

1992

Leontine C. Pond, Merle G. Hyer Company v.
Equitable Life and Casualty Insurance Company,
Insurance Investment Company, R. Earl Ross, E.
Roderick Ross, Galen J. Ross, David E. Ross IIC,
Diane Ross Worthen, Betsy Ross Rapps, Connie
Ross : Petition for Rehearing

Utah Court of Appeals

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UTAH
COURT OF
APPEALS

DOCKET NO. 920759 IN THE UTAH COURT OF APPEALS

LEONTINE C. POND and MERLE G. HYER
COMPANY, a Utah Corporation, holders of
Preferred Stock in Insurance Investment
Company, a Utah Corporation, on behalf of
themselves and other similarly situated
holders of such stock,

Plaintiffs and Appellants,

vs.

EQUITABLE LIFE AND CASUALTY INSURANCE
COMPANY, a Utah Corporation, INSURANCE
INVESTMENT COMPANY, a Utah Corporation,
R. EARL ROSS, E. RODERICK ROSS, GALEN J.
ROSS, DAVID E. ROSS IIC, DIANE ROSS
WORTHEN, BETSY ROSS RAPPS, CONNIE ROSS,
and Does 1 through 20,

Defendants and Appellees.

Case No. 920759-CA

ARGUMENT PRIORITY CLASSIFICATION 15

PETITION FOR REHEARING

APPEAL

FROM THE THIRD JUDICIAL DISTRICT COURT

COUNTY OF SALT LAKE, STATE OF UTAH

HONORABLE JAMES S. SAWAYA, JUDGE

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COMPANY, a Utah Corporation, holders of)
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PETITION FOR REHEARING

Plaintiffs and appellants respectfully petition this Court for a rehearing in the above-entitled matter based on the fact that there were certain points of fact and law that were apparently overlooked or misapprehended, and that the existence of a remedy in Utah based on the facts of this case needs to be established.

POINTS OVERLOOKED OR MISAPPREHENDED

Rule 35 of the Utah Rules of Appellate Procedure requires this Petition to "state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended." These points are as follows:

1. Facts were described at every stage of this litigation which showed oppressive conduct against the plaintiffs and those similarly situated. Likewise, the existence of statutory and common law remedies have been brought before the courts. These facts were not enumerated and this law was not addressed in the decision of this Court.

2. The Opinion of this Court states that appellants do not point to an attempt in these proceeding to pierce IIC's corporate veil. Facts were described and legal precedence urged before the trial court and on appeal justifying a disregarding of the separate identity of IIC and Equitable for purposes of identifying wrongful acts and granting an appropriate remedy.

ARGUMENT

1. THE DEFENDANTS ARE UNLAWFULLY OPPRESSING THE PLAINTIFFS.

Acts of oppression

The following facts were presented before the trial court in the form of pleadings or otherwise, and must be viewed as correct:

1. Pond was issued her 500 shares of IIC preferred stock after the death of her husband, Stillman H. Pond, upon the cancellation of the certificates that had been issued to him when he purchased them during their marriage in the early 1940's. ROA at 3.

2. The Ross family owned the controlling stock beginning with Rod and Earl's grandfather. Rod Depo at 5-7.

3. Pond owned 132 shares of Equitable common stock. She checked with several brokers, found no market quotation on the stock, and therefore sold all that she had of Equitable common stock to Ray R. Ross on November 1, 1974 for \$1.25 per share. ROA at 7-8.

4. In the early 1980's, only members of the Ross family would purchase Equitable or IIC preferred stock, and then only for less than \$5 per share. Deposition of Rod taken June 10, 1991 - ROA at 759, 549 (Rod Depo) at 120-21. Deposition of Earl taken June 11, 1991 - ROA at 760, 549 (Earl Depo) at 67-71.

5. As of October 31, 1986, the Ross family owned or controlled all or nearly all of the voting common stock of IIC and about 70% of the IIC preferred stock. ROA at 475-78.

6. A threat to Earl and Rod's control of Equitable was eliminated by Equitable's secret purchase of all of the IIC common and preferred stock and Equitable stock held directly or indirectly by defendants Galen Ross, Connie Ross, David Ross and Betsy Ross Rapps, the members of the Ross family who had been pushed from a position of control. ROA at 437, 476-78.

7. The 1988 Annual Statement reported that in the purchase of its own stock pursuant to the 1986 offer, and in the purchase from "a coalition," Equitable paid a total consideration of \$6,809,596 for the equivalent of 300,609 of its own shares, or an average of \$22.65 per share. As part of this purchase, Equitable bought over 40% (based on liquidation rights) of the outstanding IIC stock. Rod Depo, Exh. 1, 4th page.

8. That same 1988 Annual Statement reported that each share it held of IIC stock, both common and preferred, was equivalent to 3.717 shares of its own stock "(based on liquidation rights)." Id. Thus those same liquidation rights would result in an average value of over \$84 per share of IIC stock, common or preferred.

9. When equitable made that secret purchase of stock, including IIC preferred stock, from the said "coalition" of insiders, it made no comparable offer to purchase the IIC preferred stock held by the plaintiff class, which would have meant an additional investment of less than \$1,730,000. ROA at 11, 43.

10. Equitable has been in a financial position such

that making this additional investment on a comparable basis would have posed "no difficulty whatsoever." Rod Depo at 122.

11. When plaintiffs requested information pertaining to the foregoing transaction, they were forced to obtain an Order Compelling Production. ROA at 221, 275.

12. Dividends have been declared or paid by IIC in only a very few years since the issuance of the preferred stock therein, and then only at the minimum rate, 6% of the \$1 par value. IIC has indicated that dividends have been paid to the preferred shareholders of IIC on four occasions, namely, in 1954, 1981, 1983 and 1984, and seven times total. ROA 211-12, 500.

13. This policy pertaining to dividends has continued since the dismissal by the trial court, as shown in the attached document described in oral argument.

14. IIC does not have current information on the addresses of dozens of minority shareholders. ROA at 585.

15. Equitable is paying members of the Ross family unjustifiably high amounts in salary and benefits. ROA at 545.

16. Each director of Equitable receives an annual compensation for being a director of at least \$10,000. Earl Depo at 22. The total earnings of Earl and Rod have not been disclosed, in accordance with their attorney's direction. Earl Depo at 4. Earl's sisters all work for Equitable and receive additional annual compensation of about \$75,000. Earl Depo at 23.

The foregoing facts show a clear pattern of oppressive

conduct.

The most egregious element appears to be the lack of dividends. As indicated from the foregoing, in the last 50 years the plaintiffs have had less than a 50% return of capital, or an average of return on investment of less than 1% per year. An investor surely would have a reasonable expectation of a greater return if the company he invests in succeeds.

Obviously, the company has succeeded, as evidenced by the book value for each IIC preferred share of over \$84. The common shares of IIC have the same book value, and they were given a dividend 75.83 times as great: \$4.55, or 6% of \$75.83. Discovery may have shown like disparities in prior dividends.

Likewise, with or without the amendment to the Complaint, but with discovery on the salaries of Rod and Earl, it is likely that the facts would show these to have been used as a means of draining off profits without sharing with the minority shareholders. This would also be a cause of action on the part of the company, but is more important and more easily proven as an element of oppressive conduct. Donahue v. Rodd Electrotape Co. of New England, Inc., 328 N.E.2d 505, 513 (Mass. 1975).

Summarizing other pertinent applicable facts, there are unsophisticated investors, members of the general public, who buy an investment in a company or tier of companies controlled by one family. There are no books to speak of in the specific company in which stock is purchased. When records are sought, they are denied. There are no meetings nor are the investors otherwise

kept informed; in fact, there are agreements to keep them uninformed. There is no market for the shares, except for the members of the controlling family who are only willing to buy at the stock at a small fraction of its liquidation value, the value attributed to it in books supplied to the Insurance Commission.

Examples of oppression in case law

Generally, oppressive conduct involves a pattern of activities which are markedly unfair, violate the fiduciary responsibility of the majority shareholders, or thwart the reasonable expectations of the minority shareholders:

Oppressive conduct suggests "burdensome, harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealings and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." Whale Art Co., Inc. v. Doctor, 743 S.W.2d 511, 514 (Mo. App. 1987).

Thus, we conclude that our cases involving the fiduciary duty owed by majority shareholders, officers and directors of a corporation embrace the same standard which other courts have evolved under the term "oppressive conduct." Masinter v. Webco Co., 262 S.E.2d 433, 440 (W.Va. 1980).

The [New York] court stated that "oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture," Balvik v. Sylvester, 411 N.W.2d 383, 387 (N.D. 1987).

The foregoing are the general definitions and descriptions given to oppressive conduct. The following are

specific examples.

The case of Fox v. 7L Bar Ranch Co., 645 P.2d 929 (Mont. 1982) reviewed these definitions and applied them to show oppression where dividends had not been declared:

It can be said here that the corporations are in a position to declare dividends, that the refusal to do so acts as a hardship on Melvin, and when considered in light of all other circumstances, that such refusal strengthens Melvin's argument that he is being squeezed. This is a case where the cumulative effects of many acts and incidents constitute sufficient evidence of oppressive conduct to compel liquidation without a showing of inevitable ruin. Id. at 934.

The case of Stefano v. Coppock, 705 P.2d 443 (Alaska 1985) found oppressive conduct where no notice was given of meetings, the directors received very high salaries, the minority shareholder had a difficult time obtaining records, and there was an unfairly low offer to buy the stock.

In McCauley v. Tom McCauley & Sons, Inc., 724 P.2d 232 (N.M. App. 1986), the minority shareholder had no office, no benefits, no dividends, restrictions on transfer, essentially being held hostage and frozen out. Also in Masinter, supra, the court found there were no dividends and the minority shareholders were being frozen out without any business purpose.

Balvik, supra, upheld the trial court in a finding of fact of oppressive conduct where the shareholder had no employment and no office, which was contrary to the reasonable expectation.

In Delahoussaye v. Newhard, 785 S.W.2d 609

(Mo. App. 1990), on the other hand, no oppressive conduct was found. There was a mere business decision, made by independent directors, that some, and only some, stockholders should be bought out. Where there was oppression, such as in the case of Whale Art Co., supra, where the minority shareholder did not get a bonus and was thus cut out of the profits, Missouri law provided a remedy.

The court in Sugarman v. Sugarman, 797 F.2d 3 (1st Cir. 1986) found that the defendants had taken actions designed to freeze the minority shareholders out of the financial benefits they would ordinarily have received. There was uneven salary and benefits, and eventually no employment. There were no dividends. The capstone of the plan of the majority was the offer to buy the stock at a grossly inadequate price, \$3.33 instead of \$16.30 per share.

2. PLAINTIFFS ARE ENTITLED TO A REMEDY.

Utah Courts not fettered

In the realm of sovereign immunity, the courts in Utah have found themselves powerless to to fully exercise their conscience. "(T)he immunity from suit imposed by the legislature may seem unconsonably broad." Malcolm v. State of Utah, 235 Utah Adv. Rep. 18, 20 (1994). However, in this realm, concerning the oppression of minority shareholders, the Court need not ignore unconscionable results.

In fact, the legislature has encouraged, rather than discouraged, the courts in Utah to protect minority shareholders.

It has enacted and re-enacted an appropriate remedial statute.

Before 1992, subsection 16-10-92(a)(2) gave district courts the power to liquidate the assets and business of a corporation in an action by a shareholder when it was established that the acts of the directors or those in control of the corporation were oppressive.

Beginning in 1992, subsection 16-10a-1430(2)(b) provided that a corporation may be dissolved in a proceeding by a shareholder if it is established that the directors or those in control of the corporation have acted, are acting, or will act in a manner that is oppressive.

Clearly, neither statute requires a derivative action. The proceeding is one of a shareholder against the corporation to enforce the rights of that shareholder.

This is the same in other states. Most of the cases cited regarding oppressive conduct, including the freezing out of a shareholder, had no derivative aspect. The one or two that had such an aspect did not need it.

Numerous remedies available

Rule 54(c)(1) of the Utah Rules of Civil Procedure states that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The court in Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 507 P.2d 387 (1973) stated that courts are not limited to the remedy of dissolution. It then listed several

appropriate alternative remedies, including (a) dissolution on a specific future date in the event the stockholders fail to resolve their differences, (b) the appointment of a receiver to continue the operation of the business for the benefit of all of the stockholders until differences are resolved or oppressive conduct ceases, (c) the appointment of an agent to report to the court regarding the continued operation of the company with the court retaining jurisdiction, (d) the retention of jurisdiction of the court for the protection of minority shareholders without the appointment of an agent, (e) the ordering of an accounting for funds alleged to have been misappropriated, (f) the issuance of an injunction to prohibit continuing acts of oppressive conduct, which may include the reduction of salaries or bonus payments found to be unjustified or excessive, (g) the ordering of affirmative relief by the required declaration of a dividend or a reduction and distribution of capital, (h) the ordering of affirmative relief by the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders at a price to be determined by a formula or by the court, (i) an order permitting minority shareholders to purchase additional stock under conditions specified by the court, and (j) an award of damages to minority stockholders as compensation for injuries suffered by them by reason of such oppressive conduct by the majority in control.

In Chiles v. Robertson, 767 P.2d 903 (Or. App. 1989) the defendants were required to buy the plaintiffs' interests in the

related companies, without any discount to reflect their minority status. The court in McCauley, supra, gave the defendants their choice of three options: (1) liquidation of the corporation; (2) partition and reorganization; or (3) purchase by the corporation of plaintiff's outstanding shares.

In Davis v. Sheerin, 754 S.W.2d 375 (Tex. App. 1988) the trial court had ordered a combination of a buy-out, a receiver, an injunction, damages, costs, attorney's fees, a trust, dissolution, and reformation of deeds. In generally upholding the trial court, the decision cited cases from Alaska, Iowa, New Mexico, New York, and Oregon which allowed a buy-out as a less harsh remedy for oppressive acts than the liquidation provided for in their respective statutes. It also mentioned that statutes in Connecticut, Minnesota, North Carolina, South Carolina, California, and West Virginia specify a buy-out as a remedy or as an option available to majority shareholders.

Stefano, supra, was another Alaska case where a buy-out was ordered at a specific price, that being an equitable remedy less drastic than dissolution.

Whale Art Co., supra, ordered a \$10,000 bonus to be paid as the appropriate remedy.

In Fox, supra, the court recited a statute like Utah's. It then cited a publication on oppression of minority shareholders regarding dividend withholding being a squeezeout technique used in corporations of all sizes, but especially where control is concentrated in one family. Dissolution was found to

be an appropriate remedy.

Similar remedies have been upheld for oppressive conduct in the absence of statute. Donahue, supra, required a buy-out. Sugarman, supra, gave tort remedies and required the wrongfully withheld money to be paid with interest.

3. RES JUDICATA AND LAYERED CORPORATIONS MUST NOT EXCUSE OPPRESSIVE ACTS.

Duty of defendants

The defendants who are majority shareholders, directors and officers of IIC have a duty to ALL of the shareholders of IIC, not just to those in the position of control and their relatives.

However, they have used this control to go years without dividends, and then have declared grossly disproportionate dividends, without any business justification. On what basis can they rightfully claim they deserve a return on their investment over 75 times as great?

They claim a business purpose for Equitable's buying all of the IIC stock, common and preferred, at liquidation value from the dissenting members of the Ross family, and reporting it as such on their books. But they ignore the fact that they could easily have likewise offered to buy all of the IIC stock held by investors outside the Ross family. Obviously they know if they wait long enough, that can get it at the much, much lower price they customarily pay the minority stockholders for such stock.

Business form

The courts have generally ignored the restraints of the corporate form to fashion a remedy for oppressive conduct against the minority shareholders. The case of Donahue, supra, drew from the responsibility of partners to each other to order a buy-out. The case of Chiles, supra, ordered lessees and others to buy out the minority interest in six related lessors.

It is not surprising that the corporate form can be disregarded in light of the remedy of dissolution.

In the instant matter, the defendants that are majority shareholders, directors, and officers of IIC have oppressed the minority shareholders of IIC. Using that control of IIC to in turn control Equitable, they have also historically oppressed the minority shareholders of that company, implementing a freeze-out scheme that has in many cases, including Pond's, culminated with the purchase of Equitable common stock at a small fraction of its true value.

Thus the court has power, with a finding of this oppressive conduct, to order the dissolution of IIC and of Equitable. A less harsh remedy may be more appropriate. But that power means that a remedy for oppressive conduct is not barred by reason of the corporate veil.

Effect of the decision

Because of the principle of res judicata, the opinion issued in this case will bar plaintiffs from ANY remedy. The events which have taken place cannot form the basis of another

lawsuit. As it states in the case of Bradshaw v. Kershaw, 627 P.2d 528, 531 (Utah 1981):

When a second claim, demand or cause of action is essentially the same as a prior claim, demand or cause of action which has gone to final judgment, res judicata means that neither of the parties can "again litigate that claim, demand or cause of action or any issue, point or part thereof which he could have but failed to litigate in the former action." Wheadon v. Pearson, 14 Utah 2d 45, 46, 376 P.2d 946, 947 (1962). The cited authority applied that principle against a plaintiff who lost on one theory and then brought an action on another one.

The same principle is stated in Church v. Meadow Springs Ranch Corp., Inc., 659 P.2d 1045 (Utah 1983), Cox v. Cedar City Corp., 664 P.2d 1174 (Utah 1983), Office of Recovery Services v. V.G.P., 845 P.2d 944 (Utah App. 1992) (where there are four reasons listed for the principle), and Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah App. 1990).

The only exception to the application to this principle would be if this Court specifically ruled that the motion to allow the Amended Complaint could not have been denied on the basis that it failed to state a cause of action, and that the decision of this Court did not have res judicata effect with respect to the claims in that Amended Complaint.

In addition, ten other holders of IIC preferred stock have sued the defendants based on their wrongful acts, since they were denied the right to intervene in this case. That new action has been temporarily stayed pending the decision on appeal, since so many issues are questions of law. Most, if not all, of the

causes of action in that case would be dismissed on the basis of the opinion issued.

Furthermore, the defendants will receive the message that what they have done is not wrong, that they have been fully justified in all of their actions.

The stare decisis effect will encourage any promoter checking on the facts of this case to feel free to structure investment schemes in like manner, making sure to only approach Utah investors in Utah. They need only put off investors regarding dividends for the first few years, until the statute of limitation has passed on Utah securities laws. Then even if they have phenomenal success, they need only give their investors a 50% return of capital in 50 years. If such a procedure is not acceptable in Utah, it must be demonstrated in this case.

CERTIFICATION OF COUNSEL

I, Lynn P. Heward, as one of the undersigned counsel for plaintiffs, hereby certify that this Petition is presented in good faith and not for delay.

I appreciate the efforts of this Court in deciding this case. I apologize for not using the time of this Court at the initial hearing in such a way so as to avoid the need for a rehearing.

DATED this 26th day of April, 1994.

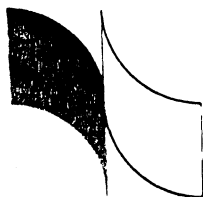
LYNN P. HEWARD & DELWIN T. POND
Attorneys for Plaintiffs
and Appellants

by Lynn Heward
LYNN P. HEWARD

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing
Petition were mailed with postage attached thereon to P. Bruce
Badger, 215 South State Street #1200, P.O. Box 510210, Salt Lake
City, Utah 84151 on this 26th day of April, 1994.

Lynn Howard



Insurance Investment Company

P.O. Box 2460
Salt Lake City, Utah 84110

February 8, 1994

Dear Shareholder:

Good News!

The Board of Directors of Insurance Investment Company is pleased to announce the payment of a dividend declared for fiscal year 1993.

Not only is this dividend the first in nearly 10 years (the first since 1984), but it is by far the largest in the Corporation's history!

In accordance with the Articles of Incorporation, the dividend is to be paid as follows:

Common Shares:	\$4.55 per share
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Preferred Shares (the maximum allowed):	\$0.06 per share
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The Articles of Incorporation state in Article 7:

A. The holders of Preferred Stock shall be entitled to receive **preferential dividends in each fiscal year in the amount of six per cent** before any dividends shall be paid upon any other stock of this corporation as and when declared by the Board of Directors of the corporation, but such dividends shall be noncumulative.

E. After the payment of dividends upon the Preferred Stock then issued and outstanding or after a sum sufficient for the payment thereof has been set aside for such purpose from the surplus or net profits of this corporation, **all of the remainder of said surplus or net profits shall become applicable to the payment of dividends on Common Stock Class "A"** then issued and outstanding, if, when and as declared by the Board of Directors of this corporation.

We are pleased to enclose your appropriate amount (\$4.55 per Common Share and \$0.06 per Preferred Share). The dividend was declared in 1993, leaving open the possibility of a 1994 dividend; however, inasmuch as the actual payment of the dividend did not occur until 1994, you should consider it 1994 income. You will receive a 1099 DIV Form from Insurance Investment about this time next year.

Should you have any questions regarding your dividend, stock or Insurance Investment, please do not hesitate to call Mr. E. Rod Ross, Corporate Secretary, or myself at 1-800-352-5150, 579-3400 locally.

Very truly yours,

R. Earl Ross
President