Louisiana Law Review

Volume 37 | Number 1
Fall 1976

"SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS: EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES. By F. Hodge O'Neal. Callaghan & Co., Chicago, Ill., 1975. Pp. xiv, 732. $37.50.

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BOOK REVIEW

"SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS: EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES. By F. Hodge O'Neal. Callaghan & Co., Chicago, Ill., 1975. Pp. xiv, 732. $37.50.

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For a business attorney there is probably no more frustrating and difficult problem to resolve than a contest for control of a business enterprise. Such contests, since they often take the form of clashes between persons having very strong personalities, can be bitter and leave scars that never heal. All attorneys whose practice involves assisting individuals in organizing successful business enterprises will find the recent book, *"Squeeze-Outs" of Minority Shareholders: Expulsion or Oppression of Business Associates*, written by F. Hodge O'Neal, a great source of useful advice concerning methods of structuring their clients' enterprises to achieve stability and prosperity.[1] Professor O'Neal analyzes many problems that recur in business enterprises and gives sound advice on how they can be successfully dealt with *when the enterprise is first organized.* Disagreements between participants in business enterprises can result in great losses both to the participants and to the entire economy.[2] The person who can do the most to prevent these losses is the attorney who recognizes the dangers before the enterprise is organized and incorporates procedures to resolve disputes that may arise among the participants.

In chapter two, Professor O'Neal analyzes the major causes of problems and disputes that arise among participants in business enterprises. The important point to be made here is that an attorney must realize that the

* Special Counsel, Division of Investment Management, Securities and Exchange Commission. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed in this book review are those of the author and do not necessarily reflect the views of the Securities and Exchange Commission or of the author's colleagues on the staff of the Commission.

1. Professor O'Neal is also the author of a widely read two-volume treatise on closely-held corporations. *See* F. O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE (rev. ed. 1971).

2. *See* F. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS §§ 1.03-.04 (1975) [hereinafter cited as O'NEAL].

organization of a successful business involves much more than merely drafting a routine corporate charter or partnership agreement. When organizing a business enterprise, one cannot escape the necessity of considering the individual needs and problems of all the participants in that enterprise.[3] A person who views his participation in a business enterprise as the means by which he can utilize unique talents in a business setting has different interests than the person who simply views such participation as a money-making venture. In the first case, efforts must be made to ensure that persons with unique talents will have the opportunity to use them in the enterprise without undue interference from their colleagues. In the second case, efforts must be made to make certain that all participants in the enterprise will equitably share in the profits. Such issues as death of one or more of the participants, inability of a participant to remain active in the enterprise, entry of new persons, sale of participant interests, valuation, and settlement of policy questions involving operation of the business should be considered before a business is finally organized, since participants usually can agree on some method to deal equitably with them at that time.[4] However, if they are not settled by the participants before organization, they can provide the basis for development of disagreements that will destroy the enterprise.[5] Since the participants often do not consider this type of question when they decide to go into business together, it is the responsibility of the attorney who is called upon to organize the enterprise to see that these issues are dealt with when the business is first organized.[6]

In chapters three through six, Professor O'Neal discusses in detail the major techniques used by participants in business enterprises to squeeze each other out. Such squeeze-out techniques are as diverse and imaginative as are the types of individuals who are parties to business enterprises.

3. Indeed, many disagreements that destroy business enterprises are caused by failure to consider the individual needs of the participants when the business was organized. *See, e.g.*, Hyman v. Velsicol Corp., 342 Ill. App. 489, 97 N.E.2d 122 (1951).

4. One of the most valuable aspects of Professor O'Neal's book is the citation of examples of shareholder agreements that have provided the basis for settling business problems that arise and for preventing one participant from taking advantage of another participant. See the shareholder agreement in Glazer v. Glazer, 374 F.2d 390 (5th Cir.), *cert. denied*, 389 U.S. 831 (1967).

5. Most, though not all, attempted squeeze-outs of one business participant by a fellow participant are caused by such disagreements. Such factors as greed, personality clashes, marital disputes, and the like are involved in many such squeeze-outs. O'NEAL at § 2.02.

6. Unfortunately, all too many attorneys today are not raising this type of inquiry with their clients. O'NEAL at § 2.20.

Professor O'Neal describes these techniques in order to warn participants in business enterprises that some day they may be subject to such squeeze-out techniques, and to enable the participants to take necessary action in advance to thwart them.[7] Some of the squeeze-out techniques described in the book involve use of control of management of a business enterprise to favor the interests of some participants at the expense of the interests of others.[8] Such action sometimes takes the form of the management's withholding dividends from some or all of the participants, preventing some participants from serving as employees of the enterprise, paying extremely high compensation to some of the participants for their services to the enterprise, selling control of the enterprise to another group of individuals,[9] having the enterprise enter into contracts with other businesses controlled by one or more of the participants, or allowing some of the participants to use the enterprise's assets for their personal benefit. Such actions, if carried on for a sufficient period of time, may so adversely affect the participants against whom they are directed that those participants will be forced to leave the business enterprise on unfavorable terms.

Another method frequently used by one group of participants in a business enterprise to squeeze out some of their colleagues is to effect fundamental changes in the organizational structure.[10] Such fundamental changes include altering the voting rights of the participants by modifying their rights as shareholders or partners, diluting a participant's equity interest in the enterprise by either issuing more shares or reducing the number of shares outstanding, eliminating cumulative voting in election of directors, merging the enterprise with another business, selling some or all of the enterprise's assets, and actually dissolving the enterprise. Such squeeze-out maneuvers often result in the controlling shareholders' forcing the sellout of an individual's minority interest at a price dictated either by the purchasers or by state statute.[11] For an individual who has invested a great

7. O'NEAL at § 1.05. However, in the preface, Professor O'Neal indicates that there is some evidence that an earlier work of his in this same area may have been utilized by the "squeezors" as well as the "squeezees." Thus, there is no way to tell which group of participants in a business enterprise in fact will find Professor O'Neal's book most valuable.

8. O'NEAL at §§ 3.01-.18, 4.01-.06.

9. However, the courts have developed a number of theories to prevent some participants from profiting at the expense of either the enterprise or of the minority participants in the sale of a control interest in a business enterprise. O'NEAL at §§ 4.03-.06.

10. O'NEAL at §§ 5.01-.32, 6.01-.10.

11. Such statutes give participants the right to have their interest in the business enterprise bought out based on its appraised value if they dissent from taking certain

deal of time and effort in developing a business, this is often inadequate compensation for his contributions to the enterprise. By demonstrating the great need for participants to constantly guard against attempts by their colleagues to make them susceptible to squeeze-out maneuvers, and thereby making participants more vigilant against such maneuvers, Professor O'Neal has performed a most useful service to the business community.

In addition to describing the major squeeze-out techniques used by participants in business enterprises against each other, Professor O'Neal discusses action which participants can take to resist such maneuvers successfully.[12] In some instances, participants can defeat the squeeze-out techniques simply by exercising the rights given them by state statute and by the documents organizing the business enterprise. For example, corporate shareholders in most instances have the right to inspect the books and records of the corporation, if they give proper notice of the reason for inspection.[13] In addition, shareholders of corporations which have a board of directors can ask the directors to explain how their actions are in the best interests of the corporation and all its shareholders, and where the directors either cannot or refuse to so justify their actions, some courts have ruled that minority shareholders have a cause of action against the directors for breach of fiduciary duties owed the minority shareholders.[14] Of course, if a partnership agreement or corporate charter gives business participants special rights (*e.g.*, guaranteed representation on the board of directors, veto power over decisions affecting operations of the enterprise, guaranteed employment at a set salary level, and the like), exercise of those rights will enable a participant to resist a squeeze-out effort. Finally, some state securities statutes have specific provisions designed to prevent individuals from being unfairly forced out of a business enterprise.[15] Participants in

fundamental action. However, these statutes do *not* apply to all types of fundamental action which can be taken to squeeze some participants out of an enterprise; and, even in those instances where these statutes do apply, they often do not result in compensation to the "squeezees" commensurate with the time and effort they have contributed to developing the business. O'NEAL at §§ 5.02, 5.27-.30.

12. O'NEAL at §§ 7.01-.17.

13. See Section 52 of the Model Business Corporation Act for the provisions governing shareholder inspection of a corporation's books and records present in most state statutes. *2 Model Bus. Corp. Act Ann. § 52* (2d ed. 1971).

14. *See, e.g.*, Jones v. H.F. Ahmanson & Co., 81 Cal. Rptr. 592 (1969), 460 P.2d 464. *See also* Note, 83 HARV. L. REV. 1904 (1970).

15. Unfortunately, such state statutes are few in number, and have in most cases not been strictly interpreted by the courts. O'NEAL at § 7.08. See *Berkowitz v. Power Mate Corp.*, 135 N.J. 36, 342 A.2d 566 (N.J. Super. Ct. 1975) and *People v. Concord Fabrics*, 377 N.Y.S.2d 84 (App. Div. 1st 1975) for two recent decisions of state courts enjoining two "going private" transactions from proceeding on the grounds of their

business enterprises should fully understand and be prepared to employ all the rights they have as shareholders or partners in such enterprises.

However, if one faces the problem of resisting a squeeze-out, and there is no specific provision in either the documents organizing the enterprise or in a state statute which can be used to defeat the attempt, the federal security laws probably provide the best protection. The Securities Act of 1933 ("1933 Act")[16] and the Securities Exchange Act of 1934 ("1934 Act")[17] both provide remedies to individuals who have purchased or sold securities based on false or misleading information.[18] Since the vast majority of squeeze-outs are effected in small business enterprises, most of the provisions in the 1933 Act will not be applicable to participants in such enterprises since they will not have purchased their interest pursuant to a public offering of securities. However, Rule 10b-5,[19] promulgated by the Securities and Exchange Commission under Section 10(b) of the 1934 Act, may be used by individuals to prevent controlling persons of a business enterprise from purchasing their interest at a deflated value, to prevent them from manipulating the price of their interest, to prevent them from taking action designed to reduce the number of shares and shareholders in order to change the status of the enterprise from a public to a private company,[20] and to prevent them from implementing a merger which unfairly treats minority

unfairness to minority shareholders. The recent adoption by the Wisconsin Commissioner of Securities of permanent rules, effective March 1, 1976, relating to "going private" transactions may be an effective vehicle to prevent efforts by controlling shareholders designed to squeeze unfairly minority shareholders out of publicly held companies. If so, other states may wish to adopt comparable regulations. For a statement of the Wisconsin regulations, see 344 BNA SEC. REG. & L. REP. at A-16, I-1 (March 17, 1976).

16. 15 U.S.C. §§ 77a to bbbb (1970).

17. 15 U.S.C. §§ 78a to hh-1 (1970).

18. *See, e.g.*, 15 U.S.C. §§ 77k, 77L, 77q, 78i, 78j, 78r (1970).

19. 17 C.F.R. § 240.10b-5 (1975).

20. This is the so-called "going private" transaction. See generally, comments of A.A. Sommer (former SEC Commissioner) reported in 278 BNA SEC. REG. & L. REP. at D-1 (November 20, 1974), and 294 BNA SEC. REG. & L. REP. at D-11 (March 19, 1975) for a good summary of the "going private" problem. See SEC Release No. 33-5567 (February 6, 1975) for two proposed rules dealing with "going private" transactions. *See also* Green v. Santa Fe Industries Inc., 533 F.2d 1283 (2d Cir. 1976); Marshel v. AFW Fabric Corp., 533 F.2d 1277 (2d Cir. 1976), *cert. requested*, 357 BNA SEC. REG. & L. REP. at A-3 (June 16, 1976), for two recent decisions of the Second Circuit Court of Appeals holding that "going private" transactions give rise to valid Rule 10b-5 causes of action. See also the complaint filed by the SEC in the Southern District of N.Y. involving *Parklane Hosiery Co., Inc.*, 352 BNA SEC. REG. & L. REP. at A-10 (May 12, 1976).

participants.[21] It should be noted that there are a number of requirements which must be met before an individual can make out a successful cause of action under Rule 10b-5 — requirements that will not always be met by victims of squeeze-out maneuvers.[22] However, every person faced with the prospect of being forced out of a business enterprise should fully explore the possibility of using Rule 10b-5 or other provisions of the federal securities laws to defeat the squeeze-out effort.

In chapter eight, Professor O'Neal discusses arrangements that can be used to avoid problems that result in squeeze-out maneuvers.[23] As noted previously, participants should agree to establish such arrangements *when the enterprise is first organized.* It is at the beginning of a business relationship that the participants are most likely to consent to enter into formal arrangements defining their respective rights in the enterprise. This is when the participants are most likely to acknowledge the right of one of their number to employment in the enterprise and therefore to agree to enter into a long-term employment contract with him. This is when the participants realize that they are dependent on their joint efforts, and that they owe each other fair treatment. Moreover, the time of organization is the best time to establish a method for valuing the business enterprise and to establish an arrangement which will enable one or more of the participants to sell their interest in the enterprise at a fair price to the remaining participants. Furthermore, if the business enterprise is of the type that requires agreement of all the participants in order for it to operate smoothly, the organizational period is the time to consider whether high vote requirements should be established that will, in effect, give all the participants a veto power over decisions affecting the operations of the enterprise.[24] Depending on the

21. See O'NEAL at § 7.09 for a listing in the footnotes of major cases in which courts applied Rule 10b-5 to these fact patterns. *See also* A. BROMBERG, SECURITIES LAW: FRAUD—SEC RULE 10b-5 (1973); A. JACOBS, THE IMPACT OF RULE 10b-5 (1st ed., 2 vol., looseleaf).

22. *Id.* The United States Supreme Court has recently rendered two decisions which limit the applicability of Rule 10b-5. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (in order to be able to make out a successful Rule 10b-5 case one must be an actual purchaser or seller of securities); Ernst & Ernst v. Hochfelder, 96 S. Ct. 1375 (1976) (liability under Rule 10b-5 requires proof of intentional or willful conduct designed to deceive or to defraud investors; showing of negligence is not sufficient). *See* Note, 37 LA. L. REV. 255 (1976).

23. O'NEAL at §§ 8.01-.14.

24. The organizational period is also the time to consider whether the participants can best be governed by traditional corporation law provisions (*e.g.*, separate management, a board of directors and the like), or whether they should be governed by special statutory provisions which a number of states have passed for closely-held corporations. These special statutory provisions are described in detail in F.

individual needs of the participants, organization of a business enterprise can be tailored to help ensure that all the participants will be fairly rewarded for their respective contributions to its success. However, if the opportunity to so tailor the organization of a business enterprise is not exploited when the enterprise is first organized, it will probably be lost forever. Participants who are agreeable to including an arrangement for division of the profits of a business enterprise according to a set formula in the documents organizing the enterprise may not be agreeable to so dividing the profits after the enterprise actually commences operations. After this time, participants begin to consider means of furthering their own best interests at the expense of their colleagues; and, if arrangements for settling disputes that may arise between participants have not been established, they rarely will be. This is the great lesson for business attorneys in Professor O'Neal's book.

Professor O'Neal concludes with a most interesting discussion of possible changes that could be made in the law to decrease the chances that squeeze-out maneuvers will be successful.[25] The courts and the bar should give great consideration to the suggestions made by Professor O'Neal in this area and, where necessary, support the amendment of state corporation laws to make squeeze-out maneuvers more difficult and expensive to implement.[26] The state statutes should allow all participants to receive just compensation for their contributions to the enterprise. However, until the necessary changes are made in the laws, it will be the responsibility of business attorneys to see that their clients are protected from potential squeeze-out efforts that may be directed against them. Because Professor O'Neal's book greatly increases the ability of business attorneys to fulfill this most important responsibility, it deserves to be in their personal libraries where they can refer to it often for assistance.

O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE §§ 1.14, 1.14(a)-(c) (rev. ed. 1971).

25. O'NEAL at §§ 9.01-.15.

26. However, I would be reluctant to give American courts the discretion to modify organizational schemes of business enterprises given English courts by Section 210 of the English Companies Act. Giving American courts such discretion may lead to results which would make the cure for the problem of squeeze-outs worse than the disease. For a description of Section 210 of the English Companies Act see O'NEAL at §§ 9.11-.14.