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Dana R. Roundtree

CORPORATE LAW

I. COURT EXPANDS REMEDIES AVAILABLE TO OPPRESSED MINORITY SHAREHOLDERS UNDER THE CORPORATE DISSOLUTION PROVISIONS

In *Hite v. Thomas & Howard Co.*[1] the South Carolina Supreme Court held that an aggrieved shareholder who alleges a legitimate ground for corporate dissolution may obtain an alternative remedy without actually demanding dissolution.[2] The *Hite* court expanded the relief available to oppressed minority shareholders by allowing shareholders to seek directly a court-ordered buy-out or other remedy through the judicial dissolution provisions of the South Carolina Business Corporation Act.[3]

Hite, the minority shareholder, owned one-third of the outstanding stock of Thomas & Howard Co. of Florence (Florence Corporation). The majority shareholder, Thomas & Howard Co. of Columbia (Columbia Corporation), voted to increase the authorized number of shares of the Florence Corporation. Over Hite's opposition, the majority shareholder also approved a stock exchange agreement that provided for the issuance of one share of the Florence Corporation's common stock in exchange for approximately ten shares of the Columbia Corporation's common stock. This exchange reduced Hite's ownership interest in the Florence Corporation from 33.33% to 11.5% of the outstanding stock.[4] Hite brought suit seeking, among other relief, dissenter's rights or a court-ordered buy-out.[5]

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1. 305 S.C. 358, 409 S.E.2d 340 (1991).

2. *Id.* at 364, 409 S.E.2d at 344. Section 33-14-300(2)(ii) of the South Carolina Business Corporation Act permits dissolution of a corporation for conduct, by those in control, "that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder." S.C. CODE ANN. § 33-14-300(2)(ii) (Law. Co-op. 1990). Section 33-14-310(d) lists remedies, other than dissolution of the corporation, that a court may order in a shareholder's action for dissolution. *Id.* § 33-14-310(d).

3. *See Hite*, 305 S.C. at 363-64, 409 S.E.2d at 343-44. South Carolina's provisions for judicially supervised corporate dissolution are codified at S.C. CODE ANN. §§ 33-14-300 to -330 (Law. Co-op. 1990). *See generally* Theresa L. Kruk, Annotation, *Relief Other Than by Dissolution in Cases of Intracorporate Deadlock or Dissension*, 34 A.L.R.4TH 13 (1984).

4. *Hite*, 305 S.C. at 360-61, 409 S.E.2d at 341-42.

5. *Id.* at 362-63, 409 S.E.2d 342-43. Hite also sued for breach of fiduciary duty and negligent mismanagement. *Id.* at 361-62, 409 S.E.2d at 342. The court determined that Hite properly brought the cause of action for breach of fiduciary duty and negligent mismanagement as an individual action, not as a derivative action,

The court dispensed with Hite's claim for dissenter's rights by strictly construing South Carolina's dissenter's rights statute.[6] Section 33-13-102 provides that a shareholder may dissent and receive fair market value for her shares if, among other reasons, her corporation's shares are acquired in a share exchange.[7] However, the court concluded that Hite was not entitled to dissenter's rights because he owned shares in the *acquiring* company, not in the *acquired* company.[8] The *Hite* court also concluded that dissenter's rights were not necessary because Hite had an adequate remedy under the judicial dissolution provisions.[9] Notably, however, Hite did not allege that the Columbia Corporation improperly denied him any preemptive rights.[10]

In another cause of action, Hite sought relief under South Carolina's judicial dissolution provisions.[11] Hite alleged oppressive, fraudulent, and unfair conduct by the majority shareholder, but sought a court-ordered buy-out of his shares at fair market value under section 33-14-310(d)(4), instead of a dissolution.[12] Essentially, Hite sought to use the Corporate Code's dissolution provisions to obtain substantially the same relief that was unavailable to him under the dissenter's rights provisions.[13]

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because Hite's alleged loss was "separate and distinct from that of the corporation." *Id.* at 361, 409 S.E.2d at 345 (citing Ward v. Griffin, 295 S.C. 219, 367 S.E.2d 703 (Ct. App. 1988)).

6. S.C. CODE ANN. § 33-13-102 (Law. Co-op. 1990), *construed in Hite*, 305 S.C. at 362-63, 409 S.E.2d at 342-43.

7. S.C. CODE ANN. § 33-13-102(2).

8. *Hite*, 305 S.C. at 363, 409 S.E.2d at 343. The court specifically refused to follow Morley Bros. v. Clark, 361 N.W.2d 763 (Mich. Ct. App. 1984) (interpreting a substantially similar statute to allow dissenter's rights to the minority shareholders of an acquiring corporation). *Hite*, 305 S.C. at 363, 409 S.E.2d at 343.

9. *Hite*, 305 S.C. at 363, 409 S.E.2d at 343. The remedies under the judicial dissolution provisions are discussed *infra* notes 12-15 and accompanying text.

10. *See generally* Stephen H. Schulman & Alen Schenk, *Shareholders' Voting and Appraisal Rights in Corporate Acquisition Transactions*, 38 BUS. LAW. 1529 (1983) (examining voting and dissenting rights in corporate acquisitions).

11. S.C. CODE ANN. §§ 33-14-300 to -330 (Law. Co-op. 1990).

12. *See Hite*, 305 S.C. at 364, 409 S.E.2d at 343-44. Section 33-14-310(d) provides:

> In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion appropriate, including, without limitation, an order: . . . (4) providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.

S.C. CODE ANN. § 33-14-310(d) (Law. Co-op. 1990).

13. *See supra* notes 6-8 and accompanying text.

The court held that a shareholder who alleges sufficient grounds for dissolution may seek the alternative relief provided in section 33-14-310(d) without demanding dissolution.[14] The court justified its broad interpretation of section 33-14-310(e) by stating that "[t]he purpose of allowing alternative equitable relief is to avoid the drastic remedy of dissolution."[15]

The problems encountered by the minority shareholder in *Hite* are not uncommon because close corporations are prone to intracorporate hostility and dissension.[16] Dissatisfied minority shareholders of a close corporation are in a difficult position because they typically have no voting power to effect corporate changes. Additionally, minority shareholders have no ready market in which to sell their shares[17] and often are limited by share transfer restrictions.[18] Moreover, as *Hite* demonstrates, dissenter's rights provisions may not adequately protect minority shareholders from fundamental corporate changes because the majority often can structure transactions to avoid dissenter's rights altogether.[19] The frustration of minority shareholders often culminates in a dissolution suit.

A court-ordered buy-out is the most frequent remedy in dissolution suits because this remedy is less drastic than dissolution and provides advantages for both the majority and minority shareholders.[20] After a buy-out, the disgruntled minority shareholder is free to pursue other investments, and the majority has eliminated the divisive shareholders.[21] Prior to *Hite*, minority shareholders who brought dissolution actions hoping for an alternative remedy took the risk that a court might dissolve

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14. *Hite*, 305 S.C. at 364, 409 S.E.2d at 344.

15. *Id.* at 364, 409 S.E.2d at 343-44. Section 33-14-310(e) provides: "The relief authorized in subsection (d) may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief, but not dissolution, is appropriate." S.C. CODE ANN. § 33-14-310(e) (Law. Co-op. 1990).

16. Common areas of friction include family and marital conflicts, disagreements between employee-shareholders and nonemployee-shareholders, and basic disagreements over corporate policy. *See generally* F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 122 (1987).

17. *Id.* at 123.

18. *See* S.C. CODE ANN. § 33-6-270 (Law. Co-op. 1990).

19. *See* O'Neal, *supra* note 16, at 138.

20. *See* Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 53 (1987).

21. *See* O'Neal, *supra* note 16, at 123 ("Some corporate officers say they have to spend more time and thought in keeping minority shareholders pacified than in operating the business.").

the corporation instead of granting alternative relief. The chilling effect of this risk may have deterred many oppressed shareholders from seeking dissolution.

Although *Hite* is a versatile tool, it merely opens the courthouse doors for oppressed minority shareholders by providing an increased array of remedies.[22] A minority shareholder still must prove actual oppression before a court will order a judicially supervised buy-out or other alternative remedy under the dissolution provisions of the South Carolina Corporate Code.[23]

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22. Oppression is a vague concept that rarely results from a single incident, but rather from a series of otherwise legitimate actions that form a pattern of oppression. *See generally* F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS (2d ed. 1985); Ferdinand S. Tinio, Annotation, *What Amounts to "Oppressive" Conduct Under Statute Authorizing Dissolution of Corporation at Suit of Minority Stockholders*, 56 A.L.R.3D 358 (1974). Ultimately, the existence of oppression is a question of fact. *See* Richard C. Tinney, *Oppressive Conduct by Majority Shareholders, Directors, or Those in Control of Corporation*, 5 AM. JUR. P.O.F.2D 645 (1975).

23. Dissolution and its corresponding alternative remedies should be reserved only for situations in which the majority subjects the minority to "genuine abuse[s] rather than . . . acceptable tactics in a power struggle for control of a corporation." S.C. CODE ANN. § 33-14-300 official cmt. (Law. Co-op. 1990).