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BCL § 626: Corporate Dissolution and Distribution of Assets Held Not to Preclude Subsequent Derivative Action

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quash, in all but unusual cases.

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BUSINESS CORPORATION LAW

BCL § 626: Corporate dissolution and distribution of assets held not to preclude subsequent derivative action

Section 626 of the Business Corporation Law (BCL) authorizes shareholders to derivatively prosecute an action in the right of a corporation.[124] To be entitled to commence such an action, the plaintiff-stockholder must be a "holder at the time of bringing the action,"[125] as well as at the time of the alleged wrong.[126] While the

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[124] Section 626 of the Business Corporation Law (BCL) provides in pertinent part:

> (a) An action may be brought in the right of a . . . corporation to procure a judgment in its favor, by a holder of shares . . . of the corporation or of a beneficial interest in such shares . . . .

N.Y. BUS. CORP. LAW § 626 (McKinney 1963).

At common law, those entrusted with the management and direction of a corporation could with impunity breach fiduciary duties owed to the corporation since shareholders were not permitted to bring actions at law against corporate directors to account for their actions or transgressions. Ross v. Bernhard, 396 U.S. 531, 534 (1970). Hence, the shareholders' derivative action developed as an equitable remedy to protect shareholders against such abuses on the part of management. Halpern v. Pennsylvania R.R., 189 F. Supp. 494, 498 (E.D.N.Y. 1960); Burnham v. Brush, 176 Misc. 39, 41, 26 N.Y.S.2d 397, 398 (Sup. Ct. N.Y. County 1941); *see* H. HENN, CORPORATIONS §§ 358-360 (2d ed. 1970); Prunty, *The Shareholders' Derivative Suit: Notes On Its Derivation*, 32 N.Y.U.L. REV. 980, 987-89 (1957). The scope of this remedy was subsequently expanded to permit actions against third parties who had injured the corporation, and against whom the corporation, through its directors' inaction, did not seek redress. Dodge v. Woolsey, 59 U.S. (18 How.) 331, 345 (1856).

The derivative action, as embodied in section 626, is the shareholder's sole remedy for a breach of a fiduciary duty owed to a corporation by a corporate director or officer. Shielcrawt v. Moffett, 49 N.Y.S.2d 64, 71 (Sup. Ct. N.Y. County 1944). It is distinguishable from both a representative action—an action in which the stockholder alleges that a duty owed to a class of which he is a member has been breached by the corporation acting through its directors (for example, the denial of voting rights), *see* Siegal v. Engelmann, 1 Misc. 2d 447, 143 N.Y.S.2d 193 (Sup. Ct. Queens County 1955); Lazar v. Knolls Co-op. Section No. 2, 205 Misc. 748, 130 N.Y.S.2d 407 (Sup. Ct. Bronx County 1954), and a personal action—an action in which the shareholder alleges that a duty owed to him individually has been breached by the corporation through its directors, *see* Diamond v. Davis, 60 N.Y.S.2d 375 (Sup. Ct. N.Y. County 1945). *See generally* Note, *Distinguishing Between Direct and Derivative Shareholder Suits*, 110 U. PA. L. REV. 1147 (1962).

[125] Hanna v. Lyon, 179 N.Y. 107, 110, 71 N.E. 778, 779 (1904); N.Y. BUS. CORP. LAW § 626(b) (McKinney 1963). The rationale underlying the requirement that the plaintiff be a stockholder at the time of commencement is that the plaintiff, being under no fiduciary duty to vindicate a wrong to a corporation, institutes the suit to have the corporation made

law is well settled that a shareholder loses the capacity to institute or continue a derivative suit when, through voluntary sale or deprivation of title, his proprietary interest in the corporation ceases,[127] the courts had not addressed whether a corporate dissolution and the accompanying distribution of assets pursuant thereto deprives a shareholder of the interest requisite to maintaining a derivative suit.[128] Recently, however, in *Independent Investor Protective League v. Time, Inc.*,[129] the Court of Appeals liberally construed the rule requiring stock ownership at the commencement of a derivative action, allowing such an action subsequent to the corporation's dissolution and distribution of assets.[130]

In *Independent Investor*, shareholders and former shareholders of record of Sterling Communications, Inc. (Sterling) at the

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whole not only for the benefit of the corporation, but also for the benefit of every stockholder, and is "authorized to proceed only because of his proprietary interest in the corporation." Tenney v. Rosenthal, 6 N.Y.2d 204, 211, 160 N.E.2d 463, 466, 189 N.Y.S.2d 158, 163 (1959). Therefore, one who voluntarily disposes of his ownership in a corporation may neither commence nor proceed in a derivative action. *See* Harris v. Averick, 24 Misc. 2d 1039, 1040, 204 N.Y.S.2d 372, 374 (Sup. Ct. N.Y. County 1960). Similarly, a party who is deprived of legal title to his stock may not commence or proceed in an action unless he retains an equitable interest therein. Witherbee v. Bowles, 142 App. Div. 407, 418, 126 N.Y.S. 954, 962-63 (1st Dep't), *rev'd on other grounds*, 201 N.Y. 427, 95 N.E. 27 (1911).

[126] N.Y. BUS. CORP. LAW § 626(b) (McKinney 1963); Myer v. Myer, 271 App. Div. 465, 474, 66 N.Y.S.2d 83, 91-92 (1st Dep't 1946), *aff'd*, 296 N.Y. 929, 73 N.E. 562 (1947) (upholding the constitutionality of the predecessor provision, General Corporation Law, ch. 650, § 61, [1969] N.Y. Laws 1521). The requirement that the plaintiff own stock at the time of the commission of the wrong, was first imposed by the Supreme Court in Hawes v. Oakland, 104 U.S. 450, 461 (1881), to stop the practice of transferring stock to nonresidents after the occurrence of the alleged wrong to create diversity jurisdiction. *Id.* at 453. The rule was subsequently codified by the Court in Equity Rule 94. Sup. Ct. R. 94, 104 U.S. IX (1881) (presently codified at FED. R. CIV. P. 23.1). State courts have since adopted this "contemporaneous ownership" requirement to prevent purchasers of stock from speculating in litigation. Note, *The Contemporaneous Ownership Requirement in the Stockholder's Derivative Suit*, 30 OKLA. L. REV. 622, 624 (1977); *see* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949). New York adopted this requirement in 1944. Ch. 667, § 1, [1944] N.Y. LAWS 1454.

[127] *See* note 125 *supra*.

[128] *See, e.g.*, Maki v. Estate of Ziehm, 55 App. Div. 2d 454, 456, 391 N.Y.S.2d 705, 707 (3d Dep't 1977); *In re* Baldwin Trading Corp., 2 Misc. 2d 698, 706, 151 N.Y.S.2d 964, 972 (Sup. Ct. Nassau County 1956), *rev'd on other grounds*, 8 N.Y.2d 144, 202 N.Y.S.2d 312 (1960); Brennan v. Barnes, 133 Misc. 340, 344-45, 232 N.Y.S.2d 112, 119 (Sup. Ct. Albany County 1928). In *Baldwin Trading*, the court posited that a plaintiff-shareholder could commence a derivative action notwithstanding the corporation's dissolution; however, the court disposed of the case on other grounds prior to reaching this question. 2 Misc. 2d at 706, 151 N.Y.S.2d at 972.

[129] 50 N.Y.2d 259, 406 N.E.2d 486, 428 N.Y.S.2d 671 (1980), *rev'g* 66 App. Div. 2d 391, 412 N.Y.S.2d 898 (1st Dep't 1979).

[130] 50 N.Y.2d at 261, 406 N.E.2d at 487-88, 428 N.Y.S.2d at 672.

time of its dissolution,[131] instituted a derivative action alleging that Time, Inc. (Time), the majority shareholder of Sterling, and the officers and directors of Sterling fraudulently mismanaged the corporation, thereby depressing the value of Sterling's stock and enabling Time to acquire Sterling at a price below its true market value.[132] The action was commenced 6 months after the winding up, pursuant to shareholder authorization, of Sterling's affairs.[133] Time moved for summary judgment contending that the plaintiffs lacked standing to sue.[134] Special term granted the motion, finding that since the corporate entity no longer existed, the plaintiffs could not satisfy the share ownership requirement of section 626(b) of the BCL and, therefore, could not proceed in a derivative capacity.[135] The Appellate Division, First Department, unanimously affirmed.[136]

On appeal, the Court of Appeals reversed, holding that the maintenance of a derivative action was proper, notwithstanding the prior dissolution of the corporation and accompanying distribution of assets.[137] Chief Judge Cooke, writing for a unanimous Court, initially observed that although the common-law rule required the abatement of an action by or against a corporation upon

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[131] The plaintiffs in this action may be classified into four groups: (1) those who accepted payment from the defendant, Time, Inc., and surrendered their shares in Sterling; (2) those who demanded the fair market value of their shares under the appraisal provision in section 623 of the BCL; (3) stockholders of record who refused a tendered payment for their stock; and (4) stockholders who were not of record at the time of Sterling's dissolution. 66 App. Div. 2d at 392, 412 N.Y.S.2d at 899.

[132] *Id.*

[133] 50 N.Y.2d at 262, 406 N.E.2d at 487, 428 N.Y.S.2d at 672. The stockholders' vote authorizing the dissolution of Sterling occurred on September 7, 1973. *Id.* Time acquired Sterling's assets by late September 1973. 66 App. Div. 2d at 392, 412 N.Y.S.2d at 899. The action was commenced in March 1974.

[134] 50 N.Y.2d at 262, 406 N.E.2d at 487, 428 N.Y.S.2d at 672.

[135] *Id.*

[136] 66 App. Div. 2d at 396, 412 N.Y.S.2d at 901. Neither the decision of the appellate division nor the decision of special term foreclosed the shareholders' right to pursue redress in an individual or representative capacity against the individual defendants, the former directors of Sterling. *Id.* at 395-96, 412 N.Y.S.2d at 901. The appellate division affirmed special term's refusal to permit the plaintiffs to amend their complaint to assert either of the alternative actions, however, on the ground that the plaintiffs failed to show that the individual defendants were before the court, since they had not been served with process. *Id.* at 395, 412 N.Y.S.2d at 901.

[137] 50 N.Y.2d at 264, 406 N.E.2d at 489, 428 N.Y.S.2d at 674. Notably, the Court upheld the dismissal of those plaintiffs who had sought appraisal under section 623 of the BCL on the ground that appraisal is an exclusive remedy. *Id.*; N.Y. BUS. CORP. LAW § 623(c), (k) (McKinney 1963).

the corporation's dissolution, the legislature, in enacting section 1006(a)(4) of the BCL, specifically provided that a corporation was to continue to exist as a legal entity for the purposes of judicial proceedings even after dissolution.[138] The Court noted that although section 626 of the BCL specifically requires a plaintiff to establish ownership at the commencement of a derivative action, this rule was not absolute.[139] Rather, the section 626(b) ownership requirement was pragmatic in nature, reflecting the need to ensure that the plaintiff is not a stranger to the corporation and is actually representative of the class of stockholders whose rights are purportedly being protected.[140] In the wake of dissolution, however, a "stockholder possesses a substantial interest in the distribution of corporate assets," according to the Court, and thus, retains a significant interest in pursuing any existing cause of action in favor of the corporation.[141] This interest, the Court found, is sufficient "to satisfy the spirit of the rule."[142] Moreover, the Court noted that section 1006(b) of the BCL which provides that the dissolution of a corporation does not affect any remedy available to or against a corporation, its directors, officers or shareholders which existed prior to the corporation's dissolution, buttressed its conclusion that such dissolution of itself cannot prevent a qualified plaintiff from satisfying the ownership requirements of section 626(b) of the BCL.[143]

It is suggested that while the Court's conclusion was sound, it might have reached the desired result without sanctioning noncompliance with the literal requirement of section 626(b) ownership. Section 1006(b) contemplates the survival, *inter alia,* of corporate remedies during the winding up of corporate affairs.[144] It is

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[138] 50 N.Y.2d at 263, 406 N.E.2d at 488, 428 N.Y.S.2d at 672. Section 1006(a)(4) of the BCL provides that a dissolved corporation, in winding up its affairs, may "sue or be sued in all courts and participate in actions and proceedings." N.Y. BUS. CORP. LAW § 1006(a)(4) (McKinney 1963). The Court noted that earlier, under the predecessor statute, section 29 of the General Corporation Law, ch. 650, § 29, [1929] N.Y. Laws 1531, it had held that a dissolved corporation could be a party to litigation even after distribution of assets. 50 N.Y.2d at 263, 406 N.E.2d at 488, 428 N.Y.S.2d at 672 (citing Matter of Ehrlich, Inc., 5 N.Y.2d 275, 279, 157 N.E.2d 495, 501, 184 N.Y.S.2d 334, 338 (1959)).

[139] 50 N.Y.2d at 263, 406 N.E.2d at 488, 428 N.Y.S.2d at 673.

[140] *Id.* at 263-64, 406 N.E.2d at 488, 428 N.Y.S.2d at 673.

[141] *Id.* at 264, 406 N.E.2d at 488, 428 N.Y.S.2d at 673.

[142] *Id.*

[143] *Id.* at 264, 406 N.E.2d at 488-89, 428 N.Y.S.2d at 673-74 (citing N.Y. BUS. CORP. LAW § 1006(b) (McKinney 1963)).

[144] N.Y. BUS. CORP. LAW § 1006(b) (McKinney 1963). Section 1006(b) was based on

submitted that in *Independent Investor* the cause of action to recover for the directors' mismanagement of the corporation is an unliquidated asset,[145] precluding, at least pro tanto, the completion of corporate winding up.[146] Thus, the institution of a derivative action, the proper remedy for injuries to the corporation even during

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section 98 (now section 105) of the Model Business Corporations Act. JOINT LEGISLATIVE COMMITTEE TO STUDY REVISION OF CORPORATION LAWS, REVISERS NOTES AND COMMENTS TO BUSINESS CORPORATION LAW 65 (Revised Supplement to Fifth Interim Report to 1961 Session of New York State Legislature) (Legislative Document (1961) No. 12). Section 105 of the Model Business Corporations Act was drafted in order to avoid the common-law rule that dissolution of a corporation terminated its legal existence and abated pending legal proceedings. MODEL BUS. CORP. ACT ANN. § 105, ¶ 2 (2d ed. 1971).

[145] A cause of action against corporate directors for the mismanagement of corporate assets is redressable only by the corporation and not by its shareholders in an individual or representative capacity, and any recovery obtained by the shareholders suing derivatively inures to the corporation. Klum v. Clinton Trust Co., 183 Misc. 340, 48 N.Y.S.2d 267 (Sup. Ct. N.Y. County 1944); *see* Smith v. Bradlee, 37 N.Y.S.2d 512 (Sup. Ct. N.Y. County 1942). *See generally* note 154 and accompanying text *infra; see also* N.Y. BUS. CORP. LAW § 623 (McKinney 1963). Section 623 provides for an appraisal remedy to determine the fair market value of the shares held by shareholders dissenting from a corporation's dissolution. *Id.* Pursuant to the determination of the stock's value the appraiser may consider, as an unliquidated asset, any corporate causes of action. *Id.*

[146] A corporation's affairs have been "wound up," when all liabilities have been satisfied and discharged and all assets have been realized and distributed. *See* Fleckner v. Bank of the United States, 21 U.S. (8 Wheat.) 338, 362 (1823); United States v. Metcalf, 131 F.2d 677, 679 (9th Cir. 1942). In Bacon v. Robertson, 59 U.S. (18 How.) 480 (1855), the United States Supreme Court, in considering whether a corporation's existence had terminated, held that where assets remain in the corporate entity for distribution, the corporation retains substance and therefore, cannot be considered to have ceased to exist. *Id.* at 488-89. Parenthetically, the *Bacon* Court further noted that where assets remain unliquidated, the corporation's shareholders could maintain a derivative action to force the distribution of these remaining assets. *Id.* at 489. In *Independent Investor,* since the corporation retained an unliquidated asset subsequent to the directors' disbursement of assets, it cannot be said to have had its affairs completely wound up.

Additionally, it is suggested that, in determining whether Sterling had been wound up, consideration must be given to the pendency of appraisal proceedings pursuant to section 623 of the BCL. Since an appraisal judgment is satisfied through the corporation by a disbursement of corporate assets, N.Y. BUS. CORP. LAW § 623 (McKinney 1963), the pendency of these proceedings involving claims against this corporation, it is submitted, indicates that the corporation has not been wound up. Moreover, if assets have been set aside to satisfy a judgment arising from appraisal proceedings and the amount set aside exceeds the amount which must be disbursed, the corporation retains assets for distribution, and cannot be considered to have been terminated by liquidation. *See* Bacon v. Robertson, 59 U.S. (18 How.) at 488-89. In the alternative, if insufficient assets or no assets have been set aside, it is submitted that winding up has not been completed as corporate liabilities have not been provided for, as required by the BCL. *See* N.Y. BUS. CORP. LAW § 1005(a)(3) (McKinney 1963). In this event, the BCL provides that the directors are jointly and severally liable to the corporation, *id.* § 719(a)(3), and authorizes a suit against the corporation by the creditors or a derivative suit by the shareholders against the directors for failing to provide for the corporation's liabilities, *id.* § 1006(a)(4).

the winding up period, would be timely.

It is submitted, moreover, that shareholders of record at the time of dissolution satisfy the section 626(b) ownership requirement and thus have standing to proceed pursuant to section 626.[147] During the pendency of the period preceding winding up, such shareholders are considered the equitable owners of the corporation.[148] It is suggested that this equitable ownership concept is analogous to the statutory ownership requirement of a "beneficial interest" in the corporation's stock at the time a derivative action is commenced.[149] Indeed, it is at least arguable that the legislature has borrowed from equity the standards by which to determine standing in a derivative action.[150] Since these standards require only that the plaintiff-shareholder in a derivative action demonstrate an interest in the corporation,[151] the shareholder's "substantial interest in the distribution of corporate assets"[152] would, it is submitted, satisfy the legislative "ownership" mandate incorporated in section 626(b) of the BCL.[153]

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[147] It is suggested that if, after dissolution, an asset, such as an unliquidated cause of action, remains, then a vestige of shareholder status remains sufficient to satisfy the section 626(b) ownership requirement. *See* note 148, *infra.* Indeed, in such a situation the requirement should be held satisfied since the shareholder has not divested himself of his ownership, but rather merely has had his ownership interest diminished to the extent that assets have been distributed.

[148] Weinert v. Kinkel, 296 N.Y. 151, 153, 71 N.E.2d 445, 446 (1947) (per curiam); *see* 2 HORNSTEIN'S CORPORATION LAW AND PRACTICE §§ 711, 714-718 (1959). Since equity recognizes that the shareholders are, in essence, the proprietors of a corporation and are ultimately the sole beneficiaries thereof, Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 195, 123 N.E. 148, 151 (1919), it follows then, that at distribution the shareholders remain the equitable owners of those assets not distributed.

[149] Section 626 of the BCL provides that a derivative action may be commenced by one who is a "holder of shares . . . *or of a beneficial interest [therein]*" at the time of initiating suit. N.Y. BUS. CORP. LAW § 626(a), (b) (McKinney 1963) (emphasis added). Since the legislature contemplates that a "beneficial interest" is a sufficient predicate to commence suit, it appears reasonable that a holder of an "equitable ownership" interest would be an appropriate plaintiff. Such equitable ownership has been held to be vested in the shareholders who hold shares at the time of dissolution and distribution of assets. *See* note 148 and accompanying text *supra.*

[150] *See* notes 124 & 126 *supra; cf.* N.Y. BUS. CORP. LAW § 626(c) (McKinney 1963) (originally a procedural rule of the courts, Continental Sec. Co. v. Belmont, 206 N.Y. 7, 19, 99 N.E. 138, 142 (1912)). *See also* note 151 *infra.*

[151] As a corollary of the equitable nature of the derivative action, *see* note 124 *supra,* the standing requirement, likewise developed, as an equitable matter, Hawes v. Oakland, 104 U.S. 450, 461-62 (1881); *see* Ross v. Bernhard, 396 U.S. 531, 534 (1970), and has always necessitated a demonstration of a shareholder's proprietary interest. *See* note 125 *supra.*

[152] 50 N.Y.2d at 264, 406 N.E.2d at 488, 428 N.Y.S.2d at 673.

[153] Since it is well settled that equity looks to substance, and not form, Small v. Sullivan, 245 N.Y. 343, 354, 157 N.E. 261, 264 (1927); Marco v. Sachs, 201 Misc. 933, 937 (Sup.

The courts of New York have long held that corporate mismanagement constitutes a corporate injury redressable only by a derivative action.[154] A strict construction of section 626(b) precluding a derivative action after dissolution would dispense with the equitable purpose of the derivative action—to provide relief to shareholders from the abuses of corporate directors which are otherwise not redressable.[155] Thus, it is submitted that the *Indepen-*

Ct. Kings County 1951), it is submitted that the interest retained upon dissolution, *see* note 148 *supra*, should suffice to permit the commencement of a derivative action notwithstanding the corporation's dissolution. *See also* note 147 *supra*.

[154] Greenfield v. Denner, 6 N.Y.2d 867, 868, 160 N.E.2d 118, 118, 188 N.Y.S.2d 986, 987 (1959), *rev'g*, 6 App. Div. 2d 263, 175 N.Y.S.2d 918 (1st Dep't 1958); Maki v. Estate of Ziehm, 55 App. Div. 2d 454, 457, 391 N.Y.S.2d 705, 707 (3d Dep't 1977); Berzin v. Litton Indus., Inc., 24 App. Div. 2d 740, 740, 263 N.Y.S.2d 485, 486 (1st Dep't 1965) (per curiam); Brennan v. Barnes, 133 Misc. 340, 344-45, 232 N.Y.S.2d 112, 119 (Sup. Ct. Albany County 1928); *cf.* N.Y. BUS. CORP. LAW § 720 (McKinney 1963) (injury caused by director's mismanagement of corporate assets may be redressed by shareholders only by means of BCL section 626). While the cases cited above deal with mismanagement by corporate directors, it should be noted that the rule is the same if a majority shareholder causes corporate assets to be mismanaged—a cause of action arising from such mismanagement belongs to the corporation and not to the minority shareholders in their own right. Beloff v. Consolidated Edison Co., 81 N.Y.S.2d 440, 443 (Sup. Ct. N.Y. County), *aff'd*, 274 App. Div. 980, 85 N.Y.S.2d 303 (1st Dep't 1948) (mem.), *aff'd*, 300 N.Y. 11, 87 N.E. 687 (1949); Amella v. Consolidated Edison Co., 73 N.Y.S.2d 263, 265 (Sup. Ct. N.Y. County), *aff'd*, 273 App. Div. 755, 75 N.Y.S.2d 513 (1st Dep't 1947).

In order to be permitted to bring an individual or representative action, the shareholder must show an injury peculiar to his status as a stockholder founded upon the breach of a duty separate and apart from that owed to the corporate entity. *See* Parascandola v. National Sur. Co., 249 N.Y. 335, 342, 164 N.E. 242, 243 (1928); General Rubber Co. v. Benedict, 215 N.Y. 18, 22, 109 N.E. 96, 97 (1915); Hammer v. Werner, 239 App. Div. 38, 44, 265 N.Y.S. 172, 179 (2d Dep't 1933); Von Au v. Magenheimer, 126 App. Div. 257, 268-69, 110 N.Y.S. 629, 635 (2d Dep't), *aff'd*, 196 N.Y. 510, 89 N.E. 1114 (1909); Coronado Dev. Corp. v. Millikin, 175 Misc. 1, 4, 22 N.Y.S.2d 670, 674 (Sup. Ct. N.Y. County 1940). It is possible, however, for a derivative action and an individual action to co-exist upon a director's misdeeds. For example, a director may, in addition to the relationship of stockholder-director, engage in some other personal fiduciary relationship with the shareholder, *see* A. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS 790 (2d ed. 1949); *cf.* Ritchie v. McMullen, 79 F. 522 (6th Cir. 1897) (pledgor-pledgee), and the breach of one would constitute a breach of the other. *See* A. STEVENS, *supra*, at 790.

There are several reasons why suits to recover upon a corporate right of action cannot be maintained by a shareholder in his individual capacity, the most important being the necessity of affording protection to the rights of corporate creditors. *See* A. STEVENS, *supra*, at 787-92; *cf.* Maki v. Estate of Ziehm, 55 App. Div. 2d 454, 457, 391 N.Y.S.2d 705, 707 (3d Dep't 1977) (since corporate liabilities must be satisfied prior to distribution of any assets, derivative action must be considered appropriate remedy to redress corporate injuries upon dissolution).

[155] If no fiduciary duty is owed directly to the shareholder from the director, a duty being owed only to the corporation, the denial of standing to the shareholder in a derivative capacity would leave the shareholder remediless since there would be no predicate for an individual or representative action. *See* note 154 and accompanying text *supra*. Notably,

dent Investor Court's conclusion that dissolution should not preclude the institution and prosecution of a derivative suit is consistent with the literal requirements of section 626(b) and, indeed, is necessary in order to provide a remedy for minority shareholders aggrieved by the misconduct of those persons exercising corporate control.

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DEVELOPMENTS IN NEW YORK LAW

General admonition to jointly represented defendants sufficient to discharge trial court's duty of inquiry

Joint representation of criminal defendants is highly suspect because the frequent inability of one attorney to protect the conflicting interests of codefendants[156] is likely to give rise to the ineffective assistance of counsel.[157] Although the sixth amendment

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however, the appellate division intimated that a direct fiduciary duty was owing to the stockholder from the corporate directors, and, therefore, the shareholder had recourse to a remedy, either a representative or an individual action. 66 App. Div. 2d at 393, 412 N.Y.S.2d at 899. The court, however, did not detail the nature of this fidiciary duty. *Id.* at 393, 412 N.Y.S.2d at 901. *But see* note 154 *supra.*

To hold that a corporate dissolution would have the effect of vitiating a shareholder's derivative action, thereby leaving the shareholder remediless, *see* note 154 *supra,* could induce dishonest corporate directors to arrange for a dissolution and distribution of assets, thereby preventing action against themselves. Holmes v. Camp, 186 App. Div. 675, 679, 175 N.Y.S. 349, 352 (1st Dep't), *aff'd,* 227 N.Y. 635, 126 N.E. 910 (1919). *See generally* note 124 *supra.*

[156] For a discussion of the types of conflict involved in joint representation of multiple defendants, see Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney,* 62 MINN. L. REV. 119, 125-35 (1978); Girgenti, *Problems of Joint Representation of Defendants in a Criminal Case,* 54 ST. JOHN'S L. REV. 55, 61-67 (1979); Judd, *Conflicts of Interest—A Trial Judge's Notes,* 44 FORDHAM L. REV. 1097, 1099-1107 (1976); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal,* 64 VA. L. REV. 939, 941-50 (1978). Typically, claims of conflict allege either counsel's failure to act in favor of one defendant in fear of implicating the other, *see, e.g.,* People v. Coleman, 42 N.Y.2d 500, 369 N.E.2d 742, 399 N.Y.S.2d 185 (1977), or taking of affirmative steps by counsel which inure to the benefit of one client while severely damaging the case of the other. *See* People v. Dell, 60 App. Div. 2d 18, 400 N.Y.S.2d 236 (4th Dep't 1977). Additionally, many defenses at trial may be lost due to counsel's attempt to minimize the existence of conflict. *See* Geer, *supra,* at 125-28.

[157] *See* Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978); People v. Gomberg, 38 N.Y.2d 307, 312, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769, 773 (1975); Geer, *supra* note 156, at 121; Lowenthal, *supra* note 156, at 939.

The right to the effective assistance of counsel is guaranteed to criminal defendants. U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6; CPL § 210.15(2) (1971). While it is the duty