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Business Corporation Law § 626(e): Two-Person Close Corporation Does Not Deter New York Court of Appeals from Steadfast Application of Statutory Rule of Recovery in Shareholder Derivative Suits

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Bartolomeo, the one most benefited was the career criminal—the criminal most threatening to society—who likely had retained an attorney on prior pending charges and therefore had immunized himself from questioning regarding his most recent criminal acts,[40] leading to an unintended and harmful result.[41]

The overturning of *People v. Bartolomeo* does not indicate a retreat from New York's celebrated history of providing broad protections to suspects of crimes. To the contrary, the court's adherence to and reaffirmation of *People v. Rogers* confirms a laudable dedication to protecting the rights of criminal defendants by adequately protecting them from self-incrimination and preserving the attorney-client relationship.

Steven E. Rindner

BUSINESS CORPORATION LAW

Business Corporation Law § 626(e): Two-person close corporation does not deter New York Court of Appeals from steadfast application of statutory rule of recovery in shareholder derivative suits

In shareholder derivative suits, the established rule of recovery states that pecuniary awards are most commonly returned to the corporation, rather than the shareholder-plaintiff.[1] New York's

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[40] *See id.* at 342, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480; *Bartolomeo*, 53 N.Y.2d at 239, 423 N.E.2d at 379, 440 N.Y.S.2d at 902 (Wachtler, J., dissenting).

[41] *See Bing*, 76 N.Y.2d at 348, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484. Because interrogation is a valuable source of information for law enforcement authorities, unnecessary extensions of *Rogers* seriously impedes effective crime control. *See Miranda*, 384 U.S. at 477-78; *see also* People v. Skinner, 52 N.Y.2d 24, 34-35, 417 N.E.2d 501, 506, 436 N.Y.S.2d 207, 212 (1980) (Jasen, J., dissenting) (for centuries law enforcement has relied heavily upon statements of guilty persons).

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[1] *See* Ross v. Bernhard, 396 U.S. 531, 538 (1970) (citing Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522 (1947)); Bokat v. Getty Oil Co., 262 A.2d 246, 249 (Del. Super. Ct. 1970); Keenan v. Eshleman, 23 Del. Ch. 234, 2 A.2d 904, 911-12 (1938); Wolff v. Wolff, 67 N.Y.2d 638, 641, 490 N.E.2d 532, 533, 499 N.Y.S.2d 665, 667 (1986); Isaac v. Marcus, 258 N.Y. 257, 264, 179 N.E. 487, 489 (1932); *see also* 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 119.05, at 119-106 (1990) [hereinafter Z. CAVITCH] (because derivative suit enforces corporate right, recovery belongs to corporation).

The rationale underlying this rule is that the shareholder is actually seeking relief for a corporate injury and any recovery should properly benefit the corporation. *See* Gordon v. Fundamental Invs. Inc., 362 F. Supp. 41, 44-46 (S.D.N.Y. 1973) (injury to corporation rather than individual); Liken v. Shaffer, 64 F. Supp. 432, 438 (N.D. Iowa 1946) (action stemming from corporate injury belongs to corporation not individual shareholder); *see also* H. HENN

Business Corporation Law ("BCL") provides a statutory mechanism for achieving this result.[2] However, in a derivative action where the wrongdoer and the plaintiff are both shareholders, strict application of the general rule leads to a seemingly anomalous re-

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& J. ALEXANDER, LAWS OF CORPORATIONS § 358, at 1037 (3d ed. 1983) (plaintiff-shareholder sues as guardian *ad litem* for corporation; not for own right or benefit); Z. CAVITCH, *supra*, § 119.01[1], at 119-6 (derivative suits are brought to enforce corporate rights).

Recognition of a corporate injury distinct from that of the individual requires adherence to the corporate "entity" concept, which, it has been suggested, was not the original basis for derivative suits. *See* Prunty, *The Shareholders' Derivative Suit: Notes on its Derivation*, 32 N.Y.U. L. REV. 980, 989 (1957) ("shareholders' action was conceived as an individual or class action parallel rather than tangential to the corporate right"). This perspective, however, can create a conceptual problem in those cases where there are insiders who owe a duty to the other shareholders as well as to the corporation itself. *See* Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505, 515 (1975). It is in the context of small close corporations that the entity concept is at its weakest. *See* 1 F. O'NEAL & R. THOMPSON, O'NEALS CLOSE CORPORATIONS § 1.10, at 44 (3d ed. & Supp. 1990) [hereinafter O'NEAL & THOMPSON] (noting that dispensing with entity concept by piercing corporate veil almost never arises except where there are few shareholders); *see also* Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. REV. 471, 472 (1956) (comment on North Carolina Supreme Court's confusing treatment of entity concept). It seems that the inherent conceptual difficulties associated with the award of damages to the corporate entity, when, in reality the injury is felt by the individual standing before the court, is what creates a sense of injustice when the general rule of recovery is strictly followed. "[I]t seems in some cases almost a travesty of justice, exalting form over substance, to demand the observance of derivative action formalities in closely held corporate disputes." Welch, *Shareholder Individual and Derivative Actions: Underlying Rationales and the Closely Held Corporation*, 9 J. CORP. L. 147, 170 (1984) (concluding nonetheless that "a generic exception, treating closely held corporations differently from other corporations, cannot be supported"); *see* Z. CAVITCH, *supra*, § 118.02, at 118-5. "Of course, it is hard to conceive of a wrong to a corporation which at the same time does not in some way affect its members," *id.*, for "[t]he derivative stockholder does not act altruistically when he sues 'for the benefit of the corporation'; he sues to promote his own interests as a stockholder." Koessler, *The Stockholder's Suit: A Comparative View*, 46 COLUM. L. REV. 238, 243 (1946).

[2] N.Y. BUS. CORP. LAW § 626(e) (McKinney 1986 & Supp. 1991). The statute states in pertinent part: "If the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff . . . the court . . . shall direct him . . . to account to the corporation . . . ." *Id.*

This section has been described as a codification of Clarke v. Greenberg, 296 N.Y. 146, 71 N.E.2d 443 (1947). *See* 3 I. KANTROWITZ & S. SLUTSKY, WHITE ON NEW YORK CORPORATIONS § 626.06, at 6-676.1 (13th ed. 1990) [hereinafter KANTROWITZ & SLUTSKY]. In *Greenberg*, corporate recovery was considered in the nature of a constructive trust for the benefit of the corporation. *Greenberg*, 296 N.Y. at 150, 71 N.E.2d at 445. This type of action is to be distinguished from a direct action where individual recovery is the rule. *See* Rossi v. Kelly, 96 A.D.2d 451, 452, 465 N.Y.S.2d 1, 3 (1st Dep't 1983); Abelow v. Grossman, 91 A.D.2d 553, 554, 457 N.Y.S.2d 30, 32 (1st Dep't 1982); Siegel v. Engelmann, 143 N.Y.S.2d 193, 195, 1 Misc. 2d 447, 449 (Sup. Ct. Queens County 1955). *See generally* D. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 2:01 (1986) (distinguishing direct from derivative actions); H. HENN & J. ALEXANDER, *supra* note 1, § 360 (same); Note, *Distinguishing Between Direct and Derivative Shareholder Suits*, 110 U. PA. L. REV. 1147 *passim* (1962) (same).

sult. In such a case, the guilty party benefits by sharing indirectly in the recovery.[3] The peculiar effect of this rule is of greater significance when examined in the context of small, closely held corporations.[4] Section 626(e) of the BCL provides no exception to the general rule of recovery in recognition of such a situation.[5]

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[3] *See* Backus v. Finkelstein, 23 F.2d 357, 366 (D. Minn. 1927) (obvious that it is "highly improper to direct that the moneys here recovered on behalf of the corporation shall be paid into the treasury thereof," because it is like "paying the moneys back into the custody and control of those from whom the recovery is had"); Hyde Park Terrace Co. v. Jackson Bros. Realty Co., 161 A.D. 699, 701-02, 146 N.Y.S. 1037, 1039 (2d Dep't 1914) (allowing recovery to enure to tort feasors' benefit is "result that is abhorrent to every conception of equity" and "[t]here is something abnormal in a judgment that allows the persons who did the fraudulent thing to share in the recovery for their guilt"); Alexander v. Quality Leather Goods Corp., 150 Misc. 577, 581, 269 N.Y.S. 499, 503 (Sup. Ct. N.Y. County 1934) (where corporation had already been dissolved, recovery was given directly to innocent shareholder and not shared by two remaining shareholders guilty of misconduct). These cases appear to recognize an exception to the general rule in situations where enriching the corporate treasury would result in a benefit to all the shareholders—including the wrongdoer. *But see infra* note 28 (shareholder's right to share profits contingent upon declaration of dividends).

[4] *See* Miller v. Geerlings, 256 Iowa 569, 128 N.W.2d 207, 212 (1964). While this peculiarity exists with both large public and small closely held corporations, in either case the proportion in which each shareholder will share in the recovery is equal to that of his stock holdings. *See id.*; B. BLACK, CORPORATE DIVIDENDS AND STOCK REPURCHASES § 1.01, at 1-1 (1990) (dividends are distributed in proportion to shares owned). Thus, where there are only two shareholders, one of which is a wrongdoer, he will share in 50% of the damage award. *See Wolff*, 67 N.Y.2d at 641, 490 N.E.2d at 533, 499 N.Y.S.2d at 667; *Grossman*, 91 A.D.2d at 554, 457 N.Y.S.2d at 32; *see also* O'NEAL & THOMPSON, *supra* note 1, at 120 (noting potential inadequacy of derivative suit in context of close corporation).

Courts have held that when there are few shareholders, and all are presently before the court, the action will be permitted as an individual action rather than a derivative one. *See* Johnson v. Gilbert, 127 Ariz. 410, 621 P.2d 916, 918 (Ariz. Ct. App. 1980) (applying partnership law principles). The American Law Institute has gone so far as to state that when a corporation is closely held, a court may treat a derivative action as a direct one, provided there is no threat of multiple actions, creditors are protected, and distribution is fair among all interested parties. A.L.I., *Principles of Corporate Governance* § 7.01 (Tent. Draft No. 8, 1988) [hereinafter A.L.I.]. For a discussion of Tentative Draft No. 8, 1988, see Continuation of Discussion of Principles of Corporate Governance, 64 A.L.I. PROC. 196-99 (1988).

[5] *See* N.Y. BUS. CORP. LAW § 626(e) (McKinney 1986 & Supp. 1991). BCL section 626(e) states in pertinent part: "This paragraph shall not apply to any judgment rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage sustained by them." *Id.* It has been suggested that this sentence refers to cases which have recognized individual pro rata recovery in the past. *See* KANTROWITZ & SLUTSKY, *supra* note 2, at 6-676.1; Note, *Corporations — Entity Theory — Derivative Actions — Pro Rata Individual Recovery*, 5 B.C. IND. & COMM. L. REV. 773, 776 n.15 (1964). However, the Legislative Studies and Reports noted in McKinney's state that the last sentence is based upon Wisconsin Business Corporation Law section 180.405. N.Y. BUS. CORP. LAW § 626, at 351 (McKinney 1986). The relevant difference in the Wisconsin statute is in the use of the word "may" rather than New York's use of the word "shall" in the previously quoted sentence, which refers to the return of proceeds to the corporation. WIS. STAT. ANN. § 180.405(1) (West 1957 & Supp. 1990). Thus, a court in Wisconsin may exercise discretion in determin-

Recently, in *Glenn v. Hoteltron Systems Inc.*,[6] the New York Court of Appeals held that in a derivative action, even where the corporation has but two shareholders who comprise all of the directors, officers, and shareholders, a section 626(e) recovery will still be awarded to the corporation directly, and not to the innocent shareholder.[7] The court reached this result despite acknowledging the ostensible incongruity of effectively allowing the wrongdoer as a shareholder of the closely held corporation to share in the recovery.[8]

In *Glenn*, each party was a fifty percent shareholder in the Ketek Electric Corporation, and together, held all of the officer and board of directors positions.[9] After experiencing financial difficulties that led to disagreement over corporate affairs, the defendant secretly removed Ketek's assets and records from the corporation's office and used them to form a corporation of his own.[10] With this new company, the defendant availed himself of various corporate opportunities belonging to Ketek, and as a result, earned substantial profits.[11] An earlier appeal had established the defendant's liability,[12] but when the case was remanded to determine damages, the Supreme Court, Suffolk County, awarded the *entire*

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ing whether the proceeds will go back to the corporation or be retained by the plaintiff. *Id.* § 180.405(3). In New York, on the other hand, courts do not have discretion; therefore, since New York courts must direct corporate recovery under the statute, the meaning of the section's last sentence is ambiguous. It would appear that this sentence must refer to recoveries in direct actions, where individual recovery is the rule, to avoid direct conflict with the rest of section 626(e). A court in New York that wishes to award individual recovery, but realizes the derivative nature of the action must then either abide by the rule, or else, simply ignore section 626(e) altogether. *See* Schur v. Salzman, 50 A.D.2d 784, 784, 377 N.Y.S.2d 82, 84 (1st Dep't 1975) (derivative action awarding individual recovery, but never mentioning § 626(e)). In any event, even if the last sentence does refer to pro rata recoveries in derivative actions, it is still silent as to when this type of recovery might be granted. Hence, when presented with a case in which a derivative action is brought and the wrongdoer is also a shareholder, it is incumbent upon the court to delineate clearly the rationale for its holding in view of the statute's ambiguity.

[6] 74 N.Y.2d 386, 547 N.E.2d 71, 547 N.Y.S.2d 816 (1989).

[7] *Id.* at 392-93, 547 N.E.2d at 74, 547 N.Y.S.2d at 819.

[8] *Id.* "It is true that this anomaly is magnified in cases involving closely held corporations, because the errant fiduciary is likely to own a large share of the corporation . . . and will share proportionately in the restitution to the corporation." *Id.*

[9] Schachter v. Kulik, 96 A.D.2d 1038, 1038, 466 N.Y.S.2d 444, 445 (2d Dep't 1983). These facts were set out in this original appeal from the trial court. *See id.*

[10] *Id.* at 1039, 466 N.Y.S.2d at 446.

[11] *Id.*

[12] *Id.*

recovery directly to the individual plaintiff.[13] The Appellate Division, Second Department, reversed on this issue and awarded all damages to the corporation pursuant to BCL section 626(e).[14]

Writing for a unanimous Court of Appeals, Chief Judge Wachtler affirmed the holding of the Appellate Division noting that the innocent shareholder "was injured only to the extent that he was entitled to share in those profits. His injury was real, but it was derivative, not direct."[15] Having thus categorized the cause of action as derivative,[16] Chief Judge Wachtler refused to recognize an exception to the general rule and summarily rejected the arguments made in support of individual recovery.[17] First, Chief Judge Wachtler concluded that to award individual recovery simply because the defendant wrongdoer is a shareholder who will therefore share in the proceeds of corporate recovery, would "effectively nullify the general rule."[18] Secondly, although he conceded that "this anomaly is magnified in cases involving closely held corporations," and that in such cases the deterrent effect of a corporate damage award is eliminated, he concluded that these considerations did not warrant a "different damage rule for close corporations."[19] Finally, Chief Judge Wachtler warned that although individual recovery might seem equitable with respect to the parties before the

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[13] Schachter v. Kulik, No. 77-3561, slip op. (Sup. Ct. Suffolk County Sept. 19, 1986).

[14] Glenn v. Hoteltron Systems Inc., 138 A.D.2d 568, 569, 526 N.Y.S.2d 149, 150 (2d Dep't 1988) (appeal from trial on issue of damages), *affirmed*, 74 N.Y.2d 386, 547 N.E.2d 71, 547 N.Y.S.2d 816 (1989). The court recognized BCL section 626(a) as authority for corporate recovery. *Id.* Although section 626(e) is more explicit as to this issue, subdivision (a) states the general proposition that a derivative suit seeks to redress a corporate injury. Thus, the fact that any recovery belongs to the corporation is implicit.

[15] *Glenn*, 74 N.Y.2d at 392, 547 N.E.2d at 74, 547 N.Y.S. 2d at 819.

[16] *Id.*; *see supra* note 2 (noting critical effect of distinguishing between direct and derivative cause of action); *see also* W.E. Hedger Transp. Co. v. Ira S. Bushey & Sons, Inc., 186 Misc. 758, 763, 61 N.Y.S.2d 876, 880 (Sup. Ct. Queens County 1945), *aff'd*, 270 A.D. 912, 61 N.Y.S.2d 882 (2d Dep't 1946) (since nature of action was derivative, even holder of 100% of stock must sue derivatively as shareholder); *supra* note 5 (noting mandatory nature of statutory rule in New York once derivative nature of suit is established). *But see* A.L.I., *supra* note 4 (expressing alternate viewpoint).

[17] *Glenn*, 74 N.Y.2d at 393, 547 N.E.2d at 74, 547 N.Y.S.2d at 819.

[18] *Id.* at 392, 547 N.E.2d at 74, 547 N.Y.S.2d at 819. Chief Judge Wachtler prefaced his comment with: "An exception based on that fact alone . . . ." *id.*, indicating that when taken as a singular fact, this might be true. This case, however, presents additional facts that collectively make a stronger argument for recognizing an exception.

[19] *See id.* A complete lack of a deterrent effect may not be entirely accurate since corporate recovery can in one sense be more of a deterrent than individual recovery. *See infra* note 35 and accompanying text (suggesting that defendants may actually prefer individual recovery).

court, it could impair the rights of corporate creditors with claims superior to those of the innocent shareholders.[20]

It would appear that the generic rationale espoused by the court in support of corporate recovery inadequately addresses the particular facts in *Glenn*. The court's opinion reveals little as to its reasoning, and the decision's most theoretically substantive segment[21] refers to hypothetical creditors who are of no concern in this case.[22] However, notwithstanding the court's limited rationale and given the fact that this case seems to implicate individual recovery as a means of avoiding injustice,[23] the court's result is correct. Additional considerations not entertained by the court help illuminate the justification for the court's seemingly inequitable conclusion.

Typically, where a court has granted individual or "pro rata"[24] recovery, the underlying circumstances justifying the corporate re-

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[20] *Id.* at 392, 547 N.E.2d at 74, 547 N.Y.S.2d at 819.

[21] *See* H. HENN & J. ALEXANDER, *supra* note 1, § 373, at 1096 (noting basic reason for corporate recovery is to protect interests of both shareholders and creditors in unimpaired financial condition of corporation); Note, *supra* note 5, at 777 (commenting on what might be considered general rule for individual recovery but tempered with caveat that pro rata recovery can be justified "only when the case is free from the complication of the claims of corporate creditors" (citing R. STEVENS, PRIVATE CORPORATIONS 797 (2d ed. 1949))); Note, *Corporations: Derivative Actions: Policy Considerations Leading to Choice of Derivative Form: Individual Recovery in Derivative Action*, 40 CAL. L. REV. 127, 132 n. 44 (1952) (citing pro rata cases and noting in each case it was stressed that creditors were secure); Note, *Shareholders' Right to Direct Recovery in Derivative Suits*, 17 WYO. L. J. 208, 213 (1963) (courts will generally not allow direct recovery when there are unpaid creditors).

[22] *See Glenn*, 74 N.Y.2d at 393, 547 N.E.2d at 74, 547 N.Y.S.2d at 819. Chief Judge Wachtler apparently focused on potential future creditors, that is, circumstances that are speculative at this point.

[23] *See supra* note 1. The apparent injustice has two aspects. First, the conceptual difficulties associated with awarding damages to a corporate entity rather than the injured shareholder. *Id.* Second, since the result of the lost corporate opportunities may cause irreparable harm to the corporation, return of stolen profits seems an inadequate remedy. Both of these aspects are implicated in the trial court's damage award. The original award was given entirely to the individual and additional damages were awarded for lost potential royalties. The Appellate Division subsequently disallowed lost royalties damages as too speculative. *Glenn*, 74 N.Y.2d at 391, 547 N.E.2d at 73, 547 N.Y.S.2d at 818.

The court could have, instead, resolved the case by awarding punitive damages, a remedy that has been used before in derivative actions. *See* Holden v. Construction Mach. Co., 202 N.W.2d 348, 359 (Iowa 1972) (intentional fraud by directors); Charles v. Epperson & Co., 258 Iowa 409, 137 N.W.2d 605, 618 (1965) (same).

[24] *See* DiTomasso v. Loverro, 250 A.D. 206, 216, 293 N.Y.S. 912, 918 (2d Dep't), *aff'd*, 276 N.Y. 551, 12 N.E.2d 570 (1937). Individual recovery, when granted, is done on a pro rata basis. Hence, if a 10% shareholder is successful, his individual award would be 10% of that which the corporation would have recovered if corporate recovery had been granted. *See id.*; H. HENN & J. ALEXANDER, *supra* note 1, at 1097.

covery general rule are lacking.[25] This is essentially the situation found in *Glenn*, where there is a single innocent shareholder with an admittedly real injury whose interests are secondary to no creditors and the defendant remains a fifty percent owner of the corporation. Hence, multiple lawsuits do not pose a threat, nor are there other shareholders or current creditors to protect, and yet the defendant will benefit from corporate recovery. To counter the effect of these ostensibly dispositive facts, the Court of Appeals merely expressed concern over the state of the general rule, while showing a lack of concern over any deterent effect an exception to the general rule might have.[26] It would appear, however, that the following considerations tip the balance in favor of corporate recovery.

Despite an uninspired analysis, the court reached an equitable result. As a fifty percent shareholder,[27] the defendant's direct enti-

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[25] *See* Caswell v. Jordan, 184 Ga. App. 755, 362 S.E.2d 769, 773 (Ga. Ct. App. 1987) (reasons justifying corporate recovery did not exist where there were no creditors and only one injured shareholder); *see also* Perlman v. Feldmann, 219 F.2d 173, 178 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955) (innocent shareholder recovery employed to avoid further profits to defendants); Fischer v. C.F. & I. Steel Corp., 614 F. Supp. 450, 452 (S.D.N.Y. 1985) (directness of injury test allowed recovery only to those shareholders actually injured, rather than corporation); General Elec. Co. v. Bucyrus-Erie Co., 563 F. Supp. 970, 974 (S.D.N.Y. 1983) ("there is ample precedent for distributing damages . . . directly to deserving shareholders"); Schur v. Salzman, 50 A.D.2d 784, 784, 377 N.Y.S.2d 82, 84 (1st Dep't 1975) (recovery proper only to shareholders determined to be innocent).

The usual justifications for the general rule of corporate recovery include: (1) necessity of protecting corporate creditors; (2) necessity of insuring the payment of taxes due; (3) necessity of preventing multiplicity of law suits; (4) necessity of protecting all shareholders equally; (5) belief that individual recovery can be improper as a "forced dividend"; and (6) belief that individual recoveries could be used to justify private settlements, even though the action is brought on behalf of all other shareholders similarly situated. *See* H. HENN & J. ALEXANDER, *supra* note 1, § 373, at 1098.

The justifications typically offered to support individual recovery include: (1) prevention of wrongdoers from sharing in the recovery by limiting recovery to the innocent shareholders; (2) protection of innocent shareholders when the wrongdoer is still in control of the corporation; (3) if the corporation has been dissolved, individual recovery is a convenient method for ultimate distribution of the assets; and (4) prevention of unjust enrichment to those who acquire control of the corporation through wrongful acts. *See generally* Grenier, *Prorata Recovery by Shareholders on Corporate Causes of Action as a Means of Achieving Corporate Justice*, 19 WASH. & LEE L. REV. 165, 167-68 (1962) (reviewing rationale of cases awarding pro rata recovery); Note, *Individual Pro Rata Recovery in Stockholders' Derivative Suits*, 69 HARV. L. REV. 1314 *passim* (1956) (same); Z. CAVITCH, *supra*, note 1 (same).

[26] *See Caswell*, 362 S.E.2d at 773. The *Caswell* court permitted the action to be brought directly instead of derivatively when faced with similar circumstances. *Id.*; *see also* Z. CAVITCH, *supra* note 1, § 119.01[2], at 119-13, 14 (classification of actions depends on individual facts of each suit).

[27] *See Glenn*, 74 N.Y.2d at 390, 547 N.E.2d at 73, 547 N.Y.S.2d at 818. There was no finding of fact indicating that the defendant's stock was ever sold or that the corporation was ever dissolved. *Id.*

tlement to fifty percent of the company's profits is contingent upon the corporation's ability to declare dividends.[28] Thus, if corporate recovery is ordered, and the corporation cannot or will not declare a dividend, the defendant will not actually receive those profits.[29] Conversely, if individual pro rata recovery were awarded,[30] the wrongdoer would simply retain half the profits unencumbered by any corporate concerns.[31] This type of recovery has been characterized as a judicially declared or "forced" dividend, which, under these circumstances, directly inures to the benefit of the wrongdoer.[32] It is important to note, however, that this result is improper in the present context not only because the wrongdoer still shares

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[28] *See* B. BLACK, *supra* note 4, § 1.02, at 1-4 ("A shareholder has no right to share in the corporation's profits unless the board of directors declares a dividend"). Whether the board chooses to declare a dividend is totally within their discretion. *See* Frey, *The Distribution of Corporate Dividends*, 89 U. PA. L. REV. 735, 736 (1941) (discretion almost unlimited). Even if the board wants to declare a dividend, its ability to do so depends on whether legally usable funds, for example surplus, are available. *See* N.Y. BUS. CORP. LAW § 510(6) (McKinney 1986); B. BLACK, *supra* note 4, § 2.03[3], at 2-31; *see also* Coffee & Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 304 (1981) (due to nature of dividend declarations "compensation of shareholders does not automatically follow from a corporate recovery").

[29] *See supra* note 28 (discussing right to share in dividends). No shareholder will share in a corporation's profits unless a dividend is declared. *Id.* This is especially significant in the close corporation context where an increase in the value of shares means less to the holder since there is usually no market for the close corporation's shares. *See* O'NEAL & THOMPSON, *supra* note 1, § 8.09, at 8-90. Thus, the defendant cannot realize the illegal profits through appreciation in the value of his shares because he is not likely to sell them. *See id.* The practical effect is that the only way a defendant can benefit from corporate recovery is through the declaration of a dividend. *See id.*

[30] *See Glenn*, 138 A.D.2d at 569, 526 N.Y.S.2d at 150. The trial court's individual damage award was not made on a pro rata basis; all of the damages were awarded directly to the individual plaintiff. *Id.* This method of damage calculation ignores the fact that the defendant is still a 50% owner. *See* KANTROWITZ & SLUTSKY, *supra* note 2, § 626.01 at 6-653 (in derivative action, shareholders benefit equally in corporate recovery). The result is that 100% of the company's profits are given to someone who is only a 50% owner. *See* H. HENN & J. ALEXANDER, *supra* note 1, § 373, at 1097.

[31] *See* H. HENN & J. ALEXANDER, *supra* note 1, § 373, at 1097. When a pro rata recovery is ordered, a shareholder receives a pro rata share of the amount that normally would have gone to the corporation. *Id.* In the event that a corporation is able to declare a dividend after a corporate recovery, the defendant will receive fifty percent of the profits, an amount to which he is entitled as a half owner. *Id.*

[32] *See* H. HENN & J. ALEXANDER, *supra* note 1, § 373, at 1098; Note, *supra* note 25, at 1315, 1319; *see also* Gordon v. Elliman, 306 N.Y. 456, 461-62, 119 N.E.2d 331, 335 (1954) (stockholder has no individual cause of action to recover undeclared dividend); Miller v. Crown Perfumery Co., 125 A.D. 881, 883, 110 N.Y.S. 806, 807 (1st Dep't 1908) (award to stockholder was impermissible judicially declared dividend); Note, *Forced Dividends*, 1 J. CORP. L. 420, 424 (1976) (indicating possible instances of proper judicially declared dividends).

in the profits, but because this result directly conflicts with the business judgment rule.[33] Another consideration stems from the fact that pro rata recovery requires that the defendant must disgorge only fifty percent of his illegal profits. Conversely, corporate recovery requires him to disgorge one hundred percent of the profits. Under this method, any benefits he may receive are derived much more indirectly than would be the case if he were simply allowed to keep half of the unencumbered profits. If the corporation is not then in a position to declare a dividend, the defendant may lose the disgorged profits entirely. There is at least a modicum of deterrence in this procedure, as opposed to allowing the defendant to directly receive fifty percent of the profits.[34] Finally, the court's authority to award individual pro rata recovery in this context is at issue since BCL section 626(e) does not expressly create an exception for close corporations. Whether the statute permits an exception under any circumstance is unclear.[35]

As briefly noted by the court, individual recovery may be appropriate in some circumstances.[36] However, since BCL section 626(e) fails to express clearly if and when this might be done, courts must consider carefully the many factors involved before creating an exception to the rule. As the *Glenn* case illustrates, with the best interests of both parties in mind, such an exception

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[33] *See* Kamin v. American Express Co., 86 Misc. 2d 809, 812, 383 N.Y.S.2d 807, 810 (Sup. Ct. N.Y. County), *aff'd*, 54 A.D.2d 654, 387 N.Y.S.2d 993 (1st Dep't 1976) (whether dividend is to be declared is "exclusively a matter of business judgment for the board of directors"); Gottfried v. Gottfried, 73 N.Y.S.2d 692, 695 (Sup. Ct. N.Y. County 1947) (noting that in close corporation context, "[i]t is axiomatic that the court will not substitute its judgment for that of the board of directors"). *See generally* B. BLACK, *supra* note 4, § 4.03[2][b][i], at 4-32 (dividend considerations in close corporations); Note, *The Business Judgment Rule and the Declaration of Corporate Dividends: A Reappraisal*, 4 HOFSTRA L. REV. 73, 74-77 (1975).

[34] *See* Coffee & Schwartz, *supra* note 28, at 302-09 (goal of derivative suits should have deterrence as main goal and not compensation). Individual recovery may be less of a deterrent since the defendant may actually prefer it because of liquidity problems. W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 629 (6th ed. 1988).

[35] *See supra* note 5 and accompanying text.

[36] *Glenn*, 74 N.Y.2d at 393, 547 N.E.2d at 74, 547 N.Y.S.2d at 819.

should not be created without thoroughly examining the ramifications of its application.

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