

Legend Removal Requires Proper “Request To Register Transfer” Re: Securities

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Removal of legends from restricted securities (i.e., securities issued without registration under the Securities Act of 1933) can be a tricky business for transfer agents, issuers and their counsel. Improperly removing legends can get them in hot water with the Securities and Exchange Commission. See, e.g., *Holladay Stock Transfer, Inc.* and Sharon M. Owens, Securities and Exchange Act Release No. 39797 (March 25, 1998) and *SEC v. Reiss*, [Securities and Exchange Act Release No. 22638](#) (March 7, 2013). On the other hand, a transfer agent or issuer who fails to honor a proper request to transfer may face liability to a stockholder.

In *Guilfoyle v. Olde Monmouth Stock Transfer Co., Inc.*, 130 Nev. Adv. 78 (2014), a stockholder sought to have a legend removed from his stock certificates. His broker called the issuer’s transfer agent and was given the name of the issuer’s corporate counsel for purposes of obtaining a legal opinion. When the broker called the issuer’s counsel, the lawyer expressed surprise that the transfer agent had provided his name and declined to provide an opinion without instruction from the issuer. When the issuer ran into trouble with the SEC and filed for bankruptcy, the stock became worthless. See [SEC Litigation Release No. 21060](#) (May 27, 2009) (*Securities and Exchange Commission v. Pegasus Wireless Corporation, Jasper Knabb, and Stephen Durland*, Case No. 09-2302 (BZ) (ND Cal. filed May 26, 2009)). The stockholder then sued the transfer agent.

Under the Uniform Commercial Code, a transfer agent owes the same duty to register a transfer as does the issuer. NRS 104.8407. An issuer is obligated to register the transfer of a certificated security, but that obligation is subject to a number of conditions. NRS 104.8401. In Guilfoyle, the stockholder had not sought to transfer the shares, it wanted the legend removed so that it a transfer could be effected more easily. Thus, an initial question was whether a request for removal of a legend constitutes a “request to register transfer” within the meaning of NRS 104.8401.

The Nevada Supreme Court, sitting en banc, held that NRS 104.8401 “applies to a request to remove a restrictive legend from a person’s shares, equally with its more obvious object of a request to register a transfer of shares from one person to another.” In support, the Supreme Court cited then Vice-Chancellor Jack Jacobs’ opinion in *Bender v. Memory Metals, Inc.*, 514 A. 2d 1109 (Del. Ch. 1986) which reached the same conclusion based on Section 158 of the Delaware General Corporation Law and “the realities of the securities transfer process”.

The Nevada Supreme Court, however, concluded that the plaintiff had not met any of the conditions of NRS 104.8401:

Neither he [the plaintiff] nor his broker, DBS, presented his Pegasus shares to Olde Monmouth or asked Olde Monmouth to remove their restrictive legend. During her call with Olde Monmouth, Walters [the broker's employee] did not identify Guilfoyle or his circumstances, so Olde Monmouth would have had no way of knowing whether Guilfoyle could meet the requirements in NRS 104.8401(1) (much less the registration exemption requirements in SEC Rule 144).

I don’t agree that a request to remove a legend is a “request to register transfer” within the plain meaning of UCC Section 8-401. The Nevada Supreme Court has in the past stated “With regard to statutory interpretation, if a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the statute’s language . . .”. *Western Sur. Co. v. ADCO Credit, Inc.*, 251 P.3d 714, 716 (Nev. 2011). There is nothing ambiguous about the word “transfer” and no reasonable person would characterize a re-issuance of shares to the same person as a “transfer”. In this regard, I do have some company. *Steranko v. Inforex, Inc.*, 362 N.E.2d 222, 236 (Mass. App. Ct. 1977) (“The removal of the legend is the “obvious first step in, and a necessary incident to the contemplated transfer of such stock” (ibid.); but it is not the equivalent of the registration of a transfer.”). Perhaps this is why Vice-Chancellor Jacobs did not rely solely on the UCC but also relied upon Section 158 of the Delaware General Corporation Law.

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