Comment

EXTENDING PROTECTION TO FORESEEABLE FUTURE CLAIMANTS THROUGH DELAWARE'S INNOVATIVE CORPORATE DISSOLUTION SCHEME— *IN RE REGO CO.*

I. INTRODUCTION

The policies underlying products liability are often at odds with corporate law, particularly when an individual has suffered an injury from a defective product but the manufacturer of the product has dissolved.[1] One of the fundamental principles of products liability is to place responsibility on the manufacturer and those in the distribution chain for injuries resulting from defective products.[2] Corporate dissolution can frustrate this responsibility by depriving an individual with a late-maturing products liability claim of a party to sue.[3]

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1. *See generally* Michael D. Green, *Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants*, 72 CORNELL L. REV. 17 (1986) (proposing adoption of legislation that would require corporations to allocate funds for future product liability claims before dissolution); David B. Hunt, Note, *Towards a Legislative Solution to the Successor Products Liability Dilemma*—Nicuum v. Hydra Tool Corp., 16 WM. MITCHELL L. REV. 581 (1990) (advocating modification of Minnesota's Business Corporations Act to provide products liability plaintiffs with a source of recovery without overly burdening corporate asset transfers); Theresa A. Nuhn, Note, *Continuing Corporate Existence for Post-Dissolution Claims: The Defective Products Dilemma*, 13 PAC. L.J. 1227 (1982) (examining the problems encountered in pursuing a products liability claim when the original manufacturer has dissolved); Mark R. Sarlitto, Note, *Recognizing Products Liability Claims at Dissolution: The Compatibility of Corporate and Tort Law Principles*, 87 COLUM. L. REV. 1048 (1987) (suggesting refinement to current dissolution law as a way to bring corporate law into harmony with the policies of products liability law).

2. Strict liability, a theory of recovery in products liability suits, was first adopted by the California Supreme Court in Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962). The liability was judicially created because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations of negligence and warranty remedies. *Id.* The court's avowed purpose was "to insure that the costs of injuries resulting from defective products [were] borne by the manufacturers that put such products on the market rather than by the injured persons who [were] powerless to protect themselves." *Id.* at 901.

3. *See* James P. Connolly, Note, *The Post-Dissolution Products Liability Claim Problem: A Statutory Versus a Judicial Solution*, 38 SYRACUSE L. REV. 1279 (1987) (stating that products liability law governs the right of a plaintiff to seek recovery, while corporate law governs the plaintiff's ability to assert a post- dissolution claim).

The novel statutory provisions of title 8, sections 280 and 281 of the Delaware Code,[4] formulated to address this dilemma, were recently applied for the first time in *In re RegO Co.*[5] RegO, a Delaware corporation faced with overwhelming actual and potential judgments in products liability suits, filed a certificate of dissolution with the Delaware Secretary of State on February 3, 1989.[6] Electing to wind up its corporate affairs under sections 280 and 281(a), the company petitioned the court of chancery pursuant to section 280(c)(1) on February 28, 1991, for judicial approval of the security provisions set forth in its plan of dissolution.[7]

The court found that RegO's total assets were inadequate because they were not reasonably likely to provide compensation for all of its foreseeable future claims.[8] The court held, however, that this fact did not preclude approval of a plan under section 280(c)(1), provided that the security arrangement consisted of all the dissolving corporation's assets and was fair to all present and future claimants.[9] The court found, however, that the terms of RegO's proposed security arrangement gave preference to present claimants over future claimants.[10] The court concluded this preference was not justified, based on the legislative intent reflected in section 281, which recognized foreseeable, unknown future claimants' right to compensation.[11] Therefore, the court refused to approve a security arrangement which it characterized as discriminating "among claimants of the same class based upon 'the relative times at which any claims mature or are reduced to judgment.'"[12]

This comment begins with an overview of the judicial and legislative responses to the legal dilemma that arises when a corporation dissolves and leaves in its wake unknown products liability claimants. Delaware's innovative statutory scheme for voluntary dissolution, codified at sections 280 through 282 of the General Corporation Law will be briefly outlined. The application of these provisions in the court's decision will be examined, as will the

4. DEL. CODE ANN. tit. 8, §§ 280, 281 (1991).
5. 623 A.2d 92 (Del. Ch. 1992).
6. *Id.* at 94.
7. *Id.*
8. *Id.* at 105.
9. *In re RegO*, 623 A.2d at 105.
10. *Id.* at 107-08.
11. *Id.* at 107.
12. *Id.* (quoting DEL. CODE ANN. tit. 8, § 281(e) (1991)).

implications of the alternative statutory mechanism for dissolution in light of the goals of products liability law and corporate dissolution law. Finally, there will be a brief discussion of the implications of the court's decision on future Delaware corporations' dissolution plans.

II. BACKGROUND

A. *The Legal Dilemma Created by Corporate Dissolution*

At common law, dissolution ended a corporation's existence[13] and was often viewed as analogous to civil death.[14] All pending actions by and against the corporation were extinguished, and its capacity thereafter to sue and be sued was terminated.[15] At least in part, the property of the dissolved corporation may have escheated to the Crown, thus posing a serious threat to creditors with legitimate claims.[16]

Courts of equity promulgated the trust fund doctrine to soften the harsh effects of the common law rule of corporate dissolution,

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13. Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257 (1927); Johnson v. Helicopter & Airplane Serv. Corp., 404 F. Supp. 726, 730 (D. Md. 1975); *In re* Citadel Indus., Inc., 423 A.2d 500, 503 (Del. Ch. 1980).

14. In *Oklahoma Natural Gas Co.*, the Supreme Court compared the dissolution of a corporation with the death of a person. The Court noted:

> It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. . . . It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant.

Oklahoma Natural Gas Co., 273 U.S. at 259.

15. Canadian Ace Brewing Co. v. Anheuser-Busch, Inc., 448 F. Supp. 769, 771 (N.D. Ill. 1978) (noting that the dissolved corporation could "neither sue nor be sued and even pending proceedings abated"); Stone v. Gibson Refrigerator Sales Corp., 366 F. Supp. 733, 734 (E.D. Pa. 1973) (holding that absent a statutory provision to the contrary, dissolution puts an end to corporate existence for all purposes); *Citadel Indus.*, 423 A.2d at 503 (noting that "dissolution of a corporation . . . abat[es] all pending actions by and against it"); Blankenship v. Demmler Mfg. Co., 411 N.E.2d 1153, 1156 (Ill. App. Ct. 1980) (holding that the right to sue a dissolved corporation is limited to a time period established by statute).

16. *See* Harry G. Henn & John R. Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865, 879-80 (1971) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *484 (1965); George I. Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321, 324 (1976).

chiefly for the benefit of creditors.[17] Under this doctrine, the assets of a dissolved corporation are considered to be held "in trust" for the payment of corporate debts;[18] the property which is distributed to the shareholders is held by them subject to the claims of the corporation's creditors.[19] The trust fund doctrine maintained the concept that a corporation was extinguished upon dissolution, but provided creditors with a remedy for recovery against the dissolved corporation's shareholders.[20] Courts have allowed creditors to recover under this doctrine for claims pending against the corporation prior to dissolution, as well as for claims asserted subsequent to dissolution.[21]

Although the trust fund doctrine provided remedies which would have otherwise terminated upon dissolution, state legislatures also began to enact continuance or abatement statutes[22] to further ame-

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17. Pacific Scene, Inc. v. Penasquitos, Inc., 758 P.2d 1182, 1183 (Cal. 1988). In Pierce v. United States, 255 U.S. 398 (1921), the Supreme Court stated that a "corporation cannot disable itself from responding [to judgments] by distributing its property among its stockholders, and leaving remediless those having valid claims." *Id.* at 402.

18. *See* Nuhn, *supra* note 1, at 1233.

19. *Id.*

20. The trust fund doctrine is best explained in *Koch v. United States*:

> Where the assets of a dissolved corporation have been distributed among the stockholders, a creditor of the dissolved corporation may follow such assets as in the nature of a trust fund into the hands of stockholders. The creditors have the right to subject such assets to their debts and for that purpose the stockholders hold them as though they were trustees. In other words, the assets of the dissolved corporation are a trust fund against which the corporate creditors have a claim superior to that of the stockholders. A stockholder who receives only a portion of the assets is liable to respond only for that portion. Where the assets coming into the hands of a stockholder suffer a change in value, the creditor must take the trust fund as he finds it, securing the advantage of any increase and suffering any decrease, unless the stockholder is responsible for the decrease. Where the trust property has been used by the stockholder for his own purpose, or disposed of by him, he may be held personally liable for the full value thereof.

Koch v. United States, 138 F.2d 850, 852 (10th Cir. 1943) (footnote omitted). *See also Pierce*, 255 U.S. at 403 (noting that the trust fund doctrine applies not only to commercial creditors but also to anyone who holds unsatisfied claims).

21. Wallach, *supra* note 16, at 328-29.

22. *See id.* at 329. Wallach notes that there is an interrelationship between the postponed abatement statutes which keep a corporation alive as a jural entity and the trust fund doctrine. Generally, the two serve the same function. He explores the issue of whether the enactment of abatement statutes bars the use of the trust fund doctrine. Initially, Wallach suggests that there is no reason why the two cannot

liorate the common law effects of dissolution.[23] Under Delaware's modern statutory provisions, corporate existence does not cease upon dissolution,[24] but rather, continues for the limited purpose of winding up corporate affairs.[25] During this period, a corporation must discharge its liabilities prior to distributing remaining assets to its shareholders.[26] Usually, a corporation is required to give notice of dissolution, and all persons with claims against the company must present them during this abatement period.[27] Although the time period for corporate continuance varies among jurisdictions, the typical abatement statute provides for a period of two or three years.[28]

The abatement statutes provide a specific statutory period for filing claims against a dissolved corporation.[29] Claims that are in-

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co-exist, giving a claimant alternative remedies. Legislative intent would provide the best indication of whether the two should co-exist, however, the intent of the draftsmen is often unclear. From a public policy standpoint, Wallach asserts that the two remedies should co-exist in order to protect products liability claimants, thus increasing the claimants' opportunities for recovery. *Id.* at 329-33.

23. *Id.* at 324.

24. *See, e.g.*, REVISED MODEL BUSINESS CORP. ACT § 14.05 (1984).

25. Section 278 of Delaware's General Corporation Law reads in relevant part:

> All corporations . . . shall . . . be continued, for the term of 3 years from . . . dissolution or for such longer period as the Court of Chancery shall in its discretion direct . . . for the purpose of prosecuting and defending suits . . . by or against them. . . . 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 . . . dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body 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.

DEL. CODE ANN. tit. 8, § 278 (1991).

26. *See id.*

27. *See id.* § 280. The statute provides that after dissolution, "the corporation . . . may give notice of the dissolution, requesting all persons having a claim against the corporation to present [them] . . . ." *Id.* If the corporation does not choose this method of notification, it must comply with the provisions of § 281(b) which requires the corporation to make provisions for the payment of both present and foreseeable future claims. *Id.* § 281(b).

28. *See, e.g.*, DEL. CODE ANN. tit. 8, § 278 (1991) (three years). Illinois, however, has chosen a longer period of five years as is provided for in the Revised Model Business Corporations Act. ILL. ANN. STAT. ch. 805, para. 5/12.80 (Smith-Hurd 1993); REVISED MODEL BUSINESS CORP. ACT § 14.07(c) (1984).

29. Nuhn, *supra* note 1, at 1234. The nature of this statutory period is unlike the statute of limitations period for a cause of action. These statutes seek to preserve claims that would have otherwise abated at common law; they do not take into account at what time a cause of action accrues. *Id.*

stituted prior to dissolution do not abate, and those arising either prior to or subsequent to corporate dissolution, but which are commenced during the abatement period, also remain actionable.[30] Conversely, claims brought against the corporation following the abatement period are generally barred.[31]

The statutory provisions governing dissolution provide substantial protection to present corporate creditors, but they can be troublesome to products liability claimants, particularly those with late-maturing claims.[32] Since a products liability claim is often contingent upon a showing that an individual sustained an injury from a defective product, many products liability claimants have no claim against the corporation at the time of dissolution. When the cause of action does accrue, the claimants may then find the dissolved corporation immune from suit.

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30. *See, e.g.*, DEL. CODE ANN. tit. 8, § 278 (1991).

31. Canadian Ace Brewing Co. v. Anheuser-Busch, Inc., 448 F. Supp. 769, 771 (N.D. Ill. 1978) ("[Generally, e]ven when a statute continues the existence of a corporation for a certain period [after dissolution,] the corporation becomes defunct upon expiration of such period, and, in the absence of a provision to the contrary, no action can afterwards be brought by or against it . . . ."); *In re* Citadel Indus., Inc., 423 A.2d 500, 507 (Del. Ch. 1980) ("[The c]ourt [has] no power to 'continue' a corporation for winding up purposes on an application made after the statutory three-year period has expired and thus after the corporation has ceased to exist as a legal entity."); Blankenship v. Demmler Mfg. Co., 411 N.E.2d 1153, 1156 (Ill. App. Ct. 1980) (citation omitted) ("A corporation can exist only under the express laws of the state by which it was created. . . . Accordingly, the right to sue a dissolved corporation is limited to the time established by the legislature.") (citations omitted). *Cf.* Chadwick v. Air Reduction Co., 239 F. Supp. 247 (N.D. Ohio 1965) (allowing a dissolved corporation to be sued on a claim arising after dissolution pursuant to the Ohio statute providing recovery for claims which would have accrued against it but for dissolution).

32. Green, *supra* note 1, at 19-20. Green describes these products liability claimants as "long-tail creditors of the predecessor." *Id.* at 20. He suggests that traditional corporate law may not afford these claimants with the same protection "because their claims accrue after the predecessor's demise and . . . because of their relatively recent arrival on the legal landscape . . . ." *Id.*

Another commentator has noted:

> Insurance industry statistics . . . suggest that only thirty percent of expected general liability claims (which include products liability) are reported three years after the initial policy year and only sixty percent are reported after the eighth year. Not until thirteen years after the initial policy year are seventy- five percent of the losses known to the insurer. The balance of these losses develop over the next two decades. These statistics suggest that a substantial proportion of products liability claimants are precluded from recovery by a five-year abatement period.

Sarlitto, *supra* note 1, at 1052 (footnotes omitted).

Courts are generally sympathetic to an injured tort victim's situation, and have not left these victims completely without remedy. Legal doctrines have emerged which allow these claimants to recover from successor corporations, as well as from shareholders and directors of the dissolved corporation.

Generally, a corporation purchasing the assets of another corporation does not assume the seller's liabilities.[33] However, liability is imposed on the successor when

> (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.[34]

A few jurisdictions expand the scope of successor liability by holding the successor liable for claims arising from the continuation of the predecessor's defective product line.[35]

Although successor liability provides a products liability claimant, whose cause of action arises post-dissolution, with a possible remedy, the actions of the predecessor and the successor corporations must fit within one of the narrow categories described above.[36] This legal doctrine provides little benefit to a products liability claimant when a corporation simply dissolves and distributes its assets to its shareholders. In that case, the claimant must look to the dissolved corporation's directors and shareholders for a remedy.

The claimant's ability to recover from the dissolved corporation's shareholders and directors varies depending on the judicial interpretation of the abatement statute in each jurisdiction. In some jurisdictions, abatement statutes do not preclude the use of the trust fund doctrine as a viable theory of recovery against a shareholder for post-dissolution claims.[37] However, other courts hold that a share-

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33. *See* Fehl v. S.W.C. Corp., 433 F. Supp. 939, 945 (D. Del. 1977); 19 AM. JUR. 2D *Corporations* § 2704 (1986).

34. Ray v. Alad Corp., 560 P.2d 3, 7 (Cal. 1977).

35. *See* Robert E. Aylward & Janice S. Aylward, *Successor Liability for Defective Products—Misplaced Responsibility*, 13 STETSON L. REV. 555, 571-74 (1984) (discussing the product line exception).

36. *See id.*; Green, *supra* note 1, at 22-26.

37. *See, e.g.*, Green v. Oilwell, Div. of U.S. Steel, 767 P.2d 1348, 1353-54 (Okla. 1989).

holder is not liable under the trust fund doctrine for post-dissolution claims[38] because "[t]he effect of [abatement] statutes [is] to supplant the equitable trust fund theory by declaring a statutory equivalent."[39] Courts adopting this view cite to a legislative policy which seeks "to protect shareholders, officers[,] and directors of a dissolved corporation from prolonged and uncertain liability,"[40] as well as the need for "the definiteness and orderly process of dissolution."[41]

A products liability claimant still faces a number of obstacles, even if he is not barred from pursuing an action arising post-dissolution, has a defendant to sue, and can prove his case and win. Generally, a judgment must be executed against any remaining corporate assets,[42] but locating these assets may be difficult and expensive. To the extent that corporate assets are insufficient, the claimant can hold individual shareholders liable to the extent of their pro rata share of the distribution received.[43] However, with this alternative the claimant faces the same challenge of locating the shareholders, as well as the possibility of "judgment-proof shareholders" and jurisdictional problems.[44]

The statutory provisions governing corporate dissolution in most jurisdictions and the practical problems of using the trust fund doctrine, if not barred, give products liability claimants with late-maturing claims a minimal chance of recovery. In addition, former shareholders who are liable to corporate claimants under the trust fund doctrine are placed in the uncomfortable position of speculating whether or not they will be able to keep their share of the corporate assets.[45]

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38. *See, e.g.*, *Pacific Scene*, 758 P.2d at 1183. The trust fund doctrine is not a viable remedy since the legislature "has generally occupied the field with respect to the remedies available against the former shareholders of dissolved corporations, thus preempting antecedent common law causes of action . . . ." *Id.*

39. Hunter v. Ft. Worth Capital Corp., 620 S.W.2d 547, 550 (Tex. 1981).

40. *Id.* at 551.

41. Bishop v. Schield Bantam Co., 293 F. Supp. 94, 96 (N.D. Iowa 1968). The court rejected the argument that the statutory language "otherwise winding up its affairs" included defending actions against the corporation, thus, granting a right to those injured by the corporation's products to seek compensation from its shareholders beyond the statutory winding-up period. *Id.* Only directors who improperly distribute assets are liable to legitimate creditors, to the extent of the assets improperly distributed. Nuhn, *supra* note 1, at 1233.

42. Sarlitto, *supra* note 1, at 1052.

43. *Id.*

44. *Id.* These obstacles give shareholders "an incentive to dissolve a corporation in order to avoid the claims of tort plaintiffs." *Id.*

45. *See In re RegO*, 623 A.2d at 94.

B. *Delaware's Statutory Scheme for Dissolution*

The recently enacted provisions of sections 280 through 282 of the Delaware General Corporation Law provide a novel alternative mechanism governing dissolution which addresses the needs of both claimants with late-maturing products liability claims, and shareholders who receive a distribution of the dissolved corporation's assets.[46] Under certain circumstances, these provisions extend protection to foreseeable, unknown future corporate claimants by providing, for the first time, assurance that reasonable provisions will be made for their claims as part of the company's dissolution plan.[47] Compliance with certain statutory provisions provides a "safe-harbor"[48] for directors, shareholders, and transferees, in that they will not be liable for foreseeable, unknown future claims related to the distribution of corporate assets.[49]

1. Notifying Claimants and Filing Claims Under the Elective Procedures for Dissolution

Sections 280 and 281(a), the elective provisions, and section 281(b), the default provision, set forth the procedures governing corporate dissolution. Corporations electing to follow section 280 and its notice provisions must give notice of the dissolution by mail and publication, and request that all persons having a claim against the corporation present them in accordance with the notice.[50] Pursuant

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46. *Id.*

47. *Id.* at 96-97.

48. The Official Comment to the 1987 amendment of § 280 states:

> New Section 280 creates a procedure that corporations may elect to follow in winding up their affairs, paying claims against the corporate assets and distributing any remaining assets to the stockholders. The section (and Section 281, as amended) is designed to provide a "safe harbor" such that if the procedures described in Section 280 are followed and assets are distributed in accordance with Section 281, as amended, directors (or governing persons of a "successor entity" as defined in subsection (d)) will not be held personally liable to unpaid claimants of the corporation for having improperly distributed assets.

S. 93, 134th Gen. Assembly 20, 66 Del. Laws 38 (1987).

49. *In re RegO*, 623 A.2d at 97.

50. DEL. CODE ANN. tit. 8, § 280(a)(1) (1991). In addition to providing what the notice should include, § 280(a)(1) also provides for the method of notification:

> Notice shall also be published at least once a week for 2 consecutive weeks in a newspaper of general circulation in the county in which the office of the corporation's last registered agent in this State is located and in the corporation's principal place of business and, in the case of a corporation

to section 280(a)(2), a corporation receiving a claim has ninety days to determine whether the claim will be honored or rejected, in whole or in part.[51] A claim paid in full extinguishes the dissolved corporation's liability to the claimant.[52] However, a claimant whose claim is rejected must be notified of this rejection at least 150 days before the expiration of the three-year winding-up period provided in section 278.[53] In addition, the claimant must be supplied with a copy of the statutory provisions contained in sections 278 through 283, among which is the right to seek appointment of a receiver.[54]

Pursuant to section 280(b)(1), notice of corporate dissolution as described in subsection (a) must also be given "to persons with contractual claims contingent upon the occurrence or nonoccurrence of future events or otherwise conditional or unmatured . . . ."[55] Upon receipt of a contingent claim, the corporation must offer the claimant security which the corporation deems sufficient to provide compensation if the claim matures.[56] The offer of security must be made within ninety days of receipt of the claim, and at least 150 days before the expiration of the three-year winding-up period.[57] A claimant who rejects the offer of security must notify the company within 120 days after receipt of the offer.[58] A claimant who fails to notify the company is deemed to have accepted the corporation's offer of security "as the sole source from which to satisfy his claim against the corporation."[59] When a corporation is notified that an offer has been rejected, it must petition the court of chancery to determine the amount and form of security that is sufficient to compensate the claimant.[60]

> having $10,000,000 or more in total assets at the time of its dissolution, at least once in all editions of a daily newspaper with a national circulation.

Id.

51. *Id.* § 280(a)(2).
52. *Id.*
53. *Id.*
54. DEL. CODE ANN. tit. 8, § 280(a)(2). The claimant can petition the court of chancery to appoint a receiver to take charge of the "unfinished business" of the corporation. *Id.* § 279.
55. *Id.* § 280(b)(1). Contractual claims do not include "any implied warranty as to any product manufactured, sold, distributed or handled by the dissolved corporation." *Id.*
56. *Id.* § 280(b)(2).
57. *Id.*
58. DEL. CODE ANN. tit. 8, § 280(b)(2).
59. *Id.*
60. *Id.* § 280(c)(1).

The procedure described in section 280(c)(2) extends protection to the interests of a foreseeable, unknown future claimant. Under this subsection, a corporation must petition the court of chancery to determine the amount and form of security that is "*reasonably likely to be sufficient* to provide compensation for claims that have not . . . arisen but that, based on facts known to the corporation or successor entity, are likely to arise or to become known to the corporation . . . ."[61] However, this provision provides little guidance in determining what constitutes an adequate form of security that is "reasonably likely" to compensate unknown claimants.[62] In addition, the court of chancery may appoint a guardian *ad litem* to protect the interests of unknown claimants.[63]

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61. *Id.* § 280(c)(2) (emphasis added).

62. In Boesky Corp. v. CX Partners, L.P., No. 9748, 1988 WL 42250 (Del. Ch. Apr. 28, 1988), *reprinted in* 14 DEL. J. CORP. L. 230 (1989), the court examined § 17-804 of the Delaware Revised Uniform Limited Partnership Act which is similar to § 280 of the Delaware Code. Section 17-804 requires a dissolved limited partnership to satisfy its liabilities or establish reserves for the satisfaction of claims. *Id.* at *16, *reprinted in* 14 DEL. J. CORP. L. at 257. Finding the skeletal provisions of the partnership law in this area to be stark, the court referred to §§ 280-282 for guidance in examining the claims of creditors of a partnership, and in determining whether a partial liquidating distribution to limited partners is permissible without the establishment of an adequate reserve for contingent claims. *Id.* The court held, "[A] person claiming to be a creditor of a partnership in dissolution is entitled to adequate security before distributions are made to partners . . . ." *Id.* Discussing the adequacy of security, Chancellor Allen stated:

> [S]ecurity may . . . be afforded by the general assets left in the partnership, even if not set up in discrete reserve accounts; that where the claim is unliquidated or contingent, what constitutes adequate security is a question of judgment; that a liquidating trustee's judgment as to what constitutes adequate security, even when made in good faith and advisedly, is not entitled to the powerful effects of the business judgment rule . . . .

Id. Rather, the court supervising the liquidation will make an independent judgment as to the adequacy of the security. *Id.* The court noted difficulty in providing for contingent claims. *Id.*, *reprinted in* 14 DEL. J. CORP. L. at 258. However, Chancellor Allen stated:

> [A]dequate security . . . may be provided, in my opinion, by an enforceable undertaking by those to whom early liquidating distributions are to be made [by requiring that] each . . . distributee submit to the jurisdiction of this court for the purpose of litigating any claim arising from the liquidation [and that] each [distributee] return such part or all of any distribution to the partnership to the extent necessary to permit the partnership to satisfy any judgment entered against it . . . .

Id. at *17, *reprinted in* 14 DEL. J. CORP. L. at 258-59. From a practical standpoint, the court's opinion provides little guidance to corporate directors who are devising a plan to provide for contingent claims.

63. DEL. CODE ANN. tit. 8, § 280(c)(2) (1991). Following the notice procedures

2. The Alternative Mechanism for Payment and Distribution to Claimants and Stockholders

Section 281 sets forth an alternative method for payment of claims brought against the dissolved corporation or its successor entity[64] and the distribution of any remaining assets to stockholders.[65] A corporation or successor entity that elects to follow the procedure set forth in section 280 must (1) "pay the claims made and not rejected in accordance with § 280(a)"; (2) "post the security offered and not rejected pursuant to § 280(b)(2)"; (3) "post any security ordered by the [c]ourt of [c]hancery in any proceeding under § 280(c)"; and (4) "pay or make provision for all claims that are mature, known and uncontested or that have been finally determined to be owing by the corporation or its successor entity."[66] These claims or obligations are to be paid or provided for in full.[67] In the event of insufficient funds, they are to be "paid or provided for according to their priority, and [ratably] among claims of equal priority."[68] The term "priority" as used in section 281 pertains neither to the order of payment outlined in section 281(a), nor to the relative times the claims become payable by the corporation or its successor entity.[69] This definition of "priority" creates a question as to which creditors, if any, are to be given preference when insufficient funds exist for paying or providing for claims.[70]

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set forth in § 280 does not revive any claim then barred or serve as an acknowledgement by the corporation that one who received notice is a proper claimant. *Id.* § 280(d).

64. Successor entity, as used in § 280, means:

> [A]ny trust, receivership or other legal entity governed by the laws of this State to which the remaining assets and liabilities of a dissolved corporation are transferred and which exists solely for the purposes of prosecuting and defending suits, by or against the dissolved corporation, enabling the dissolved corporation to settle and close the business of the dissolved corporation, to dispose of and convey the property of the dissolved corporation, to discharge the liabilities of the dissolved corporation and to distribute to the dissolved corporation's stockholders any remaining assets, but not for the purpose of continuing the business for which the dissolved corporation was organized.

Id. § 280(e).

65. *Id.* § 281.

66. *Id.* § 281(a).

67. DEL. CODE ANN. tit. 8, § 281(a) (1991).

68. *Id.*

69. *Id.* § 281(e).

70. In *In re RegO*, the court's opinion gives the example of indemnification claims as those which deserve priority. *In re RegO*, 623 A.2d at 111.

Stockholders of the dissolved corporation are entitled to any remaining assets.[71] However, the assets cannot be distributed until 150 days after the last notice of rejection is sent pursuant to section 280(a)(2).[72]

The benefit of complying with section 280 and paying claims and distributing assets according to section 281(a) is that compliance creates a "safe harbor" for directors of the dissolved corporation and persons governing the successor entity.[73] The court of chancery's approval of a plan providing for the form and amount of the security to be posted for known contingent claims and foreseeable, unknown future claims protects directors or those governing the successor entity from personal liability with respect to those claims.[74] This protection does not "abrogate the directors' prior responsibility to properly wind up the affairs of a dissolved corporation, including to properly use the assets of the corporation to discharge its liabilities."[75]

A corporation foregoing the procedures of sections 280 and 281(a) must pay claimants and distribute assets to stockholders pursuant to the default provision codified as section 281(b). This section requires that claims be paid in full or a *reasonable provision* be made for the payment of "all claims and obligations, including all contingent, conditional or unmatured contractual claims known to the corporation . . . ."[76] In addition, the corporation is required to "make . . . provision[s] . . . reasonably likely to be sufficient to provide compensation" for foreseeable future claims that are likely to arise before applicable statutes of limitation expire.[77] The directors' judgment as to what is a "reasonable provision" for payment of known creditors or what is "reasonably likely to be sufficient" to compensate foreseeable, unknown future claimants is subject to possible attack by unsatisfied claimants.[78] If the claimants prevail, the directors can be held personally liable.[79]

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71. DEL. CODE ANN. tit. 8, § 281(a) (1991).

72. *Id.*

73. Gans v. MDR Liquidating Corp., No. 9630, 1990 WL 2851, at *8 (Del. Ch. Jan. 10, 1990).

74. DEL. CODE ANN. tit. 8, § 281(c) (1991).

75. *Gans*, No. 9630, 1990 WL 2851, at *8.

76. DEL. CODE ANN. tit. 8, § 281(b) (1991).

77. *Id.*

78. *See In re RegO*, 623 A.2d at 97 (stating that "'reasonably likely to be sufficient' will, in principle at least, always be litigable"); DEL. CODE ANN. tit. 8,

If there are insufficient funds, the claims are to be paid in order of their priority; if claims have equal priority, the funds legally available for those claims are ratably paid.[80] The remaining corporate assets are then distributed to the shareholders.[81]

3. Section 282 Liability of Stockholders

Section 282 addresses the liability of stockholders who have received assets of a dissolved corporation. A stockholder of a dissolved corporation receiving assets in accordance with section 281(a) or (b) is not liable for any claim against the corporation in excess of the stockholder's *pro rata* share of the claim or the amount distributed to him upon liquidation, whichever is less.[82] If the dissolved corporation's assets were distributed pursuant to section 281(a), the shareholder is not liable for any claim against the corporation on which an action, suit, or proceeding is not begun prior to the three-year winding-up period or time thereafter provided for in section 278.[83] It was this statutory scheme that provided the basis for the court's decision in *In re RegO*.

III. ANALYSIS

A. Statement of Facts

RegO was a Delaware corporation and an indirect wholly-owned subsidiary of the Marmon Corporation (Marmon).[84] Before dissolving

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§ 281(c) (1991) (stating that directors will be protected from liability only if they comply with subsections (a) or (b)).

79. *See Gans*, No. 9630, 1990 WL 2851, at *6 (stating that if directors of a dissolved Delaware corporation did not make adequate provisions to meet the contractual commitments of the dissolved corporation, this conduct would constitute a breach of the directors' statutory duties under § 281(b)); DEL. CODE ANN. tit. 8, § 281(c) (1991) (inferring that liability will be imposed if directors do not comply with this subsection).

80. DEL. CODE ANN. tit. 8, § 281(b)(1) (1991).

81. *Id.*

82. DEL. CODE ANN. tit. 8, § 282(a) (1991). In addition, a stockholder's aggregate liability "for claims against the dissolved corporation shall not exceed the amount distributed to him in dissolution." *Id.* § 282(c).

83. *Id.* § 282(b). This provision effectively bars the use of the trust fund doctrine for claims asserted subsequent to the statutory winding-up period. *In re RegO*, 623 A.2d at 104. A corporation can be continued for a period longer than three years at the discretion of the court of chancery. DEL. CODE ANN. tit. 8, § 278 (1991).

84. *In re RegO*, 623 A.2d at 98. RegO was wholly-owned by The RegO

in 1989, RegO manufactured and marketed valves and other component parts for systems using liquified petroleum (LP), anhydrous ammonia, and other compressed gases.[85]

Due to the explosive and flammable qualities of LP gas, systems utilizing it have caused accidents which often result in both property damage and personal injury.[86] Consequently, RegO, a component parts manufacturer, was frequently named as a defendant in the resulting product liability actions.[87]

RegO was insured under an umbrella policy negotiated by its parent, Marmon, until 1987.[88] Faced with judgments of millions of dollars, and the resulting escalation in insurance expenses, RegO became self-insured effective January 1987.[89] However, large judgments in product liability suits, some involving thirty year old products, continued,[90] thus motivating Marmon to reorganize RegO's business in order to sever the claims legacy from an otherwise valuable business.[91]

Pursuant to its decision, Marmon retained Duff & Phelps Financial Consulting Company (Duff & Phelps) to value RegO. The Wyatt Company (Wyatt) was also retained to perform an actuarial analysis for RegO's potential liability risk for LP products presently in the market.[92] On October 24, 1988, Duff & Phelps' report valued the RegO business between $53 million to $60 million excluding all product liabilities.[93] If only product liabilities for products made prior to the date of the report were excluded, the valuation decreased to $24 million to $27 million.[94] On November 1, 1988, Wyatt estimated that as of January 1989, the present value of predictable product

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Group, Inc., which was in turn wholly-owned by Marmon. *In re* RegO Co., No. 11,651, slip op. at 4 (Del. Ch. May 14, 1992) (Master's Final Report). RegO was incorporated under Delaware law in 1976. *In re RegO*, 623 A.2d at 98.

85. *In re RegO*, 623 A.2d at 98. LP is a common fuel for appliances such as hot water heaters, ranges, and dryers. *In re RegO*, No. 11,651, slip op. at 4.

86. *In re RegO*, 623 A.2d at 98.

87. *Id.*

88. *Id.* Premiums for this policy were calculated based upon the relationship between the claims of each Marmon company to the claims of the group as a whole. *Id.*

89. *Id.*

90. *In re RegO*, 623 A.2d at 98.

91. *Id.* at 98-99. The decision to reorganize occurred sometime in August or September of 1988. *Id.* at 98.

92. *Id.* at 99.

93. *Id.*

94. *In re RegO*, 623 A.2d at 99.

liability claims for products manufactured as of November 1988 ranged between $102,697,000 and $115,919,000.[95] According to the report, claims were anticipated until the year 2027.[96]

After considering this information along with its exorbitant claims history, RegO sold substantially all of its operating assets to Engineered Controls International, Inc. (ECII), a Delaware corporation, on January 31, 1989.[97] Pursuant to an Asset Purchase Agreement (Purchase Agreement), ECII paid $18,405,000 in cash and assumed $4,658,000 of RegO liabilities to trade creditors.[98] Concurrently, the corporations entered into a Trademark License Agreement (License Agreement) which entitled ECII to use the RegO trademark in consideration for an annual royalty fee.[99] ECII did not assume liability for any of RegO's products manufactured prior to the asset transfer.[100]

On February 3, 1989, RegO filed a certificate of dissolution with the Delaware Secretary of State.[101] However, the company continued to exist until June 15, 1992, for the purpose of winding up its business.[102] Electing to wind up corporate affairs pursuant to section 280 of the Delaware General Corporation Law, the corporation mailed notice to all persons and entities known to have a present or potential claim against the company.[103] RegO received numerous responses from general creditors and potential claimants

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95. *Id.* An expert for the guardian *ad litem*, who contested the security plan in this case, submitted a report indicating that as of February 1, 1992, the unpaid present and future claims against RegO had a present discounted value of $57,633,000. *Id.* at 100. The different interest rate environment accounts for the discrepancy in value between this report and the Wyatt report. *Id.*

96. *Id.* at 99.

97. *Id.* One of the respondents, Emerson Electric Company, asserted that "concurrently with its decision to dissolve, RegO declared a $38,402,725.15 dividend by a post-dated resolution." *Id.* (quoting Exceptions of Emerson at 9). Neither the court nor the Master made a finding with respect to this asserted fact since it was unnecessary to do so in this proceeding. *Id.* at 99 n.16.

98. *In re RegO*, 623 A.2d at 99.

99. *Id.* The annual royalty fee in 1990 aggregated approximately $1,200,000. *Id.*

100. *Id.* ECII would be indemnified by RegO for any losses arising from RegO equipment manufactured prior to the sale. *Id.*

101. *Id.*

102. *In re RegO*, No. 11,651, slip op. at 6. Pursuant to § 278, a Delaware corporation continues to exist for a period of three years or for such longer period as the court of chancery shall in its discretion direct for the purpose of prosecuting and defending suits to enable the corporation gradually to sell its properties and to wind up its affairs and discharge its liabilities. DEL. CODE ANN. tit. 8, § 278 (1991).

103. *In re RegO*, 623 A.2d at 99.

who sought security from the company for their anticipated claims.[104] In response, RegO rejected all claims for security on pending product liability suits, as well as claims for similar suits that might be brought in the future.[105]

RegO drafted a plan providing for payment of and security for its known, and foreseeable unknown, future creditors,[106] including the establishment of a Claimants Trust Agreement (Trust Agreement), to which all of RegO's assets would be transferred.[107] The Trust Agreement set forth six categories of claims to be paid by the trust: (1) administrative obligations,[108] (2) contractual obligations,[109] (3) product obligations,[110] (4) pre-existing obligations,[111] (5) non-product obligations,[112] and (6) non-compensatory damage obligations.[113]

Specifically, the Trust Agreement provided for payment in full upon maturity of administrative obligations, pre-existing obligations, and certain contractual obligations.[114] However, product obliga-

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104. *Id.* RegO's general creditors were paid in the course of winding up its affairs. *Id.*

105. *Id.*

106. *Id.* at 94.

107. *In re RegO*, 623 A.2d at 94. RegO's assets were comprised of $36 million in receivables and intangible assets. *Id.*

108. Administrative obligations include the costs and expenses resulting from the administration of the trust, as well as litigation of the claims brought against the trust. *Id.* at 101.

109. Contractual obligations consisted of those which either existed in the Purchase Agreement between RegO and ECII, or in the indemnification provisions of the Trust Agreement. *Id.*

110. Product obligations were defined as valid settlements and judgments resulting from product liability suits against the company, including claims for contribution or indemnification. *Id.*

111. Pre-existing obligations were "all claims for amounts incurred prior to the effective date of the trust in connection with winding-up the affairs of the Company and Contractual, Product, and Non-Compensatory Damage Obligations existing but unpaid as of the effective date of the trust." *In re RegO*, 623 A.2d at 101.

112. Non-product obligations were "those obligations arising from claims other than Product Claims, which were asserted in lawsuits prior to the Effective Date of the trust and not settled or reduced to judgment until after the settlement date." *Id.*

113. Non-compensatory damage obligations were obligations associated with product liability claims for punitive, exemplary, or other non-compensatory damages. *Id.*

114. *Id.* Contractual obligations, which included claims for indemnification determined to be payable pursuant to the Purchase Agreement were subject to a $500,000 Interim Limit; and payment to ECII for indemnification of defense costs

tions,[115] non-product obligations, and non-compensatory damage obligations settled or reduced to judgment after the effective date of the trust would be paid in full, subject to a $500,000 per occurrence interim limit.[116] The priority for payment of these obligations for a proven occurrence depended upon the order in which they arose.[117] If the trust terminated with funds, these funds would be utilized to satisfy in full, or ratably if necessary, obligations owed in excess of the interim cap.[118]

The Trust Agreement contained procedures for administration and termination of the trust.[119] Five years following establishment of the trust, the trustee was directed to recommend to the court whether a termination date for asserting product and non-compensatory damage claims (claims assertion date) should be established.[120] The establishment of a claims assertion date would bar the assertion of any further product or non-compensatory damage claims once that date had passed.[121]

Termination of the trust was automatically triggered:

> ninety days after the first to occur of the following two events: (a) all Product, Non-Compensatory Damage and

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were subject to a $500,000 per occurrence cap. A "deficiency [would be] paid only if funds remained at the termination of the Trust." *In re RegO*, No. 11,651, slip op. at 10.

115. With respect to product obligations, the Trust Agreement provided:

> Any Product Obligation covered by insurance will be paid up to the amount of the available coverage. If a Product Obligation is only partially remitted by insurance, the Trust will pay the difference, subject to the Interim Limit. The Trustee may seek a modification to the Interim Limit by the Court at any time. The Trust Agreement also requires the Trustee to conduct a review and make a recommendation to the Court at the end of five years of the Trust regarding the appropriateness of the Interim Limit or whether an adjustment should be made.

In re RegO, 623 A.2d at 101 n.25.

116. *Id.* Based on the figures projected by the reports submitted by RegO's expert, Wyatt, the trust funds would be exhausted by 1996, if all claims were paid in full. However, an interim limit of $500,000 would extend the life of the trust until the year 2000, even though claims were expected to continue to arise until 2027. *Id.* at 100.

117. *Id.* at 101. Payments were to be made ratably in the event that two or more obligations relating to a single occurrence arose concurrently and full payment would exceed the interim limit. *Id.* at 101 n.26.

118. *Id.* at 101.

119. *In re RegO*, 623 A.2d at 102. The court chose to address the administration of the Trust Agreement in a separate opinion. *Id.* at 111.

120. *Id.* at 102.

121. *Id.*

> Non-Product Claims asserted against the company or trust have been settled or reduced to final judgment and paid as provided in the Trust Agreement and the Claims Assertion Date has passed; or (b) the Trustee has consented to, and the Court has approved, the termination of the Trust.[122]

Any remaining monies following termination were to be distributed:

> (1) ratably for remaining Administrative Obligations; (2) to the extent funds remain[ed], ratably to the holders of Contractual Obligations, Non-Product Obligations and Product Obligations who did not previously receive payment in full; (3) to the extent funds remain[ed], ratably to all holders of Non-Compensatory Damage Obligations who did not receive full compensation; and (4) to the extent funds remain[ed], to the stockholder of the Company as of the date of the establishment of the trust.[123]

Pursuant to section 280(c), RegO petitioned the court of chancery on February 28, 1991, for judicial approval of the security provisions set forth in its plan of dissolution.[124] Initially, this matter was heard before a Master in Chancery *pro hac vice*; the Master's Final Report recommended approval of the security plan with a few minor modifications.[125]

The case was brought before the court of chancery on exceptions to the Master's Final Report asserted by Emerson Electric Company (Emerson) and Clark W. Furlow, Esquire.[126] Emerson, a co-defendant with RegO in pending products liability suits involving RegO components, contended that it was a foreseeable future claimant since it expected to make future claims against RegO, in addition to those it had already made, for contribution or indemnification in the event

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122. *Id.*

123. *In re RegO*, 623 A.2d at 102.

124. *Id.* at 94.

125. *Id.* The Master in Chancery *pro hac vice* was Ann E.C. Stilson, Esquire, who was appointed on October 1, 1990, by Chancellor William T. Allen. Professor Stilson is an associate professor, Widener University School of Law. *In re RegO*, No. 11,651, slip op. at 2 n.2.

126. *In re RegO*, 623 A.2d at 94. In addition to the above-named respondents, Trinity Industries, Matheson Gas Products, Inc., Empire Gas, Inc. of Jacksonville, and Engineered Controls International, Inc. participated in the action before the Master, but did not participate on review before the court of chancery. *In re RegO*, No. 11,651, slip op. at 2 n.1.

liability was imposed in similar suits.[127] Clark W. Furlow, Esquire, was appointed guardian *ad litem* to represent the interests of foreseeable, unknown future corporate claimants pursuant to section 280(c)(2).[128]

The central issue before the court was the interpretation and application of section 280(c).[129]

B. The Court of Chancery Decision

Emerson contended that the proposed plan of security, consisting of all of RegO's assets, did not provide adequate funding to satisfy RegO's future claims, and therefore, the plan should be rejected.[130]

Relying on actuarial studies calculating the value of present and future claims which are anticipated to arise over the next thirty years,[131] and a security plan consisting of RegO assets amounting to $36 million, the court agreed that the corporation's present assets

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127. *In re RegO*, 623 A.2d at 94, 103.

128. *Id.* at 94.

129. *Id.* at 102. In this context, the question was whether the Trust Agreement provided security that would be sufficient for the claims of present claimants and reasonably likely to be sufficient for the claims of foreseeable, unknown future claimants. *Id.*

130. *Id.* at 103. Emerson alleged that RegO fraudulently conveyed a substantial amount of assets out of the company by declaring a $38 million dividend prior to filing for dissolution and selling the assets of the company for less than their true value. *Id.* Emerson had also instituted an action against RegO in another jurisdiction for fraudulent conveyance. *In re RegO*, No. 11,651, slip op. at 58. The Master acknowledged the litigable nature of Emerson's claim and recommended that the proposed order contain the following language: "Nothing in this Order is intended to alter existing equitable rights of legitimate claimants to pursue appropriate relief against RegO, its directors, stockholders or their transferees from any claim for fraudulent or wrongful transfer of RegO assets." *Id.*, slip op. at 59. In this proceeding, the court found the Master's recommended provision unnecessary. The court stated:

> The various limitations on stockholder liability reflected in Section 282 are limitations on liability that might arise under the trust fund doctrine. . . . [T]hese provisions provide that shareholders will not have derivative liability for "any claim against the corporation." . . . [A] claim of fraudulent conveyance is not a "claim against the corporation" within the meaning of Section 282. It entails a claim that the corporate entity itself has been misused; that its assets have been conveyed for less than fair value for no proper business purpose. . . . Section 282 is not intended to limit the ability of a court to recover for the benefit of creditors or for a receiver . . . funds fraudulently conveyed to a corporation's stockholders prior to dissolution, the transfer of which left the corporation insolvent.

In re RegO, 623 A.2d at 104 (footnote omitted).

131. *See supra* text accompanying note 96.

were unlikely to satisfy all foreseeable future claims.[132] The court noted, however, that when all of a corporation's assets are dedicated to the security plan, "the issue of sufficiency of the security does not arise," since the level of security afforded to creditors would be the same as it was prior to corporate dissolution.[133] The court found that "[t]o conclude otherwise would serve no valid interest of claimants (since they, as a class, are to be the beneficiaries of all of the corporation's assets in all events) and would deprive corporate directors of such benefits as they may draw from judicial approval of the plan of security."[134] The court, therefore, rejected Emerson's exception and held that in the special case where a company has dedicated all of its assets to a security plan, even though such assets would not be adequate to be reasonably likely to compensate all foreseeable, unknown future claims, the court is not precluded from approving the plan under section 280(c).[135] The court did require, however, that the plan must be "fair to all classes of present and future claimants."[136]

Finding that the proposed security was sufficient, the court examined the fairness of the proposed security arrangement. The guardian objected to the arrangement of the claimant's trust because it gave present, known claimants, such as those falling within the category of pre-existing obligations, superior rights over those of foreseeable, unknown future claimants by providing payment in full to present claimants.[137] The guardian urged that such preferential treatment is inconsistent with the policy of section 281, which provides that all product liability suits, whether adjudicated, ongoing, contingent, or unknown, are of *equal* priority and, therefore, should be

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132. *In re RegO*, 623 A.2d at 105.

133. *Id.* at 104. Rather, the question becomes whether the sufficiency of the proposed security arrangement is fair to various claimants or classes of claimants. *Id.*

134. *Id.* at 104-05. The court rejected the alternative argument that the benefits of § 280 are available only when a certain level of security can be provided for both present known claimants and foreseeable, future unknown claimants; otherwise, a corporation is required to dissolve under the risky provision of § 281(b). *Id.* at 104.

135. *Id.* at 105.

136. *In re RegO*, 623 A.2d at 105.

137. *Id.* The guardian pointed out that based on a statistical analysis, these individuals are "long-tail" claimants, who will become known to the company from time to time until at least the year 2027. *Id.*

paid *pro rata* due to RegO's inability to pay all foreseeable, unknown future claimants.[138]

The court began its analysis of this issue by stating that "[s]ections 280 and 281 *do incontestably create (or recognize) rights* of a certain sort in future claimants.[139] Pursuant to the optional procedure of sections 280 and 281(a), these claimants have a right to a "judicial determination of reasonable security and the funding of that security,"[140] while the default procedure of section 281(b) provides the right to "provisions [that] will be reasonably likely to be sufficient to provide compensation for [their] future claims" as part of a corporation's dissolution plan.[141]

The court examined the impact that these rights have for present creditors. Under section 281(b), a corporation that has insufficient funds to either pay or provide for its present and conditional obligations, or make reasonable provisions for foreseeable, unknown future claimants, must pay or provide for these claims according to their priority, and among claims of equal priority, ratably.[142] Since the term "priority" does not mean the time at which the claim matures, the court stated that the duty of a dissolved corporation following section 281(b) is twofold: (1) *to pay present creditors ratably*

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138. *Id. See In re RegO*, No. 11,651, slip op. at 26-27 (explaining the guardian's position on the underlying policy of § 281).

139. *In re RegO*, 623 A.2d at 106 (emphasis added). The Master has a different view of the rights created by these provisions:

> As to creating rights in future predictable plaintiffs, I interpret §§ 280 and 281 to have created a contract between a dissolving corporation and the State of Delaware whereby the dissolved corporation has a **duty** to provide security for a class of statistically foreseeable, unknown claimants with a corresponding **right** on the part of the dissolved corporation, its directors and stockholders to be absolved from liability against future claims where the corporation has followed the notice procedures of § 280. The **duty** on the part of the corporation to **post security**, however, does not create **any right** to payment on the part of long-tail claimants due to the inchoate nature of their claims. Instead, § 280 grants to these unknown plaintiffs "**sufficient security**" for future compensation which security will not vest into an **unconditional right** to **payment** until the winding-up interval is completed, no prior creditor has executed upon all remaining assets and some sort of successor entity has been established to hold monies in trust for these claimants for some reasonable period. The **conditional rights** of these future claimants are not dissimilar from the interests of **incidental** third-party beneficiaries.

In re RegO, No. 11,651, slip op. at 33-34 (footnotes omitted).

140. *In re RegO*, 623 A.2d at 106.

141. *Id.*

142. *Id.* (quoting DEL. CODE ANN. tit. 8, § 281(b)).

when sufficient funds are lacking to satisfy both present obligations and contingent and future claims, and (2) to make reasonable provisions for contingent and foreseeable, unknown future claims.[143]

Under the elective procedure of sections 280 and 281(a), the court found the right of present creditors to be paid in full is less likely to be compromised by the newly created rights of foreseeable, unknown future claimants.[144] A dissolved corporation "needs only to pay the [amount of] security fixed by the court."[145] "[R]atable payments to all claimants of the same priority is only triggered under Section 281(a) when the corporation cannot pay its various claimants and fund the court ordered security."[146]

Although the court found that the transfer of all RegO assets constituted "sufficient" security under section 280(c) regardless of the probability that all foreseeable future claimants would not be fully compensated, the chancellor stated that the court should not ignore the legislative policy behind both subsections (a) and (b).[147] Simply stated, "[F]idelity to the abundantly clear policy of Section 281(a), (b)[,] and (e) require[d] th[e] Court, in passing upon the reasonableness of a proposed security arrangement under Section 280(c), to decline to approve discrimination among claimants of the same class based upon 'the relative times at which any claims mature or are reduced to judgment.'"[148] Finding that this security arrangement discriminated against foreseeable, unknown future claimants, the court rejected RegO's proposed plan.[149]

The court next considered what means were available to implement a security plan that did not discriminate among claimants

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143. *Id.*

144. *In re RegO*, 623 A.2d at 107.

145. *Id.*

146. *Id.*

147. *Id.* The court thus rejected RegO's argument that the provision for ratable payment under § 281(a) does not apply in this case since the company will pay the security fixed by the court, that being all of its assets; paying this security covers the payments identified by § 281(a) and the ratable payment provision of § 281 need not be considered by the court when determining the sufficiency of the security arrangement. *Id.*

148. *In re RegO*, 623 A.2d at 107 (quoting DEL. CODE ANN. tit. 8, § 281(e)).

149. *Id.* at 108. The court added that this holding does not necessarily mean that § 281(a) precludes directors following § 280 who know that the corporation is unlikely to have sufficient assets to assure all future, foreseeable claimants compensation from paying present corporate creditors in full. However, these provisions require a court-approved security plan that should take into consideration the legislative policy of §§ 281(a), (b), and (e). *Id.*

of the same priority.[150] Mathematical certainty was impossible since RegO and the court were attempting to provide for the occurrence of estimated future claims.[151] RegO proposed the establishment of an interim limit of $500,000 per claim with the appropriateness of this limit to be evaluated in five years.[152] This interim limit was expected to satisfy 90-95% of all claims that arose over the next eight years,[153] although claims were expected over the next twenty to thirty years.[154]

In response to RegO's proposal of an interim limit of $500,000 per claim, the court stated that section 280(c), which requires a reasonable security arrangement for foreseeable, unknown future claimants, "[did] not afford to the dissolving corporation, or the court passing upon the proposed security arrangement, an election to fail to afford security for foreseeable claimants . . . simply because their claims will arise in some years hence."[155] The Delaware legislature "left the determination of an appropriate liability cut-off date to the substantive law of the state in which the claim arises,"[156] and in keeping with this statutory scheme, the court found no basis to foreclose distant, foreseeable claimants from protection by approving an interim limit of $500,000 which would result in the depletion of the claimants' trust within eight years.[157]

The court found the interim limit of $300,000, proposed by the guardian, to be within the spirit of section 280(c), since it was more likely to provide for claims arising over the reasonably expected period of twenty to thirty years.[158] Therefore, the court held it would approve an interim limit of $300,000.[159]

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150. *Id.*

151. *Id.* at 109. The interested parties suggested that each claimant be paid a percentage of its claim periodically with the final calculation of payment on termination of the trust. *Id.* RegO opposed this suggestion, asserting that a fair percentage could only be determined after all future claims are known. Fixing a percentage now would run the risk of depleting the trust should a few substantial judgments be awarded. *Id.* at 109-10. The court found RegO's view consistent with the policy of §§ 280(a), (b), and (e). *Id.*

152. *Id.* at 110.

153. *In re RegO*, 623 A.2d at 110.

154. *Id.* at 100.

155. *Id.* at 110.

156. *Id.*

157. *In re RegO*, 623 A.2d at 110.

158. *Id.* The court stated that "a trust of long duration is not itself problematic

As a final matter, the court addressed the provision of the Trust Agreement which allowed RegO officers and directors to seek indemnification from the trust, subject to the interim limit, for claims asserted in connection with the propriety of the Purchase Agreement.[160] The parties' views conflicted as to whether the trust assets should provide indemnification for RegO officers and directors, and whether future indemnification payments should be subject to the interim limit.[161] The court held that these "future indemnification claims [were] liabilities that the trust can and should accept [and thus,] legitimately deserve priority [exempting] them from the interim limit."[162] The court supported this holding by reasoning that if directors must give up existing indemnification rights, the innovative dissolution procedures of sections 280 through 282 would be utilized less often.[163] Thus, by holding the way it did, the court felt that it was promoting the goals of the statute.[164]

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when the interests of all foreseeable future claimants are considered, as Section 280(c) indicates they must be." *Id.*

159. *Id.* Another issue in dispute pertained to RegO's purchase of a 10-year contract of indemnity insurance from American International Reinsurance Company Ltd. (AIRCO). *Id.* at 108. Under the policy, RegO would receive $1 million per occurrence and up to $2 million in total per year as indemnity for the amount RegO pays as damages. *Id.* The unexpended portion would be paid to RegO or its successor, if the total payments made had not aggregated $20 million. *Id.* The issue regarding this indemnity policy was "whether, after the Claimants Trust is funded, payments made pursuant to that policy should be limited to amounts permitted by the interim limit." *Id.* The court was unable to determine if the AIRCO policy provided for payments to anyone other than the established trust. *Id.* at 109. However, using the same rationale as applied to the payment of claimants of the same priority, the court held the "Claimants Trust [can]not favor one set of product liability claimants (those whose claim is asserted and adjudicated or settled while the term of the [AIRCO] policy has not expired) over future claimants whose claims will be subject to an interim limit." *Id.* (footnote omitted).

160. *Id.* at 110. Since RegO transferred all of its assets to the claimants trust, RegO was unable to provide indemnification to its officers and directors. RegO adopted the position that if these obligations should arise, then indemnification should be available to the officers and directors through the claimants trust fund. *In re RegO*, No. 11,651, slip op. at 55-56.

161. *In re RegO*, 623 A.2d at 110.

162. *Id.* at 111.

163. *Id.* As a secondary issue, the court addressed the provision of the claimants trust which authorized the trustee in five years to recommend to the court a determination of a date barring the assertion of further claims and ending the trust's obligation to pay any further claims. *Id.* Looking to the language of § 280(c), the court held that a provision addressing the termination of the trust was permitted due to the statutory "command . . . to fix 'security which will be reasonably likely to be sufficient.'" *Id.* (quoting DEL. CODE ANN. tit. 8, § 280(c)). However, focusing

IV. EVALUATION

The overall statutory scheme of sections 280 through 282, coupled with the court's interpretation of it, has a broad-sweeping impact on corporate dissolution law. Mandating that reasonable provisions be made for foreseeable, future claimants, even at the possible expense of present creditors, is a legislative attempt to interpose the policies of products liability law into corporate dissolution law by making a dissolved corporation accountable for such late-maturing claims. The innovative provisions of sections 280 through 282, and the court's decision to be guided by the intent of the drafters, have radical implications for Delaware corporations contemplating dissolution, particularly as a means to escape liability for future products liability claims. Furthermore, the implications of the court's decision may have an impact on how Delaware corporations plan dissolution. Both of these effects will be examined below.

A. *Implications of Delaware's Innovative Statutory Solution to the Problem of Post-Dissolution Claims*

The need to provide protection to individuals with products liability claims maturing subsequent to corporate dissolution has received considerable attention.[165] Moreover, there has been much debate regarding the best way to provide this protection without unduly burdening the process of corporate dissolution.[166] Delaware's innovative statutory scheme, codified at sections 280 through 282, affords the best compromise to harmonize the competing goals of

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on RegO's claims history and actuarial studies, the court held, "[I]n no event could such a termination occur . . . in as little as five years." *Id.* With reservation, the court stated termination of the trust may be appropriate in 10 years. *Id.*

164. *Id.*

165. *See generally* Green, *supra* note 1 (arguing that a statutory solution restricting a corporation's right to dissolve and distribute its assets is the most efficient way to protect late- maturing products liability claimants); Nuhn, *supra* note 1 (advocating legislative action to extend liability so that those who manufacture and distribute injury-causing products can be held liable for claims accruing post-dissolution); Sarlitto, *supra* note 1 (arguing that the recognition of products liability claims at dissolution would be consistent with general principles of corporate law); Wallach, *supra* note 16 (discussing the theories that allow products liability claimants to recover against a dissolved corporation or its former shareholders).

166. Numerous law review articles have been written analyzing whether the problem of post-dissolution claims are better handled by a judicial approach or by legislative reform. *See, e.g.*, Connolly, *supra* note 3 (discussing the differences between legislative and judicial reform); Green, *supra* note 1 (asserting that a statutory solution is preferable to a judicial solution).

product liability and corporate dissolution law. The alternative mechanism provides corporate flexibility; promotes certainty and predictability for the corporation, its directors, and shareholders; and may facilitate the transferability of assets. In addition, the statutory scheme recognizes late-maturing product liability claimants as long-tail creditors with legitimate claims, prevents the corporation from escaping the costs of injuries resulting from its products, and promotes the manufacture and distribution of safer products.

However, the alternative methods of statutory dissolution do not equally serve the competing goals of product liability and corporate dissolution law. A comparison of how these goals are served by the elective provisions of sections 280 and 281(a) and the default provision of section 281(b) will be briefly examined.

1. The Elective Provisions Versus the Default Provision as a Means of Promoting Product Liability Goals

The primary goal of products liability law is to impose liability on a manufacturer for the costs of injuries that result from the use of its defective product.[167] As a result of this responsibility for the cost of injuries, manufacturers may be encouraged to make safer products.[168] While both of Delaware's statutory mechanisms governing voluntary dissolution promote the goal of holding a manufacturer responsible for compensating those injured by its defective products,

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167. There are a number of policy justifications for holding a manufacturer liable for the costs of injuries resulting from a defective product. First, the public interest in health and safety is better served by protecting the public from defective products. Second, since it is the manufacturer who chooses to put the product in the market and earn a profit thereby, it would be unjust to allow a manufacturer to control the products he places in the market and to benefit without imposing any responsibility for resulting injuries. Finally, the manufacturer is considered an expert in his field and, therefore, is better able to determine the potential dangers associated with product use, to estimate costs, and to spread the cost among consumers. W. Edward Sell, *Successor Corporation's Liability for Defective Products of its Transferor— The Product Line Exception*, 4 J.L. & COM. 65, 76-79 (1984).

168. *See* Connolly, *supra* note 3, at 1315. Connolly discusses the Model Business Corporation Act's survival remedy which holds a corporation liable for pre-and post-dissolution claims occurring five years after publication of notice of dissolution. Connolly warns that dissolving corporations "must not relent in the care taken to avoid even those latent defects that might not show up for a number of years." *Id.* This same rationale can be applied to Delaware's alternative statutory mechanism for voluntary dissolution.

the goal of products liability law is better served by the elective procedure of sections 280 and 281(a).[169]

There are two safeguards built into the dissolution procedures of sections 280 and 281(a) which account for its superiority. First, the dissolving corporation is required to petition[170] the court of chancery which serves as an arbiter and makes an impartial judgment regarding the adequacy of the amount and form of security that is reasonably likely to compensate foreseeable, unknown future claimants.[171] This mechanism also allows for the interests of foreseeable, unknown future claimants to be represented by a court-appointed guardian *ad litem*.[172] These two safeguards are more likely to ensure that the dissolved corporation bears the just costs of injuries sustained by foreseeable, unknown future claimants.

In contrast, the default provision of section 281(b) places the responsibility of making provisions reasonably likely to compensate foreseeable, unknown future claimants in the hands of the dissolved corporation's directors.[173] This mechanism creates the potential for a conflict of interest, since directors of a dissolved corporation may be more concerned with the goals of dissolution, namely, "the quick redeployment of the firm's capital" and "expeditious distribution of the assets to shareholders,"[174] than with compensating future claimants. Corporate directors may hardly be in the position to make an impartial determination of provisions reasonably likely to compensate foreseeable, unknown future claimants. Notwithstanding the fact that claimants can challenge the sufficiency of the provisions providing for compensation of their claims, they must do so at their own expense, and thus the default provision is more likely to put the foreseeable, future claimants' right to compensation in a precarious position.

2. The Elective Provisions Versus the Default Provision as Means of Promoting Corporate Dissolution Goals

One of the goals of corporate dissolution law is to provide certainty and finality for corporations and their shareholders upon

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169. Both mechanisms for voluntary dissolution require the corporation to make reasonable provisions providing for the compensation of foreseeable, unknown future claimants. *See* DEL. CODE ANN. tit. 8, §§ 280(c)(2), 281(b) (1991).

170. *Id.* § 280(c).

171. *See In re RegO*, 623 A.2d at 109.

172. DEL. CODE ANN. tit. 8, § 280(c)(2) (1991).

173. *Id.* § 281(b).

174. Sarlitto, *supra* note 1, at 1061.

dissolution.[175] In Delaware, the goals of corporate certainty and finality are achieved at the expiration of the statutory three year winding-up period.[176] However, the alternative statutory provisions for dissolution do not provide shareholders with the same degree of certainty and finality, particularly in regard to their ability to retain any distribution of corporate assets.[177] Both schemes provide shareholders, who have received a distribution of the assets, with the certainty that their liability for a claim against the corporation will not exceed the lesser of their *pro rata* share or the amount distributed to them.[178] However, only shareholders of a dissolved corporation which followed the elective provisions of sections 280 and 281(a) are guaranteed the security of finality, since liability will not be imposed upon these shareholders for any claim against the corporation not instituted prior to the expiration of the three year winding-up period.[179]

Unlike the elective scheme, the default provision of section 281(b) does not restrict the time period in which corporate creditors can seek satisfaction of their claims from shareholders who received a distribution of the dissolved corporation's assets,[180] and so these shareholders are potentially at risk for liability to corporate creditors indefinitely. Therefore, the default provision is less likely to promote the goals of certainty and finality with respect to shareholders' involvement in a dissolved corporation.

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175. *See Pacific Scene*, 758 P.2d at 1187. The court noted that:

> [the] finality interests of a dissolving corporation and those of its shareholders are not synonymous, insofar as post[-]dissolution claims against shareholders "do[ ] not prevent the final termination of an entity, as does the possibility of delayed claims against the dissolved corporation" . . . , shareholders nonetheless possess an important statutory interest in the final and certain termination of their involvement with the affairs of a dissolving corporation.

Id. (citations omitted).

176. DEL. CODE ANN. tit. 8, § 278 (1991).

177. *See* Sarlitto, *supra* note 1, at 1065. "[T]he speed and certainty with which any surplus of capital of a dissolving corporation should be returned to shareholders . . . promotes efficient redeployment of funds." *Id.* Although "[s]hareholders should be able to effect redeployment decisions undeterred by fear that distributed assets will be reclaimed, . . . [e]xpeditious distribution to shareholders . . . cannot justify the law's treatment of contingent products claims." *Id.*

178. DEL. CODE ANN. tit. 8, § 282(a) (1991).

179. *Id.* § 282(b).

180. *See id.* Section 282(b) speaks only to shareholders of corporations whose assets "were distributed pursuant to § 281(a)" and does not impose time limitations on claims against corporations that are covered by the default provisions of § 281(b). *Id.*

Another goal of corporate dissolution law is to facilitate the transfer of corporate assets.[181] To promote this goal, "a bona fide purchaser of the dissolving corporation's assets for adequate consideration acquires those assets free of any of the selling corporation's debts."[182] However, courts have carved out exceptions to this traditional corporate law rule, particularly to accommodate post-dissolution products liability claims.[183]

The use of successor liability as a remedy for post-dissolution products liability claims has been widely criticized.[184] The major criticism of successor liability is that it has an adverse impact on the "free availability and transferability" of corporate assets.[185] In addition, "[t]he contingency of sole liability for a defective product manufactured by the predecessor corporation makes it almost impossible . . . to determine an accurate purchase price for the corporation being acquired."[186] The fear of this contingent liability can have a chilling effect on "the market for the sale of corporate assets as part of dissolution."[187] Recognizing that "asset transfers are important to the health of the economy as they foster economic efficiency and productivity,"[188] legal scholars advocate the need for a legislative solution to the problem of post-dissolution products liability claims.[189]

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181. Connolly, *supra* note 3, at 1294.

182. *Id.* at 1282. This concept is known as the "non-assumption" rule. *Id.* The rule provides certainty for acquisition planners as to which debts of the predecessor will be inherited by the successor corporation. *Id.* at 1294.

183. *See supra* text accompanying notes 35-37.

184. *See* Aylward & Aylward, *supra* note 35 (discussing the shortcomings of successor liability and advocating that the predecessor be given responsibility for products liability suits); Green, *supra* note 1 (discussing the superiority of statutory reform over the use of successor liability as a solution to the post- dissolution products liability dilemma).

185. Sell, *supra* note 167, at 79 (quoting Ray v. Alad Corp., 560 P.2d 3, 5 (Cal. 1977)). *See* Connolly, *supra* note 3, at 1307-11.

186. Sell, *supra* note 167, at 79. Sell adds that the determination of a purchase price is based on "some educated guess on the liability expenses that will arise from defective products that may have been manufactured by the predecessor." *Id.* at 80.

187. *In re RegO*, 623 A.2d at 96. The purchase of corporate assets "could easily become 'traps for the unwary' where an acquiring corporation pays a substantial sum only to acquire the 'potentially enormous' unknown products liability of its predecessor." Hunt, *supra* note 1, at 596 (footnotes omitted).

188. Connolly, *supra* note 3, at 1294.

189. *See, e.g.*, Green, *supra* note 1. Green proposes a statute which is aimed at the interests of long-tail products liability claimants. Under Green's proposal, a manufacturer must make adequate provisions for post-dissolution products liability claimants that are "equivalent to the protection that would have existed if the

The issue of whether Delaware's alternative mechanism for voluntary dissolution puts an end to the use of successor liability, in the absence of the express assumption of the predecessor's liability, has not come before the Delaware courts.[190] In the case of products with latent defects discovered only after the transfer of assets, limiting the use of successor liability to situations where the purchaser expressly agrees to assume the predecessor's liability is in accord with Delaware's elective provisions for dissolution.[191] The safeguards of a court-approved amount and form of security reasonably likely to compensate the claims of foreseeable, unknown future claimants, as well as the appointment of a guardian *ad litem*, seem to ensure that an adequate remedy is available for future claimants. Allowing these claimants to sue under the additional theory of successor liability not only would hinder the transfer of corporate assets, but would also award "an unwarranted windfall of additional defendants" which "encourages costly litigation."[192] Therefore, successor liability, with the exception of the express assumption of the predecessor's liability, should not be a viable remedy for foreseeable, unknown future claimants whose interests are protected by the elective provisions of sections 280 and 281(a).

The default provision for dissolution under section 281(b) does not provide the same safeguards as the elective provisions.[193] Rather,

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corporation had continued to carry on its business . . . ." *Id.* at 51. *See* Connolly, *supra* note 3, at 1315 (concluding that § 14.07 of the Revised Model Business Corporation Act provides a superior solution to the problem of post-dissolution products liability claims than the liberal use of successor liability).

190. However, Chancellor Allen did note that if "the corporation law does not treat [post-dissolution claims] responsibly, it can be expected that other legal doctrines, such as successor liability doctrines, will be stretched and shaped to address them." *In re RegO*, 623 A.2d at 96.

191. DEL. CODE ANN. tit. 8, §§ 280-281(a) (1991). Under this situation, the selling company only has an obligation under the statutory provisions to provide for claims that are likely "to arise or become known to the corporation or successor entity prior to the expiration of applicable statutes of limitation." *Id.* §§ 280(c)(2), 281(b). Therefore, no provisions need to be made for products liability claimants who are injured by a latent defect not known to the corporation prior to the transfer of assets.

192. Michael G. Kadens, *Practitioner's Guide to Treatment of Seller's Products Liabilities in Assets Acquisitions*, 10 U. TOL. L. REV. 1, 17-18 (1978). Kadens states, "Not only will more defendants be involved in the overall proceeding (including pre-trial and discovery proceedings), but also lengthy battles will be fought to determine each defendant's respective obligations, as well as those of their insurers." *Id.* at 18.

193. *Compare* DEL. CODE ANN. tit. 8, §§ 280-281(a) (1991) *with id.* § 281(c).

the determination of provisions reasonably likely to compensate foreseeable, future claimants may possibly be made by the same director who is also negotiating the sale of the remaining corporate assets. In this situation, the provisions may be inadequate because it is unlikely that the director will be able to make an impartial determination of provisions reasonably likely to compensate these claimants. Despite the fact that the claimants can hold the directors[194] and shareholders liable,[195] the remedy of successor liability may still be needed to ensure adequate protection of claimants' interests, notwithstanding the negative impact successor liability has on the transfer of assets. Another possible result, however, is that if successor liability is not imposed when the provisions are reasonably sufficient to compensate foreseeable, unknown future claimants, the successor may pressure the seller into making sufficient provisions for these claimants prior to finalizing a deal for acquiring assets.[196] The viability of successor liability in light of the alternative mechanism for corporate dissolution, however, remains to be decided by the Delaware courts.

B. Implications for a Dissolution Plan of a Delaware Corporation

Regardless of whether Delaware corporations choose dissolution pursuant to either the elective procedure set forth by sections 280 and 281(a), or the default provision of section 281(b), corporations are now obligated to make reasonable provisions that are sufficient to compensate foreseeable, unknown future claimants. This can be achieved either through a court-approved plan or a plan created by the corporation itself. In either case, the recognition of foreseeable, unknown future claimants at the time of dissolution no longer shields the corporation and shareholders from the costs of uncertain claims which had previously been borne by these unknown and dispersed consumers.[197] Furthermore, shifting the burden of these claims to

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194. *See id.* § 281(c) (implying that liability may be imposed on the director if the company or its successor did not comply with subsections (a) or (b)).

195. *Id.* § 282(a) (implying that liability may be imposed on shareholders of companies that chose not to distribute assets pursuant to §§ 281(a) or (b)).

196. From a practical standpoint, the successor's ability to pressure the seller will be limited by the available information regarding the seller's product liability history. Often, the successor will not have access to such reliable information, particularly if the product is new and lacks a track record. *See* Connolly, *supra* note 3, at 1296-97.

197. *See* Sarlitto, *supra* note 1, at 1063.

the dissolving corporation will certainly lessen the corporation's incentive to dissolve.[198]

Assuming that a corporation still chooses dissolution under either provision, the court's decision in *In re RegO* presents to corporate officers and directors a number of concerns that should be considered when devising a dissolution plan. Under either dissolution mechanism, a determination must be made regarding the amount of security or provisions that are "reasonably likely to be sufficient to provide compensation for claims" of foreseeable, unknown future claimants, either by corporate directors pursuant to the default mechanism of section 281(b), or by the corporate directors pending approval by the court under the elective procedures of sections 280 and 281(a).[199] The only clear guidance the court's decision gives regarding the determination of what is "reasonably likely to be sufficient to provide compensation for claims" of foreseeable, unknown future claimants is in the situation where a corporation elects to dissolve pursuant to the elective provisions and transfers all of its existing assets in trust for these claimants.[200] Under this scenario, by providing all of its assets as security, a corporation satisfies the "reasonably likely to be sufficient" requirement even if all the assets are unlikely to compensate all foreseeable, unknown future claimants.[201] Consequently, the claimants' ability to exercise a valid judgment against the corporation remains unchanged by the dissolution.[202] Although not specifically addressed by the court, this same rationale can arguably be applied when a dissolved corporation following section 281(b) dedicates all of its assets to provide for foreseeable, unknown future claimants.

The court does not, however, provide much guidance to a corporation dissolving under either mechanism but not dedicating all of its assets for foreseeable, unknown future claims. While it is true that the statutory scheme designates the court as the arbiter of this determination,[203] there is a temporal difference between the two

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198. *Id.*

199. *In re RegO*, 623 A.2d at 97-98.

200. *Id.* at 102, 104.

201. *Id.*

202. *Id.* at 104.

203. *In re Rego*, 623 A.2d at 109. The court noted that in its role as arbiter, "due respect for the expertise and authority of corporate directors does not dictate deference to their judgment on the question of what adequate protections to various competing classes of claimants on dissolution." *Id.*

dissolution schemes regarding when the court becomes the arbiter. Under the elective procedure, the court serves as arbiter upon petition to approve a security plan for dissolution,[204] while under the default provision the court will serve as arbiter only if a claimant challenges the sufficiency of the plan.[205] The court suggests in its opinion that, as arbiter, it will be guided by legislative intent to ensure that the sufficiency of the provisions and arrangement of a security plan extend the same protection to foreseeable, unknown future claimants and present creditors of the same priority.[206] Thus, directors would be wise to devise a security arrangement reflecting this same, often elusive, legislative spirit.

Regardless of the statutory scheme a corporation planning dissolution selects, the court's decision radically affects the nature by which a corporation must pay its creditors. Traditionally, present creditors were paid in full,[207] and in the event of insolvency, corporate officials were permitted to choose from among the corporation's creditors who would be paid in preference to others.[208] However, the default provision of section 281(b) precludes a corporation from making preferential payments when it has insufficient funds to pay present creditors and "make reasonable provisions to pay all contingent and future claims" of the same priority.[209] Rather, the corporation must pay these creditors ratably.[210]

In contrast, under the elective provisions of sections 280 and 281(a), a dissolved corporation need not be concerned with ratable payments to all claimants of the same priority unless the corporation is unable to both pay its various claimants and fund the court ordered security for foreseeable, unknown future claimants.[211] A dissolution plan that has insufficient funds to assure compensation to all foreseeable, unknown future claimants will not necessarily preclude directors of a dissolved corporation from paying present creditors in full.[212] The court noted that it need only consider the legislative policy of section 281(a), (b), and (e) when determining whether to

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204. *See* DEL. CODE ANN. tit. 8, § 280(c)(2) (1991).
205. *See id.* § 281(b).
206. *In re RegO*, 623 A.2d at 107.
207. *Id.* at 106.
208. Asmussen v. Quaker City Corp., 156 A. 180, 181 (Del. Ch. 1931).
209. *In re RegO*, 623 A.2d at 106.
210. *Id.*
211. *Id.* at 107.
212. *Id.* at 108.

approve the security arrangement of the dissolution plan[213] and expressed no view regarding whether a corporation, following the elective procedure, could prefer certain present corporate creditors over others.[214]

While certainly not conclusive on all the issues raised by Delaware's innovative dissolution scheme, *In re RegO* presents some choices and guidelines to corporations planning dissolution. It may also serve as a precautionary statement to those corporations seeking to escape liability through dissolution.

V. CONCLUSION

Delaware's alternative statutory mechanism for voluntary dissolution is the first of its kind to address the problem of post-dissolution products liability claims by mandating that reasonable provisions be made for foreseeable, unknown future claimants. While both the elective provisions of sections 280 and 281(a) and the default provision of section 281(b) provide the directors of corporations planning dissolution with the flexibility to choose the provisions which they judge to be most suitable, the elective provisions appear to offer the best solution to the competing interests of directors and shareholders of a dissolved corporation and those of foreseeable, unknown future claimants. Compliance with section 280 and 281(a) offers directors protection from personal liability to claimants of the dissolved corporation, while shareholders will not be liable for any claim against the corporation which is not begun prior to the expiration of the three year winding-up period. Thus, while the corporate goals of certainty and predictability are achieved, whether these provisions facilitate the transfer of corporate assets greatly depends on the viability of successor liability.

This statutory scheme also promotes the goals of products liability law. Late-maturing products liability claimants, whose claims are likely to arise or become known to the corporation, are protected since the statutory mechanism mandates that reasonable provisions be made to compensate them. As a result, the manufacturer continues

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213. *In re RegO*, 623 A.2d at 108.

214. *Id.* at 108 n.34. The court's decision in *In re RegO* does, however, provide corporate directors with some examples of how "priority" will be used under the elective provisions. For example, indemnification payments from a security arrangement to officers and directors arising out of any litigation challenging the sale of corporate assets is given priority over the claims of product liability claimants. *Id.* at 110-11.

to bear the responsibility for the costs of injuries sustained by his products, thus encouraging the manufacturer to make safe products.

With respect to a Delaware corporation's plan for voluntary dissolution, directors should be guided by the procedures set forth in sections 280 through 282. Although all the questions as to the sufficiency of the security arrangement for foreseeable, unknown future claimants and the priority scheme for paying creditors have yet to be answered, the dissolution plan should at least reflect the legislative intent of these provisions which extend protection to the interests of these claimants. The court seemed willing to stretch the application of the elective procedures in order to encourage a corporation planning dissolution to utilize these innovative provisions, but was cautious not to compromise the rights of foreseeable, unknown future claimants.

Rosemary Reger Schnall