

## BAR NEWS ITEM

Date: December 28, 1995  
To: Franklin County Bar Association and all parties at interest  
From: Sheriff Robert B. Wollyung  
Subject: Advanced Fees for all services

Beginning January 1, 1996 this Office is changing accounting procedures. It will be required that all requests for service be accompanied with an advanced payment for such services. In the past, an advance fee of \$100.00 was required for Personal Property executions and \$1,000.00 for Real estate Sales. It will now be required that all other requests for service be accompanied by an advanced fee of \$50.00. any funds remaining after payment of the costs involved will be refunded.

Thank you for your cooperation in this matter.

MARVIN D. HISSONG; JERE D. HISSONG; JERE D. HISSONG, JR.; SHAWN P. HISSONG; and SPENCER R. HISSONG, Petitioners vs. HISSONG FARMSTEAD, INC.; LARRY W. HISSONG; DENNIS R. HISSONG; GREGORY A. HISSONG; and ANDREW R. HISSONG, RESPONDENTS  
Franklin County branch, Civil Action - Law A.D. 1995 - 109

*Hissong v. Hissong Farmstead, Inc. et al.*

*Corporations - Involuntary dissolution - Counsel Fees - Multiple Defendants*

1. Involuntary dissolution differs from a shareholders' derivative suit in that the corporation receives no benefit from dissolution.
2. A corporation is a proper defendant, not a nominal one, in an action for involuntary dissolution, and must appear by representative.
3. Therefore a corporation in an involuntary dissolution may properly engage an attorney to defend its interests.
4. An attorney may represent more than one party where there is no conflict of interest

*Stephen E. Patterson, Esquire, Attorney for Plaintiffs*  
*J. McDowell Sharpe, Esquire, Attorney for Defendants*

## OPINION AND ORDER

John R. Walker, P.J., December 18, 1995:

### **Factual Background**

In paragraphs 90 and 104 of plaintiffs, amended application for involuntary dissolution and in paragraph 12(g) of their petition for appointment of a receiver pendente lite, the plaintiffs have alleged that Hissong Farmstead, Inc. (the "Corporation") is wrongfully paying the defendants' attorney fees in this action. The defendants have admitted such payment, but deny that it is wrongful or is a waste of the Corporation's assets. The plaintiffs have requested that the court bar the Corporation from paying the defendants' attorney fees in all proceedings in this action, and to require the individual defendants to reimburse the Corporation for all sums paid to date to the individual defendants, counsel.

### **Discussion**

The plaintiffs argue in this motion that Hissong Farmstead, Inc. should be precluded from paying the fees of the defense

counsel. The argument they advance is twofold; first, that current counsel is only representing the interests of the individual defendant majority shareholders, and second, that the corporation itself is a nominal defendant, and therefore need not be represented. The plaintiffs rest this line of argument on an analogy to shareholder derivative suits.

Leaving aside for the moment the question of whether the corporation need be separately represented in a shareholder derivative suit, the first question to be resolved is whether the analogy plaintiffs propose is apt. The distinction is traditionally drawn between "direct" suits and those called "derivative" actions because the remedies for the latter are given to the corporation, and the shareholder is not asserting a personal right. Derivative actions are most often asserted against officers or directors for losses or wrongs suffered by the corporation. Direct suits are brought by individual shareholders, seeking a remedy which comes to them personally.

In this case, the plaintiffs have brought a petition under 15 Pa.C.S. § 1981(a). This provision states:

(a) General rule. - Upon application filed by a shareholder or director of a business corporation, the court may entertain proceedings for the involuntary winding up and dissolution of the corporation when any one of the following is made to appear:

(1) The acts of the directors, or those in control of the corporation, are illegal, oppressive or fraudulent and that it is beneficial to the interests of the shareholders that the corporation be wound up and dissolved.

(2) The corporate assets are being misapplied or wasted and that it is beneficial to the interests of the shareholders that the corporation be wound up and dissolved.

(3) The directors are deadlocked in the direction of the management of the business and affairs of the corporation and the shareholders are unable to break the deadlock and that irreparable injury to the corporation is being suffered or is threatened by reason thereof. The

court shall not appoint a receiver or grant other similar relief under this paragraph if the shareholders by agreement or otherwise have provided for the appointment of a provisional director or other means for the resolution of a deadlock but the court shall enforce the remedy so provided if appropriate.

15 Pa.C.S. § 1981(a).

This is in contrast to derivative actions, which are governed by 15 Pa. C.S. § 1717, which limits officer and director liability to the corporation only, and allows shareholders, to bring an action in the right of corporation, and not directly. The present case, brought by shareholders to force dissolution of the corporation, is not brought to secure a recovery for the corporation, and therefore it is not a derivative action.

The remainder of the issues follow from this determination. In the only Pennsylvania case considering whether the denial of minority shareholders' reasonable expectations was a basis for dissolving the corporation (the major basis for current plaintiffs' action), the only defendant was the corporation. *Gee v. Blue Stone Heights Hunting Club, Inc.*, 145 Pa. Commw. 658, 604 A.2d 1141 (1992) As the corporation is a proper party to this suit, it can only appear by counsel. 9 Fletcher, *Cyclopedia of Corporations* § 4217. Representation is therefore necessary.

Counsel for defendants appeared on behalf of all the defendants. Certificate of Service of Petition. However, the answer to the amended petition represents him as counsel for the corporation, and plaintiffs have presented no evidence throwing doubt upon the assertion. What plaintiffs are in fact objecting to through the use of this motion is counsel's dual representation of the individual defendants and the corporation.

This is a conflict of interests question governed by the Rules of Professional Conduct. Defendants' counsel rightly points to Pa.R.P.C.1.13(e) as applicable. This rule states:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organizations' consent

to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

As the rule notes, its provisions are "subject to" the regular conflict-of-interest provisions, and the comment underscores this by showing that where the representation of the individual constituent is adverse to that of the corporation, Rule 1.7 governs.

The comment to Rule 1.7 states, "[r]esolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation." It goes on to say that opposing counsel may properly raise objection to dual representation where the conflict "clearly [calls] into question the fair or efficient administration of justice., Comment Pa.R.C.P. 1.7. The major contention in this litigation appears to be that current management has oppressed the majority shareholders.

The authority cited by plaintiffs are in large part directed toward counsel in derivative suits. As noted above, this type of analysis is inapplicable to the case at hand. Plaintiffs also cite *ARC Mfg. Co. Inc. v. Konrad*, 321 Pa.Super. 72, 467 A.2d 1133 (1983) This case is also inapplicable, as it deals with reimbursement of attorneys' fees by directors to the corporation after litigation has concluded. This also does not mirror the procedural posture of the current case.

The court notes that the Konrad decision on the attorneys, fees issue rested on the determination that some, but not all, of the litigation expenses were allowed where the Chancellor below found that the directors reasonably believed the activities were in the corporation's best interest. At this point we may assume without deciding that defending HiSsong Farmstead, Inc. against dissolution is an activity which the officers and directors in this case might reasonably believe is in the best interest of the corporation.

As plaintiff's counsel explicitly disavowed the need for the corporation to receive separate counsel, and brought to the court's attention no evidence from which it must conclude that current

management, or its individual members, need separate representation, the motion as presented must be denied.

### ORDER OF COURT

December 18, 1995, plaintiffs' motion to prevent HiSsong Farmstead, Inc. from paying defendants' attorney fees is denied.