Corporation law, like every field of human endeavor, has its trends and fashions. Of current vogue in this field has been the subject of directors' fiduciary duties in all their manifestations—"going private" mergers, corporate takeovers, and transactions involving the business judgment rule. Granted, these topics are important; the problem is that a sustained literary emphasis upon what is fashionable often tends to underemphasize other topics which, even if not on the current best seller list, are still highly significant to many corporate practitioners.

One such important, although uncelebrated, subject is that of trusteeships and receiverships for Delaware corporations which are engaged in winding up their affairs. While the analogy is not perfect, corporations, like individuals, may be said to experience certain rites of passage. Included among these are mergers, consolidations, sales of assets, "spinning off" properties and subsidiaries, and ceasing to exist. If it is not unfair to speak of winding up a Delaware corporation's affairs as a rite of passage, then it would also be accurate to characterize trustees and receivers, at least metaphorically, as the ministers of those rites. In a very real sense, they are the unsung heroes of that process.

This article represents a modest effort to sing their praises. It does not purport to summarize the entire body of law touching upon corporate receiverships; that task is left for the treatises. Rather, its purpose is to overview certain areas which commonly arise in Delaware receivership practice and, where appropriate, to emphasize the flexibility afforded practitioners by Delaware law which for many years has enabled them to guide their corporate clients through this final phase of their existence.


Delaware trusteeships and receiverships are best understood in terms of the broad legal framework in which they arise. That framework involves two related but distinct concepts: the termination of a corporation's legal existence (dissolution) and the disposition of the corporation's assets, liabilities, and business affairs (winding up).

A. Dissolution

A Delaware corporation terminates its existence in one of two ways: involuntarily or voluntarily. Involuntary termination may result when particular statutorily prescribed requirements are not fulfilled. For example, nonpayment of assessed franchise taxes for one year or failure to replace a registered agent who has resigned results in a corporate charter becoming automatically void. Additionally, a corporate charter may be the subject of discretionary revocation by the court of chancery in proceedings brought by the Attorney General in cases where the corporation's "powers, privileges or franchises" have been abused, misused, or not used.

Voluntary dissolutions, by way of contrast, are not the inexorable result of substantive statutory prescriptions. A voluntary dissolution may be accomplished by following the procedural steps mandated by section 275 of the Delaware General Corporation Law. The voluntary dissolution provision made generally applicable to Delaware corporations requires (1) a board of directors' resolution followed by,

7. Del. Code Ann. tit. 8, § 275 (1974). There are certain special situations which are governed by other statutory provisions i.e., joint venture corporation having two sole stockholders (§ 273), dissolution of corporation before beginning business (§ 274), and non-profit, non-stock corporations (§ 276).
(2) the vote of a majority of stockholders entitled to vote either at a duly noticed meeting or by written consent or by a unanimous consent of all shareholders entitled to vote, and (3) the filing of a certificate of dissolution.8

Voluntary dissolutions under section 275 are commonly an integral part of “tax free” corporate liquidations under sections 331 and 337 of the Internal Revenue Code.9 These tax provisions permit the nonrecognition of any gain or loss by a corporation from the sale or exchange of its assets during a prescribed statutory period. A critical imperative of any liquidation under section 337 of the Internal Revenue Code is that it be completed within twelve months of the formal adoption by stockholders of a “plan of liquidation.”10

Much of Delaware dissolution trusteeship practice has developed in order to take full advantage of these favorable corporate tax provisions. This is because the Internal Revenue Service has ruled that a plan of liquidation may provide that where a corporation cannot be wound up within the requisite twelve month period, then before that period expires, the remaining assets and liabilities may be distributed for the benefit of shareholders to an independent trustee appointed either by shareholders (where state law permits) or by a court of competent jurisdiction.11 To comply with the twelve month liquidation completion requirements of section 337 of the Internal Revenue Code Delaware dissolution trusteeships have achieved considerable utility for corporate practitioners.

B. Winding Up

The dissolution of a corporation is legally separate and must be distinguished from the winding up of its affairs,12 even though in practice both normally occur in conjunction with each other. Dissolution provisions such as section 275 speak only to the termination of a corporation’s existence.13 They do not address the winding up of a corporation’s affairs, such as closing down the business, marshalling assets,

paying creditors, and distributing the remainder to stockholders. Other statutory sections deal with those activities.\textsuperscript{14}

A Delaware corporation may wind up its affairs in one of two ways: (1) by its officers and directors acting without court supervision, or (2) by a trustee or receiver appointed by and acting under the supervision of the Delaware Court of Chancery.

1. Winding Up by Officers and Directors Without Court Supervision

There are many corporations whose affairs are wound up by their former management acting without any court supervision. Yet practically no statutory guidelines exist prescribing what can or cannot be done by corporate officers and directors conducting the liquidation. The only statute which appears to address this situation is section 278 \textsuperscript{15} and even then only by negative implication. Section 278 provides that a dissolved corporation is continued in existence for three years from its dissolution, or for such other period as the court of chancery in its discretion permits, for the limited purpose of:

prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities, and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized . . . .\textsuperscript{16}


\textsuperscript{16} Id. The main purpose of section 278 is to provide for an extension of the corporate existence of a dissolved corporation to enable it to wind up its affairs, not to afford direction or guidance on the mechanics of winding up. Some general guidance can be found by implication from case law which provides that those responsible for the liquidation may do whatever is "necessary or incidental" to the winding up. Addy v. Short, 47 Del. 157, 89 A.2d 136 (1952); McBride v. Murphy, 14 Del. Ch. 242, 249, 124 A.2d 798, 801 (1956), aff'd, 14 Del. Ch. 457, 130 A. 283 (Del. 1925) (cannot continue corporation's business); see also Broza v. Aluminum Cleaner Corp., 18 Del. Ch. 305, 159 A. 430 (1932).

Section 278 by its terms is unclear as to whether the chancery court's power to extend the dissolved corporation's existence beyond the statutory three year period survives the expiration of the three year period. In In re Citadel Indus., Inc., 423 A.2d 500 (Del. Ch. 1980), Vice Chancellor Brown held that unless the court's statutory power under § 278 is invoked before the three year period expires, any wind up after the three year statutory period expires can be accomplished only by appointment of a trustee pursuant to Del. Code Ann. tit. 8, § 279 (1974).
The absence of definitive statutory guidance to officers and directors conducting a liquidation is a shortcoming of the statutory scheme. It also greatly contrasts with the considerably more detailed statutory direction afforded court-appointed trustees and receivers, which must be viewed as a comparative advantage of court-supervised wind ups. Another advantage is that court-supervised trustees or receivers, unlike corporation officers and directors, may receive judicial instructions as to the proper course of action to be followed where they are in doubt as to how to proceed. Since all major steps in a court-supervised corporate liquidation are normally carried out pursuant to court approval and order, the risk of personal liability of the receivers or trustees is minimized, if not eliminated. Such advantages are not available to non-court supervised liquidators.\(^\text{17}\)

2. Winding Up by Court-Supervised Receivers or Trustees

Under Delaware law trustees and receivers fall into one of three categories: (1) those appointed under section 279,\(^\text{18}\) (2) those appointed under section 291,\(^\text{19}\) and (3) those appointed under the inherent equity power of the court.

a. Appointments Under Section 279

Under section 279, the court of chancery has discretionary power to appoint a "receiver" or "trustee" for a corporation which has been dissolved in any manner whatever on application of any creditor or stockholder or anyone who shows good cause therefor.\(^\text{20}\) The need for a trusteeship to complete the liquidation of the corporation within the twelve month period prescribed by section 337 of the Internal Revenue Code is a recognized ground for appointing a trustee in dissolution.\(^\text{21}\)

Literally read, section 279 appears to require a showing of "good cause" only by those applicants who are neither creditors nor share-

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17. See Heaney v. Riddle, 343 Pa. 453, 23 A.2d 456 (1942), involving a liquidation by directors who made final distribution to stockholders without providing for a contingent corporate liability on an assigned bond and mortgage. Years later a default occurred on the bond and the directors were held personally liable. The court observed that the directors would have been protected had they availed themselves of a judicially supervised dissolution procedure, under which contingent claimants would have been given notice and an opportunity to prove their claim before the corporation's assets had been distributed. Id. at 457, 23 A.2d at 458-59.


holders. However, section 279 has been interpreted to require “good cause” to be shown by all persons seeking the discretionary appointment of a receiver or trustee in dissolution.\textsuperscript{22}

Section 279 authorizes the court to appoint “one or more directors” as “trustees” and “one or more persons” as “receivers.”\textsuperscript{23} These are the only statutorily mandated qualifications for appointment as a trustee. However, this statute has not been applied literally. Despite the explicit statutory language, non-directors have been appointed as trustees in dissolution under section 279 where that result was deemed appropriate.\textsuperscript{24}

b. Appointments Under Section 291

Under section 291, upon the application of any creditor or stockholder, the court of chancery has discretionary power to appoint a receiver for a corporation which “shall be insolvent.”\textsuperscript{25} For this purpose, “insolvency” may consist of a deficiency of assets over liabilities or an inability to meet debts as they become due in the usual course of business,\textsuperscript{26} but, in any case, insolvency must be established by “clear


\textsuperscript{23} By way of contrast, Del. Code Ann. tit. 8, § 291 (1974) authorizes only the appointment of “one or more persons” as “receivers” (emphasis added). The reason for the statutory distinction between “trustees” and “receivers” is unclear, particularly since in actual practice and under the court of chancery rules no such distinction is made. See Del. Ch. Ct. R. 148. It may be that the distinction was intended to incorporate the jurisprudence under a predecessor statute which automatically constituted the directors of a dissolved corporation as “trustees” to wind up corporate affairs. But even that earlier statute was interpreted to permit the appointment of a receiver. Folk, supra note 22, at 438; Del. Rev. Code §§ 41 & 42 of General Corporation Act (1915); Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 41, 84 A. 229 (Del. 1912). The distinction may be relevant for tax purposes however since I.R.C. § 337 and the regulations thereunder speak in terms of a “trustee” and “liquidating trust,” not a “receiver.” See supra note 11.

\textsuperscript{24} See Reilly v. Market Publications, Inc., No. 4963 (Del. Ch., Feb. 1, 1976) (directors accused of mismanagement); Kahn v. Paramount Communities Corp., No. 5812 (Del. Ch., filed Mar. 1, 1979) (disharmony among directors). The only other qualifications for appointment as a trustee or receiver are found in the chancery court rules or in case law. Generally, the choice of receiver is tailored to the exigencies of the case. No person can be appointed sole receiver or trustee who does not reside in Delaware at the time of his appointment, Del. Ch. Ct. R. 148, 150; but the court may grant relief from this requirement, Del. Ch. Ct. R. 148. And since a receiver or trustee is a fiduciary for all creditors and stockholders, it is imperative that he be impartial and disinterested. Cahall v. Lofland, 12 Del. Ch. 125, 107 A. 769 (1919); Folk, supra note 22, at 440. It is common practice to appoint attorneys, accountants, and former corporate directors and officers as receivers and trustees.


and convincing proof.” 27 Clearly a trusteeship or receivership under section 279, which may be created for any dissolved solvent corporation on a showing of “good cause,” is of broader application (and therefore more useful as a planning tool) than a receivership under section 291, which is limited to situations of insolvency. 28

c. Appointments Under Inherent Power of the Court

The first two categories of trustee and receiver—one involving dissolved corporations, the other involving insolvent corporations—are creatures of statute. The third category of receiver derives its existence and authority not from statute but from the inherent equity power of the court. Unlike the statutory receiverships which are employed as planning tools in the winding up process, inherent power receiverships are normally remedial in nature—that is, they are designed to save the corporation from gross mismanagement and to get it “back on its feet,” rather than to liquidate its assets. An “inherent power” receiver can be appointed by a state or federal court of competent jurisdiction, whether or not the corporation is dissolved or insolvent. However, the appointment can be based only upon a showing of fraud, gross mismanagement, or extreme circumstances causing imminent danger of great loss which cannot otherwise be prevented or remedied. 29 Because this remedial type of receivership is normally inapplicable (and therefore irrelevant) to the winding up process, it will not be discussed further in this article. 30

28. A § 279 trusteeship would seem to be the vehicle most likely chosen to effect a tax-free liquidation because under I.R.C. § 337, a distribution to or for the benefit of shareholders is required, and where the corporation is insolvent (at least in the “balance sheet” sense) there would be no distribution to stockholders. See Treas. Reg. § 1.337-2(b) (1955); Rev. Rul. 73-264, 1973-1 C.B. 178; Rev. Rul. 56-387, 1956-2 C.B. 189.
30. The distinction made herein between a statutory “winding up” receivership and a nonstatutory, remedial one, is somewhat blurred by Del. Code Ann. tit. 8, § 226 (1974), which empowers the court of chancery in its discretion to appoint a receiver for an insolvent corporation in specified cases of shareholder or director deadlock or where the corporation has abandoned its business but has not dissolved, liquidated, or distributed its assets within a reasonable time. A receivership under section 226 is remedial, and cannot be used as a tool for liquidating the corporation’s assets except where the corporation has abandoned its business without reasonably dissolving or liquidating or “except where the Court shall otherwise order.” Id.
II. LEGAL STATUS, FUNCTIONS, AND DUTIES OF A RECEIVER OR TRUSTEE

A. Status

As an agent appointed by the chancery court to wind up the affairs of a Delaware corporation, a trustee or receiver stands in the corporation's shoes. More precisely, under Delaware law the trustee or receiver is the corporation, and he succeeds by operation of law to the corporation's title to its property wherever located, except property located outside of Delaware. But the receiver acquires no greater interest in the estate than the corporation had, and his title is subject to whatever setoffs, liens, and encumbrances existed against the corporation's assets at the time of his appointment.

Conceptually, since the receiver or trustee is the corporation, it would follow that he would be empowered to do whatever the corporation, if in being, could have done to wind up its own affairs. That concept is validated by section 279 which empowers the trustee or receiver:

[T]o take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation . . . .

Besides acting as legal successor to the corporation, the trustee or receiver also occupies the role of a fiduciary to stockholders and creditors with respect to the administration and distribution of the corpora-

31. Del. Code Ann. tit. 8, § 292 (1974). The concept of the receiver being the repository of the corporation's assets and liabilities is analogous to section 70(a) of the former Bankruptcy Act under which the trustee was vested by operation of law with the debtor's title to property of the estate. 11 U.S.C. § 110 (1898). Under the new Bankruptcy Code, title does not vest in the trustee but in the bankruptcy estate, 11 U.S.C. § 541 (1979), and the trustee is authorized as the representative through whom the estate acts. 11 U.S.C. § 323(a) (1979); 2 Collier on Bankruptcy ¶ 523.01 (15th ed. 1979).
tion's assets. However, the receiver's or trustee's status as a fiduciary is circumscribed by his status as the successor to the corporation's assets subject to then-outstanding liabilities and equities. Thus, a Delaware trustee or receiver is prohibited from maintaining a cause of action that could not be asserted by the corporation itself; for example, a class action on behalf of stockholders or an action to enforce the rights of the corporation's creditors must be brought by the parties in interest.

The status of Delaware receivers or trustees is to be contrasted with the status of trustees in bankruptcy, who are empowered by statute to enforce claims which could have been asserted by the corporation's creditors, although not by the corporation itself. Thus, a bankruptcy trustee has the power to avoid corporate transfers that could be voided by a judicial lien creditor or an unsatisfied lien creditor. A bankruptcy trustee also has whatever rights of avoidance an unsecured creditor holding an allowable claim could have asserted on his own behalf under applicable state or federal law, as well as the power to set aside preferential or fraudulent transfers where the corporation might be estopped to do so. A Delaware receiver or trustee has no such powers or prerogatives.

B. Functions and Duties: A Short Guided Tour Through the Statute and Rules

The manner in which Delaware receivers and trustees are to carry out their duties is governed generally by sections 280, 282, and 292-299 of the Delaware General Corporation Law and by Chancery Rules 148 through 168. This admixture of statutory provisions and

34. See Folk, supra note 22, at 440; Eberhardt v. Christiana Window Glass Co., 9 Del. Ch. 284, 81 A. 774 (1911).
35. McKee v. Rogers, 18 Del. Ch. 81, 156 A. 191 (1931).
36. Bovay v. H. M. Byllesby & Co., 26 Del. Ch. 69, 22 A.2d 138 (1941). In Byllesby, the court carved out an exception to the normal rule, holding that where an insolvent corporation has perpetrated a fraud on its creditors by an illegal and improper disposition of its assets, a receiver may sue to set aside the transfer. However, this exception was rationalized on the ground that since the corporation was insolvent, only creditors' rights were involved, and also that the fraud was perpetrated on the corporation itself and was the cause of the insolvency. Under this analysis, the claim was viewed as one which could have been asserted by the corporation.
38. Del. Code Ann. tit. 8, §§ 280, 282 & 292-299 (1974); Del. Ch. Ct. R. 148-168. The court of chancery is authorized to relieve a trustee or receiver from any of the duties and procedures prescribed by rules 149-168 and may impose or prescribe such other procedures as it deems appropriate. Del. Ch. Ct. R. 148. The Court of Chancery Rules are applicable to trustees and receivers alike without regard to the statutory basis for their appointment.
court rules cannot be described as a model of Aristotelian symmetry. At first blush it is unclear which statutory sections govern the conduct of dissolution trustees and which govern the conduct of "insolvency" receivers. For example, section 281 appears to afford guidance to trustees in dissolution appointed under section 279, whereas receivers for insolvent corporations appear to be covered by several sections that spell out specific duties in particular areas of administration.\textsuperscript{39} However, the imbalance is more apparent than real, being a product of awkward statutory placement rather than legislative oversight. A closer look at sections 292 through 298 \textsuperscript{40} shows that they are applicable to both trustees and receivers thus suggesting they must apply to trustees in dissolution appointed under section 279.\textsuperscript{41} Moreover, the chancery court rules are expressly made applicable to all receivers and trustees appointed by that court, without regard to the statutory basis for their appointment.\textsuperscript{42}

As will become evident, there are some gaps in the statute and there are vague and unspecific areas in the rules. However, while the statute and rules are not a model of clarity, it has been the experience of practitioners of the Delaware Bar that the body of law which has evolved in the receivership and dissolution trusteeship area has proved to be workable and adaptable to a variety of different circumstances, and has for many years met the needs of the corporate bar for a practical and flexible approach to the winding up of the affairs of Delaware corporations.

1. Preliminary Duties Following Appointment

Once appointed, a receiver or trustee is required to perform various duties which, although of a preliminary nature, are substantively important. First, the receiver or trustee must file a bond with a surety approved by the court within the time prescribed by the order of appointment.\textsuperscript{43} The purpose of this requirement is to guarantee the receiver's or trustee's financial responsibility. Second, a certified copy of the order of appointment must be filed with the Recorder of Deeds of each county in which the corporation owns real estate.\textsuperscript{44} That requirement is intended to put the world on notice of the fact that title to the realty has succeeded to the court-appointed fiduciary. Third,

\textsuperscript{42} \textit{Del. Ch. Ct. R.} 148.
\textsuperscript{43} \textit{Del. Ch. Ct. R.} 149.
\textsuperscript{44} \textit{Del. Code Ann.} tit. 8, § 292(b) (1974).
although no statute or rule so provides, orders of appointment commonly require a receiver or trustee to file a declaration acknowledging his acceptance of the appointment as well as a power of attorney authorizing the Register in Chancery to accept service of process on his behalf. While the need for a formalized acceptance of the appointment is questionable, the designation of an agent for service of process does clarify the mode of effecting service upon a receiver or trustee, a subject not otherwise treated in the statute or rules.\textsuperscript{45} It also encourages the centering of litigation in the court of chancery, in furtherance of the objective of bringing all assets within the physical control of the court having custodia legis over the receivership estate. Also in furtherance of that objective is the additional requirement that there be filed a statement of depository showing compliance with rule 152, which directs that all corporate monies coming into the receiver's hands be deposited into a special account in a banking institution located in Delaware.\textsuperscript{46}

Of special significance is the receiver's or trustee's obligation to file reports with the court of chancery at intervals prescribed by the rules.\textsuperscript{47} This reporting obligation, as well as the trustee's or receiver's obligation to secure court authorization to take significant action involving administration of the estate,\textsuperscript{48} represent the two primary mechanisms for assuring the accountability of the receiver or trustee to the court that appointed him.\textsuperscript{49}

There are three reporting requirements. The first report must be filed within thirty (30) days of the appointment, or on such later date as the court orders, and must include: (1) a complete itemized inventory of all the estate, property, and effects of the company, together with an appraisal by court-appointed appraisers; (2) a list of debtors and creditors, showing all debts due to and from the corporation, and the last known post office or business address of each debtor and creditor; (3) a list of stockholders with the last known post office or business address; and (4) a statement of whether the capital stock outstanding is fully paid-in and if not, the names, addresses, and holdings of shareholders whose stock is not paid for, and the amounts due

\textsuperscript{45} Receivers are agents of the court for liquidation of a corporate estate in custodia legis and could not be sued absent the consent of that court. Perfection Garment Co. v. Crosby Stores, 109 N.J. Eq. 450, 158 A. 380 (1952).

\textsuperscript{46} Del. Ch. Ct. R. 152.

\textsuperscript{47} Del. Ch. Ct. R. 151, 161.


\textsuperscript{49} The reporting requirements stem from Del. Code Ann. tit. 8, § 294 (1974), and are implemented by Del. Ch. Ct. R. 151.
from each.\textsuperscript{50} Any additional property acquired by the receiver after
the initial inventory must be disclosed in a supplemental report filed
"forthwith." \textsuperscript{51}

The second reporting requirement must be satisfied within three
months of the receiver's or trustee's appointment and consists of a "full
report of his proceedings and the state of affairs of the company." \textsuperscript{52}

The third reporting requirement consists of the receiver's or trust-
ees's ongoing duty to file "a like report at the expiration of each year
during the pendency of each year of the receivership." \textsuperscript{53} These yearly
status reports are normally quite comprehensive, particularly as
they concern the financial status of the receivership estate. They cus-
tomarily include and are supported by an auditor's or accountant's re-
port of the financial status of the estate as of the end of the calendar
year. While it is essential that these annual status reports be filed,
practicalities such as the need for accounting reports which speak as of
the end of the calendar year often make it impossible to comply with
the timing requirements of the rule. For that reason, trustees often
seek relief from these timing requirements under Chancery Court Rule
148, which authorizes the court generally to relieve trustees or receiv-
ers from complying with any of the duties and procedures set forth in
the applicable chancery court rules.

2. Claims of Creditors and Stockholders: Notice
and Adjudication

a. Notice

As with federal bankruptcy, a significant purpose of state corpo-
rate receiverships and trusteeships is to impose judicial controls upon
the assertion and enforcement by creditors of their claims against the
corporation's assets. A basic concept underlying all corporate receiv-
erships is that, except for expenses of administration, claims of credi-
tors will not be paid until those claims are first identified and then
validated through a claims adjudication process. The process of

\textsuperscript{50} \textit{Del. Ch. Ct. R. 151.} The Bankruptcy Code imposes similar informational
requirements in the form of elaborate schedules (11 U.S.C. \S 521 (Supp. II 1978)),
but the time of supplying such information normally precedes the appointment of the
trustee. Under Bankruptcy Rule 108 (1973), schedules of debts and property, as well
as a statement of the debtor's affairs, are filed by the debtor at the time a voluntary
petition is filed. In the case of an involuntary petition, the schedules and statement
must be filed within 10 days of the adjudication and if this is not done, the bankruptcy
court may order the trustee to prepare and file the schedules.

\textsuperscript{51} \textit{Del. Ch. Ct. R. 151.}

\textsuperscript{52} \textit{Del. Ch. Ct. R. 161.}

\textsuperscript{53} \textit{Id.}
claim identification and validation is a crucial stage in all Delaware receiverships and trusteeships.

The identification of creditors' claims is accomplished in a procedure whereby each creditor is directed to file a proof of his claim by a date prescribed in a court order, and is also notified that any claimant who fails to file by that deadline may be barred from participating in the receivership assets. Normally, the claim's process commences with the receiver's counsel preparing a form of notice to creditors and a form of proof of claim. Thereafter, counsel seeks an order from the court directing the mailing and publication of the notices which prescribe the "bar date" for filing the proofs of claim. The rules set forth substantive requirements for the contents of proof of creditors' claims; however, they do not prescribe any particular form of proof of claim. Customarily, the forms of the notice and of the proof of claim are tailored to the requirements of each particular case. Moreover, although neither the statute nor the rules expressly provide for the filing of proofs of claim by shareholders, it has become customary to direct stockholders to file proofs of claim in order to determine their current whereabouts and to identify potential problems resulting from deaths, transfers, or changes of address not reflected on the last available stockholders list.

Once the claims-identification process has been completed by the giving of notice and the filing of completed proofs of claim with the Register in Chancery, the validity of those claims must then be determined. This administrative phase of trusteeship and receivership practice contains very few explicit statutory and rule-related guide-


55. The form and content of notices to creditors and the substantive requirements for proofs of claim are by statute left to the court of chancery by establishment of rules and by determination on a case-by-case basis. Del. Code Ann. tit. 8, § 295 (1974). The statute does prescribe that all notices to creditors and stockholders and all proofs of claim must be given by, and filed with, the Register in Chancery. Del. Code Ann. tit. 8, §§ 293, 295 (1974). Del. Ch. Ct. R. 153 requires the Register in Chancery (1) to give notice by mail to creditors to file their claims within the time to be fixed in the notice but not less than 60 days after the mailing of the notice, and (2) to cause the notice to be published in such newspapers and for such time as the court designates.

56. Del. Ch. Ct. R. 154 requires proofs of claim to contain a statement under oath, signed by the creditor; to itemize all book accounts; to contain a statement of priority of the claim; and to attach any evidence of indebtedness or a certified abstract of the record on which the obligation is based.

57. All of which information is necessary to enable the trustee or receiver to carry out his duty to pay the residue of the estate to "stockholders of the corporation or their legal representatives." Del. Code Ann. tit. 8, § 281 (1974).
lines, but to the extent they exist, they are found in section 296\textsuperscript{58} and rules 156 and 157.\textsuperscript{59}

b. \textit{Claims Adjudication}

By statute the validity of all claims must be determined in the first instance by the receiver or trustee,\textsuperscript{60} with any aggrieved creditor having the right to appeal any disallowance of his claim to the court of chancery.\textsuperscript{61} In practice most creditors' claims are adjudicated with finality at the receivership level. Procedurally, section 296(a) directs the Register in Chancery to notify the receiver or trustee of the filing of claims immediately upon the expiration of the deadline for filing.\textsuperscript{62} The trustee or receiver must then inspect the claims, determine which of them will be disallowed because their validity or correctness has not been shown,\textsuperscript{63} file the exceptions with the Register in Chancery, and forthwith notify creditors of his decision.\textsuperscript{64}

At this stage, the disallowance is only tentative, because section 296 contemplates that creditors whose claims are disallowed will be afforded the opportunity to present evidence before the trustee or receiver in support of their claims. Strangely, the statute describes this process not in terms of an opportunity afforded to the creditor, but rather more as a procedural burden to which the creditor must submit. Thus, section 296(a) states:

[T]he trustee or receiver shall require all creditors whose claims are disputed to submit themselves to such examination in relation to their claims as the trustee or receiver shall direct, and the creditors shall produce such books and papers relating to their claims as shall be required. The trustee or receiver shall have power to examine, under oath or affirmation, all witnesses produced before him touching the

\textsuperscript{60} Del. Code Ann. tit. 8, § 296(a) (1974).
\textsuperscript{61} Del. Code Ann. tit. 8, § 296(b) (1974). The power to determine the validity of creditors' claims flows from the court's jurisdiction over the assets of a Delaware corporation, Del. Code Ann. tit. 8., §§ 280, 292 (1974), not over the person of the claimant, since neither the receiver nor the court has extraterritorial powers. Stockbridge v. Beckwith, 6 Del. Ch. 72, 53 A. 620 (1887).
\textsuperscript{64} Del. Ch. Ct. R. 156. Section 296 appears to require that the disallowance determinations must be made within 30 days of the trustee being notified that the claims have been filed. However, the 30 day deadline is not viewed as mandatory, as evidenced by Del. Ch. Ct. R. 156 which prescribes that the time for filing disallowances with the Register and notifying creditors shall be "within 30 days of the expiration of time for filing claims or of any extension of time allowed by the Court . . . ." (emphasis added).
claim, and shall pass upon and allow or disallow the claims, or any part thereof, and notify the claimants of this determination. 65

Any creditor or claimant who is notified of the disallowance of his claim in whole or in part is entitled to appeal within thirty days to the court of chancery which "after hearing shall determine the rights of the parties." 66 The statute and rules do not specify whether an appeal to the court of chancery is de novo or on the record. In practice most of the hearings on appeal are on the record. However, the reference in section 296 to a "hearing" and the provision in rule 157 that at the hearing of exceptions to claims "the testimony of witnesses shall be taken in the same manner as is provided for in other causes pending in this Court," suggest that de novo hearings are permissible. 67

Some have criticized the procedure which permits a receiver who has tentatively disallowed a claim to then sit in judgment of the supplemental proof offered in support of the validity of that claim. The criticism is that such a procedure does not afford claimants an impartial tribunal. However, the assumption of bias implicit in that criticism is inconsistent with the receiver's or trustee's role, which is that of a court-appointed fiduciary having no personal interest in the claim and having no reason for bias beyond his fiduciary interest in assuring the legal and factual validity of all claims. Moreover, any risk of bias would be safeguarded against by the appellate remedy (particularly the availability of a de novo trial) and would be outweighed by the greater efficiency of the present procedure, which has resulted in the great bulk of creditors' claims being disposed of without the need to impose upon valuable judicial time.

As for the allowance or disallowance of the claims themselves, the statute, not surprisingly, contains no substantive standard. The merits of any claim must be determined in light of the contract, statute, or other rule of law upon which the claim is premised. But over the years, several principles have emerged to serve as useful guidelines to

66. Del. Code Ann. tit. 8, § 296(b) (1974). Del. Ch. Cr. R. 156, which governs the exception hearing procedure, is somewhat confusing, since it speaks of exceptions to claims being "heard by the Court upon such notice to the receiver, creditor and exceptant as may be ordered by the Court." (emphasis added). Since Del. Code Ann. tit. 8, § 296 (1974) mandates that exceptions to claims must be determined in the first instance by the receiver or trustee, presumably Del. Ch. Cr. R. 156 and 157 refer to the procedure on appeal from receivership determinations, and have been so interpreted in practice.
67. See Lasker v. McDonnell & Co., No. 3560 (Del. Ch. July 9, 1975), reprinted in 1 Del. J. Corp. L. 208 (1976), where an appeal from the receiver's disallowance of a federal tax claim was determined pursuant to a "live" trial.
practitioners. Thus, where a claim is based upon a final judgment, the validity and amount of the claim is conclusively established and neither the receiver nor the court can reexamine the underlying merits. Creditors' claims which have been allowed by a receiver or trustee and which are not appealed, constitute a final adjudication of that creditor's entitlement to share in the assets. Interest on allowed claims against an insolvent corporation is not allowed beyond the date of the receiver's appointment, except where the claim is based on a lien which bears interest. Moreover, nothing in the statute or the rules precludes a "conditional" allowance of a claim, for example, an allowance which is made contingent upon the return to the trusteeship of monies being held by the creditor but belonging to the estate.

c. Priority

Apart from having his claim allowed, of great importance to any creditor is the priority which that claim will be accorded. Priority is of crucial significance in receiverships for insolvent corporations, since the assets may be sufficient to pay "priority" claims but not claims of general creditors. The only statute dealing with priorities among claimants is section 281 which governs trusteeships and receiverships for dissolved corporations. No comparable provision governs priorities of claims in receiverships for insolvent corporations. Section 281 creates priorities for the distribution of assets in the following order:

(1) Payment of all allowances, expenses, and costs;
(2) Satisfaction of all special and general liens upon the funds of the corporation;
(3) Payment in full of the general debts due from the corporation if sufficient funds are available therefore and if not, then ratably among these creditors; and
(4) The balance, if any, is payable to shareholders justly entitled thereto.

68. In re International Re-Insurance Corp., 29 Del. Ch. at 50, 48 A.2d at 538.
70. John W. Cooney Co. v. Arlington Hotel, 11 Del. Ch. 346, 101 A. 879 (1917);
71. Although no statute or rule prescribes any procedure for evaluating claims by stockholders, customarily stockholders are required to deliver their stock certificates along with their proof of claim, or, if the certificates are lost, to file a lost instrument bond. Moreover, in practice such a bond is usually accompanied by an affidavit of loss. See Del. Code Ann. tit. 8, § 281 (1974), providing for payment of net assets to stockholders "justly entitled thereto."
Thus, in a Delaware trusteeship or receivership, the highest priority claims are expenses of administration,\textsuperscript{74} which are further defined by statute to include "reasonable compensation to the trustee or receiver for his services, and the costs and expenses incurred in and about the execution of his trust, and the cost of the proceedings in the Court . . . ."\textsuperscript{75} This category also includes the fees and expenses of the trustee's or receiver's counsel, as well as expert consultants or agents, including accountants and other experts without whose services the receivership could not function.\textsuperscript{76} What is (or is not) an expense of administration should not normally be the subject of any dispute, but to avoid controversy, prudent counsel will always obtain judicial approval in advance of incurring any such expense.

The second priority of creditors' claims are those derived from "special and general liens."\textsuperscript{77} Thus, section 281 is consistent with the rule that secured creditors come ahead of general, unsecured creditors. Liens normally derive from a statute (\textit{e.g.}, the Uniform Commercial Code, the Mechanic's Lien Statute), but equitable liens are also judicially recognized.\textsuperscript{78} The Delaware General Corporation Law affords no guidance on the question of what priority should be given among competing lienholders. That issue is normally determined by reference to the statute from which the lien derives its existence.\textsuperscript{79} Thus, the United States Code\textsuperscript{80} affords guidance as to when federal tax liens will be given priority over "other secured claims."\textsuperscript{81} By way of further example, Delaware law creates a lien in favor of employees of insolvent corporations for up to two months' un-

\textsuperscript{74} As contrasted with the Bankruptcy Code, which, with certain exceptions, confers priority upon claims secured by certain liens on estate property, and thereafter accords first priority to expenses of administration. 11 U.S.C. § 507(a)(1)(b) (Supp. II 1978); \textsc{Collier on Bankruptcy} ¶¶ 507.02, 507.05 (15th ed. 1979).

\textsuperscript{75} \textsc{Del. Code Ann.} tit. 8, § 298 (1974).

\textsuperscript{76} \textit{Veeder v. Public Serv. Holding Corp.}, 29 Del. Ch. 396, 51 A.2d 321 (1947), aff'd, 31 Del. Ch. 499, 70 A.2d 22 (Del. 1949).

\textsuperscript{77} \textsc{Del. Code Ann.} tit. 8, § 281 (1974). The terms "special" and "general" lien are not defined in the statute. Under the common law though, the distinction is between those liens existing against specific property and those existing against general receivership assets. \textit{See, e.g.}, \textsc{51 Am. Jur.2d Liens} § 5 (1970); \textit{cf. Peoples Trust Co. of Bergen County v. Lounge in Lodi, 71 N.J. Super. 178, 176 A.2d 536 (1961)}.

\textsuperscript{78} \textit{See Fisher v. Safe Harbor Realty Co.}, 38 Del. Ch. 297, 150 A.2d 617 (1959); \textit{see also Acacia Mut. Life Ins. Co. v. Newcomb}, 26 Del. Ch. 60, 21 A.2d 723 (1941).


\textsuperscript{80} \textsc{I.R.C.} § 6923 (1976).

\textsuperscript{81} \textit{See also In re Mitchell's Restaurant, Inc}, 31 Del. Ch. 121, 67 A.2d 64 (1949) (federal tax lien given priority over claims of state unemployment compensation commission for payments into unemployment fund); \textit{Silverman v. National Assets Corp.}, 22 Del. Ch. 405, 12 A.2d 389 (1940) (claims of New York state tax authorities not given priority in Delaware receivership absent a showing that the claim was entitled to priority under New York law).
paid wages and gives such claims priority over "any other debt or debts of the corporation." As for liens which derive from equitable principles (as opposed to a statute), the rule has developed that no lien on general funds in the receiver's possession will be given priority unless the funds can be specifically traced to proceeds of the sale of specific property which is subject to the creditor's claim. Additionally where a person owing money to the corporation also holds a valid lien on property for money due from the corporation and purchases that property from the corporation, the purchase price may be treated as a credit against the debt.

By definition the category of creditors having the least priority are general creditors, i.e., those holding no secured claim in the form of a general or special lien. As a rule there are no priorities among general creditors. Any exceptions to that rule must be grounded upon a statute, contract, or general equitable principles. Claims of officers and directors for funds owed them by the corporation may be treated as general claims, but such claims will be carefully scrutinized and their bona fides must be conclusively established.

At the bottom of the priority list are the shareholders who, as the owners of the business, must bear its ultimate risks. Such priorities as may exist among members of the shareholder class are defined by the corporate charter. By its very nature preferred stock has a priority over common stock, generally in terms of dividend and liquidation rights. But where distributions to shareholders are not spelled out in the charter, guidance must be found in the case law. Thus, unless otherwise specified in the charter, accrued dividends are payable only

84. Del. Ch. Cr. R. 159.
85. New York Stock Exch. v. Pickard & Co., 296 A.2d 143 (Del. Ch. 1972). An agreement to subordinate a creditor's claim is generally enforceable in insolvency proceedings. Id. at 147.
86. Id. at 149. The court has the inherent power to subordinate claims of creditors which arose out of inequitable conduct by the creditor and where payment to such creditor in competition with other creditors would be inequitable. Id.; Pepper v. Litton, 308 U.S. 295 (1939) (subordination of claim of director/officer whose breached fiduciary duties owed to corporation upheld).
to the time of the appointment of the receiver 89 and where a corporation is solvent and has senior classes of stock, any interest earned on assets to be distributed must be allocated among the preferred and other senior classes and the common.90

3. Maintenance and Defense of Lawsuits

A major function of a Delaware receiver or trustee is the maintenance and defense of lawsuits brought on behalf of or against the trusteeship estate. Both receivers and trustees are empowered by statute to prosecute and defend lawsuits in the name of the corporation or otherwise.91

The common law rule was that when a corporation was dissolved, all pending actions abated unless saved by statute.92 Sections 282 and 299, which perform that saving function, provide that actions pending against a corporation do not abate by reason of the corporation being dissolved,93 and that actions where the receiver or trustee is a party will not abate by reason of his death but will continue against his successor or, if none is appointed, against the corporation.94

The fact that receivers and trustees are generally empowered to bring lawsuits on behalf of the corporation does not mean that they are necessarily authorized to bring a given action in a specific case. The burden rests upon the trustee or receiver to establish his authority to bring a particular lawsuit.95 Generally the types of lawsuits that a trustee or receiver is authorized to bring are specified in the order of appointment.96 Absent such authorization, the recommended practice is to obtain specific judicial approval in advance for any lawsuit brought on behalf of the receivership or trusteeship estate.

As a prelude to the potential lawsuit, an important discovery tool available to a receiver or trustee is the right to examine the corpora-

93. Del. Code Ann. tit. 8, § 282 (1974). In the event of dissolution, the trustee or receiver will be substituted as a party defendant for the corporation, but if service upon counsel of record is impracticable, the action shall proceed to final judgment against the receiver or trustee in the name of the corporation. Id.
94. Del. Code Ann. tit. 8, § 299 (1974). In actions brought by the corporation, a trustee or receiver may, upon application, be substituted as a party plaintiff in place of the corporation. Id.
96. Id.; see also Cahall v. Lofland, 12 Del. Ch. 125, 107 A. 769 (1919).
tion's former officers, employees, or agents conferred by Chancery Court Rule 160, which provides:

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

A disadvantage of rule 160 is that it contains no mechanism for enforcement in cases where the corporation's officers, employees, or agents live outside Delaware and refuse to cooperate. Since a receiver or trustee has no extraterritorial power, the only way to compel nonresident corporate fiduciaries to testify is by obtaining a commission from the court of chancery and then the issuance of a subpoena by the courts of the states where the fiduciaries can be personally served.

As for actions brought against a receiver or trustee, it must be kept in mind that unlike a bankruptcy court in which actions pending against the debtor are stayed automatically, a state court of equity exercising jurisdiction over a dissolution or insolvency receivership or trusteeship has no similar power. Indeed, the Delaware statute expressly contemplates that such actions will go forward.

Although a receiver or trustee must obtain court authorization to bring an action on behalf of the corporation, such authority need not normally be obtained to defend an action against the corporation. This is because the action, if allowed to proceed to judgment

97. Stockbridge v. Beckwith, 6 Del. Ch. 72, 33 A. 620 (1887). Del. Ch. Ct. R. 160 should be contrasted with Bankruptcy Rule 704(f) which affords nationwide service of process in an adversary proceeding which is available to confer jurisdiction over the key officers and directors of the debtor.
without being defended, would have the effect of a valid claim. Cases may arise, however, where a trustee might seek authority not to defend, such as where the costs of defense would exceed the amount of the probable exposure.

Although sections 279 and 291 may be read to generally authorize a trustee or receiver to compromise claims in litigation, in any specific case it is customary as well as prudent for judicial approval to be obtained in advance, if only to foreclose any collateral attack upon the adequacy of the settlement and any risk of liability on the part of the receiver or trustee.


A critical, statutorily authorized undertaking of any receivership or trusteeship is the appointment of an “agent or agents.” In a receivership or trusteeship of any magnitude, these agents will always include attorneys and accountants, but may also include collection agencies, litigation experts, agencies which locate missing stockholders, and consultants who often are former key employees whose knowledge of the corporation’s former business may be invaluable in winding up its affairs.

Despite this general statutory grant of authority, it is both necessary and prudent to obtain a court order authorizing the specific financial compensation and other terms pursuant to which any agent is to be retained.

The “other acts” which receivers and trustees are authorized to perform in order to wind up the corporation’s affairs are as endless as the different types of enterprises which have been the subject of court supervised proceedings. Examples include sales of assets, invest-

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102. Del. Code Ann. tit. 8, § 279 (1974) authorizes the trustee or receiver “to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation.” Del. Code Ann. tit. 8, § 291 (1974) authorizes the trustee or receiver “to take charge of its assets . . . and do all other acts which might be done by the corporation and which may be necessary or proper.”


105. Unless otherwise ordered by the court, notice of all sales of property to be made by the receiver or trustee must be sent by the receiver by mail at least 15 days beforehand to all creditors who have filed claims, and to all stockholders. Del. Ch. Ct. R. 158. Where property subject to a disputed lien may deteriorate in value pending the outcome of litigation, the court of chancery may order the receiver or trustee to sell the property clear of all encumbrances and to pay the net proceeds subject to such disposition as the court shall direct. Del. Code Ann. tit. 8, § 297 (1974).
ment of receivership funds, surrender of life insurance on key employees, contracting for office or warehouse space, executing a deed to real or personal property, and completing the funding obligations under a pension trust.

A Delaware receiver or trustee, unlike a trustee in bankruptcy, has no generalized authority to recover preferential payments except where such payments amount to a fraudulent conveyance or waste of assets.\textsuperscript{106} However, there is authority for the proposition that a trustee has the power to repudiate executory contracts of the corporation made before his appointment if performance would be burdensome to the estate.\textsuperscript{107}

5. Compliance with Requirements of Taxing Authorities

A critical duty of any trustee or receiver is compliance with the requirements of the various federal, state, and local taxing authorities to which the corporation was answerable while it was actively engaged in business. The obligation to file tax returns and to pay taxes justly due and owing requires no discussion. However, there are certain tax-related problems peculiar to the receivership and trusteeship areas of which the practitioner must be aware if he is to properly effectuate the winding up of the corporate estate. Three such problems involve: (1) constructive receipt of income to shareholders, (2) the proper reporting of trust income and expenses, and (3) final distribution. Those problems merit discussion, because they involve potential tax liability of shareholders arising out of the liquidation which the trustee or receiver may have a fiduciary duty to minimize.

a. Constructive Receipt

When a trusteeship in dissolution is created under section 279\textsuperscript{108} and is utilized to complete a tax-free liquidation under section 337 of the Internal Revenue Code,\textsuperscript{109} for federal tax purposes the transfer of assets from the corporation to the trust is treated as a "constructive"

\textsuperscript{109} I.R.C. § 337(a) (1976) reads as follows:
General rule.—If, within the 12-month period beginning on the date on which a corporation adopts a plan of complete liquidation, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.
distribution of the assets to shareholders, even though in reality shareholders have received no distribution. As a result, the shareholders are taxable on any taxable gain from the constructive distribution, and must report any gain or loss on their tax return for the year of the trustee's appointment.

The prospect of shareholders having to pay tax on monies they have not in fact received suggests obvious problems. Those problems are mitigated to some extent by the rule that reasonable amounts which have been reserved for known liabilities are deemed not to have been constructively received. Consequently, creating a reserve for a reasonable amount for known liabilities will reduce the potential tax exposure to shareholders.

b. Reporting Trustee Income and Expenses

During the existence of a "grantor" trust, all income and other expenses of the trusteeship are taxed directly to the stockholders pro rata. Information as to current trusteeship income and expense is reported to the federal taxing authorities by the trustee filing a fiduciary federal income tax return and attaching thereto a separate schedule of items of income and expense. The schedule is then sent to shareholders who must include this information in their tax returns for the relevant period.

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110. I.R.C. § 337(d)(1) (1976). Treas. Reg. § 1.337-2(b) (1955) offers some guidance with respect to the concept of "constructive" distribution of the corporation's assets to the shareholders:

Section 337 shall not apply in any case in which all of the corporate assets (other than those retained to meet claims) are not distributed to the shareholders within 12 months after the date of the adoption of a resolution by the shareholders authorizing the distribution of all the corporate assets in redemption of all the corporate stock. A corporation will be considered to have distributed all of its property other than assets retained to meet claims even though it has retained an amount of cash equal to its known liabilities and liquidating expenses plus an amount of cash set aside under arrangements for the payment after the close of the 12-month period of unascertained or contingent liabilities and contingent expenses. Such arrangements for payment must be made in good faith, the amount set aside must be reasonable, and no amount may be set aside to meet claims of shareholders with respect to their stock.

111. Rev. Rul. 72-137, 1972-1 C.B. 101. The trustee reports this information on a Form 1099L (previously Form 1041) "information return" which he supplies to shareholders to enable them to prepare their tax return.


113. The other solution would be to make a partial liquidating distribution of assets to shareholders in an amount which would cover the tax liability.


c. Final Distribution

At the conclusion of the trusteeship all amounts remaining after payment of administrative expenses and claims of creditors are distributed to shareholders. If the final distribution to shareholders does not equal the reported amount of the initial "constructive" distribution plus the amount of net income earned during the trusteeship, then the stockholders must report on their tax returns for the year of the final distribution the additional amount of capital gain or loss on their interest in the trust. 116

The significance of tax-related problems of the sort described above is that they impose reporting obligations upon the trustee not only to the taxing authorities, but also to the stockholders themselves in order to enable them to comply with their tax filing and reporting obligations.

III. Receivers' and Trustees' Compensation, and Allowances and Final Distribution

A. Compensation and Allowances

Delaware law affords a trustee or receiver a statutory right to "reasonable compensation . . . for his services, and the costs and expenses incurred in and about the execution of his trust" which are statutorily mandated "to be first paid out of the assets." 117 Procedurally, the chancery court rules permit a petition for an allowance to be filed by the receiver or trustee on his own behalf and also for the services of his attorney. 118 Upon the filing of the petition, notice of the petition is normally given by mail to the persons designated by the court in the order scheduling the petition. 119 This would include all interested parties who are permitted to file written exceptions to the petition for allowances. 120

As with any fee award, the determination of what is "reasonable" compensation for a trustee or receiver is discretionary and must necessarily be decided on a case-by-case basis. Among the factors which the court will consider are the responsibility assumed by the trustee or

118. Del. Ch. Ct. R. 164. The attorney is permitted to file a separate petition. Id.
120. Written exceptions must be served on the receiver or trustee and filed with the Register in Chancery. Del. Ch. Ct. R. 166.
receiver, the services he performed, and the price usually charged for similar services.\textsuperscript{121} Also taken into account are the results achieved and the quality of the work performed.\textsuperscript{122}

Much the same approach is employed in awarding compensation to counsel for the receiver or trustee. Ordinarily the court will look to the fee arrangement authorized in the order appointing counsel, which is typically on a "normal hourly rate" basis.\textsuperscript{123} However, contingent fee arrangements have also been approved, and in such cases the court will consider the benefits achieved by counsel's endeavors, the standing and ability of counsel, the difficulties confronted by counsel, and the contingent ("at risk") nature of the fee and the efforts exerted.\textsuperscript{124}

Apart from receivers, trustees, and their counsel, compensation may also be awarded to stockholders or creditors, or their counsel for services which they can prove resulted in creating, saving, protecting, or augmenting a common fund.\textsuperscript{125} Compensation has been awarded to a creditor's attorney for bringing an action to appoint a receiver where the result proved beneficial to other creditors.\textsuperscript{126} However, services performed by "volunteers" which duplicate the efforts of the receiver and his counsel will not be compensated out of receivership assets.\textsuperscript{127}


\textsuperscript{122} Allows may be denied a receiver who was negligent in the performance of his duties thereby causing loss to the estate in excess of the allowances sought. Frazer v. Consolidated Novelty Co., 17 Del. Ch. 97, 157 A. 431 (1929).

\textsuperscript{123} Nor will the court award compensation for services or activities not encompassed within their duties or authority. Deputy v. Delmar Lumber Mfg. Co., 10 Del. Ch. at 103, 85 A. at 670.


\textsuperscript{125} Allows may be denied a receiver who was negligent in the performance of his duties thereby causing loss to the estate in excess of the allowances sought. Frazer v. Consolidated Novelty Co., 17 Del. Ch. 97, 157 A. 431 (1929).


B. Accounting, Final Distribution, and Discharge

The ultimate stage of the receivership or trusteeship is the final accounting and distribution to creditors and stockholders. As in the case of compensation petitioners, petitioners for final accounting are the subject of notice and hearing, and exceptions to a final account are heard in the same manner as petitions for allowances. Upon settling the final account with the trustee or receiver, the court will make final allowances to the receiver and his counsel and order final distribution to creditors and stockholders. Thereafter the receiver or trustee must file a report of his proceedings under the order of distribution, submitting proof of all payments so made.

A common problem which arises during this stage is how to dispose of funds which are unclaimed or which are due to persons who cannot be located. Under such circumstances the property will eventually escheat, but to what state and under what procedure?

It has become clear that the state to which unclaimed property will escheat is the state of the last known address of the stockholder as shown on the books and records of the corporation. The practical consequence of this rule is that before final distribution is made each state where an unlocated stockholder of record has a last known address must be notified of its potential escheat claim and arrangements must be made to preserve the unclaimed funds for the benefit of potential escheat claimants.

The obligation to preserve the rights of potential escheat creditors created administrative problems. Many states have differing periods of dormancy, that is statutory periods during which the funds must remain unclaimed before the state’s escheat claim ripens. Some dormancy periods are as long as seven years. This fact generated concern as to whether the trusteeship or receivership was required to remain open during the longest period of dormancy. Fortunately, this problem no longer exists by virtue of section 1160, which enables the trustee to provide for the rights of potential escheat claimants.

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128. The procedure for final accounting and distributions is set forth in Del. Ch. Cr. R. 162-167. Nothing in the statute or rules precludes interim distributions to creditors and shareholders, and it is customary that creditors are paid before the final accounting stage.
130. Del. Ch. Cr. R. 166.
132. Texas v. New Jersey, 379 U.S. 674 (1965); Nellius v. Tampax, Inc., 394 A.2d 233 (Del. Ch. 1978). Where such name and address (or the identity of the stockholder) are in issue, a hearing may be held. Id.
without the estate having to remain open, by authorizing the deposit of unclaimed funds with the Register in Chancery and then notifying affected state escheat authorities that after the applicable period of dormancy, they may claim any unclaimed funds to which they prove themselves entitled, from the Register in Chancery.

After filing the report of his performance under the order of distribution and after complying with all orders and decrees touching the distribution, the receiver or trustee then petitions the court to be discharged.134 With the granting of the discharge petition, the receivership or trusteeship is formally at a close and the winding up process has been completed.

CONCLUSION

So long as Delaware corporations continue to go out of existence and wind up their affairs, competent professionals will be needed to administer that process. Over the decades, trustees and receivers supervised by the court of chancery have ably served as those ministers, using as their legal guidelines an admixture of statutes, case law, court rules, and a large dose of common sense. As previously noted, the guidelines are not without their imperfections. No legal structure which must confront ever-changing and often unprecedented circumstances can ever be fault-free. But experience has shown that the defects are more than overcome by the virtues. The flexibility of the system and the expertise and ability of the court of chancery and the Delaware corporate bar to fashion orders tailored to solving problems in each individual case have all combined to produce a demonstrated competence in that important area. If experience is any guide, that competence will continue to serve the corporate community as well in the future as it has in the past.