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Post-Dissolution Liabilities of Shareholders and Directors for Claims Against Dissolved Corporations

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I. INTRODUCTION

When a corporation sells substantially all its assets to another corporation, the transferor corporation often will dissolve after distributing to its creditors and shareholders the consideration it received in the transfer. The process by which the transferor corporation pays its creditors and distributes its remaining assets to its shareholders is called liquidation. Although liquidation theoretically should settle all claims against the dissolved corporation,[1] certain "contingent" claims often do not appear until after liquidation.[2] These claims[3] frequently are asserted against the dissolved

1. *See, e.g.,* Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1927) ("It is well settled that at common law . . . the result of dissolution can not be distinguished from the death of a natural person in its effect."); Fleming v. Charles L. Harney Constr. Co., 177 F.2d 65 (D.C. Cir.), *cert. denied,* 338 U.S. 893 (1949); Imperial Film Exch. v. General Film Co., 244 F. Supp. 985 (S.D.N.Y. 1915); MacRae v. Kansas City Piano Co., 69 Kan. 457, 77 P. 94 (1904). On liquidation generally, see W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7968 (rev. perm. ed. 1975).

2. For a discussion of when products liability claims arise, see Note, *Statutes of Limitations: Their Selection and Application in Products Liability Cases,* 23 VAND. L. REV. 775 (1970). For a definition of "contingent" claims, see text accompanying note 22 *infra.*

3. *Compare* Bazan v. Kux Mach. Co., 358 F. Supp. 1250 (E.D. Wis. 1973) (suit against

transferor corporation, its shareholders, and its directors, as well as against the transferee corporation.[4]

This Article initially will explore the nature and extent of shareholders' and directors' liabilities for contingent claims against the dissolved corporation by examining section 105 of the Model Business Corporation Act and the case law[5] of those states that have adopted the Model Act.[6] Two purposes underlying the Model Act are uniformity and progressive resolution of issues inadequately resolved by the common law or earlier statutes.[7] An exhaustive analysis of the case law under section 105 of the Model Act, however, reveals that both purposes have been frustrated, if not defeated. First, uniformity among jurisdictions, as well as within each Model Act state, is defeated by the overwhelming inconsistency in the case law. Litigants presently can choose precedent to support almost any position they seek to argue. Moreover, section 105 itself does not resolve clearly any of the major post-dissolution liability issues. Its ambiguous language has furnished litigants and courts with little guidance in determining the legislatively intended answers to key issues.

This examination of contingent claims against a dissolved corporation, its shareholders, and its directors has two objectives: (1) to describe the cases addressing these claims and their underlying policy problems, and (2) to propose legislative action for unifying judicial treatment of defendants faced with contingent claims. The cases also are analyzed to determine policies that underlie the decision whether to impose post-dissolution liability. An understanding of these policies will clarify court decisions that on their face remain inconsistent. In practice, the policy approach to resolution of issues has been undermined by courts that have been all too ready to use any available rule that would achieve a desired outcome. Although attempts are made to harmonize some of the cases, the reader should remain aware of the patently inconsistent case law because this precedent will remain the primary source of law unless legislative revisions such as those urged in the final section of this Article are adopted.

transferee corporation) *with* Bazan v. Kux Mach. Co., 52 Wis. 2d 325, 190 N.W.2d 521 (1971) (suit against dissolved manufacturing corporation).

4. For a discussion of causes of action asserted against transferee corporations, see 30 VAND. L. REV. 238 (1977).

5. The current law for purposes of this Article is the case law of those states that have adopted substantially all of section 105 of the Model Business Corporation Act. *See generally* MODEL BUS. CORP. ACT ANN. 2d § 105 (1971 & Supp. 1977).

6. ABA-ALI MODEL BUS. CORP. ACT § 105 [hereinafter cited as MODEL ACT].

7. *See* MODEL BUS. CORP. ACT ANN. 2d § 1, ¶ 2 (1971).

II. Background: Section 105 and the Trust Fund Theory

Section 105 of the Model Act is a "survival" statute, so named because it provides for the survival of remedies against dissolved corporations. The survival statute was drafted primarily to abolish the common law rule that all actions by or against a corporation abate upon dissolution of the corporation.[8] For present purposes, the following language of section 105 is central:

> The dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution.[9]

Claims brought pursuant to this provision raise two primary issues: (1) did the claimant's right or claim exist prior to dissolution, and (2) did the claimant commence his action within two years following the date of dissolution? These issues are discussed in detail below.

Section 105, however, may not be the sole basis upon which a claimant may recover upon a claim against a dissolved corporation. The common law "trust fund" theory may provide an alternative basis for the contingent claimant, although the courts are confused about the continued vitality of the trust fund theory.[10] If, in addition

8. *See, e.g.*, Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1927) ("[D]issolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant."); Beasley v. Fox, 173 F.2d 920 (D.C. Cir. 1949); W. Fletcher, *supra* note 1, § 8173.

9. Model Act, *supra* note 6, § 105. Officers incur liability statutorily. The trust fund theory developed in equity creates only directors' and shareholders' liabilities. Nevertheless, statutes may consider both officers and directors to be trustees for distribution of the corporate assets. Because this Article is concerned primarily with trust fund theory liabilities, director and shareholder liability will be discussed more than officer liability. The Illinois survival statute acknowledges the absence of officers' liability following dissolution by omitting officers from the continuation provisions of the survival statute. *See* Ill. Ann. Stat. ch. 32, § 157.94 (Smith-Hurd Supp. 1978).

10. *See, e.g.*, Henn & Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 Cornell L. Rev. 865, 894, 896 (1971) ("Corporate statutes have supplemented but not necessarily replaced the 'trust fund theory' . . . .") ("[T]he statutory application to post-dissolution claims is so tenuous as to make it more probable that common law and equitable principles apply . . . .").

Actions based upon theories of fraudulent conveyances also have been brought against recipient shareholders. *See, e.g.*, Menconi v. Davison, 80 Ill. App. 2d 1, 225 N.E.2d 139 (1967). In *Menconi*, however, the court did not mention that the distributing corporation had dissolved but instead referred only to the liquidation of the corporation. Whether the court failed to mention dissolution to skirt a potential conflict with the Illinois survival statute, or whether the corporation actually had never dissolved, is an unanswered question. In at least one case in which judgment was obtained before dissolution, a court held that expiration of the two-year survival period did not bar an equitable action to discover assets of a corporate judgment debtor in the hands of the fraudulent transferee shareholders. La Cross Mfg. Co. v. Springer, 323 Ill. App. 525, 56 N.E.2d 146 (1944) (abstract only published). For authority to postponing the common law rule of abatement, section 105 has extinguished the trust fund theory, then the two issues phrased above would define the limits of directors' and shareholders' liabilities upon claims that could have been maintained against only the dissolved corporation but for its dissolution. Because much of this Article discusses the relationship between section 105 and the trust fund theory, it is necessary to explore the trust fund theory.

The purpose of the trust fund theory is the same as that of section 105—to relieve creditors of the hardship caused by the common law abatement of actions and claims against a dissolved corporation. The trust fund theory developed in equity to allow recovery against the distributed assets of a dissolved corporation. Those assets become a "trust fund against which the corporate creditors have a . . . claim"[11] prior to that of the shareholders or any transferee who is not a bona fide purchaser.[12] If a creditor obtains a judgment against a corporation before the corporation dissolves, execution will issue against the assets in the hands of any shareholder.[13] If a creditor fails to obtain a judgment before dissolution of a corporation and consequently loses his cause of action through abatement, then the creditor can bring the claim against a recipient shareholder individually or against that shareholder's transferee, if not a bona fide purchaser, for the distributed assets then in the possession of the shareholder or transferee.[14] Receipt of the distrib-

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that improper distributions to shareholders should be attacked through the applicable corporate statutes, rather than be treated as fraudulent conveyances, see 2 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 604 (rev. ed. 1940). For a discussion of the availability of the Uniform Fraudulent Conveyance Act as a means for contingent tort claimants to recover against recipient shareholders, see Henn & Alexander, *supra*, at 896 n.173.

11. W. FLETCHER, *supra* note 1, § 8161, at 371 (footnote omitted).

12. *Id.* at 371-72; Norton, *Relationship of Shareholders to Corporate Creditors upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets*, 30 BUS. LAW. 1061, 1072-73 (1975); *see* King v. Coosa Valley Mineral Prod. Co., 283 Ala. 197, 203, 215 So. 2d 275, 280 (1968) (quoting Kelly v. Andalusia Brick Co., 222 Ala. 203, 131 So. 559 (1930)); Luedecke v. Des Moines Cabinet Co., 140 Iowa 223, 118 N.W. 456 (1908); Love v. Gamer, 64 S.W.2d 393, 395 (Tex. Ct. App. 1933) ("[T]he right of a creditor to pursue the property of the corporation into the hands of the only stockholder and his assignees with notice is well settled."); White v. Texas Motor Car & Supply Co., 228 S.W. 138 (Tex. Comm'n App. 1921).

13. W. FLETCHER, *supra* note 1, § 8161, at 370. In the alternative, the creditor could sue on the judgment against an individual shareholder. *Id.*; *see, e.g.*, World Broadcasting System, Inc. v. Bass, 160 Tex. 261, 328 S.W.2d 863 (1959); *cf.* King v. Coosa Valley Mineral Prod. Co., 283 Ala. 197, 204, 215 So. 2d 275, 280 (1968) (the dissolved corporation's shareholders "were represented by the corporation, so far as to render binding on them the judgment in respect to corporate matters and their interests in the corporation").

14. Updike v. United States, 8 F.2d 913, 917 (8th Cir. 1925), *cert. denied*, 271 U.S. 661 (1926) ("where the debt was not judicially established by action against the corporation before its dissolution, it may be presented and its validity determined in the equitable suit to enforce such liability of the stockholders"); Myers v. Shapiro Bros. Factors Corp., 154

uted assets creates no personal liability for a shareholder unless the shareholder "has disposed of the trust fund in such a manner that it cannot be followed or where he has caused a diminution in the value of the trust assets."[15]

The trust fund theory applies differently to directors of the dissolved corporation.[16] Since shareholders are not trustees, they have no fiduciary duties and, as noted above, they are not personally liable except in special circumstances. Under the trust fund theory, shareholder liability arises because the shareholders possess the distributed assets to which an equitable lien has attached.[17] The liability of distributing directors for claims against the dissolved corporation arises because they are trustees for creditors and shareholders in settling the dissolved corporation's affairs.[18] Thus, director liability is personal and exists even though the director no longer possesses any of the dissolved corporation's assets.[19] The liability arises, however, only if there is a breach of the fiduciary duties owed to creditors and shareholders while the director is acting in his capacity as trustee.[20]

The primary fiduciary duty directors owe to creditors is to make adequate provision for payment of creditors' claims against the dissolved corporation. If directors perform this duty, they are not liable to their dissolved corporation's creditors. Since this Article is concerned with contingent liabilities, the determinative question is whether the distributing directors made adequate provision for pay-

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S.W.2d 875 (Tex. Ct. App. 1941); *see* W. FLETCHER, *supra* note 1, § 8161; Norton, *supra* note 12, at 1074-76.

15. Koch v. United States, 138 F.2d 850, 852 (10th Cir. 1943); *see* W. FLETCHER, *supra* note 1, § 8161, at 372; Norton, *supra* note 12, at 1073-74.

16. Use of the term "trust fund" theory to describe the liability of distributing directors has been questioned. *See* Henn & Alexander, *supra* note 10, at 880 n.79. The term, however, is descriptive and has been used to refer to theories of directors' as well as shareholders' liabilities. *See id.* at 892, 907.

17. Norton, *supra* note 12, at 1070-72.

18. W. FLETCHER, *supra* note 1, §§ 8175, 8186; *see, e.g.*, Smith v. Great Basin Grain Co., 98 Idaho 266, 280, 561 P.2d 1299, 1313 (1977). *See generally* Evons v. Winkler, 388 S.W.2d 265 (Tex. Ct. App. 1965).

19. *See, e.g.*, White v. Texas Motor Car & Supply Co., 228 S.W. 138 (Tex. Comm'n App. 1921); Wortham v. Lachman-Rose Co., 440 S.W.2d 351 (Tex. Ct. App. 1969); Pine Manor Homes, Inc. v. Duval, 76 Mont. Co. L. Rep. 296, 20 Pa. D. & C.2d 451 (1959), *discussed in* Henn & Alexander, *supra* note 10, at 907 n.214. *See generally* King v. Coosa Valley Mineral Prod. Co., 283 Ala. 197, 202, 215 So.2d 275, 279 (1968) ("A dissolved corporation's directors are jointly and severally liable to the corporation's creditors and stockholders to the extent of the corporate property coming into the hands of the directors.").

20. *See* King v. Coosa Valley Mineral Prod. Co., 283 Ala. 197, 202, 215 So.2d 275, 279 (1968) ("directors must exercise the reasonable care and prudence as that ordinarily required of trustees, in the performance of their duties as statutory trustees"); W. FLETCHER, *supra* note 1, § 8186; Henn & Alexander, *supra* note 10, at 892-93, 906-07.

ment of the contingent claims. Adequate provision for contingent claims "goes no further than to require the directors to refrain from distributing so much of the available corporate assets as may be required to satisfy such [contingent] obligations as and when they mature."[21]

A contingent claim or liability has been defined as "one which has not accrued and which is dependent on the happening of some future event . . . which may or may not happen."[22] Among these claims are tort claims that arise after dissolution.[23] For example, a products liability claim against a dissolved manufacturing corporation based upon strict liability in tort arises at the time the defective product injures the claimant.[24] This injury may occur several years after dissolution. Or, for example, negligent hospital employees may leave a foreign object inside a patient. The patient's claim arises upon discovery of the object in his body.[25] The discovery may be made several years following dissolution of the corporation that owned the hospital at the time the negligence took place. The relief afforded by the trust fund theory as applied to both directors and shareholders of the dissolved corporation apparently is available to claimants with such contingent claims against the dissolved corporation.[26] Although few cases have discussed the availability of the trust fund theory to claimants with post-dissolution claims,[27] the trust fund theory both by its nature and by its purpose should allow claimants with contingent claims to recover when those claims finally arise.

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21. W. FLETCHER, *supra* note 1, § 8186, at 436 (footnote omitted); *see* New Jersey Title Guar. & Trust Co. v. Berliner, 136 N.J. Eq. 162, 40 A.2d 790 (1945); Heaney v. Riddle, 343 Pa. 453, 456, 23 A.2d 456, 458 (1942) ("[T]he corporation could not dissolve and distribute its assets among the stockholders without its liquidating trustees retaining sufficient assets to provide for the corporate debts, including contingent claims . . . . [W]hen defendants, as liquidating trustees, distributed the assets among themselves as stockholders they made themselves personally liable, by reason of such breach of their trust . . . ."). *But see* Henn & Alexander, *supra* note 10, at 907 & n.214.

22. *In re* Lexington Sur. & Indem. Co., 272 N.Y. 210, 214, 5 N.E.2d 204, 205 (1936) (quoting 13 C.J. *Contingent Claims* § 114 (1917)).

23. *See* Note, *supra* note 2. If the claims are brought upon a theory of breach of warranty, rather than upon a tort theory, the claims will be deemed to arise at the time of sale rather than at the time of injury. For a discussion of the possible effect of the distinction between causes of action based upon tort claims, which do not exist "prior to . . . dissolution" and causes of action based upon breach of warranty claims, which arise "prior to . . . dissolution," see Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321, 327 (1976).

24. *See* Note, *supra* note 2, at 787-88.

25. *See generally* 70 C.J.S. *Physicians and Surgeons* § 60 (1951).

26. *See* Henn & Alexander, *supra* note 10, at 894 nn.161-62, 909; Wallach, *supra* note 23, at 331.

27. *See* Norton, *supra* note 12, at 1074-76.

III. Exclusiveness of Section 105

Section 105 creates no new cause of action.[28] The statute merely continues in existence "any remedy available to or against such [dissolved] corporation, its directors, officers, or shareholders."[29] The continuation applies, however, only to claims existing or liabilities incurred prior to dissolution, and the continuation lasts only for a definite period of time—two years following dissolution.[30] The first subsection below addresses the question whether section 105's express continuation of claims existing prior to dissolution has the effect of barring post-dissolution claims. The intention of the drafters of the Model Act is unclear, and arguments can be made both pro and con.[31] The second subsection below presents the question whether section 105's express continuation of remedies against the shareholders and directors for a definite period was intended to bar after expiration of that continuation period the maintenance of any cause of action against shareholders and directors for claims that would have been brought against their corporation but for its dissolution.

A. *Does Section 105 Prohibit Post-Dissolution Claims?*

Section 105 provides in part that the dissolution of a corporation shall not impair any remedy against that corporation, its shareholders, or its directors, "for any right or claim existing, or any liability incurred, prior to such dissolution."[32] The quoted language is important to a determination of section 105's effect upon contingent claims, since by its own terms section 105 applies only to predissolution claims. Thus, the type of contingent tort claims discussed in the final paragraph of Part II of this Article do not fall within the express language of section 105.[33] Courts have assessed

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28. *See, e.g.*, Walden Home Builders, Inc. v. Schmit, 326 Ill. App. 386, 62 N.E.2d 11 (1945).

29. Model Act, *supra* note 6, § 105.

30. Several states have substituted survival periods of three years or more for the two-year period of the Model Act provision. *See, e.g.*, Tex. Bus. Corp. Act. Ann. art. 7.12 (Vernon 1956) (three years). In at least one state the dissolved corporation is continued indefinitely. Ariz. Rev. Stat. § 10-105 (1977). For a somewhat dated list of the length of survival periods, see Model Bus. Corp. Act. Ann. 2d § 105, ¶ 3.03(2) (1971).

31. *See* Wallach, *supra* note 23, at 327-35.

32. Model Act, *supra* note 6, § 105.

33. An argument can he made that although for purposes of the running of the statute of limitations a claim may arise when a hospital patient discovers the foreign object, for purposes of categorizing the claim as a predissolution claim or a post-dissolution claim within the section 105 framework, the claim should arise when the negligence or the injury occurred. The argument has merit, both in this context and in the context of products liability claims that arguably arise when the defect occurs rather than when the injury occurs. No case

the effect of section 105 upon post-dissolution claims in four ways. The first two assessments are based upon interpretations of the language of section 105. First, the drafters may have intended to limit the application of section 105 to claims arising prior to dissolution in an effort to except post-dissolution claims from the bar imposed when the two-year survival period expires. Under this reading, post-dissolution claims could be maintained at any time—even after the survival period expires.[34] Second, the drafters may have intended to limit the application of section 105 to claims arising prior to dissolution in an effort to extend the existence of predissolution claims, while barring post-dissolution claims altogether.[35]

The third assessment, on the other hand, ignores the language of section 105 that distinguishes predissolution claims from those arising upon or after dissolution. Under this assessment, post-dissolution claims, just like predissolution claims, could be maintained during the two-year survival period but would be barred thereafter. Finally, the fourth assessment completely ignores the language of section 105 and would allow post-dissolution claims against former shareholders and directors at any time. This assessment, however, is based not upon an interpretation of the language of section 105, but rather upon a postulated nonapplication of section 105 to certain types of claims—claims that did not abate at common law.

(1) Post-Dissolution Claims Allowed Any Time: A Statutory Interpretation

In *Levy v. Liebling*[36] the Seventh Circuit allowed shareholders to bring a cause of action more than two years after dissolution by interpreting the "prior to . . . dissolution" langnage to except post-dissolution claims from the statutory bar. Sixteen years after dissolution of their corporation, the former shareholders filed suit to recover the amount remaining unpaid upon a judgment the corporation obtained prior to its dissolution. Defendant argned that the suit was barred by the two-year limitation on the survival of remedies.

addressing the issue has been found. *But cf.* George v. Douglas Aircraft Co., 332 F.2d 73 (2d Cir.), *cert. denied,* 379 U.S. 904 (1964) (court interpreted statutory language "where the cause of action arose" to have a meaning other than that usually assigned to the phrase in order to effect a particular purpose of the statute in question).

34. *See* Henn & Alexander, *supra* note 10, at 908 n.220, 909 & n.222; Wallach, *supra* note 23, at 327 n.24.

35. *See* Henn & Alexander, *supra* note 10, at 899.

36. 238 F.2d 505 (7th Cir. 1956), *cert. denied,* 353 U.S. 936 (1957), *discussed in* 23 Mo. L. Rev. 82 (1958). For further discussion of *Levy,* see Schoone, *Shareholder Liability upon Voluntary Dissolution of Corporation,* 44 Marq. L. Rev. 415, 425-26 (1961).

The court answered defendant's argument in the following manner:

> [The survival statute] by its express language applies to "any right or claim existing, or any liability incurred prior to such dissolution." It is obvious that the right or claim of Imperial [the dissolved corporation] in the Chicago judgment against defendant existed prior to the time of its dissolution, but it is equally obvious that the right or claim of plaintiffs in suit was not in existence prior to that time.[37]

The court's reasoning assumes that the survival statute barred, after a two-year survival period, claims that existed prior to dissolution but that it did not bar post-dissolution claims. Applying that assumption, the court held that the former shareholders could maintain their claim because it was a claim which they acquired not before dissolution of the corporation, but upon dissolution.[38]

The *Levy* court's reason for holding as it did is that to hold otherwise would have led to "the anomalous result of creating a bar to the capacity of the stockholders to sue at the same time they acquired title to and became vested with the ownership of the judgment."[39] This reason has far more weight for post-dissolution claims available *against* the dissolved corporation's former shareholders than for claims available *to* the dissolved corporation's former

37. 238 F.2d at 507.

38. Under *Levy,* former shareholders have post-dissolution claims if their claims are brought in the shareholders' individual capacities rather than in their corporate capacities on behalf of the corporation. The *Levy* court distinguished certain cases argued by defendant on the following ground:

> [T]his action was not brought by plaintiffs in their capacity as former stockholders of Imperial [the dissolved corporation], as defendant . . . states. The suit was brought in their individual capacity, and their status as former stockholders is immaterial other than to show the manner by which they acquired a right sufficient to authorize the maintenance of a suit.
>
> Defendant in his reply brief. . . concedes that plaintiffs could maintain the instant action if they had acquired a vested right by reason of an assignment made by Imperial during the two-year period . . . .

238 F.2d at 508. According to the court, defendant conceded that an assignment of the cause of action during the two-year period after dissolution would give rise to a post-dissolution claim. The *Levy* court saw no reason to distingnish this assignment from a distribution to the shareholders that occurred only "upon" dissolution. *Id.* at 506. This analysis has the peculiar effect of classifying claims brought by former shareholders in their individual capacities as post-dissolution claims while classifying claims brought by shareholders in their corporate capacities as predissolution claims. For further discussion of the distinction between actions against shareholders and directors individually and actions against them in their capacities as shareholders and directors, see text accompanying notes 89-103 *infra.*

39. 238 F.2d at 507. At least one student author found nothing objectionable about giving the shareholders "a right which they could not from the beginning enforce." *Id.* In fact, the author criticized the *Levy* court for failing to recoguize that, if the ability of the dissolved corporation to euforce the judgment had expired under the survival statute, then the dissolved corporation had only a judgment right with no remedy to distribute to its shareholders. The recipient shareholders should have been entitled only to what the corporation had to distribute—an unenforceable judgment right. 23 Mo. L. Rev. 82, 84 (1958).

shareholders. Claims available *to* the former shareholders, as in *Levy,* could have been enforced during the survival period by the dissolved corporation, and if the corporation refused to file suit, the stockholders could have initiated derivative actions to enforce the outstanding claims.[40] These claims actually are predissolution claims available to the corporation; the need to characterize them as post-dissolution claims in the hands of former shareholders and to hold them not barred by the survival statute is less clear than the need to protect claimants' rights against the corporation and its shareholders when the claimants' causes of action first arise after the two-year survival period.

Levy purported to interpret the Kentucky survival statute, which the court conceded should have the same interpretation as the Illinois survival statute.[41] Illinois law on the subject was reviewed at length by a federal court in *Gordon v. Loew's Inc.,*[42] which was decided two weeks after *Levy.* In *Gordon,* the former shareholders of a dissolved motion picture theater corporation brought treble damage actions under the Clayton Act. Defendants moved for summary judgment on the ground that the shareholders brought the actions after the survival period expired. The shareholders argued that the survival statute failed to bar their claims because the claims had passed to the shareholders individually by operation of law upon dissolution or, in the alternative, by assignment before dissolution. The *Gordon* court, unlike the court in *Levy,* found the claims of the shareholders to be predissolution rather than post-dissolution claims.

Answering the question whether the transfer of the claims by operation of law created post-dissolution claims, the court stated that "each of the theater corporations . . . had, before its dissolution, a remedy against the defendants under Section 4 of the Clayton Act, which remedy persisted for two years after dissolution of the corporation, but is no longer available either to the corporation or to its shareholders, the present plaintiffs."[43] As to whether the assignment created post-dissolution claims, the court stated that "[w]here a cause of action is assigned by a corporation to its sole stockholders on the effective date of dissolution, . . . such cause of action is surely for a 'remedy available to . . . such corporation . . . prior to such dissolution' within the meaning of Sec. 94 [the Illinois

40. *Id.*
41. 238 F.2d at 506.
42. 147 F. Supp. 398 (D.N.J. 1956), *aff'd,* 247 F.2d 451 (3d Cir. 1957).
43. *Id.* at 407.

survival statute]."[44] No case has followed the stated holding in *Levy* that former shareholders have post-dissolution claims as to any property right distributed to them upon dissolution,[45] but *Gordon* has been followed by cases interpreting the laws of Illinois[46] and Wisconsin,[47] the two states with the most fully developed case law under the Model Act formulation of the survival statute. Although the holding in *Gordon* directly contradicts the stated holding in *Levy,* it fails to undercut the *Levy* assumption that post-dissolution claims are excepted from the bar imposed by expiration of the section 105 two-year survival period. The result in *Gordon,* as in *Levy,* is determined by the characterization of the claims in question as post-dissolution or predissolution claims. The cases are inconsistent only because they characterize differently the claims at issue. Thus, nothing in *Gordon* requires that post-dissolution claims be barred by the survival statute either before or after the survival period expires.[48]

The *Levy* assumption—that post-dissolution claims are maintainable before and after the survival period expires—has merit primarily because it encourages dissolving corporations to take steps to provide for contingent claims.[49] When a corporation sells substantially all its assets, the purchaser typically will assume the known liabilities of the selling corporation. Any known liabilities that remain unassumed will be satisfied during liquidation. Contingent liabilities that first arise following dissolution, however, remain both unassumed and unsatisfied. The purchaser corporation may be held liable for post-dissolution products liability claims, but purchaser liability is restricted to narrow factual situations.[50] If the survival statute is interpreted to bar all post-dissolution claims, then no incentive remains to encourage dissolving corporations to take steps to protect claimants whose claims arise upon or after dissolution.[51] The dissolving corporation has no incentive to negoti-

44. *Id.* at 407-08.

45. A similar result, however, was reached in a case that preceded *Levy.* Brooks v. Saloy, 334 Ill. App. 93, 79 N.E.2d 97 (1948). *Brooks* is distinguished by *Gordon.*

46. Koepke v. First Nat'l Bank, 5 Ill. App. 3d 799, 800, 284 N.E.2d 671, 672 (1972).

47. U.S. Plywood-Championship Papers, Inc. v. Pan-American Gyro-Tex Co., 345 F. Supp. 1, 3 (N.D. Ill. 1972).

48. 147 F. Supp. at 404 ("abatement would obviously operate upon any right of action which might have accrued to the corporation *before* . . . its dissolution").

49. *See, e.g.,* Henn & Alexander, *supra* note 10, at 909 n.222.

50. *See* 30 VAND. L. REV. 238 (1977) (for a collection of authorities and cases).

51. The law of secured transactions in real property provides the necessary incentive to guarantee that the purchaser corporation assumes mortgages on real estate purchased from the dissolving corporation. Mortgaged real estate can be foreclosed upon whether the default in payment giving rise to the foreclosure right of action occurred before or after dissolution

ate with the purchaser of its assets an assumption of liabilities for post-dissolution claims.

(2) No Post-Dissolution Claims Are Allowed: A Statutory Interpretation

An early case that in dictum rejected the *Levy* assumption that post-dissolution claims are not affected by the survival statute was *Chadwick v. Air Reduction Company.*[52] Although holding, primarily because of language in the Ohio survival statute that differed from that of the Model Act survival statute,[53] that a claimant could maintain a post-dissolution claim against a dissolved corporation, the court stated that "it is, therefore, quite clear that under the Model Business Corporation Act, and those state statutes patterned after it, a corporation may be sued for predissolution torts only."[54]

This dictum was relied upon by another federal court in *Bishop v. Schield Bantam Co.,*[55] a case construing the Iowa survival statute.[56] Defendant corporation had dissolved in 1964. The claimant had been injured in 1965 by an allegedly defective truck crane manufactured by defendant prior to its dissolution; the action for breach of warranty and negligence was brought in 1967 against the dissolved corporation, its directors, and its officers. After quoting the dictum from *Chadwick,* the court held that the claimant's action was barred under the survival statute not because it was based upon a post-dissolution claim but because it was brought after the expiration of the two-year survival period. This suggests that the court might have allowed the claimant's post-dissolution claims if suit had been brought within the two-year survival period. Nevertheless, the *Chadwick* dictum was quoted with approval, and the *Bishop* court may have intended that the postulated bar to post-dissolution claims serve as an alternative ground for its holding.

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and whether suit was first brought before or after expiration of the statutory survival period. *See, e.g.,* Markus v. Chicago Title & Trust Co., 373 Ill. 557, 27 N.E.2d 463 (1940); Security Nat'l Bank v. Cohen, 31 Wis. 2d 656, 143 N.W.2d 454 (1966). *See also* Waughop v. Bartlett, 165 Ill. 124, 46 N.E. 197 (1896) (failure of mortgagee to assert his claim in probate against deceased mortgagor's estate will not bar the right to foreclosure on the mortgage).

52. 239 F. Supp. 247 (N.D. Ohio 1965).

53. OHIO REV. CODE ANN. § 1701.88 (Page 1964). The *Chadwick* court found that the language "or which would have accrued against it," which was contained in the Ohio survival statute but not in the Model Act provision, "would have no meaning, unless it is construed to [provide for the continued existence of the dissolved corporation in order to permit the bringing of causes of action based upon] post-dissolution claims." 239 F. Supp. at 251.

54. *Id.*

55. 293 F. Supp. 94 (N.D. Iowa 1968).

56. IOWA CODE ANN. § 496A.102 (West 1964). The pertinent language of the Iowa statute is identical to that of the Model Act.

(3) Post-Dissolution Claims Allowed During the Two-Year Survival Period But Not Thereafter: The Statutory Language Ignored

Another reading of *Bishop* is apparent in the following quote from *Litts v. Refrigerated Transport Co.*: "[I]n Bishop v. Schield Bantam Company, . . . a claim for injuries filed after the expiration of the extension period was barred *even though* the injuries were sustained after dissolution."[57] The federal court in *Litts*, applying the Georgia survival statute,[58] apparently cited *Bishop* in order to argue that the survival statute did apply to post-dissolution claims.[59] *Litts* clearly interprets the *Bishop* holding to be that the cause of action was precluded not because "the injuries were sustained after dissolution" but because the two-year survival period had expired. Thus, *Bishop* can be viewed as applying the survival period uniformly to predissolution claims and to post-dissolution claims.[60] This reading of *Bishop* is inconsistent with a plain meaning interpretation of the "prior to . . . dissolution" language of section 105. Treating post-dissolution claims in the same way as predissolution claims in effect renders the language meaningless.

(4) Post-Dissolution Claims Allowed Against Former Shareholders and Directors, But Not Against Dissolved Corporations: The Statute's Bar Held Inapplicable to Certain Types of Cases

Since the dictum in *Chadwick*, the clearest statement concerning the effect of the survival statute on post-dissolution claims is *Stone v. Gibson Refrigerator Sales Corp.*,[61] which held that causes

57. 375 F. Supp. 675, 678 (M.D. Pa. 1973) (emphasis added).

58. GA. CODE ANN. § 22-1325 (Harrison 1977).

59. The *Litts* court failed to state explicitly the argument that the quoted sentence was intended to counter; the court, however, cited *Bishop* to support its conclusion that "the policy behind the [survival] statute is favored over the ends of particularized justice." 375 F. Supp. at 678. The policy referred to is apparently the policy of providing certainty and definiteness to dissolved corporations by setting a definite point after which claims may not be brought. It is apparently the goal of protecting claimants who assert post-dissolution claims after expiration of the survival period that the *Litts* court referred to as the "ends of particularized justice."

60. *Cf.* Continental Ins. Co. v. City of Knoxville, 488 S.W.2d 50 (Tenn. 1972) (an action for indemnity was permitted following dissolution even though the primary liability giving rise to the claim for indemnity apparently arose after dissolution). For commentary stating that *Bishop* is susceptible to this interpretation, see Henn & Alexander, *supra* note 10, at 902.

61. 366 F. Supp. 733 (E.D. Pa. 1973). *See also* Bazan v. Kux Mach. Co., 52 Wis. 2d 325, 190 N.W.2d 521 (1971). In *Bazan*, the Supreme Court of Wisconsin quoted with approval the *Chadwick* dictum that "under the Model Business Corporation Act, and those state statutes patterned after it, a corporation may be sued for predissolution torts only." *Id.* at 335, 190 N.W.2d at 525 (quoting Bishop v. Schield Bantam Co., 293 F. Supp. 94, 95 (N.D. Iowa 1968) and Chadwick v. Air Reduction Co., 239 F. Supp. 247, 251 (N.D. Ohio 1965)).

of action based upon post-dissolution claims cannot be maintained against dissolved corporations. The reasoning of the court, however, may limit the application of the holding. Whereas *Bishop* addressed a post-dissolution claim against the dissolved corporation, its officers, and its directors,[62] *Stone* addressed a post-dissolution claim against the corporation alone. This factor was central to the reasoning of the *Stone* court and therefore may be essential to the *Stone* holding.

In *Stone,* the claimants, who were injured by a fire allegedly caused by a defective air conditioner, brought a products liability suit against defendant manufacturer of the air conditioner. Defendant filed a third party complaint against the dissolved corporate manufacturer of a component part that allegedly caused the claimant's injuries. The manufacturer of the component part had dissolved four months before the claimant's injuries and three and one-half years before the filing of the third party complaint against it. The federal district court, applying Illinois law, determined that all actions and claims against corporations would abate upon dissolution unless continued by the Illinois survival statute. The court concluded that the survival statute[63] continued corporations in existence only for the purpose of suits based upon predissolution claims. Because no statute continued the existence of corporations to permit suits based upon post-dissolution claims, the court held that the post-dissolution claim against the third party defendant manufacturing corporation had abated, as at common law, upon that corporation's dissolution.

The reasoning of the *Stone* court limits its precedential value. Although the survival statute makes no distinction between claims against dissolved corporations and claims against their directors and shareholders, this distinction does follow from the rationale of the *Stone* holding. Absent a survival statute, claims against dissolved corporations clearly abate at common law, but claims against directors and shareholders based upon the trust fund theory do not abate. The *Stone* court held that post-dissolution claims cannot be maintained against a dissolved corporation, because, not being con-

Chadwick held that the Ohio survival statute did not preclude tort actions based upon post-dissolution claims because the Ohio statute differed from the Model Act in tbat it contained determinative language authorizing the bringing of actions based upon post-dissolution claims. The *Bazan* court acknowledged the distinction drawn in *Chadwick* and stated that "neither the Wisconsin nor Illinois legislature has seen fit to so modify the language of the Model Act." 52 Wis. 2d at 335, 190 N.W.2d at 525.

62. 293 F. Supp. at 96.

63. ILL. ANN. STAT. ch. 32, § 157.94 (Smith-Hurd 1954 & Supp. 1978).

tinued by the survival statute, all post-dissolution claims against the dissolved corporation abate. This is not true for post-dissolution claims against directors and shareholders.[64] Thus, the *Stone* interpretation of "prior to . . . dissolution" does not preclude shareholder and director liability for post-dissolution contingent claims against dissolved corporations.

Although *Stone* merely left room for shareholder and director liability, in *United States v. Palakow*[65] the Seventh Circuit expressly held that this liability exists. In *Palakow,* the Small Business Administration (SBA) brought a cause of action for breach of fiduciary duties against defendants Palakow and Levin, both former officers and directors of a dissolved corporation. The SBA had accepted a pledge of defendant Levin's shares in the corporation as security for repayment of a loan. Prior to dissolution of the corporation, the SBA had foreclosed on and purchased the shares. On May 4, 1964, the corporation dissolved, but did not make liquidating distributions to the SBA, which had become a shareholder by virtue of its purchase at the foreclosure sale. The cause of action for breach of fiduciary duties owed by Levin and Palakow, as officers and directors, to the SBA as a shareholder, was commenced on August 22, 1966, following expiration of Wisconsin's two-year survival period.[66] The issue addressed by the court was not, as in *Stone,* whether the claimant could maintain a cause of action arising after dissolution, but whether the claimant could maintain an action brought after the two-year survival period. Nevertheless, the *Palakow* court based its holding upon the nonapplication of the survival statute to certain causes of action, and, for that reason, the holding is relevant to the present inquiry whether the survival statute bars post-dissolution claims.

The *Palakow* court was unclear whether it was giving alternative grounds for its holding or attempting to reinforce its holding with strong dictum about a secondary issue. The court first held that the suit was not against Palakow as a director but against him individually; thus the suit fell outside the reach of the survival statute, which by its language applies to suits against directors, not suits against individuals.[67] As though unsatisfied with its first hold-

64. *Cf.* People v. Parker, 30 Ill. 2d 486, 490, 197 N.E.2d 30, 31-32 (1964) ("Defendant offers no authority for the necessary premise that dissolution of a corporation abates liability incurred by its directors, and we do not know of any principle that requires that result."). For a detailed treatment of *Parker,* see text accompanying notes 119-29 *infra.*

65. 438 F.2d 1177 (7tb Cir. 1971), *rev'g,* 298 F. Supp. 1378 (E.D. Wis. 1969).

66. WIS. STAT. ANN. § 180.787 (West 1957).

67. For a discussion of this first holding of *Palakow,* see note 164 and text accompanying notes 90-93 *infra.* The court also held that this was not a suit by, or on behalf of, the dissolved

ing, however, the court went on to say that, even if the cause of action against Palakow were against a "director *qua* director,"[68] the cause of action was based upon a claim that would not have abated at common law. Adding to this premise the notion that the survival statute affects only claims that abated at common law, such as claims brought directly against corporations, the *Palakow* court concluded that the survival statute and its survival period did not apply to trust fund causes of action for breach of fiduciary duties owed by directors to shareholders. Because it held that the survival statute had no effect upon claims that did not abate at common law, the *Palakow* court did not need to interpret the "prior to . . . dissolution" language of the survival statute to reach its conclusion. Under the court's reasoning, the phrase "prior to . . . dissolution" applies only to claims that could have been brought directly against the dissolved corporation because only those claims abated at common law.

The *Palakow* holding directly controls cases addressing claims against directors for the contingent liabilities of their dissolved corporations. The alleged breach of duty in *Palakow* was the duty to distribute properly the assets of the corporation. Although the claimant in *Palakow* was a shareholder, the fiduciary duty that was breached is owed to shareholders and creditors alike.[69] Thus, under *Palakow,* the trust fund theory creates director liability in spite of the provisions and limitations of the survival statute. This conclusion is the same for both the alternative *Palakow* holdings.

At first glance, *Palakow* appears inconsistent with *Bishop.*[70] In *Bishop* the court dismissed a third party complaint against a dissolved corporation, its directors, and its officers on the ground that the cause of action was barred by the survival statute. *Bishop* thus applied the survival statute to a cause of action that was both based upon a post-dissolution claim and filed after expiration of the survival period. The *Bishop* court, however, did not discuss the nature of the cause of action against the directors and officers. The directors and officers possibly were joined merely as trustees of the assets of the dissolved corporation. If so, the cause of action would have been against the corporation alone, with the directors and officers

corporation, but rather a suit for the SBA itself. 438 F.2d at 1179. *Compare* note 38 *supra with* text accompanying notes 43-44 *supra.*

68. 438 F.2d at 1179.

69. *See* note 18 *supra* and accompanying text. The fiduciary duty also is owed to contingent claimants. *See* notes 18-21 *supra* and accompanying text.

70. 293 F. Supp. 94 (N.D. Iowa 1968).

joined only as representatives.[71] That the court did not mention any breach of fiduciary duties by the directors, which would support a trust fund theory cause of action, argues for this possibility. The absence of a trust fund theory cause of action clearly distinguishes *Bishop* from *Palakow*, because *Palakow* was based upon the survival of that cause of action at common law. The true nature of the *Bishop* claim against the directors is uncertain, however, and *Bishop* indeed may be inconsistent with *Palakow*.

The *Palakow* holding reinforces the conclusion that the *Stone* interpretation of "prior to . . . dissolution" precludes only causes of action brought directly against the dissolved corporation. Post-dissolution claims against shareholders and directors are, under the *Palakow* reasoning, outside the scope of the survival statute. When thus read together and harmonized, *Stone* and *Palakow* support the proposition that, although only predissolution claims support causes of action against a dissolved corporation, post-dissolution claims support trust fund theory causes of action against former shareholders and directors of the dissolved corporation. This proposition, however, is open to challenge.[72] Several cases have held that the survival statute bars trust fund theory actions filed after expiration of the statutory survival period. These cases clearly apply the

71. *See* W. FLETCHER, *supra* note 1, §§ 8189, 8191. The distinction between suits against directors and officers individually and suits against them in their capacities as trustees of the dissolved corporation's assets is clarified in Waggoner v. Edwards, 68 S.W.2d 655, 663-64 (Tex. Ct. App. 1934) (opinion on motion for rehearing), in whicb certain pleas filed by three directors individually were held insufficient because the pleas sbould have been entered on behalf of the dissolved corporation or alternatively by the directors as trustees.

72. One problem with the conclusion drawn from the *Stone-Palakow* reasoning arises from the nature of the trust fund theory, especially as tbat theory relates to shareholder liability. The trust fund theory was developed in equity. A prerequisite to relief in equity is the exhaustion of all remedies at law. *See* Wallach, *supra* note 23, at 331-32. This requires the showing of a nulla bona return from an execution issued against the sbareholder's dissolved corporation. *See* 4 J. POMEROY, EQUITY JURISPRUDENCE § 1415 (5th ed. 1941). Of course, execution will issue against dissolved corporations only if valid claims exist upon which judgments can be obtained. Under *Stone*, and consistent with the reasoning in *Palakow*, post-dissolution claims against corporations abate at common law upon dissolution, and therefore will not support causes of action brought directly against dissolved corporations. Because no judgment can be obtained against dissolved corporations for post-dissolution claims, no nulla bona return can be presented in support of the need for equitable relief. Thus, arguably no trust fund theory action can be maintained against former shareholders for post-dissolution claims. This problem, however, is illusory. The nulla bona return is required only because it shows that the remedies at law bave been exhausted and bave failed. Under *Stone*, the remedy at law is eliminated by the survival statute's bar to causes of action based upon post-dissolution claims. Since no remedy is available at law under the *Stone-Palakow* reasoning, no evidence can be presented relevant to the exhaustion of that nonexistent remedy. Consequently, the absence of a remedy at law under the *Stone-Palakow* analysis fulfills the prerequisite to suits in equity under the trust fund tbeory.

survival statute to claims that did not abate at common law. These cases and the validity of *Palakow* are discussed in the following subsection of this Article.

B. *Does Section 105 Prohibit Trust Fund Actions Brought After the Survival Period Expires?*

(1) General Rule That Trust Fund Actions Are Subject to the Survival Statute's Bar

Numerous cases have addressed the issue whether a particular cause of action is precluded because it was not commenced within two years after the date of dissolution. *Palakow* was this type of case. Clearly, actions brought directly *against dissolved corporations* are precluded if commenced after the statutory survival period expires because those causes of action continue only because of the survival statute, which postpones abatement only during the survival period. This subsection of the Article discusses primarily whether causes of action *against shareholders and directors* for the contingent liabilities of their dissolved corporations are barred after the survival period expires. Using the reasoning of *Palakow,* it was concluded in the preceding subsection of this Article that post-dissolution claims would support causes of action against shareholders and directors of dissolved corporations. A more complete consideration of the survival statute's effect upon trust fund theory causes of action is possible with cases addressing the survival period issue because more cases have addressed that issue than the issue whether the survival statute bars post-dissolution claims brought within the survival period.

In *Palakow,* acknowledging that its task was to construe the Wisconsin survival statute as would a Wisconsin state court, the Seventh Circuit concluded that "[t]hose suits which would not have abated upon dissolution are not covered by Section 94 [the Illinois survival statute]. We think that a Wisconsin court would construe Section 180.787 [the Wisconsin survival statute] in a similar manner."[73] The District Court for the Eastern District of Wisconsin had reached the opposite conclusion in *Palakow.*[74] The court reasoned as follows:

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73. 438 F.2d at 1179.

74. United States v. Palakow, 298 F. Supp. 1378 (E.D. Wis. 1969), *rev'd,* 438 F.2d 1177 (7th Cir. 1971). The lower court decision was cited with approval on a related issue by the Supreme Court of Wisconsin. Bazan v. Kux Mach. Co., 52 Wis. 2d 325, 336, 190 N.W.2d 521, 527 (1971).

> The legislative history behind § 180.787 [the Wisconsin survival statute] suggests that the legislature was primarily concerned with relieving *shareholders* of their equitable liability after two years from the date of dissolution. Nevertheless, § 180.787, in reasonably clear language, includes officers and directors, and this court cannot ignore those terms in construing the statute. It is my conclusion that the legislature of Wisconsin has barred claims against directors when such claims are brought more than two years after . . . dissolution.[75]

Commentators generally agree with the lower court's assessment of the Wisconsin legislature's intent.[76] The drafters of the 1951 Wisconsin Business Corporation Act had the "avowed purpose of limiting shareholder liability to two years after dissolution,"[77] legislatively overruling a line of Wisconsin cases holding that an earlier similar statute[78] did not bar equitable actions against shareholders following expiration of the three-year period established by the statute for settling the affairs of dissolved corporations.[79]

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75. 298 F. Supp. at 1380 (citations omitted) (emphasis in original).

76. Schoone, *supra* note 36, at 422-23; Wallach, *supra* note 23, at 330 ("[E]arly Wisconsin decisions . . . concluded that Wisconsin's postponed abatement statute did not displace the 'trust fund' theory. . . . It was the intention of the draftsmen of the 1951 Wisconsin Business Corporation Law to statutorily overrule these decisions by making the statutory remedy exclusive."); Young, *Some Comments on the New Wisconsin Business Corporation Law*, 1952 WIS. L. REV. 5, 15; *see* Tyrrell, *Introduction to the Business Corporation Law*, 22 WIS. STAT. ANN. xxv, xxxv (West 1957). *See generally* 33 MARQ. L. REV. 114 (1949).

77. Schoone, *supra* note 36, at 427. The intent of the drafters of Model Act section 105 is not as clear. *See* MODEL BUS. CORP. ACT ANN. 2d § 105 comment (West 1971); Wallach, *supra* note 23, at 330. *But cf.* Wallach, *supra* note 23, at 331 ("[T]he postponed abatement statutes logically would serve no real function if the 'trust fund' theory survived the adoption of such statutes."). Under the Model Act formulation, liquidation of the corporation precedes final dissolution. MODEL ACT, *supra* note 6, § 92. Thus, from the beginning of the survival period the dissolved corporation has no assets. If expiration of the survival period does not bar trust fund theory causes of action, then the survival statute has no readily apparent purpose. For more detailed discussion of this problem, see text accompanying notes 143-51 *infra*. At least one state legislature was perplexed by the survival statute's lack of purpose when liquidation of the corporation preceded expiration of the survival period. *See* Morrison, *Summary of Amendments to Chapter 351: The General and Business Corporation Act of Missouri*, 22 J. MO. B. 19 (1966), *reprinted in* MO. ANN. STAT. § 351.565 comment (Vernon 1966) (Morrison, 1965 Amendment).

78. WIS. STAT. § 181.02 (1949) (no longer in force). The older nonabatement statute provided that upon dissolution corporations "shall nevertheless continue . . . for 3 years thereafter for the purpose of prosecuting and defending actions, and of enabling them to settle and close up their business, dispose of and convey their property and divide their assets and for no other purpose . . . ." The older nonabatement statute was replaced in 1951 by two statutory provisions. The first is a "two-step dissolution" provision patterned after the MODEL ACT, *supra* note 6, §§ 85-87, 92-93, which requires the winding-up of the affairs of the corporation before final dissolution. WIS. STAT. ANN. §§ 180.753, 180.755, 180.757, 180.765, 180.767 (West 1957). The second is the Wisconsin survival statute. WIS. STAT. ANN. § 180.787 (West 1957 & Supp. 1978-1979).

79. One of the cases statutorily overruled was Lindmann v. Rusk, 125 Wis. 210, 104 N.W. 119 (1905), which the Seventh Circuit in *Palakow* cited to support its conclusion that "since . . . a claim alleging that a director has breached his fiduciary duty . . . may be

Despite the wealth of commentary about the Wisconsin legislature's intent, few cases have considered whether the Wisconsin survival statute relieves shareholders and directors of their equitable liabilities after the survival period expires.[80] The only Wisconsin case available to either the federal district court or the Seventh Circuit in *Palakow* was *Security National Bank v. Cohen*,[81] which expressly declined to rule on the question. In *Cohen*, the Wisconsin Supreme Court based its decision on a well-recognized rule that the death of a debtor does not extinguish a mortgage or bar its foreclosure.[82] This rule of secured property law justifies an exception to the common law rule of abatement and to any corresponding bar that the survival statute imposes after the survival period expires. In reaching its decision, the *Cohen* court relied upon an Illinois case recognizing that the nonapplication of the survival statute to mortgage foreclosure suits was an exception to the usual rule: "[W]hen this hotel corporation was dissolved it could not sue or be sued after two years, but the obligations of its mortgage survived, and . . . such remedy will be granted against the mortgaged property."[83] The *Cohen* court also recognized the validity of the mortgage foreclosure suit, but expressly declined to suggest whether trust fund theory suits against shareholders and directors similarly are excepted from the survival statute:

> [E]ven though sec. 180.787, Stats., [the survival statute], could be interpreted to abate a cause of action against a shareholder or officer of a dissolved corporation once the two-year period has passed, that question is not before the court . . . . Plaintiff has not demanded a deficiency judgment against defendant Cohen, but only demands judgment of foreclosure . . . .[84]

Thus, having no controlling Wisconsin case law, the Seventh Circuit was free to decide *Palakow* as it did even though the court's prediction as to what a Wisconsin court might decide cannot be supported.[85]

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brought after the existence of the corporation has terminated, Section 180.787 [the Wisconsin survival statute] has no application to this suit." 438 F.2d at 1179.

80. *See* Schoone, *supra* note 36, at 423; Wallach, *supra* note 23, at 330-31.

81. 31 Wis. 2d 656, 143 N.W.2d 454 (1966).

82. *Id.* at 661-62, 143 N.W.2d at 457.

83. *Id.* at 663, 143 N.W.2d at 458 (quoting Markus v. Chicago Title & Trust Co., 373 Ill. 557, 562, 27 N.E.2d 463, 466 (1940)).

84. 31 Wis. 2d at 660, 143 N.W.2d at 456.

85. No Wisconsin decision since *Palakow* is directly on point. For that reason, the Seventh Circuit's prediction has yet to be proved or disproved. That the survival statute continues to bar actions following expiration of the survival period is clear from statements made by the Wisconsin Supreme Court concerning the Illinois survival statute. The statements were meant to instruct the lower courts on remand. Bazan v. Kux Mach. Co., 52 Wis. 2d 325, 335-36, 190 N.W.2d 521, 526 (1971).

If there is a general rule that claims against shareholders and directors are barred after the survival period expires, then the *Palakow* exception for claims that did not abate at common law consumes the general rule, because only claims against corporations abated at common law. The Seventh Circuit in *Palakow* based its prediction of what Wisconsin courts would hold upon its interpretation of Illinois case law under the survival statute.[86] The accuracy of that interpretation, however, is open to question. The following examination of Illinois case law has two purposes: first, it will determine the accuracy of the Seventh Circuit's interpretation of the Illinois case law under the survival statute; second, it will trace judicial attitudes toward the applicability of the survival statute to trust fund theory causes of action in a state whose judicial decisions have been influential in the construction of the Model Act survival statute.[87]

To the extent that Illinois cases assume a general rule barring claims after two years, the cases undercut the *Palakow* holding. Two early decisions support the contention that equitable actions against shareholders are barred after the survival period expires.[88] Other decisions hold shareholders and directors liable after two years by resorting to reasoning that seemingly accepts a general rule barring claims, but at the same time finds exceptions to the general rule. The following subsections discuss these exceptions, if they correctly can be so characterized.

(2) Exception for Actions Against Individuals

In *Krauter v. Adler*,[89] the appellate court apparently assumed a general rule that, following expiration of the survival period, the survival statute bars causes of action based upon theories that the defendants are liable as officers, directors, or shareholders of their dissolved corporations. Nevertheless, the court decided that the ac-

86. 438 F.2d at 1179.

87. The survival statute has been construed frequently in Illinois; moreover, the courts of other states frequently adhere to Illinois case law interpreting the statute. *See, e.g.*, Security Nat'l Bank v. Cohen, 31 Wis. 2d 656, 143 N.W.2d 454 (1966). The annotations to the Missouri survival statute refer to both Wisconsin and Illinois cases. MO. ANN. STAT. § 351.565 (Vernon 1966) (Notes of Decisions). Similarly, commentators rely heavily on Illinois cases to answer questions left unresolved by the Model Act. *See, e.g.*, Schoone, *supra* note 36, at 423.

88. Reconstruction Finance Corp. v. Teter, 117 F.2d 716, 727-28 (7th Cir.), *cert. denied*, 314 U.S. 620 (1941) (applying Illinois law); Markus v. Chicago Title & Trust Co., 373 Ill. 557, 562, 27 N.E.2d 463, 465-66 (1940) (The survival statute, "limiting suits against the corporations, its officers or stockholders, to a period of two years after dissolution . . . barred any remedy against the corporation, its officers or stockholders . . . ."); *see* Schoone, *supra* note 36, at 424-25.

89. 328 Ill. App. 127, 65 N.E.2d 215 (1946) (abstract of opinion).

tion could be maintained even though the complaint had been filed following expiration of the survival period. To explain its decision, the *Krauter* court offered two exceptions to the general rule. First, the court noted that the untimely complaint was permitted under a statute providing for the amendment of complaints, provided the amendment grew out of the same transaction or occurrence. Since plaintiff in *Krauter* had filed his original complaint within the two-year survival period, the amended complaint was timely. Second, the court found an exception to the general rule in that plaintiff's complaint alleged defendants were liable not as officers, directors, and shareholders, but as individuals. The complaint, alleging a cause of action sounding in tort, asserted that defendants had conspired to induce their corporation to breach its contractual obligation to pay certain brokerage commissions to plaintiff. Defendants induced this breach by dissolving the corporation.

The *Krauter* court's reasoning is similar to the rationale underlying the first holding of *Palakow* that suits against directors as individuals are outside the scope of the survival statute. In *Palakow*, the Seventh Circuit phrased the primary issue before it as follows:

> The district court dismissed the government's suit on the ground that the action was barred by the two year limitation of Section 180.787 [the Wisconsin survival statute]. The basis of the court's decision was that SBA's suit did not charge "personal tortious conduct" directly against Palakow and Levin individually, but charged conduct "related and integral" to Belvedere's [the dissolved corporation's] affairs. This finding presents the main issue before us.[90]

Just as the action in *Palakow* could be maintained after the survival period expired because it was against the former officers and directors in their individual capacities for breach of duty and wrongful conversion of assets, the action in *Krauter* could be maintained after the survival period expired because it was against the former officers, directors, and shareholders in their individual capacities for inducing a breach of contract.

The test for the *Krauter-Palakow* exception to the general rule is whether the plaintiff's complaint states a cause of action against the defendant individually or as an officer, director, or shareholder.[91] The line between these causes of action is easy to draw

90. 438 F.2d at 1178.

91. The holdings of *Krauter* and *Palakow* place suits for inducing breach of contract and suits for breach of fiduciary duties in that gray area of suits that, although brought against former shareholders, officers, or directors, were probably outside the contemplation of those who drafted and enacted survival statutes. Whether the drafters and enactors of survival statutes contemplated the preclusion, following expiration of the survival period, of actions brought pursuant to the securities laws or the antitrust laws is open to question. Regarding certain actions brought pursuant to section 10b of the Securities Exchange Act of

when the defendant clearly has acted outside the scope of his duties—as, for example, when the defendant, even though at a corporate directors' or shareholders' meeting, physically assaults a fellow director or shareholder. It is more difficult to draw the line after examining the facts in *Krauter* and *Palakow*. In *Krauter* an officer, director, or shareholder apparently committed an individual tort by voting to dissolve the corporation with knowledge of outstanding contracts that would be breached by dissolution. That voting as a shareholder or director is outside the scope of one's corporate capacity is difficult to accept. Furthermore, in *Palakow* a director was liable individually for failing to properly distribute the dissolved corporation's assets. Surely distribution of the assets of a dissolved corporation is not outside the scope of a director's duties; in many states that duty is statutorily imposed.[92] Under *Krauter* and *Palakow*, therefore, the individual/corporate capacity test for excepting certain claims from the survival statute bar is difficult to apply. Moreover, it appears that any plaintiff by the exercise of sufficient ingenuity in phrasing his complaint could avoid the bar imposed by the survival statute.

In *Krauter* and *Palakow* elements of self-dealing were present that may have influenced the courts in concluding that the shareholders and directors were acting outside their corporate capacities. If treated as determinative, the element of self-dealing could render the *Krauter-Palakow* individual/corporate capacity test workable. The self-dealing in *Palakow* was evident:

> The gravamen of the complaint is that both Palakow and Levin were aware of SBA's interest in Belvedere [tbe dissolved corporation] stock and tbat the two of them, acting as officers and directors, failed to distribute to SBA its share of the assets of the corporation, and that Palakow wrongfully converted the SBA's share of the assets to his own use.[93]

The self-dealing in *Krauter* was less evident. Plaintiff's complaint alleged that defendants conspired to deprive plaintiff of his contract right, and to that end they intentionally and willfully refused to pay franchise taxes so that the corporation would be dissolved by law. In deciding whether to sustain the trial court's dismissal of plaintiff's complaint, the *Krauter* court accepted the allegations stated

1934, 15 U.S.C. § 78j (1976), see Weiskopf, *Remedies Under Rule 10b-5*, 1972-73 CORP. PRAC. COMMENTATOR 25, 61-64. Regarding antitrust actions, see Imperial Film Exch. v. General Film Co., 244 F. 985 (S.D.N.Y. 1915); Comment, *Corporate Dissolution and the Anti-Trust Laws*, 21 U. CHI. L. REV. 480 (1954). *But cf.* Galter v. Federal Trade Comm'n, 186 F.2d 810 (7th Cir.), *cert. denied*, 342 U.S. 818 (1951) (Federal Trade Commission cease and desist order having prospective effect held not to extend beyond expiration of the survival period).

92. *See* W. FLETCHER, *supra* note 1, § 8175.

93. 438 F.2d at 1179.

as true. As stated in the complaint, it appears that defendants converted plaintiff's contract right in order to increase the value of defendants' shares in the assets of the corporation. In both *Palakow* and *Krauter*, therefore, the defendants engaged in pecuniary self-dealing; thus it is possible that directors who do not engage in this type of self-dealing may escape liability even though they may breach their fiduciary duties by improperly distributing assets or by failing to provide for contingent liabilities.

Self-dealing is at least one potential component of the test for distinguishing defendants who act in their individual capacities from those who act in their corporate capacities. At least one case, however, sustained causes of action by shareholders as individuals even though no self-dealing had occurred. In *Brooks v. Saloy*,[94] former shareholders and the heirs of certain former shareholders brought an action to remove a cloud on title and for certain other equitable relief. The tax foreclosure sale that created the cloud on title occurred on April 20, 1943, dissolution followed on January 6, 1944, and the cause of action was filed more than two years later, on April 24, 1946. Thus, the cause of action based upon a predissolution claim was brought following expiration of the survival period. The *Brooks* court concluded that plaintiffs could maintain their equitable action despite expiration of the survival period because they brought the action not as shareholders but as individuals. The court reasoned that upon dissolution of the corporation title to the real property of the corporation passed to the shareholders as tenants in common, and therefore plaintiffs brought the suit as individual owners of the land rather than as former shareholders.[95] Conspiracy and self-dealing appear irrelevant to the court's holding, and certainly they were irrelevant to the court's characterization of the claim as one brought by individuals rather than as one brought by plaintiffs in their capacity as shareholders.

Edwards v. Chicago & Northwestern Railway Co.[96] is an Illinois case that supports the *Palakow* holding. In *Edwards*, plaintiffs sued to recover damages for injury to their lands allegedly caused by the coal mining operations of a dissolved corporation. The claimants

94. 334 Ill. App. 93, 79 N.E.2d 97 (1948).

95. *Id.* at 99-101, 79 N.E.2d at 100-01. *See also* Laning v. National Ribbon & Carbon Paper Mfg. Co., 40 F. Supp. 1005, 1006-07 (N.D. Ill. 1941), *modified*, 125 F.2d 565 (7th Cir. 1942) (Court dismissed a cause of action to clarify title to certain patents, stating that the dissolved corporation would be a necessary party if it were in existence and therefore "those who became tbe owners of its property after dissolution are necessary parties." Because the necessary parties were not joined, the requested relief could not be granted.).

96. 79 Ill. App. 2d 48, 223 N.E.2d 163 (1967).

brought the action against the dissolved corporation, its directors, and its sole shareholder, another corporation.[97] In other words, the dissolved corporation was the wholly owned subsidiary of defendant parent corporation. In addition to the claim for damages, and as an alternative theory of recovery, plaintiffs pleaded that defendant parent corporation had defrauded plaintiffs by inducing them to refrain from filing suit against the dissolved corporation until the survival period had expired. Defendants argued that expiration of the two-year survival period barred the causes of action. The trial court dismissed the complaint against all defendants—the dissolved corporation, the directors, and the shareholder parent corporation. The instant court affirmed the dismissal as to the dissolved corporation and the directors, but reversed the trial court's dismissal as to both claims against the shareholder parent corporation.[98]

The fraud claim in *Edwards* was held to support independent causes of action that could be maintained against the shareholder parent corporation despite expiration of the survival period.[99] Although the issue was not raised, the alleged fraud apparently occurred "during the two-year period" following dissolution,[100] which made the action one based upon a post-dissolution claim. The *Edwards* court failed to explain why the causes of action based upon the post-dissolution fraud claim could be maintained following expiration of the survival period. Several explanations are possible. The holding is consistent with the *Levy* holding that only predissolution claims are barred by expiration of the survival period.[101] Because this analysis was not mentioned, however, it is unlikely that the *Edwards* court considered it. The court seems to have assumed that the cause of action for fraud stated a claim against the shareholder parent corporation in its individual capacity. In this respect, the *Edwards* holding is based upon a ground common to *Krauter* and the first alternative holding of *Palakow*. The fraud was undertaken by the shareholder parent corporation not in its capacity as a shareholder but in its individual capacity. The fraud was intended

97. The shareholder owned all the shares except for the qualifying shares held by each of the five directors. The court appears to have treated the directors as directors only and not as both directors and shareholders. *Id.* at 51, 223 N.E.2d at 164.

98. For a discussion of the significance of dismissing the actions against the directors, see note 71 *supra* and accompanying text.

99. 79 Ill. App. 2d at 52, 223 N.E.2d at 165 ("[D]o those parts of the amended complaints which allege fraud on the part of the railway company state a cause of action?"); *see id.* at 55, 223 N.E.2d at 166 ("The essential elements of an action for fraud have been alleged.").

100. *Id.* at 55, 223 N.E.2d at 166.

101. *See* text accompanying notes 36-38 *supra.*

to benefit the perpetrator at the expense of the claimants against the dissolved corporation; therefore self-dealing was present.

The only apparent distinction between *Edwards* on the one hand, and *Krauter* and *Palakow* on the other, is that in *Edwards* defendant committed a tort following dissolution, whereas defendants in *Krauter* and *Palakow* committed torts prior to dissolution.[102] It is arguable that a post-dissolution tort is much more clearly outside one's capacity as a director or shareholder than a predissolution tort. So apparent is the distinction that it can be extracted readily from the following statement, the only one Professor Fletcher makes that directly addresses liabilities for post-dissolution claims:

> Under certain circumstances a corporation may become liable for torts committed after its dissolution, as where a de facto existence continues the corporation so as to carry with it liability then accruing. Ordinarily, however, a corporation has not even a de facto existence after the expiration of its charter, and where this is the case, such a liability does not arise. The remedy would be against the individuals committing the wrong.[103]

The quoted section underscores the individual nature of directors' and shareholders' liabilities for post-dissolution acts, even acts that would have been within their corporate capacities if committed while the corporation was still in existence. Far from buttressing the *Krauter-Palakow* rationale, however, the quoted section fails to suggest whether the survival statute bars claims against defendants either individually or in their corporate capacities.

(3) Piercing the Corporate Veil Exception

The *Edwards* court also upheld the claim for damages against the shareholder parent corporation. Undoubtedly the claim for damages was based upon an injury caused by the dissolved subsidiary corporation. Thus, plaintiffs' causes of action against the parent corporation were clearly against it in its capacity as a shareholder and not because it had committed any wrongful act itself. The causes of action were based upon a claim that but for the dissolution

102. In *Krauter,* the inducement to breach the contract was the conspiracy that culminated in dissolution. In *Palakow,* the breach of duty and conversion were connected with the distribution of the corporation's assets that under the Illinois two-step dissolution process occurs prior to the final act of dissolution, the filing of the articles of dissolution. ILL. ANN. STAT. ch. 32, § 157.80 (Smith-Hurd Supp. 1978); *see* MODEL ACT, *supra* note 6, § 92.

103. W. FLETCHER, *supra* note 1, § 8141. Torts *committed* after dissolution, however, should be distinguished from those *arising* after dissolution. The latter include torts in which the harm occurred after dissolution or the discovery giving rise to a cause of action occurred after dissolution, even though the misfeasance or nonfeasance causing the injury occurred prior to dissolution.

would have been maintainable against the subsidiary corporation alone. The *Edwards* court did not make clear its reason for sustaining the causes of action for damages, but the factors considered by the court indicate that it may have analyzed the damages claim as though the case were one of piercing the corporate veil. When cases lack evidence that the shareholders did not treat the corporation as a separate entity, piercing the corporate veil usually is predicated upon some theory of undercapitalization.[104] Although the *Edwards* court did not mention undercapitalization, it may have concluded and, because there was no other ground for using a piercing the veil analysis, should have concluded that the dissolution and liquidation of the tortfeasor corporation fulfilled this prerequisite. It is nevertheless conceptually unsatisfactory to argue that dissolution and liquidation "undercapitalize" the subsidiary and therefore permit recovery under a piercing the corporate veil theory.

Perhaps, then, *Edwards* should be viewed not as a case of piercing the corporate veil but as a case of transferee liability. The "unity of interest and ownership between"[105] defendant shareholder parent corporation and the tortfeasor subsidiary corporation, which the court apparently found determinative of the damages claim, is relevant to both theories of recovery against defendant. Unity of interest and ownership is one of the characteristics frequently used to justify imposition of transferee liability; the theory is that the transferee corporation that purchased substantially all the assets of the transferor corporation is a mere continuation of the transferor corporation.[106] If this theory of liability is accepted as the rationale for the *Edwards* decision, then the liability of the shareholder parent corporation is easily explained without reference to the survival statute. The liability is imposed on the defendant not in its capacity as a shareholder of the dissolved corporation but in its capacity as a corporate transferee of the working assets and operations of the tortfeasor transferor corporation. Under this rationale, the *Edwards* holding as to the damages claim creates no potential liabilities for shareholders or directors who receive or distribute nonworking assets of the dissolved corporation following the sale of substantially all the working assets to a third party. The potential liability of shareholders who receive, and directors who distribute, working as-

104. *See, e.g.*, Anderson v. Abbott, 321 U.S. 349 (1944); Minton v. Cavaney, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961); Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 155 N.E. 58 (1926).

105. 79 Ill. App. 2d at 52-53, 223 N.E.2d at 165.

106. For a discussion of this theory of liability, which also has been referred to as the de facto merger doctrine, see 30 VAND. L. REV. 238 (1977).

sets for the purpose of continuing the business operations of the corporation in another form—partnership or sole proprietorship, for example—is outside the scope of this Article.

The problem with this interpretation is that the *Edwards* court apparently failed to discuss transferee liability.[107] The court emphasized the parent-subsidiary relationship rather than the status of defendant as a transferee corporation that continued the working operations of the tortfeasor. Furthermore, the parent-subsidiary relationship is merely a special type of shareholder-corporation relationship. Although the holding in *Edwards* may be limited to this special type of relationship, there is no apparent reason why piercing the corporate veil between a subsidiary corporation and its parent should be treated differently from a piercing of the veil between a corporation and its individual shareholders.[108]

Therefore, if piercing the corporate veil is the rationale for permitting the damages claim in *Edwards* after the survival period expired, then this is a significant exception to the postulated general rule that expiration of the survival period precludes the bringing of actions against former shareholders of the dissolved corporation. Furthermore, if it is assumed, as it must have been by the *Edwards* court if a justifiable reading is to be given to the case, that dissolution and liquidation of the tortfeasor corporation satisfied the undercapitalization prerequisite to piercing the corporate veil, then the exception may be broader than the postulated rule. One caveat is that courts have traditionally been more inclined to pierce the corporate veil for tort claims than for contract claims.[109] Thus, courts following *Edwards* should be more likely, following expiration of the survival period, to permit the bringing of tort claims than breach of warranty claims.

One final point is worth noting in this discussion of *Edwards*. Whether the claim for damages arose before or after dissolution is not discussed, and therefore some of the relevant facts may have

107. Defendant, in an effort to have the damages claim dismissed, cited a case that characterized the issue as one of transferee liability rather than as one of piercing the corporate veil. The case had held that a transferee mining operator was not liable "for surface subsidence over areas mined only by bis predecessor in title, where there has been no express assumption of such liability, and the predecessor is a wholly unrelated business entity." Tankersley v. Peabody Coal Co., 31 Ill. 2d 496, 498, 202 N.E.2d 498, 499 (1964). The *Edwards* court distinguished tbis case and a similar one by stating that the predecessor in title in *Edwards* was a subsidiary of defendant rather than a wholly unrelated entity. 79 Ill. App. 2d at 54, 223 N.E.2d at 166.

108. *See* note 104 *supra*.

109. *Compare* Bartle v. Home Owners Coop., 309 N.Y. 103, 127 N.E.2d 832 (1955) *with* Minton v. Cavaney, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961).

been omitted from the opinion. From the facts presented, however, the dissolution of the tortfeasor subsidiary apparently occurred before the surface subsidence that caused the injury.[110] The statute of limitations in causes of action like those in *Edwards* begins to run when the subsidence occurs.[111] Plaintiffs, therefore, were permitted to maintain causes of action based upon a post-dissolution claim following expiration of the survival period. Thus, the exception, if any, for causes of action predicated upon a theory of piercing the corporate veil is a complete exception to application of the survival statute and not just an exception of predissolution claims from application of the bar imposed by expiration of the survival period.[112]

(4) Three Additional Exceptions: Post-Dissolution Claims, Fraudulent Conveyances, and Particular Statutory Causes of Action

Having postulated a general rule that expiration of the survival period bars causes of action against shareholders, three theoretical exceptions, in addition to those previously discussed, deserve attention. These three exceptions also have support in the Illinois case law. Two of the exceptions require no lengthy treatment at this point. The first is the exception created by the *Levy* interpretation of the survival statute's language.[113] Under *Levy,* post-dissolution claims are expressly excluded from the survival statute limitation. The second exception is for causes of action against recipient shareholders predicated upon a theory that the liquidating distribution was a fraudulent conveyance.[114] In *La Crosse Manufacturing Co. v. Springer,*[115] the claimants' original judgment against the dissolved corporation and the fraudulent transfer of corporate assets occurred before dissolution of the corporation. Thus the cause of action was based upon a predissolution claim. The equity action that the court permitted following expiration of the survival period was against the dissolved corporation's shareholders, who had both induced and received the fraudulent transfers. Although the transfers in *Springer*

110. 79 Ill. App. 2d at 54, 223 N.E.2d at 166.

111. RESTATEMENT OF TORTS, Scope and Introductory Note, §§ 817-821 (1939).

112. *See* text accompanying notes 99-101 *supra.*

113. *See* text accompanying notes 36-38 *supra.*

114. *See* Consolidated Coal Co. v. Flynn Coal Co., 274 Ill. App. 405, 412 (1934) ("We are not disposed to hold that in a proper case where the officers of a defunct corporation by fraudulent conduct conceal and convert corporate property, a bill to account is required to be filed within the two years provided for by the Corporation Act after dissolution . . . ."). *See also* note 10 *supra.*

115. 323 Ill. App. 525, 56 N.E.2d 146 (1944) (abstract of opinion).

were not clearly the liquidating distributions themselves,[116] liquidating distributions have been held to be fraudulent conveyances, and creditors with contingent claims have been held to be among those who have standing to pursue transferred assets into the hands of recipient shareholders.[117] Carried to its logical conclusion, therefore, any distribution to shareholders may be a fraudulent conveyance that can be attacked following expiration of the survival period.[118] Thus, the fraudulent conveyances exception to the postulated general rule of the survival statute's bar may consume the general rule itself.

The third of the three exceptions derives from a narrow reading of the holding in *People v. Parker.*[119] In *Parker,* the State of Illinois brought an action against a former director for unpaid personal property taxes assessed against the former director's dissolved corporation. The taxes were assessed in 1953 and 1954; the corporation dissolved in 1955; and the suit against the former director was filed in 1961. Thus the claimant brought an action based upon a predissolution claim following expiration of the survival period. The claimant also was allowed to recover interest on the unpaid personal

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116. *Id.* In *Springer,* the assets alleged to have been fraudulently conveyed were funds withdrawn from corporate bank accounts prior to dissolution. Under the Illinois two-step dissolution procedure, any liquidating distributions would have preceded final dissolution, and therefore these distributions also would have given rise to predissolution claims. For the present version of the Illinois two-step dissolution statute, which is virtually identical to the version in effect when *Springer* was decided, see ILL. ANN. STAT. ch. 32, § 157.80 (Smith-Hurd Supp. 1978).

117. Menconi v. Davison, 80 Ill. App. 2d 1, 225 N.E.2d 139 (1967); *see* note 10 *supra. See generally* Weller v. Schulte, 137 Ill. App. 520 (1907).

118. Section 4 of the Uniform Fraudulent Conveyance Act renders fraudulent as to creditors any transfer for no consideration that will render the transferor insolvent. Liquidation renders corporate transferors insolvent and shareholders who receive assets in distribution give no consideration for those assets; therefore, every liquidating distribution to shareholders is fraudulent as to creditors, which includes creditors with contingent or unliquidated claims. Transfers are not fraudulent under § 4, however, as to future creditors. Whether claimants with post-dissolution claims are fraudulent under § 4 should depend on whether those claims are characterized as contingent claims or only as future claims. Although transfers are not fraudulent as to claimants with future claims under § 4, liquidating distributions to shareholders may be fraudulent even as to claimants with future claims under §§ 6 or 7 of the Uniform Fraudulent Conveyance Act. Dictum in Menconi v. Davison, 80 Ill. App. 2d 1, 225 N.E.2d 139 (1967), suggested that a post-dissolution claimant could recover from recipient shareholders upon proof of actual fraud. This dictum is consistent with the characterization of post-dissolution claims as future rather than contingent claims, because actual fraud is relevant to whether transfers are fraudulent under § 7, which renders transfers fraudulent as to creditors with future claims. Actual fraud is irrelevant under § 4, which renders transfers fraudulent as to creditors with contingent claims but not as to future creditors. Although Illinois is not one of the twenty-eight states having adopted the Uniform Fraudulent Conveyance Act, the common law fraudulent conveyance treatment of the Illinois cases is analogous to the results that would obtain under the Uniform Act.

119. 30 Ill. 2d 486, 197 N.E.2d 30 (1964).

property taxes.[120] Some of that interest accrued after dissolution of the corporation, and the claim for that portion of the interest can be characterized as a post-dissolution claim. As in previous cases that excepted certain causes of action from the bar imposed by expiration of the survival period, predissolution and post-dissolution claims were not distinguished.[121]

Defendant director in *Parker* argued that the cause of action was barred by the survival statute. The claimant, the State of Illinois, argued that the survival statute did not preclude the suit because the liability the State sought to impose upon the former director was created by section 42(f) of the Business Corporation Act.[122] Dissolution under section 42 is a two-step process. First, the corporation must file an intent to dissolve and mail notice of this intent to all of the corporation's known creditors. The notice is intended to facilitate the winding-up of the corporation's affairs, which includes payment of outstanding claims and liquidation. When the corporation has completed the winding-up, it may file its articles of dissolution—the final act in the dissolution process. Section 42(f) imposes personal liability on the directors of a corporation that fails to mail notice to a known creditor. In *Parker,* the dissolved corporation failed to mail notice of its intent to dissolve to the county treasurer for the county that had assessed the personal property tax. The suit brought by the State against the former director was predicated upon the section 42(f) liability of that former director. The narrow holding of the Illinois Supreme Court in *Parker* was that expiration of the survival period does not bar recovery under section 42(f) by a known claimant to whom no notice of intent to dissolve has been given.

This narrow holding represents sound policy. The notice provision has been proposed as a prerequisite to relieving shareholders and directors of their common law liabilities upon expiration of the statutory survival period.[123] The bar created by expiration of the survival period was not intended to provide irresponsible entrepreneurs with a means for escaping liability. The possibility that shareholders and directors might covertly dissolve their corporations and

120. *Id.* at 491, 197 N.E.2d at 32.

121. *Id.* ("If the plaintiff was entitled to recover interest . . . from the corporation, . . . we can perceive no reason why this item . . . is not recoverahle [in this case] . . . ."); *see* text accompanying notes 100-02 & 110-12 *supra. But see* text accompanying notes 62-63, 103, & 113 *supra.*

122. ILL. REV. STAT. ch. 32, § 157.42(f) (1953) (current version at ILL. ANN. STAT. ch. 32, § 157.42-6 (Smith-Hurd Supp. 1978)); *see* MODEL ACT, *supra* note 6, § 48.

123. Schoone, *supra* note 36, at 429.

rely upon the survival statute bar to insulate them from the claims of known creditors is clearly undesirable. Furthermore, giving priority to the policy underlying section 42(f) is not inconsistent with the survival statute's policy of providing shareholders and directors with a certain and definite point at which their liabilities end, because any uncertainty created by giving priority to section 42(f) will be caused by the willful or negligent act of the directors upon whom the section 42(f) liability is imposed.[124]

(5) Precedent Rejecting the General Rule

The *Parker* court did not undertake the policy analysis discussed above. Instead, by offering a different rationale for imposing liability, the court created the much broader holding that the survival statute does not affect suits that did not abate at common law. The broader holding was then used by the Seventh Circuit in *Palakow* to form its second alternative holding that suits against directors in their corporate capacity did not abate at common law and therefore are unaffected by the survival statute.[125] *Parker* was the only Illinois case cited in *Palakow* to support the conclusion that the Illinois survival statute affects only actions that abated at common law. The *Parker* court's rationale and the availability of that rationale to support the second holding of *Palakow* are evident in the following statement of the *Parker* court's test for application of the statute:

> Unless the liability imposed upon corporate directors by section 42(f) abates upon dissolution of the corporation involved, section 94 [the survival statute] has no application. Defendant offers no authority for the necessary premise that dissolution of a corporation abates liability incurred by its directors, and we do not know of any principle that requires that result.[126]

The broader holding created by use of the *Parker* test, quite unlike the narrow holding, rejects, rather than creates an exception to, the postulated general rule of no shareholder or director liability following expiration of the survival period. The narrow holding of *Parker* is that director liability under section 42(f) is not barred by expiration of the survival period; other shareholder and director liabilities are outside the scope of the *Parker* decision. The test enunciated in *Parker,* on the other hand, nullifies the postulated general rule by producing a holding far broader than was required to support the

124. Both section 42(f) and the survival statute originally were adopted on July 13, 1933. *See* 1933 Ill. Laws §§ 42(f), 94.

125. 438 F.2d at 1179. *See also* text accompanying note 73 *supra.*

126. 30 Ill. 2d at 490, 197 N.E.2d at 31-32.

actual result in *Parker*. Because no actions against former shareholders and directors abated at common law, all actions against former shareholders and directors are unaffected by the survival statute's bar.

That the holding is broader than was intended by the *Parker* court is evidenced by the context in which the test was stated and by the decisions relied upon by the court. The three cases cited by the *Parker* court in arriving at its test were all cases addressing directors' and shareholders' liabilities that were created by statute.[127] The reliance upon these cases suggests that what the court intended was an exception to the postulated general rule either for certain specific statutory causes of action or for statutorily created causes of action in general.[128] Whether the *Parker* court intended the broader holding that can be derived by application of the abatement test to all causes of action is unclear. Certainly, the test was phrased broadly enough to justify its use in *Palakow* to permit maintenance of a nonstatutory cause of action brought after the survival period expired.[129]

127. In one of the cases, Dukes v. Harrison & Reidy, 270 Ill. App. 372 (1933), *discussed in* Schoone, *supra* note 36, at 423-24, a suit against shareholders following expiration of the survival period was dismissed because the statute imposing the shareholder liability required joinder of the dissolved corporation as a necessary party, and the dissolved corporation could not be joined because of the survival statute's bar. *But cf.* Laning v. National Rihhon & Carbon Paper Mfg. Co., 40 F. Supp. 1005 (N.D. Ill. 1941) (those who received the property of the dissolved corporation were necessary parties in lieu of the dissolved corporation that was no longer subject to suit) (dictum). The *Parker* court cited *Dukes* for the unsupported proposition that the *Dukes* decision "assumed that statutory liability of a stockholder for unpaid stock subscription survives dissolution of the corporation." 30 Ill. 2d at 490, 197 N.E.2d at 32.

The *Parker* court quoted language from Consolidated Coal Co. v. Flynn Coal Co., 274 Ill. App. 405 (1934), but its reliance upon that case was clearly misplaced. The court in *Flynn Coal Co.* considered the effect of the Illinois survival statute upon two types of claims against former directors of a dissolved corporation. The plaintiff's first claim was that the directors had "assented to an indebtedness in excess of the capital stock of the corporation, and therefore are personally and individually liable to the extent of such excess, according te section 23 of the Corporation Act . . . ." *Id.* at 408. The second claim was "[t]hat the fraudulent conversion, or the fraudulent conduct of the defendants in the transfer of the corporation property existed separate and independent of the Corporation Act, and that its action was not controlled by" the survival statute. 274 Ill. App. at 410. For the text of the survival statute then in existence, see 274 Ill. App. at 409-10. The *Flynn Coal Co.* court held that the bar imposed by expiration of the survival period "applies te the remedy to enforce statutory liabilities." *Id.* at 412. On that basis, the court sustained the dismissal of the statutory claim against the former director. *Id.* at 411-12. The court, however, declined to decide whether the claim of fraudulent concealment and conversion of corporate property was barred by expiration of the survival period, hecause the claim could be and was adequately disposed of on another ground—the five year statute of limitations for hringing the cause of action had expired. *Id.* at 412-13. The third of the three cases cited by *Parker* was Galter v. FTC, 186 F.2d 810 (7th Cir.), *cert. denied,* 342 U.S. 818 (1951).

128. *See also* note 91 *supra.*

129. 438 F.2d at 1179.

(6) Precedent Supporting the General Rule

Since the decision of the Seventh Circuit in *Palakow,* the only Illinois case directly on point casts serious doubt upon the accuracy of the *Palakow* assessment of Illinois law. That case, *Koepke v. First National Bank,*[130] took a plain meaning approach to the language of the survival statute. The crux of the Illinois appellate court's one page opinion is that "[t]he provisions of the [survival] statute are clearly applicable, 1) to the defunct corporation, to its directors and shareholders (see, *Gordon v. Loew's Incorporated* (D.C.N.J. 1956)), 147 F. Supp. 398, and 2) to 'any remedy,' which would include an action brought in equity."[131] Although the opinion seems to recognize no exceptions to the bar of the survival statute, it does not expressly repudiate the theory that there is a general rule of bar coupled with a few well-defined exceptions. Certainly this holding conflicts with the second holding of *Palakow,* which proposes that all actions brought in equity are outside the scope of the survival statute and its bar.

Moreover, *Koepke* and the second holding of *Palakow* cannot be satisfactorily distinguished. While the claimant in *Palakow,* as in *Parker,* sought a remedy "*against* . . . [the dissolved corporation], its directors, officers, or shareholders," the claimant in *Koepke* sought a remedy "available *to* . . . [the dissolved corporation], its directors, officers, or shareholders."[132] In *Koepke,* the majority shareholder of the dissolved corporation brought an action in equity on behalf of all the shareholders against a third party for breach of a contract entered into with the dissolved corporation. Although plaintiff alleged only financial injury as the basis for equitable relief, defendant did not attack the complaint for failure to state a cause of action. Defendant argued instead, and the court held, that the survival statute's bar applied to equitable remedies just as it applied to all others. In *Palakow,* on the other hand, the bar of the survival statute was asserted not by a third party but by former directors of the dissolved corporation to defeat the claim of a third party.[133] An argument can be constructed that, although the survival statute should bar actions by shareholders and directors for

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130. 5 Ill. App. 3d 799, 284 N.E.2d 671 (1972).

131. *Id.* at 800, 284 N.E.2d at 672.

132. MODEL ACT, *supra* note 6, § 105 (emphasis added); *see* ILL. ANN. STAT. ch. 32, § 157.94 (Smith-Hurd Supp. 1978); WIS. STAT. ANN. § 180.787 (West Supp. 1978-1979).

133. That the third party in *Palakow* was actually a shareholder of the dissolved corporation is immaterial. *See* text accompanying note 69 *supra.* In *Parker,* the third party against whom the bar was pleaded was not a shareholder, as in *Palakow,* but a creditor of the dissolved corporation.

remedies available *to* the dissolved corporation because they had ample opportunity to seek those remedies, and because they had some control over the decision to dissolve, the survival statute should not bar actions by third parties because they should not be prejudiced by a corporate dissolution over which they had no control.

The distinction between remedies available to and remedies available against the dissolved corporation, its directors, and its shareholders is an uneasy one. The language of the survival statute makes no such distinction. Both the "prior to . . . dissolution" language and the two-year limitation on survival apply equally to remedies "available to" and to remedies "available . . . against." Furthermore, the courts have not made the distinction. The only case cited by the *Koepke* court, *Gordon v. Loew's Inc.*,[134] clearly rejects this distinction. The *Gordon* court, after reviewing the cases and the legislative history, reached the following conclusion:

> In 1941 Section 94 [the Illinois survival statute] of the 1933 Act was amended to . . . [substitute] the phrase "remedy available to or against such corporation, its directors, or shareholders" for the phrase "remedy given against such corporation, its officers, or stockholders."
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> . . . .
>
> . . . It seems obvious that the 1941 amendment merely included remedies available *to* the corporation, its directors and shareholders, with the remedies given *against* the corporation, its officers or stockholders, and *made no change in the requirement for the commencement of suit within two years after dissolution.*[135]

Other cases have not been so explicit, but they similarly have made no distinction between cases in which the bar was imposed against a third party and cases in which the bar was imposed against dissolved corporations, shareholders, and directors.[136]

(7) General Rule or No General Rule: An Unsatisfactory Conclusion

Because *Koepke* and the second holding in *Palakow* cannot be reconciled or satisfactorily distinguished, the question is which case

134. 147 F. Supp. 398 (D.N.J. 1956), *aff'd*, 247 F.2d 451 (3d Cir. 1957). For further discussion, see the text accompanying notes 41-48 *supra*.

135. 147 F. Supp. at 405-07 (emphasis in original).

136. *Compare* Levy v. Liebling, 238 F.2d 505 (7th Cir. 1956), *cert. denied*, 353 U.S. 936 (1957) *with* Gordon v. Loew's Inc., 147 F. Supp. 398 (D.N.J. 1956), *aff'd*, 247 F.2d 451 (3d Cir. 1957). *Levy* and *Gordon* reached opposite results in cases with similar facts and similar causes of action based upon claims available to shareholders. *Compare* United States v. Palakow, 438 F.2d 1177 (7th Cir. 1971) *with* Brooks v. Saloy, 334 Ill. App. 93, 79 N.E.2d 97 (1948). *Palakow* and *Brooks* reached identical results even though one involved an action against directors aud the other involved an action upon a claim available to shareholders.

is correct. The unfortunate answer is that both are, since precedent exists to support the result in each case. The holding in *Koepke,* like the second holding of *Palakow,* is stated too broadly. The court in each case apparently determined the result it wanted to reach and then found precedent from which to construct a rule, as in *Koepke,* or a test, as in *Palakow,* to justify the desired result. The broadly stated rule and test then became precedent for future litigants and courts. Because both the rule and the test are stated too broadly, they lead to results that not only are inconsistent but also have little or no justification when measured against the real concerns of the court that originally enunciated the rule or the test.

This unfortunate state of precedent allows litigants to pick and choose standards according to the result they wish to achieve. No further attempt will be made to harmonize the cases previously discussed by analyzing what the courts said they were doing. Even though there may be a general rule that expiration of the survival period bars actions by or against dissolved corporations, their directors, or their shareholders, the exceptions to the general rule are so numerous and so broad that they consume the rule itself. Many courts apparently assume the existence of the postulated general rule, but few have been willing to abide by that general rule when deciding the case before them. There are two possible causes for this confused state of precedent: (1) either the courts do not understand the policies and goals of the survival statute, or (2) the courts disagree as to the weight those policies and goals should be given when set against countervailing policies or goals. The following section of this Article attempts to explain the cases previously discussed in light of the policies that should be given effect.

IV. WHAT COURTS DO AND WHY: PREDICTING WHETHER A CLAIM IS BARRED BY EXPIRATION OF THE SURVIVAL PERIOD[137]

That the survival statute has an uncertain effect upon various categories of claims has been stated repeatedly.[138] The following

137. This section of the Article undertakes a task best described in Cook, *The Logical and Legal Bases of the Conflict of Laws,* 33 YALE L.J. 457 (1924):

> In making our observations we shall, however, find it necessary to focus our attention upon what courts have *done,* rather than upon the description they have given of the reasons for their action. Whatever generalizations we reach will therefore purport to he nothing more than an attempt to describe in as simple a way as possible the concrete judicial phenomena ohserved . . . .

Id. at 460 (emphasis in original).

138. *E.g.,* Schoone, *supra* note 36, at 427; Wallach, *supra* note 23, at 334-35. The most eloquent phrasing of the uncertainty is that in Henn & Alexander, *supra* note 10, at 916, *quoting* W. SHAKESPEARE, THE TRAGEDY OF MACBETH, Act III, scene ii: "Absent statutory

statement of the United States Court of Appeals for the Fourth Circuit evidences the experience of many courts that essential questions have been left unanswered: "[T]he right to maintain a products liability suit against a dissolved corporation, in process of liquidation under statutory authority, for post-dissolution-accrued claims has received at best limited judicial or textbook consideration."[139] Although the Fourth Circuit was addressing the Delaware rather than the Model Act provisions, the court's feeling that it had been left to wander in the dark typifies the feeling that many courts must share.

A. *Policy Goals Underlying the Survival Statute*

If the courts are confused about the effect of the survival statute upon actions by and against shareholders and directors, their confusion is justified. At common law, all actions and claims by and against corporations abated upon dissolution. The language of the survival statute suggests that the statute's sole purpose is to postpone the abatement for two years following dissolution. When the plaintiff or defendant in the suit is the dissolved corporation itself, the language of the survival statute has worked well. The courts have held consistently that suits by and against corporations can be maintained during the two-year survival period, but not thereafter, because no other statute postpones abatement. Similarly, the courts have held consistently that only predissolution claims support actions by and against dissolved corporations directly, because the survival statute, which is the only source for continued existence of dissolved corporations, continues such corporations only for the purpose of actions based upon claims arising "prior to . . . dissolution."[140] The common law rule of abatement, rather than the survival statute, effected the bar to post-dissolution actions. This insight helps to identify the primary policy goal of the survival statute: by postponing abatement for two years, the survival statute aimed to protect certain claimants against dissolved corporations and to protect dissolved corporations with claims, but the protection was limited. It extended only to predissolution claims brought within two years of dissolution.

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resolution, shareholders about to vote for dissolution with a view toward their eventual receipt of liquidation distributions might well join in Lady Macbeth's lament:"

'Tis safer to be that which we destroy
Than by destruction dwell in doubtful joy.

139. Johnson v. RAC Corp., 491 F.2d 510, 514 (4th Cir. 1974).

140. *See, e.g.*, text accompanying note 61 *supra*.

The drafters and enactors of the Model Act survival statute apparently sought to achieve another policy goal as well. The policy goal was best phrased by the *Bishop* court:[141]

> [I]t seems highly untenable that the legislative intent manifest in the inclusion of the last paragraph was such as to allow indefinite continued subjection of the corporation and its officers and directors to litigation . . . . *There should be a definite point in time at which the existence of a corporation and the transaction of its business are terminated.* To allow, as the plaintiff contends, the continued prosecution of lawsuits perverts the definiteness and orderly process of dissolution so as to produce a continuous dribble of business activity contrary to the intent of the . . . statute.[142]

This policy goal—certainty and definiteness for the corporation, its shareholders, and its directors—also underlies the continued vitality of the common law rule of abatement. The survival statute, however, achieves its primary goal of protecting certain claims by postponing the certainty and definiteness for a reasonable period to allow the bringing of protected claims. The essential questions that have received no satisfactory treatment are whether and to what extent the survival statute itself furthers certainty and definiteness, and how that policy goal should be balanced against the goal of protecting claims. Certainty and definiteness for dissolved corporations are ensured by the rule of abatement, which operates automatically when the survival statute's protection ceases or fails to apply. On the other hand, certainty and definiteness for the shareholders and directors of dissolved corporations are not ensured by the rule of abatement because theories were developed in equity to allow recovery against shareholders and directors for claims that would have been maintained against the corporation but for its dissolution. That the equitable theories had the same policy goal as one of the original primary policy goals of the survival statute—the protection of claimants against the dissolved corporation—led some to conclude that the survival statute was intended to replace the equitable theories of recovery.[143]

The language of the survival statute indicates that legislatures intended to substitute the survival statute for the equitable theories as the exclusive mechanism for protecting claimants against dis-

141. The *Bishop* court was interpreting IOWA CODE ANN. § 496A.102 (West 1962). The Iowa legislature adopted the Model Act provision basically intact but supplemented that provision as follows: "A corporation which has been dissolved or the period of duration of which has expired by limitation or otherwise, may nevertheless continue to act for the purpose of conveying title to its property, real and personal, and otherwise winding up its affairs."

142. 293 F. Supp. 94, 96 (N.D. Iowa 1968) (emphasis added). For further discussion, see notes 55-60 *supra*.

143. *See* notes 74-79 *supra* and accompanying text.

solved corporations. By its own terms the survival statute applies to remedies whether available to or against the dissolved corporation, its shareholders, or its directors. Because remedies against shareholders and directors did not abate upon dissolution, however, no need exists to continue those remedies. Those remedies were not available at common law until dissolution. The wording of the survival statute that "dissolution . . . shall not take away or impair any remedy" works well when applied to a remedy that would be impaired absent the statute. The courts understandably have been confused, however, when confronted with remedies that were not impaired at common law—the trust fund remedies. This confusion is evident in the *Palakow* and *Koepke* decisions. The second holding of *Palakow,* that the survival statute does not affect claims that did not abate at common law, is not incorrect because the survival statute purports only to continue causes of action, not to bar them. On the other hand, *Koepke* is not incorrect because the survival statute applies to shareholders and directors as well as to dissolved corporations, and no apparent reason exists for including shareholders and directors within the survival statute unless the bar was meant to limit the time for bringing actions by and against shareholders and directors. *Palakow* furthers one of the policy goals of the survival statute and the policy goal of the equitable theories of recovery—protection of claimants against dissolved corporations—at the expense of the secondary policy goal of the survival statute and the policy goal of the common law rule of abatement—certainty and definiteness. The broadly phrased holding of *Koepke,* on the other hand, furthers certainty and definiteness at the expense of protecting claimants and corporations with claims.

That the drafters and enactors of the survival statute intended to further the purpose of securing certainty and definiteness for shareholders and directors also is indicated by the relationship of the survival statute to other provisions of the Model Act.[144] These other provisions form the two-step dissolution process, which has been adopted in various forms by most states having survival statutes.[145] The first step of dissolution is the filing of a statement of intent to dissolve with the appropriate state official, who by recording the statement makes it a public record. The world is on notice following the recordation, but many statutes require that the corpo-

144. *See* MODEL ACT, *supra* note 6, §§ 85-87, 92-93.

145. *Compare* MODEL BUS. CORP. ACT ANN. 2d § 105 ¶ 3 Statutory Provisions (ABA 1971 & Supp. 1977) *with* MODEL ACT, *supra* note 6, §§ 85-87, 92-93 ¶ 3 Statutory Provisions. *See generally* Schoone, *supra* note 36, at 421 nn.47-55, 422 nn.56-77.

ration give additional and more direct notice to its known creditors. The second step of the dissolution process is the filing of the articles of dissolution. The corporation may take this second step only after it (1) protects any claimants with suits pending by making provision for satisfying any judgment that might be rendered against the corporation, (2) pays or makes provision for paying the creditors of the corporation, and (3) distributes to the shareholders the remaining assets of the corporation.[146] In other words, under two-step dissolution, liquidation occurs between the giving of constructive or actual notice of intent to dissolve and the final dissolution of the corporation. The first step terminates the corporation's existence for purposes other than winding-up its affairs,[147] and the second step terminates its existence for all purposes "except for the purpose of suits, other proceedings and appropriate corporate action by shareholders, directors and officers as provided in this Act."[148] The quoted phrase acknowledges that the survival statute continues the existence of the finally dissolved corporation for the limited purpose of allowing remedies for any claim existing "prior to . . . dissolution" if suit is filed thereon within the survival period.[149]

Whether the survival statute is needed to protect claimants against dissolved corporations is questionable in light of the protection already afforded by the two-step dissolution procedure. Under two-step dissolution, a corporation cannot file articles of dissolution unless it makes affirmative representations that creditors have been satisfied and that the corporation has made provision for satisfying claimants with pending suits. Thus, in states having two-step dissolution, and in some states having one-step dissolution,[150] legislatures apparently contemplated that claimants against the corporation would be protected by steps taken before dissolution. If legislatures intended the survival statute to protect any claimants against the corporation, they are claimants with predissolution claims who first take action on those claims following final dissolution. Thus, with all known creditors and all but a small class of claimants protected by the two-step dissolution process, little weight can be given to the survival statute's original policy goal of protecting claimants against the dissolved corporation. Also weakened is the other origi-

146. MODEL ACT, *supra* note 6, § 92.

147. *Id.* § 86.

148. *Id.* § 93.

149. *But cf.* Schoone, *supra* note 36, at 422 ("The intention of the draftsmen apparently was to place the limitation, not on the corporation's existence, but on the cause of action.").

150. MODEL BUS. CORP. ACT ANN. 2d § 92 ¶ 3 Statutory Provisions (ABA 1971 & Supp. 1977).

nal policy goal of the survival statute—protecting dissolved corporations, shareholders, and directors with claims against third parties—because two-step dissolution contemplates that such claims will be brought during the winding-up period prior to final dissolution. The weakness of these two original policy goals is demonstrated most strikingly in those states where the survival statute existed prior to the two-step dissolution procedure.[151] The survival statute in those states provided the dissolved corporation with a period within which to wind up its affairs, thus eliminating the harsh results of abatement that accompanied the formal cessation of business. When the two-step dissolution procedure was adopted in those states, corporations could cease their business operations and then wind up before final dissolution and the consequent abatement. That legislatures enacted two-step dissolution procedures to further the policy goal of protecting claims by and against dissolved corporations makes retention of the survival statute the best evidence that certainty and definiteness for shareholders and directors was intended as an important secondary policy goal of the survival statute.

B. The Cases Reinterpreted in Light of the Policy Goals: What Courts Do Rather Than What Courts Say

The survival statute protects claims by and against dissolved corporations by authorizing the bringing of certain actions for a reasonable period following dissolution. In some states, the reasonable period is two years, in others three or more.[152] The common thread among the individual/corporate capacity test, the abatement/nonabatement test, and every other exception to the postulated general rule barring actions after the survival period is that any court applying the tests or creating an exception considered the survival period an unreasonable period within which to require the bringing of the particular case before the court. Conversely, in cases such as *Koepke* the two-year period was considered reasonable.

In *Koepke* a majority shareholder brought suit against a party who breached a contract with the dissolved corporation. Although the cause of action was theoretically an action in equity to recover for financial injury, the court was unimpressed with the equitable nature of the claim but did not phrase its holding on that basis.[153] Possibly the crucial, unstated factor in *Koepke* was that the cause

151. *See* Schoone, *supra* note 36, at 420-23.
152. *See* note 30 *supra*.
153. 5 Ill. App. 3d at 799-800, 284 N.E.2d at 672.

of action for breach of contract was of a type that the dissolved corporation should have maintained itself. The two years allowed by the survival statute thus were considered an additional period for bringing such causes of action by dissolved corporations. Moreover, courts generally have not been reluctant to require dissolved corporations to bring suit within the two-year period, since this period is an extension of time beyond that traditionally afforded by the common law rule of abatement.

The *Brooks* court,[154] similarly addressing an action by former shareholders based upon a claim available to the corporation before dissolution, reached the opposite result. In *Brooks* the court relied upon the individual/corporate capacity distinction to permit an equitable action following expiration of the survival period. Whether the court properly applied the individual/corporate capacity test and whether the cause of action was actually one that would have abated at common law are less important than the court's obvious intent to achieve its result. The court may have felt that the two-year period was an unreasonably short period within which to require the bringing of the action. Plaintiff shareholders, according to the court, owned the land in question as tenants in common, having become tenants in common automatically upon dissolution of their corporation. The court took jurisdiction to allow the shareholders to exercise their right of redemption, to remove a cloud on title, and to partition the land.[155] This relief, especially the removal of a cloud on title, is a type that courts understandably are reluctant to limit by imposing a short period within which to bring the action.[156] For example, one state has recognized the distinction between quiet title actions and all other actions by providing in its survival statute for the indefinite survival of the corporation for suits against it to quiet title.[157] The title to land requires and deserves judicial attention because uncertainty of title may reduce the value and the productivity of land. Purchasers may be reluctant to make valuable improvements on land to which the title is unclear. Consequently, courts would injure society if they did not judicially clarify title to land whenever possible. This is not to say that the removal of the cloud on title in *Brooks* should not have been undertaken by the corporation before dissolution or during the survival period. Instead, the point is that a court is unlikely to reject causes

154. *See* text accompanying note 94 *supra*.
155. 334 Ill. App. at 102, 79 N.E.2d at 101.
156. A similar concern led to one of the clearest exceptions to the survival period bar—the exception for actions to foreclose mortgages. *See* text accompanying note 82 *supra*.
157. CAL. CORP. CODE § 2011(c) (West 1977).

of action to remove a cloud on title without clear and express legislative intent to limit these causes of action to a definite period. That the legislative intent is unclear regarding the policy goal of certainty and definiteness for shareholders and directors has been demonstrated.

Assuming that the underlying concern of those courts that have found exceptions to the postulated general rule is the unreasonableness of the duration of the survival period, the essential question is what factors might lead a court to conclude that the survival period is unreasonable. Self-dealing is a characteristic of several cases in which courts allowed causes of action against shareholders and directors following expiration of the survival period.[158] Self-dealing shareholders and directors are likely to be held liable to those they defraud or mislead whether the court justifies allowing the cause of action with the theory that the cause of action is against the perpetrators individually rather than in their corporate capacities,[159] or whether the court finds a fraudulent conveyance and ignores the dissolution, relying solely upon the fraudulent transfers that may take the form of liquidating distributions.[160] Because the public has a strong interest in preventing self-dealing, it is easy to understand why courts are reluctant to disallow causes of action in these cases. The countervailing interest in certainty and definiteness for shareholders and directors is outweighed by the public interest in imposing liability for self-dealing. As with the interest in securing judicial clarification of title to land, the interest in dissuading self-dealing will not be overcome by less than clear legislative intent to subordinate that interest to the policy goal of providing certainty and definiteness for shareholders and directors.

Although self-dealing is a significant factor that may justify allowing a claim brought after the survival period expires, courts may be equally influenced by other considerations, as the *Parker* case makes clear.[161] Although self-dealing arguably was present in *Parker,* the court also contemplated an additional problem—the date the claim arose. The court prefaced its analysis of this issue by stating that "[i]t would be anomalous that the occasion giving rise to the liability, dissolution of the corporation, would also cause it to abate."[162] If a claim arises because of the dissolution process itself, it may be unreasonable to allow the claimant only a two-year

158. *See* text accompanying notes 93-94 *supra.*
159. *Id.*
160. *See* text accompanying notes 114-18 *supra.*
161. For a discussion of *Parker,* see text accompanying notes 119-29 *supra.*
162. 30 Ill. 2d at 490, 197 N.E.2d at 32; *see* text accompanying note 39 *supra.*

period within which to take action. This is especially true when, as in *Parker* and *Palakow,* the claimant is a governmental entity that customarily does not bring actions within such a short period. In *Parker* the cause of action was filed in 1961 for taxes assessed in 1953 and 1954. Undoubtedly, the state's attorney brought suit just prior to the expiration of the statute of limitations for collecting the taxes—a routine practice consistent with the common government policy of giving taxpayers every possible chance to pay taxes voluntarily. This prevalent practice is fair to the taxpayer and less costly to the government because fewer suits will have to be brought if taxpayers are given more time to pay. Furthermore, the administrative cost of checking each corporate taxpayer for a possible dissolution might be overly burdensome.

Thus, when the survival period expires before the state routinely files suit, the two-year period imposed by the survival statute arguably is unreasonable—the administrative cost of bringing suit within the survival period against those dissolved corporations that fail to give the statutory notice is too great to justify imposition upon the taxpaying public. The unreasonableness is more severe when the sole purpose of allowing suit is to assure certainty of liability to a director who, if not a self-dealing party, at least was negligent. For example, although in *Palakow* the directors should have made distributions in liquidation to the Small Business Administration (SBA) as a shareholder of the dissolving corporation, the directors dissolved the corporation without any notice to the SBA. A two-year period within which to bring an action is unreasonable, especially when parties owing the claimant a fiduciary duty have dissolved the corporation by covert action that not only brought about the claim but also started the two-year period running without any notice to the shareholder claimant.

The three factors discussed above were present in *Palakow*: (1) self-dealing, (2) a claim that arose at a late date and was brought about by the dissolution itself, and (3) no notice of the running of the survival period when such notice should have been provided by the defendant who had a fiduciary duty, or as in *Parker,* a statutory duty, to provide or oversee that notice. Whether any or all of these factors must be present before a court will apply the *Palakow* individual/corporate capacity test or the abatement/nonabatement test that ultimately could justify allowing a claim brought after the survival period expired is open to question. It is also unclear what interests identified with these factors will outweigh the policy goal of certainty and definiteness for shareholders and directors. It is doubtful, however, that either of the two tests from *Palakow* would be applied if none of the factors or interests described above were present.

C. *Predicting Success of Tort and Breach of Warranty Claims*

Among the post-dissolution claims addressed in this Article are tort claims and breach of warranty claims that would have been brought directly against the corporation but for its liquidation and dissolution. Claims upon which suits are pending on the date of final dissolution are outside the scope of this discussion because in two-step dissolution states a corporation must provide for those claims prior to filing of the articles of dissolution.[163] Even in states where provision for such claims is not required, those claims can be satisfied, and if not, at least the amount of those claims and the shareholders' and directors' exposure for them can be estimated readily and taken into account by the shareholders and directors in deciding whether to vote for dissolution. Thus, the shareholders' and directors' liabilities under consideration in this subsection are liabilities for tort claims or breach of warranty claims against the dissolved corporation that are unknown until after dissolution. These claims will be either post-dissolution claims or predissolution claims upon which no action is brought until after dissolution.

Under the individual/corporate capacity test[164] and the abatement/nonabatement test, the contemplated claims could be main-

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163. *See, e.g.*, MODEL ACT, *supra* note 6, § 92.

164. The test ultimately distinguished those causes of action against shareholders and directors that abate at common law from those that do not. In *Palakow* an equitable action that did not abate was held to state a cause of action against the defendant individually. The ultimate result of labelling such actions to be actions against defendants individually and the result that makes the first and second holdings of *Palakow* consistent is that only actions joining the directors or the shareholders in their capacities as trustees of the corporation's assets are subject to the survival statute. This reduces the inclusion of shareholders and directors within the survival statute to mean in part that actions against dissolved corporations directly, which name the directors or shareholders as trustees, similar to actions naming as defendants the administrator or executor of a decedent's estate, are subject to the survival statute and its bar. *See* note 71 *supra*. With respect to actions brought *by* shareholders and directors, under this analysis the survival statute applies only to actions brought by shareholders and directors on behalf of the dissolved corporation. For example, shareholders' derivative suits would be barred by the survival statute if those suits were based upon post-dissolution claims or if the survival period had expired prior to the filing of the suits. Suits predicated upon a breach of fiduciary duty owed to the shareholder individually, however, would be unaffected by the survival statute, as indeed was the case in *Palakow*, in which the shareholder's action, which was filed following expiration of the survival period, was not even questioned upon the ground that the bar of the survival statute applies to remedies available to shareholders. 438 F.2d at 1179. Thus, the individual/corporate capacity test from the first holding in *Palakow*, when taken to its ultimate conclusion without any additional requirement of self-dealing, produces the same result as the abatement/nonabatement test of the second holding in *Palakow*.

tained against the directors or shareholders at any time because the survival statute would have no effect on causes of action based upon equitable theories. Because these two tests, like exceptions to the postulated rule that the survival statute bars all claims after two years, are used by courts only after those courts have decided that the survival statute should not apply, it is necessary to determine whether a court likely would consider the survival statute unreasonable when applied to either post-dissolution claims or predissolution claims upon which no causes of action are pending on the date of dissolution. The examples that have been used before to demonstrate the type of post-dissolution tort claims that are most likely to lead to actions against shareholders and directors or dissolved corporations are: (1) a claim that arises when a defective product manufactured by the corporation before dissolution causes injury after dissolution, and (2) a claim that arises when a foreign object negligently inserted into a claimant's body by a corporation's medical employees is discovered after dissolution of that corporation. Are any of the factors and interests that were present in *Palakow* present in cases addressing these types of claims?

Neither the dissolving corporation nor the directors have any statutory or common law fiduciary duty to notify those who have potential post-dissolution tort claims. Moreover, the dissolving corporation's statutory duty under two-step dissolution to notify potential claimants by filing for public record a notice of intent to dissolve does not help contingent claimants whose claims do not arise until after dissolution. Similarly, self-dealing is of no special concern in cases addressing post-dissolution products liability or malpractice claims. Although it might be argued that directors and shareholders who liquidate and dissolve their corporations with reason to expect future tort claims and who do not provide for satisfaction of the claims have engaged in self-dealing, more direct self-dealing by shareholders or directors apparently must be present to influence courts.[165] The Model Act two-step dissolution requires only that the corporation represent that it has provided for creditors and claimants who have suits pending.[166] Courts probably will not view as self-dealing the failure to provide for claimants excluded from statutory protection.

Thus, cases addressing these types of post-dissolution claims often lack two of the factors present in *Palakow:* (1) a defendant who failed to give claimants notice of dissolution or of the running of the

165. *See* text accompanying notes 93-94 & 161 *supra.*
166. MODEL ACT, *supra* note 6, § 92.

survival period although he had a duty to provide that notice, and (2) a defendant who engaged in self-dealing. The same considerations are lacking in cases involving predissolution tort and breach of warranty claims upon which no suit has been filed on the date of dissolution, except that the absence of notice element may be present if notice of intent to dissolve is not filed in a state in which filing gives constructive notice.

The only factor, common both to *Palakow* and to cases involving post-dissolution claims, that is relevant to the reasonableness of limiting remedies against shareholders and directors to the survival period is that the claim first arises at a late date. If post-dissolution claims may be brought only during the survival period, as suggested by the previously discussed *Litts* reading of *Bishop,*[167] then the period available for bringing an action on the claim would be a maximum of two years. Whether two years is a reasonable time within which to bring a cause of action depends upon the length of the statute of limitations for bringing the cause of action. If the statute of limitations has expired, then the cause of action is barred; if not, then the length of the survival period is likely to be unreasonable because a claimant having no actual notice of the running of the survival period will be unaware of the need for action prior to expiration of the appropriate statute of limitations. Requiring individual claimants to check immediately for corporate existence of their potential defendants is unreasonable, just as it was in *Parker* for a state claimant to whom notice should have been given.[168]

An absolute bar to causes of action based upon post-dissolution claims certainly is unreasonable.[169] To alleviate this bar, the *Levy* court interpreted the "prior to . . . dissolution" language of the survival statute to mean that the survival statute does not apply to post-dissolution claims.[170] The unreasonableness of precluding remedies for claims from the time they first arise was an express concern of the *Levy* court.[171] The *Levy* court interpreted the survival statute so that a reasonable period for bringing causes of action on post-dissolution claims would be available. By holding that the survival statute does not affect post-dissolution claims, the *Levy* court effectively decided that the survival period was an unreasonably short period within which to require the bringing of actions based upon

167. *See* text accompanying notes 57-60 *supra.*
168. *See* text accompanying note 162 *supra.*
169. *See* text accompanying notes 49-51 *supra.*
170. *See* text accompanying notes 36-39 *supra.*
171. *See* text accompanying note 39 *supra.* The same concern was expressed in *Parker.* *See* text accompanying note 162 *supra.*

post-dissolution claims, and that the survival statute should not be construed so as to attribute unreasonableness to the drafters and enactors of the survival statute without clear legislative intent to accomplish this result.

The second category of claims upon which actions are likely to be brought following expiration of the survival period are predissolution claims upon which no suit is pending on the date of dissolution. Again, these are assumed to be suits filed after dissolution by breach of warranty or tort claimants who do not qualify as known creditors under the two-step dissolution provisions.[172] Claimants with predissolution claims, unlike those with post-dissolution claims, usually will be afforded a reasonable length of time for bringing actions upon their claims because in most instances the statute of limitations on the predissolution tort claim will expire before expiration of the survival period.[173] When that is not the case, as with breach of warranty claims, the survival period may be an unreasonably short period within which to require the filing of suit. Under *Levy*, however, predissolution claims are subject to the survival statute. In addition, predissolution claims clearly can be maintained against the dissolved corporation, its shareholders, and its directors during the survival period. Thus, although the survival period may be an unreasonably short period within which to require the bringing of an action upon a predissolution claim, the *Levy* rationale does not support the exclusion of predissolution claims from application of the survival statute. Furthermore, although an argument can be made that *Levy* provides an adequate solution for treating post-dissolution claims, permitting post-dissolution claims to be maintained as though there were no survival statute and no bar defeats the policy goal of certainty and definiteness for former shareholders and directors of dissolved corporations. Certainty and definiteness should not be totally abandoned in favor of protecting claimants.

V. Toward Judicial Uniformity Through Statutory Reform

The examination of case law under section 105 has revealed confusion in the courts about an area of law that deserves more precision and certainty. Shareholders and directors, if they are to

172. *See, e.g.*, Model Act, *supra* note 6, § 92. Breach of warranty claims arise when the defective product is sold, which usually occurs prior to dissolution. Post-dissolution breach of warranty claims therefore will be rare. *See* note 23 *supra*.

173. Whereas the survival period in most states is two years or longer, the statute of limitations in most states for causes of action based upon personal injuries caused by defective products is one year. *Compare* materials cited in note 30 *supra with* 53 C.J.S. *Limitations of Actions* § 74 (1948).

plan for personal liabilities, must be able to predict their exposure to liability.

In addition, for a corporation desiring to sell its assets and subsequently dissolve and liquidate, the valuation of those assets and the advisability of making the sale can be determined only if the extent of post-dissolution liabilities is known. For any shareholder who will receive a large share of the distributed assets, this is an important consideration—one that should affect the vote of his stock for or against the sale of assets and subsequent dissolution of the corporation. Any shareholder of a corporation with contingent malpractice or products liability claims should weigh carefully the possibility that a claimant against the dissolved corporation may trace and recover all or a large portion of what the shareholder can expect to receive in distribution. This potential loss could make the sale of assets very unattractive, especially if insurance, which covered the risk for the corporation, is unavailable to the shareholder.

Section 105 in its present form is outdated. Section 105 increases the confusion among the courts, rather than reducing it. Moreover, subsequently enacted provisions of the Model Act and cases construing section 105 have frustrated its achievement of many desirable policy goals. The proposed revision of section 105 set forth below is designed to resolve current confusion by balancing for both post-dissolution and predissolution claims the competing policy goals[174] of protecting claimants and providing corporate and individual defendants with certainty and definiteness.

A. *Proposed Section 105*

TERMINATION OF REMEDIES UPON DISSOLUTION

Claims By and Against the Corporation

The dissolution of a corporation either (1) by the issuance of a certificate of dissolution, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this Model Act, or (3) by expiration of its period of duration shall terminate all remedies, claims, and causes of action available to or against the corporation, unless a legal action or proceeding thereon is commenced before a court or tribunal of competent jurisdiction prior to such dissolution.

174. An alternative revision of section 105 was proposed in Henn & Alexander, *supra* note 10, at 915-16. It can be compared profitably with the instant proposal. The Missouri legislature took yet another approach to resolving some of the problems of the survival statute. *See* MO. ANN. STAT. § 351.565 (Vernon 1966) (Notes of Decisions).

Notwithstanding the foregoing, any remedy, claim, or cause of action, whether arising before or after the dissolution of a corporation, that would have been available against the dissolved corporation but for the dissolution may be pursued (1) directly against any director or officer who is a trustee of the assets of the dissolved corporation or, (2) if jurisdiction cannot be obtained over any such director or officer, directly against any shareholder; provided that no director, officer, or shareholder shall be liable under the foregoing provisions, if the dissolved corporation, prior to filing a statement of intent to dissolve, acquired from a purchaser or transferee of substantially all the assets of the dissolved corporation an express agreement to assume liability for all remedies, claims, and causes of action that would otherwise be available against the dissolved corporation but for its dissolution.

Any director or officer shall be liable under the foregoing paragraph, not personally but in a representative capacity, only to the extent of the assets held by such director or officer on the date that the director or officer received service of process or other official notice that an action or proceeding has been commenced naming him as a party. Any shareholder shall be personally liable under the foregoing paragraph, but only to the extent of the fair market value of any assets received in distribution from the corporation, the fair market value of which is to be determined as of the date of dissolution of the corporation. Any shareholder against whom a remedy, claim, or cause of action shall be asserted under or pursuant to this paragraph shall be entitled to contribution from any other shareholder to whom assets were distributed.

Claims Against Officers, Directors, and Shareholders

Unless a legal action or proceeding thereon is commenced before a court or tribunal of competent jurisdiction within two years after the date of dissolution of a corporation, all remedies, claims, and causes of action based upon any act, omission, or breach of duty of any officer, director, or shareholder in his respective capacity as such shall continue to be available for a period of two years following the date of dissolution and shall terminate absolutely thereafter; provided, however, that nothing in this paragraph shall terminate or limit any remedy, claim, or cause of action:

(a) Under or pursuant to the first two paragraphs of this section;

(b) Under or pursuant to section 48(c) of this Act, or for any right to contribution that any director liable under section 48(c) of this Act may have; or

(c) Against any director by any shareholder of the dissolved corporation, if the shareholder (1) had no actual knowledge of the dissolution, (2) was given no notice of intent to dissolve, and (3) received no distributions to which he was entitled by virtue of the dissolution of the corporation.

General Exceptions

Notwithstanding any provision to the contrary contained herein, the following remedies, claims, and causes of action shall not terminate or be affected otherwise either by dissolution of a corporation or by expiration of the two-year continuation period:

(a) Those to foreclose or enforce a lien, mortgage, security interest, or other encumbrance to which the real or personal property of the corporation was subject on the date of dissolution, against real or personal property;

(b) Those to clarify title to real or personal property (1) by any officer or director holding such property as a trustee of the assets of the corporation, or (2) by any shareholder to whom such property has been distributed in liquidation of the corporation; and

(c) Those by any officer or director as trustee of the assets of the corporation or by distributee shareholders as a class to collect a valid and final judgment obtained by the corporation against a judgment debtor.

B. Comment on the Statutory Proposal

The drafters of the proposed section 105 have suggested a solution that balances the two competing goals under the survival statute—providing a certain and definite cut-off point for the bringing of claims against officers, directors, and shareholders on the one hand, and the protection of claimants, whether the corporation, its officers, directors, or shareholders, or third parties suing those persons, on the other. This balance is not provided by the present survival statute, which by its express terms favors certainty and definiteness at the expense of adequate protection for claimants. Nor is the balance provided by courts applying section 105; the courts have created broad exceptions that when carried to their logical conclusions upset the balance in favor of the other extreme—complete protection with no certainty and definiteness. In order to assure that both policy goals are advanced, the proposed statute expressly incorporates a modified rule of abatement and theories of recovery similar to the equitable theories.

Unlike the present survival statute that neither creates nor destroys any cause of action, the proposed statute expressly creates new causes of action with the intent to abolish the equitable theories of recovery. The intent of the drafters is to abolish the use of any trust fund theory, fraudulent conveyance theory, or piercing the veil theory as a means of recovery against officers, directors, and shareholders of dissolved corporations. Similarly, unlike the survival statute that only postponed the common law rule of abatement, the present statute abolishes the common law rule and substitutes a modified version of that rule. The specific provisions of the proposed section 105 are explained below.

(1) Claims By and Against the Corporation

This, the first of three divisions of the proposed section 105, is a statutory replacement for both the common law rule of abatement and the equitable theories of recovery. The first sentence is a modified rule of abatement that terminates all remedies, claims, and causes of action that are not initiated by legal action prior to dissolution. No abatement occurs if a legal action or proceeding is commenced prior to dissolution because claimants with pending legal actions or proceedings are protected by section 92 of the Model Business Corporation Act,[175] one of the two-step dissolution provisions. As a prerequisite to dissolution section 92 requires that certain corporate officers represent that the corporation has provided for the satisfaction of potentially successful claimants with pending legal actions or proceedings. Section 48(c), which imposes personal liability on directors of any corporation that fails to satisfy the claims of known creditors, should give claimants with pending legal actions a source of recovery if the representations made by the officers as a prerequisite to final dissolution are false.[176] The proposed section 105 does not continue the existence of a corporation beyond dissolution because fictional continuation is no longer needed to permit the winding-up of the corporation, which under two-step dissolution occurs before final dissolution.

The first clause of the second sentence in paragraph one establishes new causes of action that abolish all other forms and theories of recovery against officers, directors, or shareholders for remedies, claims, and causes of action that would have been available directly

175. MODEL ACT, *supra* note 6, § 92.
176. *Id.* § 48(c).

against the corporation but for its dissolution. The theories abolished include, but are not limited to, the trust fund theory as applied to shareholders, the fraudulent conveyance theory to the extent that it allowed recovery from recipient shareholders,[177] and piercing the corporate veil theories used to reach assets in the hands of recipient shareholders or parent corporations.[178]

Under the statutory formulation, an officer or director may be sued in his own name if, either by statute or common law of the local jurisdiction, he is a liquidating trustee. This eliminates the need to continue the dissolved corporation in order to allow suit in the corporate name. The second paragraph provides that the liquidating trustee is not liable personally for distributing the assets incorrectly, as he would have been under the equitable trust fund theory.[179] The liquidating trustee is liable in a representative capacity only, and his liability is limited to the value of any assets held by him on the day he has actual notice of the suit against him. Thus, from the day he has actual notice until judgment is satisfied, the liquidating trustee owes the limited duty of not diminishing the value of those assets. Although the maximum liability is the value of the assets on the day of actual notice, the liability is not personal; thus the claimant can seek to satisfy his judgment only from the assets held by the trustee, except that if the trustee breaches his duty not to diminish the value of the assets, personal liability attaches for the prohibited diminution. Furthermore, the claimant may not be able to reach assets to which other creditors or claimants have prior or equal claims. To protect the trustee in this situation, no personal liability is imposed for proper division of the available assets to all creditors and all claimants whose pending suits the liquidating trustee has actual knowledge of on the date of distribution.

Under the two-step dissolution process, the liquidating trustee should have no assets in his possession or under his control after the date of dissolution. Thus, this liability will attach only under exceptional circumstances. It is not impossible, however, that a director or officer will hold assets following dissolution. This provision is designed to overrule the result in a reported case in which claimants who filed suit after expiration of the survival period were denied recovery even though the directors continued to hold and invest assets in trust for shareholders following dissolution.[180] The liquidat-

177. *See* notes 10 & 116-18 *supra.*

178. *See* text accompanying notes 104-09 & 112 *supra.*

179. *See* text accompanying notes 16-21 *supra.*

180. Johnson v. Helicopter & Airplane Serv. Corp., 404 F. Supp. 726 (D. Md. 1975)

ing trustee may also have assets in his possession when dissolution occurs by a decree of court, as described in the first sentence of the section, or by expiration of the duration of the corporation rather than by voluntary dissolution pursuant to the two-step dissolution provisions. The liability of officers and directors in a representative capacity will be especially useful for such dissolutions.

The shareholder liability under the present statutory formulation is personal, unlike the trust fund theory liability, which travelled with the assets.[181] The shareholder is liable personally for the value of what he received on the date of dissolution. What the shareholder does with the assets is therefore irrelevant. This provision eliminates both the possibility and the need for tracing assets into the hands of certain transferees, as was required for recovery under the equitable trust fund theory.[182]

The liability provisions of the first and second paragraphs provide some protection for all claimants, whether their claims arise before or after dissolution, if the claimants are entitled to recover from assets held by the offending corporation when it ceased doing business. If the corporation was insolvent, no liability arises. If, however, the corporation had enough assets to make distributions to the shareholders, then the liability does arise. Corporations that are likely to make distributions substantial enough to warrant post-dissolution suit are those that have sold virtually all their assets to third parties. When a third party purchases a significant amount of the operating assets of the dissolving corporation, the third party transferee probably will use stock or cash to make the purchase. When the transferee uses stock to make the acquisition, the transaction, assuming it is not a statutory merger or consolidation, normally will be a de facto merger or will effect a continuation of the transferor dissolving corporation.[183] The transferee corporation consequently will be held liable for claims against the transferor corporation whether arising before or after dissolution. When the consideration is cash rather than stock, transferees traditionally have not been held liable. A trend has developed, however, that imposes liability on cash purchasing transferees who continue to operate the businesses of their transferors.[184]

The proposed statute affects traditional notions in two respects.

(construing the Delaware survival provision, 8 DEL. CODE ANN. tit. 8, § 278 (1975), which is comparahle to MODEL ACT § 105).

181. *See* text accompanying notes 11-15 *supra*.

182. *See* note 12 *supra*.

183. *See* 30 VAND. L. REV. 238 (1977).

184. *Id.*

First, many corporate transferees, by recognizing the present trend toward transferee liability, might agree to assume the liability that probably would be imposed even without such an agreement. If the transferor corporation procures an express assumption of liability, then the officers, directors, and shareholders of the transferor will be released from all liability imposed by the first division of section 105. This release provision gives officers, directors, and shareholders an opportunity to secure almost absolute certainty and definiteness and, at the same time, it adequately protects claimants. The transferee corporation will be in a good position to insure against the claims assumed.[185] The adjustment in purchase price that a transferee is likely to demand in exchange for assuming the contingent claims should represent the actuarial cost of insuring against the assumed claims. This is a cost that the transferor would have borne had it continued in existence, and it is not unreasonable to require that the transferor's distributee shareholders bear that cost before terminating the transferor corporation's existence.

Second, the proposed statute makes it clear that, absent an express assumption of liability by a transferee, the shareholders of the dissolved transferor will be liable to claimants for the value of stock received by them in a stock purchase of the assets. This liability attaches notwithstanding the transferee liability that may exist even without the express assumption of liability. Thus, the present statute produces the same legal result in stock-for-assets purchases and in cash-for-assets purchases.

(2) Claims Against the Officers, Directors, and Shareholders

The second division of the proposed section 105 is designed to provide officers, directors, and shareholders with maximum certainty about their liabilities following dissolution of their corpora-

185. Tail insurance often is available in directors' and officers' liability coverage policies. Typically, if coverage under such a policy is terminated for various specified reasons, the individual director or officer is entitled to continue his coverage in effect for a few more years. This enables an officer or director who ceases to act in his corporate capacity to carry insurance covering claims that arise after he leaves his corporate position. Although similar coverage apparently is unavailable to insure former directors, officers, and shareholders of a transferor corporation against claims that would have been brought against that corporation directly had it not dissolved and liquidated, such coverage potentially could be negotiated with a corporation's liability insurance carrier either by a far-sighted transferor corporation or by a transferee corporation under a contractual obligation to provide the coverage. *See generally* Johnson & Stern, *Significant Provisions in a Professional Liability Policy*, in PROFESSIONAL LIABILITY INSURANCE FOR LAWYERS AND ACCOUNTANTS HANDBOOK 9-55 (1976); Marquis, *The Claims Made Policy—The St. Paul's Experience*, RISK MANAGEMENT 28 (July 1977).

tion. The second division sets forth a general rule that all remedies, claims, and causes of action abate if no action is commenced thereon within two years after final dissolution. Any claim, remedy, or cause of action against any officer, director, or shareholder is abated if it has any connection with the corporate business or the winding-up of the corporation. This includes any act, omission, or breach of duty whether committed within or outside the scope of the defendant's duties, or whether characterized as within the defendant's capacity as an officer, director, or shareholder or characterized as against the defendant individually. Remedies, claims, and causes of action, however, that are truly by or against the defendant as an individual, who just incidentally happens to be an officer, director, or shareholder, do not abate. Causes of action against officers, directors, and shareholders that do not abate include actions for breach of contracts upon which the defendant is personally liable in his individual capacity and actions for torts personally committed by the defendant that had no direct connection with the defendant's position with the corporation. For example, an action for negligence arising when the defendant caused an accident while driving a company car on official business would not abate, nor would an action arising when the defendant personally left a foreign object in the body of a patient while acting as a physician employed by the hospital corporation for which the defendant also happens to be an officer, director, or shareholder.

Those actions that abate include breaches of contracts that the defendant signed in his capacity as an officer, director, or shareholder only, and actions for torts committed by the defendant in the interest of the corporation, or against the interest of the corporation and in his personal interest but accomplished through his position with the corporation. These latter actions might include an action for actual or constructive fraud in concealing the assets of the corporation, an action against the defendant for inducing the corporation to breach a contract, an action against the defendant for fraudulently dissuading the claimants from filing suit in a timely manner, and an action for breach of fiduciary duty by failing to pay certain claimants, creditors, or shareholders.

The abatement occurs two years after the date of dissolution. This gives claimants with actions against officers, directors, and shareholders based upon acts, omissions, or breaches of duty two years to act upon their claims. Thus, officers and directors would need tail insurance covering directors and officers liabilities for only a two-year period following dissolution.[186] After expiration of the two-year continuation, most liabilities of officers and directors that arose as a result of their having been connected with the dissolved corporation will end. Certain specific exceptions to the general rule of abatement are listed. Subdivision (a) excepts from abatement those causes of action created by the first division of section 105 in an effort to strike a compromise between certainty and definiteness, on the one hand, and protection of creditors, claimants, and shareholders with claims against those officers, directors, or shareholders, on the other.

Subdivisions (b) and (c) are designed to extend the actionability of a remedy, claim, or cause of action that arises because the two-step dissolution mechanism for protecting creditors, claimants, and shareholders has failed or has been subverted. Section 48(c) of the Model Act creates liability for directors of a corporation that fails to satisfy any known obligation or liability. Among the known liabilities are those arising from suits pending on the date of final dissolution. Section 48(c) therefore makes directors liable to creditors and claimants who the corporation represented it had satisfied prior to final dissolution and as a condition of final dissolution pursuant to section 92 of the Model Act. Section 92 also requires that the corporation represent that shareholders have received in distribution those assets remaining after satisfaction or provision for satisfaction of the creditors and claimants with pending legal actions. Subdivision (c) excepts from termination any remedy, claim, or cause of action that a shareholder might have against an officer or director if the officer or shareholder neglects that shareholder in the liquidation and dissolution of the corporation. Subdivision (c) applies if the shareholder receives no notice prior to final dissolution and if the shareholder receives no liquidating distribution either in person or through the agency of the state treasurer under section 104 of the Model Act.[187] Thus, the shareholders protected by subdivision (c) are those who clearly went unprotected by the proper mechanism for that protection, section 92.[188] If the shareholder receives notice of either the intent to dissolve or the final dissolution, he must guard his own interests in the dissolving corporation. Subdivision (c) does not protect this shareholder, who must remedy any wrongs committed against him within the two-year period. The only time limits on

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186. *See* note 185 *supra*.

187. MODEL ACT, *supra* note 6, § 104.

188. Subdivision (c) is designed to resolve the problem that led the Seventh Circuit to create the broadest exceptions to application of the survival statute and its bar. *See* text accompanying notes 146-51 *supra*.

the bringing of remedies, claims, and causes of action pursuant to subdivisions (b) and (c) are the limits imposed by applicable statutes of limitations.

(3) General Exceptions

The third division of the proposed section 105 creates certain super-exceptions to application of the section. Courts recognized that certain remedies, claims, and causes of action did not fit comfortably within the framework of the survival statute and its bar.[189] The drafters thought those remedies, claims, and causes of action were outside section 105 and what they intended it to accomplish. Subdivision (a) contemplates remedies, claims, and causes of action following dissolution against property that has been distributed. Subdivisions (b) and (c) contemplate legal actions and proceedings that will be initiated or defended by the interested shareholders or by a liquidating trustee in a representative capacity. Thus, in none of the three subdivisions should there be any need to join the corporation as a named party.

Subdivision (a) permits foreclosure proceedings against real property to enforce any security interest, lien, mortgage, or other encumbrance entitled to such relief. Courts carved out this exception to abatement in cases brought under the survival statute. Although subdivision (a) does not authorize actions for deficiency judgments, foreclosure certainly should be maintainable whenever default occurs, regardless of dissolution or expiration of any survival period or continuation period. The same is true of actions to secure rights in personal property; thus subdivision (a) expressly excludes remedies, claims, and causes of action relating directly to interests in the personal property itself, as opposed to causes of action for deficiency judgments and other relief directed not against the property but against the defaulting debtor.

Courts have been reluctant to limit access to courts for the purpose of removing clouds on title to real property.[190] Clouds on title that arise while a corporation is holding property may go unnoticed until years later. Similarly, a corporation may decide not to clarify a cloud on title prior to dissolution. A corporation should be allowed to pass clouded property to its shareholders who can then clarify title. This would avoid lengthy litigation prolonging the corporation's winding-up period and delaying final dissolution. Subdivision (b) recognizes the passage of title to the shareholders upon

189. *See* notes 84 & 156 *supra* and accompanying text.
190. *See* text accompanying notes 154-57 *supra*.

dissolution—shareholders should be as unhampered by dissolution as would any other transferee. Thus, subdivision (b) excepts from termination actions to clarify title—and extends this exception to personal property as well as to real property.

Subdivision (c) allows the collection of corporate judgments no matter how long that collection process may last, thus facilitating winding-up and early final dissolution. Executions and garnishments are among the remedies that are authorized, and creditor's bills are typical actions that might be brought by shareholders or a liquidating trustee.

In general, the proposed section 105 is intended to be a comprehensive statute governing all post-dissolution legal actions and proceedings against dissolved corporations, their officers, directors, and shareholders. Whenever there is doubt about the applicability or construction of section 105, doubt should be resolved in favor of the exclusiveness of section 105 and in favor of termination of any remedy, claim, or cause of action not expressly excepted from termination.