

# Commentary from the Bar

## THE 1987 DELAWARE LAW OF VOLUNTARY CORPORATE DISSOLUTION

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### I. INTRODUCTION

Delaware has recently enacted significant amendments to its law of voluntary corporate dissolution.<sup>1</sup> These amendments provide, for the first time, detailed procedures whereby a dissolved corporation may settle its claims and distribute its remaining assets to its shareholders.<sup>2</sup> When the dissolved corporation elects to follow them, these procedures will provide substantial safeguards to creditors and will allow the directors to distribute the remaining assets without incurring personal liability to any unpaid claimants of the dissolved corporation. When these procedures are observed, the new law also limits the liability of stockholders to those unpaid claimants.

The major substantive changes are found in revised sections 280, 281, and 282 of the Delaware General Corporation Law (DGCL).<sup>3</sup> Under revised section 280, a dissolved corporation may give notice

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1. DEL. CODE ANN. tit. 8, §§ 274-276, 278-285 (Interim Supp. 1987). A voluntary dissolution of a Delaware corporation occurs when the stockholders vote to dissolve the corporation in accordance with the provisions of DEL. CODE ANN. tit. 8, § 275 (1983 & Interim Supp. 1987).

2. Prior to the new amendments, a dissolved corporation settled claims and distributed assets according to the procedures in §§ 278, 279, and 281 of title 8. See DEL. CODE ANN. tit. 8, § 278 (1983) (amended by DEL. CODE ANN. tit. 8, § 278 (Interim Supp. 1987)) (dissolved corporations shall be continued for three years after dissolution for the limited purposes of enabling the corporation to prosecute and defend actions and to wind up its affairs); *id.* § 279 (on application of a creditor or stockholder, the court of chancery may appoint a trustee or receiver to wind up the affairs of the corporation); *id.* § 281 (after payment of allowances, expenses and costs, and satisfaction of liens, the trustees or receivers shall pay the other debts of the corporation if there are sufficient funds; if not, the funds shall be distributed ratably among all the creditors who prove their debts in a manner provided by the court. Any funds remaining shall be distributed among the stockholders.).

3. DEL. CODE ANN. tit. 8, §§ 280-282 (Interim Supp. 1987).

of its dissolution to both known and potential claimants of the corporation, requesting that they present their claims against the corporation within a specified time.<sup>4</sup> Revised section 280 also provides a procedure for resolving disputed claims and for handling contingent claims and potential claims involving unknown claimants.

Revised section 281(a) provides for the payment of all claims as resolved in accordance with section 280, and for the payment or making of provisions for all other obligations of the dissolved corporation.<sup>5</sup> If there are assets remaining, they are then distributed to the dissolved corporation's stockholders.<sup>6</sup> Once these distributions have been made, the directors of the dissolved corporation are absolved from any personal liability to unpaid claimants of the corporation.<sup>7</sup> Furthermore, the stockholders to whom such distributions have been made will not be liable for unpaid claims brought against the corporation after the expiration of the three year time period prescribed in revised section 278.<sup>8</sup> Even if such a claim is brought before the expiration of the section 278 time period, each stockholder will be liable for no more than the lesser of his pro rata share of the claim or the amount distributed to him in dissolution.<sup>9</sup>

Moreover, revised sections 281 and 282 also include provisions for limiting the liability of directors and stockholders of dissolved corporations, even when the dissolved corporation has not elected to follow the procedures described in section 280(a).<sup>10</sup>

These amendments to the General Corporation Law are unique to Delaware. While the new Delaware law is in some respects similar to the Revised Model Business Corporation Act (RMBCA),<sup>11</sup> there

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4. *Id.* § 280(a)(1)c. Prior to the 1987 amendments, the only notice provision for creditors was in Court of Chancery Rule 158 (notice must be sent to creditors on sale of assets). *See* DEL. CH. CT. R. 158 (1987). *See infra* notes 58-88 and accompanying text (detailed discussion of revised § 280).

5. DEL. CODE ANN. tit. 8, § 281(a) (Interim Supp. 1987).

6. *Id.*

7. *Id.* § 281(c).

8. *Id.* § 282(b).

9. *Id.* § 282(a).

10. *Id.* §§ 281, 282. Section 281(c) expressly provides that corporate directors or other persons governing a dissolved corporation shall not be personally liable to claimants provided they comply with either subsection (a) or (b) of § 281. Since subsection (b) of § 281 is specifically directed to those who have not followed the procedure of § 280, it is clear that the personal protection afforded directors under this section applies whether or not the directors have complied with § 280(a). *See* DEL. CODE ANN. tit. 8, § 281(a), (b), & (c) (Interim Supp. 1987).

11. *See generally* REV. MODEL BUSINESS CORP. ACT ch. 14 (1984).

are substantial differences.<sup>12</sup> Of the two, the Delaware law provides greater protection from liability to directors and stockholders of dissolved corporations, as well as greater procedural safeguards to creditors.<sup>13</sup>

## II. CHANGES IN THE DELAWARE STATUTE

The statutory changes to the Delaware law of voluntary corporate dissolution are represented by amendments to several sections of subchapter X of the DGCL.<sup>14</sup> Subchapter X, entitled "Sale of Assets, Dissolution and Winding Up," now includes sections 271 through 285.<sup>15</sup> Sections 274 through 276, and 278 through 285 have been amended.<sup>16</sup> Sections 271, 272, and 273, entitled, respectively, "Sale, lease or exchange of assets; consideration; procedure," "Mortgage or pledge of assets," and "Dissolution of joint venture corporation having 2 stockholders," are unchanged.<sup>17</sup> Section 277, requiring "[p]ayment of franchise taxes before dissolution," is also unchanged.<sup>18</sup> In connection with the revisions to subchapter X, old sections 283 and 284 have been renumbered, respectively, sections 284 and 285.<sup>19</sup> The substance of renumbered sections 284 and 285, which, respectively, concern "revocation or forfeiture of charter; proceedings" and "dissolution or forfeiture of charter by decree of court; filing," remains unchanged from the prior law.<sup>20</sup> In addition, section 311,<sup>21</sup> which provides that a corporation's shareholders have

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12. See *infra* notes 22, 25, 32, 44, 67, 71, 96 & 106 and accompanying text (discussion of differences).

13. See *infra* notes 67, 71, 96 & 106.

14. DEL. CODE ANN. tit. 8, §§ 271-284 (1983) (amended by DEL. CODE ANN. tit. 8, §§ 274-276, 278-285 (Interim Supp. 1987)).

15. DEL. CODE ANN. tit. 8, §§ 271-285 (1983 & Interim Supp. 1987).

16. DEL. CODE ANN. tit. 8, §§ 274-276, 278-285 (Interim Supp. 1987).

17. DEL. CODE ANN. tit. 8, §§ 271-273 (1983).

18. *Id.* § 277. The Secretary of State will refuse to accept for filing dissolution papers if all corporate taxes have not been paid. 2 R. BALOTTI & J. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 10.15 n.174 (Supp. 1987).

19. DEL. CODE ANN. tit. 8, §§ 284, 285 (Interim Supp. 1987).

20. *Id.* Amended § 284 provides the court of chancery with jurisdiction to revoke or forfeit a corporate charter for "abuse, misuse or nonuse" of corporate power. DEL. CODE ANN. tit. 8, § 284(a) (Interim Supp. 1987). Additionally, the court of chancery may take steps to insure proper wind up of the corporation's affairs. *Id.* § 284(b). The right to exact a forfeiture of a corporate charter for nonuse also existed under the common law. See, e.g., *Morford ex rel. Gray v. Trustees of Middletown Academy*, 25 Del. Ch. 58, 65, 13 A.2d 168, 171 (1940).

21. DEL. CODE ANN. tit. 8, § 311 (1983).

up to approximately three years to revoke a voluntary dissolution,<sup>22</sup> has not been amended.

#### A. Section 274

Section 274 is now entitled "Dissolution before issuance of shares or beginning of business; procedure."<sup>23</sup> Under the prior law, only a corporation which had not begun the business for which it was organized could be dissolved under the simplified procedure provided in section 274.<sup>24</sup> This simplified procedure is now also available to a corporation which has begun the business for which it was organized, but has not issued any stock.<sup>25</sup> Such a corporation, like a corporation which has not begun business, can now be dissolved by the action of a majority of the incorporators or directors, without the necessity of first issuing stock and then obtaining the approval of the stockholders.<sup>26</sup> Section 274 was further amended to provide that, if the corporation has begun business but has not issued stock, the certificate of dissolution shall state that all debts of the corporation have been paid.<sup>27</sup>

#### B. Section 275

Section 275, now entitled "Dissolution generally; procedure," describes the dissolution procedures of general application.<sup>28</sup> The amendments to this section retain the substantive requirements of

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22. *Id.* § 311(a). In addition, § 311(b) also provides that the revocation of dissolution shall be effective at the time a certificate of such revocation is filed and approved by the Delaware Secretary of State. Section 14.04(e) of the RMBCA, on the other hand, states that the revocation shall relate back to the effective date of the dissolution so that it shall be as though the dissolution had never occurred. Section 14.04(a) of the RMBCA also allows shareholders only 120 days to revoke the dissolution. Compare DEL. CODE ANN. tit. 8, § 311 (1983) with REV. MODEL BUSINESS CORP. ACT § 14.04 (1984).

23. DEL. CODE ANN. tit. 8, § 274 (Interim Supp. 1987).

24. DEL. CODE ANN. tit. 8, § 274 (1983) (amended by DEL CODE ANN. tit. 8, § 274 (Interim Supp. 1987)).

25. DEL. CODE ANN. tit. 8, § 274 (Interim Supp. 1987). This change incorporates the procedure suggested by § 14.01 of the RMBCA, and in so doing avoids the necessity of completing the formation of a corporation in order to dissolve it. See 3 MODEL BUSINESS CORP. ACT ANN. 1453 (Supp. 1987).

26. DEL. CODE ANN. tit. 8, § 274 (Interim Supp. 1987).

27. *Id.* Though § 274 is now applicable to corporations that have begun business but have not issued stock, application of that section is limited by the requirement that debts of the corporation be satisfied.

28. DEL. CODE ANN. tit. 8, § 275 (1983 & Interim Supp. 1987).

the prior law by providing that a dissolution may be authorized in either of two ways.<sup>29</sup> The first allows a majority of the board of directors to adopt a resolution calling for the dissolution of the corporation at a meeting of the whole board called for that purpose.<sup>30</sup> This resolution may then be adopted at a stockholders meeting by a majority of the outstanding stock of the corporation entitled to vote.<sup>31</sup> The second method of dissolution dispenses with the requirement of action by the directors and authorizes the dissolution of the corporation by the written consent of all of the stockholders entitled to vote.<sup>32</sup> Subsections (b) and (c) of section 275 have been amended by deleting from those subsections the description of the certificates to be filed when the dissolution is approved.<sup>33</sup> A new subsection (d) has been added describing the form and content of a uniform certificate of dissolution.<sup>34</sup>

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29. *Id.* § 275(a)-(c).

30. DEL. CODE ANN. tit. 8, § 275(a) (1983). See *Brinati v. TeleSTAR, Inc.*, No. 8118, slip op. at 6 (Del. Ch. Sept. 3, 1985), reprinted in 11 DEL. J. CORP. L. 869, 894 (1986) (absent unanimous consent of all stockholders entitled to vote on dissolution, § 275 requires action by directors to initiate the dissolution). See also *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 n.8 (Del. 1985) (a board of directors is not a passive instrumentality in the area of corporate dissolution, where director action is a prerequisite to subsequent change).

31. DEL. CODE ANN. tit. 8, § 275(b) (Interim Supp. 1987). In a joint venture corporation with only two stockholders, however, the corporation may be dissolved under DEL. CODE ANN. tit. 8, § 273 (1983) without a majority vote of the shareholders. See *In re Arthur Treacher's Fish & Chips*, No. 5357 (Del. Ch. Oct. 16, 1980). The requirement of stockholder approval under § 275 also depends on whether director action is taken pursuant to a plan of liquidation. See *Bacine v. Scharffenberger*, Nos. 7862 & 7866, slip op. at 11-12 (Del. Ch. Dec. 11, 1984), reprinted in 10 DEL. J. CORP. L. 603, 608-09 (1985) (denying injunction against sale of subsidiary corporations since this sale was not pursuant to the plan of liquidation also proposed by the directors).

32. DEL. CODE ANN. tit. 8, § 275(c) (Interim Supp. 1987). Unlike § 275 of the DGCL, § 14.02 of the RMBCA does not provide for the dissolution of a corporation by the written consent of all the shareholders entitled to vote, without any prior action by the directors. Compare DEL. CODE ANN. tit. 8, § 275(c) (Interim Supp. 1987) with REV. MODEL BUSINESS CORP. ACT § 14.02 (1984). Under special circumstances, such as a conflict of interest, the RMBCA does not require the directors to recommend dissolution to the shareholders. Instead, the directors may submit a proposal for dissolution to the shareholders without any affirmative recommendation. REV. MODEL BUSINESS CORP. ACT § 14.02(b)(1) (1984).

33. DEL. CODE ANN. tit. 8, § 275(b), (c) (1983 & Interim Supp. 1987).

34. DEL. CODE ANN. tit. 8, § 275(d) (Interim Supp. 1987). This new subsection eliminates some of the repetitive requirements applied to dissolutions, incorporating them in a clearer, generally applicable manner. The uniform certificate must set forth the name of the corporation, the dissolution authorization date, that the dissolution

Section 275 has further been amended by adding subsection (e), which permits the board of directors or other governing body of the corporation to abandon a proposed dissolution without further stockholder or member action.<sup>35</sup> This power of the directors or other governing body, based on the comparable provision in section 271(b),<sup>36</sup> must be provided for in the resolution authorizing the proposed dissolution.<sup>37</sup>

Subsection (f)<sup>38</sup> has also been added, providing that the corporation shall be dissolved when a certificate of dissolution becomes effective in accordance with section 103.<sup>39</sup> This subsection simplifies the statute by replacing the redundant application of section 103 to each of the prior subsections (b) and (c)<sup>40</sup> with a single statement applicable to the entire section.

### C. Section 276

Section 276, now entitled "Dissolution of nonstock corporation; procedure," has been amended by deleting the references to "non-profit" and "not for profit."<sup>41</sup> A new subsection (b) has also been added, providing for the dissolution, under procedures similar to those of amended section 274, of a nonstock corporation which has not commenced the business for which it was organized.<sup>42</sup>

has been authorized in accordance with § 275(a) and (b) or in accordance with § 275(c), the names and addresses of the directors and officers of the corporation, and must be in accordance with § 103.

35. DEL. CODE ANN. tit. 8, § 275(e) (Interim Supp. 1987). This differs from the prior version, under which dissolution was effectively finalized upon appropriate authorization by the stockholders and satisfaction of the § 103 requirements. DEL. CODE ANN. tit. 8, § 275(a)-(c) (1983) (amended 1987).

36. DEL. CODE ANN. tit. 8, § 271(b) (1983). Section 271(b) states:

Notwithstanding authorization or consent to a proposed sale, lease or exchange of a corporation's property and assets by the stockholders or members, the board of directors or governing body may abandon such proposed sale . . . without further action by the stockholders or members

*Id.* Unlike § 275, § 271 does not require an affirmative authorization for the directors to abandon the proposed transaction. See 2 E. FOLK, R. WARD & E. WELCH, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 271.1 (2d ed. 1987).

37. DEL. CODE ANN. tit. 8, § 275(e) (Interim Supp. 1987).

38. *Id.* § 275(f).

39. See DEL. CODE ANN. tit. 8, § 103 (1983).

40. DEL. CODE ANN. tit. 8, § 275(b), (c) (1983) (amended 1987).

41. DEL. CODE ANN. tit. 8, § 276 (Interim Supp. 1987).

42. DEL. CODE ANN. tit. 8, § 276(b) (Interim Supp. 1987). Amended § 276(b)

## D. Section 278

Section 278 remains entitled "Continuation of corporation after dissolution for purposes of suit and winding up affairs" and still provides for dissolved or expired corporations to be continued for an additional three years or for such longer period as the court of chancery shall determine.<sup>43</sup> The purposes of this continued existence are limited to enabling the corporation to prosecute and defend actions, and to wind up its affairs.<sup>44</sup> The amendment to section 278 also incorporates a provision previously found in section 282,<sup>45</sup> that any action, suit or proceeding begun by or against the corporation, during the period described in section 278, shall not abate due to the dissolution of the corporation.<sup>46</sup> The corporation shall continue its existence, beyond the expiration of the period described in section 278, *solely* for the purpose of resolving such an action, suit or proceeding.<sup>47</sup>

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provides that the steps in dissolving a corporation which has not yet begun the business for which it was formed or which has not issued capital stock are to be taken by a majority of the governing body, or if none, a majority of the incorporators. *Id.* Amended § 274 provides that such steps be taken by a majority of the incorporators, or, if directors were named in the certificate of incorporation or were elected, by a majority of the directors. DEL. CODE ANN. tit. 8, § 274 (Interim Supp. 1987).

43. DEL. CODE ANN. tit. 8, § 278 (Interim Supp. 1987). *See also* Smith-Johnson S.S. Corp. v. United States, 231 F. Supp. 184, 186 (D. Del. 1964) (holding that prior version of § 278 represented legislative policy that all suits be brought by or against a corporation within three years following dissolution but that it was not a statute of limitations per se. Nonetheless, legislative policy, by way of analogy, justified application of statute of limitations decisions). *Cf. infra* notes 48-51 and accompanying text (comparing the remedy under § 279 if § 278 is unavailable).

44. *See* Addy v. Short, 47 Del. 157, 163, 89 A.2d 136, 139 (1952) (construing prior statute); McBride v. Murphy, 14 Del. Ch. 242, 249, 124 A. 798, 801 (1924), *aff'd*, 14 Del. Ch. 457, 130 A. 283 (1925) (construing predecessor statute) (holding that following a dissolution the only business that may be conducted is that which is "incidental and necessary" to the wind up). In contrast to the three year period provided in section 278, the RMBCA provides that claims against a dissolved corporation are barred after five years, so long as proper notice was provided by the dissolved corporation. *Compare* DEL. CODE ANN. tit. 8, § 278 (Interim Supp. 1987) with REV. MODEL BUSINESS CORP. ACT § 14.07 (1984).

45. DEL. CODE ANN. tit. 8, § 282 (1983) (repealed 1987).

46. DEL. CODE ANN. tit. 8, § 278 (Interim Supp. 1987). *See* Melrose Distillers, Inc. v. United States, 359 U.S. 271 (1959) (construing prior version of § 278 and holding that prosecution would not be halted by the dissolution of a corporation following indictment in connection with antitrust violations).

47. DEL. CODE ANN. tit. 8, § 278 (Interim Supp. 1987).

The revision to section 278 does not disturb the holding of *In re Citadel Industries, Inc.*<sup>48</sup> In that case, the court refused a petition to "continue" the existence of a dissolved corporation when the petition was filed more than three years after the filing of the certificate of dissolution.<sup>49</sup> The court held that it was "legally barred by the intent and purpose of § 278 from 'continuing' Citadel's corporate existence once the statutory three-year period had already expired."<sup>50</sup> The court concluded that, once the period described in section 278 had expired, the claimant's remedy could be pursued only under the procedure described in section 279.<sup>51</sup>

#### E. Section 279

Section 279 is now entitled "Trustees or receivers for dissolved corporations; appointment; powers; duties."<sup>52</sup> Under section 279, a trustee or receiver may be appointed at any time to take charge of the dissolved corporation's property, with power to prosecute or defend suits.<sup>53</sup> The section protects stockholders and creditors when assets remain undisposed of after dissolution.<sup>54</sup>

Section 279 was amended to add directors of dissolved corporations to those who may petition the court of chancery to appoint a trustee or receiver for the corporation.<sup>55</sup> Otherwise, section 279 is unchanged. The revision to section 279 therefore leaves undisturbed previous judicial interpretations of that section.<sup>56</sup> Under dictum in

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48. 423 A.2d 500 (Del. Ch. 1980).

49. *Citadel*, 423 A.2d at 507.

50. *Id.* at 503 (referring to predecessor statute). Section 278 granted the court the discretion to continue the existence of the corporation beyond the three year period. *Id.* at 505. The court's discretion, however, must be exercised before the expiration of the three year period. *Id.* at 507.

51. *Id.* at 507 (involving predecessor statute). Under § 279, the court of chancery may appoint a trustee or receiver on application of a creditor showing good cause. DEL. CODE ANN. tit. 8, § 279 (Interim Supp. 1987).

52. DEL. CODE ANN. tit. 8, § 279 (Interim Supp. 1987).

53. *Id.*

54. *Citadel*, 423 A.2d at 506 (involving predecessor statute). *See supra* notes 48-51 and accompanying text and *infra* notes 56-57 and accompanying text (detailed discussion of *Citadel*).

55. DEL. CODE ANN. tit. 8, § 279 (Interim Supp. 1987).

56. After the expiration of the three year statutory period under § 278, the court may appoint a trustee or receiver under § 279. *See Citadel*, 423 A.2d at 506 (stating that prior version of § 279 was specifically applicable in situations when the time period under § 278 had expired and the appointment of a trustee or receiver was requested). *See also In re Nat'l Medical Properties, Inc.*, No. 6036 (Del.

the *Citadel* case, section 279 may not be available when there are no undistributed assets of the dissolved corporation since the “primary purpose [of the section] is to safeguard the collection and administration of still existing property interests . . . . [W]here there are no undistributed assets against which to effect a recovery, § 279 provides little solace to one possessing an after-discovered claim against a dissolved corporation.”<sup>57</sup>

#### F. Section 280

Section 280, entitled “Notice to claimants; filing of claims,” is entirely new.<sup>58</sup> This section creates a procedure that dissolved corporations may follow when winding up their affairs. Section 280, along with amended section 281, provides a “safe harbor” for directors of the dissolved corporation, or other governing persons of a successor entity.<sup>59</sup> Such governing persons will not incur personal liability to unpaid claimants of the dissolved corporation for having improperly distributed the assets, so long as the procedures described in section 280 are followed and the assets are distributed to creditors and stockholders in accordance with section 281(a).<sup>60</sup> The liability of stockholders to unsatisfied claimants is also limited when the procedures in sections 280 and 281 are followed.<sup>61</sup> New section 280 represents a substantial change from the prior law, which did not include any comparable provision.

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Ch. Feb. 7, 1980) (construing predecessor statute).

In *Addy v. Short*, 47 Del. 157, 89 A.2d 136 (1952) (construing predecessor statute to § 279), the court stated that after the three year period the corporation may be made a defendant for the purpose of appointing a receiver or trustee, who may be appointed at any time that good cause is shown. *Id.* at 164, 89 A.2d at 139-40 (citing *Harned v. Beacon Hill Real Estate Co.*, 9 Del. Ch. 232, 80 A. 505, *aff'd*, 9 Del. Ch. 411, 84 A. 229 (Del. 1912)). “The remedy of receivership (or as here, appointment of trustees) is available to a creditor or stockholder of any corporation ‘dissolved in any manner whatever.’ ” *Addy*, 47 Del. at 164, 89 A.2d at 140. Any assets of the corporation which are not disposed of during the winding up period may be administered by the court of chancery “and the rights of creditors and stockholders protected.” *Id.* See also *Slaughter v. Moore*, 9 Del. Ch. 350, 371, 82 A. 963, 966 (1912).

57. *Citadel*, 423 A.2d at 506 (referring to predecessor statute).

58. DEL. CODE ANN. tit. 8, § 280 (Interim Supp. 1987).

59. *Id.* §§ 280, 281. As defined in amended § 280(e), the term “successor entity” includes any trust, receivership, or other legal entity to which the remaining assets and liabilities of a dissolved corporation are transferred. *Id.* § 280(e).

60. *Id.* § 281(c). See *infra* notes 89-105 and accompanying text (discussing the procedure for distributing the assets of a dissolved corporation).

61. DEL. CODE ANN. tit. 8, § 282(a), (b) (Interim Supp. 1987). See *infra* notes 106-09 and accompanying text (discussing limitations on stockholder liability).

The new procedure created by section 280 is described in subsections (a), (b), and (c) of that section.<sup>62</sup> A corporation electing to follow this procedure must comply with subsections (a) and (b) in all cases, and subsection (c) when necessary or appropriate to obtain the benefit of the "safe harbor" from director liability.<sup>63</sup> In general, a corporation electing to comply with section 280 must publish notice of its dissolution and also send notice to all persons having claims against the corporation.<sup>64</sup> This notice shall direct such persons to present their claims to the corporation within a time period of at least sixty days.<sup>65</sup> A similar notice and claims procedure is required for persons with conditional, contingent or unmatured claims.<sup>66</sup> The notices required by subsections (a) and (b) must be in substantially the same form and sent and published in the same manner.<sup>67</sup>

The corporation may accept or reject, in whole or in part, any claim made under section 280(a).<sup>68</sup> Any rejection of a claim must be made within 90 days of the receipt of such claim, and at least 150 days before the expiration of the period described in revised section 278.<sup>69</sup> If a claim is rejected in whole or in part, the claimant is entitled to pursue any available remedy.<sup>70</sup>

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62. DEL. CODE ANN. tit. 8, § 280(a), (b), (c) (Interim Supp. 1987).

63. *Id.*

64. *Id.* § 280(a)(1).

65. *Id.* § 280(a)(1)c.

66. *Id.* § 280(b)(1).

67. *Id.* The notice provisions of amended § 280 are similar, although not identical, to those of the RMBCA. Compare DEL. CODE ANN. tit. 8, § 280 (Interim Supp. 1987) with REV. MODEL BUSINESS CORP. ACT §§ 14.06, 14.07 (1984). The most significant difference between the notice provisions of the RMBCA and amended § 280 is the provision barring claims of known creditors, who received written notice of the corporate dissolution and did not pursue their claims within the requisite time period, contained in § 14.06(c)(1). Amended § 280 contains no comparable provision. Compare DEL. CODE ANN. tit. 8, § 280 (Interim Supp. 1987) with REV. MODEL BUSINESS CORP. ACT § 14.06(c)(1) (1984) (survival of creditor claims).

68. DEL. CODE ANN. tit. 8, § 280(a)(2) (Interim Supp. 1987).

69. *Id.* Amended § 278, as well as its predecessor, specifies a period of three years from the date of dissolution, or such longer period as the court of chancery shall determine, for the winding up of the affairs of the dissolved corporation. DEL. CODE ANN. tit. 8, § 278 (Interim Supp. 1987). See *supra* notes 43-51 and accompanying text.

70. DEL. CODE ANN. tit. 8, § 296(b) (1983) provides: "Every creditor or claimant who shall have received notice from the receiver or trustee that his claim has been disallowed in whole or in part may appeal to the court of chancery within 30 days thereafter. The court, after hearing, shall determine the rights of the parties." *Id.* See also DEL. CH. CT. R. 156 (1987).

The corporation must respond to a conditional, contingent or unmatured claim filed under new section 280(b) by offering the claimant such security as the corporation determines is sufficient to provide compensation to the claimant if the claim becomes a present obligation.<sup>71</sup> The claimant may reject the offer, but if the rejection is not delivered in writing within 120 days after receipt of that offer, the claimant shall be deemed to have accepted the offer and will thereafter be entitled to look only to the security offered to satisfy its claim against the corporation.<sup>72</sup>

If a claimant rejects an offer of security under section 280(b), the corporation must then petition the court of chancery for a determination of the amount and form of security deemed sufficient to provide compensation to the claimant.<sup>73</sup> The directors will be fully protected in relying on the court's determination in making distributions under section 281.<sup>74</sup> However, section 280 does not limit the remedies available to a claimant who rejects an offer of security made by the corporation.<sup>75</sup> Thus, whether or not the judgment of the court of chancery will bind the claimant (and limit his rights to the right to proceed against the security ordered by the court) will depend on due process considerations governing the court's ability to exercise jurisdiction over the claimant or over the property in question.<sup>76</sup>

Finally, section 280(c)(2) requires the corporation to petition the court of chancery to determine the amount and form of security sufficient to provide compensation to persons who have or will have claims of a type known to the corporation, but whose identities are not then known.<sup>77</sup> This provision deals with difficult problems associated with claims, particularly personal injury claims, that may be undiscovered or may not yet have occurred at the time of dis-

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71. DEL. CODE ANN. tit. 8, § 280(b)(2) (Interim Supp. 1987). The RMBCA contains no comparable provision for the dissolved corporation to provide security for the payment of unknown or contingent claims, if and when such claims become due.

72. *Id.*

73. *Id.* § 280(c)(1). Revised § 283 gives the court of chancery jurisdiction over the proceedings. DEL. CODE ANN. tit. 8, § 283 (Interim Supp. 1987). *See* John Julian Constr. Co. v. Monarch Builders, Inc., 324 A.2d 208 (Del. 1974) (construing prior statute). *See also* DEL. CH. CT. R. 153-57 (1987) (governing notice to creditors, filing of claims, exceptions to claims and hearings thereon when receivers or trustees are appointed for corporations).

74. DEL. CODE ANN. tit. 8, § 281(a), (c) (Interim Supp. 1987).

75. *See* DEL. CODE ANN. tit. 8, § 280 (Interim Supp. 1987).

76. *See* Shaffer v. Heitner, 433 U.S. 186 (1977).

77. *Id.* § 280(c)(2).

solution.<sup>78</sup> A dissolved corporation may know the nature of these claims and the likelihood of their later assertion from its own claims experience or from the correlation of its former business activities and the claims experience of others.<sup>79</sup> The procedure created in section 280(c)(2) gives the corporation a means of liquidating despite the knowledge that such claims will likely be asserted in the future.<sup>80</sup> When an action is brought under subsection (c)(2), the court is directed to appoint a guardian ad litem for the unknown claimants.<sup>81</sup> The petitioning corporation will bear the related reasonable fees and expenses.<sup>82</sup>

Section 280(d) provides that the giving of notice or the making of any offer under any provision of section 280 does not have the legal effect of reviving any claim, constituting acknowledgement that any person to whom notice is sent is a proper claimant, or waiving any defense or counterclaim.<sup>83</sup>

The provisions of section 280 apply not only to directors of the dissolved corporation, but also to governing persons of a "successor entity" as defined in section 280(e).<sup>84</sup> Thus, any liquidating trust or similar legal entity, if governed by Delaware law, may gain a "safe harbor" from director liability for liquidating distributions by following the provisions of sections 280 and 281.<sup>85</sup>

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78. Such claims may be based on personal injuries occurring after dissolution but caused by allegedly defective products sold before dissolution, or involve negligence for which the statute of limitations does not begin to run until the negligence is discovered. See generally Friedlander & Lannie, *Post-Dissolution Liabilities of Shareholders and Directors for Claims Against Dissolved Corporations*, 31 VAND. L. REV. 1363 (1978) (discussing confusing and inconsistent results arising from post-dissolution claims).

79. Prior to the enactment of DEL. CODE ANN. tit. 8, § 280(c)(2) (Interim Supp. 1987), a contingent claimant had little hope of recovery once the three year period of continuation prescribed by DEL. CODE ANN. tit. 8, § 278 (1983) (amended 1987) had expired. See *In re Citadel Indus., Inc.*, 423 A.2d 500 (Del. 1980) (court lacked authority to renew the corporate existence under § 278 after expiration of the three year statutory period to defend a post-dissolution products liability claim).

80. See DEL. CODE ANN. tit. 8, § 280(c)(2) (Interim Supp. 1987).

81. *Id.* Once a corporation or successor entity has given notice under § 280(a) of its dissolution, requesting all persons having a claim against the corporation to present their claims, the corporation or successor entity may then "petition the Court of Chancery to determine the amount and form of security which will be sufficient to provide compensation to claimants whose claims are known to the corporation or successor entity but whose identities are unknown. The Court of Chancery shall appoint a guardian ad litem." *Id.* The guardian ad litem will represent all claimants whose identities are unknown in any proceeding brought under § 280(c)(2). See *id.*

82. *Id.* § 280(c)(2).

83. *Id.* § 280(d).

84. *Id.* § 280(e).

85. *Id.* §§ 280, 281.

The provisions of revised section 280 relating to notices to claimants of dissolved corporations are somewhat different than those found in the Court of Chancery Rules governing receivers and trustees of corporations.<sup>86</sup> Although section 280(e) indicates that the provisions of section 280 apply to trustees and receivers of dissolved corporations,<sup>87</sup> it does not indicate whether the provisions of section 280 supersede those of the Court of Chancery Rules.<sup>83</sup>

### G. Section 281

Section 281, now entitled "Payment and distribution to claimants and stockholders," is also entirely new.<sup>89</sup> Subsection (a) prescribes the procedure for distributing the assets of a dissolved corporation which has followed the provisions of section 280, including the distribution of any remaining assets to the stockholders.<sup>90</sup> The dissolved corporation must first pay section 280(a) claims,<sup>91</sup> post the section 280(b) security which was offered and not rejected, and then post the security ordered by the court of chancery in any section 280(c) proceeding.<sup>92</sup> The dissolved corporation shall then pay or make provision for all other obligations of the corporation.<sup>93</sup> Section 281(a) provides that, in the absence of actual fraud,<sup>94</sup> the judgment of the

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86. DEL. CH. CT. R. 153-57 (1987). The court of chancery rules provide for mailing and publication of notice to known creditors of the dissolved corporation to file claims against the corporation, set forth the requirements for the contents of such creditors' claims, and provide for the filing of exceptions to such claims. Exceptions to claims will be heard by the court upon notice. *Id.*

87. DEL. CODE ANN. tit. 8, § 280(e) (Interim Supp. 1987).

88. The provisions of revised § 280 go far beyond those of court of chancery rules 153-57 by providing for notice to persons with contingent claims or otherwise conditional or unmatured claims, as well as providing for security for claimants whose identities are unknown but whose claims are of a type known to the corporation. The court of chancery rules provide only for notice to known claimants. Compare DEL. CODE ANN. tit. 8, § 280 (Interim Supp. 1987) with DEL. CH. CT. R. 153-57 (1987).

89. DEL. CODE ANN. tit. 8, § 281 (Interim Supp. 1987).

90. *Id.* § 281(a).

91. Section 281(a) provides that claims and obligations shall be paid in full if sufficient funds are available. "If there are insufficient funds, such claims and obligations shall be paid or provided for according to their priority, and, among claims of equal priority, ratably to the extent of funds legally available therefor." DEL. CODE ANN. tit. 8, § 281(a) (Interim Supp. 1987).

92. *Id.* § 281(a)(1)-(3).

93. *Id.* § 281(a)(4).

94. Actual fraud is also the standard of review of the judgment of directors as to the value of consideration given for capital stock, and for stock options and rights, issued by a corporation. DEL. CODE ANN. tit. 8, §§ 152, 157 (1983). Actual

directors shall be conclusive as to the provision made for payment of this last category of corporate obligations.<sup>95</sup> This presumption, combined with new section 281(c), which provides that directors will not be personally liable for the claims of creditors, creates a "safe harbor" for directors when the dissolved corporation has complied with sections 280 and 281(a).<sup>96</sup>

Section 281(a) specifies that the distribution of the remaining assets to the stockholders may not occur sooner than 150 days after the last notice of rejection is given pursuant to section 280(a)(2).<sup>97</sup> Section 281(a) corresponds to the time periods specified in revised section 280(a)(2) and affords rejected claimants an opportunity to contest their rejection.<sup>98</sup> Similarly, the final distribution of remaining assets to stockholders under section 281(a) may not occur until the corporation has complied with sections 280(b) and (c) and any proceeding initiated pursuant to section 280(c) has reached its conclusion.<sup>99</sup> The dissolved corporation may be required to delay the final distribution as a result of some other action initiated by a claimant in the court of chancery or another forum.

Section 281(b) prescribes the procedures for distributing the assets of a dissolved corporation which has not elected to comply with the notice and claims procedures of section 280.<sup>100</sup> This includes the distribution of any remaining assets to the stockholders.<sup>101</sup> In general, a corporation must pay or make a reasonable provision to pay all the claims and obligations of the corporation.<sup>102</sup> Under section 281(c), the directors of a dissolved corporation which complies with section 281(b) in making liquidating distributions will not be liable to creditors whose claims are ultimately unsatisfied.<sup>103</sup> Unlike section

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fraud may be shown directly or it may be inferred from attendant circumstances. *Lewis v. Scotten Dillon Co.*, 306 A.2d 755, 757 (Del. Ch. 1973); *West v. Sirian Lamp Co.*, 28 Del. Ch. 398, 402, 44 A.2d 658, 660 (1945); *Diamond State Brewery, Inc. v. De La Rigaudiere*, 25 Del. Ch. 257, 263, 17 A.2d 313, 316 (1941). Inadequacy of consideration is one factor which may be used to support such an inference. *Diamond State Brewery*, 25 Del. Ch. at 263-64, 17 A.2d at 316-17. Bad faith or a reckless indifference to the rights of others may represent significant factors in determining the existence of actual fraud. *Lewis*, 306 A.2d at 757.

95. DEL. CODE ANN. tit. 8, § 281(a) (Interim Supp. 1987).

96. *Id.* § 281(c). Unlike § 281(c), the method of voluntary dissolution prescribed in the RMBCA contains no provision addressing the issue of directors' liability.

97. *Id.* § 281(a).

98. Compare *id.* with *id.* § 280(a)(2).

99. DEL. CODE ANN. tit. 8, § 281(a) (Interim Supp. 1987).

100. *Id.* § 281(b).

101. *Id.*

102. *Id.*

103. *Id.* § 281(c).

281(a), section 281(b) does not provide for a presumption of reasonableness as to the provision made to pay claims and obligations.<sup>104</sup> The directors of a dissolved corporation thus receive less protection under section 281(b) than they receive under section 281(a).<sup>105</sup>

#### H. Section 282

New section 282, entitled "Liability of stockholders of dissolved corporations," replaces the former section entirely and limits the liability of those stockholders to the unpaid claimants of the corporation.<sup>106</sup> Subsection (a) provides that when the assets of a dissolved corporation are distributed in accordance with sections 281(a) or (b), its stockholders shall not be liable for any claim for more than the lesser of their pro rata shares of the claim or of the amounts distributed to them by the corporation.<sup>107</sup> In addition, section 282(b) provides that stockholders of a dissolved corporation with assets distributed pursuant to section 281(a) will not be liable for claims against the corporation on which no suit is brought until after the expiration of the period described in section 278.<sup>108</sup>

Section 282(c) provides that "[t]he aggregate liability of any stockholder of a dissolved corporation for claims against the dissolved corporation shall not exceed the amount distributed to him in dissolution."<sup>109</sup> The application of this provision is not made dependent on compliance with any other section.

#### I. Section 283

New section 283, now entitled "Jurisdiction,"<sup>110</sup> has expanded and replaced old section 280.<sup>111</sup> Formerly, section 280 provided that the court of chancery had jurisdiction over applications made pursuant to section 279 and proceedings thereunder.<sup>112</sup> Section 283 now

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104. Compare DEL. CODE ANN. tit. 8, § 281(a) (Interim Supp. 1987) with *id.* § 281(b).

105. *Id.*

106. DEL. CODE ANN. tit. 8, § 282 (Interim Supp. 1987). The RMBCA contains different limitations on stockholder liability, depending on whether the claim was a known, matured claim at the time of dissolution, or was a contingent liability or a claim based on an event occurring after dissolution. See REV. MODEL BUSINESS CORP. ACT §§ 14.06, 14.07 (1984).

107. DEL. CODE ANN. tit. 8, § 282(a) (Interim Supp. 1987).

108. *Id.* § 282(b).

109. *Id.* § 282(c).

110. *Id.* § 283.

111. DEL. CODE ANN. tit. 8, § 280 (1983) (repealed 1987).

112. *Id.* See *John Julian Constr. Co. v. Monarch Builders, Inc.*, 324 A.2d 208 (Del. 1974).

provides that the court of chancery shall have jurisdiction of any application made under subchapter X of the DGCL.<sup>113</sup>

### III. CONCLUSION

The statutory revisions to sections 274 through 276, and 278 through 285 have transformed the process of voluntary corporate dissolution in Delaware. Now, with an orderly procedure to pay and provide for claims, directors will be able to wind up the affairs of dissolved corporations without the threat of personal liability for claims submitted after assets have been distributed to stockholders. This will tend to relieve the pressure on the directors to protect themselves by placing the affairs of dissolved corporations in the hands of court appointed receivers or trustees.

The notice and claims procedures in the new law protect creditors by providing an incentive for dissolved corporations to settle their claims promptly. The new law also provides an orderly procedure for resolving disputed claims, encouraging the prompt resolution of such disputes. Unknown claimants and others with contingent claims are protected by the new procedures, which allow dissolved corporations to provide for the settlement of their claims, if and when they become due.

Finally, stockholders who receive liquidating distributions will be able to conduct their affairs with less uncertainty about their potential liability for unknown claims against the dissolved corporation.

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113. DEL. CODE ANN. tit. 8, § 283 (Interim Supp. 1987).