CHAPTER 13

Dissenters’ Rights

ARTICLE 1

Right to Dissent and Obtain Payment for Shares

**SECTION 33‑13‑101.** Definitions.

 In this chapter:

 (1) “Corporation” means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.

 (2) “Dissenter” means a shareholder who is entitled to dissent from corporate action under Section 33‑13‑102 and who exercises that right when and in the manner required by Sections 33‑13‑200 through 33‑13‑280.

 (3) “Fair value”, with respect to a dissenter’s shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable. The value of the shares is to be determined by techniques that are accepted generally in the financial community.

 (4) “Interest” means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.

 (5) “Record shareholder” means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

 (6) “Beneficial shareholder” means the person who is a beneficial owner of shares held by a nominee as the record shareholder.

 (7) “Shareholder” means the record shareholder or the beneficial shareholder.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

1. Introductory Comment.

Chapter 13 deals with the tension between the desire of the corporate leadership to be able to enter new fields, acquire new enterprises, and rearrange investor rights and the desire of investors to adhere to the rights and the risks on the basis of which they invested. Most contemporary corporation codes in the United States attempt to resolve this tension through a combination of two devices. On the one hand, the majority is given an almost unlimited power to change the nature and shape of the enterprise and the rights of its members. On the other hand, the members who dissent from these changes are given a right to withdraw their investment at a fair value.

The traditional accommodation has been sharply criticized from two directions. From the viewpoint of dissident investors, the dissent procedure is criticized for providing little help to the ordinary investor because its technicalities make its use difficult, expensive, and risky. From the viewpoint of the corporate leadership, it is criticized because it fails to protect the corporation from suits brought by dissenting shareholders on grounds of unfairness or fraud, and from demands that are motivated by the hope of a nuisance settlement or by fanciful conceptions of value.

Chapter 13 contains a unique compromise between these opposing points of view that was developed in 1976 as an amendment to the 1969 version of the Model Act. It seeks to increase the frequency with which assertion of dissenters’ rights leads to economical and satisfying solutions, and to decrease the frequency with which they lead to delay, expense, and dissatisfaction. It seeks this aim primarily by motivating the parties to settle their differences in private negotiations, without resort to judicial appraisal proceedings.

This approach involves a substantial change in the prevailing concept of the dissenters’ right in most corporation codes. The right has sometimes been characterized as the “appraisal right,” implying that its object is to provide each dissenter with a judicial appraisal. The objective of chapter 13 is to permit each dissenter to receive fair value without the formality of judicial appraisal, which involves delays and uncertainties and legal expenses that are prohibitive to small investors. Appraisal is the ultimate sanction to be invoked only when the parties fail to reach reasonable terms of settlement. In line with this conception, this chapter completely avoids the term “appraisal right” and refers consistently to “dissenters’ rights to obtain payment for their shares.”

2. Specialized Definitions.

Section 13.01 (Section 33‑13‑101) contains specialized definitions applicable only to chapter 13.

(1) The definition of “corporation” in section 13.01(1) (Section 33‑13‑101(1)) includes successor or acquiring corporations in mergers or share exchanges within the scope of that definition. In these transactions, the obligations of the disappearing or acquired corporations must be assumed by the successor or acquiring corporation and they are thus included within the definition of “corporation”.

(2) The definition of “dissenter” in section 13.01(2) (Section 33‑13‑101(2)) is phrased in terms of a “shareholder,” a term that is itself specially defined in section 13.01(7) (Section 33‑13‑101(7)). The definition of “shareholder” for purposes of chapter 13 differs from the definition of that term used elsewhere in the Model Act. Section 1.40 (Section 33‑1‑400) defines “shareholder” as used elsewhere in the Act to include only “record shareholders” as defined in section 13.01(5) (Section 33‑13‑101(5)). Section 13.01(7) (Section 33‑13‑101(7)), on the other hand, defines “shareholder” to include not only “record shareholders” but “beneficial shareholders,” a term that is itself defined in section 13.01(6) (Section 33‑13‑101(6)). The specially defined terms “record shareholder” and “beneficial shareholder” appear primarily in section 13.03 (Section 33‑13‑103), which establishes the manner in which beneficial shareholders, and record shareholders who are acting as nominees for more than one beneficial shareholder, establish dissenters’ rights. The broadest definition of “shareholder” is used generally throughout the balance of Chapter 13 in order to permit beneficial shareholders to take advantage of the provisions of this chapter as provided in section 13.03 (Section 33‑13‑103). The definition of “dissenter” in section 13.01(2) (Section 33‑13‑101(2)) is also limiting, since only a shareholder who has performed all the conditions imposed on him by this chapter in order to obtain payment for his shares is a “dissenter”. Under this definition, a shareholder who initially objects but fails to perform any of these conditions within the times specified by this chapter loses his status as “dissenter” under this section.

(3) The definition of “fair value” in section 13.01(3) (Section 33‑13‑101(3)) leaves to the parties (and ultimately to the courts) the details by which “fair value” is to be determined within the broad outlines of the definition. This definition thus leaves untouched the accumulated case law about market value, value based on prior sales, capitalized earnings value, and asset value. It specifically preserves the former language excluding appreciation and depreciation in anticipation of the proposed corporate action, but permits an exception for equitable considerations. The purpose of this exception (“unless exclusion would be inequitable”) is to permit consideration of factors similar to those approved by the Supreme Court of Delaware in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), a case in which the court found that the transaction did not involve fair dealing or fair price: “In our view this includes the elements of rescissory damages if the Chancellor considers them susceptible of proof and a remedy appropriate to all the issues of fairness before him.” Consideration of appreciation or depreciation which might result from other corporate actions is permitted; these effects in the past have often been reflected either in market value or capitalized earnings value.

“Fair value” is to be determined immediately before the effectuation of the corporate action, instead of the date of the shareholder’s vote, as is the case under most state statutes that address the issue. This comports with the plan of this chapter to preserve the dissenter’s prior rights as a shareholder until the effective date of the corporate action, rather than leaving him in a twilight zone where he has lost his former rights, but has not yet gained his new ones.

(4) The definition of “interest” in section 13.01(4) (Section 33‑13‑101(4)) is included to make interest computations under this chapter more realistic. The right to receive interest is based on the elementary consideration that the corporation has the use of the dissenter’s money, and the dissenter has no use of it, from the effective date of the corporate action until the date of payment. The definition also requires the adjustment of rates to accommodate radical changes in prevailing rates like those seen in the late 1970s and early 1980s and that may be seen again in the future. The specification of the rate currently paid by the corporation provides a prima facie standard which should facilitate voluntary settlements. The date from which interest runs has been changed from the date of the shareholders’ vote to the effective date of the corporate action, in conformity with the change of the valuation date in section 13.01(3) (Section 33‑13‑101(3)).

SOUTH CAROLINA REPORTERS’ COMMENTS

There was no comparable provision in the 1981 South Carolina Business Corporation Act. However, former Section 33‑11‑270(a) stated that the fair value of a dissenter’s shares was to be determined as of the day before the vote, whereas the 1984 Model Act provides that valuation should be as of the day before the action is effectuated. Both provisions provide that appreciation or depreciation in anticipation of the action should be ignored in valuing the shares, but the Model Act allows it to be considered if excluding it would be inequitable. Additionally, former Section 33‑11‑270(i)(6) provided for calculating interest on the fair value at a rate “fair and equitable under all the circumstances.” The definition of “interest” in the new provision sets the rate, if the corporation has bank loans outstanding, at the current rate paid by the corporation on its principal bank loans. By this is meant short‑term loans. Although the provision uses the same test as prior South Carolina law if the corporation has no bank loans outstanding, what is fair and equitable should be determined with regard to short‑term debt of the corporation or similar corporations.

The 1984 Model Act definitions were adopted with one change. The definition of “fair value” has been modified to include language from Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), specifying that the Delaware block method of valuation has been superseded by the methods used in the financial community. No longer should courts use artificial methods which produce values lower than those that would be used in a voluntary sale of the shares. This is the purpose of the Model Act definition.

DERIVATION: 1984 Model Act Section 13.01.

CROSS REFERENCES

Act definitions, see Section 33‑1‑400.

Merger and share exchange, see Sections 33‑11‑101 et seq.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 42, Effect of Merger or Consolidation‑ Dissenting Shareholders.

NOTES OF DECISIONS

In general 1

1. In general

Business Corporation Act reference to “fair value” of corporate shares as held by a dissenting stockholder means “intrinsic value”. Santee Oil Co., Inc. v. Cox. (S.C. 1975) 265 S.C. 270, 217 S.E.2d 789.

Business Corporation Act reference to “fair value” does not restrict the appraising court to the use of any one method of valuation, thus market value and net asset value are pertinent value considerations, although neither is necessarily exclusive. Santee Oil Co., Inc. v. Cox. (S.C. 1975) 265 S.C. 270, 217 S.E.2d 789. Corporations And Business Organizations 2671(4)

The fair market value of a dissenting stockholder’s shares in a corporate merger is assessed through the major factors of net asset value, market value, and the earning or investment value of the dissenting stock. Santee Oil Co., Inc. v. Cox. (S.C. 1975) 265 S.C. 270, 217 S.E.2d 789. Corporations And Business Organizations 2670

**SECTION 33‑13‑102.** Right to dissent.

 (A) A shareholder is entitled to dissent from, and obtain payment of the fair value of, his shares in the event of any of the following corporate actions:

 (1) consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by Section 33‑11‑103 or the articles of incorporation and the shareholder is entitled to vote on the merger or (ii) if the corporation is a subsidiary that is merged with its parent under Section 33‑11‑104 or 33‑11‑108 or if the corporation is a parent that is merged with its subsidiary under Section 33‑11‑108;

 (2) consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares are to be acquired, if the shareholder is entitled to vote on the plan;

 (3) consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale must be distributed to the shareholders within one year after the date of sale;

 (4) an amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter’s shares because it:

 (i) alters or abolishes a preferential right of the shares;

 (ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares;

 (iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities;

 (iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes, other than a limitation by dilution through issuance of shares or other securities with similar voting rights; or

 (v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under Section 33‑6‑104; or

 (5) any corporate action to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares;

 (6) the conversion of a corporation into a limited liability company pursuant to Section 33‑11‑111 or conversion of a corporation into either a general partnership or limited partnership pursuant to Section 33‑11‑113;

 (7) the consummation of a plan of conversion to a limited liability company pursuant to Section 33‑11‑111 or to a partnership or limited partnership pursuant to Section 33‑11‑113.

 (B) Notwithstanding subsection (A), no dissenters’ rights under this section are available for shares of any class or series of shares which, at the record date fixed to determine shareholders entitled to receive notice of a vote at the meeting of shareholders to act upon the agreement of merger or exchange, were either listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], Section 33‑15‑10 [1962 Code Section 12‑19.1; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1851, 1892; R. S. 1499; 1886 (19) 846; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], Section 33‑17‑50 [1962 Code Section 12‑20.5; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], Section 33‑17‑90 [1962 Code Section 12‑20.9; 1952 Code Sections 12‑459 to 12‑462; 1942 Code Section 7759; 1932 Code Section 7759; 1925 (34) 246; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑19‑50 [1962 Code Section 12‑21.5; 1952 Code Sections 12‑633 to 12‑635; 1942 Code Section 7706; 1932 Code Section 7706; 1926 (34) 1052; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1998 Act No. 328, Section 8; 2004, Act No. 221, Section 17.

OFFICIAL COMMENT

1. Transactions Giving Rise to Dissenters’ Rights.

Section 13.02(a) (Section 33‑13‑102) establishes the scope of a shareholder’s right to dissent (and his resulting right to obtain payment for his shares) by defining the transactions with respect to which a right to dissent exists. These transactions are:

(1) A plan of merger if the shareholder (i) is entitled to vote on the merger under section 11.03 (Section 33‑11‑103) or pursuant to provisions in the articles of incorporation, or (ii) is a shareholder of a subsidiary that is merged with a parent under section 11.04 (Section 33‑13‑104). The right to vote on a merger under section 11.03 (Section 33‑11‑103) extends to corporations whose separate existence disappears in the merger and to the surviving corporation if the number of its outstanding shares is increased by more than 20 percent as a result of the merger.

(2) A share exchange under section 11.02 (Section 33‑11‑102) if the corporation is a party whose shares are being acquired by the plan and the shareholder is entitled to vote on the exchange.

(3) A sale or exchange of all or substantially all of the property of the corporation not in the usual course of business under section 12.02 (Section 33‑12‑102) if the shareholder is entitled to vote on the sale or exchange. Section 13.02(a)(3) (Section 33‑13‑102(a)(3)) generally grants dissenters’ rights in connection with sales in the process of dissolution but excludes them in connection with sales by court order and sales for cash that require substantially all the proceeds to be distributed to the shareholders within one year. The inclusion of sales in dissolution is designed to ensure that the right to dissent cannot be avoided by characterizing sales as made in the process of dissolution long before distribution is made. An exception is provided for sales for cash pursuant to a plan that provides for distribution within one year. These transactions are unlikely to be unfair to minority shareholders since majority and minority are being treated in precisely the same way and all shareholders will ultimately receive cash for their shares. A sale other than for cash gives rise to a right of dissent since property sometimes cannot be converted into cash until long after receipt and a minority shareholder should not be compelled to assume the risk of delays or market declines. Similarly, a plan that provides for a prompt distribution of the property received gives rise to the right of dissent since the minority shareholder should not be compelled to accept for his shares different securities or other property that may not be readily marketable.

The exclusion of court‑ordered sales from the dissenter’s right is based on the view that court review and approval ensures that an independent appraisal of the fairness of the transaction has been made.

(4) Amendments to articles of incorporation that impair the shareholders’ rights as shareholders in any of the enumerated ways. The reasons for granting a right of dissent in these situations are similar to those granting such rights in cases of merger and transfer of assets. The grant of these rights increases the security of investors by allowing them to escape when the nature of their investment rights is fundamentally altered or they are compelled to accept cash for their investment in an amount established by the corporation. The grant also enhances the freedom of the majority to make changes, because the existence of an escape hatch makes fair and reasonable a change that might be unfair if it forced a fundamental change of rights upon unwilling investors without giving them a reasonable alternative.

(5) Any corporate action to the extent the articles, bylaws, or a resolution of the board of directors grants a right of dissent. Corporations may wish to grant on a voluntary basis dissenters’ rights in connection with important transactions (e.g., those submitted for shareholder approval). The grant may be to nonvoting shareholders in connection with transactions that give rise to dissenters’ rights with respect to voting shareholders. The grant of dissenters’ rights may add to the attractiveness of preferred shares, and may satisfy shareholders who would, in the absence of dissenters’ rights, sue to enjoin the transaction. Also, in situations where the existence of dissenters’ rights may otherwise be disputed, the voluntary offer of those rights under this section will avoid a dispute.

Generally, only shareholders who are entitled to vote on the transaction are entitled to assert dissenters’ rights with respect to the transaction. The right to vote may be based on the articles of incorporation or other provisions of the Model Act. For example, a class of nonvoting shares may nevertheless be entitled to vote (either as a separate voting group or as part of the general voting group) on an amendment to the articles of incorporation that affects them as provided in one of the ways set forth in section 10.04 (Section 33‑10‑104); such a class is entitled to assert dissenters’ rights if the transaction also falls within section 13.02 (Section 33‑13‑102). On the other hand, such a class does not have the right to vote on a sale of substantially all the corporation’s assets not in the ordinary course of business, and therefore that class is not entitled to assert dissenters’ rights with respect to that sale. One exception to this principle is the merger of a subsidiary into its parent under section 11.04 (Section 33‑11‑104) in which minority shareholders of the subsidiary have the right to assert dissenters’ rights even though they have no right to vote.

2. Exclusivity of Dissenters’ Rights [Note: Section 13.02(b) of the Model Act is not included in this Act—See the South Carolina Reporters’ Comments.].

Section 13.02(b) basically adopts the New York formula as to exclusivity of the dissenters’ remedy of this chapter. The remedy is the exclusive remedy unless the transaction is “unlawful” or “fraudulent.” The theory underlying this section is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and persuades a court that this is correct. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. Thus in general terms an exclusivity principle is justified. But the prospect that shareholders may be “paid off” does not justify the corporation in proceeding unlawfully or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in articles of incorporation prohibiting it, by deception of shareholders, or in violation of a fiduciary duty—to take some examples—the court’s freedom to intervene should be unaffected by the presence or absence of dissenters’ rights under this chapter. Because of the variety of situations in which unlawfulness and fraud may appear, this section makes no attempt to specify particular illustrations. Rather, it is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York and other states with regard to the effect of dissenters’ rights on other remedies of dissident shareholders. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (appraisal remedy may not be adequate “where fraud, misrepresentation, self‑dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved.”) See also Vorenberg, “Exclusiveness of the Dissenting Stockholders’ Appraisal Right,” 77 HARV. L. REV. 1189 (1964).

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 13.02) and this provision, which is identical to it in most respects, contains a number of substantial changes from the 1981 South Carolina Business Corporation Act. Under the 1981 act, shareholders of a corporation that has shares listed on a national securities exchange did not have dissenters’ rights unless the articles provided them; the Model Act and the new South Carolina provision delete this limitation.

Section 33‑13‑102(1) provides dissenters’ rights for shareholders of a merging corporation. Like former Section 33‑17‑90, it grants dissenters’ rights to shareholders of a subsidiary corporation merged into its parent in a short‑form merger but not to the shareholders of the parent. In other mergers, the determining factor is whether the shareholder has the right to vote on the merger. Shareholders of a surviving corporation whose outstanding shares are increased by less than twenty percent in a merger do not have the right to vote on the merger under Section 33‑11‑103(g) and thus do not have dissenters’ rights. This is much broader than former Section 33‑17‑90(b) which denied dissenters’ rights to shareholders of a corporation that merged a wholly‑owned subsidiary into itself. In addition, this provision grants dissenters’ rights to shareholders of the parent and the subsidiary corporations in a short‑form merger of a parent into its ninety percent‑owned subsidiary under Section 33‑11‑108. Since Section 33‑11‑108 did not come from the Model Act, it had to be added to the triggering events listed.

Section 33‑13‑102(2) provides dissenters’ rights for shareholders whose shares are acquired in a share exchange. Although this provision limits the right to shareholders entitled to vote on the plan, this limitation is without significance since all shareholders whose shares are to be acquired in a share exchange have the right to vote under Section 33‑11‑103. Thus, this section provides the same result as did Section 33‑17‑90(c) of the 1981 South Carolina Business Corporation Act.

Section 33‑13‑102(3) provides dissenters’ rights for shareholders of a corporation engaging in a sale of all or substantially all of its assets. This provision is identical substantively to Section 33‑19‑50 of the 1981 South Carolina Business Corporation Act.

Section 33‑13‑102(4) provides dissenters’ rights for shareholders of a corporation making certain amendments to its articles. Under both this provision and Section 33‑15‑10(d)(1) of the 1981 South Carolina Business Corporation Act, shareholders suffering a material, adverse affect to a preferential right or redemption right or sinking fund have dissenters’ rights. The prior South Carolina law’s limitation of the amount receivable as the fair value to the lesser of the amount that would be due upon redemption or liquidation is not contained in the new provision. In addition to these dissenters’ rights granted in both present and prior law, the new provision provides dissenters’ rights if the articles are amended to alter or abolish the shareholder’s preemptive rights, to limit his voting rights, including the right to vote cumulatively, or to reduce the number of shares he owns to a fraction of a share which is to be cashed out. Prior South Carolina law did not provide dissenters’ rights in these situations.

Section 33‑13‑102(5) allows the corporation to provide dissenters’ rights for voting or nonvoting shareholders in other events. The 1984 Model Act provision is limited to events approved by a shareholder vote. This limitation was not contained in the 1981 South Carolina Business Corporation Act and is not included in the new provision. As was noted in the South Carolina Reporter’s Comments to former Section 33‑11‑270 explaining the addition of this power, “ [t]his is particularly beneficial to the close corporation and can become an important control device. Now, by provision in the articles one interest can ‘bail out’ upon the happening of any number of events, such as cessation of employment, etc.” Although prior South Carolina law required that the provision be included in the articles, the Model Act and the new provision permit it to be in the bylaws or a resolution of the board.

Subsection (b) of the 1984 Model Act section contains a provision attempting to limit judicial scrutiny of corporate actions that give rise to dissenters’ rights. There was nothing similar in prior South Carolina law, and it is not included in the new provision because it would probably be largely ineffective and is undesirable.

DERIVATION: 1984 Model Act Section 13.02.

CROSS REFERENCES

Amendment of articles of incorporation, see Sections 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑105 and 33‑10‑200 et seq.

Compulsory purchase of shares after death of shareholder, see Section 33‑18‑140.

Cumulative voting, see Section 33‑7‑280.

Dissenter, defined, see Section 33‑13‑101.

Dissenter’s rights upon termination of statutory close corporation, see Section 33‑18‑310.

Dissolution, see Sections 33‑14‑101 et seq.

Election of statutory close corporation, see Section 33‑18‑103.

Fractional shares, see Section 33‑6‑104.

Notice by dissenter of intent to demand payment for shares, see Sections 33‑13‑210, 33‑13‑220.

Notice of dissenter’s rights, see Section 33‑13‑200.

Preemptive rights, see Section 33‑6‑300.

Redemption of shares, see Sections 33‑6‑101 and 33‑6‑103.

Sale of assets, see Sections 33‑12‑101 et seq.

Share dividends, see Section 33‑6‑230.

Share preferences, see Sections 33‑6‑101 and 33‑6‑102.

“Voting group” defined, see Section 33‑1‑400.

Voting rights generally, see Section 33‑7‑210.

Library References

Corporations 182.4(4), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 73, Right to Dissent.

S.C. Jur. Costs Section 44, Dissenting Shareholder’s Actions.

NOTES OF DECISIONS

In general 1

Compensation 3

Dissenters’ rights 2

1. In general

Stockholder of constituent bank who did not subscribe for stock in consolidated bank, or participate in consolidation proceedings, or exchange old stock, or receive any dividends, or appear on new bank’s books as stockholder, was held not to be a “stockholder” and not subject to stockholder’s statutory liability either by contract or estoppel. Rivers v Stevenson (1933) 169 SC 422, 169 SE 135, 89 ALR 766. Rivers v Buchanan (1933) 169 SC 428, 169 SE 137.

A dissenting stockholder ceases to be a stockholder in the constituent corporation upon making demand for the payment of his stock and where a dissenting stockholder, within the time required by statute, demanded payment for her stock and petitioned the court for the appointment of appraisers, and there was no showing that she was induced to make this demand through fraudulent concealment or false representations as to the facts, or through mistake, she was bound by her election and could not thereafter withdraw her demand and restore her status as a stockholder; after a dissenting stockholder has made demand for the payment of his stock, there is a transitory period when he is such in name only with none of the ordinary incidents or rights of a stockholder; a dissenting stockholder who has made demand for the payment of his stock, having ceased to be a stockholder, has no standing to continue a stockholder’s derivative action against the directors of the constituent corporation for mismanagement and waste. Johnson v. Baldwin (S.C. 1952) 221 S.C. 141, 69 S.E.2d 585.

In Johnson v Spartanburg County Fair Ass’n (1947) 210 SC 56, 41 SE2d 599, the court said, “Similar statutes have been uniformly construed as giving the holders of two thirds of the outstanding stock the right to determine the price at which such assets are to be sold and, in the absence of bad faith or fraud, their decision is final. The dissenting stockholder has a plain and adequate remedy at law in the appraisal proceedings to secure the fair value of his stock. The only grounds upon which the minority stockholders can maintain an action to enjoin the sale are that the proceedings are ultra vires, illegal or fraudulent.” Johnson v. Spartanburg County Fair Ass’n (S.C. 1947) 210 S.C. 56, 41 S.E.2d 599. Corporations And Business Organizations 2719

Former section should be construed liberally in favor of the stockholder, so as to carry out its manifest theory and to save harmless the stockholder from all costs and expenses in obtaining the value of his stock at the time of the consolidation, and interest thereon from thirty days thereafter; when corporation wrongfully refused to pay interest due on judgment and further proceedings were necessary, shareholders were entitled to additional costs. Manning v. Brandon Corp. (S.C. 1931) 163 S.C. 178, 161 S.E. 405.

A stockholder of constituent bank involved in consolidation, not objecting to consolidation, was held not presumed to have become stockholder in consolidated bank; dissenting stockholders opposing consolidation, though bound by action of majority of stockholders of constituent corporation, are not required to become stockholders of consolidated corporation, but may have old stock cancelled. Rivers v. McIntire (S.C. 1931) 160 S.C. 462, 158 S.E. 816.

2. Dissenters’ rights

A minority shareholder had no dissenter’s rights under Section 33‑13‑102, and thus could not maintain an action for conversion of stock, where the majority stockholder (a corporation) voted to approve a stock exchange agreement between itself and the subject corporation, and the agreement provided that one share of the subject corporation’s stock would be exchanged for 10 shares of the majority stockholder’s stock; shareholders in the acquired corporation (the majority stockholder), not the acquiring corporation, are entitled to dissenter’s rights. Hite v. Thomas & Howard Co. of Florence, Inc. (S.C. 1991) 305 S.C. 358, 409 S.E.2d 340.

There is no underlying “natural right” of a shareholder to follow his investment into a consolidated corporation. A dissenting stockholder is put to an election by a statute of this kind. Of course there may be circumstances under which the duty to make an election does not arise. For instance, if the merger is not authorized by law or if brought about through fraudulent conduct, the dissenting stockholder has the right to go in a court of equity and seek an injunction against consummation of the merger. Johnson v. Baldwin (S.C. 1952) 221 S.C. 141, 69 S.E.2d 585.

3. Compensation

The remedy of appraisal and payment provided in former Sections 12‑459 to 12‑462 was intended to afford fair and just compensation to the dissenters and at the same time provide a method by which their objections could be fairly composed so as to enable the consolidation to proceed. Johnson v. Baldwin (S.C. 1952) 221 S.C. 141, 69 S.E.2d 585.

Under former section the interest of the dissenting stockholder in his stock does not cease until he has been paid its value or provision made for payment. Johnson v. Baldwin (S.C. 1952) 221 S.C. 141, 69 S.E.2d 585.

**SECTION 33‑13‑103.** Dissent by nominees and beneficial owners.

 (a) A record shareholder may assert dissenters’ rights as to fewer than all the shares registered in his name only if he dissents with respect to all shares beneficially owned by any one person and notifies the corporation in writing of the name and address of each person on whose behalf he asserts dissenters’ rights. The rights of a partial dissenter under this subsection are determined as if the shares to which he dissents and his other shares were registered in the names of different shareholders.

 (b) A beneficial shareholder may assert dissenters’ rights as to shares held on his behalf only if he dissents with respect to all shares of which he is the beneficial shareholder or over which he has power to direct the vote. A beneficial shareholder asserting dissenters’ rights to shares held on his behalf shall notify the corporation in writing of the name and address of the record shareholder of the shares, if known to him.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.03 (Section 33‑13‑103) addresses the relationship between dissenters’ rights and the widespread practice of nominee or street name ownership of publicly held shares. Generally, a shareholder must dissent with respect to all the shares he owns or over which he has power to direct the vote. If a record shareholder is a nominee for several beneficial shareholders, however, some of whom wish to dissent and some of whom do not, section 13.03(a) (Section 33‑13‑103(a)) permits the record shareholder to dissent with respect to a portion of the shares owned by him but only with respect to all the shares beneficially owned by a single person. This limitation is necessary to prevent speculative abuse by a single beneficial shareholder who is not fundamentally opposed to the proposed corporate action but who may wish to gamble, as to some of his shares, on the possibility of a high payment to dissenters.

Section 13.03(a) (Section 33‑13‑103(a)) also requires a record shareholder who dissents with respect to a portion of the shares held by him to notify the corporation of the name and address of the beneficial owner on whose behalf he has dissented.

Section 13.03(b) (Section 33‑13‑103(b)) permits a beneficial shareholder to assert dissenters’ rights directly if he submits the record shareholder’s written consent. Generally, corporations treat the record shareholder as the owner of shares, and a beneficial shareholder is entitled to assert dissenters’ rights only as set forth in this section. It would be foreign to the premises underlying nominee and street name ownership to require these record shareholders to forward demands and participate in litigation on behalf of their clients. In order to make dissenters’ rights effective without burdening record shareholders, beneficial shareholders should be allowed to assert their own claims as provided in this subsection. The beneficial shareholder is required to submit a written consent by the record shareholder to his assertion of dissenters’ rights to verify the beneficial shareholder’s entitlement and to permit the protection of any security interest in the shares. In practice, a broker’s customer who receives a forwarded notice of proposed corporate action and who wishes to dissent may request the broker to supply him with the name of the record shareholder (which may be a house nominee or a nominee of the Depository Trust Company), and a form of consent signed by the record shareholder. From that point forward, the corporation must deal with the beneficial shareholder.

SOUTH CAROLINA REPORTERS’ COMMENTS

The new provision, like the 1984 Model Act:

(1) continues the requirement in Section 33‑11‑270(l) of the 1981 South Carolina Business Corporation Act that a dissenting shareholder must dissent as to all the shares that he owns beneficially or that are owned beneficially by any one person;.

(2) makes explicit the implicit rule under prior South Carolina law, that a nominee may dissent as to all of the shares of some beneficial owners and not dissent as to the shares beneficially owned by others;.

(3) adds procedural detail not in prior South Carolina law and provides that a beneficial shareholder may assert dissenters’ rights as to his shares; under prior South Carolina law only record shareholders could dissent.

The new provision, however, does not contain the Model Act requirement that a dissenting beneficial shareholder submit to the corporation the written consent of the record shareholder to his assertion of dissenters’ rights. Since the corporation need only give ten days’ notice of the meeting under Section 33‑7‑105, and since the notice will have to be forwarded to the beneficial shareholder by the record shareholder before the beneficial owner can take any action, it is unreasonable to require that the beneficial shareholder obtain permission from the record holder before filing the notice of intent to dissent, which must be filed with the corporation before the vote is taken on the proposed action. The Official Comment to the Model Act explains that this requirement was included to verify the beneficial shareholders’ interest in the shares and to protect any security interest in the shares. However, these interests are preserved adequately by the requirement that the dissenter deposit the shares in order to perfect his rights. Furthermore, subsection (b) of the new provision adds to the Model Act the requirement that the beneficial owner asserting dissenters’ rights notify the corporation of the record owner’s name and address. Thus, the Model Act requirement is not necessary for the claimed purposes and serves merely as a needless impediment to the assertion of dissenters’ rights by countless shareholders whose shares are held in street names.

DERIVATION: 1984 Model Act Section 13.03.

CROSS REFERENCES

“Beneficial shareholder” defined, see Section 33‑13‑101.

Notice to the corporation, see Section 33‑1‑410.

“Person” defined, see Section 33‑1‑400.

“Record shareholder” defined, see Section 33‑13‑101.

“Shareholder” defined, see Sections 33‑1‑400 and 33‑13‑101.

Shares held by nominee, see Section 33‑7‑230.

Voting agreements, see Section 33‑7‑310.

Voting trusts, see Section 33‑7‑300.

Library References

Corporations 182.4(4), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

ARTICLE 2

Procedure for Exercise of Dissenters’ Rights

**SECTION 33‑13‑200.** Notice of dissenters’ rights.

 (a) If proposed corporate action creating dissenters’ rights under Section 33‑13‑102 is submitted to a vote at a shareholders’ meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters’ rights under this chapter and be accompanied by a copy of this chapter.

 (b) If corporate action creating dissenters’ rights under Section 33‑13‑102 is taken without a vote of shareholders, the corporation shall notify in writing all shareholders entitled to assert dissenters’ rights that the action was taken and send them the dissenters’ notice described in Section 33‑13‑220.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.20(a) (Section 33‑13‑200(a)) requires the corporation to notify record shareholders of the existence of dissenters’ rights before the vote is taken on the corporate action. This notice provides the reassurance to investors that the right to dissent is intended to provide because many shareholders have no idea what rights of dissent they may have or know to assert them. If the corporation is uncertain whether or not the shareholders have dissenters’ rights, it may comply with this notice requirement by stating that the shareholders “may have” dissenters’ rights.

A similar requirement of notice is expressly required by proxy rules, by the dissenters’ rights statutes of several states, and possibly under more general disclosure requirements of federal and state securities laws.

Section 13.20(b) (Section 33‑13‑200(b)) provides that notice be given after the action is taken in situations where the action is validly taken without a vote of shareholders, e.g., in a merger of a subsidiary into its parent under section 11.04 (Section 33‑11‑104). This notice may be combined with the dissenters’ notice required by section 13.22 (Section 33‑13‑220).

SOUTH CAROLINA REPORTERS’ COMMENTS

The new provision, which is identical to Section 13.20 of the 1984 Model Act, requires that the corporation inform the shareholders of the existence of dissenters’ rights and send them a copy of the statutory dissenters’ rights provisions so they can determine what they must do to assert their rights. In addition, the new provision requires that a corporation send a dissenters’ notice to shareholders if the action creating the right to dissent was taken without a vote of the shareholders. No such requirements existed under the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 13.20.

CROSS REFERENCES

Acting without meeting, see Section 33‑7‑104.

Court costs and counsel fees, see Section 33‑13‑310.

Dissenter, defined, see Section 33‑13‑101.

Meeting notice, see Section 33‑7‑105.

“Notice” defined, see Section 33‑1‑410.

“Record shareholder” defined, see Section 33‑13‑101.

Right to dissent, see Section 33‑13‑102.

“Shareholder” defined, see Section 33‑13‑101.

Shareholders’ meetings, see Sections 33‑7‑101 through 33‑7‑103.

Library References

Corporations 182.4(4), 610(4), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799, 835, 837.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:25 , Close Corporations.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 7163.10, General Rights Against Consolidated Company‑Statutory Share Value Appraisal.

**SECTION 33‑13‑210.** Notice of intent to demand payment.

 (a) If proposed corporate action creating dissenters’ rights under Section 33‑13‑102 is submitted to a vote at a shareholders’ meeting, a shareholder who wishes to assert dissenters’ rights (1) must give to the corporation before the vote is taken written notice of his intent to demand payment for his shares if the proposed action is effectuated and (2) must not vote his shares in favor of the proposed action. A vote in favor of the proposed action cast by the holder of a proxy solicited by the corporation shall not disqualify a shareholder from demanding payment for his shares under this chapter.

 (b) A shareholder who does not satisfy the requirements of subsection (a) is not entitled to payment for his shares under this chapter.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

If a shareholder’s vote is called for, section 13.21(a) (Section 33‑13‑210(a)) requires the shareholder to give notice of his intent to demand payment before the vote on the corporate action is taken. This notice enables other voters to determine how much of a cash payment may be required. It also serves to limit the number of persons to whom the corporation must give further notice, including the technical details of depositing share certificates. This subsection has no application to actions taken without a shareholder vote.

In order to be and remain a dissenter eligible to demand payment for his shares, the section requires that a shareholder must not only give the notice required by this section but must also vote against, or abstain from voting on, the proposal.

SOUTH CAROLINA REPORTERS’ COMMENTS

The new provision, like Section 13.21 of the 1984 Model Act, continues the requirement of the 1981 South Carolina Business Corporation Act that a dissenting shareholder inform the corporation that he intends to dissent. Under prior South Carolina law, he could do so at any time before or at the shareholders’ meeting; under the new provision, which follows the Model Act, he must do so before the vote is taken. The new provision replaces “deliver” in the Model Act section with “give” to make it clear that, to be timely, the notice must be effective under Section 33‑1‑410(e) before the vote is taken. The Model Act language was susceptible of the interpretation that a written notice mailed before the vote was taken but not received until after the vote was timely. See Section 33‑1‑400(5) defining “deliver” as including the act of mailing.

Additionally, the new provision, like the Model Act, continues the requirement of prior South Carolina law that a dissenting shareholder not vote his shares in favor of the action. The new provision, however, adds that a vote cast by the corporation’s proxyholders under a proxy solicited by the corporation does not disqualify the shareholder from dissenting. If the shareholder has notified the corporation that he intends to dissent and also has sent the corporation his proxy, the corporation should not vote his shares in favor of the proposed action. Its doing so should not destroy his dissenters’ rights, although the vote itself may be valid.

The new provision, like the Model Act, continues the requirement of the 1981 South Carolina Business Corporation Act that a shareholder must satisfy the procedural requirements in order to perfect his dissenters’ rights. This requirement should be applied in a reasonable manner. One of the major inadequacies of dissenters’ rights has been that, occasionally, courts and corporations have been unyielding in demanding hypertechnical, precise compliance. The modern tendency is for courts to accept substantial, good‑faith compliance as sufficient when doing so provides fair treatment of shareholders while protecting the legitimate interests of the corporation. See, e.g., Raab v. Villager Industries, Inc., 355 A.2d 888 (Del. 1976), in which the court held that pre‑vote written objection signed by the husband was sufficient to allow dissent as to shares jointly owned by the husband and wife.

DERIVATION: 1984 Model Act Section 13.21.

CROSS REFERENCES

Court action to protect shareholders of statutory close corporation, see Section 33‑18‑400.

Court costs and counsel fees, see Section 33‑13‑310.

“Deliver” includes mail, see Section 33‑1‑400.

Dissenter, defined, see Section 33‑13‑101.

Effective date of notice, see Section 33‑1‑410.

“Notice” defined, see Section 33‑1‑410.

Library References

Corporations 182.4(4), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

**SECTION 33‑13‑220.** Dissenters’ notice.

 (a) If proposed corporate action creating dissenters’ rights under Section 33‑13‑102 is authorized at a shareholders’ meeting, the corporation shall deliver a written dissenters’ notice to all shareholders who satisfied the requirements of Section 33‑13‑210(a).

 (b) The dissenters’ notice must be delivered no later than ten days after the corporate action was taken and must:

 (1) state where the payment demand must be sent and where certificates for certificated shares must be deposited;

 (2) inform holders of uncertificated shares to what extent transfer of the shares is to be restricted after the payment demand is received;

 (3) supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters’ rights certify whether or not he or, if he is a nominee asserting dissenters’ rights on behalf of a beneficial shareholder, the beneficial shareholder acquired beneficial ownership of the shares before that date;

 (4) set a date by which the corporation must receive the payment demand, which may not be fewer than thirty nor more than sixty days after the date the subsection (a) notice is delivered and set a date by which certificates for certificated shares must be deposited, which may not be earlier than twenty days after the demand date; and

 (5) be accompanied by a copy of this chapter.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The basic purpose of section 13.22 (Section 33‑13‑220) is to require the corporation to tell all actual or potential dissenters what they must do in order to take advantage of their right of dissent. The requirements of what this notice (called a “dissenters’ notice”) must contain are spelled out in detail to ensure that this notice serves this basic purpose.

In the case of an action that is submitted to the vote of shareholders, the dissenters’ notice must be sent only to those persons who gave notice of their intention to dissent under section 13.21 (Section 33‑13‑210) and who refrained from voting in favor of the proposed actions. In the case of a transaction not involving a vote by shareholders, the dissenters’ notice must be sent to all persons who are eligible to dissent and demand payment. In either case the dissenters’ notice must be sent within 10 days after the corporate action is taken and must be accompanied by a copy of this chapter.

The notice must contain or be accompanied by a form which a person asserting dissenters’ right may use to complete the demand for payment under section 13.23 (Section 33‑13‑230). The form must specify the date by which it must be received by the corporation, which date must be at least 30 days after the effective date of the notice of how to demand payment.

The dissenters’ notice must also specify where and when share certificates must be deposited, or, in the case of uncertificated shares, when restrictions on transfer will become effective under section 13.24 (Section 33‑13‑240). The date for deposit of share certificates may not be set at a date earlier than the date for receiving the demand for payment.

Section 13.22(b)(3) (Section 33‑13‑220(b)(3)) requires the corporation to specify the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action. This is the critical date for determining the rights of shareholder transferees: persons who became shareholders prior to that date are entitled to the full right to dissent and obtain payment for their shares, while persons who became shareholders on or after that date are entitled only to the more limited rights provided by section 13.27 (Section 33‑13‑270). See the Official Comments to sections 13.23 and 13.27 (Sections 33‑13‑230 and 33‑13‑270). It is appropriate for the corporation to furnish this critical date since it knows when information relating to the transaction was publicly released. The date selected should be the date the terms were announced, not the earlier date when consideration of the proposed transaction may have been announced.

SOUTH CAROLINA REPORTERS’ COMMENTS

The new provision, which is similar to Section 13.22 of the 1984 Model Act with a couple of technical corrections, requires that the corporation send a notice to dissenters informing them of where and when they must demand payment and deposit their shares in order to perfect their dissenters’ rights. It also requires that the corporation include with the notice a form that can be filled out to demand payment. The form must set forth the date on which the first announcement of the terms of the proposed corporate action was made and request the dissenter to certify whether he acquired beneficial ownership of his shares before that date to aid the corporation in determining whether it will withhold payment for those shares pursuant to new Section 33‑13‑270. No such requirements existed under the 1981 South Carolina Business Corporation Act. In addition, the new provision requires the corporation to set the period for receiving the demand as thirty to sixty days from the delivery (which includes mailing; see Section 33‑1‑400(5)) of the notice, which must be sent by the corporation within ten days of the taking of the action giving rise to the dissenters’ rights. The new provision changes “sent” in subsection (b) of the Model Act to the defined term “delivered”, which includes mailed, for the sake of consistency. Under prior South Carolina law, the demand had to be filed within twenty days of the vote on the proposed action.

Although the 1984 Model Act would give the corporation unfettered discretion in setting the time for deposit of the shares, this provision requires that this deposit date not be earlier than twenty days after the demand date. Under prior South Carolina law, the shares had to be submitted for notation within twenty days of demand.

DERIVATION: 1984 Model Act Section 13.22.

CROSS REFERENCES

Action without meeting, see Section 33‑7‑104.

After‑acquired shares, see Section 33‑13‑270.

Court costs and counsel fees, see Section 33‑13‑310.

“Deliver” includes mail, see Section 33‑1‑400.

Dissenter, defined, see Section 33‑13‑101.

Effective date of notice, see Section 33‑1‑410.

“Notice” defined, see Section 33‑1‑410.

Notice to dissenter after failure to take action on original plan, see Section 33‑13‑260.

Notice of dissenter’s rights, see Section 33‑13‑200.

Share transfer restrictions, see Sections 33‑6‑270 and 33‑13‑240.

Shareholder’s demand for payment, see Section 33‑13‑230.

Shares without certificates, see Section 33‑6‑260.

Library References

Corporations 182.4(4), 610(4), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799, 835, 837.

NOTES OF DECISIONS

In general 1

1. In general

Former wife of corporation director held estopped to assert invalidity of lease unfavorable to corporation where, due to circumstances indicating former husband was controlling and dominating force with respect to stock owned by members of immediate family, it was inferable that she had knowingly acquiesced in state of affairs existing at time lease was executed. Metromont Materials Corp. v. Pennell (S.C. 1977) 270 S.C. 9, 239 S.E.2d 753.

**SECTION 33‑13‑230.** Shareholders’ payment demand.

 (a) A shareholder sent a dissenters’ notice described in Section 33‑13‑220 must demand payment, certify whether he (or the beneficial shareholder on whose behalf he is asserting dissenters’ rights) acquired beneficial ownership of the shares before the date set forth in the dissenters’ notice pursuant to Section 33‑13‑220(b)(3), and deposit his certificates in accordance with the terms of the notice.

 (b) The shareholder who demands payment and deposits his share certificates under subsection (a) retains all other rights of a shareholder until these rights are canceled or modified by the taking of the proposed corporate action.

 (c) A shareholder who does not comply substantially with the requirements that he demand payment and deposit his share certificates where required, each by the date set in the dissenters’ notice, is not entitled to payment for his shares under this chapter.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The demand for payment required by section 13.23 (Section 33‑13‑230) is the definitive statement by the dissenter. In the case of a transaction involving a vote by shareholders, it is a confirmation of the “intention” expressed earlier; in the case of any other transaction, it is the person’s first statement of position. In either event, the filing of these demands informs the corporation of the extent of the potential cash drain if it proceeds with the proposed corporate action.

The demand for payment must include a certificate as to whether the date on which the dissenter acquired ownership of the shares was before (or on or after) the announcement date. See section 13.22(b)(3) (Section 33‑13‑220(b)(3)). This information permits the issuer to detect acquisitions made for speculative or obstructive purposes and to exercise its right under section 13.27 (Section 33‑13‑270) to defer payment of compensation for these shares.

Section 13.23(a) (Section 33‑13‑230(a)) also requires a person who files a demand for payment to deposit his share certificates as directed by the corporation in its dissenters’ notice. The deposit of share certificates is necessary to prevent dissenters from giving themselves a 30‑day option to take payment if the market price of the shares goes down, but sell their shares on the open market if the price goes up. If this kind of speculation were possible, all sophisticated investors might be expected to file demands that they would not intend to carry through unless the price should fall. If the shares are not represented by certificates, the corporation can prevent speculation by restricting their transfer, as authorized by section 13.24 (Section 33‑13‑240).

With respect to certificated shares, this provision differs from many statutes in that the certificates are “deposited” for retention, rather than “submitted for notation.” This change assumes that the corporation will retain the certificates unless it fails to effectuate the proposed corporate action; it thus avoids the need of sending the certificates back to the shareholders, only to be surrendered again when payment is made. In most cases, payment will be made promptly, and the shuttling of certificates back and forth is unnecessary.

A person who fails to file the demand for payment or does not deposit his share certificates as required by section 13.23(a) (Section 33‑13‑230(a)) loses his status as a dissenter entitled to payment for his shares. But a person who fails to certify whether he acquired his shares before (or on or after) the announcement date does not lose his right to dissent; if he does not thereafter establish that he acquired his shares before the announcement date, the corporation may treat him as an after‑acquiring shareholder under section 13.27 (Section 33‑13‑270).

A shareholder who deposits his shares retains all other rights of a shareholder until those rights are modified by effectuation of the proposed corporate action. See section 13.23(b) (Section 33‑13‑230(b)).

SOUTH CAROLINA REPORTERS’ COMMENTS

The title of Section 13.23 of the 1984 Model Act has been changed to clarify that shareholders have no “duty” to file a demand for payment. This act uses the phrase “shareholder’s payment demand”. The Model Act’s careless use of “duty” was confusing and carried the potential for creating the mistaken impression that the corporation had the right to force the shareholder to file a demand for payment or to pay damages if he did not. Clearly, this was not intended by the draftsman of the Model Act provision since it applied equally to shareholders who had filed a notice of intent to demand payment under Section 33‑13‑210 and to those who were not entitled to vote on the proposed action and, thus, received a written dissenters’ notice under Section 33‑13‑220 without having filed a Section 33‑13‑210 notice of intent to demand payment. Of course, there is no general duty of all shareholders who are not entitled to vote on the proposed action to file a demand for payment and perfect their dissenters’ rights; they are perfectly free not to dissent. There is nothing in the statute to indicate that shareholders who have filed a Section 33‑13‑210 notice of intent to demand payment have a duty to actually do so. As the note in the Model Business Corporation Act Annotated on the Historical Background of Model Act Section 13.23 indicates, this provision is based on Section 81(e) of the 1969 Model Act, as revised in 1978. That provision does not speak of a “duty” and neither did prior South Carolina law. What is intended is that the shareholder must file a demand for payment and deposit his share certificates in order to perfect his dissenters’ rights; this is a condition precedent, not a “duty.”

Except for this change in title, a couple of technical corrections, and the addition of language making it explicit that a dissenter’s substantial compliance with the requirements of this section is sufficient to perfect his appraisal rights, the new provision is identical to Section 13.23 of the 1984 Model Act. Major defects of dissenters’ rights in the past have been the hypertechnical requirements for their assertion and a tendency of courts to be extremely unyielding in demanding precise compliance. Although the modern tendency is for courts to accept substantial compliance as sufficient to satisfy the requirements for perfecting dissenters’ rights, some courts have insisted on technical compliance in making the demand for payment. See, e.g., Raab v. Villager Industries, Inc., 355 A.2d 888 (Del. 1976). The addition of substantial compliance language in subsection (c) is designed to ensure that the same reasonable attitude prevails in applying this section as under Section 33‑13‑210, promoting the fair treatment of shareholders while protecting the legitimate interests of the corporation. Under it, courts should be far more liberal in determining whether a shareholder has perfected his dissenters’ rights. Similar language is found in Okla. Stat. Ann. tit. 18 Section 1.159(8).

As under the 1981 South Carolina Business Corporation Act, filing the demand is the determinative event in establishing the shareholder as a dissenter. The new provision requires that the shareholder (1) demand payment and (2) deposit his shares in order to perfect his rights. Prior South Carolina law required the filing of the demand and the submission of his share certificates for notation. Thus, under prior law, a dissenting shareholder could sell or pledge his shares, representing his right to be paid their fair value, while under the new provision he cannot. An additional difference is that the deposit of the shares is necessary to perfect the dissenters’ rights under the new provision while, under prior law, the failure of the dissenter to submit his shares for notation gave the corporation the power to terminate his rights as a dissenter. Under prior law, a dissenter lost all his rights as a shareholder once he had filed his demand while, under the new provision, he only loses those rights once the proposed action has been effected.

The new provision requires that the dissenter certify whether he acquired beneficial ownership of the shares before the date of the announcement of the terms of the proposed action, but there is no sanction if he does not do so.

DERIVATION: 1984 Model Act Section 13.23.

CROSS REFERENCES

After‑acquired shares, see Section 33‑13‑270.

Court action to protect shareholders of statutory close corporation, see Section 33‑18‑400.

Court costs and counsel fees, see Section 33‑13‑310.

Dissenter, defined, see Section 33‑13‑101.

Dissenters’ notice, see Section 33‑13‑220.

Effective date of notice, see Section 33‑1‑410.

Payment for shares, generally, see Section 33‑13‑250.

Share transfer restrictions, see Sections 33‑6‑270 and 33‑13‑240.

Library References

Corporations 182.4(5), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

**SECTION 33‑13‑240.** Share restrictions.

 (a) The corporation may restrict the transfer of uncertificated shares from the date the demand for payment for them is received until the proposed corporate action is taken or the restrictions are released under Section 33‑13‑260.

 (b) The person for whom dissenters’ rights are asserted as to uncertificated shares retains all other rights of a shareholder until these rights are canceled or modified by the taking of the proposed corporate action.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.24 (Section 33‑13‑240) deals with uncertificated shares in the dissent process. Section 13.23(a) (Section 33‑13‑230(a)) requires certificated shares to be deposited as directed by the corporation in its dissenters’ notice; the restrictions on transfer of uncertificated shares provided by this section impose an analogous restriction on uncertificated shares for the same reasons. See the Official Comment to section 13.23 (Section 33‑13‑230).

Section 13.24(b) (Section 33‑13‑240(b)) makes express that the restriction on transfer of shares provided by this section does not affect any other rights of the shareholder until these rights are modified by the corporate action.

SOUTH CAROLINA REPORTERS’ COMMENTS

Except for a couple of technical corrections, the new provision is identical to Section 13.24 of the 1984 Model Act. There was no provision for dealing with the possibility of uncertificated shares in the dissenters’ rights provisions of the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 13.24.

CROSS REFERENCES

Court costs and counsel fees, see Section 33‑13‑310.

Dissenter, defined, see Section 33‑13‑101.

Information statement for certificateless shares, see Section 33‑6‑260.

Payment demand, see Section 33‑13‑230.

Share transfer restrictions generally, see Section 33‑6‑270.

Shares without certificates, see Section 33‑6‑260.

Library References

Corporations 113, 182.4(4), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 220, 340, 344, 799.

**SECTION 33‑13‑250.** Payment.

 (a) Except as provided in Section 33‑13‑270, as soon as the proposed corporate action is taken, or upon receipt of a payment demand, the corporation shall pay each dissenter who substantially complied with Section 33‑13‑230 the amount the corporation estimates to be the fair value of his shares, plus accrued interest.

 (b) The payment must be accompanied by:

 (1) the corporation’s balance sheet as of the end of a fiscal year ending not more than sixteen months before the date of payment, an income statement for that year, a statement of changes in shareholders’ equity for that year, and the latest available interim financial statements, if any;

 (2) a statement of the corporation’s estimate of the fair value of the shares and an explanation of how the fair value was calculated;

 (3) an explanation of how the interest was calculated;

 (4) a statement of the dissenter’s right to demand additional payment under Section 33‑13‑280; and

 (5) a copy of this chapter.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.25 (Section 33‑13‑250) changes the relative balance between corporation and dissenting shareholders by requiring immediate payment by the corporation upon the completion of the transaction or (if the transaction did not need shareholder approval and has been completed) upon receipt of the demand for payment. The corporation may not wait for a final agreement on value before making payment, and the shareholder has the immediate use of the amount determined by the corporation to represent fair value without waiting for the conclusion of appraisal proceedings.

This obligation to make immediate payment is based on the view that since the person’s rights as a shareholder are terminated with the completion of the transaction, he should have immediate use of the money to which the corporation agrees it has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed.

Since the shareholder must decide whether or not to accept the payment in full satisfaction, he must be furnished at this time with the financial information specified in section 13.25(b) (Section 33‑13‑250(b)), with a reminder of his further rights and liabilities, and with a copy of this chapter.

SOUTH CAROLINA REPORTERS’ COMMENTS

Except for one technical correction, the addition of the substantial compliance language (see the South Carolina Reporters’ Comments to Section 33‑13‑230), and the addition of the requirements that the corporation explain how it calculated the fair value, the new provision is identical to Section 13.25 of the 1984 Model Act.

This provision is a significant change from the 1981 South Carolina Business Corporation Act which merely required that the corporation offer to pay the amount it contended was the fair value. The payment was only required after the shareholder had agreed to the value. Under the new provision, the corporation must pay to each dissenter the amount it calculates is the fair value of his shares (except for after‑acquired shares under Section 33‑13‑270).

Other, more technical, changes are made in the timing and the financial statements and explanations required to accompany the offer. Additionally, the new provision does not contain the requirement of prior South Carolina law that the amount per share offered each shareholder be identical.

The financial statements required by Section 33‑13‑250(b)(1) include interim financial statements if any have been prepared that are more recent than the balance sheet, the income statement, and the statement of changes in shareholders’ equity. Interim statements do not have to be prepared just for distribution to dissenters, although any of the annual statements that the corporation did not usually prepare would have to be prepared.

The requirement of Section 33‑13‑250(b)(2) that the corporation explain to the dissenter how it calculated the fair value it is offering him is intended to further the process of settling the parties’ differences in private negotiations as well as to give the shareholder the information needed to make an informed decision whether or not to accept the payment in full satisfaction. The explanation must describe the method used in calculating the fair value and designate the data used in making the calculations.

For example, a corporation might explain that it had calculated the value of the shares by capitalizing its average earnings over the past three years at a rate of X, or its explanation might be that it had calculated the value of the shares by adding a Y percent premium to the highest quoted price for the shares on the New York Stock Exchange during the preceding six months, or it might explain that its offer was the net asset value per share as shown on the accompanying balance sheet. Although minimal explanations such as these would satisfy the statutory mandate, if they accurately described the method used and did not omit any material factors included in the calculation of the offered fair value, a more complete explanation might serve better to convince the dissenting shareholders of the fairness of the value offered or at least to provide a more meaningful basis for discussion of the parties’ differences.

In providing the valuation information, the corporation must take care to avoid liability under other applicable laws, such as Rule 10b‑5 under the Securities Exchange Act of 1934.

DERIVATION: 1984 Model Act Section 13.25.

CROSS REFERENCES

After‑acquired shares, see Section 33‑13‑270.

Court costs and counsel fees, see Section 33‑13‑310.

Dissenter, defined, see Section 33‑13‑101.

Dissenters’ notice, see Section 33‑13‑220.

“Fair value” defined, see Section 33‑13‑101.

“Interest” defined, see Section 33‑13‑101.

Payment demand, see Section 33‑13‑230.

Rejection of corporation’s estimate of fair value, see Section 33‑13‑280.

Withholding payment for acquisition of after‑acquired shares, see Section 33‑13‑270.

Library References

Corporations 182.4(5), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

**SECTION 33‑13‑260.** Failure to take action.

 (a) If the corporation does not take the proposed action within sixty days after the date set for demanding payment and depositing share certificates, the corporation, within the same sixty‑day period, shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares.

 (b) If, after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters’ notice under Section 33‑13‑220 and repeat the payment demand procedure.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.26 (Section 33‑13‑260) essentially grants the corporation 60 days after the payment demand date to complete the transaction and make payment for the shares as required by section 13.25 (Section 33‑13‑250). If the corporation is unable to complete the corporate action within 60 days, it must release the shares, and give a new notice when it is ready to repeat the cycle. This requirement prevents the corporation from holding the dissenter indefinitely in a position where he has no possibility of realizing on his shares either by obtaining payment from the corporation or by selling them. If the transaction has been effected but the corporation fails to make payment as required by this chapter, it is subject to the sanctions of section 13.31(b) (Section 33‑13‑310(b)).

Section 13.26(b) (Section 33‑13‑260(b)) makes it clear that the corporation at any time after returning the deposited shares may send a new dissenters’ notice under section 13.22 (Section 33‑13‑220) and repeat the procedure.

SOUTH CAROLINA REPORTERS’ COMMENTS

This provision, which is nearly identical to Section 13.26 of the 1984 Model Act, adds a new sixty‑day time limit to the law. The 1981 South Carolina Business Corporation Act only required the corporation to return dissenters to the status of shareholders if the action were abandoned or the shareholders revoked the authority for it. The new provision adds to the Model Act the language “within the same sixty‑day period” to make explicit what was implicit and, therefore, a trap for the unwary, under Model Act Section 13.28 (Section 33‑13‑280). Under that section, if the shares have not been returned within sixty days after the date set for demanding payment, the shareholder is entitled to payment even if the action has been abandoned.

DERIVATION: 1984 Model Act Section 13.26.

CROSS REFERENCES

Certificateless shares, see Section 33‑6‑260.

Court action to compel payment, see Sections 33‑13‑300 and 33‑13‑310.

Court costs and counsel fees, see Section 33‑13‑310.

Dissenter, defined, see Section 33‑13‑101.

Dissenters’ notice, see Section 33‑13‑220.

Information statement for certificateless shares, see Section 33‑6‑260.

Share transfer restrictions, see Section 33‑13‑240.

Library References

Corporations 182.4(5), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

**SECTION 33‑13‑270.** After‑acquired shares.

 (a) A corporation may elect to withhold payment required by section 33‑13‑250 from a dissenter as to any shares of which he (or the beneficial owner on whose behalf he is asserting dissenters’ rights) was not the beneficial owner on the date set forth in the dissenters’ notice as the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action, unless the beneficial ownership of the shares devolved upon him by operation of law from a person who was the beneficial owner on the date of the first announcement.

 (b) To the extent the corporation elects to withhold payment under subsection (a), after taking the proposed corporate action, it shall estimate the fair value of the shares, plus accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of his demand. The corporation shall send with its offer a statement of its estimate of the fair value of the shares, an explanation of how the fair value and interest were calculated, and a statement of the dissenter’s right to demand additional payment under Section 33‑13‑280.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2] and Section 33‑11‑290 [1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.27 (Section 33‑13‑270) provides for separate treatment of shares acquired on or after the date of public announcement of the proposed corporate action; this date is specified by the corporation in its dissenters’ notice under section 13.22 (Section 33‑13‑220). At the corporation’s option, holders of shares acquired on or after this date are not entitled to immediate payment under section 13.25 (Section 33‑13‑250); rather, they may receive only an offer of payment which is conditioned on their agreement to accept it in full satisfaction of their claim. If the right of unconditional immediate payment were granted as to all after‑acquired shares, speculators and others might be tempted to buy shares merely for the purpose of dissenting. Since the function of dissenters’ rights is to protect investors against unforeseen changes, there is no need to give equally favorable treatment to purchasers who knew or should have known about the proposed changes.

Corporations are given discretion whether to apply section 13.27 (Section 33‑13‑270) to after‑acquired shares. Considerations of simplicity and harmony may prompt the corporation to make immediate payment for shares acquired on or after the specified date as well as for reacquired shares.

The date used as a cut‑off for determining the application of this section is “when the terms” of the transaction are first announced to the news media or shareholders. The cut‑off should not be set at an earlier date, such as when the first public statement that the corporate action was under consideration was made, because the goal of this section is to prevent use of dissenters’ rights as a speculative device after the terms of the transaction are announced. See the Official Comment to section 13.22 (Section 33‑13‑220).

A dissenter under this section may accept the offered payment in full satisfaction; if he does not, he is entitled to demand a judicial determination of the amount to which he is entitled under sections 13.28 and 13.30 (Sections 33‑13‑280 and 33‑13‑300). He is then entitled to payment of the amount so determined at the termination of the proceeding.

SOUTH CAROLINA REPORTERS’ COMMENTS

Except for a couple of technical corrections (including one to make it clear that this provision only affects payment for after‑acquired shares and not all shares owned by a shareholder who bought additional shares after the date of the announcement), the addition of the requirement that the corporation explain how it calculated the fair value (see the South Carolina Reporters’ Comments to Section 33‑13‑250), and the addition of language based upon Section 33‑11‑290 of the 1981 South Carolina Business Corporation Act to make this provision inapplicable to a shareholder who inherited or otherwise acquired the shares through the operation of law, the new provision is identical to Section 13.27 of the 1984 Model Act. There was nothing similar in the 1981 South Carolina Business Corporation Act, since it did not require the corporation to make payment until the dissenter had agreed to accept the amount offered.

DERIVATION: 1984 Model Act Section 13.27.

CROSS REFERENCES

Court costs and counsel fees, see Section 33‑13‑310.

“Dissenter” defined, see Section 33‑13‑101.

“Fair value” defined, see Section 33‑13‑101.

“Interest” defined, see Section 33‑13‑101.

Rejection of corporation’s offer, see Section 33‑13‑280.

Library References

Corporations 182.4(5), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

**SECTION 33‑13‑280.** Procedure if shareholder dissatisfied with payment or offer.

 (a) A dissenter may notify the corporation in writing of his own estimate of the fair value of his shares and amount of interest due and demand payment of his estimate (less any payment under Section 33‑13‑250) or reject the corporation’s offer under Section 33‑13‑270 and demand payment of the fair value of his shares and interest due, if the:

 (1) dissenter believes that the amount paid under Section 33‑13‑250 or offered under Section 33‑13‑270 is less than the fair value of his shares or that the interest due is calculated incorrectly;

 (2) corporation fails to make payment under Section 33‑13‑250 or to offer payment under Section 33‑13‑270 within sixty days after the date set for demanding payment; or

 (3) corporation, having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within sixty days after the date set for demanding payment.

 (b) A dissenter waives his right to demand additional payment under this section unless he notifies the corporation of his demand in writing under subsection (a) within thirty days after the corporation made or offered payment for his shares.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.28 (Section 33‑13‑280) also departs significantly from the prior law of dissenters’ rights.

The dissenter who is not content with the corporation’s remittance must state in writing the amount he is willing to accept. A dissenter who acquired his shares after public announcement of the transaction (section 13.27 (Section 33‑13‑270)) and is dissatisfied with the corporation’s offer must also state in writing the amount he is willing to accept. A dissenter cannot, by remaining silent, force the corporation into the expense and delay of a judicial appraisal. Furthermore, if his supplemental demand is unreasonable, he runs the risk of being assessed litigation expenses under section 13.31 (Section 33‑13‑310). These provisions are designed to encourage settlement without a judicial proceeding.

A dissenter to whom the corporation has made payment (or who has been offered payment under section 13.27 (Section 33‑13‑270)) must make his supplemental demand within 30 days after receipt of the payment (or offer of payment) in order to permit the corporation to make an early decision on initiating appraisal proceedings. If he fails to do so, he loses the right to demand additional payment under section 13.28(b) (Section 33‑13‑280(b)).

If the corporation, having failed to make payment, also fails to return the certificates previously deposited or release the restrictions on transfer of uncertificated securities within 60 days, the shareholder may treat the shares as purchased by the corporation and demand payment of the full amount claimed under this section. See section 13.30(a) (Section 33‑13‑300(a)). This provision creates no hardship for the corporation since, if it cannot complete the transaction within 60 days, it may return the certificates (or release the restrictions on uncertified shares) and start the process over again at any time.

SOUTH CAROLINA REPORTERS’ COMMENTS

Except for a couple of technical corrections, the new provision is identical to Section 13.28 of the 1984 Model Act. There was no specific procedure similar to this in the 1981 South Carolina Business Corporation Act. This is an important part of the Model Act’s attempt to encourage settlement of differences of opinion as to the value of the shares.

DERIVATION: 1984 Model Act Section 13.28.

CROSS REFERENCES

After‑acquired shares, see Section 33‑13‑270.

Court costs and counsel fees, see Section 33‑13‑310.

“Deliver” includes mail, see Section 33‑1‑400.

“Dissenter” defined, see Section 33‑13‑101.

Effective date of notice, see Section 33‑1‑410.

“Fair value” defined, see Section 33‑13‑101.

“Interest” defined, see Section 33‑13‑101.

Judicial appraisal, see Section 33‑13‑300.

“Notice” defined, see Section 33‑1‑410.

Payment for shares, see Section 33‑13‑250.

Offer of payment for after‑acquired shares, see Section 33‑13‑270.

Library References

Corporations 182.4(5), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Costs Section 44, Dissenting Shareholder’s Actions.

NOTES OF DECISIONS

In general 1

1. In general

Proper weight of net asset value to earnings value held to be 95 percent to five percent due to unusual nature of corporation, where closely‑held family corporation existed primarily as vehicle to hold real estate, amounting to 90 percent of total assets, where there was no established market price, and where income was insignificant. Metromont Materials Corp. v. Pennell (S.C. 1977) 270 S.C. 9, 239 S.E.2d 753.

Stockholders should not have been penalized by award of five percent interest on dissenting stock rather than higher rate, for attempted removal of case to Federal Court, whatever their motivation. Metromont Materials Corp. v. Pennell (S.C. 1977) 270 S.C. 9, 239 S.E.2d 753.

ARTICLE 3

Judicial Appraisal of Shares

**SECTION 33‑13‑300.** Court action.

 (a) If a demand for additional payment under Section 33‑13‑280 remains unsettled, the corporation shall commence a proceeding within sixty days after receiving the demand for additional payment and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty‑day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

 (b) The corporation shall commence the proceeding in the circuit court of the county where the corporation’s principal office (or, if none in this State, its registered office) is located. If the corporation is a foreign corporation without a registered office in this State, it shall commence the proceeding in the county in this State where the principal office (or, if none in this State, the registered office) of the domestic corporation merged with or whose shares were acquired by the foreign corporation was located.

 (c) The corporation shall make all dissenters (whether or not residents of this State) whose demands remain unsettled parties to the proceeding as in an action against their shares and all parties must be served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication, as provided by law.

 (d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) is plenary and exclusive. The court may appoint persons as appraisers to receive evidence and recommend decisions on the question of fair value. The appraisers have the powers described in the order appointing them or in any amendment to it. The dissenters are entitled to the same discovery rights as parties in other civil proceedings.

 (e) Each dissenter made a party to the proceeding is entitled to judgment for the amount, if any, by which the court finds the fair value of his shares, plus interest, exceeds the amount paid by the corporation.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.30 (Section 33‑13‑300) retains the concept of judicial appraisal as the ultimate means of determining fair value. The proceeding is to be commenced by the corporation within 60 days after receiving a demand for payment under section 13.28 (Section 33‑13‑280). Section 13.30(a) (Section 33‑13‑300(a)) makes this time period jurisdictional; if the petition is not commenced within this period the corporation must pay the additional amounts demanded by the shareholders under section 13.28 (Section 33‑13‑280). See the Official Comment to that section. Each shareholder may sue directly for this amount, if necessary, and in an appropriate case may be entitled to charge the corporation with the costs of suit.

All demands for payment made under section 13.28 (Section 33‑13‑280) are to be resolved in a single proceeding brought in the county where the corporation’s principal office is located or, if none, in other specified counties. All shareholders making section 13.28 (Section 33‑13‑280) demands must be made parties, with service by publication authorized if necessary. Appraisers may be appointed within the discretion of the court. The final judgment establishes not only the fair value of the shares in the abstract but also determines how much each shareholder who made a section 13.28 (Section 33‑13‑280) demand should actually receive.

If the corporation fails to commence a judicial proceeding to establish the fair value of the shares as required by this section, it must pay the full amount claimed under this section.

SOUTH CAROLINA REPORTERS’ COMMENTS

Except for several technical corrections, the new provision is identical to the 1984 Model Act. Item (2) from subsection (e) of the Model Act, which states the form of a judgment in a dissenters’ rights case where after‑acquired shares are involved, has been deleted. This deletion is not intended to effect any change from the Model Act’s intended meaning. The item was redundant because item (1) adequately provided for after‑acquired shares for which the corporation had elected to withhold payment. For such shares the amount paid by the corporation is nothing and the amount due under item (1) is the fair value of the shares, plus interest. Additionally, the Model Act subsection provides confusing guidance about what is due to a shareholder who owned some shares before the first announcement and acquired other shares for which payment has been withheld under Section 33‑13‑270. The wording of new subsection (e) provides clear directions for this case as well.

The new provision makes a number of changes in prior South Carolina law under the 1981 South Carolina Business Corporation Act. See generally, the Official Comment to this section. The most significant change is in the effect of the corporation’s failure to commence judicial proceedings when required; under the new law the corporation becomes liable for the amount demanded by the dissenters.

DERIVATION: 1984 Model Act Section 13.30.

CROSS REFERENCES

After‑acquired shares, see Section 33‑13‑270.

Court costs and counsel fees, see Section 33‑13‑310.

“Dissenter” defined, see Section 33‑13‑101.

“Fair value” defined, see Section 33‑13‑101.

“Interest” defined, see Section 33‑13‑101.

“Person” defined, see Section 33‑1‑400.

“Principal Office”: defined, see Section 33‑1‑400.

“Proceeding” defined, see Section 33‑1‑400.

Registered Office: required, see Sections 33‑2‑102 and 33‑5‑101.

Library References

Corporations 182.4(6), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 42, Effect of Merger or Consolidation‑ Dissenting Shareholders.

S.C. Jur. Costs Section 44, Dissenting Shareholder’s Actions.

NOTES OF DECISIONS

In general 1

1. In general

Court‑appointed appraiser’s valuation of stock held binding, in accordance with previous agreement, where stockholders failed to show alleged error in valuation of corporate real estate holdings which fell between valuations of interested appraisers for appellants and respondents. Metromont Materials Corp. v. Pennell (S.C. 1977) 270 S.C. 9, 239 S.E.2d 753.

Court erred in valuation of dissenting shareholders’ stock, in which issue was extent to which value of tract of land was reduced by existence of 20‑year lease with option to renew, the Court construing a 1967 lease as mere restatement of misplaced 1959 lease, but the language of lease manifested no intention that lease be mere restatement of or subordinate to 1959 lease, and 1967 lease extended lease period seven years beyond period of 1959 lease. Metromont Materials Corp. v. Pennell (S.C. 1977) 270 S.C. 9, 239 S.E.2d 753.

Court erred in valuation of dissenting stock by disregarding existence of lessee’s option to renew lease on land owned by corporation, where option would have been exercised by lessee, given his favorable terms. Metromont Materials Corp. v. Pennell (S.C. 1977) 270 S.C. 9, 239 S.E.2d 753.

**SECTION 33‑13‑310.** Court costs and counsel fees.

 (a) The court in an appraisal proceeding commenced under Section 33‑13‑300 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under Section 33‑13‑280.

 (b) The court also may assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

 (1) against the corporation and in favor of any or all dissenters if the court finds the corporation did not comply substantially with the requirements of Sections 33‑13‑200 through 33‑13‑280; or

 (2) against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

 (c) If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited.

 (d) In a proceeding commenced by dissenters to enforce the liability under Section 33‑13‑300(a) of a corporation that has failed to commence an appraisal proceeding within the sixty‑day period, the court shall assess the costs of the proceeding and the fees and expenses of dissenters’ counsel against the corporation and in favor of the dissenters.

HISTORY: Derived from 1976 Code Section 33‑11‑270 [1962 Code Section 12‑16.27; 1952 Code Sections 12‑459 to 12‑462, 12‑633 to 12‑635; 1942 Code Sections 7706, 7759; 1932 Code Sections 7706, 7759; 1925 (34) 246; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13.31 (Section 33‑13‑310) provides that generally the costs of the appraisal proceeding should be assessed against the corporation. But the court is authorized to assess these costs, in whole or in part, against the dissenters if it concludes they acted arbitrarily, vexatiously, or not in good faith in making the section 13.28 (Section 33‑13‑280) demand for additional payment. Similarly, counsel fees may be charged against the corporation or against dissenters upon a finding of a failure to comply in good faith with the requirements of this chapter. Individual dissenters, in turn, can be called upon to pay counsel fees for other dissenters if the court finds that the services were of substantial benefit to the other dissenters.

The purpose of all these grants of discretion with respect to costs and counsel fees is to increase the incentives of both sides to proceed in good faith under this chapter to attempt to resolve their disagreement without the need of a formal judicial appraisal of the value of the shares.

SOUTH CAROLINA REPORTERS’ COMMENTS

Except for the addition of subsection (d) to make explicit the result discussed in the Official Comment to Section 33‑13‑300, the new provision is identical to Section 13.31 of the 1984 Model Act. It makes a number of changes in prior South Carolina law. See, generally, the Official Comment to this section. Under the new provision, if the court finds that the dissenters acted arbitrarily, vexatiously, or not in good faith, it may assess costs, including attorneys’ fees, against them but it may not deny them interest as it could do under the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 13.31.

CROSS REFERENCES

Appraisers, see Section 33‑13‑300.

“Dissenter” defined, see Section 33‑13‑101.

“Proceeding” defined, see Section 33‑1‑400.

Library References

Corporations 182.4(6), 584.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 799.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 32, Dissenting Stockholder Actions for Stock Valuation.

S.C. Jur. Costs Section 44, Dissenting Shareholder’s Actions.

NOTES OF DECISIONS

In general 1

1. In general

In an action brought by a minority shareholder against a corporation alleging that he was frozen out of the corporation without adequate compensation, in breach of the majority shareholder’s fiduciary duty to him, it was reversible error to award the minority shareholder attorney’s fees, since the action was not premised upon former Section 33‑11‑270 and since there was no contractual or equitable basis for an award of fees. Dibble v. Sumter Ice and Fuel Co. (S.C.App. 1984) 283 S.C. 278, 322 S.E.2d 674.

Award of $7,500 attorneys’ fees, $5,000 expert and appraisal fees, and $1,084.64 miscellaneous expenses found reasonable in suit for valuation of dissenting stock. Metromont Materials Corp. v. Pennell (S.C. 1977) 270 S.C. 9, 239 S.E.2d 753.