

No. 21752 - STATE OF WEST VIRGINIA EX REL. HERBERT ELISH, HARVEY L. SPERRY, WARREN E. BARTEL, DAVID M. GOULD, JAMES BRUHN, DAVID L. ROBERTSON, F. JAMES RECHIN, RICHARD F. SCHUBERT, GORDON C. HURLBERT, LAWRENCE M. ISAACS, IRVING BLUESTONE, THOMAS R. STURGES, JR., THOMAS W. EVANS, JOHN T. GILMORE, AND WEIRTON STEEL CORPORATION, A DELAWARE CORPORATION V. HONORABLE RONALD E. WILSON, JUDGE OF THE CIRCUIT COURT OF HANCOCK COUNTY, LARRY G. GODICH, JOHN L. BIRD, RAYMOND A. SACRIPANTI, SR., SHERIDAN BUFFINGTON, THOMAS M. RODGERS, MARTIN A. REITTER, JO ANN BRANLETT, EDWARD A. GODICH, AND BARBARA J. WILSON

Miller, Justice, concurring:

Although I agree with the majority that this writ should be denied, I disagree with the majority's interpretation of W. Va. Code, 31-1-94 (1974), and W. Va. Code, 31-1-103, in regard to voting trust certificates. The majority recognizes that, under West Virginia law, a shareholder derivative suit may be filed by holders of voting trust certificates. W. Va. Code, 31-1-103. However, the majority concludes that holders of shares under an employee stock option plan (ESOP) in this case are not holders of voting trust certificates. I believe that under West Virginia law, the respondents, equitable shareholders of Weirton Steel stock under this ESOP, have standing to bring the underlying action because, in essence, they are holders of record of voting trust certificates.

The majority cites W. Va. Code, 31-1-94, to support its contention that this ESOP is not a voting trust. ____ W. Va. at ____, ____ S.E.2d at ____ (Slip op. at 7). W. Va. Code, 31-1-94, sets out the following method of creating a voting trust: (1) Any number of shareholders of the corporation may create a voting trust by conferring

upon a trustee or trustees the right to vote or otherwise represent their shares; (2) the voting trust may not exceed a period of ten years; (3) the voting trust must be a written agreement specifying the terms and conditions of the voting trust; (4) the voting trust agreement must be deposited with the corporation at its principal office; and (5) the shares must be transferred to the trustee.

Although it is true that the ESOP does not meet the ten-year limitation on voting trusts prescribed by W. Va. Code, 31-1-94,¹ it is also true that the ESOP satisfies the purpose of the ten-year limitation in substance if not form. The ten-year rule is designed to protect shareholders from signing away their voting rights for a prolonged period of time. Thus, voting trust participants only are locked in for a limited time if they become disenchanted with the trustee's representation. The ESOP provides that shareholders may make periodic withdrawals of their interests under the trust as early as one year after joining the ESOP. Thus, the purpose of the ten-year rule is satisfied. See Oceanic Exploration Co. v. Grynberg, 428 A.2d 1, 5 (Del. Sup. 1981), where the Delaware court held that, in regard to the applicability of the Delaware voting trust statute

¹The majority also suggests that a voting trust must be "signed." This assertion is unsupported by the statute, which merely states that the voting trust must be written. The ESOP meets that qualification. Moreover, the majority claims that the ESOP is not a voting trust because the ESOP was created before the respondents became shareholders. Such an argument is hyper-technical and wrong. The fact is that the respondents meet the statutory requirement that they be shareholders who confer upon trustees certain representation interests.

"the test is whether the substance and purpose of the stock arrangement is 'sufficiently close to the substance and purpose of (the [voting trust] statute) to warrant its being subject to the restrictions and conditions imposed [thereby].'" Quoting Lehrman v. Cohen, 222 A.2d 806, 806 (Del. Sup. 1966)). See generally Annot., Validity of Voting Trust or Similar Agreement for Control of Voting Power of Corporate Stocks, 98 A.L.R.2d 376 (1964).

Moreover, the majority's reliance on W. Va. Code, 31-1-94, in interpreting W. Va. Code, 31-1-103, is misplaced. W. Va. Code, 31-1-94, is designed not to restrict shareholder rights, but rather to enhance them. Regulation of voting trusts serves the important purpose of preventing secret and uncontrolled groups of shareholders from acquiring control of a corporation to the detriment of non-shareholders. Oceanic Exploration Co., 428 A.2d at 7 (citing Lehrman, 222 A.2d at 807). See generally 76 Am. Jur. 2d Trusts § 11 at 43 (1992); 18A Am. Jur. 2d Corporations § 1125, et seq. (1985).

Certainly, the ESOP is neither secret nor uncontrolled. It was created for the purpose of divorcing the self-interest of the employees from management decisions and to facilitate corporate growth to the benefit of all shareholders. Thus, it meets the traditional purpose of a voting trust.

In the context of W. Va. Code, 31-1-103, one must then look to the purpose of the statute -- and the purpose is clearly to permit

interested shareholders to protect the corporate interests. It limits the right to file a derivative action to shareholders with more than mere partial equitable interests. However, it permits traditional voting trust participants the right to file a derivative action because their share interests are deemed strong enough to sustain such an action. Thus, it is the amount of control over one's share to which the standing limitation in W. Va. Code, 31-1-103, is directed.

In this case, the respondents, as members of the ESOP, do not have all the rights of traditional shareholders. Their rights to sell their shares are limited. However, their interests are much stronger than those who are traditional participants in voting trusts.

The respondents have the right to direct the trustee to vote their shares according to the respondents' wishes, thus giving them more control than traditional voting trust participants. I believe that the shareholder derivative suit statute must be construed in light of its purpose, which is to allow shareholders to file a derivative action if their control of their shares is strong enough. Thus, any shareholder with interests and control greater than participants in a traditional voting trust would have standing to file a shareholder derivative action under W. Va. Code, 31-1-103.

Although case law in this area is rather limited, one jurisdiction has dealt with the analogous situation of participants

in a stock bonus plan and found that such participants qualify as holders of record of voting trust certificates. In Foltz v. United States News & World Report, Inc., 627 F. Supp. 1143, 1159 (D.D.C.

1986), the court stated the following:

"What a participant in the stock bonus plan had were voting trust certificates which were redeemable as stock at the termination of the participant's employment, should the magazine decline its option to repurchase the stock represented by the certificates. In that eventuality, the participant would hold a stock certificate, with which he could do as he wished. Looking then at the plain language of the statute, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S. Ct. 1917, 1935, 44 L. Ed. 2d 539 (1975), citing in Daniel, 439 U.S. at 558, 99 S. Ct. at 795, it would appear that interests in the U.S. News stock bonus plan represent either 'stock' or 'voting-trust certificates' within the meaning of the securities laws." (Footnote omitted).

In any event, I believe, for purposes of standing under the West Virginia shareholder derivative suit statute, W. Va. Code, 31-1-103, that the substance and purpose of the ESOP meets the qualifications of a voting trust, and that the respondents should be permitted to proceed on that basis.