

Table of Contents

CHAPTER 1. DIVIDENDS IN GENERAL

- § 1:1 Introduction
- § 1:2 Declaration of the dividend
- § 1:3 Dividend regulation

CHAPTER 2. SURPLUSES

I. EARNED SURPLUS STATUTE: THE PRE-1980 MODEL BUSINESS CORPORATION ACT

- § 2:1 Policy and background
- § 2:2 Pre-1980 Model Act
- § 2:3 Requirement of earned surplus
- § 2:4 Distributions from sources other than earned surplus
 - § 2:5 —Distributions from capital surplus
 - § 2:6 —Payment of cumulative dividends
- § 2:7 Capital surplus
- § 2:8 Balance sheet vs. current value surplus
- § 2:9 Determination of stated capital
 - § 2:10 —Issuance of shares for cash, property or services
 - § 2:11 —Share dividends
 - § 2:12 —Shares issued upon conversion or exchange
 - § 2:13 —Other increases in stated capital
- § 2:14 Reduction of stated capital
 - § 2:15 —Reducing par value
 - § 2:16 —Reducing stated capital
 - § 2:17 —Cancelling shares
 - § 2:18 — —Redeemable shares
 - § 2:19 — —Other repurchased shares
 - § 2:20 —Transfers to surplus
- § 2:21 Quasi-reorganization

II. SURPLUS STATUTE: DELAWARE

- § 2:22 Requirements for legal dividends
- § 2:23 Surplus test
- § 2:24 Balance sheet vs. current value surplus
- § 2:25 Computation of capital

CORPORATE DIVIDENDS AND STOCK REPURCHASES

- § 2:26 Reduction of capital
- § 2:27 —Retirement
- § 2:28 —Repurchase or redemption
- § 2:29 —Conversion or exchange
- § 2:30 —Transfers to surplus

III. SURPLUS STATUTE: NEW YORK

- § 2:31 Requirements for legal dividends
- § 2:32 Insolvency test
- § 2:33 Surplus test
- § 2:34 Balance Sheet vs. Current Value Surplus
- § 2:35 Reduction surplus
- § 2:36 Quasi-reorganization
- § 2:37 Computation of stated capital
- § 2:38 —Increases in stated capital
- § 2:39 —Reductions in stated capital
- § 2:40 Disclosure requirements: Changes in shareholders' equity

IV. RECENT EARNINGS (“NIMBLE DIVIDENDS”)

- § 2:41 Introduction
- § 2:42 Policy and background—Early statutes
- § 2:43 —Justifications
- § 2:44 —Criticisms
- § 2:45 —Recommendations
- § 2:46 Delaware statute
- § 2:47 New York statute
- § 2:48 Pre-1980 Model Act

V. WASTING ASSETS

- § 2:49 Introduction
- § 2:50 Pre-1980 Model Business Corporation Act
- § 2:51 Delaware
- § 2:52 New York
- § 2:53 Criticisms

CHAPTER 3. THE NON-SURPLUS STATUTES

I. REVISED MODEL BUSINESS CORPORATION ACT

- § 3:1 Introduction

TABLE OF CONTENTS

- § 3:2 Equitable insolvency—Definition
- § 3:3 —Application of standard
- § 3:4 — —Involvement of auditors
- § 3:5 — —Other situations
- § 3:6 —Creditor protection
- § 3:7 —The cases
- § 3:8 Balance sheet test

II. NON-SURPLUS STATUTE: CALIFORNIA

- § 3:9 Requirements for legal dividends
- § 3:10 Insolvency test
- § 3:11 Retained earnings test
- § 3:12 Assets/liabilities tests
- § 3:13 Dividends in property
- § 3:14 Notice to shareholders
- § 3:15 Protections for senior shareholders

CHAPTER 4. DIRECTORS' AND SHAREHOLDERS' LIABILITY

I. DIRECTORS' LIABILITY FOR ILLEGAL DIVIDENDS UNDER CORPORATE STATUTES: GENERAL CONSIDERATIONS

- § 4:1 Standard of care
- § 4:2 Cases analyzing standard of care: Nondividend
- § 4:3 The outside director's duty of care
- § 4:4 Cases analyzing standard of care: Dividend

II. DIRECTORS' LIABILITY FOR ILLEGAL DIVIDENDS UNDER SPECIFIC CORPORATE STATUTES

- § 4:5 Delaware
- § 4:6 New York—Civil liability
- § 4:7 —Criminal liability
- § 4:8 California
- § 4:9 Pre-1980 Model Act
- § 4:10 Revised Model Act

III. DIRECTORS' LIABILITY: ABUSE OF DISCRETION

- § 4:11 Standard of review

CORPORATE DIVIDENDS AND STOCK REPURCHASES

- § 4:12 Failure to declare dividends—General principles
- § 4:13 —The closely held corporation—Common law
- § 4:14 — —“Oppressive conduct” statutes
- § 4:15 —Control: Preferred vs. Common Stock
- § 4:16 Excessive dividends—General principles
- § 4:17 —Parent-subsidary corporations
- § 4:18 Dividends as defensive tactic to takeover attempt—Introduction
- § 4:19 —Dividends in partial liquidation—Straight cash dividend
- § 4:20 — —Cash and debt dividend
- § 4:21 —Leveraged dividends (pro rata)—Recapitalization upheld
- § 4:22 — —Recapitalization invalidated
- § 4:23 —Recapitalization plans as a “sale”
- § 4:24 — —A “sale” invalid under Unocal
- § 4:25 — —A dividend and not a sale
- § 4:26 — —A sale and not a dividend
- § 4:27 —Disclosure violations
- § 4:28 — —State law
- § 4:29 — —Federal law
- § 4:30 Discriminatory distributions

IV. SHAREHOLDERS’ LIABILITY FOR ILLEGAL DIVIDENDS

- § 4:31 Common law
- § 4:32 Corporation statutes
- § 4:33 —New York and Delaware
- § 4:34 —California
- § 4:35 —The Model Act and the Revised Model Act

V. LIABILITY FOR ILLEGAL DIVIDENDS: CREDITORS’ STATUTES

- § 4:36 Introduction
- § 4:37 The Uniform Acts
- § 4:38 —Transfers fraudulent as to present and future creditors
- § 4:39 — —Actual intent
- § 4:40 — —Unreasonably small remaining assets
- § 4:41 — —Intent to incur debts beyond its ability to pay
- § 4:42 —Transfers fraudulent as to present creditors
- § 4:43 The Uniform Acts—Uniform Voidable Transactions Act

TABLE OF CONTENTS

- § 4:44 Bankruptcy Reform Act of 1978
- § 4:45 —Actual intent
- § 4:46 —Less than reasonably equivalent value
- § 4:47 — —Insolvency
- § 4:48 — —Unreasonably small capital
- § 4:49 — —Intent to incur debts beyond its ability to pay
- § 4:50 — —Insider benefit under employment contract
- § 4:51 Comparison with dividend statutes
- § 4:52 —Plaintiffs
- § 4:53 —Defendants
- § 4:54 —Standard of liability
- § 4:55 —Burden of proof
- § 4:56 Applicability of creditors' statutes to dividends and corporate repurchases—Introduction
- § 4:57 —The cases
- § 4:58 — —Dividends and corporate repurchases
- § 4:59 — —Leveraged buyouts

CHAPTER 5. PREFERRED STOCK DIVIDENDS; STOCK DIVIDENDS AND STOCK SPLITS; OTHER RESTRICTIONS ON DIVIDENDS

I. PREFERRED STOCK DIVIDENDS

- § 5:1 Introduction
- § 5:2 Mandatory dividends
- § 5:3 Cumulative or non-cumulative dividends
- § 5:4 Elimination of preferred stock arrearages—
Demise of vested rights
- § 5:5 —Statutory procedures
- § 5:6 — —Delaware—Amendment
- § 5:7 — — —Merger
- § 5:8 — — —Appraisal procedure
- § 5:9 — — —Caselaw interpretation and application
- § 5:10 — —New York—Amendment
- § 5:11 — — —Merger
- § 5:12 — — —Appraisal procedure
- § 5:13 — —California—Amendment
- § 5:14 — — —Merger
- § 5:15 — — —Appraisal procedure
- § 5:16 — —Pre-1978 Model Business Corporation Act
- § 5:17 — — —Amendment

CORPORATE DIVIDENDS AND STOCK REPURCHASES

- § 5:18 — — —Merger
- § 5:19 — — —Appraisal procedure
- § 5:20 — — —Revised Model Business Corporation Act—
Amendment
- § 5:21 — — —Merger
- § 5:22 — — —Appraisal procedure
- § 5:23 —Fairness

II. STOCK DIVIDENDS AND STOCK SPLITS

- § 5:24 Introduction
- § 5:25 Surplus test statutes
- § 5:26 California and the Revised Model Act
- § 5:27 Accounting treatment of stock dividends and
splits
- § 5:28 New York Stock Exchange requirements
- § 5:29 Stock dividends as manipulative or fraudulent
devices

III. OTHER RESTRICTIONS ON DIVIDENDS

- § 5:30 Introduction
- § 5:31 Agreements between the corporation and its
shareholders
- § 5:32 —Directors' discretion: Preferred shares
- § 5:33 —Directors' discretion: Common shares
- § 5:34 — —Statutory provisions
- § 5:35 — —Common law
- § 5:36 Agreements between corporation and creditors
- § 5:37 Other statutory and regulatory controls: Foreign
corporations
- § 5:38 —New York
- § 5:39 —California

IV. DIVIDEND REINVESTMENT PLANS

- § 5:40 Generally
- § 5:41 —Valuation of shares

CHAPTER 6. CORPORATE REPURCHASES

I. RESTRICTIONS ON CORPORATE REPURCHASES

- § 6:1 Introduction

TABLE OF CONTENTS

§ 6:2	—Reasons for repurchases: Publicly traded corporations
§ 6:3	—Reasons for repurchases: Closely held corporations
§ 6:4	Introduction
§ 6:5	Surplus statutes—New York—The tests
§ 6:6	—Accounting treatment
§ 6:7	—Liability
§ 6:8	—Delaware—The test
§ 6:9	—Accounting treatment
§ 6:10	—Liability
§ 6:11	—Model Business Corporation Act—The tests
§ 6:12	—Accounting treatment
§ 6:13	—Liability
§ 6:14	Non-surplus statutes
§ 6:15	—Revised Model Business Corporation Act—The tests
§ 6:16	— —Liability
§ 6:17	—California—The tests
§ 6:18	— —Liability
§ 6:19	Repurchase agreements; installment purchases
§ 6:20	—Surplus statutes: In general—The relevant time
§ 6:21	—Payment by note
§ 6:22	—Seller as creditor
§ 6:23	—New York
§ 6:24	—Delaware
§ 6:25	—The Model Act
§ 6:26	—Non-surplus statutes: In general
§ 6:27	—Revised Model Act
§ 6:28	—California
§ 6:29	Common law
§ 6:30	—Breach of fiduciary duties
§ 6:31	—Trust fund theory
§ 6:32	Common law-breach of contract

II. STANDARD OF REVIEW: AN OVERVIEW (DELAWARE LAW)

§ 6:33	Introduction
§ 6:34	Ordinary business decisions—Business judgment rule
§ 6:35	—Ordinary or defensive transaction?
§ 6:36	Defensive repurchases—Early decisions
§ 6:37	—Cheff v. Mathes
§ 6:38	—Unocal Corp. v. Mesa Petroleum Co

CORPORATE DIVIDENDS AND STOCK REPURCHASES

- § 6:39 — —“Good faith and reasonable investigation”
- § 6:40 — —“Reasonable in relation to threat posed”
- § 6:41 —Unitrin, Inc. v. American General Corp
- § 6:42 “Impermissible control” transactions
- § 6:43 Standing—Derivative claims
- § 6:44 —Individual claims

III. STANDARD OF REVIEW: AN OVERVIEW (OTHER JURISDICTIONS)

- § 6:45 Introduction
- § 6:46 Decisions under New York law
- § 6:47 Decisions in other jurisdictions—Transactions motivated by control
- § 6:48 —Transactions not motivated by control
- § 6:49 Standing to sue

IV. GREENMAIL

- § 6:50 Introduction
- § 6:51 Attacking the purpose of the transaction
- § 6:52 Attackable as corporate waste
- § 6:53 Denial of equal opportunity
- § 6:54 Recent statutory restrictions on greenmail
- § 6:55 Greenmailer’s liability—Primary liability
- § 6:56 —Secondary liability
- § 6:57 Federal securities laws violations—Greenmail as fraud
- § 6:58 —Disclosure violations

V. ISSUER TENDER OFFERS

- § 6:59 Introduction
- § 6:60 State fiduciary duty claims—Issuer tender offers as a response to a third party tender offer
- § 6:61 —Issuer tender offers not in response to a third party tender offer
- § 6:62 Definition of tender offer
- § 6:63 —Open market transactions
- § 6:64 —Negotiated transactions
- § 6:65 —Issuer’s rights plans
- § 6:66 Disclosure requirements for issuer tender offers
- § 6:67 —Summary of 2000 revisions—Regulation M-A
- § 6:68 — —Summary term sheet
- § 6:69 — —Schedule TO
- § 6:70 —Disclosure of information

TABLE OF CONTENTS

- § 6:71 —Dissemination of information to shareholders
- § 6:72 —Exclusions from Rule 13e-4
- § 6:73 Substantive regulation of issuer tender offers—
Rule 13e-4
- § 6:74 —Rule 14e-1
- § 6:75 —Additional rules under § 14(e) and § 10(b)

VI. GOING PRIVATE: MANAGEMENT- INITIATED LEVERAGED BUYOUTS

- § 6:76 Introduction
- § 6:77 “Going private”—Weinberger v. UOP, Inc
- § 6:78 —Alpert v. 28 Williams St. Corp
- § 6:79 Leveraged buyouts in response to a third party’s
tender offer—Revlon, Inc. v. MacAndrews &
Forbes Holdings, Inc
- § 6:80 —Mills Acquisition Co. v. Macmillan, Inc
- § 6:81 —Other cases involving defensive LBOs
- § 6:82 Leveraged buyouts not in response to third party
tender offers
- § 6:83 —Smith v. Van Gorkom
- § 6:84 —Post-Van Gorkom analysis
- § 6:85 Rule 13e-3—Introduction
- § 6:86 —Application of the rule
- § 6:87 —Information filed with SEC
- § 6:88 — —Disclosures relating to fairness
- § 6:89 — —Other required disclosures
- § 6:90 — —Exhibits
- § 6:91 —Disclosure of information to shareholders
- § 6:92 —Dissemination of information to shareholders
- § 6:93 —Exceptions to Rule 13e-3

VII. OPEN MARKET REPURCHASES; STOCK MANIPULATION

- § 6:94 Statutory prohibitions against manipulation
- § 6:95 Repurchases as defenses to takeovers
- § 6:96 Stock repurchases and acquisition programs
- § 6:97 Other abuses of corporate repurchase programs
- § 6:98 SEC Rule 10b-18—Introduction
- § 6:99 —Conditions of the rule
- § 6:100 — —One broker or dealer
- § 6:101 — —Time of purchases
- § 6:102 — —Price of purchases
- § 6:103 — —Volume of purchases
- § 6:104 Insider trading; disclosure violations

**VIII. CLOSE CORPORATIONS:
DISCRIMINATORY REPURCHASES AND
FREEZE-OUTS; COURT-ORDERED
BUYOUTS**

- § 6:105 Disclosure requirements relating to repurchases
of issuer's equity securities
- § 6:106 Discriminatory repurchases
- § 6:107 Freeze-outs
- § 6:108 Court-ordered buyouts

APPENDICES

- APPENDIX A. Selected Provisions of the Pre-1980
Model Business Corporation Act
- APPENDIX B. Selected Provisions of the Delaware
General Corporation Law
- APPENDIX C. Selected Provisions of the New York
Business Corporation Law
- APPENDIX D. Selected Provisions of the Revised Model
Business Corporation Act
- APPENDIX E. Selected Provisions of the California
General Corporation Law
- APPENDIX F. Selected Provisions of Creditors'
Statutes
- APPENDIX G. Rule 13e-3 and Schedule 13E-3
- APPENDIX H. Rule 13e-4 and Schedule TO
- APPENDIX I. Mergers and Acquisitions (Regulation
M-A)
- APPENDIX J. Rule 10b-18
- APPENDIX J1. Share Repurchase Disclosure
Modernization
- APPENDIX K. State Statutes, Grouped According to
Regulatory Pattern
- APPENDIX L. Repurchase Agreement
- APPENDIX M. Employee-Shareholder Repurchase
Agreement
- APPENDIX N. Sample Bylaw Provisions Governing
Dividends
- APPENDIX O. Sample Pleadings

Table of Laws and Rules