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NORTH CAROLINA CORPORATION LAW AND PRACTICE

Revised third edition by
Russell M. Robinson II†

Norcross, Georgia: The Harrison Company, 1982.
Pp. xxi, 606. \$69.95.

REVIEWED BY THOMAS LEE HAZEN‡

Although it borrows heavily from many provisions of its model counterpart,¹ the North Carolina Business Corporation Act² has several unique provisions.³ For over twenty years Russell Robinson's treatise on North Carolina corporation law has been a first rate guide through the statutory provisions and relevant case law.⁴ The third edition of this work continues the tradition.⁵

Although the practice of corporate law necessarily involves tax and securities law considerations, the author wisely has limited the scope of the book to corporate law issues and the basic problems of securities regulation that the general practitioner dealing with North Carolina corporations can be expected to encounter.⁶ Consistent with this focus, the author devotes an entire chapter to the "federal corporation law" that has developed as a result of the securities acts.⁷ The remainder of the book deals with state corporate law issues.

Robinson's treatment of the material is complete within the context of the book's avowed purpose. It provides the general practitioner with the information he or she needs to make basic corporate law related decisions. Other sources would, of course, have to be consulted for more detailed treatment of tax and securities related issues. The book deals with all of the necessities, including the decisions whether and where to incorporate as well as the formalities involved in the incorporation process.⁸ Once the decision to incorporate has been made, the question of which state to select as the situs of incorporation becomes a vital one for the corporate planner, since it has the

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1. See MODEL BUSINESS CORP. ACT OF 1978.

2. N.C. GEN. STAT. §§ 55-1 to 55-175 (1982).

3. See *infra* text accompanying notes 28-31.

4. For a thorough review of both the first edition and the North Carolina Act, see Folk, *Revisiting the North Carolina Corporation Law: The Robinson Treatise Reviewed and the Statute Reconsidered*, 43 N.C.L. REV. 768 (1965).

5. R. ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE (3d ed. 1982).

6. *Id.* at § 1-6.

7. *Id.*, Chapter 16.

8. *Id.*, Chapter 2.

effect of determining the applicable corporate law regardless of where the business is to be conducted. The book provides thorough coverage of North Carolina law and thus, as discussed below, the Robinson treatise is most helpful in leading the practitioner to a proper resolution of where to incorporate in light of the factual circumstances of a particular case.

Robinson, both in the body of the treatise itself and the appendix of forms that follows,⁹ provides the practitioner with the technical know-how to set up a North Carolina corporation and maintain the formalities necessary for its continued existence. There is extensive treatment of shareholders' rights and duties¹⁰ as well as excellent discussion of the obligations and potential liabilities of corporate management.¹¹ In addition to all relevant aspects of corporate finance,¹² the book includes a discussion of North Carolina's very complex system for legal corporate accounting.¹³ These sections are particularly helpful for the attorney lacking an accounting background, who is thrust into the world of par value, stated capital, capital surplus, and earned surplus by virtue of the statute's dividend and other accounting provisions. Robinson also examines the increasingly important issues relating to shareholder derivative litigation.¹⁴ He completes his treatment with consideration of fundamental corporate changes,¹⁵ corporate dissolution,¹⁶ and the qualification provisions and jurisdictional requirements that apply to corporations incorporated elsewhere but doing business within the state.¹⁷

Anyone familiar with North Carolina corporation law is aware of the most notable of the statute's unique provisions. The real value of a corporate law treatise is determined by its treatment of such knotty problems. The Robinson work passes this test with flying colors. For example, the enforceability of shareholder agreements in a close corporation can be a very sticky issue. Shareholders in North Carolina have the option of relying on the amorphous common law pooling agreement which may not be specifically enforceable,¹⁸ using the highly formalized statutory voting trust,¹⁹ or relying upon the North Carolina statute's validation of qualifying agreements.²⁰ The Robinson treatise does an excellent job of comparing the alternatives and pointing out

9. *Id.*, pt. VIII.

10. *Id.*, pt. II.

11. *Id.*, pt. III.

12. *Id.*, pt. IV.

13. *Id.*, ch. 20.

14. *Id.*, ch. 14.

15. *Id.*, pt. V.

16. *Id.*, pt. VI.

17. *Id.*, pt. VII.

18. For the leading case holding that pooling agreements, although valid, will not be specifically enforced, see *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, 29 Del. Ch. 610, 53 A.2d 441 (1947). See also *White v. Snell*, 35 Utah 434, 100 P. 927 (1909); *State ex rel. Everett Trust & Sav. Bank v. Pac. Waxed Paper Co.*, 22 Wash. 2d 844, 157 P.2d 707 (1945).

19. N.C. GEN. STAT. § 55-72 (1982).

20. N.C. GEN. STAT. § 55-73 (1982). As Robinson points out, "[a] shareholders' pooling agreement under G.S. § 5-73(a) serves essentially the same purpose as a voting trust in consolidating control under one authority, but it is less formal." R. ROBINSON, *supra* note 5, § 7-6.

the relative advantages and disadvantages of each.²¹ The treatise also compares provisions in the articles of incorporation or the corporate by-laws that can be used toward the same end in allocating or rearranging voting control.²²

Another area where North Carolina law diverges from the mainstream is its jealous protection of preferred shareholders' liquidation preferences and rights to accrued but undeclared dividends.²³ Once again, the Robinson treatise examines the difficult statutory provisions and provides the practitioner with a well-written, simplified analysis of the North Carolina approach.²⁴ The treatise also highlights other North Carolina provisions that differ from the mainstream, including the shareholders' statutory right to compel dividends,²⁵ the antideadlock provisions,²⁶ and the shareholders's right to dissent from most amendments to the corporate charter.²⁷

All of the foregoing aspects of North Carolina law give added protection to the shareholders of a corporation. Managers of corporations organized under the laws of North Carolina thus have less freedom than is likely to be the case with their counterparts in other states. Delaware, by contrast, is known for its more generous approach to management.²⁸ In making the decision of where to incorporate, it must be remembered that a corporation need not be organized under the laws of the state where it conducts most of its business. In fact, a corporation need have no other contact with its state of incorporation aside from its organization there. Differences among the vari-

21. R. ROBINSON, *supra* note 5, §§ 7-4 to -9.

22. Specifically, Robinson identifies:

1. High quorum and high-vote requirements for shareholders and for directors.
2. Voting and nonvoting shares.
3. Shares issued at disproportionate prices as a substitute for shares with fractional or multiple votes per share.
4. Classification of directors for election by different classes of shares.
5. Voting trusts and pooling agreements.
6. Shareholder agreements.
7. Deadlock provisions.
8. Stock transfer restrictions.

R. ROBINSON, *supra* note 5, § 7-2. See §§ 5-6, 5-7, 7-4 to -10, 29-10.

23. N.C. GEN. STAT. §§ 55-2(10), -40, -41 (1982).

24. R. ROBINSON, *supra* note 5, §§ 17-7 to -9, 23-3.

25. *Id.*, § 21-14 (discussing N.C. GEN. STAT. § 55-50(1)-(m) (1982). See also *id.*, §§ 21-15 to -17 (discussing equitable and contract rights to compel dividends, and procedural matters in exercising these rights).

26. *Id.*, §§ 29-8 to -16; (discussing provisions of N.C. GEN. STAT. §§ 55-39, -125 (1982)). In addition to the traditional provisions for involuntary corporate dissolution upon a deadlock of shareholders and/or directors, the North Carolina statute permits the appointment of a provisional director and also allows for shareholder agreements governing dissolution. See N.C. GEN. STAT. §§ 55-39, -125, -125.1 (1982).

27. R. ROBINSON, *supra* note 5, §§ 27-2; N.C. GEN. STAT. § 55-101(b) (1982). New York has had a similar provision for a long time, and more recently the Model Business Corporation Act was amended to give dissenting shareholders statutory appraisal rights with regard to amendments to the corporate charter. See N.Y. BUS. CORP. LAW § 806(b)(6) (McKinney 1963); MODEL BUSINESS CORP. ACT § 80(a)(4) (1978).

28. DEL. CODE ANN tit. 8 §§ 101-398 (1975 & Cum. Supp. 1982). See generally, Murdock, *Delaware: The Race to the Bottom—Is the End in Sight?*, 9 LOY. U. CHI. L.J. 643 (1978); Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969).

ous state corporate laws can thus be relevant regardless of where the business is to be carried on.

Robinson points out the specific protectionist provisions of the North Carolina statute:

1. statutory requirement that one-third of the corporate earnings be paid out in dividends upon demand by the holders of at least twenty percent of the shares . . . ;
2. mandatory cumulative voting;
3. extensive mandatory voting rights to nonvoting shares;
4. extensive class voting rights and rights of appraisal given to preferred shareholders upon any recapitalization designed to eliminate dividend arrearages or effect other prejudicial changes;
5. other unusual rights of appraisal . . . ;
6. strict nonfinancial limitations on a corporation's purchase of its own shares;
7. prohibition against shares redeemable at holder's option and against convertibility into a senior security;
8. strict limitations on increases and decreases in number of directors;
9. limitations on employee compensation by stock and options;
10. relatively tight watered stock liability, particularly for promoters;
11. nonresident directors subject to the jurisdiction of local courts;
12. no security-for-expenses provision in derivative actions.²⁹

The general wisdom is that, when in doubt, the lawyer or other corporate planner should select the corporation's home state as the state of incorporation.³⁰ As Robinson adeptly points out, however, the protective provisions of the North Carolina statute may make Delaware a more attractive state of incorporation for entities desiring a wide latitude in management discretion.³¹ Before taking this step, the practitioner should be certain that the advantages of a Delaware incorporation outweigh the inconvenience of dealing with out-of-state filings and other long distance dealings which could conceivably require retention of counsel authorized to practice law in Delaware. Furthermore, when a corporation doing business in North Carolina decides to incorporate in another state, it must nevertheless comply with the North Carolina statutory provisions relating to foreign corporations.³²

For many small to medium sized corporations the protectionist provisions of the North Carolina statute make incorporation here attractive. This may be equally true for corporations whose principal place of business is elsewhere. Even beyond the particular statutory provisions, another advantage of incorporation in North Carolina lies in predictability of result and the correlative

29. R. ROBINSON, *supra* note 5, § 2-3.

30. *See, e.g.*, W. CARY & M. EISENBERG, CORPORATIONS—CASES AND MATERIALS 23 (5th unabr. 1982); G. SEWARD & W. NAUSS, BASIC CORPORATE PRACTICE 27 (2d ed. 1977).

31. R. ROBINSON, *supra* note 5, § 2-3.

32. N.C. GEN. STAT. §§ 55-131 to -154 (1982).

certainty in planning. While many states rely heavily on judicial interpretation to fill in statutory gaps, the North Carolina Act "is one of the most comprehensive of all state statutes in its codification."³³ Robinson further points out that:

The over-all effect of this extensive codification is difficult to appraise. On the one hand, it is certain that the Act does make the practitioner's job easier by its well organized "blueprint" sections and does clarify many otherwise doubtful points of substantive law. On the other hand, though, the very novelty of some of these provisions may cause some uncertainty, although they all seem to have worked well in practice.³⁴

In addition, Robinson highlights the North Carolina Act's "very liberal 'enabling' spirit."³⁵ In other words, the Act gives corporate planners the ability to mold the organizational structure to best meet the needs of all concerned parties.

In terms of current corporate related issues, the Robinson work gives excellent coverage to the issue of shareholder derivative suits in general and specifically to the directors' power under the "business judgment rule" to terminate such litigation.³⁶ The book does not go into much depth in discussing the North Carolina takeover law,³⁷ probably a wise decision in light of the United States Supreme Court's recent ruling on the invalidity of similar state laws.³⁸

The organization of the treatise follows a very natural and logical progression from the formation of the corporate entity to its dissolution, with concluding chapters focusing on foreign corporations doing business in North Carolina. There are, however, two minor difficulties with the indexing system. Those not totally familiar with the law of corporations may find difficulty using the multiple references in the index, rather than citations to the most applicable sections.³⁹ This is probably a tradeoff for the advantage of having liberal cross-referencing throughout the body of the text. This type of cross-referencing is necessary to give the reader a full understanding of how a specific issue may relate to other aspects of corporate law. Another minor drawback is that some of the indexed terms refer the reader to another term in the index, rather than giving section numbers. These are relatively trivial inconveniences and should not be interpreted as detracting from the first-rate work that Mr. Robinson has produced.

In sum, the Robinson treatise provides the reader with a balanced view of

33. R. ROBINSON, *supra* note 5, § 2-3.

34. *Id.*

35. *Id.*

36. *Id.*, ch. 14.

37. *Id.*, § 7-11. The North Carolina Tender Offer Disclosure Act appears at N.C. GEN. STAT. §§ 78B-1 to -11 (1981).

38. *Edgar v. Mite Corp.*, 102 S. Ct. 2629 (1982).

39. The problem could be cured by listing the principal section number first, rather than indexing all entries in their numerical order.

North Carolina corporation law. The book is a very workable size. As was the case with the first two editions, it is a welcome companion for the practitioner dealing with North Carolina corporate law.

