Complainants point out that they are the only stockholders who are asking for payment. The defendant could, without difficulty, retire their stock immediately, but all stockholders of the same class must be offered equal treatment. The court should not decree payment of complainants alone for such payment might jeopardize the others. Of course, stockholders may elect, if they choose, not to take advantage of the decree.

SV Investment Partners, LLC v. ThoughtWorks, Inc.

Delaware Court of Chancery, 2010.
7 A.3d 973.

■ LASTER, VICE CHANCELLOR.

* * *

I. FACTUAL BACKGROUND

[Roy Singham, ThoughtWorks' founder, owns 94 percent of its common stock. The Company is an information technology professional services firm that develops and delivers custom business software applications and provides related consulting services. The nature of ThoughtWorks' business makes for volatile cash flows. ThoughtWorks' engagements are typically short-term; engagements come cyclically. Management historically has tried to maintain a cash cushion that will enable the firm to ride out unexpected revenue shortfalls and seasonal lows.

[In 1999, ThoughtWorks began to consider an initial public offering. ThoughtWorks retained an investment bank, S.G. Cowen Securities Corporation, for advice. Having an existing venture capital investor was thought to enhance a new issuer's credibility. SVIP and ThoughtWorks commenced negotiation, both anticipating an IPO within a year or two. They also discussed redemption rights in case no IPO materialized. The ThoughtWorks offering memorandum proposed a redemption right after seven years, with the payments made in twelve quarterly installments. SVIP countered with a redemption right after four years, then softened that demand to redemption after five years. ThoughtWorks proposed a two-year payout period. SVIP rejected that term. The parties compromised on a redemption right after five years, subject both to the legal availability of funds and to a one-year working capital carve-out. SVIP invested $26.6 million in ThoughtWorks in exchange for 2,970,917 shares of the Preferred Stock.

[The Preferred Stock is entitled to receive cumulative cash dividends at a rate of 9% per annum, compounded semi-annually and accruing semi-annually in arrears. In any liquidation, dissolution, or winding up of the Company, the Preferred Stock is entitled to a liquidation preference equal to the initial purchase price of $8.95 per share (adjusted for any stock dividends, splits, recapitalizations, or consolidations) plus all accrued and unpaid dividends, plus an amount equal to what the Preferred Stock would receive in liquidation assuming it were converted into common stock and shared ratably with the common. Article IV(B), Section 4(a) of the Charter sets out the Preferred Stock's redemption right:

> On the date that is the fifth anniversary of the Closing Date . . . , if, prior to such date, the Company has not issued shares of Common Stock to the public in a Qualified Public Offering . . . each holder of Preferred Stock shall be entitled to require the Corporation to redeem for cash out of any funds legally available therefor and which have not been designated by the Board of Directors as necessary to fund the working capital requirements of the Corporation for the fiscal year of the Redemption Date, not less than 100% of the Preferred Stock held by each holder on that date. Redemptions of each share of Preferred Stock made pursuant to this Section 4 shall be made at the greater of (i) the Liquidation Price and (ii) the Fair Market Value (as determined pursuant to Section 4(e) below) of the Preferred Stock.

Article IV also addresses what happens if ''funds of the Corporation legally and otherwise available for redemption pursuant to Section 4(a)'' are ''insufficient to redeem all the Preferred Stock required to be redeemed.'' In that event,

> funds to the extent so available shall be used for such purpose and the Corporation shall effect such redemption pro rata according to the number of shares held by each holder of Preferred Stock. The redemption requirements provided hereby shall be continuous, so that if at any time after the Redemption Date such requirements shall not be fully discharged, without further action by any holder of Preferred Stock, funds available pursuant to Section 4(a) shall be applied therefor until such requirements are fully discharged.

The same provision states that ''[f]or the purpose of determining whether funds are legally available for redemption . . . , the Corporation shall value its assets at the highest amount permissible under applicable law'' (the ''Valuation Provision'').

[The hoped-for IPO did not materialize. By 2003, it was clear that ThoughtWorks would be unable to redeem the Preferred. In 2005, an investment bank, William Blair, was engaged to seek debt financing to fund a redemption. ThoughtWorks sought to raise $30 million. The largest proposal offered was for $20 million. With no ability to pay $43 million, ThoughtWorks formally offered to redeem all of the Preferred Stock for $12.8 million. SVIP rejected the offer. On May 19 and 20, 2005, SVIP exercised its redemption rights and requested immediate and full redemption effective July 5, 2005.

[The ThoughtWorks Board took the position that the working capital restriction gave it the right, ongoing from year to year, to exclude necessary working capital from the funds available to pay the redemption obligation. A declaratory judgment to this effect was refused by the Chancery Court, which ruled that the working capital set-aside applied only in fiscal year 2005, and, thus, ThoughtWorks must now redeem SVIP's preferred stock to the extent funds are legally available therefor.

[SVIP again exercised its redemption right, demanding $45 million, the aggregate redemption price at the time. In response, the Board analyzed the extent to which the Company had ''funds legally available'' to make a redemption payment. The Board obtained legal advice from Freeborn & Peters LLP and financial advice from AlixPartners LLC. A Freeborn memorandum set out the process for the Board to follow:

> In declaring the amount of legally available funds for redemption, the Board must (a) not declare an amount that exceeds the corporation's surplus as determined by the Board at the time of the redemption, (b) reassess its initial determination of surplus if the Board determines that a redemption based on that determination of surplus would impair the Company's ability to continue as a going concern, thereby eroding the value of any assets (such as work in process and accounts receivable) that have materially lower values in liquidation than as part of a going concern, such that the value assumptions underlying the initial computation of surplus are no longer sustainable and the long term health of the Company is jeopardized, (c) exercise its affirmative duty to avoid decisions that trigger insolvency, (d) redeem for cash, (e) apply the amount declared pro rata to the Redeemed Stock, and (f) recognize the right of the Preferred Shareholders to a continuous remedy if the amount declared is not sufficient to satisfy in full the redemption obligation under the Charter.

The Board determined that ThoughtWorks had $500,000 of funds legally available and redeemed Preferred Stock in that amount. In each of the subsequent sixteen quarters, the Board followed the same process to determine the extent to which funds are legally available for redemptions. In each case, the Board has considered current financial information about the Company and consulted with its advisors. To date, through this quarterly process, ThoughtWorks has redeemed a total of $4.1 million of Preferred Stock. That equates to 222,802 shares, of which 214,484 are held by SVIP. SVIP has declined to submit its stock certificates for payment.

[Beginning in August 2009, ThoughtWorks sought third-party financing for a potential redemption. AlixPartners prepared an information memorandum that was sent to seventy financing sources. Eventually, two lenders provided definitive term sheets. The first binding term sheet was from an asset-based lender that focused on ThoughtWorks' tangible collateral. Given the intangible nature of ThoughtWorks' assets, the amount of financing from this source was limited. It also was contingent on all of the Preferred Stock being redeemed in return for the loan proceeds, which would have been significantly less than full redemption price. The second binding term sheet was from the debt financing arm of a private equity firm and focused on ThoughtWorks' ability to generate cash flow. Total debt financing of $30 million was offered, including a $5 million revolving line of credit and $25 million (less expenses) to redeem the Preferred Stock. The commitment letter was conditioned on holders tendering all of the Preferred Stock. SVIP declined, and the commitment expired.

[SVIP seeks a declaratory judgment as to the meaning of the phrase "funds legally available" and a monetary judgment for the lesser of (i) the full amount of ThoughtWorks' redemption obligation and (ii) the full amount of ThoughtWorks' "funds legally available."]

II. LEGAL ANALYSIS

Section 160 of the Delaware General Corporation Law (the "DGCL") authorizes a Delaware corporation to redeem its shares, subject to statutory restrictions. It provides, in pertinent part:

> (a) Every corporation may purchase, redeem, receive, take or otherwise acquire . . . its own shares; provided, however, that no corporation shall:
>
> (1) Purchase or redeem its own shares of capital stock for cash or other property when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment of the capital of the corporation, except that a corporation . . . may purchase or redeem out of capital any of its own shares which are entitled upon any distribution of its assets, whether by dividend or in liquidation, to a preference over another class or series of its stock . . . if such shares will be retired upon their acquisition and the capital of the corporation reduced in accordance with §§ 243 and 244 of this title.

"A repurchase impairs capital if the funds used in the repurchase exceed the amount of the corporation's 'surplus,' defined by 8 Del. C. § 154 to mean the excess of net assets over the par value of the corporation's issued stock." *Klang v. Smith's Food & Drug Ctrs., Inc.,* 702 A.2d 150, 153 (Del.1997). "Net assets means the amount by which total assets exceed total liabilities." 8 Del. C. § 154. Under Section 160(a)(1), therefore, unless a corporation redeems shares and will retire them and reduce its capital, "a corporation may use only its surplus for the purchase of shares of its own capital stock." *In re Int'l Radiator Co.,* 92 A. 255, 256 (Del.Ch.1914).

Section 160's restrictions on redemptions are intended to protect creditors. The statute seeks to accomplish this goal by prohibiting transactions that would redistribute to stockholders assets that were part of what nineteenth and early twentieth century common law jurists deemed a permanent base of financing upon which creditors were presumed to rely when extending credit. *See, e.g., In re Tichenor–Grand Co.,* 203 F. 720, 721 (S.D.N.Y.1913) (Hand, J.) (describing a redemption from capital as taking from the creditors "[t]he fund which they have the right to rely upon"); *see generally* Bayless Manning & James J. Hanks, Jr., *Legal Capital* ch. 2 (3d ed. 1990) [hereinafter "Legal Capital"] * * *. As a practical matter, the test operates roughly to prohibit distributions to stockholders that would render the company balance-sheet insolvent, but instead of using insolvency as the cut-off, the line is drawn at the amount of the corporation's capital.

Section 160(a) permits a Delaware corporation to redeem shares of stock. For ThoughtWorks, the Redemption Provision converts that authority into a mandatory obligation by granting SVIP the power "to require [ThoughtWorks] to redeem for cash out of any funds legally available therefor . . . not less than 100% of the Preferred Stock."

ThoughtWorks does not have and cannot raise sufficient funds to redeem "100% of the Preferred Stock." SVIP contends that under the circumstances, it is entitled to a judgment against ThoughtWorks for the full amount of the redemption price. * * * Equating ''funds legally available'' with ''surplus'' performs all of the work in SVIP's argument. With that move, SVIP converts a provision contemplating payment ''for cash'' into a formula based on an incorporeal legalism. This is a fallacy:

> One result of the perspective adopted by the legal capital scheme is that lawyers and judges often speak of making a distribution ''out of surplus'', or of ''paying out the surplus'' to shareholders. There is no special harm in this manner of speaking so long as the speaker and all their listeners are fully conscious that the statement is hash. ''Surplus'' and ''deficit'' are concepts invented by lawyers and accountants. They refer to an arithmetic balancing entry on a balance sheet, to the number that is the resultant of all the other numbers on the balance sheet and that is dictated by the basic mandate of the double entry book-keeping convention-that the left side and the right side must at all times balance. Distributions are never, and can never be, paid ''out of surplus''; they are paid out of assets; surplus cannot be distributed-assets are distributed. No one ever received a package of surplus for Christmas. A distribution of assets will produce accounting entries that reduce assets and also reduce something on the right hand side of the balance sheet-often surplus-but that is quite another statement.

Legal Capital, *supra,* at 37–38. Rather than examining ThoughtWorks' assets to determine whether it has ''funds'' that are ''available'' and can be used ''legally'' for redemptions, SVIP seeks a judgment based on an accounting convention.

A. The Plain Meaning Of ''Funds Legally Available''

The plain meaning of ''funds legally available'' has more practical content. ''A certificate of incorporation is viewed as a contract among shareholders, and general rules of contract interpretation apply to its terms.'' *Waggoner v. Laster,* 581 A.2d 1127, 1134 (Del.1990). * * * Because the existence of surplus under Section 160 most commonly constrains a corporation's ability to pay dividends or redeem stock, ''funds legally available'' is colloquially treated as if synonymous with ''surplus.'' The two concepts, however, are not equivalent. *Black's Law Dictionary* defines ''funds'' as follows:

> In the plural, this word has a variety of slightly different meanings, as follows: moneys and much more, such as notes, bills, checks, drafts, stocks and bonds, and in broader meaning may include property of every kind. Money in hand, assets, cash, money available for the payment of a debt, legacy, etc. Corporate stocks or government securities, in this sense usually spoken of as the ''funds.'' Assets, securities, bonds, or revenue of a state or government appropriated for the discharge of its debts. Generally, working capital; sometimes used to refer to cash or to cash and marketable securities.

Black's Law Dictionary 673 (6th ed. 1990). Non-legal dictionaries define funds (plural) as ''available pecuniary resources,'' *Webster's New Collegiate Dictionary* 461 (1979), or ''[a]vailable money; ready cash,'' *American Heritage College Dictionary* 551 (1993). Each of these definitions focuses on cash, cash-equivalents, and other relatively liquid assets that could readily be used as a source of cash.

Black's Law Dictionary defines ''available'' as ''[s]uitable; useable; accessible; obtainable; present or ready for immediate use.'' *Id.* at 135. Non-legal definitions of ''available'' include ''present or ready for immediate use,'' *Webster's, supra,* at 77, and ''[p]resent and ready for use; at hand; accessible,'' or ''[c]apable of being gotten; obtainable,'' *American Heritage, supra,* at 94.

Black's Law Dictionary defines ''legal'' as ''[c]onforming to the law; according to law; required or permitted by law; not forbidden or discountenanced by law; . . . lawful.'' Id. at 892. Other definitions of ''legal'' include ''conforming to or permitted by law or established rules,'' *Webster's, supra,* at 650, and ''[i]n conformity with or permitted by law,'' *American Heritage, supra,* at 774.

The phrase ''funds legally available'' therefore contemplates initially that there are ''funds,'' in the sense of a readily available source of cash. The funds must both be ''available'' in the general sense of accessible, obtainable, and present or ready for immediate use, and ''legally'' so, in the additional sense of accessible in conformity with and as permitted by law. The Redemption Provision renders this usage of ''funds'' all the more clear by speaking in terms of redemption ''for cash out of funds legally available therefor.'' The Redemption Provision thus directly links ''funds'' to the concept of ''cash.''

A corporation easily could have ''funds'' and yet find that they were not ''legally available.'' *See Klang,* 702 A.2d at 154 (noting that balance sheet showed negative net worth, which prevented distribution of cash via self-tender prior to revaluation of assets) * * *. A corporation also could lack ''funds,'' yet have the legal capacity to pay dividends or make redemptions because it had a large surplus. Under those circumstances, a corporation could still redeem shares in exchange for other corporate property. *See Alcott v. Hyman,* 208 A.2d 501, 508 (Del.1965) (explaining that Section 160 authorizes ''a corporation to use its property for the purchase of its own capital stock if such use will not impair its capital''). * * *

Even within the narrow confines of the DGCL, the terms are not coextensive. Section 160 authorizes shares to be redeemed out of capital ''if such shares will be retired upon their acquisition and the capital of the corporation reduced in accordance with §§ 243 and 244.'' 8 Del. C. § 160(a). Under those circumstances, ''legally available funds'' extends beyond surplus to ''capital.'' Section 170(a) authorizes dividends, which generally can be paid only out of surplus, to be paid alternatively ''out of . . . net profits for the fiscal year in which the dividend is declared and/or [sic] the preceding fiscal year.'' 8 *Del. C.* § 170(a). In that case, ''legally available funds'' extends to ''net profits.''

Outside the DGCL, a wide range of statutes and legal doctrines could restrict a corporation's ability to use funds, rendering them not ''legally available.'' * * *

Most significantly for the current case, the common law has long restricted a corporation from redeeming its shares when the corporation is insolvent or would be rendered insolvent by the redemption. Black-letter law recognizes that "the shareholder's right to compel a redemption is subordinate to the rights of creditors." 11 *Fletcher's Cyclopedia of the Law of Private Corporations* § 5310 (perm. ed.). * * * Learned commentators similarly explain that the redemption right of a preferred stockholder cannot impair the rights of creditors and therefore cannot be exercised when the corporation is insolvent or would be rendered insolvent by the payment.

Delaware follows these principles. Since at least 1914, this Court has recognized that, *in addition* to the strictures of Section 160, "[t]he undoubted weight of authority" teaches that a "corporation cannot purchase its own shares of stock when the purchase diminishes the ability of the company to pay its debts, or lessens the security of its creditors." *Int'l Radiator,* 92 A. at 255. In *Farland v. Wills,* 1975 WL 1960 (Del.Ch. Nov. 12, 1975), this Court enjoined payments by a corporation to its sole stockholder, including a repurchase of stock. The Court held that it was not necessary "to conclude preliminarily that there was an actual impairment of capital" under Section 160 of the DGCL. Rather, the Court enjoined the repurchase on the legal principle that "[a] corporation should not be able to become a purchaser of its own stock when it results in a fraud upon the rights of or injury to the creditors."

A corporation may be insolvent under Delaware law either when its liabilities exceed its assets, or when it is unable to pay its debts as they come due. *See, e.g., N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla,* 2006 WL 2588971, at *10 (Del.Ch. Sept. 1, 2006), *aff'd,* 930 A.2d 92 (Del.2007); *Prod. Res. Gp., L.L.C. v. NCT Gp., Inc.,* 863 A.2d 772, 782 (Del.Ch.2004). Although a corporation cannot be balance-sheet insolvent and meet the requirements of Section 160, a corporation can nominally have surplus from which redemptions theoretically could be made and yet be unable to pay its debts as they come due. The common law prohibition on redemptions when a corporation is or would be rendered insolvent restricts a corporation's ability to redeem shares under those circumstances, giving rise to yet another situation in which "funds legally available" differs from "surplus." * * *

The Valuation Provision does not override these distinctions. It simply requires that when determining whether funds are legally available, ThoughtWorks must "value its assets at the highest amount permissible under applicable law." The provision recognizes that there could be situations, as in *Klang* and *Morris,* when ThoughtWorks could have "funds" on hand and yet could not satisfy applicable legal requirements, most obviously Section 160 of the DGCL. Under those circumstances, the Valuation Provision requires that ThoughtWorks re-value its assets "at the highest amount permissible under applicable law" in order to free "funds" for redemptions to the maximal extent permitted by law. The Valuation Provision does not create an obligation to redeem shares when no "funds" exist. Nor can the Valuation Provision trump other legal impediments to the use of funds for redemption, such as cash-flow insolvency, that cannot be addressed by re-valuing assets.

SVIP's claim depends on "funds legally available" being equivalent to "surplus." Because the two concepts differ, SVIP's claim fails as a matter of law. SVIP's claim also fails because it supposes that the existence of "surplus" is sufficient to establish conclusively a corporation's obligation to redeem shares, regardless of whether the corporation actually has funds from which the redemption can be made. "Funds legally available" means something different. It contemplates "funds" (in the sense of cash) that are "available" (in the sense of on hand or readily accessible through sales or borrowing) and can be deployed "legally" for redemptions without violating Section 160 or other statutory or common law restrictions, including the requirement that the corporation be able to continue as a going concern and not be rendered insolvent by the distribution.

B. The Amount Of Funds Legally Available

* * *

Under Delaware law, when directors have engaged deliberatively in the judgment-laden exercise of determining whether funds are legally available, a dispute over that issue does not devolve into a mini-appraisal. Rather, the plaintiff must prove that in determining the amount of funds legally available, the board acted in bad faith, relied on methods and data that were unreliable, or made a determination so far off the mark as to constitute actual or constructive fraud. *Klang,* 702 A.2d at 156; *accord Morris,* 63 A.2d at 584–85.

The Valuation Provision requires that ThoughtWorks "value its assets at the highest amount permissible under applicable law." This language does not eliminate the need for judgment when determining "funds legally available." Judgment is inherently part of the valuation process, particularly when the necessary decisions encompass the corporation's ability to continue as a going concern. Nor does the Valuation Provision require this Court to mark ThoughtWorks' assets at the highest number a valuation expert can put on the Company while keeping a straight face. In *Klang,* the Delaware Supreme Court held that a corporation has the power to revalue its assets, rather than relying on book value, to show surplus for the purpose of making stock redemptions. 702 A.2d at 154. The Delaware Supreme Court did not invite practitioners of the valuation arts to calculate speculative figures. The Court rather stated: "Regardless of what a balance sheet that has not been updated may show, an actual, though unrealized, appreciation reflects *real economic value that the corporation may borrow against or that creditors may claim or levy upon.*" *Id.* (emphasis added). A projection-driven discounted cash flow analysis may not reflect "real economic value" or bear any relationship to what a corporation might borrow or its creditors recover.

SVIP failed to prove at trial that the Board ever (i) acted in bad faith in determining whether ThoughtWorks had legally available funds, (ii) relied on methods and data that were unreliable, or (iii) made determinations so far off the mark as to constitute actual or constructive fraud.

Rather than litigate these issues, SVIP instructed its expert, Laura B. Stamm, to value ThoughtWorks, and she did so utilizing the discounted cash flow, comparable companies, and comparable transaction methodologies. Based on these analyses, she valued ThoughtWorks' equity in the range of $68–$137 million. SVIP's counsel instructed Stamm that in light of the Valuation Provision, her valuation was equivalent to ''funds legally available.'' She therefore opined that ThoughtWorks had sufficient ''funds legally available'' to redeem SVIP's Preferred Stock.

Stamm concededly did not consider the amount of funds ThoughtWorks could use for redemptions while still continuing as a going concern. She never considered how making an eight-figure redemption payment would affect ThoughtWorks' ability to operate and achieve the projections on which her analyses relied. She had no thoughts on how ThoughtWorks might raise the funds for such a redemption payment. Although defensible as a theoretical exercise, her opinion does not credibly address the issue of ''funds legally available.'' It does not reflect ''real economic value'' or bear any relationship to what ThoughtWorks might borrow or its creditors recover. It offers no assistance in determining whether the Board acted in bad faith, relied on methods and data that were unreliable, or made determinations so far off the mark as to constitute actual or constructive fraud.

The factual record demonstrates that the Board has acted in the utmost good faith and relied on detailed analyses developed by well-qualified experts. For sixteen straight quarters, the Board has undertaken a thorough investigation of the amount of funds legally available for redemption, and it has redeemed Preferred Stock accordingly. On each occasion, the Board has consulted with financial and legal advisors, received current information about the state of the Company's business, and deliberated over the extent to which funds could be used to redeem the Preferred Stock without threatening the Company's ability to continue as a going concern. The Board's process has been impeccable, and the Board has acted responsibly to fulfill its contractual commitment to the holders of the Preferred Stock despite other compelling business uses for the Company's cash. This is not a case where the Board has had ample cash available for redemptions and simply chose to pursue a contrary course. *Cf. Mueller v. Kraeuter & Co.,* 131 N.J. Eq. 475, 25 A.2d 874, 877 (N.J.Ch.1942) (compelling corporation to take steps to redeem preferred stock where directors in prior years deployed funds exceeding amount of redemption obligation for purposes of expansion).

Most notably, the Board actively tested the market to determine what level of ''funds'' ThoughtWorks could obtain. A thorough canvass that included contacts with seventy potential funding sources generated a term sheet that would enable ThoughtWorks to borrow funds netting $23 million for redemptions, *if and only if* the ''funds'' were used to satisfy the entire obligation to the Preferred Stock. This proposal is the most credible evidence of the maximum funds legally available for a complete redemption of the Preferred Stock. There is no evidence that ThoughtWorks could obtain more funds for redemption or, importantly, that any third party would finance a partial redemption.

C. The Settled Commercial Expectations Of Investors And Issuers

SVIP's plight is nothing new. * * * Faced with venerable and widely recognized impediments to mandatory redemption, investors have developed other ways to protect themselves and secure exit opportunities.

Most obviously, in lieu of preferred stock, investors can purchase convertible debt or straight debt with warrant coverage. Either combination provides the same potential equity upside as preferred stock, but carries the downside protection of a debt instrument's right to payment at a specified time, irrespective of the company's financial condition. * * *

Although debt offers an alternative, there are many reasons why investors and issuers might want to structure a position as equity. *See generally* George G. Triantis, *Financial Contract Design in the World of Venture Capital,* 68 U. Chi. L.Rev. 305, 311–19 (2001) (comparing venture capital preference for convertible securities, principally preferred stock, with bank paradigm of short-term secured debt). Investors who take equity stakes often insist on additional protections, such as a springing right to board control. * * * The National Venture Capital Association pointedly explains the rationale for such a provision in terms that apply to the current case:

> Due to statutory restrictions, it is unlikely that the Company will be legally permitted to redeem in the very circumstances where investors most want it (the so-called ''sideways situation''), [so] investors will sometimes request that certain penalty provisions take effect where redemption has been requested but the Company's available cash flow does not permit such redemption-e.g., the redemption amount shall be paid in the form of a one-year note to each unredeemed holder of Series A Preferred, and the holders of a majority of the Series A Preferred shall be entitled to elect a majority of the Company's Board of Directors until such amounts are paid in full.

NVCA Model Term Sheet, *supra,* at 6 n. 14.

Another alternative, common in stockholders' agreements, allows a preferred stockholder to sell its security and ''drag along'' the remaining stockholders. ''Drag along'' rights, which effectively allow a preferred stockholder to sell the entire company to a third party without board involvement, are quite common. A similar but stronger provision requires the forced sale of the company to the preferred stockholder. *See, e.g., Hokanson v. Petty,* 2008 WL 5169633 (Del.Ch. Dec. 10, 2008) (rejecting a fiduciary duty challenge to a merger effected pursuant to a ''Buyout Option'' negotiated by a preferred stockholder at the time of its investment).

The existence of these and other widely utilized alternatives demonstrates at least two things. First, sophisticated investors understand that mandatory redemption rights provide limited protection and function imperfectly, particularly when a corporation is struggling financially. If a standard mandatory redemption provision offered a clear path to a large monetary judgment and concomitant creditor remedies, then so many alternatives likely would not have evolved. My interpretation of ''funds legally available'' thus fulfills the settled expectations of investors and issuers as evidenced by established commercial practice.

Second, SVIP easily could have protected its investment and avoided its current fate through any number of means. SVIP decided not to, and that choice was rational at the time. SVIP bought the Preferred Stock at the height of the dot-com mania from a technology firm with an established track record, real revenues, and actual earnings-all of which compared favorably with many issuers then embarking on over-subscribed and first-day-popping IPOs. Everyone involved anticipated that ThoughtWorks soon would go public at a multi-billion dollar valuation. Instead, the bubble burst. Now, with hindsight, SVIP understandably wishes it had additional rights * * *.

III. CONCLUSION

Judgment is entered in favor of ThoughtWorks and against SVIP.

4. ALTERATION OF FINANCIAL RIGHTS

(A) BY CHARTER AMENDMENT

Goldman v. Postal Telegraph

United States District Court, District of Delaware, 1943.
52 F.Supp. 763.

■ LEAHY, DISTRICT JUDGE. Diversity and the requisite amount establish jurisdiction.

* * *

Postal Telegraph, Inc., incorporated under the laws of Delaware in 1939 (herein called ''Postal''), agreed to transfer to Western Union Telegraph Company (herein called ''Western Union''), another Delaware corporation, all its assets. At the time of the agreement plaintiff owned 500 shares of non-cumulative preferred stock of Postal which, by the terms of Postal's certificate of incorporation, entitled all preferred stockholders to a payment of $60 a share on liquidation before any distribution could be made to its common stockholders. On July 5, 1943, defendant Postal proposed to its stockholders three resolutions authorizing (1) the sale of all its assets to Western Union, conditioned upon the approval by Postal's stockholders of an amendment to its certificate of incorporation referred to in (2); (2) the amendment of Postal's certificate of incorporation so as to provide that the holders of defendant's non-cumulative preferred stock would receive in lieu of $60 per share on liquidation one share of Western Union B stock;* and (3) formal dissolution of Postal. At the stockholders'

* [Ed. Note] The amendment added the following to the provisions of the certificate of incorporation dealing with the rights of preferred stockholders: