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The Integrity of Delaware's Corporate Dissolution Statute After Territory of the United States Virgin Islands v. Goldman, Sachs & Co.: Is Extended Post-Dissolution Shareholder Liability a Necessary Component of Delaware's Corporate Dissolution Scheme?

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THE INTEGRITY OF DELAWARE'S CORPORATE DISSOLUTION STATUTE AFTER *TERRITORY OF THE UNITED STATES VIRGIN ISLANDS v. GOLDMAN, SACHS & CO.*: IS EXTENDED POST-DISSOLUTION SHAREHOLDER LIABILITY A NECESSARY COMPONENT OF DELAWARE'S CORPORATE DISSOLUTION SCHEME?

INTRODUCTION

The possibility of corporate dissolution creates both an incentive for opportunistic corporations to avoid future liability and a corresponding risk of non-compensable harm for consumers and the general public.[1] This is especially true in the area of products liability and environmental contamination, where a company's products or manufacturing activities may inflict harm many years after the entity has dissolved and distributed its assets.[2]

1. Henry Hansmann and Reinier Kraakman note:

> The second factor that can exacerbate inefficient incentives under limited liability is the shareholder's option to liquidate the corporation and distribute its assets before tort liability attaches. Since products and manufacturing processes often create long-term hazards that become visible only after many years, firms can—and often do—liquidate long before they can be sued by their tort victims.

Toward Unlimited Shareholder Liability for Corporate Torts, 100 YALE L.J. 1879, 1884 (1991); *see also* Mark R. Sarlitto, Note, *Recognizing Products Liability Claims at Dissolution: The Compatibility of Corporate and Tort Law Principles*, 87 COLUM. L. REV. 1048, 1062–63 (1987) ("Dissolution law shifts the fixed costs of claim uncertainty away from the firm and its shareholders to a class of anonymous and dispersed consumers. The possibility of this shift creates the dissolution incentive.").

2. One commenter notes:

> Since a products liability claim is often contingent upon a showing that an individual sustained an injury from a defective product, many products liability claimants have no claim against the corporation at the time of dissolution. When the cause of action does accrue, the claimants may then find the dissolved corporation immune from suit.

Rosemary Reger Schnall, Comment, *Extending Protection to Foreseeable Future Claimants Through Delaware's Innovative Corporate Dissolution Scheme*—In re Rego Co., 19 DEL. J. CORP. L. 141, 146 (1994). Based on an analysis of insurance industry statistics, Mr. Sarlitto has also noted the delayed accrual of products liability claims and the problem corporate dissolution poses for recovery of such claims:

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

To eliminate this "dissolution incentive,"[3] most states have enacted statutory schemes that regulate corporate dissolution and impose varying degrees of liability upon both directors and shareholders.[4]

In the late 1980s, the State of Delaware developed a statutory scheme, then revolutionary, that sought to balance the competing policy concerns of corporate and tort law.[5] While revised since its inception, Delaware's dissolution scheme is still predicated upon two competing, but not irreconcilable, policy concerns: 1) the expeditious distribution of corporate assets in a manner that facilitates their subsequent beneficial utilization; and 2) the protection of corporate creditors and claimants.[6] Based on these policy concerns, Delaware's statutory scheme provides corporate directors with a choice between either formal, judicially supervised wind-up procedures or informal, extrajudicial wind-up procedures.[7] Generally, judicially supervised wind-up provides both directors and shareholders greater insulation from liability and affords shareholders greater security for liquidation distributions.[8] In addition, judicially supervised dissolution provides corporate creditors and claimants—known, contingent, and unknown but foreseeable—with a greater degree of protection than extrajudicial dissolution.[9] Thus, judicially supervised dissolution, while costly, efficiently satisfies the competing policy concerns underlying Delaware's statutory scheme.[10] Extrajudicial corporate dissolution,

> statistics suggest that a substantial proportion of products liability claimants are precluded from recovery by a five-year abatement period.

Sarlitto, *supra* note 1, at 1052 (citing REINSURANCE ASS'N OF AM., LOSS DEVELOPMENT STUDY (5th ed. 1985)); *see also* Ann E. Conaway Stilson, *Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors*, 20 DEL. J. CORP. L. 1, 73 (1995) ("The most common scenario implicating future unknown claims is that of delay-occurrence products liability injuries that are not only foreseeable to a dissolving firm at the time of its death but which also provide the sole impetus for the corporation's dissolution.").

3. Sarlitto, *supra* note 1, at 1063.

4. For a list of corporate dissolution statutes by state, see MODEL BUS. CORP. ACT § 14.07 cmt. at 14-69–70 (2008).

5. Stilson, *supra* note 2, at 75–76 ("Only Delaware and Florida have statutes which have ostensibly been 'tort' reformed to address the academic proposals of tort modifications within dissolution statutes.") (citing DEL. CODE ANN. tit. 8, §§ 280–282 (1994); FLA. STAT. ANN. § 607.1406 (West 1990 & Supp. 1994)); *see also* Schnall, *supra* note 2, at 149 ("The recently enacted provisions of sections 280 through 282 of the Delaware General Corporation Law provide a novel alternative mechanism governing dissolution which addresses the needs of both claimants with late-maturing products liability claims, and shareholders who receive a distribution of the dissolved corporation's assets.").

6. *See In re* RegO Co., 623 A.2d 92, 96–97 (Del. Ch. 1992); Schnall, *supra* note 2, at 149.

7. *See* DEL. CODE ANN. tit. 8, §§ 280–281 (2009).

8. Schnall, *supra* note 2, at 168; *see* Sarlitto, *supra* note 1, at 1062 (arguing that the dissolution provisions shift the risk from the company to the company's past customers).

9. Schnall, *supra* note 2, at 167–68.

10. *Id.* at 175.

on the other hand, fails to adequately satisfy policy concerns—i.e., protection of corporate creditors or facilitation of corporate asset distribution—in situations where corporations have potential future liability.[11]

Elective corporate dissolution under judicial scrutiny is, given the possibility of future liability, the optimum method of corporate dissolution. However, in *Territory of the United States Virgin Islands v. Goldman, Sachs & Co.*, the Delaware Court of Chancery interpreted Delaware's dissolution statute as providing shareholders the same degree of protection from future liability regardless of whether the corporation winds up its affairs extrajudicially or under judicial scrutiny.[12] This raises the question of whether temporally extended shareholder liability for post-dissolution corporate distributions is a necessary element of Delaware's statutory scheme. More broadly, *Goldman Sachs* questions the utility of post-dissolution shareholder liability as an element of a state's corporate dissolution scheme in general. Given Delaware's preeminent status as a state of incorporation,[13] the broad reach and influence of its Court of Chancery,[14] and the comparatively unique nature of its

11. *See id.* at 168–69 (noting that the default provisions fail to safeguard the rights of future claimants and do not give shareholders the same finality and certainty as the elective provisions).

12. 937 A.2d 760, 798–800 (Del. Ch. 2007), *aff'd*, 956 A.2d 32 (Del. 2008).

13. A leading treatise on Delaware General Corporation Law (DGCL) observed:

> By any measure, Delaware is the preeminent state in corporation law. Over 40 percent of the companies listed on the New York Stock Exchange are incorporated in Delaware. A majority of the publicly traded Fortune 500 companies are Delaware corporations. More than 80 percent of the companies that have reincorporated during the past quarter century have migrated to Delaware. Legal pronouncements by Delaware courts are watched in the financial capitals of the world.

Leo Herzel & Laura D. Richman, *Delaware's Preeminence By Design*, *Foreword* to 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS F-1 (3d ed., supp. 2001) (footnotes omitted); *see also* JEFFREY W. BULLOCK, DEL. DIV. CORPS., 2008 ANNUAL REPORT 1 (2009) ("Despite the worldwide economic decline and its effect on new business formations, Delaware remained the chosen home of 64% of Fortune 500 companies . . . . At the end of 2008, there were over 882,000 active business entities in Delaware—an overall increase of 4.1% over the previous year.").

14. In their comparison of DGCL with the Model Business Corporation Act, Michael P. Dooley and Michael D. Goldman noted the importance of Delaware's judicial decisions involving corporate law:

> The influence of the Delaware judiciary cannot be overstated. Corporation law students are fed a heavy, nearly exclusive diet of opinions from the Delaware Court of Chancery and the Supreme Court of Delaware, and this learning carries over to their post-graduation careers in practice. In transactions or disputes involving firms incorporated elsewhere, lawyers regularly look to Delaware case law for guidance if there is no binding precedent or controlling statute in the relevant state of incorporation.

Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 738 (2001).

statutory dissolution scheme,[15] this Comment will primarily focus on Delaware law. Specifically, this Comment will discuss the viability of exposing shareholders to extended post-dissolution liability as a means of deterring corporate liability-avoidance by dissolution.

Under the current law after *Goldman Sachs*, shareholders lack an incentive to initiate or approve of formal dissolution—they are equally protected from post-dissolution liability regardless of the method of wind-up the corporation employs.[16] Moreover, given the increased cost of formal dissolution and its potential to diminish shareholder liquidation distributions, shareholders may actually have an incentive to initiate or approve extrajudicial dissolution as a means of avoiding future liabilities. To further complicate matters, *Goldman Sachs* articulates a strong policy preference among the Delaware Court of Chancery for temporally limited post-dissolution shareholder liability.[17] The chancery court's decision in *Goldman Sachs* thus threatens to undermine the balance of competing policy concerns underlying Delaware's statutory dissolution scheme. In order to preserve the flexibility and security offered to directors and shareholders while simultaneously protecting the interests of corporate claimants at dissolution, Delaware courts must take several steps to modify the law governing corporate dissolution. To reestablish the balance between corporate and tort law policy concerns regarding corporate dissolution after *Goldman Sachs*, the Delaware Court of Chancery should employ three measures: 1) limit the power to choose the method of corporate dissolution solely to directors; 2) impose an implied statutory duty upon such directors to make reasonable provisions for future claims if they elect extrajudicial wind-up; and 3) utilize the doctrine of successor liability[18] when necessary to avoid pre-dissolution asset liquidation. By employing these measures, the Delaware Court of Chancery can protect corporate shareholders from temporally-indeterminate post-dissolution liability while simultaneously protecting the interests of present and future tort claimants. These measures would also allow the Court of Chancery to ensure that corporations with the potential for future liability will utilize the formal wind-up procedures. This, in turn, will provide

15. Schnall, *supra* note 2, at 175 ("Delaware's alternative statutory mechanism for voluntary dissolution is the first of its kind to address the problem of post-dissolution products liability claims by mandating that reasonable provisions be made for foreseeable, unknown future claimants.").

16. *See Goldman, Sachs & Co.*, 937 A.2d at 764.

17. *See id.* at 792–97.

18. Under the doctrine of successor liability, Delaware courts may, where "avoidance of liability would be unjust," impose liability upon the transferee of "all or substantially all" of a transferor's assets. *See* Ross v. Desa Holdings Corp., No. 05C-05-013, 2008 WL 4899226, at *4 (Del. Super. Ct. Sept. 30, 2008). Situations where this liability may arise include: "1) the buyer's [contractual] assumption of liability; 2) de facto merger or consolidation; 3) mere continuation of the predecessor [corporation] under a different name; or 4) fraud." *Id.*

greater protection for corporate claimants insofar as the formal wind-up procedures provide for judicial supervision of corporate dissolution and the appointment of a guardian *ad litem* to represent the interests of future corporate claimants.[19] Employing these measures will restore the delicate balance between corporate and tort law policy concerns regarding corporate dissolution.

This Comment will first track the historical development of the law governing corporate dissolution. A brief, historical analysis of corporate dissolution under the common law will provide a proper context within which Delaware's modern statutory dissolution scheme may be assessed. Next, this Comment will summarize the operation of Delaware's statutory dissolution scheme and the manner in which it balances corporate and tort law policy concerns. Then, the Comment will discuss the *Goldman Sachs* decision and its implications for the integrity of Delaware's statutory dissolution scheme. Finally, this Comment will conclude with several recommendations for a change in the law that will enable Delaware to preserve the integrity of its dissolution scheme while simultaneously protecting shareholders from temporally indeterminate post-dissolution liability.

I. HISTORICAL DEVELOPMENT OF THE LAW GOVERNING CORPORATE DISSOLUTION

A. *Common Law Corporate Dissolution*

Early common law viewed the corporation as a distinct legal entity, roughly analogous to an individual human being. Under early English common law, the corporation, or *corpora corporata*, was considered an "artificial person" composed of, yet distinct from, its constituent members.[20] When individuals united into a corporate entity to achieve various ends—whether religious, educational, or commercial—such persons and their successors were considered "one person in law."[21]

Early American common law also reified the corporation. In *Trustees of Dartmouth College v. Woodward*,[22] Chief Justice Marshall described the corporation as a distinct entity possessing individual characteristics:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . . Among the most important are immortality, and, if the expression may be allowed,

19. Schnall, *supra* note 2, at 167–68 (citing DEL. CODE ANN. tit. 8, § 280(c) (2008)).
20. 1 WILLIAM BLACKSTONE, COMMENTARIES *467–68.
21. *Id.* at *468.
22. 17 U.S. (4 Wheat.) 518 (1819).

> individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.[23]

Thus, at common law, the corporation was a discrete, legally-cognizable entity of potentially eternal existence. As such, it was legally distinguishable from its constituent members and capable of acting in its own capacity. This conception of the corporation had important implications for the law regarding corporate dissolution.

While recognizing the ability of a corporation to exist perpetually, both Blackstone and American common law also acknowledged the reality of corporate dissolution. Perhaps following his initial analogy to its logical conclusion, Blackstone described the dissolution of a corporation as its "civil death."[24] In *Oklahoma Natural Gas Co. v. Oklahoma*, Chief Justice Taft rendered this analogy more explicit: "It is well settled that at common law . . . a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect."[25] In accordance with this analogy, dissolution of the corporation at common law immediately terminated all claims by and against the corporate entity.[26] The corporation itself ceased to exist, and was therefore incapable of sustaining suits of any kind.[27] Moreover, the constituent members of the corporation—both directors and shareholders—were entirely protected from any liability after corporate dissolution.[28] Chief Justice Taft noted that "as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant."[29] Thus, at early common law, the dissolution of the corporation left all claimants without remedy and all corporate members without liability.[30] While simplistic in its operation,[31] this rule created a notable incentive for dissolution; corporate

23. *Id.* at 636.

24. 1 BLACKSTONE, *supra* note 20, at *484 ("The grant is indeed only during the life of the corporation; which *may* endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life.").

25. 273 U.S. 257, 259 (1927).

26. *See In re* RegO Co., 623 A.2d 92, 95 (Del. Ch. 1992) (citing, inter alia, *Okla. Natural Gas Co.*, 273 U.S. at 259).

27. Pac. Scene, Inc. v. Penasquitos, Inc., 758 P.2d 1182, 1183 (Cal. 1988) (en banc).

28. 1 BLACKSTONE, *supra* note 20, at *484 ("The debts of a corporation, either to or from it, are totally extinguished by it's [sic] dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities.").

29. *Okla. Natural Gas Co.*, 273 U.S. at 259.

30. *In re RegO Co.*, 623 A.2d at 95 ("At an early stage of our law . . . [c]orporate dissolution thus stood as a substantial risk to corporate creditors, threatening to deprive them of a party to sue on their claims.").

31. *See* Joseph Jude Norton, *Relationship of Shareholders to Corporate Creditors upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets*, 30 BUS.

directors or shareholders were able to dissolve a corporate entity, distribute its assets, and avoid any pending or future claims with impunity.[32]

B. Historical Overview of the Trust Fund Doctrine

To "ameliorate the harsh effects of th[e] common law," American courts eventually fashioned the amorphous "trust fund doctrine."[33] Somewhat ambiguous in nature,[34] the doctrine emerged as an equitable remedy that enabled creditors to recover against shareholders after corporate dissolution if the corporation improperly distributed its assets to shareholders rather than unsatisfied creditors.[35] Initially, the doctrine enabled creditors to pursue dissolution distributions into the hands of shareholders on the theory that an equitable lien or constructive trust attached to the distributed property in favor of corporate creditors.[36] This judicial notion of a constructive trust also gave rise to the fiduciary duties of directors during dissolution.[37] As the doctrine developed, courts began characterizing directors during corporate dissolution as trustees—legally obligated to administer corporate assets in favor of creditors and stockholders.[38] A brief historical summary of the trust fund doctrine will establish a helpful context for an analysis of Delaware's contemporary dissolution statute.

LAW. 1061, 1061 (1975); *see also In re RegO*, 623 A.2d at 95 ("At an early stage of our law, that law was clear, if harsh.").

32. Stilson, *supra* note 2, at 67; *see also In re RegO*, 623 A.2d at 95 ("Corporate dissolution thus stood as a substantial risk to corporate creditors, threatening to deprive them of a party to sue on their claims.").

33. Pac. Scene, Inc. v. Penasquitos, Inc., 758 P.2d 1182, 1183 (Cal. 1988) (en banc); *In re RegO*, 623 A.2d at 95; Blankenship v. Demmler Mfg. Co., 411 N.E.2d 1153, 1155 (Ill. App. Ct. 1980).

34. Norton, *supra* note 31, at 1067 ("'Just what the doctrine is, even those who uphold it do not seem to know. It seems to be an accommodating judicial *ignis fatuus*, which is present or absent as courts seem to require. No court has been able to describe it exactly or to define its limits.'") (quoting Note, *The "Trust Fund" Theory*, 9 HARV. L. REV. 481, 482 (1896)); 15A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7360, at 48 (West perm. ed., rev. vol. 2009) (1917) ("Perhaps no concept has created as much confusion in the field of corporate law as has the 'trust fund doctrine.'").

35. *See* Koch v. United States, 138 F.2d 850, 852 (10th Cir. 1943); Wood v. Dummer, 30 F. Cas. 435, 436–37 (C.C.D. Me. 1824) (No. 17,944).

36. *Koch*, 138 F.2d at 852; *Wood*, 30 F. Cas. at 436–37; 19 AM. JUR. 2D *Corporations* § 2419, at 515 (2009).

37. *See, e.g.*, Okla. Natural Gas Co. v. Oklahoma, 273 U.S. 257, 260 (1927) (citing OKLA. STAT. tit. 34, § 5361 (1921)); *see also* Stilson, *supra* note 2, at 90 (acknowledging that inconsistent application of corporate law across different states can cause confusion about managerial duties, especially to creditors).

38. *See, e.g.*, *Okla. Natural Gas Co.*, 273 U.S. at 260.

The trust fund doctrine first emerged in early nineteenth century American Jurisprudence with Justice Story's opinion in *Wood v. Dummer*.[39] Justice Story, sitting circuit, reviewed whether bank shareholders who received dividend distributions prior to insolvency were liable for the outstanding debts of the dissolved bank.[40] The defendant shareholders had authorized substantial distributions despite the existence of outstanding banknotes.[41] The holders of the notes filed suit against the shareholders, alleging fraudulent division of the bank's capital stock.[42] However, the plaintiffs failed to establish the existence of fraud.[43] Thus, according to Justice Story, the plaintiffs could only recover based on the fact that defendant shareholders possessed the bank's distributed capital.[44] Justice Story ultimately held the defendant shareholders liable for the outstanding debts of the bank in accordance with their respective shares of capital stock.[45] His articulation of the basis for relief predicated subsequent development of the trust fund doctrine:

> [T]he charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it; and the stockholders have no rights, until all the other creditors are satisfied. . . .
>
> . . . If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any persons, having notice of the trust attaching to it. As to the stockholders themselves, there can be no pretence to say, that, both in law and fact, they are not affected with the most ample notice.[46]

While critics have suggested that this basis of relief was unnecessary and vague,[47] *Wood* provided a foundation for further judicial application of the trust fund theory. After *Wood*, it became possible for an "equitable charge,"—be it a constructive trust or equitable lien—to attach to corporate distributions

39. *Wood*, 30 F. Cas. at 436–37; *see also* Norton, *supra* note 31, at 1062 (noting that the trust fund doctrine was not an essential holding of *Wood* but that the doctrine was applied uncritically afterwards).

40. *Wood*, 30 F. Cas. at 436.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 438.

45. *Wood*, 30 F. Cas. at 440.

46. *Id.* at 436–37.

47. *See, e.g.*, Norton, *supra* note 31, at 1062–67 (arguing that Justice Story looked for broader equitable principles to justify his decision because the plaintiff's complaint was poorly drafted); Stilson, *supra* note 2, at 79–81 (pointing out three unfortunate aspects of Justice Story's opinion: 1) It was not required to decide the case; 2) It created an ambiguous doctrine with poorly defined limits; and 3) It distorted basic corporate law).

in favor of unpaid creditors.[48] This provided creditors and other claimants with a viable basis for ex post recovery against the shareholders of a dissolved corporation.

In the century succeeding *Wood*, courts continued to apply and even expand upon the trust fund doctrine as a means of post-dissolution recovery against shareholders.[49] In *Koch v. United States*, the Tenth Circuit, capitalizing upon the notion of an implied trust, expansively defined the doctrine:

> Where the assets of a dissolved corporation have been distributed among the stockholders, a creditor of the dissolved corporation may follow such assets as in the nature of a trust fund into the hands of stockholders. . . . Where the trust property has been used by the stockholder for his own purpose, or disposed of by him, he may be held personally liable for the full value thereof.[50]

In addition, courts also imposed equitable duties on directors during corporate dissolution, further expanding the trust fund doctrine.[51] In *Oklahoma Natural Gas Co.*, Chief Justice Taft, interpreting Oklahoma law, expanded upon the notion of a constructive trust imposed upon corporate assets and stated that the directors and managers of a dissolved corporation were "trustees of the creditors and stockholders."[52] As such, corporate directors had a fiduciary duty to administer corporate assets in favor of creditors and stockholders.[53] Unsatisfied creditors possessed a claim to corporate assets superior to that of stockholders at dissolution.[54] If directors breached their duty to creditors by wrongfully distributing corporate assets to shareholders before creditors at dissolution, the directors could be personally liable.[55]

Thus, by the middle of the twentieth century, the law governing corporate dissolution had developed into a convoluted web of equitable trusts, liens, and fiduciary duties. Reacting to the simplistic yet harsh effects of the common-law rule of no post-dissolution liability, judges crafted equitable solutions to

48. *See* Norton, *supra* note 31, at 1071, 1067–72 (critically examining the trust fund doctrine to determine the nature of the equitable remedy courts employed (i.e., a constructive trust or equitable lien)).

49. 15A FLETCHER ET AL., *supra* note 34, § 7369 ("[T]he doctrine has given rise to a system of legal rules, and the decisions stating the principle, either directly or by implication, also state the effect of collateral principles involved.").

50. 138 F.2d 850, 852 (10th Cir. 1943) (footnote omitted).

51. *In re* RegO Co., 623 A.2d 92, 95 (Del. Ch. 1992) (footnote omitted) ("While in some of its aspects the trust fund doctrine has had a varied history, its central concepts have been widely acknowledged. Those core concepts are that on dissolution corporate directors have obligations to creditors . . . ."); Stilson, *supra* note 2, at 90 ("[I]t is irrefutable that equity gave birth to the doctrine which first announced the directorial duty to creditors.").

52. Okla. Natural Gas Co. v. Oklahoma, 273 U.S. 257, 260 (1927) (quoting OKLA. STAT. tit. 34, § 5361 (1921)).

53. *Id.*

54. *See* Wood v. Dummer, 30 F. Cas. 435, 436–37 (C.C.D. Me. 1824) (No. 17,944).

55. 15A FLETCHER ET AL., *supra* note 34, § 7369.

remedy the problems inherent in corporate dissolution under an all-encompassing "trust fund doctrine." While the doctrine has been criticized for its ambiguity,[56] two broad rules governing the duties and liabilities of directors and shareholders at dissolution have emerged in the case law of various jurisdictions. First, corporate directors serve as fiduciaries charged with the administration of corporate assets in favor of both creditors and shareholders.[57] Second, an "equitable charge"[58] attaches to corporate assets in favor of creditors, thereby enabling creditors to pursue these assets into the hands of recipient shareholders.[59]

C. Modern Statutory Dissolution Schemes

Perhaps due to the ambiguity inherent in the trust fund doctrine, many state legislatures have crafted a statutory solution to the problem of corporate dissolution. As judges were powerless to prolong the existence of the corporate entity itself, the trust fund doctrine imposed liabilities and duties upon individual directors and shareholders.[60] Insofar as corporations are creatures of statute, however, legislatures possess the ability to statutorily manipulate their existence and modify their legal attributes.[61] Consequently, many states enacted laws that precluded claim abatement upon dissolution and/or statutorily extended a dissolved corporation's existence.[62] Commonly referred to as "survival statutes,"[63] nearly all jurisdictions have now adopted some variant of these laws.[64] While differing in certain respects, most state dissolution statutes extend the existence of a dissolved corporation for a specified number of years (generally ranging from two to five) and prevent common law claim abatement at dissolution.[65] Under most statutes, the existence of a dissolved corporation is temporarily prolonged solely for the

56. *See supra* note 34 and accompanying text.

57. *Okla. Natural Gas Co.*, 273 U.S. at 260 (quoting OKLA. STAT. tit. 34, § 5361); *In re* RegO Co., 623 A.2d 92, 95 (Del. Ch. 1992); JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS § 26.08, at 714 (2d ed. 2003).

58. Norton, *supra* note 31, at 1071.

59. *See Wood*, 30 F. Cas. at 437; *In re RegO Co.*, 623 A.2d at 95; 19 AM. JUR. 2D *Corporations* § 2419, at 515 (2009).

60. *See Okla. Natural Gas Co.*, 273 U.S. at 259 ("But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation.").

61. *Cf. id.* (acknowledging corporations exist by legislative will).

62. *See, e.g.*, MODEL BUS. CORP. ACT ANN. § 14.07, cmt. at 14-68 (4th ed. 2008).

63. *See* Stilson, *supra* note 2, at 68–69.

64. *See supra* note 4 and accompanying text. For Delaware's statutory dissolution scheme, see DEL. CODE ANN. tit. 8, §§ 275–282 (2008).

65. MODEL BUS. CORP. ACT ANN. § 14.07, cmt. at 14-68, 14-71.

purposes of properly administering corporate assets and disposing of corporate liabilities.[66]

The pervasive development of state dissolution statutes has largely displaced the equitable trust fund doctrine.[67] Insofar as this doctrine filled the gaps of the common law by providing corporate claimants with a means of recovery at dissolution, state dissolution statutes seem to have largely fulfilled this purpose.[68] Moreover, by enabling creditors to satisfy their claims against the corporation for an extended period after dissolution, these statutes seem to have substantially mitigated the incentive for opportunistic dissolution. Yet, these statutes have not entirely abrogated the potential for corporate opportunism. An analysis of modern statutory dissolution schemes, specifically that of Delaware, reveals a distinct gap. While most state dissolution statutes adequately dispose of claims arising prior to or during the corporation's statutorily-extended existence, few address the possibility of claims accruing after the corporation's prolonged existence but stemming from pre-dissolution conduct. For instance, few, if any, state survival statues would adequately address the potential for liability where a corporation discharges toxic chemicals into a water source and dissolves a decade before authorities discover the contamination. In his description of Delaware's dissolution statute, Chancellor Allen describes this statutory gap:

> This modern scheme still leaves open the question, what, if any, rights are afforded to persons who have no claim against a corporation at the time of its dissolution, or during the statutory wind-up period, but who do thereafter

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66. *Id.* at 14-68 ("[M]any jurisdictions also provided that the existence of the corporation continued after dissolution for the purpose of prosecuting or defending against litigation."); Stilson, *supra* note 2, at 66–68 ("States reacted to the harsh effects of the common law by enacting modern dissolution statutes which permitted corporations to retain title in firm property for the limited purpose of winding up corporate affairs.").

67. COX & HAZEN, *supra* note 57, at 714; 15A FLETCHER ET AL., *supra* note 34, § 7373, at 65; Marsh v. Rosenbloom, 499 F.3d 165, 176 (2d Cir. 2007) ("We are persuaded by the general consensus that modern statutory remedies have effectively replaced the trust fund doctrine . . . .").

68. *See* Pac. Scene, Inc. v. Penasquitos, Inc., 758 P.2d 1182, 1185 (Cal. 1988) ("In view of the detailed statutory remedies now encompassing virtually all claims previously asserted in equity against the former shareholders of dissolved corporations, we must similarly conclude that the Legislature has occupied the field and precluded resort to dormant common law doctrines for provision of extra-statutory relief."); *see also In re* RegO Co., 623 A.2d 92, 95 (Del. Ch. 1992) ("Modernly, the problem that the trust fund doctrine addresses has been ameliorated by provisions in the corporate codes of most or all jurisdictions that continue the existence of the corporation as a jural entity for limited purposes following dissolution."); Hunter v. Fort Worth Capital Corp., 620 S.W.2d 547, 550 (Tex. 1981) ("The effect of these statutes was to supplant the equitable trust fund theory by declaring a statutory equivalent."). *But see* Green v. Oilwell, 767 P.2d 1348, 1353 (Okla. 1989) ("[T]he equitable trust fund doctrine is available to a claimant injured by a defective product after the dissolution of a corporate manufacturer against the former shareholders of the dissolved corporation to the extent of the assets received by them.").

> acquire such a claim. . . . It would seem apparent that such a person could not sue the dissolved corporation itself. . . . But has such a person a cognizable claim against others—against directors or shareholders most notably?
>
> This I take to be an unclear and troubling question.[69]

While such an abstract hypothetical may seem like a mere pedagogical exercise, the potential for post-dissolution claims in modern society is real. As the Delaware Court of Chancery observed, "the problem of compensation to persons injured by defective products or by undiscovered and actionable environmental injury, caused by dissolved corporations, is of obvious social concern."[70] In addition, the possibility of such claims raises important questions about the operations of various statutory dissolution schemes, and the role shareholder liability plays therein.

II. CORPORATE DISSOLUTION UNDER DELAWARE GENERAL CORPORATION LAW

A. *The Policies Underlying Delaware's Dissolution Statute*

Traditionally, corporate dissolution has precipitated a conflict between tort law and corporate law. Seeking to facilitate the efficient use of capital, the predominant theme in corporate dissolution law is the expeditious distribution of corporate assets in a flexible manner that provides recipients with a reasonable degree of certainty regarding the security of their respective shares.[71] Contrastingly, the goal of tort law is to efficiently allocate losses by compelling defendants to compensate injured claimants.[72] To achieve this end, tort law seeks to ensure the continuing availability of corporate assets to compensate parties who suffer injuries at the hands of a corporation or manufacturer. As a specific example, products liability law imposes strict liability upon manufacturers whose products injure consumers.[73] And, as most causes of action for products liability accrue at the time of injury, proper compensation may require the preservation of corporate assets for an extended period after dissolution if injuries occur after a corporation dissolves.

69. *In re RegO Co.*, 623 A.2d at 96. In *Territory of the United States Virgin Islands v. Goldman, Sachs & Co.*, the Chancery Court again noted the existence of this statutory gap:

> Specifically, § 278, as well as § 325(b) of the DGCL, bore on a question less than ideally certain under Delaware law (and American corporate law more generally): what, if any, liability was owed by corporate stockholders and directors for the activities of a dissolved corporation that occurred before its dissolution but where the claims regarding those activities arose only after its dissolution?

937 A.2d 760, 767 (Del. Ch. 2007), *aff'd*, 956 A.2d 32 (Del. 2008).

70. *In re RegO Co.*, 623 A.2d at 96.

71. Sarlitto, *supra* note 1, at 1065.

72. *See* Schnall, *supra* note 2, at 167.

73. *See id.*

Delaware's statutory dissolution scheme strikes a delicate balance between these two competing policy concerns.[74] By requiring corporations to provide adequate security for unknown but foreseeable claimants, Delaware's dissolution statute "recognizes rights in unknown future corporate claimants and provides a level of assurance to such persons that . . . reasonable provision will be made for their future claims."[75] The statute also fulfills the goals of corporate law. Promoting flexibility at dissolution, directors have the ability to choose between two different methods of claim disposition and asset distribution that provide differing levels of protection from liability[76]—formal, judicially supervised wind-up, or informal, extrajudicial wind-up.[77] Compliance with either method provides directors and shareholders with an efficient method of asset distribution and a reasonable, though different, degree of protection from personal liability.[78] A brief analysis of these statutory provisions will reveal the specific manner in which the Delaware legislature has attempted to balance these policies, and the extent to which they were successful in so doing.

B. The Operation of Delaware's Statutory Dissolution Scheme

Delaware's statutory dissolution scheme is contained in Sections 275 through 282 of Title 8 of the Delaware General Corporation Law (DGCL).[79] Under these provisions, a Delaware corporation dissolves upon duly disposing of all outstanding franchise tax liabilities and filing a certificate of dissolution with the secretary of state.[80] Notably, Delaware's dissolution statute allows either directors or shareholders to independently initiate dissolution.[81] Pursuant to DGCL Section 278, the existence of a dissolved corporation is automatically extended for a period of three years from the effective date of dissolution, or for such longer period as the Court of Chancery deems necessary.[82] Any claim initiated against the corporation prior to or within the three-year period does not abate by reason of the dissolution, and a corporation's statutory existence may be extended beyond the three-year

74. *In re RegO Co.*, 623 A.2d at 97; Schnall, *supra* note 2, at 166–68.

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

76. *See* DEL. CODE ANN. tit. 8, § 281(a)–(b) (2008); S.B. 93, 134th Gen. Assemb. § 280 cmt. (Del. 1987) ("The section (and Section 281, as amended) is designed to provide a 'safe harbor' such that if the procedures described in Section 280 are followed and assets are distributed in accordance with Section 281, as amended, directors . . . will not be held personally liable to unpaid claimants of the corporation for having improperly distributed assets.").

77. *See* tit. 8, §§ 280–281.

78. *In re RegO Co.*, 623 A.2d at 97; Schnall, *supra* note 2, at 167–69.

79. *See* tit. 8, §§ 275–282.

80. *See id.* §§ 275(f), 277.

81. *Id.* § 275(a)–(c).

82. *Id.* § 278.

limitation solely for the purpose of disposing of previously filed claims.[83] In addition, Section 278 strictly limits a corporation's post-dissolution activities. During its three-year winding-up period, a corporation may not continue in the business for which it was organized.[84] Rather, corporate existence is statutorily extended exclusively for the following purposes: 1) prosecuting and defending suits; 2) gradually settling and closing corporate business; 3) disposing of and conveying corporate property; 4) discharging liabilities; and 5) distributing to stockholders any remaining assets.[85] After the expiration of the three-year period, or of the period specified by the Court of Chancery, the corporation ceases to exist as a legal entity.[86] Similar to the common law rule, the termination of the corporation's existence constitutes its "civil death,"[87] and thereby renders it incapable of acting in a corporate capacity or sustaining liabilities.[88]

After dissolution under Section 278 and during the corporation's extended existence, directors may choose between two different statutory methods of administering the corporation's assets and disposing of its liabilities.[89] Sections 280 through 281 provide directors with a choice between a formal, judicially supervised wind-up procedure, and an informal, extrajudicial asset distribution process.[90] If the directors of a dissolved corporation elect to administer corporate assets and dispose of liabilities under judicial supervision, they must comply with the provisions of Sections 280 through 281(a). The provisions of these sections set forth a complex claim management scheme that contains various notice and claim-classification provisions. Under Section 280, a corporation that elects formal wind-up is required to publish notice of its dissolution in a specified manner and for a specified period of time.[91] Claimants with mature causes of action who fail to timely notify the

83. *Id.*

84. Tit. 8, § 278.

85. *In re* Citadel Indus., Inc., 423 A.2d 500, 504 (Del. Ch. 1980) (interpreting Section 278).

86. *Id.* at 503.

87. 1 BLACKSTONE, *supra* note 20, at *484.

88. *In re Citadel Indus., Inc.*, 423 A.2d at 503; *see also* Smith-Johnson S.S. Corp. v. United States, 231 F. Supp. 184, 186–87 (D. Del. 1964) (a corporation "lacks capacity" to be sued after the three-year period under Section 278 expires).

89. *See* tit. 8, §§ 280–281.

90. *Compare id.* §§ 280–281(a), *with id.* § 281(b). For the sake of brevity and clarity, this Comment will refer to judicially supervised corporate wind-up under Sections 280 through 281(a) as "formal wind-up," and extrajudicial wind-up under Section 280(b) as "informal wind-up."

91. *Id.* § 280(a)(1). After dissolution, a "corporation . . . may give notice of dissolution, requiring all persons having a claim against the corporation other than a claim against the corporation in a pending action, suit or proceeding to which the corporation is a party to present their claims." *Id.* This notice must "be published at least once a week for 2 consecutive weeks," and must state, inter alia, "[t]he date by which such a claim must be received by the corporation or successor entity, which date shall be no earlier than 60 days from the date thereof." *Id.*

corporation of their claim are barred from future recovery.[92] This notification procedure enables directors to efficiently identify all corporate claimants, and thereby facilitates judicious and efficient claim management.

After providing notice to all known claimants,[93] the directors are required to administer corporate assets in accordance with the claim-management provisions of Section 280. This Section divides claims into three classes: 1) matured or pending claims known to the corporation;[94] 2) contingent contractual claims known to the corporation;[95] and 3) unknown, but reasonably foreseeable claims.[96] If the directors fail to privately settle all known claims with the opposing parties, they must "petition the Court of Chancery to determine the amount and form of security that will be reasonably likely to be sufficient" for any pending claims or contingent contractual claims.[97] In addition, Section 280(c)(3) requires a formal judicial procedure to determine the potential for any unknown future claims, and the amount of corporate assets necessary for the satisfaction thereof.[98] Under this section, a dissolved corporation is required to "petition the Court of Chancery to determine the amount . . . of security" to be posted to satisfy potential claims that may "arise or . . . become known to the corporation" between five and ten years after dissolution.[99]

Depending upon the nature of the corporation's business, it may be necessary to employ an "actuarial analysis of statistically possible claims" in order to properly fulfill the requirements of this section.[100] Moreover, the Court of Chancery may, in its discretion, appoint a guardian ad litem at the corporation's expense to represent the interests of the potential claimants.[101]

After the Court of Chancery has determined the proper amounts of "security" under Section 280,[102] the directors of the dissolved corporation are required to distribute corporate assets in accordance with the provisions of Section 281(a). Pursuant to this section, the directors must pay all of the judicially determined claims in full to the extent corporate assets so provide.[103]

92. *Id.* § 280(a)(2).
93. *Id.* § 280(a)(1).
94. Tit. 8, § 280(a)(1).
95. *Id.* § 280(b)(1).
96. *Id.* § 280(c)(3).
97. *Id.* § 280(c)(1).
98. *Id.* § 280(c)(3).
99. Tit. 8, § 280(c)(3). This five- to ten-year period includes the automatic three-year extension provided by Section 278; *see id.* § 278 ("All corporations . . . shall nevertheless be continued, for the term of 3 years from such expiration or *dissolution* . . . .") (emphasis added).
100. Stilson, *supra* note 2, at 35.
101. Tit. 8, § 280(c)(3).
102. *Id.* § 280(c)(1)–(3).
103. *Id.* § 281(a).

If any assets remain after such provisions, the corporation may distribute the residue to the stockholders.[104] If the assets are insufficient to satisfy the claims, the corporation must provide for the claims by their priority, and ratably amongst equally-prioritized claims.[105] While the statute does not prescribe a means of prioritization, Section 281(c) and relevant case law suggest the existence of parity between present and future claims.[106]

A dissolved corporation may also choose to wind up its business and dispose of its liabilities in an informal, extrajudicial manner.[107] While this method has certain implications for director and shareholder liability, it is significantly less complex and time-consuming. Under this scheme, Section 281(b) provides an abbreviated dissolution process that enables directors to independently assess corporate claims without judicial supervision. Pursuant to this section, a dissolved corporation is simply required to adopt a plan of distribution prior to the expiration of the corporation's extended three-year post-dissolution existence under Section 278.[108] Similar in form to the claim classification provisions of Section 280, the relevant segments of Section 281(b) require a dissolved corporation to make reasonable provisions to pay: 1) all current and pending claims; 2) contingent contractual claims; and 3) unknown claims that "based on the facts known to the corporation . . . [or] are likely to arise or to become known . . . within 10 years after the date of dissolution."[109] The corporation is then required to pay all such claims in full to the extent its assets allow.[110] If the assets are insufficient, the corporation must pay the claims "according to their priority and . . . ratably" amongst equally prioritized claims.[111]

Delaware's dissolution statute thus provides directors with two distinct means of disposing of corporate claims and distributing corporate assets. Under Sections 280 and 281, a dissolved corporation engages in a complex notice and claim management process that entails judicial supervision and judicially-stipulated provisions of security. Under these sections, a corporation must petition the Court of Chancery to provide security for any unsettled pending or contingent claims or unknown future claims.[112] Contrastingly, Section 281(b) provides an informal process that enables a corporation to construct its own plan of claim provision and asset distribution, and implement

104. *Id.*
105. *Id.*
106. *See* tit. 8, § 281(a)–(b); *In re* RegO Co., 623 A.2d 92, 109–11 (Del. Ch. 1992).
107. *See* tit. 8, § 281(b).
108. *Id.* § 281(b).
109. *Id.*
110. *Id.*
111. *Id.*
112. Tit. 8, § 280(c)(1)–(3); *see also id.* § 281(a) (establishing payment and notice requirements).

that plan extrajudicially. Thus, a corporation that elects to dissolve under this section may forego the judicial formalities required under formal dissolution.[113] While this choice provides corporate directors and shareholders with flexibility during corporate dissolution, it also creates the potential for corporate opportunism. Given the increased complexity of Sections 280 and 281(a), and the fact that judicially determined provisions of security may deplete shareholder dissolution distributions, corporations with potential future liability may opportunistically exploit the informal wind-up procedures under Section 281(b). Delaware's scheme must preclude such exploitation as a means of avoiding liability. The legislature seems to have achieved this through a judicious allocation of liabilities.

C. Director and Shareholder Liability at Dissolution

The extent to which directors and shareholders are protected from personal liability during and after corporate dissolution is a function of the chosen method of asset distribution. So long as the corporation properly distributes its assets under either Sections 280 through 281(a) or Section 281(b), shareholders are only liable to corporate claimants up to the lesser of their pro rata share of the claim or the amount they received in dissolution distributions.[114] However, Section 282(b) provides an additional degree of protection for shareholders of a corporation the assets of which were distributed under court supervision pursuant to Sections 280 and 281(a). The stockholders of such a corporation are not liable for any claim against the corporation brought after the three-year dissolution period under Section 278.[115] This affirmative grant of protection to the stockholders of a corporation that distributes its assets under the formal method of Sections 280 through 281(a) impliedly suggests the absence of such protection for the stockholders of a corporation that distributes its assets under the informal provisions of Section 281(b).[116] Thus, a facial reading of the statute suggests that formal dissolution pursuant to Sections 280 and 281(a) provides shareholders with a greater degree of protection from pro rata liability to corporate creditors than does informal dissolution under Section 281(b).

Formal dissolution under Sections 280 and 281(a) also provides directors with a greater degree of protection from personal liability.[117] While Section

113. *Id.* § 281(b).

114. *Id.* § 282(a).

115. *Id.* § 282(b).

116. Schnall, *supra* note 2, at 169 & n.180 ("Unlike the elective scheme, the default provision of section 281(b) does not restrict the time period in which corporate creditors can seek satisfaction of their claims from shareholders who received a distribution of the dissolved corporation's assets, and so these shareholders are potentially at risk for liability to corporate creditors indefinitely.") (footnote omitted).

117. *See supra* note 76 and accompanying text.

281(c) states that directorial compliance with either the formal distribution requirements under Section 281(a) or the informal requirements of Section 281(b) will shield directors from personal liability, a closer reading of the statute suggests that protection under the latter section is somewhat dubious.[118] Compliance with the formal provisions of Sections 280 and 281(a) is confirmed upon judicial approval of the directors' provisions of security for corporate claimants.[119] Thus, upon judicial confirmation of the requisite security under Section 280(c) and distribution of the required assets, directors can be certain they complied with the statutory requirements.[120] Certain compliance with the informal methods of Section 281(b), however, is significantly more difficult. Insofar as Section 281(b) requires directors to make provisions "reasonably likely to be sufficient" for various claimants, directors may be personally liable if their provisions of security and asset distributions are not "reasonable," as determined by later litigation.[121] Consequently, informal asset distribution under Section 281(b) exposes directors to uncertainty and potentially extensive liability, "regardless of their good faith and due care."[122]

D. The Operational Symmetry of Delaware's Statutory Dissolution Scheme

The antecedent review of Sections 278 through 282 suggests that Delaware's dissolution scheme adequately satisfies both of its underlying policy concerns.[123] Through claim management, judicial supervision, and a judicious allocation of liability, these statutory provisions provide both flexibility and security to corporations at dissolution and reasonable protection for potential post-dissolution claimants. Formal dissolution under Sections 280 and 281(a) provides directors and shareholders with protection from personal liability while simultaneously providing potential post-dissolution claimants with judicially-approved security. However, formal dissolution is both time-consuming and expensive. Thus, Section 281(b) provides corporations that lack any serious potential for future liabilities with the ability to pursue an informal and less expensive method of asset distribution extrajudicially. However, the distribution of corporate assets under Section 281(b) does not provide future creditors with the same degree of protection as

118. *In re* RegO Co., 623 A.2d 92, 97 (Del. Ch. 1992).

119. *See* tit. 8, §§ 280(c), 281(c).

120. *See In re RegO Co.*, 623 A.2d at 97 ("[C]ompliance with subsection (b)'s standard, 'reasonably likely to be sufficient' will, in principle at least, always be litigable. . . . [S]ubsection(a) of Section 281 . . . if successfully completed, can eliminate this risk.").

121. *See id*.

122. *Id.*

123. Schnall, *supra* note 2, at 166–67 (listing "competing goals of product liability and corporate dissolution law").

the elective provisions.[124] Thus, the statute prevents corporate opportunism by exposing both directors and shareholders to a greater degree of liability if the corporation selects this method.[125] The potential for personal shareholder and directorial liability after informal asset distribution, combined with the "safe harbor"[126] provisions of formal asset distribution under Sections 280 through 281(a), serve to channel those corporations that have potential future liabilities to utilize the formal procedures.

Thus, by providing greater protection to both directors and shareholders under formal distribution, and by exposing directors and shareholders to greater liability under informal distribution, Delaware's statutory scheme incentivizes judicially supervised distribution for those corporations that have potential future claimants.[127] In so doing, the statutory scheme protects future claimants, thereby satisfying the policies of tort and products liability law.[128] However, the internal coherency of this scheme is potentially threatened by a recent holding of the Court of Chancery, affirmed by the Supreme Court of Delaware.[129]

III. *TERRITORY OF THE UNITED STATES VIRGIN ISLANDS V. GOLDMAN, SACHS & CO*: A POTENTIAL BREAKDOWN OF DELAWARE'S STATUTORY DISSOLUTION SCHEME

A. *The Facts of Goldman, Sachs & Co.*

The facts of *Territory of the United States v. Goldman, Sachs & Co.* ("*Goldman Sachs*") are relatively protracted and complex.[130] In 2006, the Virgin Islands of the United States ("the Virgin Islands") filed suit against Goldman, Sachs & Co. ("Goldman Sachs") in the Court of Chancery of Delaware to recover approximately $9.9 million in dissolution distributions Goldman Sachs received as a thirteen percent passive shareholder of Panex

124. *Id.* at 171.

125. See *supra* Part II.C.

126. S.B. 93, 134th Gen. Assemb. § 280 cmt. (Del. 1987).

127. *See* Schnall, *supra* note 2, at 175 ("While both the elective provisions of sections 280 and 281(a) and the default provision of section 281(b) provide the directors of corporations planning dissolution with the flexibility to choose the provisions which they judge to be most suitable, the elective provisions appear to offer the best solution to the competing interests of directors and shareholders of a dissolved corporation and those of foreseeable, unknown future claimants.").

128. *See id.* at 168 ("[T]he goal of products liability law is better served by the elective procedure of sections 280 and 281(a).").

129. Territory of the U.S. V.I. v. Goldman, Sachs & Co., 937 A.2d 760 (Del. Ch. 2007), *aff'd*, 956 A.2d 32 (Del. Super. Ct. 2008).

130. *Id.* at 765. As a full recapitulation would exceed the scope and purpose of this Comment, a brief summary of the pertinent facts and holdings will suffice for purposes of analyzing Delaware's statutory dissolution scheme.

Industries, Inc. ("Panex").[131] According to the Virgin Islands, a modern version of the trust fund doctrine required Goldman Sachs to disgorge dissolution distributions it received from Panex in order to satisfy a default judgment obtained against Panex after its dissolution for alleged prior environmental contamination.[132]

In 1985, Panex, a Delaware corporation, duly filed its articles of dissolution and, in order to exploit favorable tax provisions, conducted its three-year winding-up process through a liquidation trust.[133] Prior to the expiration of its statutory existence under Section 278, Panex's liquidation trust distributed approximately $9.9 million to Goldman Sachs in its capacity as a corporate shareholder.[134] In 1992, approximately four years after Panex's statutory existence expired, the Virgin Islands joined Panex and its directors in suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and common law tort claims predicated on alleged environmental contamination on the island of St. Thomas.[135] After the Third Circuit Court of Appeals dismissed the Virgin Island's claims against Panex and its directors,[136] the Virgin Islands amended their complaint to include both Panex's successor trust and Goldman Sachs in its capacity as a shareholder.[137] The Virgin Islands subsequently dismissed its claims against Goldman Sachs without prejudice in 1998.[138] However, after protracted environmental litigation forced Panex's successor trust to accept a $51.6 million default judgment, the Virgin Islands renewed its suit against Goldman Sachs in Delaware's Court of Chancery as a judgment-creditor of the successor trust.[139]

In order to collect from Goldman Sachs, the Virgin Islands invoked a contemporary variant of the trust fund doctrine.[140] The first count of the Virgin Island's two-count complaint alleged that Goldman Sachs would be

131. *Id.* at 765, 770, 782–83.

132. *Id.* at 782–84.

133. *Id.* at 766.

134. *Goldman, Sachs & Co.*, 937 A.2d at 770.

135. *Id.* at 770–71.

136. After dismissing the common law claims, the District Court for the Virgin Islands originally found that CERCLA preempted time limits for winding up a corporation under the Delaware Code, but after a contrary decision by the Third Circuit, the District Court tried to avoid dismissing the CERCLA claims on the grounds that the life of a corporation as a entity capable of maintaining a suit was extended by the existence of the Liquidating Trust. *Id.* at 773–74, 778. The Third Circuit rejected this logic and reversed without opinion. *Id.* at 774 (citing *In re* Tutu Wells Contamination Litig., 74 F.3d 1228 (3d Cir. 1995)).

137. *Goldman, Sachs & Co.*, 937 A.2d at 779 (citing *In re* Tutu Wells Contamination Litig., 994 F. Supp. 638, 646 (D.V.I. 1998)).

138. *Id.* at 782.

139. *Id.* at 781, 782–83.

140. *Id.* at 784.

"unjustly enriched" if it were allowed to keep dissolution distributions.[141] The Virgin Islands argued that equity required Goldman Sachs, as a shareholder of Panex, to disgorge its dissolution distributions due the superior—though late-arising—claim of a corporate creditor.[142] Goldman Sachs subsequently filed a motion to dismiss for failure to state a claim.[143] The primary issue before the Court of Chancery was whether Goldman Sachs was liable for the distributions it received pursuant to Panex's dissolution plan, despite the fact that the Virgin Islands did not file its environmental claims against Panex until at least four years after Panex's statutory existence had expired under Section 278.[144]

B. The Chancery Court's Holding and Rationale

On the issue of Goldman Sachs's liability for its dissolution distributions,[145] the Court of Chancery held that Sections 278 and 325(b) of the Delaware General Corporation Law precluded the Virgin Islands from recovering against Goldman Sachs after the termination of Panex's three-year statutorily-extended existence.[146] Despite the complexity of the surrounding issues, the court's application of Delaware's pre-1987[147] dissolution statute was relatively straightforward. Under Section 278, Panex ceased to exist as a juridical entity three years after its dissolution in 1985 and, therefore, was incapable of participating in legal proceedings at any point after 1988.[148] The court quoted Section 325(b): "[n]o suit shall be brought against any . . . stockholder for any debt of a corporation of which he is a[] . . . stockholder, until judgment be obtained therefor [sic] against the corporation and execution thereon be returned unsatisfied."[149] Thus, reasoned the court, the nonexistence of Panex in 1992 and 1996 under Section 278 precluded the Virgin Islands from obtaining an unexecuted judgment against the corporation.[150] The Virgin Islands had to obtain a judgment against Panex prior to filing a claim against

141. *Id.* at 783.

142. *See Goldman, Sachs & Co.*, 937 A.2d at 783.

143. *Id.*

144. *Id.* at 788.

145. The court also disposed of issues concerning collateral estoppel, laches, and the utilization of a liquidation trust in corporate dissolution. *See id.* at 764.

146. *Id.*

147. Due to the timing of the Virgin Islands' lawsuit and the prolonged succession of corporate entities dating back to 1968, the court was required to apply Delaware's statutory dissolution scheme as it existed prior to the 1987 amendments. *See Goldman, Sachs & Co.*, 937 A.2d at 798. However, the relevant provisions—Sections 278 and 325(b)—are substantially identical to Delaware's current General Corporation Law.

148. *Id.* at 788.

149. *Id.* at 789 (alterations in original) (quoting DEL. CODE ANN. tit. 8, § 325(b) (1985)).

150. *See id.* (noting that Panex's capacity to sue and be sued expired in 1988 through operation of Section 278).

Goldman Sachs, a shareholder thereof, under Section 325(b).[151] Therefore, the court concluded Section 278 in conjunction with Section 325(b) barred the Virgin Islands from holding Goldman Sachs liable for the receipt of its dissolution distributions from Panex.[152]

As a result of the statutory preclusion of its claim, the Virgin Islands attempted to invoke the chancery court's equitable jurisdiction by seeking extra-statutory relief predicated on a modern variant of the trust fund doctrine. Essentially, the Virgin Islands argued for a rule according to which a corporate shareholder who receives dissolution distributions is liable to return those distributions if a subsequent claimant emerges at any time with a valid claim against the corporation.[153] The court ultimately rejected this argument, concluding that Delaware's legislative enactments precluded judicial intervention.[154] The court predicated its conclusion on two distinct bases: 1) The three-year wind-up period created by Section 278 manifested a conclusive legislative policy determination that three years was a sufficient time within which to bring claims against a dissolved corporation; and 2) The rule invoked by the Virgin Islands was excessively broad in its reach, and thereby implicated a host of potentially deleterious consequences for the economic vitality of equity investments in corporate enterprises.[155]

The court first rested its conclusion on its conception of the policy underlying the former version of Section 278. According to the court, the three-year wind-up period created by Section 278 constituted a legislative policy determination as to the appropriate and exclusive time within which a corporate creditor may brings claims against a dissolved corporation.[156] Under Delaware's pre-1987 dissolution scheme, the court reasoned, Section 278 struck a balance between the interests of corporate creditors and shareholders.[157] According to the court, the legislative extension of a dissolved corporation's existence for three years provided creditors with sufficient time to bring claims after corporate dissolution.[158] In addition, by barring any claims arising after this three-year period, Section 278 provided corporate directors and shareholders with "repose" from potential future liabilities.[159] Therefore, the court concluded, the conjoined application of Sections 325(b) and 278 to preclude post-dissolution claims against shareholders arising three years after corporate dissolution achieves the legislature's policy "in a

151. *Id.*
152. *Goldman, Sachs & Co.*, 937 A.2d at 789.
153. *See id.* at 784.
154. *Id.* at 793.
155. *See id.* at 789–98.
156. *Id.* at 789.
157. *Goldman, Sachs & Co.*, 937 A.2d at 789.
158. *Id.* at 789–91.
159. *Id.* at 789.

measured way."[160] The Court of Chancery thus believed itself bound by this determination and was thereby precluded from circumventing the statute by means of the trust fund doctrine.[161]

The court noted the excessively broad reach of the Virgin Islands' proposed theory of recovery as an additional reason for denying relief.[162] In its criticism of the Virgin Islands' theory, the court specifically noted both the absence of any requirement that the directors of a corporation know or have reason to know of future claims for which stockholders may be liable and the lack of time constraints on the post-dissolution liability of shareholders.[163] The court reasoned that the potential for temporally indeterminate shareholder liability arising from claims—of which the directors had no knowledge or reason to know—would have several negative consequences for equitable shareholders. According to the court, the potential for temporally-indeterminate liability for dissolution distributions would cause "stockholders of American corporations [to] . . . live in constant fear" that they may be liable for late-arising claims.[164] As a result, stockholders "would hesitate to use those assets [they received from corporate dissolution] or to reinvest the assets" and, eventually, would "question the wisdom of making equity investments in corporations in the first instance."[165] In addition, the court noted that the imposition of temporally indeterminate liability upon contemporary shareholders would have potentially far-reaching consequences. According to the court, a significant portion of corporate stock is currently held by mutual and pension funds, the administrators of which are "fiduciaries for ordinary investors, such as Americans saving for college and retirement."[166] Requiring administrators and shareholders of this type to account for dissolution distributions "a generation later" would seriously disrupt this

160. *Id.* at 784.

161. *Id.* at 789–90 ("In determining that winding-up provisions like § 278 preclude stockholder liability under a common law trust fund theory, I join the majority of courts and commentators who have addressed the question of whether the adoption of corporate dissolution statutes supplanted the trust fund doctrine.").

162. *See Goldman, Sachs & Co.*, 937 A.2d at 792–93.

163. *Id.* at 792 ("If, as seems probable, the public interest in promoting economic growth would be impaired by exposing equity investors to perpetual risk of this kind, a container of some kind on the trust fund doctrine would have to be built."); *see also id.* at 793 ("What I find unfathomable is the notion that this state would adopt, as part of its common law of equity, a trust fund doctrine that puts stockholders receiving distributions from a dissolving corporation at risk of liability when the creditor-plaintiff made no demand of any type on the dissolving corporation and the dissolving corporation's directors had *no reason to believe* such a demand would be made before the expiration of the extra three-year period established by § 278.") (emphasis added).

164. *Id.* at 792.

165. *See id.* at 796 (footnote omitted).

166. *Id.* at 797 n.163.

beneficial method of investment.[167] The court, therefore, concluded that important policy reasons further buttressed its application of the statute to preclude the Virgin Islands' theory of recovery.

In a final effort to obtain recovery, the Virgin Islands advanced a statutory-construction argument that invoked the modern, amended version of Delaware's dissolution statute. While the contemporary version of Delaware's dissolution statute—namely, Sections 280 through 282—was inapplicable to the case, the Virgin Islands argued that this statutory scheme illuminated legislative intent regarding the prior version of Sections 278 and 325(b), which exist in virtually identical form today. According to the Virgin Islands, the application of Sections 278 and 325(b) to preclude recovery against shareholders for claims arising after a dissolved corporation's extended three-year existence would render the additional protection afforded by Section 282(b) superfluous.[168] In short, if the shareholders of a corporation are protected from all claims three years after dissolution under Sections 278 and 325(b)—regardless of the chosen method of dissolution—then the protection supplied by Section 282(b) only for the shareholders of a corporation that elected formal dissolution would be meaningless. Therefore, if Section 282(b) is to meaningfully incentivize formal dissolution, it must provide greater protection from liability to shareholders and directors of a corporation that chooses formal dissolution than to the shareholders and directors of a corporation that chooses informal dissolution. Otherwise, Section 282 essentially serves no purpose.

Despite the patent reasonableness of this argument, the court ultimately rejected it on policy grounds.[169] While the court noted the "cognitive dissonance" created by the application of Sections 325(b) and 278 to Delaware's modern dissolution scheme, it concluded that resolution of apparent "gap" was a legislative task.[170] Specifically, the court reasoned that the mere provision of heightened protection for the shareholders of a corporation that dissolved under formal supervision pursuant to Sections 280 and 281(a) did not necessarily imply temporally indeterminate liability for shareholders of a corporation that dissolved under the informal procedures of Section 281(b).[171] The provision of heightened protection for one class of

167. *See Goldman, Sachs & Co.*, 937 A.2d at 797 n.163.

168. *Id.* at 798–99.

169. *See id.* at 799–800.

170. *Id.* at 798–99.

171. *Id.* at 799 ("That the 1987 Amendments injected more rigor into the overall dissolution process . . . and used § 282(b) as an incentive, does not mean that the General Assembly was implicitly creating or somehow recognizing the existence of a cause of action holding innocent stockholders strictly liable to return distributions received in dissolution whenever a later-arising creditor obtains a judgment based solely on the harm caused by a corporation's pre-dissolution activities.").

shareholders and corresponding silence as to the liability of the other did not, so the court believed, provide corporate claimants with a cause of action against the latter class of shareholders.[172] Therefore, the court concluded that, despite the "cognitive dissonance" created by the Delaware's modern dissolution scheme, Sections 278 and 325(b) still precluded imposition of an equitable trust against Goldman Sachs.[173]

C. *Summary of the Court's Holding*

In sum, the chancery court held that Sections 278 and 325(b)[174] preclude a corporate claimant from holding a shareholder liable for its dissolution distributions after the dissolved corporation's three-year statutory existence expired.[175] In addition, the court held that Sections 278 and 325(b) preclude judicial creation of an equitable remedy by which a corporate claimant may obtain extra-statutory relief for a claim arising after a dissolved corporation's statutorily-extended existence expires.[176] Therefore, the court ultimately held that the Virgin Islands was barred from compelling Goldman Sachs to disgorge the dissolution distributions it received from Panex to satisfy a post-dissolution claim filed at least four years after Panex's three-year wind-up period expired.[177]

IV. THE IMPLICATIONS OF *GOLDMAN SACHS* FOR DELAWARE'S CURRENT STATUTORY DISSOLUTION SCHEME AND POTENTIAL SOLUTIONS

A. *Implications of Applying* Goldman Sachs *to Sections 280–282*

The conjoined application of Sections 325(b) and 278 has potentially problematic implications for the proper operation of Delaware's current statutory dissolution scheme. As described above,[178] Sections 280 through 282 provide corporations with a choice between formal, judicially supervised wind-up procedures under Sections 280 and 281(a), and informal, extrajudicial wind-up procedures under Section 281(b). As a means of rewarding or incentivizing utilization of the formal wind-up procedures, Sections 281(c) and 282(b) provide a "safe harbor" for the directors and shareholders of a corporation that distributes its assets in accordance with the requirements of

172. *Goldman, Sachs & Co.*, 937 A.2d at 799.
173. *See id.* at 798–800.
174. While the court applied the former versions of these statutes, the current versions are substantially similar in form and wording.
175. *See id.* at 764.
176. *Id.*
177. *Id.*
178. See *supra* Part II.

those provisions.[179] By providing this enhanced protection to directors and shareholders, Delaware's dissolution scheme creates an incentive for dissolving corporations facing potential future liabilities to choose judicially supervised dissolution, despite its increased cost and technical requirements.[180] In contrast, the absence of such protection when a corporation elects to informally wind-up under Section 281(b) deters opportunistic use of this method as a means of avoiding future liabilities. The Delaware Court of Chancery first construed these statutes in 1992 in *In re RegO Co.*[181] The court observed:

> Subsection 281(c) provides that directors of the corporation "shall not be personally liable to the claimants of the dissolved corporation" (presumably under the common law trust fund doctrine) if the corporation has "complied with subsections (a) or (b) of this section." But compliance with subsection (b)'s standard, "reasonably likely to be sufficient" will, in principle at least, always be litigable. Thus, reliance upon the mechanism of Section 281(b) may present a risky situation for corporate directors regardless of their good faith and due care.[182]

Thus, both legislative commentary and judicial interpretation confirm that only directors of corporations that employ the formal wind-up procedures under Sections 280 and 281(a) are afforded enhanced protection from personal liability. This—in conjunction with the implication from Section 282(b) that shareholders of a dissolved corporation electing to employ informal wind-up will be exposed to temporally extended post-dissolution liability—creates a sufficient incentive for both directors *and* shareholders to employ formal dissolution under Sections 280 and 281(a) when there is the potential for future corporate liabilities. *Goldman Sachs*, however, threatens to remove this incentive.

In *Goldman Sachs*, the Court of Chancery held that Sections 278 and 325(b) preclude: 1) a corporate claimant from holding a shareholder liable for its dissolution distributions after the dissolved corporation's three-year statutory existence; and 2) judicial use of the trust fund doctrine to provide extra-statutory relief.[183] This holding is alone sufficient to abrogate the shareholder incentive to approve of or propose formal wind-up under Sections 280 and 281(a).[184] So long as Sections 278 and 325(b) provide shareholders

179. S.B. 93, 134th Gen. Assemb. § 280 cmt. (Del. 1987).

180. Schnall, *supra* note 2, at 175.

181. 623 A.2d 92 (Del. Ch. 1992).

182. *Id.* at 97 (alteration in original) (quoting Section 281(c)).

183. *See* Territory of the U.S. V.I. v. Goldman, Sachs & Co., 937 A.2d 760, 763 (Del. Ch. 2007), *aff'd*, 956 A.2d 32 (Del. Super. Ct. 2008).

184. *Cf. Goldman, Sachs & Co.*, 937 A.2d at 798–99 ("Using § 282(b), the Virgin Islands makes a simple argument. If that section must be construed as having some intended effect, it must preclude a reading of the pre-existing §§ 278 and 325(b) as barring claims against

with the same protection as Section 282(b), they have no economic reason to approve an expensive method of dissolution that could potentially diminish their liquidation distributions without providing any cognizable benefit.

This holding *may* also be sufficient to abrogate the directorial incentive to employ the formal wind-up procedures under Sections 280 and 281(a). While the court in *Goldman Sachs* did not employ Section 325(b) to preclude recovery against directors, the language of the statute is equally applicable to both shareholders and directors. The relevant portion of Section 325(b) provides that "[n]o suit shall be brought against any officer, *director* or stockholder for any debt of a corporation of which such person is an officer, director or stockholder, until judgment be obtained therefore against the corporation and execution thereon returned unsatisfied."[185] Given this language, the court's logic in *Goldman Sachs* is, in principle at least, equally apposite to directors. Just as obtaining an unsatisfied judgment against the corporation is a prerequisite to holding a shareholder liable for dissolution distributions,[186] such a judgment *may* also be a prerequisite to holding corporate directors liable for post-dissolution claims if they fail to make reasonable provisions under Section 281(b). However, if the directors are to be held liable either by implication under Section 281(b) or—as the *In re RegO* Court suggested—under the trust fund doctrine,[187] then the application of Sections 278 and 325(b) under *Goldman Sachs* precludes the imposition of liability in accordance with either theory.[188] Therefore, Sections 278 and 325(b) may potentially be invoked to preclude suit against corporate directors after the corporation's three-year wind-up period is complete, even if the corporation employed the formal procedures under Section 281(b) and the directors failed to make provisions "reasonably likely to be sufficient"[189] for foreseeable future claimants. Consequently, corporate directors would receive the same degree of protection from personal liability regardless of whether the corporation employs extrajudicial wind-up procedures under Section 281(b).

Thus, application of Section 325(b) in this manner may effectively abrogate the directorial incentive to elect formal corporate wind-up under Sections 280 and 281(a). The safe harbor Delaware's legislature expressly created would be superfluous, and the statutory scheme would fail to adequately provide protection for future claimants. This result fails to comport with either the policy concerns underlying Sections 280 through 282 or

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stockholders after the three-year extension on the corporation's existence under § 278 expired. Otherwise, there would be no reward for following the more rigorous § 281(a) process.").

185. DEL. CODE ANN. tit. 8, § 325(b) (2008) (emphasis added).

186. *See Goldman, Sachs & Co.*, 937 A.2d at 764.

187. *See In re RegO Co.*, 623 A.2d at 97.

188. *See Goldman, Sachs & Co.*, 937 A.2d at 764.

189. Tit. 8, § 281(b).

explicitly stated legislative intent. To avoid this outcome, it may be necessary for the Delaware General Assembly to rectify the "cognitive dissonance" created by the collateral application of Section 325(b) to Delaware's statutory dissolution scheme. [190]

B. *Solution I: Preserve the Original Integrity of Delaware's Dissolution Scheme*

Amending Section 325(b) to render it inapplicable to claims arising under Sections 281(a) and 282(b) may preserve the internal coherence of Delaware's statutory dissolution scheme while simultaneously fulfilling the policy concerns expressed in *Goldman Sachs*. By precluding the ad hoc application of external statutory provisions to Sections 280 through 282, the Delaware General Assembly may be able to preserve the previously lauded[191] balance between corporate and tort law policy goals and avoid the dangers observed in *Goldman Sachs.* In *Goldman Sachs*, the court primarily sought to avoid exposing shareholders to temporally indeterminate liability for corporate claims that the directors had no reason to know of at dissolution.[192] Delaware's current statutory dissolution scheme, however, can avoid these unfavorable consequence while protecting the interests of potential future claimants without the problematic application of Section 325(b) (i.e., removing the incentive for shareholders and, potentially, directors to utilize the formal wind-up procedures under Sections 280 and 281(a)).

Assuming the inapplicability of Section 325(b), Sections 280 through 281 incentivize the use of formal dissolution—which optimally benefits claimants, shareholders, and directors[193]— while exposing shareholders and directors to a significant, but limited, degree of liability if their corporation elects informal dissolution under Section 281(b). Section 281(b) explicitly provides a temporal limit for post-dissolution shareholder liability when a corporation elects informal wind-up.[194] Under this section, directors are only required to make provisions for claims that may foreseeably arise "within 10 years after the date of dissolution."[195] Thus, if the shareholders of such a corporation are

190. *Goldman, Sachs & Co.*, 937 A.2d at 798–99 ("I must note the cognitive dissonance arguably injected by the General Assembly's adoption in 1987 of substantial amendments to the DGCL's provisions relating to dissolution.").

191. *See generally* Schnall, *supra* note 2.

192. *Goldman, Sachs & Co.*, 937 A.2d at 792–98.

193. The benefit accruing to directors and shareholders is an increased level of protection against liability. Given the technicalities and requirements of formal dissolution under Sections 280 through 282, it is likely to be more expensive. Thus, it may decrease the amount of dissolution distributions available for shareholders. However, it provides shareholders with more security in the assets they do receive, thus providing them with a cognizable benefit.

194. DEL. CODE ANN. tit. 8, § 281(b) (2008).

195. *Id.*

impliedly liable beyond the three-year wind-up period under Section 282(b), this liability would be limited to claims filed within ten years after corporate dissolution and of which the directors had reason to know.[196] The shareholders of such a corporation would not, therefore, be exposed to temporally indeterminate liability for *all* late-arising claims. Rather, they would only be liable for claims that the directors had reason to know may arise within ten years after dissolution.[197] These two qualifications provide meaningful limits on the degree of potential shareholder liability under Section 282(b), and thereby avoid the negative consequences of temporally indeterminate liability observed in *Goldman Sachs* (i.e., preclusion of the beneficial utilization of dissolution distributions, the undue chilling of equitable investments in corporations, and the disruption of institutional investors managing the savings accounts of individuals).[198] If, however, Delaware Courts of Chancery are determined to categorically limit post-dissolution shareholder liability to three years under Section 278, then the second proposed solution offers a more favorable alternative.[199]

Importantly, the viability of this first solution depends upon a legislative recognition of a cause of action against shareholders and directors for claims arising after a corporation's three-year wind-up period. The Delaware Supreme Court's recent affirmation of *Goldman Sachs* confirms that Delaware's comprehensive statutory dissolution scheme precludes application of the trust fund doctrine.[200] Thus, to maintain the theoretical consistency of the dissolution scheme, the Delaware General Assembly must explicitly recognize what Section 282(b) negatively implies; namely, the liability of shareholders after the three-year wind-up period for dissolution distributions received from a corporation that employed informal wind-up under Section 281(b). Given the judicial abrogation of the trust fund doctrine, a legislative pronouncement of post-dissolution liability for these shareholders is the only method by which late-arising claimants may hold such shareholders liable. This potential for future liability is necessary to deter corporate exploitation of the informal wind-up procedures at the expense of future claimants.

Furthermore, the Delaware courts must also recognize the existence of an implied statutory duty incumbent upon directors under Section 281(b) to make reasonable provisions for foreseeable claimants. If Sections 280 and 281(a)

196. *See id.* §§ 281(b), 282(b).

197. *See id.* § 281(b).

198. *See* Territory of the U.S. V.I. v. Goldman, Sachs & Co., 937 A.2d 760, 792–97 (Del. Ch. 2007).

199. See *infra* Part IV.C.

200. *See Goldman, Sachs & Co.*, 937 A.2d at 763 (holding that Delaware General Corporate Law precluded the Virgin Islands from making a claim on a distribution to a shareholder), *aff'd*, 956 A.2d 32 (Del. Super. Ct. 2008).

are to serve as a safe harbor in accordance with legislative intent, then there must be potential directorial liability against which the safe harbor provides protection. In *In re RegO Co.*, the court suggested that failure to comply with Section 281(c) would result in potential directorial liability under the trust fund doctrine.[201] However, judicial rejection of this doctrine in *Goldman Sachs*[202] prevents its use as a means of imposing liability upon directors for noncompliance with Section 281(b). In order to preserve the integrity of the statutory scheme, Delaware courts must recognize the existence of a *statutory* duty under Section 281(b),[203] breach of which, directors will be personally liable.[204] This recognition will deter opportunistic exploitation of informal corporate wind-up as a means of avoiding future liabilities. As a corollary to this deterrence, protection from such liability for directors who elect formal wind-up provides an incentive to utilize these procedures when corporations face future liabilities. This, in turn, will provide greater protection to any potential future claimants, as Sections 280 and 281(a) require judicial approval of a dissolved corporation's provisions of security for future claims.[205]

While this proposed solution preserves the initial integrity of Delaware's dissolution scheme, it may provide less protection to shareholders then the court in *Goldman Sachs* would prefer. Given the strong preference for substantially limiting post-dissolution shareholder reliability expressed in *Goldman Sachs*, a second solution may provide a more favorable alternative.

C. Solution II: Categorically Limit Shareholder Liability After Dissolution and Impose Strict Duties on Directors

Recognizing that the modern corporation is largely manager-controlled and that additional factors may be employed to deter director-initiated opportunistic dissolution, Delaware's corporate dissolution statute may

201. *In re* RegO Co., 623 A.2d 92, 97 (Del. Ch. 1992).

202. *Goldman, Sachs & Co.*, 937 A.2d at 789–90.

203. Rather than a judicially-imposed equitable duty.

204. *See* Gans v. MDR Liquidating Corp., No. 9630, 1990 WL 2851, at *7 (Del. Ch. Jan. 10, 1990) (Section 281(b) "imposes a statutory duty upon the directors or trustees of a 'dissolved corporation or successor entity which has not followed the procedures in § 280' to 'pay or make reasonable provisions to pay all claims and obligations' of the dissolved corporation.") (quoting DEL. CODE ANN. tit. 8, § 281(b) (1987)). Recognition of a statutory duty at dissolution is additionally important given the Supreme Court of Delaware's recent decision in *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007). In *Gheewalla*, the court held that "[t]he creditors of a Delaware corporation that is either insolvent or in the zone of insolvency have no right, as a matter of law, to assert direct claims for breach of fiduciary duty against its directors." *Id.* at 103. Thus, the absence of both the trust fund doctrine and fiduciary-duty theory as means of imposing liability upon directors who fail to provide adequate security to future claimants in informal dissolution requires recognition of at least a statutory duty.

205. Tit. 8, §§ 280, 281(a).

adequately protect future claimants *and* limit shareholder liability regardless of the chosen method of winding-up corporate affairs. In short, the imposition of a statutory duty on directors to provide adequate security for future claimants if the corporation pursues informal wind-up—in conjunction with additional legal doctrines and market factors[206]—may be sufficient to prevent corporate exploitation of informal dissolution as a means of avoiding future liability. If shareholders lack the ability and/or inclination to initiate and control the means of corporate dissolution, then exposing them to extended liability to deter opportunistic dissolution is arguably unnecessary as a means of deterrence. Further, the possibility that temporally extended shareholder liability is of limited utility as a means of compensating future claimants—but imposes a high social cost on the vitality of equity investments—further militates against its use as a deterrent in Delaware's dissolution scheme. Ultimately, however, the viability of categorically limiting shareholder liability depends upon judicial recognition of an implied statutory duty for directors and the potential for successor liability as a means of deterring pre-dissolution liquidation.

While Delaware's dissolution statute enables either directors or shareholders to independently initiate dissolution,[207] the modern status of equitable ownership in corporations arguably renders shareholder-initiated dissolution unlikely.[208] The historical division of ownership from control isolates information and management in a comparatively small group of directors and officers.[209] Thus, the modern shareholder is unlikely to possess sufficient knowledge of future corporate liabilities to initiate dissolution proceedings.[210] Moreover, Section 275(c) requires written, unanimous consent

206. For a comprehensive analysis of the market, legal, and psychological factors that serve as a deterrent to corporate dissolution as a means avoiding future liability, see Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1 (1986). Ultimately, Roe argues that "[t]he managerial structure of the large public firm suggests that blitzkrieg liquidation is an unlikely counterpunch to mass tort onslaught." *Id.* at 29.

207. Tit. 8, § 275(a)–(c).

208. *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 420 (1983) (citing Bayless Manning, Book Review, 67 YALE L.J. 1477, 1483 (1958)) ("Managers still are rarely displaced by voters; managers' recommendations on fundamental corporate changes, amendments of by-laws, or other matters are routinely followed; shareholders' proposals do well if they have 5 percent of the vote. In those rare situations where a proxy fight for control develops, the insurgent's chance for success is likely determined by the amount of shares he owns rather than by the force of his arguments."); Roe, *supra* note 206, at 9 (observing that corporate shareholders are largely "scattered and uniformed" whereas managers have "substantial control over the firm"); *see also* 1 BRENT A. OLSON, PUBLICLY TRADED CORPORATIONS §§ 2:6–29, at 23–34 (3d ed. 2010) (discussing the various types of modern shareholders and why much shareholder action is largely responsive rather than initiative).

209. *See* Roe, *supra* note 206, at 28.

210. *Id.* (noting that the modern shareholder generally lacks access to information regarding the operation of corporate affairs).

among qualified stockholders to initiate dissolution without director action.[211] Given this requirement, it is unlikely that corporate shareholders could marshal the requisite votes to initiate dissolution as a means of avoiding future liabilities without revealing the apparently fraudulent motivation.[212] Finally, individual investors are more likely to simply sell their shares in the face of potential future liabilities rather than initiate a proxy fight to achieve corporate dissolution.[213]

In addition to these impediments to shareholder-initiated dissolution, Delaware's dissolution statute and the realities of corporate governance suggest that directors have the ultimate choice as to the means by which the corporation will be wound up. Under Section 278, the corporation is "continued, for the term of 3 years" as a "bod[y] corporate" to wind-up corporate affairs.[214] This continuation of the corporate entity, as such, seems to imply that the directors will maintain their position and authority to dispose of corporate assets and provide for corporate claims. Further, the commentary to Section 280 indicates the intent to create a "safe harbor" so that "directors . . . will not be held personally liable to unpaid claimants of the corporation for having improperly distributed assets."[215] This seems to suggest that at dissolution, directors rather than shareholders are responsible for selecting the means by which corporate assets are distributed. In *Lone Star Industries Inc. v. Redwine*,[216] the Fifth Circuit, construing Delaware law, observed that Section 278 "provides that the corporation itself may conduct winding up, presumably through its officers and directors."[217] The court further concluded that "the formal act of dissolution does not disturb the directors' authority to determine the means by which winding up is to be accomplished."[218] Moreover, in *In re RegO Co.*, the Delaware Court of Chancery, in construing the formal dissolution method under Sections 280 and 281(a), noted that "[f]ollowing this procedure allows corporate directors to assure themselves that they have satisfied the corporation's obligations to future claimants and that they will qualify for the protections afforded by Section 281(c)."[219] These cases suggest that directors have the ability and

211. Tit. 8, § 275(c).

212. *Cf.* Roe, *supra* note 206, at 28 (asserting that fraudulent conveyances are at issue during liquidation).

213. *See* Easterbrook & Fischel, *supra* note 208, at 404 (arguing that when shareholders' shares are "under water" the shareholders lack incentive because their efforts will benefit creditors, not them).

214. Tit. 8, § 278.

215. S.B. 93, 134th Gen. Assemb. § 280 cmt. (Del. 1987).

216. 757 F.2d 1544 (5th Cir. 1985).

217. *Id.* at 1549.

218. *Id.* at 1550.

219. *In re* RegO Co., 623 A.2d 92, 97 (Del. Ch. 1992).

authority to select the method by which a dissolved corporation distributes its assets.[220] Thus, it seems that the ultimate decision as to whether a dissolved corporation will wind up its affairs under the formal provisions of Sections 280 and 281(a), or the informal provisions of Section 281(b) is within director, rather than shareholder, discretion. Consequently, the imposition of temporally extended liability upon shareholders to deter opportunistic exploitation of the informal wind-up process may be of limited utility.

Assuming that directors possess the ability to choose the means of corporate wind-up, it is likely that the possibility of personal directorial liability under informal dissolution may be sufficient to deter corporations from using the informal provisions of Section 281(b) as a means of avoiding future liability. If the Delaware courts recognize that directorial noncompliance with Section 281(b) gives rise to personal liability, then directors have a personal incentive to eliminate this risk. Consequently, if a corporation has potential future liabilities to tort claimants, directors have an incentive to utilize the safe harbor provided by formal dissolution under Sections 280 and 281(a).[221] This, in turn, provides future claimants with greater protection, because formal dissolution requires judicial determination of the provisions of security necessary for the protection of future claimants.[222] So long as Delaware courts are willing to enforce a statutory duty of directors under Section 281(b),[223] it will likely serve as a deterrent to the opportunistic use of informal wind-up procedures to avoid future liabilities.

In addition to the potential for personal liability, commentators have noted the presence of other legal doctrines and market factors that may deter directors from dissolving a corporation to avoid future tort liabilities.[224] While somewhat tenuous under Delaware case law, the doctrine of successor liability may be employed to deter directors from disposing of corporate assets and

220. In the case of closely held corporations where the shareholders often manage the firm's business, Section 351(3) subjects such shareholders to the same liabilities as directors. DEL. CODE ANN. tit. 8, § 351(3) (2008). Consequently, the shareholders of closely held corporations may not initiate corporation dissolution and avoid the statutory liabilities of directors under Section 281(b). *See id.*

221. *See In re RegO*, 623 A.2d at 97 ("[R]eliance upon the mechanisms of Section 281(b) may present a risky situation . . . . It is difficult to see the utility in preserving this risk. . . . Following [Section 281(a)] allows corporate directors to assure themselves . . . that they will qualify for the protections afforded by Section 281(c).").

222. Tit. 8, § 280(c)(3).

223. *See* discussion *supra* pp. 1200–01 (discussing a statutory duty of directors).

224. *See, e.g.*, Roe, *supra* note 206, at 30–38 (listing among market factors contract creditors and contingent claimants); Stilson, *supra* note 2, at 75–76 (noting that the trust fund doctrine, corporate dissolution statutes, fraudulent conveyance statutes, and successor liability theory have been utilized).

subsequently distributing the proceeds to shareholders.[225] While there does not appear to be a reported decision in Delaware applying successor liability, the elements have been articulated in several unpublished lower court opinions. In one such opinion, the Delaware Superior Court stated that "where avoidance of liability would be unjust," Delaware law imposes liability under the "mere continuation of the predecessor corporation under a different name" theory—that is, when the transferee is "dominated or controlled" by the transferor.[226] Other examples of situations where this liability may arise include contractual assumption of liability by the buyer, de facto merger or consolidation, or fraud.[227] While not a complete bar to liability avoidance, the successor liability doctrine—if Delaware courts choose to adopt it—may be used to inhibit the ability of directors to liquidate a firm's assets at dissolution in order to avoid making provisions for future tort claimants. The potential for successor liability would arguably dissuade potential purchasers from acquiring a substantial portion of a dissolving firm's assets. In addition, the reticence of purchasers would likely force the corporation to sell its assets piecemeal, thereby reducing their value.[228] In order for this theory to serve as a sufficient deterrent, however, Delaware courts would have to explicitly adopt it and be willing to apply it when necessary.

Delaware's fraudulent conveyance statutes may also be applied to further deter opportunistic asset distributions during dissolution.[229] Under Section 1304, a conveyance is fraudulent as to a future creditor (e.g., a future tort claimant) if it was made "[w]ith actual intent to hinder, delay or defraud any creditor."[230] While bona fide purchasers for value are protected from liability,[231] directors or shareholders possessing knowledge of future liabilities may both be subject to liability for the value of the distributions.[232] The applicability of these statutes is inherently limited, however, by the requirement that the plaintiff creditor prove actual fraud,[233] the time limits

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225. *See* Roe, *supra* note 206, at 31–32 (discussing the use of successor liability theory in general as a means of deterring mass tort liquidation).

226. Ross v. Desa Holdings Corp., No. 05C-05-013, 2008 WL 4899226, at *4 (Del. Super. Ct. Sept. 30, 2008).

227. *Id.*

228. *See* Roe, *supra* note 206, at 31–32.

229. The use of fraudulent conveyance statutes to deter opportunistic liquidation has been recommended and noted by many commentators. *See, e.g.*, *id.* at 33–34; Stilson, *supra* note 2, at 75–76.

230. DEL. CODE ANN. tit. 6, § 1304(a) (2008).

231. *Id.* § 1308(a).

232. *See id.* §§ 1307(a)–(b), 1308(b).

233. *See id.* § 1304(a); *see also* Roe, *supra* note 206, at 20 ("The required demonstration of the conveyer's actual intent to hinder, delay, or defraud future creditors might sometimes defeat plaintiffs . . . .").

within which claims must brought,[234] and the protection afforded to bona fide purchasers.[235]

Finally, in an article discussing corporate reaction to future tort liability, Professor Mark Roe has articulated a host of non-legal factors that deter opportunistic decisions by directors.[236] According to Professor Roe, "the managerial structure of the modern corporation suggests that the liquidation response, although plausible, probably would not be common." [237] Among the many factors serving as deterrents, Professor Roe notes managerial reluctance to end their own jobs and destroy their source of indemnification and the possibility of destroying their reputation in the future job market.[238] Thus, in addition to the legal doctrines, there may be other plausible market factors that prevent directors from exploiting the informal wind-up procedures of Section 281(b) to avoid future liabilities.

It is therefore feasible for the Delaware General Assembly to categorically limit shareholder liability to three years after corporate dissolution, while simultaneously providing adequate protection to future tort claimants. As noted by the court in *Goldman Sachs*, exposing shareholders to temporally extended post-dissolution liability may have deleterious consequences for equity investments in corporations.[239] By imposing uncertainty upon dissolution distributions, extended shareholder liability limits the ability of shareholders to reinvest or otherwise use these distributions.[240] In addition, temporally extended shareholder liability may be of only limited utility as a means of compensating future claimants, who may face significant difficulties and expenses in locating and obtaining jurisdiction over individual shareholders years after corporate dissolution.[241]

The feasibility of categorically limiting post-dissolution liability, however, depends upon judicial recognition of both directorial power and liability during corporate dissolution. If the shareholder incentive to utilize the formal wind-up procedures under Sections 280 and 281(a) is removed, then the integrity of

234. Depending upon the nature of the fraudulent transfer, creditors generally must file suit between one to four years of the transfer, or, if later, within one year after the transfer was or reasonably could have been discovered. *See* tit. 6, § 1309.

235. *Id.* § 1308(a).

236. Roe, *supra* note 206, at 58–59.

237. *Id.* at 57–58.

238. *See id.* at 57–59 (managerial reluctance and lost indemnification); *id.* at 23 (lost reputation).

239. Territory of the U.S. V.I. v. Goldman, Sachs & Co., 937 A.2d 760, 795–96 (Del. Ch. 2007), *aff'd*, 956 A.2d 32 (Del. Super. 2008).

240. *Goldman, Sachs & Co.*, 937 A.2d at 796.

241. Sarlitto, *supra* note 1, at 1052; Schnall, *supra* note 2, at 148; *see also Goldman, Sachs & Co.*, 937 A.2d at 796 (noting inherent difficulties); *In re* Citadel Indus., 423 A.2d 500, 506 (Del. Ch. 1980) ("[T]he task would be enormous.").

Delaware's statutory scheme can only be preserved by confirming that directors alone may choose the means of corporate wind-up. Further, Delaware courts must be willing to enforce a statutory duty for directors under Sections 281(b) and 281(c) to make reasonable provisions for future claimants if they choose informal wind-up. By exposing directors to personal liability if they fail to provide adequate security during informal wind-up, the statutory scheme will incentivize the use of formal wind-up under Sections 280 and 281(a) where a corporation has potential future liability. This, in turn, will protect future claimants by providing both judicial determination of security provisions and the possibility of a guardian ad litem to protect their interests.[242] In addition, judicial use of a successor liability doctrine will provide an additional deterrent to directorial opportunism. By potentially exposing transferees of a corporation's assets to the transferor corporation's liability, the successor liability doctrine will inhibit directorial ability to arrange a large disposition of corporate assets to avoid future liabilities. Thus, while feasible, a categorical limitation of post-dissolution shareholder liability will require recognition of directorial power and liability at dissolution, and the potential use of additional judicial doctrines to deter opportunism. Given the Delaware Court of Chancery's apparent preference for limiting shareholder liability in *Goldman Sachs*,[243] this solution may be the most favorable.

CONCLUSION

As initially conceived, Delaware's statutory dissolution scheme protects and furthers both corporate law and tort law policy concerns.[244] By providing corporations with a choice between formal wind-up under Sections 280 and 281(a), and informal wind-up under Section 281(b), this scheme provides corporations with flexibility during dissolution.[245] Further, by providing directors and shareholders with certain protection from personal liability if the corporation employs formal wind-up procedures, the scheme offers these parties certainty and facilitates the subsequent investment of dissolution distributions.[246] These benefits, in turn, incentivize the use of formal dissolution,[247] which thereby fulfills important tort law policy concerns. Under formal dissolution, the Court of Chancery determines adequate provisions of security for current and future claimants, and may appoint a guardian ad litem to protect the interests of future claimants.[248] Therefore, Delaware's

242. *See* DEL. CODE ANN. tit. 8, § 280(c) (2008).
243. *Goldman, Sachs & Co.*, 937 A.2d at 792–98.
244. Schnall, *supra* note 2, at 175.
245. *See* tit. 8, §§ 280–281(a); Schnall, *supra* note 2, at 167.
246. *See* tit. 8, § 281(c); Schnall, *supra* note 2, at 175.
247. *See Goldman, Sachs & Co.*, 937 A.2d at 799.
248. Tit. 8, § 280(c)(3).

dissolution scheme, as initially conceived, admirably balances traditionally competing policy concerns.[249]

After *Goldman Sachs*, however, it may be necessary to modify existing judicial doctrines and re-interpret Delaware's dissolution statute in order to both preserve the integrity of this system and provide shareholders with substantial protection from post-dissolution liability. Given the current state of the law under *Goldman Sachs*, shareholders lack an incentive to initiate or approve of formal dissolution; they are equally protected from post-dissolution liability regardless of the method of wind-up the corporation employs.[250] Consequently, to enable corporations to choose between formal and informal dissolution, while simultaneously preventing opportunistic dissolution under the latter, the Delaware Courts of Chancery should employ three measures: 1) limit the power to choose the method of corporate dissolution solely to directors; 2) impose an implied statutory duty upon such directors to make reasonable provisions for future claims if they elect informal wind-up; and 3) utilize the doctrine of successor liability when necessary to avoid pre-dissolution asset liquidation. By vesting directors with the sole power to choose the method of corporate wind-up, and imposing a statutory duty under Section 281(b) to make adequate security provisions if they choose informal wind-up, the statutory scheme may be able to maintain the balance between corporate and tort law policy concerns. This solution will protect shareholders regardless of the method of dissolution, but, by exposing directors to personal liability if they elect informal wind-up, it will deter directorial opportunism. However, the viability of this option requires the Delaware Court of Chancery to both confirm that only directors may choose the method of corporate wind-up and recognize a statutory duty incumbent upon directors under Section 281(b). In addition, Delaware courts must be willing to utilize judicial doctrines like successor liability to further deter directorial exploitation of the informal wind-up provisions.

Thus, it may be possible for Delaware General Corporation Law to achieve a new balance between corporate and tort law policy concerns regarding corporate dissolution, and protect shareholders from post-dissolution liability. By 1) limiting the power to choose the method of corporate wind-up solely to directors, 2) imposing an implied statutory duty upon such directors to make reasonable provisions for future claims if they elect informal wind-up under Section 281(b), and 3) making ready use of successor liability to avoid pre-dissolution asset liquidation, the Delaware Court of Chancery may be able to protect corporate shareholders and claimants alike. Under these conditions, Delaware's statutory dissolution scheme still provides directors with the flexibility of choosing between two different methods of corporate wind-up

249. Schnall, *supra* note 2, at 175.
250. *See Goldman, Sachs & Co.*, 937 A.2d at 764.

while simultaneously limiting shareholder liability for post-dissolution distributions to three years regardless of the chosen method of dissolution. In addition, future tort claimants would be protected insofar as the directors of corporations with potential future liabilities would have a personal incentive to utilize the judicially supervised formal wind-up procedures under Sections 280 and 281(a). Under these provisions, foreseeable tort claimants are entitled to judicially approved security and, under certain circumstances, may obtain a guardian ad litem at the corporation's expense to protect their interests.[251]

Delaware's dissolution statute thus provides an admirable model for corporate dissolution. By providing directors and shareholders with the flexibility and protection from liability during and after corporate dissolution, while simultaneously protecting the interests of present and foreseeable corporate claimants, Delaware's dissolution statute adequately balances disparate policy concerns. With the implementation of some of the changes recommended in this Comment, Delaware's statutory scheme may serve as a model for other states' corporate dissolution schemes.

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251. Tit. 8, § 280(c)(3).

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