RECEIVERSHIP PRACTICE IN THE DELAWARE COURTS

By Jack B. Jacobs *

This area is a fascinating one, and this talk can only scratch the surface of what this subject truly deserves. Obviously, in one half hour there is no way to cover this entire topic, and it would be foolish to try. I would like to spell out for you some central themes, concepts, and perspectives, and also to touch on, and perhaps humanize, some of the problems we encounter from time to time for which there are often no answers or at best unclear ones.

As litigators, it is important for you to know that receivership procedures under Delaware law are available as a remedy not only for extreme cases of corporate mismanagement but also as a remedy to protect the rights of creditors having claims against corporations which happen to be insolvent. As corporate planners, it is important for you to know that there are statutory receivership and trusteeship procedures available to effectuate sales and liquidations of corporate assets on an advantageous tax basis and in a manner which would avoid, or at least minimize, the risk of personal liability on the part of those persons responsible for the winding up of the corporation's affairs.

Let's start with the methods for winding up a Delaware corporation. "Winding up" means the distribution of the assets and resolution of the liabilities of the corporation and the conclusion of its affairs, as opposed to "dissolution" which is the formal termination of the existence of the corporation. By way of great oversimplification, there are two ways of winding up the affairs of such a corporation: with court supervision and without it. A winding up without court supervision normally consists of the voluntary dissolution of the corporation under section 275.[1] Following that, the officers and

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* Member, Delaware State and American Bar Associations. Partner, Young, Conaway, Stargatt & Taylor, Wilmington, Delaware. A.B., 1964, University of Chicago; LL.B., 1967, Harvard Law School.

1. Del. Code Ann. tit. 8, § 275 (1974):

Dissolution; procedure.

(a) If it should be deemed advisable in the judgment of the board of directors of any corporation that it should be dissolved, the board, after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, shall cause notice to be mailed to each

directors "wind up" the affairs of the corporation by marshalling its assets, resolving the amounts and priority of all liabilities, and reducing the assets to cash in order to pay the corporation's creditors and shareholders.

The second method, the court-supervised method of winding up, is conducted under the aegis of a statutory trustee or receiver who has been appointed by and who is continuously supervised by the Delaware Court of Chancery.

While I intend to talk about both methods of winding up, my focus will be upon the court-supervised method. This method is more frequently encountered by Delaware corporate practitioners since that approach is more typically used by the larger publicly held companies.

At common law, the rule was that if a corporation were dissolved, it no longer existed, and all of its property reverted to its shareholders. The corporation, from the moment of its dissolution, could no longer sue or be sued. The common law rule was ridiculous and unworkable. Corporate property, such as real estate, plants, or productive facilities, is inherently incapable of division and reversion to hundreds or thousands of scattered shareholders. Another problem with the common law rule was that since the corporation was disabled from suing or being sued, no remedy was available to creditors of the corporation. One does not have to be too imaginative to grasp the practical and legal absurdities which flowed from the common law approach.

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stockholder entitled to vote thereon of the adoption of the resolution and of a meeting of stockholders to take action upon the resolution.

(b) At the meeting a vote shall be taken for and against the proposed dissolution. If a majority of the outstanding stock of the corporation entitled to vote thereon shall vote for the proposed dissolution, a certificate stating that the dissolution has been authorized in accordance with the provisions of this section and setting forth the names and residences of the directors and officers shall be executed, acknowledged and filed, and shall become effective, in accordance with § 103 of this title. Upon such certificate becoming effective in accordance with § 103 of this title, the corporation shall be dissolved.

(c) Whenever all the stockholders entitled to vote on a dissolution shall consent in writing, either in person or by duly authorized attorney, to a dissolution, no meeting of directors or stockholders shall be necessary. The consent shall be filed and shall become effective in accordance with § 103 of this title. Upon such consent becoming effective in accordance with § 103 of this title, the corporation shall be dissolved. In the event that the consent is signed by an attorney, the original power of attorney or a photocopy thereof shall be attached to and filed with the consent. The consent filed with the Secretary of State shall have attached to it the affidavit of the secretary or some other officer of the corporation stating that the consent has been signed by or on behalf of all the stockholders entitled to vote on a dissolution; in addition there shall be attached to the consent a certification by the secretary or some other officer of the corporation setting forth the names and residences of the directors and officers of the corporation.

To avoid these results, Delaware enacted what is now section 278.[2] Other states have enacted similar statutes. Section 278 extends the life of the corporation for a three-year period so that the corporation is enabled to own property, to retain the ability to sue or be sued, and is also given sufficient time in which to convert its assets into a form which can be used to pay off creditors and shareholders. The Delaware statute also permits an extension of this period by an order of the court of chancery; however, the court must be requested to act before the period expires.

One question which has recently come up is whether a corporation, once dissolved, may have a derivative claim filed on its behalf. I have not found any recent case on that subject, but would think that a derivative claim could be filed where it is the officers and directors who are winding up the affairs of the company: section 278 authorizes a dissolved corporation to sue and, of course, a derivative claim is a claim on behalf of the corporation. However, once a trustee or a receiver is appointed to wind up the corporation's affairs, I do not believe that a derivative claim would lie. In that circumstance only the trustee is entitled to bring the claim against the corporation. If the trustee or receiver will not bring the claim, the remedy would be for the court of chancery to order the trustee to bring an action in the name of the dissolved corporation. Otherwise, I do not believe a derivative suit by a stockholder would be an available remedy where a trustee is in place.

The discussion has thus far focused upon the concept of dissolution. Let us proceed to the winding up stage, particularly where this is being done by corporate officers and directors, acting without court supervision. This approach is often used by small companies, those having no public shareholders. It is also used by larger companies

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2. DEL. CODE ANN. tit. 8, § 278 (1974):

Continuation of corporation after dissolution for purposes of suit and winding up affairs.

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer periods as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities, and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit, or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the corporation shall, for the purpose of such actions, suits or proceedings, be continued bodies corporate beyond the 3 year period and until any judgments, orders, or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

which pour their assets into liquidating trusts at the end of a one-year period following the dissolution.

There are definite problems occasioned by winding up a corporation without court supervision. The first involves the risk, from a liability standpoint, to the officers and directors who take upon themselves the obligation of winding up the affairs of the company. Risk is always inherent in "liquidating" decisions such as at what price to sell assets, whether or not to file a suit against a third party, whether or not to compromise claims, or whether to take any number of a variety of actions. All such decisions tend to come up in the course of a typical winding up and pose the risk of liability to shareholders who may be displeased with a particular decision made or action taken in the course of the winding up. It is possible, and it has been known to happen, for officers and directors to be sued by shareholders for negligence or on claims of breach of fiduciary duty, as a result of actions taken in the course of a winding up.[3]

Normally, the "business judgment rule" would be a defense in such an action unless the directors and officers doing the winding up have engaged in self-dealing or some other act which would constitute an exception to the business judgment rule. However, even though directors and officers may ultimately prevail in such a lawsuit, it is nonetheless unpleasant and expensive to be put to the defense of such an action.

The second potential problem with a non-court supervised winding up is the tax consequences. As you know, the sale of corporate assets normally results in a capital gains tax at the corporate level, followed by a second tax at the shareholder level. In sections 331 and 337 of the Internal Revenue Code,[4] the federal tax laws do provide a procedure whereby the tax at the corporate level can be avoided. In order to avail oneself of that tax benefit, however, it is necessary to complete the winding up within one year of the adoption of the plan of liquidation. This is often difficult to do.

Thus, it is evident that there are at least two very important objectives to be achieved in almost every liquidation and winding up. First is the need to avoid the risk of liability on the part of those persons responsible for carrying out the wind-up of the corporation's affairs. Second is the need to avoid the double taxation which would result from the reduction of the corporate assets to cash, at least where there is a capital gain.

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3. Hearney v. Riddle, 23 A.2d 456 (Pa. Super. 1942).

4. I.R.C. § 331; I.R.C. § 337.

These needs are met by the use of court-appointed and supervised receivers or trustees. It is in this area that a considerable amount of receivership law and even more receivership practice has been generated. First, court-supervised wind-ups avoid the liability risks previously described, because every act by a court-appointed receiver or trustee (assuming he is doing his job properly) is done pursuant to an order of the court. So long as there is full disclosure to the court of all revelant facts, the order authorizing any given act by the trustee or receiver operates as a defense to any claim that the trustee or receiver acted improperly as a fiduciary.

Second, in the taxation area, a statutory trusteeship or receivership is regarded as a separate entity under the federal tax laws. Consequently, if before the expiration of the twelve-month period contemplated by section 337 of the Internal Revenue Code, an application is made to the court of chancery for the appointment of a trustee in dissolution under section 279,[5] the appointment of the trustee operates as a transfer of all of the corporation's assets to the trusteeship. Expressing it in tax language, the appointment of a statutory trustee would constitute the completion of the liquidation of all the assets of the corporate entity, even though, in fact, the assets might not yet have been sold. It is in this fashion that the statutory trusteeship procedure available under Delaware law is used to avoid tax at the corporate level for asset sales in satisfaction of the requirements of section 337 of the Internal Revenue Code.

There are basically three types of court-appointed trustees and receivers. First, there is the receivership or trusteeship which comes into being when a Delaware corporation is dissolved. I am referring to section 279,[6] which provides that where a corporation is dissolved,

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5. DEL. CODE ANN. tit. 8, § 279 (1974):

Trustees or receivers for dissolved corporations; appointment; powers.

When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor or stockholder of the corporation, or on application of any one, who, in the Court's discretion, shows good cause therefor, at any time, may either appoint 1 or more of the directors of the corporation to be trustees, or appoint 1 or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

6. *Id.*

a trustee or receiver may be appointed by the Delaware Court of Chancery. A section 279 receivership or trusteeship is the vehicle most commonly used to perfect a tax-free liquidation under section 337 of the Internal Revenue Code. The second type of receivership exists by virtue of a corporation's insolvency. Section 291 [7] provides that where a corporation is insolvent, a receiver may be appointed by the court of chancery. Both of these procedures are statutory. The third procedure is a non-statutory receivership which is allowed in the rare case where a creditor or a stockholder is able to show gross mismanagement or misconduct on the part of corporate officers and directors. To warrant receivership relief, the misconduct must pose such a threat to the assets of the corporation that a receivership is the only way the situation can be remedied. That type of receivership exists under the inherent power of the court; it is not authorized by any particular statute.[8]

Whereas the statutory receiverships are conducted by and created under the aegis of the Delaware Court of Chancery, the "inherent" power (or non-statutory) receivership can be created either by the court of chancery or in the United States district court, which is also a court of equity. Since this third type of receivership is really a remedy for corporate fiduciary misconduct rather than a tool for corporate and tax planning, and because the "inherent" power receivership does not come up very often, I do not plan to discuss it at length.

Several problems which often arise in connection with the appointment of statutory receivers and trustees are appropriate for discussion at this point. Section 279 [9] applies in those cases where the corporation is dissolved. Section 291 [10] applies in those cases where the corporation is insolvent. The question is what procedure should be used when the corporation is both dissolved and insolvent? I do not know the answer, but it may not matter in actual practice because

7. DEL. CODE ANN. tit. 8, § 291 (1974):

Receivers for insolvent corporations; appointment and powers.

Whenever a corporation shall be insolvent, the Court of Chancery, on the application of any creditor or stockholder thereof, may, at any time, appoint 1 or more persons to be receivers of and for the corporation, to take charge of its assets, estate, effects, business and affairs, and to collect the outstanding debts, claims, and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by the corporation and which may be necessary or proper. The powers of the receivers shall be such and shall continue so long as the Court shall deem necessary.

8. *See* Hall v. John S. Issacs & Sons Farms, Inc., 163 A.2d 288, 293 (Del. 1960); Drob v. National Memorial Park, 41 A.2d 589 (Del. Ch. 1945).

9. *See* note 5 *supra*.

10. *See* note 7 *supra*.

under these two sections court-appointed fiduciaries have the same powers. Section 291 may be preferable in such a circumstance, however, because under section 291 the only showing that need be made is the fact of insolvency; whereas, under section 279, a showing must be made not only that the corporation is dissolved but also that there is "good cause."

What if the dissolved corporation is insolvent but a receiver is asked for and/or appointed to remedy mismanagement pursuant to the inherent power of the court? In other words, consider a circumstance where a receiver would be justified both by reason of insolvency and under the inherent power of the court. That has come up in only one situation that I am familiar with, and I happened to be the one appointed as trustee.[11] In that case, the ground for the appointment was corporate mismanagement so severe that the assets would be dissipated unless a receiver were appointed immediately. In the actual order of appointment, however, the receivership was designated as a trusteeship in dissolution under section 279 in order to preserve whatever tax advantages existed under the corporate plan of liquidation. I do not know whether that was the right or the wrong procedure, but it is now precedent.

A third problem arises where the corporation is not dissolved and it is not insolvent, but it cannot function because there is a hopeless deadlock within its board of directors. Can a receiver be appointed to wind-up the corporation and its affairs under those circumstances? The answer is unclear, but appears to be no. We do have a provision which deals with deadlock, section 226.[12] Section 226

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11. Reilly v. Market Publications, Inc., No. 4963 (Del. Ch. Feb. 6, 1976).

12. DEL. CODE ANN. tit. 8, § 226 (1974):

Appointment of custodian or receiver of corporation on deadlock or for other cause.

(a) The Court of Chancery, upon application of any stockholder, may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of and for any corporation when:

(1) At any meeting held for the election of directors the stockholders are so divided that they have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors; or

(2) The business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division; or

(3) The corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets.

(b) A custodian appointed under this section shall have all the powers and title of a receiver appointed under § 291 of this title, but the authority of the custodian is to continue the business of the corporation and not to

provides that a receiver can be appointed to wind-up when the corporation is insolvent.[13] The court of chancery can appoint a custodian for a solvent corporation, but section 226 provides that the only thing the custodian can do is to continue to run the business. If the corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate, or distribute those assets, a custodian can then be appointed to liquidate.

However, section 226 has a catchall phrase—"unless the Court shall otherwise order." The meaning of that language is unknown. It appears to be a loophole by which the court, under circumstances not delineated in the statute or in any cases of which I am aware, may be permitted to appoint a custodian to liquidate the affairs of the corporation. That language, to my knowledge, has not been construed to permit a receiver to wind up the corporation because of deadlock.

A fourth problem involves a calculation of whether the utilization of section 291 or the federal bankruptcy procedure would be more advantageous to the corporate creditor. Section 291 [14] permits the court of chancery to appoint a receiver for a corporation that is insolvent, yet the Federal Bankruptcy Code, as you know, also permits an insolvent corporation to be wound up through federal bankruptcy procedures.[15] There is no categorical answer to that question, but a comparison of the bankruptcy procedure and the Delaware procedure might provide some insights to a creditor who is considering and weighing either course of action.

Three areas are significant in making that comparison. First, a Delaware receivership, in contrast to a federal bankruptcy, is less complicated to initiate. Under section 291,[16] a Delaware trusteeship can be initiated by any creditor, whereas under the Bankruptcy Code it takes three or more entities, each having non-contingent claims aggregating at least $5,000, to accomplish an involuntary bankruptcy.[17]

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liquidate its affairs and distribute its assets, except when the Court shall otherwise order and except in cases arising under subparagraph (a)(3) of this section or § 352(a)(2) of this title.

13. Under some circumstances, courts of equity will appoint liquidating receivers for solvent corporations but the power to do so is always exercised with great restraint and upon a showing of gross mismanagement, positive misconduct by corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which otherwise cannot be prevented. Hall v. John S. Issacs & Sons Farms, Inc., 163 A.2d 288, 293 (Del. 1960).

14. *See* note 7 *supra*.

15. 11 U.S.C. §§ 701-728 (1978).

16. *Id.*

17. 11 U.S.C. § 303(b)(1) (1978). There is an exception to this rule in 11 U.S.C. § 303(b)(2) (1978). In certain cases, there can be a one-creditor petition if there are less than 12 creditors of the corporation, but that exception would involve, in most cases, a small corporation. *Id.*

Second, in a Delaware receivership, unlike bankruptcy, there are no avoidable preferences. Absent a transfer in a fraud on creditors, preferences are immune from attack. In federal bankruptcy, a trustee has express statutory power to avoid preferential payments made by the debtor within ninety days of the bankruptcy or one year in the case of a payment made to an insider.[18] There may be times when this factor may be material to a creditor in deciding which procedure to initiate.

One such case comes to mind.[19] A brokerage firm which had been undergoing liquidation conducted by the New York Stock Exchange was put into a Delaware receivership. The reason for this choice was that the Stock Exchange liquidator had invested considerable funds of the Stock Exchange into the insolvent brokerage firm for the purpose of paying off customers. It had then removed several hundred thousand dollars, in effect paying itself back. The removal of those funds might have constituted an avoidable preference in a bankruptcy. To avoid the position where a bankruptcy trustee would seek to recover those monies, the New York Stock Exchange put the brokerage firm under the aegis of a Delaware receivership, pursuant to section 291.

Third, the Delaware statutory receivership procedure is more flexible than its bankruptcy counterpart. The Court of Chancery Rules are very flexible and can be and are varied, in almost every case, by the court in order to meet the requirements of a particular situation. In contrast, the duties and procedures which govern the conduct of a bankruptcy trustee[20] are fixed by statute alone and are not so adaptable to a particular case.

I do not mean by what I have said to suggest that all of the advantages weigh in favor of the Delaware procedure. They do not. Certainly there are advantages in using a bankruptcy procedure rather than a section 291 procedure. For example, the bankruptcy court has the statutory power to enjoin all proceedings against the debtor company nationwide,[21] whereas a Delaware receivership court has no such power. Moreover, in a bankruptcy context there is nationwide service of process in a adversary proceeding which is available to confere jurisdiction over the key officers and directors of the bankrupt corporation.[22] No comparable process is available in a Delaware

18. 11 U.S.C. § 547 (1978).
19. Lasker v. McDonnell & Co., No. 3560 (Del. Ch. Mar. 31, 1971).
20. 11 U.S.C. § 704 (1978).
21. 11 U.S.C. § 362 (1978).
22. BANKRUPTCY CT. R. 704(f) (1976).

receivership proceeding. Even though there is a Delaware rule, Chancery Court Rule 160,[23] which requires officers and directors to submit to examination by the receiver for purposes of testifying about the affairs of the corporation, that rule contains no mechanism to force directors and officers to come to Delaware for the purpose of complying. Rule 160 can be enforced only by having a subpoena issued by a court of the state where the directors are located, pursuant to a commission. That procedure is inconvenient and, to some extent, uncertain.

Let us move away from theory and talk a bit about what actually happens in the life of a receiver or trustee once he or she is appointed. That may be the best way to get a flavor of what goes on in this area of practice.

By way of preface, let me say that although we do have a statute and rules dealing with this subject, it often takes a jigsaw puzzle-like fitting together of the statute, the rules, and the case law to figure out what should be done in a particular case. There are gaps in the statute and in the rules. Many of those gaps are filled by the common sense and the experience of a number of Delaware lawyers who have practiced in this area for many years.

What does happen once a receiver or trustee gets appointed? The first thing that a competent receiver or trustee would do is to survey the landscape and to learn about the corporation, its business, its problems, and its finances as quickly as possible. In some cases, if the corporation has been well run it doesn't have any serious problems. Its operations and all of the corporate records are in order. The procedures for winding up the corporation are relatively routine. There are situations, however, where the state of the corporation's books, records, and finances is one of unmitigated disaster. I have been involved in both situations, as have other people in this room.

The second thing a receiver does, almost simultaneously with the first, is to get control over the money, over the incoming and outgoing cash flow. In this area, a very important and fundamental concept

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23. DEL. CH. CT. R. 160:

REQUIRING CORPORATE OFFICER OR AGENT TO MAKE DISCLOSURE

Upon the application of the receiver or any creditor or stockholder of the corporation, the Court may require any officer, employee or agent of the corporation to appear before the receiver, or before a Master appointed by the Court, at a designated time and place, and answer such questions respecting the assets, liabilities, dealings and transactions of the company as are, or seem likely to be important in the discovery, recovery and collection of the assets of the company and the administration of the receivership. Whenever necessary, a Master will be appointed to conduct the examination and make report of any matter deemed by him important in the administration of the receivership.

is that the receiver is the corporation: the receiver legally has title to the property of the corporation subject to all the liens and encumbrances against the property. On that basis a receiver or trustee is entitled to all the cash flow that would normally be incoming to the company. In order to carry out his fiduciary duty to protect the assets, it is imperative that the receiver get control over the cash immediately.

In one case where I personally was appointed as a trustee,[24] I recall that after the order to appointment was signed, the next day or so we arrived at corporate headquarters with certified copies of the order of appointment, and went to all the banks to direct them to close out all accounts and to issue cashier's checks to us so that the money could be transferred to Delaware where the receiver would have control over it. We also notified accounts receivable that all payments were thereafter to be made to the receiver at the receivership office.

That is what is normally done on the "cash-incoming" end. On the "cash-outgoing" end, it is important to keep in mind that the receiver or trustee has no obligation to pay creditors whose claims have not been filed and duly allowed pursuant to a formal claims procedure approved by the court. The only items for which money has to be outlaid on a current basis are expenses of administration, that is, those services and materials necessary to the continued operation of the receivership.

Normally, to provide for those expenses the receiver goes into court shortly after the appointment and asks for and obtains orders authorizing the appointment of a series of professionals who must be in place in order for the receivership to properly function. Thus, almost immediately after a receiver or trustee is appointed, orders are typically obtained engaging counsel, both local and out-of-town counsel, in order to defend against whatever lawsuits are ongoing.

Moreover, it is commonplace, indeed almost an article of faith, that an accountant will be employed immediately to do what is necessary to put the books and records in order, to prepare tax returns, and to comply with the requirements of taxing authorities. It is also now becoming commonplace for consultants to be hired, and in many cases those consultants may be persons who formerly were employees of the corporation, who are familiar with the way the company operated, and who have information that is indispensable for the carrying out of the receivership. In one case in which I was trustee, we were permitted to hire as a consultant the former comptroller of the company,[25] who happened to be the only person who understood what the

24. Reilly v. Market Publications, Inc., No. 4963 (Del. Ch. Feb. 6, 1976).
25. *Id.*

books and records meant. It would have been impossible to interpret the records, to create reliable balance sheets and income statements, and to figure out what had happened in this corporation unless that person were "on board." Finally, a collection agency is also becoming a commonplace type of professional service which is hired in order to make sure that accounts receivable are properly collected.

After the professionals are in place, the next thing to be done is to set up a claims procedure. As I previously indicated, it is not necessary to pay out claims to creditors immediately, because claims must be processed through a claims procedure approved by the court. But the matter of creditors' claims cannot be delayed for very long. A procedure for giving notice to all creditors of the requirement for filing a proof of claim form on or before a specified date must be established and approved by the court.

The key concept in this area is that of "bar date." [26] Normally a proof of claim form is sent to every known creditor (and in many cases stockholders) advising them that they must file a proof of claim form setting forth their position as to what the corporation owes them (at least in the case of a creditor), requesting that they attach whatever proof they deem desirable, and also advising them that the proof of claim must be filed by a date certain or it will be forever barred. Not only are known creditors notified of this obligation by a letter or by a specific notice, but notice by publication is also given in one or more newspapers.

If claims are filed prior to the deadline, they are reviewed and passed upon, and they are preliminarily allowed or disallowed by the receiver. If the claims are disallowed, the receiver or trustee notifies the creditor of the basis for the disallowance and invites the creditor to come in and prove the claim if he chooses to do so.

There is no procedure fixed either by statute or by rule as to how a disallowance is overcome and it can be accomplished in any number of ways: in some cases it may be done by submitting evidentiary documents and legal briefs; in other cases it is done by presenting

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26. DEL. CODE ANN. tit. 8, § 295 (1974):

Creditors' proofs of claims; when barred; notice.

All creditors shall make proof under oath of their respective claims against the corporation, and cause the same to be filed in the office of the Register in Chancery of the county in which the proceeding is pending within the time fixed by and in accordance with the procedure established by the Rules of the Court of Chancery. All creditors and claimants failing to do so, within the time limited by this section, or the time prescribed by the order of the Court, may, by direction of the Court, be barred from participating in the distribution of the assets of the corporation. The Court may also prescribe what notice, by publication or otherwise, shall be given to the creditors of the time fixed for the filing and making proof of claims.

live testimony of the creditor or other witnesses before the receiver. As a result of this procedure, claims that have been tentatively disallowed are either finally allowed or finally disallowed, as the case may be. A creditor is given the statutory right of appeal to the court of chancery from any adverse determination by the receiver.[27]

My time is almost up, so let me conclude with just one thought. In a thirty minute presentation, there is simply no way to cover adequately this fertile, highly interesting, and important area. At best, what is possible is to convey a flavor of what receivership practice is about. However, I do think it important for you to be aware that the winding up procedures available under Delaware law are highly useful tools in assisting corporations which are in the process of terminating their affairs. For many years these procedures have met the need of the corporate bar for a workable, flexible, and adaptable approach to concluding the affairs of Delaware corporations.

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27. DEL. CODE ANN. tit. 8, § 296(b) (1974):

Adjudication of claims; appeal.

(a) The Register in Chancery, immediately upon the expiration of the time fixed for the filing of claims, in compliance with the provisions of § 295 of this title, shall notify the trustee or receiver of the filing of the claims, and the trustee or receiver, within 30 days after receiving the notice, shall inspect the claims, and if the trustee or receiver or any creditor shall not be satisfied with the validity or correctness of the same, or any of them, the trustee or receiver shall forthwith notify the creditors whose claims are disputed of his decision. The trustee or receiver shall require all creditors whose claims are disputed to submit themselves to such examination in relation to their claims as the trustee or receiver shall direct, and the creditors shall produce such books and papers relating to their claims as shall be required. The trustee or receiver shall have power to examine, under oath or affirmation, all witnesss produced before him touching the claims, and shall pass upon and allow or disallow the claims, or any part thereof, and notify the claimants of his determination.

(b) Every creditor or claimant who shall have received notice from the receiver or trustee that his claim has been disallowed in whole or in part may appeal to the Court of Chancery within 30 days thereafter. The Court, after hearing, shall determine the rights of the parties.