued before the restriction has been adopted, unless the holder of the security voted in favor of the restriction or is a party to the agreement imposing the restriction.").

[56] See *id.* § 21.209.

[57] *See* TEX. BUS. & COMM. CODE ANN. §§ 8.104(a)(1), 8.301(a)(1) (West 2017).

[58] Dutcher v. Dutcher-Phipps Crane & Rigging, Inc., 510 S.W.3d 592, 598 (Tex. App.—El Paso 2016, pet. denied).

[59] BUS. ORGS. § 3.201(b) ("The ownership interests in a for-profit corporation, real estate investment trust, or professional corporation must be certificated, except to the extent a governing document of the entity or a resolution adopted by the governing authority of the entity provides that some or all of the classes or series of the ownership interests are uncertificated or that some or all of the ownership interests in any class or series of the ownership interests are uncertificated.").

[60] *Id.* § 3.202(c).

[61] *Id.* § 3.202(f) ("A certificate representing ownership interests may not be issued in bearer form.").

[62] *Id.* § 3.203(a) ("The managerial official or officials of a domestic entity authorized by the governing documents of the entity to sign certificated ownership interests of the entity must sign any certificate representing an ownership interest in the entity.").

[63] *Id.* § 3.204 ("A domestic entity shall deliver a certificate representing a certificated ownership interest to which the owner is entitled.").

[64] *Id.* § 3.021(b) ("The entity may have outstanding both certificated and uncertificated ownership interests of the same class or series.").

[65] *Id.* § 3.021(b) ("If a domestic entity changes the form of its ownership interests from certificated to uncertificated, a certificated ownership interest subject to the change becomes an uncertificated ownership interest only after the certificate is surrendered to the domestic entity.").

[66] *Id.* § 3.205(b) ("Except as otherwise expressly provided by law, the rights and obligations of the owner of an uncertificated ownership interest are the same as the rights and obligations of the owner of a certificated ownership interest of the same class and series.").

[67] *Id.* § 3.205(a) ("after issuing or transferring an uncertificated ownership interest, a domestic entity shall notify the owner of the ownership interest in writing of any information required under this subchapter to be stated on a certificate representing the ownership interest.").

[68] *Id.* § 3.205(c) ("A domestic entity is not required to send a notice under Subsection (a) if: (1) the required information is included in the governing documents of the entity; and (2) the owner of the uncertificated ownership interest is provided with a copy of the governing documents.").

[69] Dutcher v. Dutcher-Phipps Crane & Rigging, Inc., 510 S.W.3d 592, 598 (Tex. App.—El Paso 2016, pet. denied) (quoting In re Seminole Walls & Ceilings Corp., 446 B.R. 572, 586 (Bankr. M.D. Fla. 2011) (construing Texas law)).

[70] Yeaman v. Galveston City Co., 167 S.W. 710, 720 (1914) ("In a corporation the certificate of stock is not the stock itself"); Bakke v. Harvison, 417 S.W.3d 645, 650 (Tex. App.—El Paso 2013, pet. denied) ("A stock certificate is some evidence of ownership in a corporation, but under Texas law, the absence of a stock certificate does not necessarily invalidate a parties' stock ownership. This is because Texas courts have held that a certificate of stock is not the stock in a corporation itself, but rather, a muniment of title which is evidence of the ownership of the stock.").

[71] *Yeaman*, 167 S.W. at 720 (stating that the share certificate "is but a muniment of title, an evidence of the ownership of the stock."); Greenspun v. Greenspun, 194 S.W.2d 134, 137 (Tex. Civ. App.—Fort Worth 1946), *aff'd*, 198 S.W.2d 82 (Tex. 1946) ("In this latter connection it is to be remembered that the certificates of stock are not in themselves property, but are only evidence of the interest of the stockholder in the corporation."); A. B. Frank Co. v. Latham, 190 S.W.2d 739, 741 (Tex. Civ. App.—Austin 1945), *aff'd*, 193 S.W.2d 671 (Tex. 1946) ("Nor does mere cancellation of the stock certificates effect a reduction of the capital. They are but evidences in the hands of the holder of his aliquot part of the legal capital of the corporation."); *Bakke*, 417 S.W.3d at 651 ("Texas law does not require possession of a stock certificate to evidence ownership in a corporation."); Matter of Estate of Crawford, 795 S.W.2d 835, 838 (Tex. App.—Amarillo 1990, no writ) ("A stock certificate is not, itself, stock in a corporation; it is a muniment of title which evinces ownership of such stock."). *See also* Dewing v. Perdicaries, 96 U.S. 193, 196 (1877) ("The stock of such corporations may be held by a valid title without a certificate. The certificate is only one of the indicia of title. The right to the stock is in the nature of a non-negotiable chose in action.").

[72] *Dutcher*, 510 S.W.3d at 595 ("A stock certificate is not synonymous with actual ownership of the shares represented by the certificate; it is merely some evidence of ownership."); *Yeaman*, 167 S.W. at 720 (Possession of a stock certificate "is not necessary to a subscriber's complete ownership of the stock."); *Greenspun*, 194 S.W.2d at 137 ("It is possible under some circumstances for one to own stock in a corporation though no certificate has been issued to him or endorsed or delivered to him, and likewise it is possible under some circumstances for title to the stock to pass without delivery of the certificate of stock or without written assignment of it."); *Crawford*, 795 S.W.2d at 838 ("Complete ownership of certificated stock may exist without the issuance of a certificate or its delivery.").

[73] *Yeaman*, 167 S.W. at 720.

[74] Graham v. Turner, 472 S.W.2d 831, 832–33 (Tex. Civ. App.—Waco 1971, no writ).

[75] TEX. BUS. ORGS. CODE ANN. § 21.157(b) (West 2017) ("Shares may not be issued until the consideration, determined in accordance with this subchapter, has been paid or delivered as required in connection with the authorization of the shares. When the consideration is paid or delivered: (1) the shares are considered to be issued; (2) the subscriber or other person entitled to receive the shares is a shareholder with respect to the shares; and (3) the shares are considered fully paid and nonassessable.").

[76] *Id.* § 3.204 ("A domestic entity shall deliver a certificate representing a certificated ownership interest to which the owner is entitled.").

[77] *See, e.g.*, Bakke v. Harvison, 417 S.W.3d 645, 650 (Tex. App.—El Paso 2013, pet. denied) ("In fact, it is not necessary that a certificate even be issued for complete ownership of stock.").

[78] *See id.* at 651 ("Bakke's failure to produce the original Ponder certificates does not, in and of itself, invalidate ownership of the stock.").

[79] See TEX. BUS. & COMM. CODE ANN. § 8.301 (West 2017).

[80] Greenspun v. Greenspun, 194 S.W.2d 134, 137 (Tex. Civ. App.—Fort Worth 1946), *aff'd*, 198 S.W.2d 82 (Tex. 1946) ("It is possible under some circumstances for one to own stock in a corporation though no certificate has been issued to him or endorsed or delivered to him, and likewise it is possible under some circumstances for title to the stock to pass without delivery of the certificate of stock or without written assignment of it."); In re Seminole Walls & Ceilings Corp., 446 B.R. 572, 585 (Bankr. M.D. Fla. 2011) ("Texas has

adopted Article 8 of the Uniform Commercial Code, which governs the creation and transfer of corporate securities. Article 8 does not require a stock certificate to prove ownership in a company. A stock certificate is not by itself stock in a corporation; it is merely evidence of ownership.") (applying Texas law).

[81] Dutcher v. Dutcher-Phipps Crane & Rigging, Inc., 510 S.W.3d 592, 598 (Tex. App.—El Paso 2016, pet. denied).

[82] *See* Yeaman v. Galveston City Co., 167 S.W. 710, 720 (1914); BUS. ORGS. § 21.157(b).

[83] BUS. ORGS. § 21.157(a) ("Except as provided by section 21.158, a corporation may issue shares for consideration if authorized by the board of directors of the corporation.").

[84] *See* Intermedics, Inc. v. Grady, 683 S.W.2d 842, 847 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

[85] *In re Seminole Walls & Ceilings Corp.*, 446 B.R. at 585 ("Rather, in order to create a stockholder relationship, a party must show an agreement giving the shareholder the ability to exercise a shareholder's rights.").

[86] *Greenspun*, 194 S.W.2d at 137.

[87] Dutcher v. Dutcher-Phipps Crane & Rigging, Inc., 510 S.W.3d 592, 598 (Tex. App.—El Paso 2016, pet. denied).

[88] *In re Seminole Walls & Ceilings Corp.*, 446 B.R. at 585 (citing Hallmark v. Hand, 833 S.W.2d 603, 607 (Tex. App.—Corpus Christi 1992, writ denied)).

[89] *Dutcher*, 510 S.W.3d at 597.

[90] Estate of Bridges v. Mosebrook, 662 S.W.2d 116, 121 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (citing Webb v. Webb, 184 S.W.2d 153, 156–57 (Tex. Civ. App.—Eastland 1944, writ ref'd)).

[91] *Dutcher*, 510 S.W.3d at 596 (quoting Krainz v. Kodiak Res., Inc., 436 S.W.3d 325, 332–33 (Tex. App.—Austin 2013, pet. denied).

[92] Graham v. Turner, 472 S.W.2d 831, 833 (Tex. Civ. App.—Waco 1971, no writ) (noting that the stock certificate is "evidence in the hands of the shareholder that the corporation recognizes him as owning an interest therein").

[93] *Id.* ("Where the name of a shareholder is made to appear upon the stockbook of a corporation as the owner therein, it becomes evidence of ownership.").

[94] TEX. BUS. ORGS. CODE ANN. § 21.201 (West 2017).

[95] It is even more unfortunate that a great number of lawyers advising these defendants do not know that possession of a certificate is not a prerequisite to share ownership and then either advise (or at least permit) their clients to take a false position that transforms a simple shareholder grievance into a claim for conversion. This is simply malpractice.

[96] Watts v. Miles, 597 S.W.2d 386, 388 (Tex. Civ. App.—San Antonio 1980, no writ) ("The fact that certificates evidencing ownership of shares of stock were never issued is irrelevant."); Krainz v. Kodiak Res., Inc., 436 S.W.3d 325, 331 (Tex. App.—Austin 2013, pet. denied) ("The law does not require possession of a stock certificate to substantiate a claim of ownership of stock."); Greenspun v. Greenspun, 194 S.W.2d 134, 137 (Tex. Civ. App.—Fort Worth 1946), aff'd, 198 S.W.2d 82 (Tex. 1946) ("As between transferor and transferee, it seems to be the rule that transfer of title may take place though there is no delivery of the certificates themselves, no endorsement of them, nor transfer of them on the books of the corporation, and even though the sale by parol."); *Turner*, 215 S.W. at 833 ("The certificate is not necessary to the existence of the stock, nor to the transfer of it by the shareholder.").

[97] *See, e.g.*, Waisath v. Lack's Stores, 474 S.W.2d 444, 446 (Tex. 1971) (plaintiff's testimony as to ownership of the furniture); Schwartz v. Pinnacle Comms., 944 S.W.2d 427, 433 (Tex. App.—Houston [14th Dist.] 1997, no writ) (proof of purchase through cancelled check).

[98] Graham v. Turner, 472 S.W.2d 831, 833 (Tex. Civ. App.—Waco 1971, no writ) ("But the issuance of a certificate is not essential in order to create the relation of shareholder, which may arise by reason of the contract duly made, and to vest in the subscriber the privileges attendant upon the relationship of stockholder which he may exercise and enjoy with the consent of the company.").

[99] Hydroscience Techs., Inc. v. Hydroscience, Inc., 401 S.W.3d 783, 792–93 (Tex. App.—Dallas 2013, pet. denied) (quoting *Greenspun*, 194 S.W.2d at 137).

[100] *Turner*, 215 S.W. at 833.

[101] *Id.*

[102] *Id.*; *see also* Wilson v. Bankers' Tr. Co., 218 S.W. 803, 804 (Tex. Civ. App.—Dallas 1920, writ dism'd w.o.j.) (Evidence of ownership includes "attendance upon and voting at stockholders' meetings, holding official position in the corporation, [] the receiving of dividends

. . . the acceptance of the subscription contract, the entry of the name of the subscriber upon the stock book as a stockholder, permitting him to attend stockholders' meetings and vote, paying him dividends or proportional shares of the profits and gains . . . .").

[103] Greenspun v. Greenspun, 194 S.W.2d 134 (Tex. Civ. App.—Fort Worth), *aff'd*, 198 S.W.2d 82 (Tex. 1946).

[104] *Id.* at 135.

[105] *Id.*

[106] *Id.* at 137.

[107] *Id.* at 136.

[108] *Id.* at 137.

[109] *Id.* at 136.

[110] *Id.* at 138.

[111] Davis v. Sheerin, 754 S.W.2d 375, 377 (Tex. App.—Houston [1st Dist.] 1988, writ denied), *disapproved of on other grounds*, Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014).

[112] *Id.* at 377.

[113] *Id.* at 382.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 378.

[117] Tex. Const. art. XII, § 6 (repealed Nov. 2, 1993).

[118] TEX. BUS. ORGS. CODE ANN. § 21.159 (West 2017).

[119] *See* Chan v. An–Loc Rest., Inc., 641 S.W.2d 617, 621 (Tex. App.—Houston [1st Dist.] 1982, no writ) (contribution of past labor and services and "past technology" was adequate consideration).

[120] BUS. ORGS. § 21.162.

[121] Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 616 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.). *See also* McAlister v. Eclipse Oil Co., 98 S.W.2d 171, 176 (Tex. 1936) (Where promoter and two other persons who subscribed for all of the capital stock were fully cognizant of all that was done in its organization and in issuance of charter and capital stock, "neither the corporation itself nor any of its stockholders has any right to say that the issuance of the stock to McAlister was a void transaction in its incipiency").

[122] BUS. ORGS. § 21.157(c) ("This subsection applies only to shares issued in accordance with Subsections (a) and (b) and sections 21.160 and 21.161 for consideration consisting, wholly or partly, of a contract for future services or benefits or a promissory note. A corporation may place the shares, although fully paid and nonassessable, in escrow, or make other arrangements to restrict the transfer of the shares, and may credit distributions made with respect to the shares against their purchase price, until the services are performed, the note is paid, or the benefits are received.").

[123] *Id.*

[124] *See id.* § 21.162.

[125] Morris v. House, 32 Tex. 492, 495 (1870) ("[I]t is properly said that fraud vitiates whatever it touches.").

[126] BUS. ORGS. § 21.223(a) ("A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of such a holder, owner, or subscriber or of the corporation, may not be held liable to the corporation or its obligees with respect to: (1) the shares, other than the obligation to pay to the corporation the full amount of consideration, fixed in compliance with Sections 21.157–21.162, for which the shares were or are to be issued"). An assignee or transferee who acquired the shares in good faith and without knowledge that the full consideration had not been paid many not be held personally liable on the obligation. *Id.* § 21.217 ("An assignee or transferee of certificated shares, uncertificated shares, or a subscription for shares in good faith and without knowledge that full consideration for the shares or subscription has not been paid may not be held personally liable to the corporation or a creditor of the corporation for an unpaid portion of the consideration."). Pledgees holding shares as collateral, *Id.* § 21.226(a) ("A pledgee or other holder of shares as collateral security is not personally liable as a shareholder."), and executors, guardians, trustees, and receivers are not personally liable on the obligation, *Id.* § 21.226(b) ("An executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver is not personally liable as a holder of or subscriber to

shares of a corporation."), but a shareholders estate and his funds administered by an executor, guardian, trustee or receiver are liable for the obligation to pay the full amount of consideration. Sec. 21.226(c) ("The estate and funds administered by an executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver are liable for the full amount of the consideration for which the shares were or are to be issued.").

[127] *Id.* § 21.224 ("The liability of a holder, beneficial owner, or subscriber of shares of a corporation, or any affiliate of such a holder, owner, or subscriber or of the corporation, for an obligation that is limited by Section 21.223 is exclusive and preempts any other liability imposed for that obligation under common law or otherwise.").

[128] "The Texas action for the tort called conversion is descended from several common law forms of action, each of which addressed a particular injury to personal property and provided a separate remedy for that injury; the modern action, without being fettered by the strict procedural rules of the forms of action, encompasses the elements and remedies of each of these actions and applies them as appropriate to the particular case." 15 Tex. Jur. 3d Conversion § 2 (2016).

[129] *See, e.g.*, Rodriguez v. Ortegon, 616 S.W.2d 946, 949 (Tex. Civ. App.—Corpus Christi 1981, no writ) ("Once a presentment of the stock and reasonable request for change of ownership, coupled with some proof of ownership, then the unreasonable refusal to transfer is a conversion of the stock."); Earthman's, Inc. v. Earthman, 526 S.W.2d 192, 204 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) ("A refusal of a corporation to transfer record ownership of corporate stock may, under appropriate circumstances, result in liability of the corporation for damages as a corporation for damages as a conversion of the stock.); Patterson v. Wizowaty, 505 S.W.2d 425, 427 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (advising that appellees could have plead another cause of action, such as fraudulent conversion); City Nat'l Bank v. Kiel, 348 S.W.2d 260, 265-66 (Tex. Civ. App.—Fort Worth 1961, ref'd n.r.e.) ("Under the record in this case we think the plaintiff was not required to make a tender prior to bringing a suit for conversion.); Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 619 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.) ("They were wrongfully asserting and exercising an authority over a right in the stock which was destructive of the vested property right of Williams vested herein.").

[130] Ritchie v. Rupe, 443 S.W.3d 856, 882 (Tex. 2014).

[131] Gannon v. Baker, 807 S.W.2d 793, 799 (Tex. App.—Houston [1st Dist.] 1991), *rev'd in part on other grounds*, 818 S.W.2d 754 (Tex. 1991) (per curiam).

[132] RESTATEMENT (SECOND) OF TORTS § 222A (1965).

[133] Hankey v. Employer's Cas. Co., 176 S.W.2d 357, 360–61 (Tex. Civ. App.—Galveston 1943, no writ). *See also* RESTATEMENT (SECOND) OF TORTS § 222A (1965) cmt.a ("The modern action for the tort called conversion is descended from the old common law action of trover. This action originated at an early date as a remedy against the finder of lost goods who refused to return them to the owner but instead 'converted' them to his own use.").

[134] *See* Ferrous Prods. Co. v. Gulf States Trading Co., 323 S.W.2d 292, 296 (Tex. Civ. App.— Houston [1st Dist.] 1959), *aff'd*, 332 S.W.2d 310 (Tex. 1960) ("While we do not, of course, have the common law forms of action in Texas, the substance of the actions has been retained and by alleging and proving the facts that would entitle you to relief under a particular form of action at common law, you may obtain the relief that such form of action would entitle you to.").

[135] Cage Bros. v. Whiteman, 163 S.W.2d 638, 640–41 (Tex. 1942).

[136] Khorshid, Inc. v. Christian, 257 S.W.3d 748, 758–59 (Tex. App.—Dallas 2008, no pet.).

[137] Corral–Lerma v. Border Demolition & Envtl. Inc., 467 S.W.3d 109, 124 (Tex. App.—El Paso 2015, pet. filed) ("Texas does not recognize conversion claims for real property.").

[138] Robin Singh Educ. Servs., Inc. v. Test Masters Educ. Servs., Inc., 401 S.W.3d 95, 97 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("[U]nder Texas law, a tort action for conversion is limited to tangible property . . . .").

[139] Carson v. Dynegy, Inc., 344 F.3d 446, 456 (5th Cir. 2003) ("[S]cope of Texas conversion law [] concerns only physical property . . . .").

[140] Express One Int'l v. Steinbeck, 53 S.W.3d 895, 901 (Tex. App.—Dallas 2001, no pet.).

[141] *Robin Singh*, 401 S.W.3d at 102 (Frost, J., concurring).

[142] *E.g.*, Prewitt v. Branham, 643 S.W.2d 122, 123 (Tex. 1982) (lease). *See also* Lee County Nat'l Bank v. Nelson, 761 S.W.2d 851, 852 (Tex. App.—Beaumont 1988, writ denied) ("It is important to note that the conversion found was the withholding of title, not that the vehicle itself was actually converted.").

[143] *See Express One*, 53 S.W.3d at 901.

[144] Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699, 705 (5th Cir. 2009); Lawyers Title Co. v. J.G. Cooper Dev., Inc., 424 S.W.3d 713, 718 (Tex. App.—Dallas 2014, pet denied).

[145] Great W. Drilling, Ltd. v. Alexander, 305 S.W.3d 688, 695 (Tex. App.—Eastland 2009, no pet.).

[146] *See* Waisath v. Lack's Stores, Inc., 474 S.W.2d 444, 446 (Tex. 1971).

[147] *Id.*; *Lawyers Title Co.*, 424 S.W.3d at 718.

[148] Pierson v. GFH Fin. Servs., 829 S.W.2d 311, 314 (Tex. App.—Austin 1992, no writ).

[149] *Waisath*, 474 S.W.2d at 447.

[150] Bradley v. McKinzie, 226 S.W.2d 458, 460 (Tex. Civ. App.—Eastland 1950, no writ).

[151] Pan Am. Petroleum Corp. v. Long, 340 F.2d 211, 220 (5th Cir. 1964); Gulf, Colo. & Sante Fé R.R. v. Pratt, 183 S.W. 103, 104 (Tex. Civ. App.—Beaumont 1916, writ ref'd).

[152] Lopez v. Lopez, 271 S.W.2d 780, 784 (Tex. App.—Waco 2008, no pet.); Staats v. Miller, 240 S.W.2d 342, 344 (Tex. App.—Amarillo 1951), *rev'd on other grounds*, 243 S.W.3d2d 686 (Tex. 1951). *See* Conlee Seed Co. v. Brandvik, 526 S.W.2d 795, 798 (Tex. App.—Amarillo 1975, no writ).

[153] *Staats*, 240 S.W.2d at 344.

[154] Bures v. First Nat'l Bank, 806 S.W.2d 935, 938 (Tex. App.—Corpus Christi 1991, no writ); First Nat'l State Bank, N.A. v. Morse, 227 S.W.3d 820, 827–28 (Tex. App.—Amarillo 2007, no pet.); Whitaker v. Bank of El Paso, 850 S.W.2d 757, 760 (Tex. App.—El Paso 1993, no writ); Loomis v. Sharp, 519 S.W.2d 955, 958 (Tex. Civ. App.—Texarkana 1975, writ dism'd).

[155] RESTATEMENT (SECOND) OF TORTS § 222(a), cmt.c (1965).

[156] R.J. Suarez Enters., Inc. v. PNYX L.P., 380 S.W.3d 238, 242 (Tex. App.—Dallas 2012, no pet.); Winkle Chevy-Olds-Pontiac v. Condon, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dism'd).

[157] Imperial Sugar Co. v. Torrans, 604 S.W.2d 73, 74 (Tex. 1980) (per curiam); Khorshid, Inc. v. Christian, 257 S.W.3d 748, 758–59 (Tex. App.—Dallas 2008, no pet.).

[158] *R.J. Suarez Enters., Inc.*, 380 S.W.3d at 243.

[159] Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699, 705 (5th Cir. 2009); Rio Grande Cattle Co. v. Burns, 17 S.W. 1043, 1046 (Tex. 1891); Earthman's, Inc. v. Earthman, 526 S.W.2d 192, 204 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). *See also* Gordon v. Gordon, No. 09-05-330-CV, 2006 WL 5961831, at *17 (Tex. App.—Beaumont July 31, 2008, pet. denied) (mem. op) ("Certainly, shares of stock can be converted.").

[160] *See, e.g.*, Baker v. Wasson, 53 Tex. 150, 156 (Tex. 1880) ("The company only, had the power to cancel the old stock and issue new, and if this was done illegally and wrongfully, whether through negligence or fraud," the claim by the true owner is against the corporation.); *Alford W. Tifford, PA*, 562 F.3d at 705 ("In Texas, a shareholder may sue a corporation for conversion of shares.").

[161] *Arthur W. Tifford, PA*, 562 F.3d at 705.

[162] *Id.* (citing Rodriguez v. Ortegon, 616 S.W.2d 946, 949 (Tex. App.—Corpus Christi 1981, no writ) ("unreasonable refusal to transfer stock ownership. . . .") *See also* Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 619 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.) (imposing unreasonable restraints on a stock's marketability).

[163] *Arthur W. Tifford, PA*, 562 F.3d at 705.

[164] *Id.*

[165] Great W. Drilling, Ltd. v. Alexander, 305 S.W.3d 688, 695 (Tex. App.—Eastland 2009, no pet.); Almance v. Shipley Bros., 247 S.W.3d 252, 254 (Tex. App.—El Paso 2007, no pet.); FCLT Loans, L.P. v. Estate of Bracher, 93 S.W.3d 469, 482 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

[166] *Arthur W. Tifford, PA*, 562 F.3d at 705 (citing *Sandor Petroleum Corp.*, 321 S.W.2d at 619; Prudential Petroleum Corp. v. Rauscher, Pierce & Co., 281 S.W.2d 457, 460 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.)).

[167] Robinson v. Nat'l Autotech, Inc., 117 S.W.3d 37, 39 (Tex. App.—Dallas 2003, pet. denied). *See also* Waisath v. Lack's Stores, Inc., 474 S.W.2d 444, 446 (Tex. 1971); Lawyers Title Co. v. J.G. Cooper Dev., Inc., 424 S.W.3d 713, 718 (Tex. App.—Dallas 2014, pet. denied); Smith v. Maximum Racing, Inc., 136 S.W.3d 337, 341 (Tex. App.—Austin 2004, no pet.); Edmunds v. Sanders, 2 S.W.3d 697, 703 (Tex. App.—El Paso 1999, pet. denied); Morey v. Page, 802 S.W.2d 779, 786 (Tex. App.—Dallas 1990, no writ).

[168] 489 S.W.2d 184 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

[169] *Id.* at 185.

[170] *Id.*

[171] *Id.* at 188.

[172] *Id.* at 185.

[173] *Id.*

[174] Act of Sept. 6, 1955, 54th Leg., R.S., ch. 64, 1955 Tex. Gen. Laws 250 (amended 2006) (current version at TEX. BUS. ORGS. CODE ANN. § 21.157 (West 2012); *see* Tex. Const. art. XII, § 6 (repealed Nov. 2, 1993).

[175] Gulf States Abrasive Mfg. v. Ortel, 489 S.W.2d 184, 185 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e) (The company also offered to cancel the note and contended that the plaintiff "ratified and confirmed this understanding as to bonuses, has accepted benefits of it, and is estopped to deny its existence"). The opinion does not state what the plaintiff's position was regarding the purpose of the note. *See id.*

[176] *Id.* at 186.

[177] *Id.*

[178] *Id.* at 187.

[179] *Id.*

[180] Rodriguez v. Ortegon, 616 S.W.2d 946, 949 (Tex. Civ. App.—Corpus Christi 1981, no writ).

[181]17 S.W. 1043 (Tex. 1891).

[182] *Id.* at 1045.

[183] Prudential Petroleum Corp. v. Rauscher, Pierce & Co., 281 S.W.2d 457, 461 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.). *See also* Earthman's, Inc. v. Earthman, 526 S.W.2d 192, 204 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) ("A refusal of a corporation to transfer record ownership of corporate stock may, under appropriate circumstances, result in liability of the corporation for damages as a conversion of the stock.").

[184] *Rodriguez*, 616 S.W.2d at 949.

[185] Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699 (5th Cir. 2009).

[186] *Id.* at 702–03.

[187] *Id.* at 704.

[188] *Id.* at 707.

[189] *Id.* at 705.

[190] Evanston Ins. v. Legacy of Life, Inc., 370 S.W.3d 377, 383 (Tex. 2012). *See also* Dos Republicas Coal P'ship v. Saucedo, 477 S.W.3d 828, 836 (Tex. App.—Corpus Christi 2015, no pet.) ("Under Texas common law, property ownership comes with a 'bundle of rights' which includes, among other things, the rights of possession and use."); Apr. Sound Mgmt. Corp. v. Concerned Prop. Owners for Apr. Sound, Inc., 153 S.W.3d 519, 525 (Tex. App.—Amarillo 2004, no pet.) ("The right to own and have exclusive dominion over private property is a sacred one, and it is a universal principle of law that the right to own property carries with it the right to control and dispose of it in such manner as not to contravene law or public policy.").

[191] Yeaman v. Galveston City Co., 167 S.W. 710, 723 (1914) ("We are unwilling to affirm that, in the absence of some statutory or charter power, or express consent to that effect, a corporation has any authority to forfeit a stockholder's shares upon such a ground.").

[192]Rio Grande Cattle Co. v. Burns, 17 S.W. 1043, 1045 (Tex. 1891).

[193] TEX. BUS. ORGS. CODE ANN. § 3.151(a)(3) (West 2012).

[194] *Id.* § 3.204.

[195] Neyland v. Brammer, 73 S.W.2d 884 (Tex. Civ. App.—Galveston 1933, writ dism'd).

[196] *Id.* at 885.

[197] *Id.* at 887.

[198] *Id.* at 889.

[199] Yeaman v. Galveston City Co., 167 S.W. 710, 720 (1914). *See also In re* Estate of Crawford, 795 S.W.2d 835, 838 (Tex. App.—Amarillo 1990, no writ) ("Complete ownership of certificated stock may exist without the issuance of a certificate or its delivery."); Estate of Bridges v. Mosebrook, 662 S.W.2d 116, 120 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) ("It is not necessary for complete ownership of stock that a certificate ever be issued."); Rogers v. Butler, 563 S.W.2d 840, 843 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) ("Rogers and Butler were stockholders in Fiesta International, Inc., even though certificates of stock were never issued.").

[200] Humble Oil & Ref. Co. v. Blankenburg, 235 S.W.2d 891, 894 (Tex. 1951) ("[E]ntry on the books of the corporation is not necessary to pass title to stock."); De Anda v. De Anda, 662 S.W.2d 107, 109 (Tex. App.—San Antonio 1983, no writ) ("The requirement that stock transfer be recorded on the corporate books is to protect the corporation," however, failure of the corporation to record a transfer does not invalidate the transfer); Alba Nat'l Bank v. Shaw, 18 S.W.2d 728, 729 (Tex. Civ. App.—Texarkana 1929, writ ref'd) ("It has been definitely decided in this state that the entry of the transfer on the books of the corporation, where such formality is required, is not necessary to vest the title to the stock in a transferee, if the contract of assignment is otherwise sufficient."); Blooming Grove Cotton-Oil Co. v. First Nat'l Bank, 56 S.W. 552, 553 (Tex. Civ. App.—San Antonio1900, no writ) ("The transfer made by Robinson of the stock, although not registered on the books of the corporation, was valid.").

[201] For this reason, it is often a sound tactic to avoid alleging claims for denial of share ownership until the defendant has unequivocally done so. The lawsuit might start simply as an effort to enforce a demand for inspection of documents in which share ownership would be a prerequisite and the defendant would be more likely to take an extreme position in defending that relatively insignificant claim.

[202] Neyland v. Brammer, 73 S.W.2d 884, 888 (Tex. Civ. App.—Galveston 1933, writ dism'd).

[203] Adam v. Harris, 564 S.W.2d 152, 155 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

[204] 754 S.W.2d 375 (Tex. Civ. App.—Houston [1st Dist.] 1988, writ denied), *disapproved of by*, Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014). *Davis* was the seminal shareholder oppression doctrine case in Texas and is analyzed in Eric Fryar, *Filling in the Gaps: Shareholder Oppression After Ritchie v. Rupe*, 47:1 TEX. J. BUS. L. 1, 14 (2017).

[205] As developed below, a conversion judgment, rather than a buy-out order, would likely have awarded the same amount of actual damages, plus exemplary damages and attorneys fees—neither of which were awarded to the plaintiff in *Davis*.

[206] *Davis*, 754 S.W.2d at 382.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 381.

[210] *Id.* at 382.

[211] R.J. Suarez Enters. v. PNYX L.P., 380 S.W.3d at238, 243. (Tex. App.—Dallas 2012, no pet.).

[212] *Davis,* 754 S.W.2d at 378.

[213] *Id.* at 383 ("appellants did not convert appellees stock").

[214] *Id.* at 382–83.

[215] *Id.* at 382.

[216] *See* Gulf States Abrasive Mfg., Inc. v. Oertel, 489 S.W.2d 184, 186 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

[217] 20 Tex. Prac., Bus. Orgs. § 26:7. *See, e.g.*, Peter v. 2117 Walker Corp., 417 S.W.2d 459, 459–60 (Tex. Civ. App.—Waco 1967, no writ) (claim that if plaintiff supervised organization of business and the remodeling of the building he would "own an undivided one-third interest in said building and would be issued one-third of the corporate stock"); Krueger v. Young, 406 S.W.2d 751, 752 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.) (an attorney was told that "he would be permitted to 'get in on the ground floor as a founder' on the same basis" as the promoters).

[218] Neyland v. Brammer, 73 S.W.2d 884 (Tex. Civ. App.—Galveston 1933, writ dismissed).

[219] Willis v. Donnelly, 199 S.W.3d 262, 262 (Tex. 2006). Willis was the first shareholder oppression case to be considered by the Texas Supreme Court and is analyzed in Part One at Eric Fryar, *Filling in the Gaps: Shareholder Oppression After Ritchie v. Rupe*, 47:1 TEX. J. BUS. L. 1, 13 (2017).

[220] *Id.* at 266.

[221] *Id.* at 267.

[222] *See id.* at 264

[223] *Id.* at 268.

[224] *Id.* at 268–69.

[225] *Id.* at 277.

[226] Yeaman v. Galveston City Co., 167 S.W. 710, 719. (1914).

[227] *Id.* at 720.

[228] 194 S.W.2d 134 (Tex. Civ. App.—Fort Worth), *aff'd*, 198 S.W.2d 82 (Tex. 1946).

[229] *Id.* at 137.

[230] *See* Greenspun v. Greenspun, 194 S.W.2d 134 (Tex. Civ. App.—Fort Worth 1946), *aff'd*, 198 S.W.2d 82 (Tex. 1946).

[231] Neyland v. Brammer, 73 S.W.2d 884 (Tex. Civ. App.—Galveston 1933, writ dism'd).

[232] *Id.* at 887.

[233] *Willis*, 199 S.W.3d at 269.

[234] Id. at 277–78. The plaintiff might have created a fact issue, however, by maintaining that he was a shareholder and that the tax reporting was a ruse.

[235] *See* Mathews v. First Citizens Bank, 374 S.W.2d 794, 796 (Tex. Civ. App—Dallas 1963, writ ref'd n.r.e.) (judgment in favor of Mathews for the value of the stock converted by forged endorsement).

[236] *Id.* at 797.

[237] Although no reported cases reflect these fact patterns, the author has had two recent cases that do. Carter v. Carter, No. 14-03-02878, in the 284th District Court, Montgomery County, Texas, which resulted in a settlement with the buy-out of the minority shareholder's interest, and Pasagui v. Perez, No. 2011-16452, in the 133th District Court, Harris County, Texas, which resulted in a $1.5 million fraud judgment in favor of the plaintiff.

[238] RESTATEMENT (SECOND) OF TORTS § 222A, illus. 1–4 (1965).

[239] *Express One Int'l*, Inc. *v. Steinbeck*, 53 S.W.3d 895, 901. (Tex. App.—Dallas 2001, no pet.). *See, e.g.*, *id.* (a trade name not subject to conversion claim); CICCorp. v. Aimtech Corp., 32 F. Supp. 2d 425, 430 (S.D. Tex. 1998) (internet webpage address not subject to conversion claim); *Robin Singh Educ. Servs., Inc. v. Test Masters Educ. Servs., Inc.*, 401 S.W.3d 95, 98 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (misdirected emails not subject to conversion claim).

[240] *Adams v. Great Am. Lloyd's Ins. Co.*, 891 S.W.2d 769, 772 (Tex. App.—Austin 1995, no writ).

[241] *See* Dewing v. Perdicaries, 96 U.S. 193, 196 (1877).

[242] *See* Farrington v. Tenn., 95 U.S. 679, 686 (1877).

[243] *Express One Int'l*, *Inc.*, 53 S.W.3d at 901.

[244] Prewitt v. Branham, 643 S.W.2d 122, 123 (Tex. 1982).

[245] *Id.* (lease); *Lee Cmty. Nat'l Bank v. Nelson*, 761 S.W.2d 851, 852 (Tex. App.—Beaumont 1988, writ denied) (car title); *Allied Bank v. Plaza DeVille Assocs.*, 733 S.W.2d 566, 572–73 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

[246] Yeaman v. Galveston City Co., 167 S.W. 710, 720 (1914) ("In a corporation the certificate of stock is not the stock itself.").

[247] Rio Grande Cattle Co. v. Burns, 17 S.W. 1043, 1046 (Tex. 1891); *Watts v. Miles*, 597 S.W.2d 386, 388 (Tex. Civ. App.—San Antonio 1980, no writ); *Bower v. Yellow Cab Co.*, 13 S.W.2d 708, 710 (Tex. Civ. App.—El Paso 1929, writ ref'd).

[248] *Watts*, 597 S.W.2d at 387.

[249] *Id.* at 388.

[250] *Id.*

[251] 243 S.W. 662 (Tex. Civ. App.—Beaumont 1922, no writ).

[252] *Id.* at 663.

[253] Courts have resisted similar arguments in other contexts. *See, e.g.*, Pebble Beach Co. v. Tour 18 I, Ltd., 942 F.Supp. 1513, 1569 (S.D. Tex. 1996) (applying Texas law) ("[S]urrepticiously videotaping plaintiffs' trade dress, which [Tour 18] used for its own commercial purposes" did not constitute conversion and/or unfair competition); Robin Sighn Educ. Servs., Inc. v. Test Masters Educ. Servs., Inc., 401 S.W.3d 95, 97 (Tex. App.—Houston [14th Dist. 2011, no pet.); ExpressOne Int'l, Inc. v. Steinbeck, 53 S.W. 3d 895, 901 (Tex. App.—Dallas 2001, no pet.) ("Our conclusion is supported by case law that refuses to allow plaintiffs to recharacterize trademark infringement claims as claims for conversion."); CICCorp., Inc. v. AIM Tech. Corp., 32 F.Supp. 2d 425, 429 n.9 (interpreting Texas law) (no authority shown to supporting unlawful dominion and control over intangible property such as internet webpage).

[254] TEX. BUS. ORGS. CODE ANN. § 3.102 (West 2006).

[255] *Id.* § 3.204 ("A domestic entity shall deliver a certificate representing a certificated ownership interest to which the owner is entitled.").

[256] "To secure his interest therein no formal issuance of a certificate was therefore necessary." Rio Grande Cattle Co. v. Burns, 17 S.W. 1043, 1045 (Tex. 1891) (citing MOR. PRIV. CORP. § 258; TAYL. CORP. § 511). The court found that, under these particular facts, he was entitled to have a certificate issued. *Id.* His interest in the corporation was fixed, and his stock was transferable. *Id.* Although our statute provides that the stock 'shall be transferable only on the books of the corporation,' still in this case the corporation, upon demand, refused to enter the transfer, or to issue a certificate to the assignee. The interest of Glasscock was clearly assignable, and his assignment thereof to the appellee, under the circumstances, vested at least the equitable title to the stock or interest of Glasscock in the appellee, and entitled it to demand recognition at the hands of the corporation." *Id.* at 1045 (citation omitted). *See also* Bower v. Yellow Cab Co., 13 S.W.2d 708, 710 (Tex. App.—El Paso 1929, writ ref'd) ("The certificate, if issued, would have been but the mere evidence of her ownership of the stock. She was entitled to have the stock certificate issued and to be accorded the full right of a stockholder.").

[257] Berl v. Crutcher, 60 F.2d 440, 444 (5th Cir. 1932) ("Generally speaking, a corporation is a separate entity distinct from the stockholders, but as between itself and its stockholders this is a mere fiction, and the equitable ownership of all its property is in the stockholders, subject to the prior rights of creditors.").

[258] *Rio Grande Cattle Co.*,17 S.W. at 1046. *See Watts*, 597 S.W.2d at 388; *Bower*, 13 S.W.2d at 710.

[259] Yeaman v. Galveston City Co., 167 S.W. 710, 720 (1914). *See also* Estate of Crawford, 795 S.W.2d 835, 838 (Tex. App.—Amarillo 1990, no writ) ("Complete ownership of certificated stock may exist without the issuance of a certificate or its delivery."); Estate of Bridges v. Mosebrook, 662 S.W.2d 116, 120 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) ("It is not necessary for complete ownership of stock that a certificate ever be issued."); Rogers v. Butler, 563 S.W.2d 840, 843 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) ("Rogers and Butler were stockholders in Fiesta International, Inc., even though certificates of stock were never issued.").

[260] Humble Oil & Refining Co. v. Blankenburg, 235 S.W.2d 891, 894 (Tex. 1951) ("Entry on the books of the corporation is not necessary to pass title to stock."); De Anda v. De Anda, 662 S.W.2d 107, 109 (Tex. App.—San Antonio 1983, no writ) ("The requirement that stock transfer be recorded on the corporate books is to protect the corporation, however, failure of the corporation to record a transfer does not invalidate the transfer."); Alba Nat'l Bank v. Shaw, 18 S.W.2d 728, 729 (Tex. Civ. App.—Texarkana 1929, writ ref'd) ("It has been definitely decided in this state that the entry of the transfer on the books of the corporation, where such formality is required, is not necessary to vest the title to the stock in a transferee, if the contract of assignment is otherwise sufficient."); Blooming Grove Cotton-Oil Co. v. First Nat. Bank, 56 S.W. 552, 553 (Tex. Civ. App. 1900, no writ) ("The transfer made by Robinson of the stock, although not registered on the books of the corporation, was valid.").

[261] Robinson v. Nat'l Autotech, Inc., 117 S.W.3d 37, 39–40 (Tex. App.—Dallas 2003, pet. denied).

[262] *See* U.S. Bank, N.A. v. Prestige Ford Garland Ltd. P'ship, 170 S.W.3d 272, 276 (Tex. App.—Dallas 2005, no pet.); Dolenz v. Nat'l Bank of Texas at Fort Worth, 649 S.W.2d 368, 370 (Tex. App.—Fort Worth 1983, writ refused n.r.e.); Killian v. Trans Union Leasing Corp., 657 S.W.2d 189, 192 (Tex. App.—San Antonio 1983, writ refused n.r.e.).

[263] Turner v. Cattleman's Trust Co., 215 S.W. 831, 833 (Tex. Comm'n App. 1919, judgm't adopted).

[264] *Id.*

[265] Auto. Mortgage Co. v. Ayub, 266 S.W. 134, 135 (Tex. Comm'n App. 1924, judgm't adopted).

[266] *See* Earthman's, Inc. v. Earthman, 526 S.W.2d 192, 204 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). *See also* Bower, 13 S.W.2d at 710 ("an action in damages will lie for conversion of corporate stock"); Hoad v. Winchester, 279 S.W. 875, 876 (Tex. Civ. App.—San Antonio 1926, writ dism'd w.o.j.) (discussing that "certificates when issued became personal property and became a subject of conversion.").

[267] 1 A.D.2d 1037 (N.Y. App. Div. 1956).

[268] *Id.* at 1038 (citing Pierpoint v. Hoyt, 182 N.E. 235 (N.Y. Ct. App.1932)).

[269] *Id.*

[270] *Id.*

[271] TransPecos Banks v. Strobach, 487 S.W.3d 722, 728 (Tex. App.—El Paso 2016, no pet.), *accord*, Penhollow Custom Homes, LLC v. Kim, 320 S.W.3d 366, 372 (Tex. App.—El Paso 2010, no pet.) ("A corporation is a separate legal entity from its shareholders, officers, and directors.").

[272] Castleberry v. Branscum, 721 S.W.2d 270, 271 (Tex. 1986).

[273] Dewing v. Perdicaries, 96 U.S. 193, 196 (1877) ("The capital stock and all the other property and effects of a corporation are a trust fund.").

[274] TEX. BUS. ORGS. CODE ANN. § 3.003 (West 2017) ("DURATION. A domestic entity exists perpetually unless otherwise provided in the governing documents of the entity. A domestic entity may be terminated in accordance with this code or the Tax Code.").

[275] *See* TEX. BUS. ORGS. CODE ANN. § 21.401(a)(2) (West 2013) ("The board of directors of a corporation shall . . . direct the management of the business and affairs of the corporation."). *See* 20 TEX. PRAC., BUS. ORGS. § 30:1 ("Shareholders elect directors who then have the responsibility for managing the corporation's affairs. Once the directors are elected, shareholders have little say in management other than to vote on certain fundamental transactions."); *id.* § 30:2 ("A shareholder, as such, has little right to participate in management, save the right to elect directors, and vote on fundamental transactions.").

[276] *See* Hoagland *ex rel.* Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 747 (7th Cir. 2004) ("A principal economic function of corporate organization is separation of ownership from control, so that entrepreneurs need not supply all the capital, and those who supply capital may diversify their investments and need not furnish managerial skills.").

[277] TransPecos Banks v. Strobach, 487 S.W.3d 722, 728 (Tex. App.—El Paso 2016, no pet.)

[278] Providence Bank v. Billings, 29 U.S. 514, 524 (1830) ("The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men."). *See also* Wright Hydraulics, Inc. v. Womack Mach. Supply Co., 482 S.W.2d 34, 36 (Tex. Civ. App.—Fort Worth 1972, no writ) ("Since corporations become entities upon incorporation their status before the law is that of individuals (in the ordinary case) despite the fact that one corporation may be the subsidiary of another, or the affiliate of any other, or of others.").

[279] Dewing v. Perdicaries, 96 U.S. 193, 196 (1877) (shares represent "aliquot parts of the trust fund"); Farrington v. State of Tennessee, 95 U.S. 679, 687 (1877) ("Each share represents an aliquot part of the capital stock."). *See also* Auto. Mortg. Co., 266 S.W. at 135 ("It is generally agreed that shares in an incorporated company are the aliquot parts of the capital stock, and merely give to the owner a right to his share of the profits of the corporation, while it is a going concern, and to a share of the proceeds of its assets, when sold for distribution in case of its dissolution and winding up.") (quoting Presnall v. Stockyards Nat'l Bank, 151 S. W. 873, 876 (Tex. Civ. App.—Texarkana 1912), aff'd, 194 S. W. 384 (Tex. 1917)).

[280] *Auto. Mortg. Co.*, 266 S.W. at 135 ("Shares of stock in a corporation are a species of personal property, belonging to the holder thereof, entirely separate and distinct from the property of the corporation itself."); *Farrington*, 95 U.S. at 686 ("The capital stock [i.e., the corpus of the trust fund] and the shares of the capital stock are distinct things.").

[281] Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 645 (Tex. 1996); see also McAlister v. Eclipse Oil Co., 98 S.W.2d 171, 176 (Tex. 1936) ("Under our authorities the corporation is a legal entity, distinct from its stockholders. In this regard, strictly speaking, the ownership of the corporate assets is vested in the corporation itself and not in its stockholders."); Hicks v. State, 419 S.W.3d 555, 558

(Tex. App.—Amarillo 2013, no pet.) ("It has long been the law that a stockholder owns an interest in the company but not the assets of the company. Rather, the assets, including the cash residing in corporate bank accounts, are owned by the corporation, and the latter is a separate legal entity from its shareholders.").

[282] *Dewing*, 96 U.S. at 196 ("The corporation owns and holds [the trust fund] as a trustee."); *Farrington*, 95 U.S. at 686 ("It is a trust fund, held by the corporation as a trustee.").

[283] *Farrington*, 95 U.S. at 687 ("Every [stock]holder is a cestui que trust to the extent of his ownership."); McAlister, 98 S.W.2d at 176 ("Also, strictly speaking, the ownership of the stock does not carry with it the equitable title to the corporate property. This simply means, however, that the stockholders have no right to require the corporation to convey to them the legal title to the corporate property. In a larger or real sense the stockholders of a corporation are the beneficial owners of its corporate properties.").

[284] *See* Griffith v. Jones, 518 S.W.2d 435, 437 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) ("Shares of corporate stock are personal property in the nature of choses in action.")

[285] Yeaman, v. Galveston City Co., 167 S.W. 710, 720 (1914) ("In a corporation the certificate of stock is not the stock itself"); Bakke v. Harvison, 417 S.W.3d 645, 650 (Tex. App.—El Paso 2013, pet. denied) ("A stock certificate is some evidence of ownership in a corporation, but under Texas law, the absence of a stock certificate does not necessarily invalidate a parties' stock ownership. This is because Texas courts have held that a certificate of stock is not the stock in a corporation itself, but rather, a muniment of title which is evidence of the ownership of the stock.").

[286] Watts v. Miles, 597 S.W.2d 386, 388. (Tex. Civ. App.—San Antonio 1980, no writ).

[287] *See* Auto. Mortg. Co. v. Ayub, 266 S.W. 134, 135. (Tex. 1924).

[288] Turner v. Cattleman's Trust Co., 215 S.W. 831, 833 (Tex. Comm'n App. 1919, judgm't adopted) (stock at all time remains "in the possession of the corporation"); *see also* Benson v. Greenville Nat. Exch. Bank, 253 S.W.2d 918, 928–29 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.) ("[T]he situs of the stock may be at the domicile of the corporation . . . .")..

[289] *See Yeaman*, 167 S.W. at 720.

[290] 53 Tex. 150 (1880).

[291] *Id.* at 151.

[292] *Id.* at 155.

[293] *Id.* at 155–56.

[294] *Id.* at 156.

[295] *Id.*

[296] *Id.*

[297] Graham v. Turner, 472 S.W.2d 831, 836 (Tex. Civ. App.—Waco 1971, no writ).

[298] Yeaman, v. Galveston City Co., 167 S.W. 710, 723 (1914).

[299] Baker v. Wasson, 53 Tex. 150, 156 (Tex. 1880).

[300] Waisath, v. Lack's Stores, Inc., 474 S.W.2d 444, 447 (Tex. 1971) (emphasis added).

[301] Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S.W. 1043, 1044 (1891).

[302] TEX. BUS. ORGS. CODE ANN. § 3.204 (West 2006).

[303] TEX. BUS. ORGS. CODE ANN. § 3.151(a)(3) (West 2006).

[304] *See* Tex. Const. art. I, § 26 interp. commentary (West 2007) ("The framers of the Texas Constitutions, beginning with that of the Republic, have believed in an unrestrained power to convey or transfer property, and thus have written into the Bill of Rights this provision against perpetuities, primogeniture and the entailment of estates."); Hicks v. Castille, 313 S.W.3d 874, 881–82 (Tex. App.—Amarillo 2010, pet. denied) (alienability is a legal incident of property). *Cf.* Ritchie v. Rupe, 339 S.W.3d 275, 292 (Tex. App.—Dallas 2011), *rev'd*, 443 S.W.3d 856 (Tex. 2014) ("One of the general reasonable expectations of any property owner—including the owner of stock in a corporation—is the right of free alienation of that property.").

[305] Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 383 (Tex. 2012).

[306] Cooper v. United States, 322 F. Supp. 2d 733, 737 (E.D. Tex. 2004).

[307] *See* Tenneco, Inc. v. Enter. Prod. Co., 925 S.W.2d 640, 646 (Tex. 1996) ("Sound corporate jurisprudence requires that courts narrowly construe rights of first refusal and other provisions that effectively restrict the free transfer of stock."); Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 617 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.) ("Generally speaking, corporate shares of stock are property which may be freely sold and delivered.").

[308] Hicks v. Castille, 313 S.W.3d 874, 881 (Tex. App.—Amarillo 2010, pet. denied); *See* Tex. Const. art. I, § 26 interp. commentary (West 2007) ("The framers of the Texas Constitutions, beginning with that of the Republic, have believed in an unrestrained power to convey or transfer property, and thus have written into the Bill of Rights this provision against perpetuities, primogeniture and the entailment of estates."); *Hicks*, 313 S.W.3d at 881.).

[309] *Sandor*, 321 S.W.2d at 617.

[310] *See Tenneco, Inc.*, 925 S.W.2d at 646; Dixie Pipe Sales, Inc. v. Perry, 834 S.W.2d 491, 493 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

[311] *Sandor*, 321 S.W.2d at 617 ("Generally speaking, corporate shares of stock are property which may be freely sold and delivered.").

[312] *Dixie Pipe Sales, Inc.*, 834 S.W.2d at 493; *see also* TEX. BUS. ORGS. CODE ANN. § 21.209 (West 2006) ("Except as otherwise provided by this code, the shares and other securities of a corporation are transferable in accordance with Chapter 8, Business & Commerce Code."); *Id* §§ 21.210–21.213 (stating manner of creating restrictions and listing examples of valid restrictions on transfer of shares); TEX. BUS. & COM. CODE ANN. § 8.204 & cmt. 1 (West 1995) (validity of restriction determined by other law, but any restriction on transfer must be noted conspicuously on certificate if certificated security to be enforceable).

[313] TEX. BUS. ORGS. § 21.210(b) ("A restriction imposed under Subsection (a) is not valid with respect to a security issued before the restriction has been adopted, unless the holder of the security voted in favor of the restriction or is a party to the agreement imposing the restriction.").

[314] *Id.* § 21.211(a) ("Without limiting the general powers granted by Sections 21.210 and 21.213 to impose and enforce reasonable restrictions, a restriction placed on the transfer or registration of transfer of a security of a corporation is valid if the restriction reasonably…").

[315] *Id.* § 21.210(a) ("A restriction on the transfer or registration of transfer of a security, or on the amount of a corporation's securities that may be owned by a person or group of persons, may be imposed by: (1) the corporation's certificate of formation; (2) the corporation's bylaws; (3) a written agreement among two or more holders of the securities").

[316] *Id.* § 21.210(a)(4) ("A restriction on the transfer or registration of transfer of a security, or on the amount of a corporation's securities that may be owned by a person or group of persons, may be imposed by: (4) a written agreement among one or more holders of the securities and the corporation if: (A) the corporation files a copy of the agreement at the principal place of business or registered office of the corporation; and (B) the copy of the agreement is subject to the same right of examination by a shareholder of the corporation, in person or by agent, attorney, or accountant, as the books and records of the corporation.").

[317] *Id.* § 21.210 (b) A restriction imposed under Subsection (a) is not valid with respect to a security issued before the restriction has been adopted, unless the holder of the security voted in favor of the restriction or is a party to the agreement imposing the restriction.").

[318] *Id.* § 21.212(a) ("A corporation that has adopted a bylaw or is a party to an agreement that restricts the transfer of the shares or other securities of the corporation may file with the secretary of state, in accordance with Chapter 4, a copy of the bylaw or agreement and a statement attached to the copy that: (1) contains the name of the corporation; (2) states that the attached copy of the bylaw or agreement is a true and correct copy of the bylaw or agreement; and (3) states that the filing has been authorized by the board of directors or, in the case of a corporation that is managed in some other manner under a shareholders' agreement, by the person empowered by the agreement to manage the corporation's business and affairs.").

[319] *Id.* § 21.212(b) ("After a statement described by Subsection (a) is filed with the secretary of state, the bylaws or agreement restricting the transfer of shares or other securities is a public record, and the fact that the statement has been filed may be stated on a certificate representing the restricted shares or securities if required by Section 3.202.").

[320] *Id.* § 21.212(c) ("A corporation that is a party to an agreement restricting the transfer of the shares or other securities of the corporation may make the agreement part of the corporation's certificate of formation without restating the provisions of the agreement in the certificate of formation by amending the certificate of formation. If the agreement alters any provision of the certificate of formation, the certificate of amendment shall identify the altered provision by reference or description. If the agreement is an addition to the certificate of formation, the certificate of amendment must state that fact.").

[321] *Id.* § 21.212(d) ("The certificate of amendment must: (1) include a copy of the agreement restricting the transfer of shares or other securities; (2) state that the attached copy of the agreement is a true and correct copy of the agreement; and (3) state that inclusion of

the certificate of amendment as part of the certificate of formation has been authorized in the manner required by this code to amend the certificate of formation.").

[322] *Id.* § 3.202(d) ("A certificate representing ownership interests that is subject to a restriction, placed by or agreed to by the domestic entity under this code, or otherwise contained in its governing documents, on the transfer or registration of the transfer of the ownership interests must: (1) conspicuously state or provide a summary of the restriction on the front of the certificate; (2) state the restriction on the back of the certificate and conspicuously refer to that statement on the front of the certificate; or (3) conspicuously state on the front or back of the certificate that a restriction exists pursuant to a specified document and: (A) that the domestic entity, on written request to the entity's principal place of business, will provide a free copy of the document to the certificate record holder; or (B) if the document has been filed in accordance with this code, that the document: (i) is on file with the secretary of state or, in the case of a real estate investment trust, with the county clerk of the county in which the real estate investment trust's principal place of business is located; and (ii) contains a complete statement of the restriction.").

[323] *Id.* § 21.213(a) ("A restriction placed on the transfer or registration of the transfer of a security of a corporation is specifically enforceable against the holder, or a successor or transferee of the holder, if: (1) the restriction is reasonable and noted conspicuously on the certificate or other instrument representing the security; or (2) with respect to an uncertificated security, the restriction is reasonable and a notation of the restriction is contained in the notice sent with respect to the security under Section 3.205.").

[324] *Id.* § 21.213(b) ("Unless noted in the manner specified by Subsection (a) with respect to a certificate or other instrument or an uncertificated security, an otherwise enforceable restriction is ineffective against a transferee for value without actual knowledge of the restriction at the time of the transfer or against a subsequent transferee, regardless of whether the transfer is for value.").

[325] *Id.* § 21.213(b) ("A restriction is specifically enforceable against a person other than a transferee for value from the time the person acquires actual knowledge of the restriction's existence.").

[326] *Id.* § 3.202(e) ("A domestic entity that fails to provide to the record holder of a certificate within a reasonable time a document as required by Subsection (d)(3)(A) may not enforce the entity's rights under the restriction imposed on the certificated ownership interests.").

[327] *Id.* § 21.211(a).

[328] *See id.* ("Without limiting the general powers granted by Sections 21.210 and 21.213 to impose and enforce reasonable restrictions, a restriction placed on the transfer or registration of transfer of a security of a corporation is valid if the restriction reasonably"); 21.213(a) ("A restriction placed on the transfer or registration of the transfer of a security of a corporation is specifically enforceable against the holder, or a successor or transferee of the holder"). *See id.* ("Without limiting the general powers granted by Sections 21.210 and 21.213 to impose and enforce reasonable restrictions, a restriction placed on the transfer or registration of transfer of a security of a corporation is valid if the restriction reasonably"); *Id.* § 21.213(a) ("A restriction placed on the transfer or registration of the transfer of a security of a corporation is specifically enforceable against the holder, or a successor or transferee of the holder").

[329] *Id.* § 21.212(b) ("A restriction placed on the transfer or registration of transfer of a security of a corporation, on the amount of the corporation's securities, or on the amount of the corporation's securities that may be owned by a person or group of persons is conclusively presumed to be for a reasonable purpose if the restriction: (1) maintains a local, state, federal, or foreign tax advantage to the corporation or its shareholders, including: (A) maintaining the corporation's status as an electing small business corporation under Subchapter S of the Internal Revenue Code; (B) maintaining or preserving any tax attribute, including net operating losses; or (C) qualifying or maintaining the qualification of the corporation as a real estate investment trust under the Internal Revenue Code or regulations adopted under the Internal Revenue Code; or (2) maintains a statutory or regulatory advantage or complies with a statutory or regulatory requirement under applicable local, state, federal, or foreign law.").; *Id.* ("A restriction placed on the transfer or registration of transfer of a security of a corporation, on the amount of the corporation's securities, or on the amount of the corporation's securities that may be owned by a person or group of persons is conclusively presumed to be for a reasonable purpose if the restriction: (1) maintains a local, state, federal, or foreign tax advantage to the corporation or its shareholders, including: (A) maintaining the corporation's status as an electing small business corporation under Subchapter S of the Internal Revenue Code; (B) maintaining or preserving any tax attribute, including net operating losses; or (C) qualifying or maintaining the qualification of the corporation as a real estate investment trust under the Internal Revenue Code or regulations adopted under the Internal Revenue Code; or (2) maintains a statutory or regulatory advantage or complies with a statutory or regulatory requirement under applicable local, state, federal, or foreign law.").

[330] Dixie Pipe Sales, Inc. v. Perry, 834 S.W.2d 491, 493 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

[331] *Id.* at 494.

[332] Tenneco Inc. v. Enter. Products Co., 925 S.W.2d at 646 ("Sound corporate jurisprudence requires that courts narrowly construe rights of first refusal and other provisions that effectively restrict the free transfer of stock.").

[333] 321 S.W.2d 614 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.).

[334] *Id.* at 616

[335] *Id.* at 616–17.

[336] *Id.*

[337] *Id.* at 617. At the time, *Sandor* was decided, article 2.22A of the Texas Business Corporations Act provided: "Any corporation may impose restrictions on the sale or other disposition of its shares and on the transfer thereof, which do not unreasonably restrain or prohibit transferability, if each such restriction is expressly set forth in the articles of incorporation or bylaws of the corporation and is copied at length on the face or so copied on the back and referred to on the face of each certificate representing shares, to the transfer of which the restriction applies." This requirement is now codified at Texas Business Organizations Code section 21.213, which provides that a transfer restriction is not enforceable against a transferee for value if the restriction is not conspicuously stated on the certificate, unless the transferee has actual knowledge of the restriction prior to the transfer.

[338] *Id.*

[339] *Id.* at 615.

[340] *Id.* at 617.

[341] *Id.*

[342] Act of May 25, 1973, 63rd Leg., R.S., ch. 545, sec. 12, 1973 Tex. Gen. Laws 1486, 1493 (current version at BUS. ORGS. at § 21.211(a)(1)).

[343] Texas Business Corporation Act article 2.23(A) provided that the power was vested in the shareholders, but could be delegated to the board. The original bylaws in *Sandor* provided for amendment by the board, and the appellees argued that the plaintiff had "agreed to the exercise of this authority by the board of directors of the corporation when he signed the original bylaws including Article XI thereof providing for further amendments." Sandor Petroleum Corp. 321 S.W.2d at 617. The law now provides that the power to amend the bylaws is held by the board of directors unless restricted by the shareholders or the certificate of formation. *See* BUS. ORGS. at § 21.057.

[344] *Sandor*, 321 S.W.2d at 617.

[345] *Id.*

[346] *Id.* at 619; *Id.* at 618. "But, an entirely different question is presented when the holder of such unrestricted stock is by an amended bylaw denied the right to demand the full price which could be had on the open market. That is the question in this case."

[347] *Id.* at 619.

[348] *Id.* at 618. The holding is now codified at TEX. BUS. ORGS. CODE § 21.210(b) (West 2006) ("A restriction imposed under Subsection (a) is not valid with respect to a security issued before the restriction has been adopted, unless the holder of the security voted in favor of the restriction or is a party to the agreement imposing the restriction.").

[349] *Sandor Petroleum Corp.*, 321 S.W.2d at 619. BUS. ORGS. at § 21.051 now provides: "A shareholder of a corporation does not have a vested property right resulting from the certificate of formation, including a provision in the certificate of formation relating to the management, control, capital structure, dividend entitlement, purpose, or duration of the corporation." One commentator has noted: "This statute was meant to reverse such cases as Sandor Petroleum Corp. v. Williams." 20 Tex. Prac., Bus. Orgs. § 27:17 n.3. 321 S.W.2d at 618. While "vested rights" are by statute no longer an impediment to amendment of organizational documents, the precise holding of Sandor, that restrictions on transfer may not be imposed on unrestricted without the shareholder's consent, is now codified in the Business Organizations Code. *See* BUS. ORGS. at 21.210(b) ("A restriction imposed under Subsection (a) is not valid with respect to a security issued before the restriction has been adopted, unless the holder of the security voted in favor of the restriction or is a party to the agreement imposing the restriction."). Nothing in the Business Organizations Code suggests that a shareholder does not have vested property interests in his stock, and *Sandor* continues to be cited as good law on the application of the tort of conversion to interfere with such vested property rights. *See* Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699, 705, 708 (5th Cir. 2009); S. Cent. Livestock Dealers, Inc. v. Sec. State Bank, Tex., 614 F.2d 1056, 1061 (5th Cir. 1980); Boehringer v. Konkel, 404 S.W.3d 18, 32 (Tex. App.—Houston [1st Dist.] 2013, no pet.), *disapproved on other grounds*, Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014); Ritchie v. Rupe, 339 S.W.3d 275, 292 (Tex. App.—Dallas 2011), *rev'd on other grounds*, 443 S.W.3d 856 (Tex. 2014).

[350] *Sandor*, 321 S.W.2d at 619.

[351] *Id.*

[352] *Id.* at 619–20.

[353] *Id.* at 617.

[354] *Id.* at 619.

[355] *Id.*

[356] *Id.* at 617.

[357] *Id.* at 619.

[358] *Id.*

[359] 517 F.2d 925 (5th Cir. 1975).

[360] *Id.* at 931.

[361] Ritchie v. Rupe, 339 S.W.3d 275 (Tex. App.—Dallas 2011), *rev'd*, 443 S.W.3d 856 (Tex. 2014).

[362] *Id.* at 296.

[363] *Id.* at 293–94.

[364] *Sandor*, 321 S.W.2d at 619.

[365] *Id.*

[366] *Id.*

[367] Branham v. Prewitt, 636 S.W.2d 507, 511 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

[368] *Ritchie*, 339 S.W.3d at 294.

[369] "Ritchie admitted, and put in writing, his refusal to speak with potential purchasers." *Id.* at 295.

[370] Plaintiff's broker "testified that one of the regular, necessary steps in the due-diligence investigation of any prospective investor in a closely-held corporation is a meeting with the corporation's management." *Id.* Two of the directors admitted that it would be reasonable for management to meet with a prospective purchaser. *Id.* at 296.

[371] *Id.* at 294.

[372] *Id.* at 297.

[373] *See generally* Stidham v. Lewis, 23 S.W.2d 851, 852 (Tex. Civ. App.—Fort Worth 1929, no writ) ("A constructive conversion takes place when a person does such acts in reference to the goods or personal chattel of another as amount, in view of the law, to the appropriation of the property to himself.").

[374] *See* Robinson v. Nat'l Autotech, Inc., 117 S.W.3d 37, 39–40 (Tex. App.—Dallas 2003, pet. denied).

[375] Pierson v. GFH Fin. Servs., 829 S.W.2d 311, 314 (Tex. App.—Austin 1992, no writ).

[376] *Sandor*, 321 S.W.2d at 619. It should be noted that the Texas Supreme Court in reversing *Ritchie* did state: "Dennard, Ritchie, and Lutes had no contractual, statutory, or other duty to meet with prospective buyers." *Ritchie,* 443 S.W.3d at 871. However, that statement is pure dicta and was not made in the context of a conversion claim or on a record that might have been developed to prove that cause of action. Nothing in the Supreme Court's opinion casts any doubt on the holding in *Sandor* or the validity of that court's reasoning. *See id.*

[377] Robinson v. Nat'l Autotech, Inc., 117 S.W.3d 37, 39–40 (Tex. App.—Dallas 2003, pet. denied); Dolenz v. Nat'l Bank of Tex. at Fort Worth, 649 S.W.2d 368, 370 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

[378] Eric Fryar, *Filling in the Gaps: Shareholder Oppression After Ritchie v. Rupe*, 47:1 TEX. J. BUS. L. 1, 91 (2017).

[379] Turner v. Cattleman's Trust Co., 215 S.W. 831, 833 (Tex. Comm'n App. 1919). *See also* Farrington v. State of Tennessee, 95 U.S. 679, 687 (1877). ("The corporation, though holding and owning the capital stock, cannot vote upon it. It is the right and duty of the shareholders to vote. They in this way give continuity to the life of the corporation, and may thus control and direct its management and operations."); Morrison v. St. Anthony Hotel, 274 S.W.2d 556, 567 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.) ("incidents of stock ownership" include "the rights, pro tanto, to share in its management"). *See also* Baker v. Raymond Int'l, Inc., 656 F.2d 173, 180

(5th Cir. 1981) ("Ownership of a controlling interest in a corporation entitles the controlling stockholder to exercise the normal incidents of stock ownership, such as the right to choose directors and set general policies, without forfeiting the protection of limited liability.").

[380] Johnson Ranch Royalty Co. v. Hickey, 31 S.W.2d 150, 153 (Tex. App.—Amarillo 1930, writ ref'd). *See also* Perry v. Perry Bros., Inc., 753 S.W.2d 773, 777 (Tex. App.—Dallas 1988, no writ) (Howell, J., dissenting); Chavco Inv. Co., Inc. v. Pybus, 613 S.W.2d 806, 809 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) ("The right of a stockholder as conferred by statute to examine the corporate records, although not absolute, is a valuable right.").

[381] Morrison v. St. Anthony Hotel, 274 S.W.2d 556, 567 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.). *See Turner* at 833; Moroney v. Moroney, 286 S.W. 167, 169 (Tex. Comm'n App. 1926); see also Farrington v. State of Tennessee, 95 U.S. 679, 687 (1877) (listing among the fundamental aspects of share ownership the entitlement "to share in the dividends and profits."); Auto. Mortgage Co. v. Ayub, 266 S.W. 134, 135 (Tex. Comm'n App. 1924) ("It is generally agreed that shares in an incorporated company are the aliquot parts of the capital stock, and merely give to the owner a right to his share of the profits of the corporation, while it is a going concern, and to a share of the proceeds of its assets, when sold for distribution in case of its dissolution and winding up.") (quoting Presnall v. Stockyards Nat. Bank, 151 S. W. 873 (Tex. Civ. App.—Texarkana 1912)); Olsen v. Homestead Land & Imp. Co., 28 S.W. 944 (Tex. 1894) ("The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate, according to the amount of his stock, in the surplus profits of the corporation on a division, and ultimately on its dissolution in the assets remaining after the payment of its debts."); Byerly v. Camey, 161 S.W.2d 1105, 1110 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.m.) ("The stockholder has a right to his share of the profits while the corporation is a going concern, and to a share of the proceeds of its assets, when sold for distribution in case of its dissolution and winding up.").

[382] 13 S.W.2d 708 (Tex. Civ. App.—El Paso 1929, writ refused).

[383] *Id.* at 708–10.

[384] *Id.* at 710.

[385] *Id.*

[386] *Id.* at 710–11. The court reversed a directed verdict and remanded the case to the trial court. The opinion states the plaintiff would be "entitled to have the stock certificate issued and to be accorded the full right of a stockholder" but does not discuss the possibility of a damages award. *Id.* at 710.

[387] 157 So. 2d 829, 833 (Fla. Dist. Ct. App. 1963).

[388] *Id.* at 834.

[389] Ritchie v. Rupe, 443 S.W.3d 856, 879 (Tex. 2014).

[390] *Id.* at 894.

[391] *Id.*

[392] *E.g.*, Boehringer v. Konkel404 S.W.3d 18 (Tex. App.—Houston [1st Dist.] 2013), *disapproved of by, Ritchie*, 443 S.W.3d at 856. *See generally* D. Moll, *Shareholder Oppression in Texas Close Corporations: Majority Rule (Still) Isn't What It Used to Be*, 9 HOUS. BUS. & TAX L.J. 33, 35–39 (2008), www.hbtlj.org/v09p1/v09p1mollar.pdf. (distinguishing minority shareholder status in close corporation from publicly held corporation).

[393] *See* DOUGLAS MOLL & R. RAGAZZO, THE LAW OF CLOSELY-HELD CORPORATIONS § 7.01[C] at 7–30 (2013 Supp.). *See also* Nagy v. Riblet Prods. Corp., 79 F.3d 572, 577 (7th Cir. 1996) ("Many closely-held firms endeavor to show no profits (to minimize their taxes) and to distribute the real economic returns of the business to the investors as salary. When firms are organized in this way, firing an employee is little different from canceling his shares."), *certified question answered*, 683 A.2d 37 (Del. 1996).

[394] Waisath v. Lack's Stores, 474 S.W.2d 444, 446 (Tex. 1971).

[395] Pan Am. Petroleum Corp. v. Long, 340 F.2d 211, 220 (5th Cir. 1964) (citing Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614 (Tex. Civ. App.—Eastland 1959); Stidham v. Lewis, 23 S.W.2d 851, 852 (Tex. Civ. App.—Fort Worth 1929, no writ). *See* McVea v. Verkins, 587 S.W.2d 526, 530–31 (Tex. Civ. App.—Corpus Christi 1979, no writ).

[396] *Waisath*, 474 S.W.2d at 447.

[397] Pierson v. GFH Fin. Servs., 829 S.W.2d 311, 314 (Tex. App.—Austin 1992, no writ).

[398] Yeaman v. Galveston City Co., 167 S.W. 710, 723 (1914).

[399] *Sandor*, 321 S.W.2d at 618.

[400] *Id.*

[401] Tifford v. Tandem Energy Corp., 562 F.3d 699 (5th Cir. 2009).

[402] *Sandor*, 321 S.W.2d at 619.

[403] Eric Fryar, *Filling in the Gaps: Shareholder Oppression After Ritchie v. Rupe*, 47:1 TEX. J. BUS. L. 1, 6 (2017).

[404] *E.g.*, Rio Grande Cattle Co. v. Burns, 17 S.W. 1043, 1045 (Tex. 1891).

[405] 13 S.W.2d 708, 710 (Tex. Civ. App.—El Paso 1929, writ ref'd).

[406] *Id.*

[407] *Sandor*, 321 S.W.2d at 619.

[408] *Id.*

[409] Ritchie v. Rupe, 443 S.W.3d 856, 879 (Tex. 2014).

[410] *Id.*

[411] RESTATEMENT (SECOND) OF TORTS § 222A, cmt.c (AM. LAW INST. 1965) ("In conversion the measure of damages is the full value of the chattel, at the time and place of the tort. When the defendant satisfies the judgment in the action for conversion, title to the chattel passes to him, so that he is in effect required to buy it at a forced judicial sale.").

[412] 526 S.W.2d 192 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

[413] 1 Oppression of Min. Shareholders and LLC Members § 3:4 & n. 12.

[414] *Earthman's, Inc.,* 526 S.W.2d at 196.

[415] *Id.*

[416] *Id.* at 196–97.

[417] *Id.* at 197.

[418] *Id.*

[419] *Id.* at 205.

[420] *Id.* at 198.

[421] *Id.*

[422] *Id.* at 199.

[423] *Id.* at 196, 199–200.

[424] *Id.* at 208.

[425] *Id.* at 195–96.

[426] *Id.* at 201.

[427] *Id.* at 202–203. The court held: "A provision which restricts a stockholder's right to sell or transfer his stock, particularly one which affords a prior right of purchase to the corporation or to another stockholder, is not looked upon with favor in the law and is strictly construed. It has generally been held that such a restriction is inapplicable to a transfer occurring as a result of an involuntary sale or by operation of law unless by specific provision in the restriction it is made applicable." (citing Casteel v. Gunning, 402 S.W.2d 529 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.); Gulf States Abrasive Mfg., Inc. v. Oertel, 489 S.W.2d 184 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.)).

[428] *Id.* at 204.

[429] Minter v. Sparks, 246 S.W.2d 954, 957 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.).

[430] *Earthman's, Inc.*, 526 S.W.2d at 204.

[431] *Id.*

[432] *Id.* at 199.

[433] *Id.* at 203.

[434] *Id.* at 206.

[435] *Id.* at 205.

[436] *Id.*

[437] Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth., 258 S.W.3d 613, 618 (Tex. 2008) (quoting Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).

[438] Arthur W. Tifford v. Tandem Energy Corp., 562 F.3d 699, 705 (5th Cir. 2009).

[439] Minter v. Sparks, 246 S.W.2d 954, 957 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.).

[440] *See* TEX. BUS. ORGS. CODE ANN. § 21.218 (West 2017).

[441] *In re White*, 429 B.R. 201, 215 (Bankr. S.D. Tex. 2010); Cardiac Perfusion Servs. v. Hughes, 380 S.W.3d 198, 205 (Tex. App.—Dallas 2012, *disapproved of by* Ritchie v. Rupe, 443 S.W.3d 856, 856 (Tex. 2014).; *Davis*, 754 S.W.2d 375, 377 (Tex. App.—Houston [1st Dist.] 1988, writ denied), *disapproved of on other grounds*, Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014).

[442] Commonwealth of Massachusetts v. Davis, 168 S.W.2d 216, 221 (Tex. 1942).

[443] Adam v. Harris, 564 S.W.2d 152, 155 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.); Ligon v. E.F. Hutton & Co., 428 S.W.2d 434, 438 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.). *See* Smith v. Maximum Racing, Inc., 136 S.W.3d 337, 343 (Tex. App.—Austin 2004, no pet.); Rodriguez v. Ortegon, 616 S.W.2d 946, 949 (Tex. Civ. App.—Corpus Christi 1981, no writ); Chrysler Credit Corp. v. Malone, 502 S.W.2d 910, 914 (Tex. Civ. App.—Fort Worth 1973, no writ; Ferrous Prods. Co. v. Gulf States Trading Co., 323 S.W.2d 292, 295 (Tex. Civ. App.—Houston [1st Dist.] 1959), *aff'd*, 160 Tex. 399, 332 S.W.2d 310 (1960); Henson v. Reddin, 358 S.W.358 S.W.3d 428, 435 (Tex. App.—Fort Worth 2012, no pet.); NXCESS Motor Cars, Inc. v. JPMorgan Chase Bank, 317 S.W.3d 462, 471 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); Khorshid, Inc. v. Christian, 257 S.W.3d 748, 759 (Tex. App.—Dallas 2008, no pet.).

[444] Earthman's, Inc. v. Earthman, 526 S.W.2d 192, 204 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (quoting Powell v. Forest Oil Corp., 392 S.W.2d 549, 552 (Tex. Civ. App.—Texarkana 1965, no writ)).

[445] Morey v. Page, 802 S.W.2d 779, 786 (Tex. App.—Dallas 1990, no writ); Lindsey v. Sec. Sav. Ass'n, 556 S.W.2d 570, 571 (Tex. Civ. App.—Dallas 1977, no writ).

[446] Ligon v. E.F. Hutton & Co., 428 S.W.2d 434, 438 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

[447] Rodriguez v. Ortegon, 616 S.W.2d 946, 949 (Tex. Civ. App.—Corpus Christi 1981, no writ) (citing White-Sellie's Jewelry Co. v. Goodyear Tire & Rubber Co., 477 S.W.2d 658, 662 (Tex. Civ. App.—Houston (14th Dist.) 1972, no writ); Powell v. Forest Oil Corp., 392 S.W.2d 549 (Tex. Civ. App. Texarkana 1965, no writ)).

[448] Ritchie vs. Rupe, 443 S.W.3d 856, 890 n.62 (Tex. 2014).

[449] *Id.* at 889.

[450] Yeaman v. Galveston City Co., 167 S.W. 710, 723 (1914).

[451] Khorshid, Inc. v. Christian, 257 S.W.3d 748, 759 (Tex. App.—Dallas 2008, no pet.).

[452] Smith v. Maximum Racing, Inc., 136 S.W.3d 337, 343 (Tex. App.—Austin 2004, no pet.).

[453] Earthman's, Inc. v. Earthman, 526 S.W.2d 192, at 204 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

[454] See *Smith*, 136 S.W.3d at 343 (characterizing qualified refusal as a "defense" and holding that the defendant had not proven it); Morey v. Page, 802 S.W.2d 779, 786 (Tex. App.—Dallas 1990, no writ) (holding that qualified refusal as a" ground of defense" was waived because the defendant did not submit it to the jury); *Khorshid*, 257 S.W.3d at 759 (upholding jury's finding that the defendant did not make a qualified refusal). *Cf.* Camacho v. Villareal, No. 05-96-01764-CV, 1999 WL 173690, at *4, n.3 (Tex. App.—Dallas Mar. 31, 1999, no pet.) (in dicta, not accepting the plaintiff's characterization of "a qualified refusal as an affirmative defense to conversion, although we have not found any authority so explicit.").

[455] Stein v. Maruricio, 580 S.W.2d at 82, 83 (Tex.Civ. App.—San Antonio 1979, no writ).

[456] *Id.*; *Earthman's Inc.*, 526 S.W.2d at 204. *But see* Rodriguez v. Ortegon, 616 S.W.2d 946, 949 ("[W]rongful intent is not required. Therefore, good faith could not have been asserted by the appellant to legally excuse his unreasonable refusal to transfer the stock.").

[457] *Earthman's, Inc.*, 526 S.W.2d at 205–6.

[458] *Id.* 204 ("Where the refusal is not absolute, but is qualified by certain conditions which are reasonable and justifiable, and which are imposed in good faith, and in recognition of the rights of plaintiff, it will not serve as a sufficient basis for an action for conversion.").

[459] *Id.* ("The conditions, however, must have a legal foundation, or rest on a reasonable doubt as to the validity of plaintiff's claim, or be based on a reasonable doubt as to defendant's duty under the circumstances."). *See also* Hofland v. Elgin-Butler Brick Co., 834 S.W.2d 409, 413 (Tex. App.—Corpus Christi 1992, no writ).

[460] Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699, 708 (5th Cir. 2009); Smith v. Maximum Racing, Inc., 136 S.W.3d 337, 343–44 (Tex. App.—Houston [1st Dist.] 1975, no writ); *Hofland*, 834 S.W.2d at 413; *Stein*, 580 S.W.2d at 83; *Earthman's*, 526 S.W.2d at 204.

[461] *Earthman's*, 526 S.W.2d at 204; *Hofland*, 834 S.W.2d at 413.

[462] *Smith*, 136 S.W.3d at 343 ("Where the refusal is not absolute, but is qualified by certain conditions which are reasonable and justifiable, and which are imposed in good faith, and in recognition of the rights of plaintiff, it will not serve as a sufficient basis for an action for conversion.").

[463] RESTATEMENT (SECOND) OF TORTS § 222A, illus. 1–4 (1965).

[464] 526 S.W.2d at 205.

[465] *Id.* at 204.

[466] *Id.* at 205.

[467] *Id.* at 206.

[468] *Id.* at 204.

[469] *Id.* at 205.

[470] *Id.*

[471] Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 619 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e).

[472] *Earthman's*, 526 S.W.2d at 202–3.

[473] *Earthman's* 526 S.W.2d at 205 ("The issues having been joined as to the legal determination of the parties' respective rights and duties as to the shares of stock beneficially owned by Mrs. Earthman, the question of whether the Earthman corporations subsequently acted arbitrarily and without reasonable grounds in refusing to transfer the stock as requested became a vital inquiry in the case.").

[474] *See id.* at 204.

[475] *Id.* at 205 ("Whether or not Earthman's, Inc., acted in good faith and upon reasonable grounds under the circumstances existing at the time of the letter of April 5, 1972, was an appropriate consideration for the jury.").

[476] *Id.* at 204 ("Where the qualified or conditional refusal is not reasonable or justifiable under the circumstances, and amounts to a denial of plaintiff's rights in the property, it will be sufficient to sustain an action for conversion, and it is for the jury, under proper instructions from the court, to pass on the existence of the qualification and its reasonableness."). *See also* Khorshid, Inc. v. Christian, 257 S.W.3d at 748, 759 (Tex. App.—Dallas 2008, no pet.) ("Whether a conversion defendant acted in good faith and upon reasonable grounds under the circumstances is a question for the jury."); Smith v. Maximum Racing, Inc., 136 S.W.3d at337, 344 (Tex. App.—Austin 2004, no pet.) (same); First State Bank, Morton v. Chesshir, 634 S.W.2d 742, 745 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.) ("Hence, the question of the bank's authorized or wrongful action was for submission to, and resolution by, the jury.").

[477] *Earthman's*, 526 S.W.2d at 205 ("This determination required the jury to consider not only the legal relationship of the parties but as well the entire set of circumstances affecting their relationship at the time of the letter of April 5, 1972.").

[478] Sneed v. Webre, 465 S.W.3d 169, 172 (Tex. 2015). *See* TEX. BUS. ORGS. CODE ANN. § 21.401 (West 2017).

[479] TEX. BUS. ORGS. CODE ANN. at § 21.401 (West 2017).

[480] Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 618 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e).

[481] *Id.*

[482] *Id.* at 618–19.(characterizing the right to sell unrestricted stock both as a vested property right and a vested contractual right); *see id.* at 618 ("The original stock certificates held by Williams constituted a contract between him and the corporation.").

[483] Tifford v. Tandem Energy Corp., 562 F.3d 699, 705 (5th Cir. 2009) (citing *Sandor*, 321 S.W.2d at 619; Prudential Petroleum Corp. v. Rauscher, Pierce & Co., 281 S.W.2d 457, 460 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.)).

[484] *Sandor*, 321 S.W.2d at 619.

[485] Rodriguez v. Ortegon, 616 S.W.2d at 946, 949 (Tex. Civ. App.—Corpus Christi 1981, no writ) ("The lack of formal presentation of the stock for transfer was not pled by the appellant as an affirmative defense under Rule 94, T.R.C.P., so any objection is thereby waived."); *Prudential*, 281 S.W.2d at 460 ("Appellant is in no position to argue that plaintiff failed to prove proper presentation of Stock Certificate No. 772 to the corporation for transfer on its books under the undisputed facts of this record . . . Furthermore, the objection is in nature of a plea of 'an avoidance' (of liability) 'or affirmative defense' and waived under Rule 94, T.C.P., unless expressly pled.").

[486] Earthman's, Inc. v. Earthman, 526 S.W.2d 192, 204 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) ("If under the circumstances existing at the time of the letter of April 5, 1972 there was no legal justification for the refusal of the Earthman corporations to immediately effectuate the transfer of Mrs. Earthman's shares to her, the fact that they may have relied upon advice of counsel or that they innocently believed their actions to be justified, would not constitute a legal defense to an action for conversion."). *See* Kolp v. Prewitt, 9 S.W.2d 490, 493 (Tex. Civ. App.—Fort Worth 1928, no writ).

[487] 616 S.W.2d at 949 (citing Bus. Corp. Act, art. 2.41, D). Acts 2003, 78th Leg., ch. 238, 2003 Tex. Gen. Laws (current version at TEX. BUS. ORGS. CODE ANN. § 3.102 (West 2006) ("A director shall not be liable for any claims or damages that may result from his acts in the discharge of any duty imposed or power conferred upon him by the corporation if, in the exercise of ordinary care, he acted in good faith and in reliance upon the written opinion of an attorney for the corporation."). The *Rodriguez* court pointed out the lack of a written opinion from the corporate attorney in its opinion. Rodriguez v. Ortegon, 616 S.W.2d at 949.

[488] *Rodriguez*, 616 S.W.2d at 949.

[489] *Id.* at 948.

[490] *Id.* at 949–50. (rejecting the defense because the statute required the advice of counsel to be in writing, and "[n]o written opinion of counsel for the corporation advising the appellant to refuse to transfer the stock was entered in the record of this case."); *Id.*; The current provision no longer includes a requirement of a writing; however, the defense does require proof of the director's good faith and ordinary care, §3.102(a), and is not available if the director "has knowledge of a matter that make the reliance unwarranted." TEX. BUS. ORGS. CODE ANN. §§ 3.102(a)(2) 3.102(b) (West 2017).

[491] *Earthman's*, 526 S.W.2d at 205 ("The action for declaratory relief was brought by Mrs. Earthman for the purpose of having her rights with respect to this stock determined and declared. Whether, after the filing of this action and during its pendency the Earthman defendants acted arbitrarily and without reasonable basis in refusing the requested transfer is a question requiring a factual consideration of the entire relationship between the parties.").

[492] *Id.* at 205 ("Had, for example, Earthman's, Inc. initiated a bill of interpleader and placed the Earthman's, Inc. stock in the registry of the court pending judicial determination of the legal effect of the restrictive provision in the articles of incorporation, it could hardly be said that its subsequent refusal to complete the transferon its books, pending such determination, would have constituted a conversion authorizing recovery of the full market value of the stock.").

[493] Adam v. Harris, 564 S.W.2d 152, 155 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

[494] TEX. CIV. PRAC. & REM. CODE § 16.003(a) (West Supp. 2016); Vanderpool v. Vanderpool, 442 S.W.3d 756, 762 (Tex. App.—Tyler 2014, no pet.).

[495] Burns v. Rochon, 190 S.W.3d 263, 271 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

[496] Sharpe v. Roman Catholic Diocese, 97 S.W.3d 791, 796 (Tex. App.—Dallas 2003, pet. denied). See also Hofland v. Elgin-Butler Brick Co., 834 S.W.2d at 409, 413 (Tex. App.—Corpus Christi 1992, no writ); *Earthman's*, 526 S.W.2d at 204; Young v. J & J Bail Bonds Co., 792 S.W.2d 484, 485 (Tex.App.—El Paso 1990, no writ).

[497] *Hofland*, 834 S.W.2d at 414–15.

[498] 167 S.W. at 710, 723 (Tex. 1914).

[499] *Earthman's*, 526 S.W.2d at 200–1; Intermedics, Inc. v. Grady, 683 S.W.2d 842, 847 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

[500] *See* Yeaman, v. Galveston City Co., 167 S.W. 710, 723 (1914)

[501] *Id.*

[502] *Id.* at 723–24.

[503] *See, e.g., Earthman's*, 526 S.W.2d at 206 ("An officer who actively participates with the corporation in the conversion may be held personally responsible, not solely by reason of his corporate office, but because of his active participation in the tortious act."). *See* also Bower v. Yellow Cab Co., 13 S.W.2d 708, 710 (Tex.Civ.App.—El Paso, 1929, writ ref'd); Wichita Falls Grain Co. v. Taylor Foundry Co., 649 S.W.2d 798, 801 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) ("officers of corporations who actively participate with the corporation in performing a tortious act might be personally liable as a joint tortfeasor"). *See also* Lone Star Mining Co. v. Texeramics, Inc., 363 S.W.2d 868, 869 (Tex.Civ.App.—Eastland, 1962, writ ref'd n.r.e.); Permian Petroleum Co. v. Barrow, 484 S.W.2d 631, 635 (Tex.Civ.App.—El Paso, 1972, no writ).

[504] Keyser v. Miller, 47 S.W.3d 728, 729 (Tex. App.—Houston [1st Dist.] 2001), *rev'd on other grounds*, 90 S.W.3d 712 (Tex. 2002).

[505] Sutton v. Reagan & Gee, 405 S.W.2d 828, 833 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.); *Earthman's, Inc.*, 526 S.W.2d at 206 ("An officer who actively participates with the corporation in the conversion may be held personally responsible, not solely by reason of his corporate office, but because of his active participation in the tortious act.").

[506] Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942) ("It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.").

[507] N.S. Sportswear, Inc. v. State, 819 S.W.2d 230, 232 (Tex. App.—Austin 1991, no writ). *See also Bower*, 13 S.W.2d at 710 ("And those of the company's directors and officers who participated therein by instigating, aiding, or abetting the company in so doing are liable with the company as joint tort-feasors" for conversion of stock for failure to issue after demand.); *Permian*, 484 S.W.2d at 634 ("Where the evidence shows liability upon the part of a company for conversion, then those of the company's directors and officers who participated therein by instigating, aiding, or abetting the company in so doing are liable with the company as joint tort-feasors."); *Earthman's, Inc.*, 526 S.W.2d at 206 ("[W]here corporate directors and officers actively participate in the conversion of another's property by instigating, aiding or abetting the corporation, they may be held liable as joint tortfeasors with the corporation.").

[508] Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 620 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e).

[509] Although not addressed directly in the case law, presumably an agreement between a single majority shareholder and the corporation would not constitute a civil conspiracy. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 777 (1984).

[510] "Where the corporation refuses to issue shares as a result of an agreement between two of the directors, those directors may be sued for civil conspiracy to commit conversion." Watts v. Miles, 597 S.W.2d at 386, 388 (Tex. Civ. App.—San Antonio 1980, no writ). There is no indication in that case that a claim was asserted directly against the corporation). *See also* Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699, 710 (5th Cir. 2009) (civil conspiracy claim where individual "Defendants agreed by corporate resolution to cancel Certificate 1069 and the 2.7 million shares it represents" thus creating "a genuine issue on conversion and the lawfulness of Defendants' actions"). In Texas, a civil conspiracy is a combination "to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." Lane v. Halliburton, 529 F.3d 548, 564 (5th Cir. 2008). The elements are: "(1) two or more persons; (2) an end to be accomplished; (3) meeting of the minds on the end or course of action; (4) one or more overt, unlawful acts; and (5) proximately resulting in injury." *Id.* A defendant's liability is derivative of an underlying tort; without independent tortious conduct, there is no actionable civil conspiracy claim. Miller v. Raytheon Aircraft Co., 229 S.W.3d 358, 381 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

[511] *See* R.J. Suarez Enters., Inc. v. PNYX L.P., 380 S.W.3d 238, 242 (Tex. App.—Dallas 2012, no pet.); Wiese v. Pro Am Servs. Inc., 317 S.W.3d 857, 862 (Tex. App.—Houston [14th Dist.] 2010, no pet.); Varel Mfg. Co. v. Acetylene Oxygen Co., 990 S.W.2d 486, 497 (Tex. App.—Corpus Christi 1999, no pet.).

[512] Gardner v. Jones, 570 S.W.2d 198, 201 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); Holland v. Lesesne, 350 S.W.2d 859, 865 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.) ("Hence, such a tender will not preclude the recovery of damages for the conversion.").

[513] Mathews v. First Citizens Bank, 374 S.W.2d 794, 796–97 (Tex. Civ. App. 1963, writ ref'd n.r.e.).

[514] *R.J. Suarez Enters. Inc.*, 380 S.W.3d at 243.

[515] *Id.*; Horlock v. Horlock, 614 S.W.2d 478, 484 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). *R.J. Suarez Enters. Inc.*, 380 S.W.3d at 243.

[516] Prewitt v. Branham, 643 S.W.2d 122, 123 (Tex. 1983); Rodriguez v. Ortegon, 616 S.W.2d 946, 949 (Tex. Civ. App.—Corpus Christi 1981, no writ).

[517] United Mobile Networks, L.P. v. Deaton, 939 S.W.2d 146, 147–48 (Tex. 1997); Imperial Sugar Co. v. Torrans, 604 S.W.2d 73, 74 (Tex. 1980); Varel Mfg. Co. v. Acetylene Oxygen Co., 990 S.W.2d 486, 497 (Tex. App.—Corpus Christi 1999, no pet.); Taiwan Shrimp Farm Vill. Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 71 (Tex. App.—Corpus Christi 1996, writ denied); *R.J. Suarez Enters. Inc.*, 380 S.W.3d at 242; First Nat'l Bank of Missouri City v. Gittelman, 788 S.W.2d 165, 169 (Tex. App.—Houston [14th Dist.] 1990, writ denied); Patterson v. Wizowaty, 505 S.W.2d 425, 427 (Tex. Civ. App.—Houston [14th Dist.] 1974, no pet.).

[518] *R.J. Suarez Enters. Inc.*, 380 S.W.3d at 242–43. *See also* Ayala v. Valderas, No. 02-07-00134-CV, 2008 WL 4661846, at *5, *15 (Tex. App.—Fort Worth Oct. 23, 2008, no pet.) (mem. op.) (evidence factually insufficient to support damages award because award not based on fair market value of property at time of conversion); Bishop v. Geno Designs Inc., 631 S.W.2d 581, 584 (Tex. App.—Tyler 1982, no writ) (evidence insufficient to support damages award because no evidence of fair market value of property converted); Engineered Plastics Inc. v. Woolbright, 533 S.W.2d 906, 908 (Tex. App.—Tyler 1976, no writ) (evidence insufficient to support finding of market value because plaintiff offered evidence of replacement value and made no attempt to prove market value); *See also* Hughes Blanton, Inc. v. Shannon, 581 S.W.2d 538, 540 (Tex. Civ. App.—Dallas 1979, no writ) (replacement value less 40% discount was not competent evidence to establish fair market value of converted tools).

[519] *Taiwan Shrimp*, Inc., 915 S.W.2d at 71; Exxon Corp. v. Middleton, 613 S.W.2d 240, 246 (Tex. 1981); City of Pearland v. Alexander, 483 S.W.2d 244, 247 (Tex. 1972); Taiwan Shrimp Farm Vill. Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc., 915 S.W.2d 61, 71 (Tex. App.—Corpus Christi 1996, writ denied).

[520] This is essentially the fact pattern in Davis v. Sheerin. 754 S.W.2d 375 (Tex. App.—Houston [1st Dist.] 1988, writ denied). While the appellate opinion indicates that the corporate record did reflect the plaintiff's share ownership, the majority shareholder denied that the plaintiff owned shares, and the court held that the conspiring to deprive plaintiff of his ownership of stock in a corporation was a particularly oppressive act. Id. at 382. *See also* Manbourne, Inc. v. Conrad, 796 F.2d 884, 889 (7th Cir. 1986) (Under Wisconsin law, directors breached fiduciary duty and denied rights as a shareholder by refusing to record the transfer and conversion of shares to minority shareholder and then refusing to allow inspection of corporate records because plaintiff was not a shareholder of record); Georgeson v. DuPage Surgical Consultants, Ltd., No. 05 CV 1653, 2007 WL 914219, at *4 (N.D. Ill. Mar. 22, 2007) (Under Illinois law, plaintiff stated a shareholder oppression claim where defendants "completely denied him the incidents of ownership of his shares" by eliminating his shares (as reflected on corporate income tax returns) and refused to compensate him for those shares after he left the company.).

[521] This was the relief ordered in Ritchie v. Rupe, 339 S.W.3d 275, 280 (Tex. App.—Dallas 2011), *rev'd*, 443 S.W.3d 856 (Tex. 2014).

[522] The plaintiff's stock would become treasury shares, and the majority shareholder's percentage stock interest would increase.

[523] *See* Gulf States Abrasive Mfg., Inc. v. Oertel, 489 S.W.2d at 184, 185 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

[524] Hankey v. Employer's Cas. Co., 176 S.W.2d 357, 361 (Tex. Civ. App.—Galveston 1943, no writ). "In conversion the measure of damages is the full value of the chattel, at the time and place of the tort. When the defendant satisfies the judgment in the action for conversion, title to the chattel passes to him, so that he is in effect required to buy it at a forced judicial sale." RESTATEMENT (SECOND) OF TORTS § 222A, cmt.c (1965).

[525] Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 232 S.W.3d 883, 890 (Tex. App.—Dallas 2007), *rev'd*, 299 S.W.3d 106 (Tex. 2009); Willis v. Donnelly, 118 S.W.3d 10, 40–41 (Tex. App.—Houston [14th Dist.] 2003), *aff'd in part*, *rev'd in part on other grounds*, 199 S.W.3d 262, 279 (Tex. 2006); InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 889 (Tex. App.—Texarkana 1987, no writ.), *disapproved on other grounds*, Tex. Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240 (Tex. 2002).

[526] Hollis v. Hill, 232 F.3d 460, 467 (5th Cir. 2000); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 271 (Tex. App.—Dallas 2012, pet. denied); Ritchie v. Rupe, 339 S.W.3d 275, 280 (Tex. App.—Dallas 2011), *rev'd*, 443 S.W.3d 856 (Tex. 2014); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514 (1975).

[527] *Hollis*, 232 F.3d at 468; Moll, Shareholder Oppression, *supra* note 390, at 38.

[528] Patterson v. Wizowaty, 505 S.W.2d 425, 427 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). *See also* Page v. Walser, 213 P. 107, 113 (Nev. 1923) ("Where there is no market value, proof may be given of transactions in the particular stock, and the prices at which the stock has been sold or optioned, to show its actual value.").

[529] Gorham v. Massillon Iron & Steel Co., 120 N.E. 467, 471 (Ill. 1918). *See also* Zokoych v. Spalding, 344 N.E.2d 805, 821 (Ill. 1976) ("To arrive at the actual value of plaintiff's half interest it is therefore necessary to take into consideration the actual value of Ample's assets, the amount of its liabilities and its earning power prior to the transfer of its assets and close of its business. It is necessary to determine those values from the actual amounts as to the value of its assets, liabilities and earning power, rather than the amounts carried on its books.").

[530] *Akin,* 232 S.W.3d at 890.

[531] Willis v. Donnelly, 118 S.W.3d 10, 41 (Tex. App.—Houston [14th Dist.] 2003, *rev'd in part on other grounds*, 199 S.W.3d 262 (Tex. 2006).

[532] Cardiac Perfusion Servs., Inc. v. Hughes, 380 S.W.3d 198, 204 (Tex. App.—Dallas 2012), *rev'd in part on other grounds*, Ritchie v. Rupe, 436 S.W.3d 790 (Tex. 2014); Ritchie v. Rupe, 339 S.W.3d 275, 300 (Tex. App.—Dallas 2011), *rev'd*, 443 S.W.3d 856 (Tex. 2014); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 258 (Tex. App.—Dallas 2012, pet. denied).

[533] *Ritchie*, 339 S.W.3d at 301 (the plaintiff's expert's "valuation sought to determine the enterprise value—not the fair market value—of the Stock.")

[534] *Id.* ("Two factors affecting the fair market value of the Stock are its lack of marketability and the fact that it represents a minority position in RIC.").

[535] *Cardiac Perfusion Servs.*, 380 S.W.3d at 204; *Argo*, 380 S.W.3d at 271. *See also* Swope v. Siegel-Robert, Inc., 74 F. Supp. 2d 876, 911 (E.D. Mo. 1999), *aff'd in part, rev'd in part*, 243 F.3d 486 (8th Cir. 2001) ("Thus, enterprise value by its nature does not include a discount based on shares' minority status or lack of marketability, as the purchase contemplated gives the buyer total control over the corporation which the buyer has procured on the market.").

[536] Many courts have recognized the unfairness of applying discounts in the context of a shareholder dissenting to a merger. *See, e.g.*, Brown v. Allied Corrugated Box Co., 154 Cal. Rptr. 170, 177 (Cal. Dist. Ct. App. 1979) (when a corporation elects to buy out the shares of a dissenting shareholder, the fact that the shares are noncontrolling is irrelevant to their value); Columbia Mgmt. Co. v. Wyss, 765 P.2d 207, 214 (Or. Ct. App. 1988) ("To include a minority discount would simply penalize him while allowing the corporation to buy his shares cheaply."); Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989) ("to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall").

[537] The appellate opinion in Ritchie noted: "Enterprise value has been seen as the appropriate valuation when a minority shareholder, with no desire to leave the corporation, has been forced to relinquish his ownership position by the oppressive conduct of the majority. *See* Douglas K. Moll, *Shareholder Oppression*, *supra* note 390 and "Fair Value": of Discounts, Dates, and Dastardly Deeds in the Close Corporation, 54 DUKE L.J. 293, 319–20 (2004). In that situation, '[t]he oppressed minority investor was not looking to sell, and the oppressive majority investor, absent the threat of dissolution or other judicial sanction, was not looking to buy.' *Id.* at 321, n.108; *Ritchie*, 339 S.W.3d at 301.

[538] R.J. Suarez Enters., Inc. v. PNYX L.P., 380 S.W.3d 238, 243 (Tex. App.—Dallas 2012, no pet.).

[539] *Id.*

[540] United Mobile Networks, L.P. v. Deaton, 939 S.W.2d 146, 148 (Tex. 1997); *see* Wells Fargo Bank Nw., N.A. v. RPK Capital XVI, L.L.C., 360 S.W.3d 691, 706 (Tex. App.—Dallas 2012, no pet.); Varel Mfg. Co. v. Acetylene Oxygen Co., 990 S.W.2d 486, 498 (Tex. App.—Corpus Christi 1999, no pet.); Groves v. Hanks, 546 S.W.2d 638, 648 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

[541] Dorchester Gas Producing Co. v. Harlow Corp., 743 S.W.2d 243, 257 (Tex. App.—Amarillo 1987 writ denied).

[542] *See, e.g.*, Caballero v. Anselmo, 759 F. Supp. 144, 153 (S.D.N.Y. 1991) (holding that there "is no provision for a discount under those circumstances; consequently, we decline to apply one" in determining damages for conversion of stock in a closely-held corporation). An analogous situation arose in *Robblee v. Robblee*, which was a dispute over a contract providing for a majority shareholder to buy out the minority but did not specify the price. 841 P.2d 1289 (Wash. Ct. App. 1992). The court determined that the plaintiff was entitled to the fair market value of his shares. The court held that the plaintiff "was not oppressed as a minority shareholder" and thus a fair market value minority discount could apply. *Id.* at 1293. Nevertheless, the court held that it was error to discount minority shares being acquired by the majority. *Id.* at 1295 (because no market was involved in valuing the shares, and majority shareholder had strong incentive to buy). The minority discount is "inappropriate to an 'internal transaction', because market recognition of a minority discount has little validity when the corporation or someone already in control of the corporation is the purchaser." *Id.* at 1294.

[543] Storms v. Reid, 691 S.W.2d 73, 75 (Tex. App.—Dallas 1985, no pet.).

[544] *United Mobile*, 939 S.W.2d at 148; *see* Wise v. SR Dallas, LLC, 436 S.W.3d 402, 414 (Tex. App.—Dallas 2014, no pet); Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd., 287 S.W.3d 877, 889 (Tex. App.—Dallas 2009, no pet.).

[545] Ritchie v. Rupe, 339 S.W.3d 275, 280 (Tex. App.—Dallas 2011), *rev'd,* 443 S.W.3d 856 (Tex. 2014) ("If Ann had been able to sell to a willing buyer under no obligation to purchase, Ann would have obtained the "fair market value" of the Stock. As an equitable remedy for appellants' oppressive conduct, Ann is entitled to no more than that.").

[546] Green Int'l v. Solis, 951 S.W.2d 384, 391 (Tex. 1997); Southwestern Inv. v. Alvarez, 453 S.W.2d 138, 141 (Tex. 1970); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)(2) (West 2003).

[547] Earthman's, Inc. v. Earthman, 526 S.W.2d 192, 208 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

[548] *Id.*

[549] *Id.*

[550] *See* Broesche v. Jacobson, 218 S.W.3d 267, 277 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

[551] *See* High Plains Wire Line Servs., Inc. v. Hysell Wire Line Servs., Inc., 802 S.W.2d 406, 408 (Tex. App.—Amarillo 1991, no writ).

[552] TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 1985) ("A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: . . . . (8) an oral or written contract.").

[553] R.J. Suarez Enters., Inc. v. PNYX L.P., 380 S.W.3d 238, 249 (Tex. App.—Dallas 2012, no pet.); Exxon Corp. v. Bell, 695 S.W.2d 788, 791 (Tex. App.—Texarkana 1985, no writ); *High Plains*, 802 S.W.2d at 408. *See also* NRC, Inc. v. Pickhardt, 667 S.W.2d 292, 294 (Tex. App.—Texarkana 1984, writ ref'd n.r.e.) ("Pickardt's suit for rescission and special damages was a suit founded upon a written contract . . . ."); Berlow v. Sheraton Dallas Corp., 629 S.W.2d 818, 823 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

[554] TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (West 1985) ("To recover attorney's fees under this chapter: (1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented."). *See also High Plains*, 802 S.W.2d at 410 (denying recovery of attorneys' fees in a conversion claim because no evidence of presentment).

[555] *See* Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 618 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.). ("The original stock certificates held by Williams constituted a contract between him and the corporation. Williams had a vested property right in the value of his stock.").

[556] *Id.* The opinion does not mention whether the plaintiff sought attorneys' fees.

[557] 802 S.W.2d 406, 410 (Tex. App.—Amarillo 1991, no writ).

[558] *Id.*

[559] *Id.*

[560] 404 S.W.3d 18 (Tex. App.—Houston [1st Dist.] 2013). *Boehringer* was the last significant shareholder oppression doctrine case decided before *Ritchie v. Rupe* and is analyzed in Eric Fryar, *Filling in the Gaps: Shareholder Oppression After Ritchie v. Rupe*, 47:1 TEX. J. BUS. L. 1, 20 (2017).

[561] *Id.* at 22.

[562] *Id.* at 22–23.

[563] *Id.* at 23.

[564] *Id.*

[565] *Id.* at 28.

[566] *Id.* at 31.

[567] *Id.*

[568] *Sandor*, 321 S.W.2d at 618.

[569] *Id.* at 619.

[570] Gulf States Abrasive Mfg., Inc. v. Oertel, 489 S.W.2d at 184, 187, n.4 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

[571] *Sandor*, 321 S.W.2d at 619.

[572] Arthur W. Tifford, PA v. Tandem Energy Corp., 562 F.3d 699, 705 (5th Cir. 2009).

[573] Boehringer v. Konkel, 404 S.W.3d 18, 30, 31 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

[574] *Id.* at 29.

[575] *Id.* at 32.

[576] *See id.* at 29–30, 31.

[577] *Id.* at 23.

[578] *Id.* at 29.

[579] *Id.* at 28, 32.

[580] *Id.* at 24.

[581] *Id.* at 22, 30.

[582] Schneider v. Union Oil Co., 86 Cal. Rptr. 315, 318 (1st Dist. 1970).

[583] *Id.* at 317–18 ("As to defendant's first contention, it is well settled that in this state, plaintiff has an election of remedies as a result of defendant's breach of fiduciary duty, with an action for damages for alleged conversion as only one of the available alternatives.").

[584] *Id.* at 318.

[585] *Id.*

[586] Patterson v. Wizowaty, 505 S.W.2d 425, 427 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) ("The measure of damage in a stock conversion suit is the market value of the stock at the time of the conversion."); Ligon v. E.F. Hutton & Co., 428 S.W.2d 434, 439 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) ("[T]he measure of damages is the value of the property converted at the time of the conversion, with legal interest.").

[587] Hollis v. Hill, 232 F.3d 460, 472 (5th Cir. 2000).

[588] Ritchie v. Rupe, 443 S.W.3d 856, 888–89 (Tex. 2014).