Analysis of the 1987 Amendments to the Delaware Corporation Law

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INTRODUCTION

Amendments to the Delaware General Corporation Law became effective on July 1, 1987. While a total of 22 sections of the statute were changed, the principal changes include a clarification and refining of the provisions regulating action by written consent, the repeal of Delaware's first generation takeover statute which has been held unconstitutional and a complete overhaul of the provisions governing the dissolution and liquidation of Delaware corporations, including safe harbor provisions for stockholders and directors under certain circumstances against suits by creditors challenging the making of distributions to stockholders. It is interesting to observe that the Delaware legislation was noted as much for what it did not do as for what it does. In light of the Supreme Court's decision in *CTS Corporation v. The Dynamics Corporation of America,* 107 S. Ct. 1637 (1987), in April, 1987 upholding Indiana's second generation takeover statute, there was a great deal of speculation as to whether Delaware would enact a statute similar to Indiana's. While a number of other states have enacted new takeover laws since the Supreme Court's decision, after six weeks of careful study, the Corporation Law Section of the Delaware Bar Association decided not to recommend legislation modeled on the Indiana statute at this time.[1] This article describes the changes effected by the 1987 amendments and supplements previous reports published by Prentice Hall, Inc. on periodic amendments to the Delaware General Corporation Law.[2]

FORMATION

Certificate of incorporation; contents [§102].—Section 102(a)(4) has been amended to negate erroneous implications that could be drawn from the existing language in the provisions of that section dealing with grants of authority to a board of directors to fix the terms of so-called "blank" stock. In connection with the 1985 amendments to the statute a sentence was added to Section 102(a)(4) stating that a grant of authority to the board to fix the powers, preferences and rights of shares "may include the power to specify the number of shares of any series." This language was added to conform to certain changes made in Section 141(c) relating to the power of committees of the board. However, it created the impression that without an express grant of authority in the certificate of incorporation, the board does not have authority to specify the number of shares in a series at the time that the board acts to fix the terms of the series. This implication was not intended. Hence, the offending sentence has been deleted.

In addition, Section 102(a)(4) has been amended to negate the implication that shares of the same class might have differing par values. As amended in 1985, Section 102(a)(4) required that the certificate of incorporation specify with respect to each class those shares that are to be without par value and those shares that are to have a par value and

(1) *See* Black, "Why Delaware is Wary of Anti-Takeover Law", *Wall St. Journal,* July 10, 1987 at 18.

(2) Arsht and Stapleton, Analysis of the New Delaware Corporation Law, Analysis of the 1969 Amendments to the Delaware Corporation Law, Analysis of the 1970 Amendments to the Delaware Corporation Law; Arsht and Black, Analysis of the 1973 Amendments to the Delaware Corporation Law, Analysis of the 1974 Amendments to the Delaware Corporation Law, Analysis of the 1976 Amendments to the Delaware Corporation Law; and Black and Sparks, Analysis of the 1981 Amendments to the Delaware Corporation Law, Analysis of the 1983 Amendments to the Delaware Corporation Law, Analysis of the 1984 Amendments to the Delaware Corporation Law; Analysis of the 1985 Amendments to the Delaware Corporation Law, Analysis of the 1986 Amendments to the Delaware Corporation Law; Prentice Hall, Inc. 1967, 1969, 1970, 1973, 1974, 1976, 1981, 1983, 1984, 1985 and 1986, respectively. Copies of these articles are available from Prentice Hall Information Services, Corporation & Finance Dept., 240 Frisch Court, Paramus, NJ 07652, (201) 368-4636.

the par value of each share of each such class. This language has been changed to say that the certificate of incorporation shall "specify each class the shares of which are to be without par value and each class the shares of which are to have par value and the par value of the shares of each such class."

DIRECTORS AND OFFICERS

Board of directors; powers; committees; etc. [§141].—Section 141(d) of the General Corporation Law provides that a certificate of incorporation may give the holders of a class or series of stock the right to elect one or more directors having such terms and voting power as are stated in the certificate of incorporation. That section makes clear that these terms and voting powers may be greater or less than those of any other director or class of directors. These provisions, which were added to the General Corporation Law in 1974, permit corporations to simplify their corporate governance procedures if they wish. For example, when it is desired to give a particular stockholder multiple representation on the board of directors, or even control of the board, instead of creating a class or series of stock for such stockholder with power to elect multiple directors, the class or series can simply be given power to elect one director with multiple votes. These provisions have had particular utility for some foreign investors who have found it cumbersome to find numerous directors or to pay their travel expenses, when, in essence, they represent the interests of one person. However, it has not been clear how the multiple voting power authorized in Section 141(d) interfaces with other provisions of the statute which speak in terms of numbers of directors. For example, can a director's multiple votes be frustrated by quorum provisions requiring a majority of directors to constitute a quorum? The 1987 amendments address this question by adding to Section 141(d) a sentence providing that where a certificate of incorporation provides for more or less than one vote per director, "every reference in this chapter to a majority or other proportion of directors shall refer to a majority or other proportion of the votes of such directors."

Prior to the 1987 amendments, Section 141(e) provided that in performing their duties members of the board of directors, or committees of the board, were "fully protected" in relying in good faith upon books of account and other corporate records and upon reports made by officers, independent certified public accountants or appraisers. This formulation failed to explicitly cover other experts who frequently report to boards of directors, such as lawyers and investment bankers. The 1987 amendments broaden the scope of Section 141(e) by authorizing directors and committee members to rely, in addition to corporate records, upon "information, opinions, reports or statements" presented to the corporation by officers, employees or a board committee "or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation."

STOCK AND DIVIDENDS

Classes and series of stock; rights, etc. [§151].—Section 151(g) of the General Corporation Law provides that where the board of directors acts to fix the terms of a class or series of stock in accordance with power granted to the board in the certificate of incorporation, the corporation shall file a certificate of designations with the Delaware Secretary of State setting forth the board resolutions fixing such terms. This certificate of designations becomes part of the certificate of incorporation. Prior to the 1987 amendments, Section 151(g) conferred limited power on the board to further amend the certificate of incorporation, even after a certificate of designations has been filed, by increasing or decreasing the number of shares in a class or series created by board action and by eliminating a class or series in those instances where none of the shares are outstanding and none will be issued subject to that particular certificate of designations.

The 1987 amendments extend the power of the board to effect charter amendments without stockholder action by acting with reference to a certificate of designations, although that power is still closely circumscribed. As amended, Section 151(g) authorizes the board of directors to amend a certificate of designations to change the powers, preferences and rights of the subject shares so long as no shares of the class or series described in the certificate of designations have been issued. In addition, language has been added

to the last sentence of Section 151(g) to make it clear that the limited power to amend the certificate of incorporation conferred on the board in that section continues after the certificate of designations has been filed with the Secretary of State and is not affected by the filing of a restated certificate of incorporation in the interim.

Liability of directors as to dividends or stock redemption [§172].—The 1987 amendments broaden the scope of Section 172 of the General Corporation Law, consistent with the changes in Section 141(e) described above, to extend the protection which Section 172 affords directors and members of board committees from liability for unlawful dividends or unlawful purchases or redemption of the corporation's stock. As amended, Section 172 protects directors and committee members who rely in good faith upon corporate records and upon information, opinions, reports or statements presented to the corporation by its officers or employees or board committees or "by any other person as to matters the director reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation."

STOCK TRANSFERS

Tender offers [§203].—In light of decisions holding Section 203 of the General Corporation Law unconstitutional in the wake of the decision of the U.S. Supreme Court in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), that section has been repealed. In connection with the 1987 amendments, the Council of the Corporation Law Section of the Delaware Bar Association considered proposing a control share acquisition statute modeled on the Indiana statute approved by the U.S. Supreme Court in *CTS Corp. v. Dynamics Corporation of America, Inc.*, 107 S. Ct. 1637 (1987), but it was decided to defer introduction of such a statute pending further study.

MEETINGS, ELECTIONS, VOTING AND NOTICE

Fixing date for determination of stockholders of record [§213].—The 1987 amendments to the General Corporation Law completely revamp Section 213 to deal more specifically with the record date for action by written consent and to make other changes. The provisions of Section 213 dealing with action by written consent should be read together with Section 228 which has also been revised to set out more clearly the mechanics for taking action by a consent in writing. These changes in the statute were prompted by court decisions which pointed up some uncertainties about the procedure for action by consent and invited clarification by the legislature, most notably *Empire of Carolina, Inc. v. Deltona Corp.*, 514 A.2d 1091 (Del. 1985).

Section 213(a), as revised, incorporates the provisions relating to fixing a record date to determine the stockholders entitled to notice of or to vote at meetings of stockholders. The provisions now collected in Section 213(a) formerly appeared in subsections (a), (b) and (c) of Section 213. No substantive change has been made. However, the language authorizing the board to fix "in advance" a record date, which had apparently engendered some confusion, has been changed to specify that the board may fix a record date "which record date shall not precede the date upon which the resolution fixing the record date is adopted."

Section 213(b) spells out the procedure for fixing record dates for action by written consent. As amended, it provides that the board of directors may fix a record date for determining the stockholders entitled to consent to corporate action in writing "which record date shall not be more than ten days" after the date on which the board acts to fix the record date. Section 213(b) goes on to provide that where no record date is fixed by the board, and no prior action by the board is required by the provisions of the Delaware General Corporation Law (such as, for example, an amendment to the charter where the statutory scheme contemplates initial action by the board declaring the amendment advisable) the record date shall be the first date on which a signed written consent setting forth the action taken or proposed is delivered to the corporation. A stockholder acting by written consent has three choices as to where to deliver the consent. It can be delivered to the corporation's registered office in Delaware (in which case it must be de-

livered by hand or by certified or registered mail), to the corporation's principal place of business or to the officer or agent who has custody of the corporation's minute books. This last provision accommodates the numerous corporations who leave their minute books with their attorneys or other agents.

Where no record date has been fixed by the board and prior action by the board is required under the General Corporation Law for the action proposed to be taken, the record date for determining the stockholders entitled to act by written consent is the close of business on the day on which the board takes the required prior action.

Hence, as revised, Section 213(b) recognizes that the board of directors does not have exclusive authority to fix record dates for action by written consent. Where prior board action is not a prerequisite, a record date can be fixed by a stockholder who delivers a written consent to the corporation and that consent can constitute effective approval of the corporate action if it has been signed by stockholders having sufficient voting power or it can be the opening gun in a proxy solicitation relating to the proposed action.

Section 213(c) collects the provisions relating to the fixing of record dates for determining stockholders entitled to receive a dividend or any other distribution or allotment of rights in respect of any change, conversion or exchange of stock "or for the purpose of any other lawful action." Again no substantive change has been made, although the requirement that the record date not precede the date of the board action fixing the record date has been clarified.

Quorum and required vote for stock corporations [§216].—Section 216 of the General Corporation Law sets forth certain statutory quorum requirements and requirements governing the vote necessary to take corporate action in those cases where a corporation's certificate of incorporation or by-laws are silent on those matters. Prior to the 1987 amendments, Section 216 required a majority vote for all stockholder action. This provision did not take into account contested elections of directors in which there might be multiple candidates for a board seat. In such cases, it could be possible that none of the candidates would receive a majority of the votes cast. The 1987 amendments to Section 216 deal separately with elections of directors, providing that, where the certificate of incorporation or by-laws do not speak to the question, directors shall be elected by plurality vote.

In addition, Section 216 has been amended to make it clear that where shares are entitled to vote as a class, a majority of the shares of the class will constitute a quorum.

Consent of stockholders in lieu of meeting [§228].—The provisions of Section 228 of the General Corporation Law dealing with stockholder action by written consent have been amended to clarify and provide more detail as to the rules governing corporate action by written consent. The new provisions, together with the new provisions relating to record dates for action by consent in Section 213, were prompted by, and to some degree codify, case law which has developed in contested consent solicitations.

Existing Sections 228(a) and 228(b) have been amended to acknowledge that action can be taken by consent "or consents" and to specify where consents should be delivered to the corporation, i.e. at the office of its registered agent in Delaware, its principal place of business, or to the officer or agent who has custody of the corporation's minute books.

A new subsection (c) is the heart of Section 228, as amended. It requires that a written consent bear the date of the signature of each shareholder who signs the consent and goes on to provide that no consent will be effective to take corporate action unless written consents sufficient to approve the action are delivered to the corporation within sixty days of the earliest dated consent. This provision, which tracks closely the holding in *Pabst Brewing Co. v. Jacobs,* 549 F. Supp. 1068 (D. Del. 1982), *aff'd,* 707 F.2d 1394 (3d Cir. 1982),[3] responds to the concern that, unlike proxy solicitations for a meeting, which are confined to a finite period of time, a solicitation of consents could go on indefinitely. In the absence of such a provision, in contested situations, consent solicitations could become chaotic, with both sides soliciting consents or revocations of consents and neither knowing whether the magic number of votes has ever been reached.

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(3) In *Pabst Brewing Co. v. Jacobs* the court, interpreting Section 213 before its amendment, held that consents were only valid for sixty days from the record date. Under new subsection 228(c), the 60-day period is measured from the date of execution of the first written consent, rather than from the record date.

Subsection (c) of the existing Section 228 has been redesignated as subsection (d) with no change.

AMENDMENT OF CERTIFICATE OF INCORPORATION; CHANGES IN CAPITAL AND CAPITAL STOCK

Retirement of stock [§243].—Section 243 of the General Corporation Law deals with the retirement of stock. The 1987 amendments delete the second sentence of Section 243(a). That sentence had caused some confusion since it appeared to provide for the automatic retirement of shares where a corporation's capital account was debited in connection with a purchase or redemption or a conversion or exchange of shares while Section 244 contemplates board action to authorize any reduction of capital.

In addition, Section 243(b) has been amended to make it clear that, where there are several series within a class of authorized shares, upon retirement of shares of a particular series, those shares resume the status of authorized and unissued shares of the series unless the certificate of incorporation otherwise provides.

MERGER OR CONSOLIDATION

Agreement of merger or consolidation [§§251, 252].—Prior to the 1987 amendments, the provisions of Section 251 governing the merger or consolidation of domestic corporations and Section 252 governing the merger or consolidation of domestic and foreign corporations authorized a provision reciting that the certificate of incorporation of one of the constituent Delaware corporations would be the certificate of incorporation of the surviving corporation. In order to accommodate an interpretation of the Delaware Secretary of State and the Secretary of State's recordkeeping function, these provisions have been changed so as to preclude designating the certificate of incorporation of the corporation which does not survive the merger as the certificate of incorporation of the surviving corporation. This change appears in amended Sections 251(b)(3), 251(c)(4) and 252(c)(4).

In addition, the 1987 amendments require that in the case of consolidations, the certificate of incorporation of the resulting corporation be attached to the consolidation agreement. This change appears in amended Sections 251(b)(4), 251(c)(5), and 252(c)(5).

Other substantive changes in the provisions governing mergers or consolidations of domestic or foreign and domestic companies effected by the 1987 amendments are a change in Section 251(c) to require that the notice of a meeting of stockholders to act on an agreement of merger or consolidation contain a copy of the agreement or a brief summary of its terms and the deletion of former Section 252(c)(5) requiring that a certificate of merger relating to a merger in which a Delaware corporation is not the survivor "set forth in full" the certificate of incorporation of the surviving corporation.

Merger of parent corporation and subsidiary [§253].—Section 253(a) of the General Corporation Law has been amended to provide that in the case of a short form merger in which the surviving corporation is not a Delaware corporation, the certificate of ownership and merger filed in Delaware shall recite that the merger was approved by the parent corporation in accordance with the requirements of its state of incorporation. Prior to this amendment Section 253(a) appeared to require that the foreign corporation follow the requirements of Delaware law in approving a short form merger.

Merger or consolidation of domestic corporation and joint-stock or other association [§254].—The 1987 amendments change Section 254(d) of the General Corporation Law which sets forth the provisions to be included in a certificate of merger or consolidation involving corporations and joint-stock associations to preclude, in the case of a merger, provisions making the certificate of incorporation of a disappearing corporation the certificate of incorporation of the survivor and to require, in the case of a consolidation, that the certificate of incorporation of the surviving corporation be attached to the certificate of merger or consolidation.

Merger or consolidation of domestic nonstock nonprofit corporations [§255].—The 1987 amendments add a sentence to Section 255(c) requiring that the notice of a meeting to act on an agreement of merger or consolidation of domestic nonstock corporations include a copy of the agreement or a summary of its terms.

Appraisal rights [§262].—Section 262(a) has been amended to make it clear that, in order to be entitled to appraisal rights, a stockholder must not only be a stockholder of record on the date of making a demand for appraisal, but must also hold the shares covered by the demand continuously through the effective date of the merger or consolidation. This change addresses an issue raised, but not decided, in *AC Acquisition Corp. v. Anderson Clayton & Co.*, C.A. No. 8501 (Del. Ch. June 10, 1987), in which it was argued that, under the former statutory language, a stockholder had to be a stockholder of record on the record date for the vote on a merger in order to demand appraisal. The amendment rejects the notion that a person must be a stockholder of record on the record date for the taking of a vote on a merger in order to make a valid demand, providing instead that the date by which a stockholder must achieve record status is the date the demand is made.

The amendment also makes it clear that a person may not demand appraisal as to shares, sell such shares before the merger, and then acquire other shares and have his prior demand apply to the newly-acquired shares. As revised, the statute now provides that a demand is valid only as to shares held of record continuously by the demanding stockholder from the date demand is made until the merger is effected.

The introductory language in Section 262(b) has been amended to make clear that appraisal rights are available for shares of stock of a constituent corporation in a statutory consolidation to the same extent as in a merger.

Section 262(i) has been amended to permit the Court of Chancery to award either simple or compound interest on an appraisal award, measured from the date of the merger. Prior case law had restricted the Court's discretion to the award of simple interest. *See Charlip v. Lear Siegler, Inc.*, C.A. No. 5178 (Del. Ch. July 2, 1985).

SALE OF ASSETS, DISSOLUTION AND WINDING UP

Dissolution before the issuance of shares or beginning a business; procedure [§274].—Prior to the 1987 amendments Section 274 contained a simplified procedure whereby a corporation which had not yet begun business could, by action of a majority of its incorporators or directors only, and without the need for stockholder approval, voluntarily dissolve by filing with the Secretary of State a certificate of dissolution before beginning business. The 1987 amendments broaden the availability of this simplified procedure by making it available to corporations which have begun business but have not yet issued any shares of stock. In the latter case, the certificate filed with the Secretary of State must also certify that no shares of stock have been issued and that all debts of the corporation have been paid.

Dissolution; procedure [§275].—Section 275 of the General Corporation Law specifies the procedures to be followed in dissolving a corporation which has both commenced business and issued stock. Subsection (a), which requires as a first step board action declaring the advisability of such a dissolution and the noticing of a stockholders' meeting to consider the issue, was unchanged by the 1987 amendments. The requirement of former subsection (b) that such a dissolution be approved by a majority of the outstanding stock entitled to vote thereon also remains the same. However, that portion of former subsection (b) specifying the contents of the certificate of dissolution required to be filed with the Secretary of State before a dissolution becomes effective has been transferred by the 1987 amendments to a new subsection (d). Likewise, new subsection (d) also specifies the contents of the certificate to be filed for dissolutions effected pursuant to revised subsection (c), which continues to provide that a dissolution may be effected without prior board action if approved by a unanimous vote of stockholders. Thus, new subsection (d) of Section 275 requires that the certificate of dissolution filed with respect to all dissolutions approved by stockholders, whether pursuant to Section 275(a)-(b) or 275(c), contain the same information: the name of the corporation; the date dissolution was authorized; that the dissolution was approved by the directors and stockholders pursuant to Section 275(a)-(b) or by unanimous stockholder action pursuant to Section 275(c), as the case may be; and the names and addresses of the directors and officers of the corporation. A new subsection (e) provides that notwithstanding the approval of stockholders, or the members of a nonstock corporation, the board of directors or governing body may choose to abandon a proposed dissolution. Finally, as found elsewhere in the prior ver-

sion of section 275, a new subsection (f) provides that a corporation shall be dissolved upon the filing of the certificate of dissolution with the Secretary of State.

Dissolution of nonstock corporation; procedure [§276].—Both the title and text of Section 276 have been amended to make clear that the procedures for dissolution thereunder apply to all nonstock corporations, whether organized for profit or not for profit. Further, the pre-existing provisions authorizing the dissolution of nonstock corporations by action of the governing body followed by a vote of those members entitled to elect such governing body were redesignated as subsection (a), and a new subsection (b) was added authorizing the dissolution of a nonstock corporation by action of the incorporators or the governing body, without the need for action by the membership, in those cases where the corporation has not yet commenced business.

Continuation of corporation after dissolution for purposes of suit and winding up affairs [§278].—Section 278 provides generally that dissolved corporations continue as bodies corporate for a period of three years, or for such longer period as the Court of Chancery might direct, for the limited purposes of prosecuting or defending suits by or against them, settling and closing their business, disposing of property, discharging liabilities and distributing any remaining assets to stockholders. Section 278 also provides that, with respect to and solely for the purpose of any action, suit or proceeding begun either before or during the statutory three-year period, the corporation shall remain a body corporate beyond the expiration of the three-year period until any judgments, orders or decrees in such an action, suit or proceeding shall be fully executed. The 1987 amendments to Section 278 provide specifically that such an action does not abate by reason of the dissolution of the corporation.

Trustees or receivers for dissolved corporations; appointment [§279].—Prior to the 1987 amendments, Section 279 granted standing to any creditor, stockholder or other person showing good cause therefor to petition the Court of Chancery to appoint one or more persons to be trustees or receivers of a dissolved corporation. The 1987 amendments make it explicit that a director of a dissolved corporation has the same standing as a creditor or stockholder to file such a petition.

Notice to claimants; filing of claims [§280].—Pursuant to the 1987 amendments, the substance of former Section 280 dealing with the jurisdiction of the Court of Chancery over petitions filed pursuant to Section 279 is transferred to a new Section 283. New Section 280, which has no prior counterpart in the General Corporation Law, establishes an optional procedure whereby a dissolved corporation may seek a judicial determination as to the form and amount of security required to satisfy certain unresolved claims against the corporation prior to the distribution of assets to stockholders.

In order to avail itself of the benefits of the new provision, a corporation must first give notice in the form and manner specified in subsection (a)(1) to all persons having a claim against the corporation, requesting that such persons present their claim or claims to the corporation by a date specified in the notice, which shall be no earlier than 60 days from the date of the notice. Pursuant to subsection (a)(2), a corporation may reject, in whole or in part, any claim made. Any creditor whose claim is rejected has at least 150 days in which to complete a judicial challenge to that rejection, since new Section 281 prohibits any corporation which follows the Section 280 procedure from distributing any assets to stockholders until 150 days have passed from the sending of the last notice of rejection under Section 280(a)(2).

Pursuant to subsection (b)(1) of new Section 280, the same notice must also be given to persons with claims contingent upon the occurrence or nonoccurrence of future events or otherwise conditional or unmatured, such as the beneficiaries of a corporate guarantee of a third party's performance of a contract. Subsection (b)(2) requires that the dissolved corporation then offer any claimant whose claim is contingent, conditional or unmatured such security as the corporation determines is sufficient to provide compensation to the claimant if the claim matures. If the claimant does not reject the offer within the time period specified in the statute, the claimant is deemed to have accepted such security as the sole source from which to satisfy his claim against the corporation, thereby protecting stockholders to whom a distribution of assets is made from being assessed by reason of

the claim. If the claimant rejects the offer of security, the corporation is required by subsection (c)(1) to petition the Court of Chancery to determine the form and amount of such security.

Subsection 280(c)(2) also requires that any corporation electing to follow the Section 280 procedures petition the Court of Chancery to determine the amount and form of security which will be sufficient to provide compensation to claimants whose claims are known to the corporation but whose identities are unknown, such as, for example, claims arising as a result of latent asbestosis conditions which it is anticipated will be brought once symptoms become apparent in particular yet-to-be-identified victims. In any such proceeding the Court of Chancery is required to appoint a guardian *ad litem* to represent the interests of claimants whose identities are unknown.

Finally, pursuant to subsection (e), the procedures of Section 280 are also available to any trust, receivership or other legal entity to which the assets of a dissolved corporation are transferred and which exists solely for the purpose of winding up the corporation's affairs.

Payment and distribution to claimants and stockholders [§281].—Former Section 281 dealt narrowly with the duties of trustees or receivers to make payments and distributions to creditors and stockholders of a dissolved corporation. New Section 281 has been broadened and substantially revised to cover the obligations not only of trustees and receivers, but also of directors, to make payment and distribution to claimants, including creditors, and to stockholders.

New Section 281 is divided into four subsections. Subsection (a) sets forth the procedures for payments and distributions to be followed by corporations which have elected to utilize the notice and court petition procedures authorized in Section 280. Subsection (b) sets forth the procedures to be followed by corporations which have not elected to follow the procedures in Section 280.

Subsection (a) of Section 281 provides that a dissolved corporation or successor entity which has followed the procedures set forth in Section 280 shall pay claims made and not rejected in accordance with Section 280(a), shall post the security offered and not rejected pursuant to Section 280(b)(2), shall post any security ordered by the Court of Chancery in any proceeding under Section 280(c) relating to unidentified claimants, and shall pay or make provision for all other obligations of the corporation. If there are insufficient funds to pay or make provision for such payments in full, subsection (a) provides that such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of funds legally available therefor. Any remaining funds are required to be distributed to the stockholders of the dissolved corporation. As previously noted, however, no such distribution to stockholders may be made prior to the expiration of 150 days from the date of the last notice of rejection given pursuant to Section 280(a)(2) so as to permit persons whose claims have been rejected to seek redress before funds are distributed. Subsection (a) of Section 281 also provides that, in the absence of actual fraud, the judgment of the directors of a dissolved corporation as to the adequacy of a provision made for payment of those obligations which fall outside of the scope of Section 280 shall be conclusive.

Subsection (b) of Section 281, which governs the procedures to be followed by a dissolved corporation which has not elected to avail itself of the new procedures set forth in Section 280, requires that such a corporation pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured claims known to the corporation and all claims which are known but for which the identity of the claimant is unknown. As in the case of subsection (a), such claims are required to be paid in full if there are sufficient funds. If there are insufficient funds, such claims and obligations are required to be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of funds legally available therefor, with any remaining funds to be distributed to stockholders.

Subsection (c) of Section 281 provides that directors of a dissolved corporation or governing persons of a successor entity which has complied with either subsection (a) or subsection (b) shall not be personally liable to claimants of the dissolved corporation for decisions made in connection with payments or distributions. In this connection, however, it should be significantly easier in many cases for a director who has followed the objec-

tive procedures of Section 281(a) to establish his or her entitlement to the defense provided by subsection 281(c) than it would be for a director of a dissolved corporation which had followed the procedures of subsection 281(b). In the latter case, whether "reasonable provision" had been made for the payment of claims and obligations prior to a distribution to stockholders would appear to present a more litigable question than those which would arise under subsection 281(a).

Liability of stockholders of dissolved corporations [§282].—Former Section 282, which dealt with the abatement of pending actions in the event of a dissolution, has been deleted from the statute. As previously noted, Section 278 has been amended to make clear that a dissolution does not cause a pending action to abate. The additional procedural requirements of former Section 282 were deleted as unnecessary.

New Section 282 is designed to codify for the first time, and to set limits upon, the liability of stockholders of a dissolved corporation. Subsection (a) of Section 282 provides that, so long as the assets of a corporation were distributed either pursuant to Section 281(a) or Section 281(b), a stockholder shall not be liable for any claim against the corporation in an amount in excess of such stockholder's prorata share of the claim or the amount so distributed to him, whichever is less. Subsection (b) provides additional protections to stockholders of a dissolved corporation which has elected to follow the procedures of Section 280 and the assets of which were thereafter distributed pursuant to Section 281(a) by providing that such stockholders shall not be liable for any claim against the corporation on which an action, suit or proceeding is not begun prior to the three-year period after dissolution referred to in Section 278, or any judicial extension thereof. Finally, subsection (c) of Section 282, which applies to stockholders of any dissolved corporation, provides that the aggregate liability of any stockholder shall not exceed the amount distributed to him in dissolution.

Jurisdiction of the Court [§283].—Former Section 280, which vested jurisdiction in the Court of Chancery over applications for the appointment of receivers and trustees under Section 279, has been renumbered as Section 283 and expanded to include actions under any of the dissolution provisions of the General Corporation Law, including the new provisions of Section 280. In addition, present Sections 283 and 284, relating to the revocation or forfeiture of charters and the dissolution or forfeiture of charters by decree of court have been renumbered as Sections 284 and 285, respectively.

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