Effect of Corporate Dissolution on Products Liability Claims

Harry G. Henn

John R. Alexander

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.cornell.edu/clr/vol56/iss6/1
EFFECT OF CORPORATE DISSOLUTION ON PRODUCTS LIABILITY CLAIMS*

Harry G. Henn† and John R. Alexander††

TABLE OF CONTENTS

I. THEORIES OF PRODUCTS LIABILITY CLAIMS ........................................ 867
   A. Breach of Warranty ............................................................................. 868
   B. Negligence ...................................................................................... 871
   C. Strict Liability .................................................................................. 873
   D. Unitary Concept ............................................................................... 878

II. CORPORATE DISSOLUTION .................................................................. 879
   A. Types of Corporate Dissolution ...................................................... 879
   B. Dissolution Patterns ......................................................................... 879
      1. At Common Law and in Equity .................................................. 879
      2. Under Model Business Corporation Act ...................................... 882
      4. Under Other Corporate Statutes ............................................... 887

III. PRODUCTS LIABILITY CLAIMS AGAINST DISSOLVED CORPORATIONS .......... 888
   A. Differentiating Between Pre-"Dissolution" and Post-"Dissolution" Claims .. 888
   B. Liabilities for Pre-Dissolution Claims ............................................. 890
      1. Liabilities of Participating Corporate Personnel for Pre-Dissolution
         Claims ............................................................................................ 890
      2. Liabilities of Dissolved Corporation for Pre-Dissolution Claims ...... 890
      3. Liabilities of Distributing Directors for Pre-Dissolution Claims ...... 892
      4. Liabilities of Recipient Shareholders for Pre-Dissolution Claims ..... 894
   C. Liabilities for Post-Dissolution "Claims" .......................................... 896
      1. Liabilities of Participating Corporate Personnel for Post-Dissolution
         "Claims" ......................................................................................... 897
      2. Liabilities of Dissolved Corporations for Post-Dissolution "Claims" ... 898
         a. Under Model Business Corporation Act .................................... 899
         b. Under New York Business Corporation Law ............................ 902
         c. Under Other Corporate Statutes ............................................. 906

* © Copyright 1971 by Harry G. Henn and John R. Alexander. All rights reserved.
† Edward Cornell Professor of Law, Cornell University. A.B. 1941, New York University;
Products liability provides the subject matter for a proliferating mass of legal literature. Commentators continually score the anomalies and inconsistencies of the theories of products liability claims and urge adherence to some unitary concept. A plethora of court decisions only adds to the confusion.

Little, if anything, however, has been published on the effect of dissolution of a corporation which manufactures a defective product on pre- and post-dissolution products liability claims against (1) the corporate personnel who participated in the design, manufacture, or sale of the defective product; (2) the dissolved corporation; (3) the directors who were responsible for the distribution of the corporation's "net assets" to shareholders; and (4) the shareholders who received such assets. The meager body of judicial decisions on the effect of corporate dissolution further complicates the problems created by the products liability cases.

Compounding the confusion are the contributions of the commercial law codifiers who drafted Article 2 of the Uniform Commercial Code on sales, the torts re-restaters who drafted section 402A of the Restatement (Second) of Torts, and the corporation lawyers who, prob-
ably unaware of all the implications of this codifying and re-restating, very explicitly dealt in their corporate statutory revisions with pre-dissolution claims but, as far as post-dissolution claims were concerned, maintained, at best, a Delphic, and at worst, a Sphinx-like, stance.

I

Theories of Products Liability Claims

There are two distinct theories and one hybrid theory of products liability claims:  

(1) breach of warranty;  
(2) negligence; and  
(3) strict liability—a hybrid.

The respective theories are not always clearly distinguishable because of their considerable overlap and mutual influence. Breach of warranty is subject to several variations in different jurisdictions. The negligence theory has received the most consistent treatment. Strict liability has not even been recognized in many jurisdictions, has been treated as a tort theory in several jurisdictions, and has been more or less assimilated into the breach of warranty theory in a few jurisdictions. All of the theories, however, share the common goal of achieving the most satisfactory allocation of risks by balancing the interests of suppliers, manufacturers, wholesalers, retailers, consumers, users, and even innocent bystanders.

This article will deal primarily with those aspects of the theories of products liability claims that are relevant to the effect of corporate dissolution on such claims. Under all of the theories, consequential damages caused by the defect, including personal injuries proximately

---


There is also a theoretical possibility of liability for deceit based on false statements by sellers. Fraud statutes of limitations usually begin to run when the fraud was or should have been discovered. E.g., N.Y. Civ. Prac. Law § 213(9) (McKinney Supp. 1970). But see id. § 209(6).

6 Pasley, supra note 1, at 241.

7 See notes 35-50 and accompanying text infra.


9 Pasley, supra note 1, at 261; see text accompanying notes 63-69 infra.
resulting therefrom, would be included in recoverable damages.\(^\text{10}\) Since this is a constant, it can be excluded from further consideration. Of relevance, under the respective theories, are the following issues:

(1) Who might be the claimant?
(2) Against whom might the claim be asserted?
(3) When would such claim or claims accrue?
(4) What would be the applicable period or periods of limitations?

A. **Breach of Warranty**

The breach of warranty theory is difficult to categorize. Although warranty is part of the law of sales and the broader law of contracts, its historical origins are in tort,\(^\text{11}\) and the same sale of a defective product might also involve negligence or strict liability or both. The elements of the cause of action are sale by the seller (the warrantor) of a defective product and personal injury to the buyer, his family, household, or guest, and, *dubitante*, others (the warrantees).

**Claimants.** The Uniform Commercial Code, although adopted in every American jurisdiction except Louisiana, has achieved less than complete uniformity.

Some thirty-one states, the District of Columbia, and the Virgin Islands\(^\text{12}\) have adopted Alternative A of section 2-318, which provides that:

A seller's warranty [of merchantability, including fitness for the ordinary purposes for which such goods are sold\(^\text{13}\)] whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by

\(^{10}\) Uniform Commercial Code § 2-715 [hereinafter cited as UCC] (consequential damages resulting from seller's breach of warranty including injury to person or property proximately resulting from any breach of warranty) (breach of warranty theory); Restatement (Second) of Torts §§ 430-62 (1965) (negligence theory); id. § 402A (strict liability theory); see Annot., 29 A.L.R.3d 1021 (1970) (allowance of punitive damages in products liability cases).


\(^{13}\) UCC §§ 2-314(1), (2)(c).
the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.\(^{14}\)

Under the much older privity requirement, the warranty runs from a seller only to his immediate buyer.\(^{15}\) Although section 2-318 "extends" the warranty to the family, household, and guests of the buyer, this extension is conservative when compared with some cases which have held that the warranty "runs with the goods."\(^ {16}\) Section 2-318, however, was not intended to enlarge or restrict the developing case law on whether the seller's warranties extend to persons other than the immediate buyer.\(^ {17}\) A few states have expressly inserted such qualifying language in their versions of this Code section.\(^ {18}\)

California and Utah, in adopting the Code, completely omitted section 2-318. Some twelve other states enacted other alternatives for section 2-318, or a variation, most to the effect that the warranty extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is personally injured by breach of the warranty.\(^ {19}\)

Depending on the local statutory formulation, and its construction, those who would have a claim for personal injuries resulting from the defective product usually include the buyer and his family, household, and guests, and might also include other users or even bystanders.\(^ {20}\)

---

14 Id. § 2-318 (Alternative A).  
15 Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842); see Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). "The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discussion." Id. at 180, 174 N.E. at 445 (Cardozo, C.J.). See also Annot., 75 A.L.R.2d 39 (1961).  
17 UCC § 2-318, Comment 3. Accord, N.Y.U.C.C. § 2-318 (McKinney 1964) (New York Annot.): The Code is silent on the question of the liability of manufacturers or wholesalers to the ultimate consumers. In short, the Code enlarges the number of prospective plaintiffs in a warranty action but it does not increase the number of potential defendants. In no way is the Code intended to limit the extension of warranty protection by the courts to a greater number of plaintiffs or the expansion of the manufacturer's liability . . . .  
Persons Liable. The manufacturer of a defective product would be liable for breach of the warranty to his buyer, probably a wholesaler, who in turn would be liable to the retailer, who would then be liable to the ultimate purchaser. If the injured claimant were some other user or a bystander, warranty protection would be less likely. If a defective component part were supplied by another, the latter would be liable to the manufacturer, and possibly to others. Ultimately responsible would be the manufacturer, who might be liable directly to the injured claimant. Corporate personnel selling products in their representative capacities, assuming they did not make personal misstatements or warranties, or engage in fraud, would not be personally liable for breach of the corporation's warranty.

942 (1969) (person who, by his culpable act, whether it stems from negligence or breach of warranty, places another person in a position of imminent peril, may be held liable for any damages sustained by rescuer attempting to aid imperiled victim). See Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965) ("mere bystander" who was brother of purchaser); Greenberg v. Lorenz, 9 N.Y.2d 195, 175 N.E.2d 779, 218 N.Y.S.2d 39 (1961) (modifying rule that there can be no warranty, express or implied, without privity of contract, in favor of injured infant son of purchasing father in action against retail food dealer); Comment, The Bystander's Liberation Front—U.C.C. § 2-318 or Strict Liability, 19 U. KAN. L. REV. 251 (1970). For third-party practice, possible cross-claims, claims-over, impleading, and vouching-in, see notes 21-22 infra. See also Gentry v. Wilmington Trust Co., 321 F. Supp. 1379 (D. Del. 1970); UCC § 2-607(5).


Each seller in the distributive chain makes some implied or express warranty to his immediate purchaser. Separate claims, for example, by the injured person against the retailer, then by the retailer against the wholesaler, and finally by the wholesaler against the manufacturer of the completed product, and possibly of a component thereof, can be consolidated under modern third-party practice, cross-claims, impleading, and vouching-in. See Shanker, supra note 2, at 776. As to the res judicata effect of a judgment against one person in the distributive chain on a subsequent action against another in the distributive chain, see Annot., 3 A.L.R.3d 518 (1970).

22 Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). An intriguing question is whether new causes of action against the manufacturer arise at each step in the distributive chain on respective tenders of delivery. As far as the warranties of the manufacturer are concerned, any cause of action against it would probably accrue when tender of delivery is made by it to the wholesaler and would extend beyond the immediate buyer to the retailer, consumer, and the latter's family, household, and guests, and, in some jurisdictions, to other persons suffering personal injury from breach of warranty. See also note 24 infra.

23 A.B. Corp. v. Futrovsky, 259 Md. 56, 267 A.2d 130 (1970). An officer who, with authority, contracts in behalf of his corporation is not personally liable on the contract unless he is also a party or guarantor. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 250, at 447-48 (2d ed. 1970). Nor is a director personally liable under traditional contract
Accrual of Claims. Under the Uniform Commercial Code, the cause of action for breach of warranty accrues, regardless of the aggrieved party's lack of knowledge of the breach, when "tender of delivery is made," except that where a warranty "explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."24

Applicable Periods of Limitations. For breach of warranty, the Uniform Commercial Code prescribes a four-year period of limitations from the time of accrual of the cause of action.26 The Code expressly does not alter the law on tolling of the statute of limitations.28 Although such provisions follow many patterns, some states expressly provide for the tolling of statutes of limitations in the case of infancy or other disability of the plaintiff.27

B. Negligence

A manufacturer of defective products is liable in negligence to those whom it should expect will use the products or be endangered by law principles, unless he has personally bound himself as party, surety, or guarantor. Id. at 430. See also notes 31 & 41 infra.

24 UCC § 2-725(2). See text accompanying note 22 supra; text accompanying notes 43-58 infra. Quaere, as to the meaning of "explicitly." Some commentators have urged that warranties, inasmuch as they provide recovery for personal injury, should be considered prospective and breached when injury occurs. Donnelly, Commercial Law, 1969 Survey of New York Law, 21 SYRACUSE L. REV. 589 (1969); 21 SYRACUSE L. REV. 1508, 1512 (1970). At least one jurisdiction which has adopted the UCC, Alabama, has provided that a cause of action for damages for injury to the person in the case of consumer goods shall accrue when the injury occurs. ALA. CODE tit. 7A, § 2-725(2) (1966). Connecticut applies the shorter of two alternative periods of limitations: (1) three years from date of act; or (2) two years from date of physical injury. CONN. GEN. STAT. ANN. § 52-584 (Supp. 1970). California, in adopting the Code, originally omitted § 2-725, believing there was no need for uniformity in statutes of limitations, and such matters were best governed by local policy. CAL. COMM. CODE § 2725, Comment 2 (West 1964). In 1967 California adopted § 2-725 without change. CAL. COMM. CODE § 2725 (West Supp. 1971).

26 UCC § 2-725(1). Some jurisdictions have adopted variations, e.g., Mississippi (six years), Oklahoma (five years). 1 UNIFORM LAWS ANN. § 2-725, at 499-500 (1968). Connecticut law provides that an action to recover damages shall be brought within two years from the date when the injury is first sustained or discovered, except that no such action may be brought more than three years from the date of the act or omission complained of. CONN. GEN. STAT. ANN. § 52-584 (Supp. 1970). Louisiana, which has not adopted the UCC, has a 10-year statute of limitations. LA. CIV. CODE ANN. arts. 3544-47 (West 1953).

27 Compare N.Y. CIV. PRAC. LAW § 208 (McKinney 1963) and CAL. CIV. PRO. CODE § 352 (West Supp. 1971), with PA. STAT. ANN. tit. 12, § 35 (1959), which provides no tolling for personal injury actions. Absent a statutory provision for tolling, there should be none. Lametta v. Connecticut Light & Power Co., 139 Conn. 218, 92 A.2d 781 (1952) (no tolling for infancy of then one-year statute of limitations from date of act or omission for personal injuries caused by negligence).
their probable use, for any resultant physical harm. Privity is not required, but proof of the usual elements of a claim for negligence—duty, lack of due care, proximate cause, and damage—with the burden of proof on the plaintiff, is required. Among the possible defenses are contributory negligence and assumption of the risk.

Claimants. Under the negligence theory, claimants are not limited to the buyer, his family, household, and guests, but, as stated above, include anyone physically harmed by the use of the product whom the manufacturer should have expected to use the product or to be endangered by its probable use.

Persons Liable. The person or persons who were negligent (the tortfeasor or tortfeasors) obviously are primarily liable, and their liability is not affected by corporate dissolution. For any negligence of its employees, the manufacturer would be vicariously liable under the doctrine of respondeat superior.

Accrual of Claims. Causes of action for personal injury resulting from negligence usually accrue when the physical harm occurs.

Applicable Periods of Limitations. The period of limitations...
would be the one applicable to causes of action for personal injuries resulting from negligence, for which most states prescribe two-, three-, or four-year periods, subject, of course, to possible tolling for infancy or other disability of the plaintiff.

C. **Strict Liability**

A growing number of jurisdictions, by judicial decision, have imposed a special liability on the sellers of certain types of products for physical harm to users and consumers. As provided in the *Restatement (Second) of Torts*:

(1) One who sells any products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

---


34 See note 27 supra.

35 *Restatement (Second) of Torts* § 402A(1), comment b (1965). Although this concept originally covered only food for human consumption, it was first expanded to include products intended for intimate bodily use, and was later extended to encompass any product which, should it prove to be defective, may be expected to cause physical harm to the consumer or to his property. See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Hoffman v. Miscricordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965); Annot., 15 A.L.R.3d 1057, 1071-73 (1967).

Neither negligence nor privity is required, and it is irrelevant that:

(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.\(^7\)

The elements of the cause of action are the sale by the defendant in the course of business of a product in a defective condition which is unreasonably dangerous to the user or consumer with resultant physical harm suffered by such person from such defect.

Although "warranty" language is found in some opinions,\(^8\) the liability is, according to the Restatement, one of strict liability in tort.\(^9\) Some commentators, preoccupied with negligence concepts, suggest that the defenses of contributory negligence and assumption of the risk might be applicable.\(^10\)

Claimants. Any ultimate user or consumer, or possibly even bystanders and others,\(^11\) who suffers physical harm caused by any unreason-


\(^8\) Restatement (Second) of Torts § 402A, comment m (1965).

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.


\(^11\) Restatement (Second) of Torts § 402A, caveat (1965): "The Institute expresses no opinion as to whether the rules stated in this Section may not apply . . . to harm to
ably dangerous defective product has a claim against the seller for damages for such physical harm.

*Persons Liable.* The seller of the product is liable under the strict liability theory. Corporate personnel participating in the design, manufacture, or sale of the product presumably are not liable. 42

*Accrual of Claims.* Accrual of a cause of action depends on whether the court assimilates the strict liability theory into the breach of warranty theory or the negligence theory. By breach of warranty or law of sales analogy, the cause of action accrues when "tender of delivery is made." 43 Under tort principles, the cause of action accrues when the physical harm occurs. 44

Courts in only a few jurisdictions have passed on this question. The supreme courts of New Jersey 45 and Wisconsin, 46 an intermediate appellate court in Illinois, 47 and a United States District Court in Oregon 48 applying Oregon law, have applied tort principles to hold that the cause of action under the strict liability theory does not arise until the time of physical injury. A Tennessee Supreme Court holding to the contrary 49 was overruled by statute.50

Also to the contrary is the controversial New York Court of Ap-
peals holding in *Mendel v. Pittsburgh Plate Glass Co.*51 There the product was sold and installed in 1958, prior to the effective date in New York of the Uniform Commercial Code, and the injured plaintiff suffered physical harm in 1965. The action was commenced in 1967, alleging causes of action sounding in negligence and based upon alleged breach of warranty. The lower courts held that the cause of action for breach of warranty was barred by the then "six year from the time of sale" statute of limitations. The New York Court of Appeals affirmed. The majority of the court construed its earlier holdings52 as having extended the New York concept of implied warranty by eliminating the requirement of privity, rather than as having established, as other jurisdictions had, a new action in tort under the strict liability theory,53 stating further:

We would merely add that both parties appear to agree, and we believe correctly, that strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action. If we were to adopt a three-year limitations period from the time of the injury, then we would create a situation where at least those plaintiffs not in privity covered by section 2-318 of the Uniform Commercial Code, would be entitled to pick and choose between the code's four-year-from-the-time-of-the-sale, and our three-year-from-the-time-of-the-injury, limitations period, depending upon which, under the facts of a given case, would grant them the longest [sic] period of time to sue. Although it is true that a plaintiff may have two different theories of recovery involving the same wrong with different limitation periods (e.g., negligence and breach of warranty), it would be absurd to have two different periods of limitation applicable to the same cause of action, with the same elements of proof, complaining of the very same wrong.

In conclusion, if the case presented merely an open policy question, which as evidenced from the discussion above we do not believe, we would nevertheless affirm. We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum. Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance. It is our opinion that to guard against the unfounded actions that would be brought many years

after a product is manufactured, we must make that presumption conclusive by holding the contract Statute of Limitations applicable to the instant action and limit appellants to their action in negligence.54

In view of this case, New York law appears to be that a claim based on strict liability, since it is merely a different way, in the absence of privity, of describing a cause of action for breach of warranty, accrues when “tender of delivery is made.”55

The three dissenting judges recognized strict liability as an independent theory, contending that such a cause of action accrued at the time of physical injury.56

The Mendel case may not prove to be a trustworthy precedent because of the close division of the court, the questionable reasoning of the majority, their debatable balancing of the interests of sellers and injured persons, the vigor of the dissent, the contrary holdings in other jurisdictions,57 and the critical comments on the holding.58

Applicable Periods of Limitations. The question of the period of limitations applicable to a claim under the strict liability theory, like the question of when the cause of action accrues, depends on whether the court applies the law of contracts (sales) or the law of torts (negligence). If the Uniform Commercial Code is applied, the period is four years from the time when “tender of delivery is made.”59 If tort princi-

54 25 N.Y.2d at 345-46, 253 N.E.2d at 210, 305 N.Y.S.2d at 494-95 (Scileppi, Burke, Bergan & Jasen, JJ.). The majority opinion to the contrary notwithstanding, both parties did not agree that strict liability and implied warranty described a single cause of action. The defendant's brief devoted an entire point, six pages, to the proposition that “Plaintiffs should not be permitted to assert causes of action for 'strict liability in tort' under the guise and pleading of causes of action for breach of implied warranty,” arguing that breach of warranty and “strict liability in tort” were “separate and distinct theories of liability, and they should not be confused with each other.” Brief for Defendant at 10-15, Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

55 25 N.Y.2d at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 494, quoting UCC § 2-725. The majority, while assimilating strict liability into breach of warranty, expressly recognized negligence as a distinct cause of action. In short, the majority recognized two separate theories: (1) breach of warranty, arising on tender of delivery and subject to the four-year [UCC] statute of limitations; and (2) negligence, arising at the time of physical injury and subject to the three-year statute of limitations. See Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964). See also Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936).

56 25 N.Y.2d at 346, 253 N.E.2d at 211 (Brettel, J., Fuld, C.J. & Gibson, J., dissenting).

57 See notes 45-50 supra.


59 See notes 24-27 & 49; text accompanying notes 51-55 supra. Connecticut bars actions
Ples are found to control, the period would be that applicable to causes of action for personal injuries—usually two, three, or four years,\textsuperscript{60} commencing when the physical harm occurs.\textsuperscript{61}

Whatever the period of limitations, it, of course, would be subject to possible tolling for infancy or other disability of the plaintiff.\textsuperscript{62}

\textbf{D. Unitary Concept}

Commentators on products liability increasingly have advocated synthesizing a unitary concept, but there is still no consensus as to what that concept should be.\textsuperscript{63}

The three theories coexist because each has its limitations: breach of warranty is limited by possible disclaimers and vestigial privity requirements;\textsuperscript{64} negligence by its burden of proof and defenses;\textsuperscript{65} and strict liability by its possible applicability to only certain kinds of products\textsuperscript{66} and limitations to “consumers” and “users” as potential claimants.\textsuperscript{67}

The elements of the cause of action under the unitary concept would depend on the eventual definition of that concept, as would the time of the accrual of the cause of action.\textsuperscript{68} Since the eventual theory probably will not be based on fault, the liabilities of the potential defendants should not be open-ended, but should be subject to a relatively short statute of limitations,\textsuperscript{69} with shorter periods of limitation for those more remote in the distributive chain.

Until the products liability experts, with their contracts (sales) and
torts (negligence or strict liability) expertise, reach some conclusion, the puzzled corporation lawyers, concerned with the effect of corporate dissolution on products liability claims, must base their analyses on the existing theories of products liability claims.

II

CORPORATE DISSOLUTION

A. Types of Corporate Dissolution

Corporate dissolution statutes explicitly deal with the recognition and barring of pre-dissolution claims, but with a few, not particularly well-drafted exceptions, fail to mention post-dissolution claims.

Corporate statutes provide for various, somewhat overlapping types of corporate dissolution: (1) voluntary or nonjudicial dissolution, sometimes with judicial supervision of liquidation; (2) involuntary or judicial dissolution; (3) expiration of duration; (4) forfeiture, cancellation, or annulment of charter; (5) merger, in which the constituent corporation or corporations other than the surviving corporation are dissolved; and (6) consolidation, in which all of the constituent corporations are dissolved and replaced by the consolidated corporation.

The following discussion will concentrate on the effect of voluntary or nonjudicial dissolution, and involuntary or judicial dissolution. However, when appropriate, analogies will be drawn to or from the other types of corporate dissolution.

B. Dissolution Patterns

1. At Common Law and in Equity

Blackstone stated that the dissolution of a corporation at common law marked its civil death. Debts, either to or from the corporation,

198 F.2d 821 (2d Cir. 1952) (former Connecticut one-year statute held to run from time of sale by manufacturer and to bar claim by non-purchaser injured four years later); Note, Statutes of Limitations: Their Selection and Application in Products Liability Cases, 23 Vand. L. Rev. 775 (1970).

See text accompanying notes 87-181 infra.


E.g., MODEL ACT § 105.

E.g., id. § 94.

E.g., id. §§ 71, 74.

E.g., id. §§ 72, 74.
were totally extinguished and its property reverted to the grantor or escheated to the Crown.\(^7\)

Morawetz, in his classic treatise on corporations, qualified this “death” analogy, arguing that in modern business corporations the shareholders are the donors of the corporate assets and the corporation merely the trustee.\(^8\) While the common law recognized only the corporation’s legal right or title, equity demanded that the corporate assets, under the “trust fund theory,”\(^7\) should revert to the shareholders, subject to the superior rights of creditors.\(^8\) This view finds support in the United States Supreme Court’s holding in *Curran v. Arkansas*:\(^8\)

> [T]here is no difficulty in a creditor following the property of the corporation into the hands of any one not a *bona fide* creditor or purchaser... and obtaining satisfaction of his just debt out of that fund specifically set apart for its payment when the debt was contracted, and charged with a trust for all the creditors when in the hands of the corporation; which trust the repeal of the charter does not destroy.\(^8\)

Although at common law dissolution clearly abated all actions and barred all claims against the corporation, its creditors with judgments, other liquidated claims, and even unliquidated claims, were protected in equity under the “trust fund theory.”\(^8\) Assets of a dis-

---


\(^8\) 2 V. Morawetz, A Treatise on the Law of Private Corporations § 1032, at 989 (2d ed. 1886).

\(^7\) Several commentators question the use of the term “trust fund theory” to characterize this fiduciary duty owed creditors and shareholders. See G. Glenn, The Law Governing Liquidation § 156 (1935); Schoone, Shareholder Liability upon Voluntary Dissolution of Corporation, 44 Marq. L. Rev. 415, 416-17 (1961).

\(^8\) V. Morawetz, supra note 78, at 990.


\(^2\) 56 U.S. (15 How) at 311-12.

\(^3\) See Updike v. United States, 8 F.2d 913 (8th Cir. 1925) (effect of retrospective federal excess profits tax on dissolved corporation for period during which it was carrying on business):

> In Wood et al. v. Dummer et al. ... Mr. Justice Story places a dissolved corporation, left without property because of distribution to its stockholders, in the same category with one that is insolvent, and says: “If the capital stock is a trust fund [and he holds that it is], then it may be followed by the creditors into the hands of any persons, having notice of the trust attaching to it. As to the stockholders themselves, there can be no pretense to say, that, both in law and fact, they are not affected with the most ample notice. The doctrine of following trust funds into the hands of any persons, who are not innocent purchasers, or do not otherwise possess superior equities, has been long established.”

It has, therefore, been held that the assets of a dissolved corporation may be followed as in the nature of a trust fund into the hands of stockholders, and
solved insolvent corporation, under the "trust fund theory," were deemed to be held in trust for creditors as against all persons except bona fide purchasers and other creditors. Directors who distributed such assets in violation of the "trust" were liable to creditors to the extent of the assets distributed.\(^8\) Recipient shareholders were liable to creditors to the extent of the assets respectively received by them.\(^9\) Since the

that, 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. And this doctrine has been applied in cases similar to the one before us. All the stockholders must be made parties defendant.

\(^8\) See G. Glenn, \textit{supra} note 79, \S\ 250, at 382; 1 V. Morawetz, \textit{supra} note 78, \S\ 568; 2 id. \S\ 795, at 765. In Heaney v. Riddle, 343 Pa. 453, 23 A.2d 456 (1942), the court stated:

Fiduciaries who distribute funds in their hands without an accounting and an audit of their accounts do so at their own risk, and when they assume that risk they must be held responsible for payments made without the approval of the court which turn out to have been improper.

\(^9\) Id. at 457, 23 A.2d at 459 (citations omitted). The liquidating directors, as trustees under the "trust fund theory," like other trustees, were "bound to execute the trust with proper diligence and care" being "responsible for any injury sustained by [their] negligence or misconduct." Lowry v. Commercial & Farmers' Bank, 15 F. Cas. 1040, 1047 (No. 8,581) (C.C.D. Md. 1848) (Taney, Circuit Justice).


\(^8\) See J. Angell & S. Ames, \textit{supra} note 77, \S\S\ 599-600; 3 J. Story, \textit{Commentaries on Equity Jurisprudence} \S\ 1660, at 302 (14th ed. 1918). See G. Glenn, \textit{supra} note 79, \S\ 250, at 382-83. \textit{See also Quintal v. Adler,} 146 Misc. 500, 262 N.Y.S. 126 (Sup. Ct. 1933), aff'd mem., 239 App. Div. 775, 263 N.Y.S. 943 (1st Dep't 1933), aff'd mem., 264 N.Y. 452, 191 N.E. 509 (1934) (complaint by corporation's trustee in bankruptcy against shareholders, who had received improper dividends out of stated capital, dismissed where there were no allegations that dividends were paid while corporation was insolvent or rendered corporation insolvent, or that shareholders received dividends in bad faith or with knowledge that they were paid from stated capital); \textit{cf.} Palmer v. Justice, 322 F. Supp. 892 (N.D. Tex. 1971).

For a discussion of the diminution in value of corporate assets distributed in kind, where deterioration was through the fault of the recipient shareholder, see McWilliams v. Excelsior Coal Co., 298 F. 884 (8th Cir. 1924):

Where the stockholder is not responsible for such change, obviously, the creditor can and must take the trust fund as he finds it, suffering any decrease and securing the advantage of any increase in value.

How is the rule to be applied when such property has deteriorated through the fault of the stockholder? One who takes trust property with notice stands in the position of a trustee and may be held responsible as such.

\(^9\) Id. at 886.
recipient shareholders were primarily liable, any directors who suffered liability should have been able to seek reimbursement from them.

2. *Under Model Business Corporation Act*

Under the Model Business Corporation Act dissolution formulation, which has been adopted substantially in about half the states and the District of Columbia, voluntary or nonjudicial dissolution involves three stages:

1. filing of "statement of intent to dissolve";
2. winding up or liquidation; and
3. filing of "articles of dissolution" and issuance by secretary of state of "certificate of dissolution."

After filing of the statement of intent to dissolve, the corporation must cease to carry on business except insofar as may be necessary for winding up. Meanwhile, corporate existence continues until a certificate of dissolution is issued or a decree of dissolution is entered. Notice of dissolution is then mailed to each known creditor of the corporation.

During the winding up period, the corporation may do all acts required to liquidate its business and affairs. Once assets are collected

---

87 For the *Model Act Dissolution Procedure Timetable*, see Appendix A infra.
89 *Model Act* § 85. The statement of intent to dissolve may be by consent of shareholders (id. § 83) or by act of the corporation, i.e., by board of directors and shareholder action (id. § 84). If the corporation has not commenced business and has not issued any shares, it may be voluntarily dissolved by its incorporators upon the filing by them of articles of dissolution and the issuance by the secretary of state of a "certificate of dissolution" (id. § 82). Presumably, such a corporation would not have incurred any claims against it, since it had not commenced business, but there often are pre-incorporation expenses for which the corporation may be liable.
90 Id. § 86. Corporate existence continues until the "certificate of dissolution" is issued or until the entry of decree of dissolution. *Id.* For revocation of voluntary dissolution proceedings by consent of the shareholders or act of the corporation, see id. §§ 88-89. *See also* id. §§ 90-91 (filing and effect of statement of revocation of voluntary dissolution proceedings).
91 Id. § 86.
92 Id. § 87(a). For due process requirements of notice, see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (statutory notice by newspaper publication held sufficient for unknown claimants but insufficient for known claimants).
93 The corporation shall proceed to collect its assets, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business and affairs, and, after paying or adequately providing for
and liabilities are either paid or adequately provided for, the remainder of the corporate assets may be distributed among the shareholders according to their respective rights and interests. At any time during winding up, an application may be made to continue the liquidation under judicial supervision.

After winding up, articles of dissolution are executed and delivered to the secretary of state, who then issues a certificate of dissolution if the articles conform to law. Nonjudicial or voluntary dissolution occurs at this third stage, which thus becomes the demarcation line between pre- and post-dissolution claims under the Model Act formulation. Upon the issuance of the certificate of dissolution, the existence of the corporation ceases, except for the purpose of suits, other proceedings, and appropriate corporate action by shareholders, directors, and officers as provided in the Model Act.

Involuntary or judicial dissolution proceedings may be commenced by the attorney general, a shareholder, or a creditor. The corporation, after it has filed a statement of intent to dissolve, may also seek judicial supervision of liquidation. The court may require the filing of claims within designated time limitations and may prescribe the form of notice to be given creditors and claimants. Those failing to file on time may be barred from participating in the distribution of assets. Any receiver of a corporation has the authority to sue and de-
fend in all courts in his own name as receiver of such corporation. 104

When the expenses of the liquidation proceedings and all liabilities of the corporation have been paid and all of the remaining assets of the corporation distributed to its shareholders, or the assets, when insufficient to satisfy such expenses and liabilities, are exhausted, the court enters a decree dissolving the corporation. 105 At the time of the entry of the decree, judicial dissolution occurs. All claims accruing prior to the decree are pre-dissolution claims; unless filed within the time set by the court, they may be barred. 106 The existence of the corporation ceases upon the entry of the decree of dissolution. 107

If the liquidation of assets is carried out by a court, no statutory provision is made for the survival of remedies. Otherwise section 105 provides that dissolution shall not impair any remedy by or against the corporation, its directors, officers, or shareholders, on any claims incurred prior to dissolution if action thereon is commenced within two years after the date of dissolution. 108 Thus, the corporation has two years in which to sue, and a claimant whose claim accrues at any time prior to the issuance of a certificate of dissolution or entry of a decree of dissolution is given two years in which to commence an action.

Winding up under the Model Act is primarily a pre-dissolution period. The two-year "survival of remedy" period begins to run after dissolution and is thus a post-dissolution period. Claims that might have accrued for or against the corporation in the two-year period were

104 Id. §§ 98-99.

105 Id. § 102.

106 See text accompanying notes 102-03 supra.

107 MODEL ACT § 102. The clerk of the court is required to file a certified copy of the decree of dissolution with the secretary of state. Id. § 103.

108 Id. § 105 (applicable to dissolution either by issuance of certificate of dissolution, or by court order when the court has not liquidated assets, or by expiration of period of corporate duration). Section 48, entitled "Liability of Directors in Certain Cases," provides that "[i]n addition to any other liabilities imposed by law upon directors," directors distributing assets of a corporation without paying or making adequate provision for all known liabilities of the corporation shall be jointly and severally liable to the corporation for the value of the assets distributed, to the extent that such liabilities of the corporation are not thereafter paid. Any director against whom such a claim shall be asserted and who shall be held liable thereon, shall be entitled to contribution from the shareholders who received any such assets, knowing such distribution to have been made in violation of the Act, in proportion to the amounts received. Any director against whom such a claim shall be asserted shall be entitled to contribution from the other distributing directors.

it not for dissolution, unlike claims accruing during the winding up period, are not covered by the survival provision of section 105. Nevertheless, claims arising during the two-year period possibly can be asserted by or against the dissolved corporation or against its directors or shareholders.\textsuperscript{109} Since claims cease to exist after the two-year period, no claims thereafter can be asserted by or against the dissolved corporation or against its directors or shareholders.\textsuperscript{110}

3. Under New York Business Corporation Law

Nonjudicial dissolution in New York,\textsuperscript{111} in contrast to the Model Act, involves two stages:

(1) filing of “certificate of dissolution”; and

(2) winding up or liquidation.

Prior to 1963, New York provided for a third stage called “termination,” at which time the corporation ceased to exist.\textsuperscript{112}

Dissolution occurs at the first stage, upon filing of the certificate of dissolution, which filing precedes winding up.\textsuperscript{113} Thus, the post-dissolution period begins to run concurrently with winding up under New


\textsuperscript{110} See note 196 infra. This assumes compliance with statutory procedures. If there has not been compliance, liability may continue. The purpose of the two-year period has been construed as permitting claims which would ordinarily be barred upon dissolution and suits which would ordinarily abate upon dissolution. Therefore, claims against directors, officers, or shareholders which would not be barred by dissolution are not barred after the two-year period. United States v. Palakow, 438 F.2d 1177 (7th Cir. 1971) (Wisconsin statute held not to preclude suit against director after two-year period for conversion of liquidation proceeds due pledge of corporation’s shares); People v. Parker, 30 Ill. 2d 486, 197 N.E.2d 30 (1964) (director of dissolved corporation which failed to mail notice to known creditors held liable for interest on taxes accruing prior to filing of statement of intent to dissolve); Lindemann v. Rusk, 125 Wis. 210, 104 N.W. 119 (1905) (action commenced within three-year period against dissolved corporation and liquidating director did not abate but could continue for conversion of corporation’s goodwill).

\textsuperscript{111} For the New York Dissolution Procedure Timetable, see Appendix B infra. The dissolution provisions of New Jersey are substantially similar to those of New York.

Complicating the analysis of New York law is a 70-year-old New York Court of Appeals case, Shayne v. Evening Post Publishing Co., 168 N.Y. 70, 61 N.E. 115 (1901), where the court allowed a pre-dissolution claim against a dissolved corporation to be asserted against the liquidating directors, absent a statute or rule of law barring such a claim.\textsuperscript{112} See former N.Y. Stock Corp. Law § 105(11) (McKinney 1951). Since the elimination of this third stage, a New York dissolved corporation could be described as continuing “in limbo.” For an interesting example of a corporation “in limbo,” see Arnold, Dissolution and Liquidation of Arkansas Corporations, 21 Ark. L. Rev. 490, 493-94 (1968).

\textsuperscript{112} See former N.Y. Stock Corp. Law § 105(11) (McKinney 1951). Since the elimination of this third stage, a New York dissolved corporation could be described as continuing “in limbo.” For an interesting example of a corporation “in limbo,” see Arnold, Dissolution and Liquidation of Arkansas Corporations, 21 Ark. L. Rev. 490, 493-94 (1968).

\textsuperscript{113} N.Y. Bus. Corp. Law § 1004 (McKinney 1963). The dissolved corporation shall carry on no business except for the purposes of winding up. Id. § 1005(a)(1); see note 174 infra.
York law. After paying or adequately providing for payment of its liabilities, the dissolved corporation may distribute any remaining assets among its shareholders.

A dissolved corporation may continue to function for the purpose of winding up in the same manner as if dissolution had not taken place, except as otherwise provided in the statute or by court order, including suing and being sued. Directors shall not be deemed to be trustees of corporate assets, and title to such does not vest in them. Dissolution does not affect any remedy available to or against the corporation, its directors, officers, or shareholders for any right or claim or any liability incurred before such dissolution. At any time after dissolution, the corporation may give notice requiring all creditors and claimants, including “any with unliquidated or contingent claims and any with whom the corporation has unfulfilled contracts,” to present their claims within a period of not less than six months after the first publication of notice. Besides publication, copies of the notice must be mailed “to each person believed to be a creditor of or claimant against the corporation whose name and address are known to or can with due diligence be ascertained by the corporation.” Claims not timely filed are forever barred as against the corporation, its assets, directors, officers, and shareholders, although the court may, upon the showing of a satisfactory reason for such failure, allow a tardy claim against “any remaining assets of the corporation.”

---

115 Id. § 1005(a)(3)(B).
116 Id. § 1006(a).
117 Id. § 1006(a)(4). In contrast, the Model Act provides that corporate existence ceases except for purposes of suit as provided therein. See text accompanying note 97 supra.
118 N.Y. Bus. Corp. Law § 1006(a)(1) (McKinney 1963); see text accompanying note 84 supra.
119 N.Y. Bus. Corp. Law § 1006(b) (McKinney 1963). The substance of this section is based upon § 105 of the Model Act. Id. § 1006 (Legislative Studies and Reports).
120 Id. § 1007(a).
121 Id. See note 92 supra.
122 N.Y. Bus. Corp. Law § 1007(b) (McKinney 1963). See Bernard Semel, Inc. v. Fleishaker (Sup. Ct. 1970), in N.Y.L.J., Sept. 30, 1970, at 18, col. 5 (denying the motion of a dissolved corporation for summary judgment dismissing a complaint alleging post-dissolution damage resulting from pre-dissolution negligence, on the ground that plaintiff should have opportunity to show satisfactory reason for not filing a timely claim); cf. In re New York World’s Fair 1964-1965 Corp., 30 App. Div. 2d 928, 294 N.Y.S.2d 80 (2d Dep’t 1968) (upholding inherent judicial power to permit late filing of claim against dissolved membership corporation). New York law requires any assets distributable to a creditor or shareholder who is unknown or cannot be found, or who is under disability and for whom there is no legal representative, be paid to the state comptroller as abandoned property. N.Y. Bus. Corp. Law § 1005(c) (McKinney 1963). In the light of § 1007 barring claims after at least six months where the required notice is given, it can be argued that no
At any time after the filing of a certificate of dissolution, the corporation or, with court approval, a creditor, claimant, director, officer, or shareholder, may petition for judicial supervision of liquidation.  

The provisions for voluntary or nonjudicial dissolution, including the "suability for purposes of winding up," "survival of remedies," and "filing and barring of claims" provisions, are applicable also to dissolution by expiration of corporate duration or under the New York Tax Law, and, subject to the provisions of article 11, to judicial or involuntary dissolution. A corporation is judicially dissolved upon the filing of a final order of dissolution by the secretary of state.  

4. Under Other Corporate Statutes

Some deviations from the above two patterns require mention. Arizona and Ohio continue corporate liability after dissolution for any cause which, but for dissolution, would have accrued. Thus, no distinction is drawn between pre- and post-dissolution claims and the assets are distributable to any creditor who is unknown or cannot be found, and therefore, no payment to the state comptroller with respect to such creditor is required by § 1005(c). See Texas v. New Jersey, 379 U.S. 674 (1965) (defining states' escheat powers); Uniform Disposition of Unclaimed Property Act (rev. 1966), 9A UNIFORM LAWS ANN. (Supp. 1967).

123 N.Y. BUS. CORP. LAW § 1008(a) (McKinney 1963) literally permits exercise of jurisdiction by the supreme court to supervise dissolution and liquidation "at any time after the filing of a certificate of dissolution." The court may issue orders, inter alia, in respect of the adequacy of the notice given to creditors and claimants and the possible requirements of further notice (id. § 1008(a)(2)); determination of the validity of claims presented to the corporation (id. § 1008(a)(3)); barring of all creditors and claimants who have not timely filed claims or whose claims have been disallowed (id. § 1008(a)(4)); determination and enforcement of the liability of any director, officer, shareholder, or subscriber to the corporation or of the liabilities of the corporation (id. § 1008(a)(5)); payment of claims against the corporation, retention of assets for such purpose, and determination of the adequacy of provisions made for payment of liabilities (id. § 1008(a)(6)); appointment and removal of a receiver under article 12 (id. § 1008(a)(9)); distributions to shareholders (id. § 1008(a)(10)); and payment to the state comptroller, as abandoned property, of assets distributable to missing creditors or shareholders (id. § 1008(a)(11)). See Stephens v. Maust, 11 App. Div. 2d 1004, 205 N.Y.S.2d 913 (1st Dep't 1960) (nonjudicial dissolution in which supreme court supervision was involved): "[I]t may also be expedient to withhold part of the assets to protect any present creditors as well as future creditors who may present claims as a result of the pending litigation." Id. at 1004, 205 N.Y.S.2d at 913-14.

124 N.Y. BUS. CORP. LAW § 1009 (McKinney 1963).

125 Id. § 1117.

126 Id. § 1111(6).

127 ARIZ. REV. STAT. ANN. § 10-365(B) (1956); OHIO REV. CODE ANN. § 1701.88 (Page 1964); see Niesz v. Gorsuch, 295 F.2d 909 (9th Cir. 1961) (Arizona statute continuing corporate existence for purposes of suit held inapplicable to merged corporations (or to constituent corporations in cases of consolidation) since all their rights passed to, and all their liabilities were assumed by, surviving (or consolidated) corporation).
corporation is relegated to the otherwise applicable statutes of limitations for the barring of claims.\textsuperscript{128}

Other statutes provide for nonimpairment of pre-dissolution claims, but set no limitation on actions, leaving them subject, of course, to applicable statutes of limitations.\textsuperscript{129}

Some statutes provide that dissolved corporations shall continue for the purpose of suing and being sued without time limitations.\textsuperscript{130} Other statutes impose such limitation. For example, Delaware law provides that dissolved corporations shall continue for at least three years after dissolution,\textsuperscript{131} thereby permitting actions against them on post-
dissolution claims accruing during such three-year or longer period.

III

PRODUCT LIABILITY CLAIMS AGAINST DISSOLVED CORPORATIONS

A. Differentiating Between Pre-“Dissolution” and Post-“Dissolution” Claims

The distinction between pre- and post-“dissolution” claims depends upon two sometimes interwoven factors: (1) the time of the accrual of the claims against the corporation and (2) the time of the “dissolution” of the corporation.


The corporation may continue for longer than the three-year period if a court of chancery so directs. Del. Code Ann. tit. 8, § 278 (Supp. 1968). For the purpose of actions commenced by or against dissolved corporations either prior to or within the three-year period, dissolved corporations shall “be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed. . . .” Id.
Products liability claims accrue at the time of tender of delivery or at the time of physical injury, depending upon the applicable theory.\textsuperscript{132}

Complicating the classification of products liability claims as pre- or post- "dissolution" is the question of when "dissolution" occurs under applicable law, usually that of the jurisdiction of incorporation.\textsuperscript{133} In the case of voluntary or nonjudicial dissolution under the Model Act, with its three stages, "dissolution" occurs after winding up or liquidation, at the third stage, upon the issuance of the "certificate of dissolution." Claims accruing prior to this third stage, under the Model Act formulation, are pre-dissolution claims; those arising thereafter are post-dissolution claims.

In contrast, the New York Business Corporation Law prescribes a two-stage nonjudicial dissolution procedure, with "dissolution" occurring before winding up or liquidation, at the first stage, upon the filing of the "certificate of dissolution." In New York, then, claims accruing prior to the first stage are pre-dissolution claims, and those arising thereafter are post-dissolution claims.

With respect to other types of dissolution, "dissolution" would occur as follows:

- \( (1) \) in the case of \textit{judicial dissolution}, at the time of the entry of the decree of dissolution,\textsuperscript{134} or its filing by the secretary of state;\textsuperscript{135}
- \( (2) \) in the case of \textit{expiration of duration}, at such time;\textsuperscript{136}
- \( (3) \) in the case of \textit{forfeiture, cancellation, or annulment of charter}, at the time of the entry of the decree of dissolution,\textsuperscript{137} or its filing by the secretary of state;\textsuperscript{138} and
- \( (4) \) in the case of \textit{merger or consolidation}, at the time the "certifi-
cate of merger" or the "certificate of consolidation" is issued under the Model Act formulation,\(^\text{139}\) or is filed under the law of New York\(^\text{140}\) and some other jurisdictions.

**B. Liabilities for Pre-Dissolution Claims**

Modern corporate statutes expressly deal with the effect of corporate dissolution on pre-dissolution claims. The unanswered question is the extent to which common law and equitable principles also apply.

Pre-dissolution products liability claims are those, under the breach of warranty theory, which accrue upon tender of delivery of the goods before dissolution; under the negligence theory, upon physical injury before dissolution; and under the strict liability theory, by negligence analogy, upon physical injury before dissolution, or by breach of warranty analogy, upon tender of delivery of the goods before dissolution.

With respect to pre-dissolution claims, the potential liabilities are those of

1. **Liabilities of Participating Corporate Personnel for Pre-Dissolution Claims**

   Participating corporate officers or other employees responsible for any pre-dissolution claims, regardless of their possible liabilities in other capacities as directors or shareholders, would be liable personally from the time of the accrual of the cause of action. The dissolution of the corporation would not affect this liability, which would be limited only by applicable statutes of limitations.

2. **Liabilities of Dissolved Corporation for Pre-Dissolution Claims**

   Apart from any liabilities of corporate personnel, the corporation would be liable as the party which made and breached the warranty, as the employer under the doctrine of respondeat superior for any negligence committed by any of its officers or other employees during the course of their employment, and as the seller of the product under the strict liability theory.

\(^\text{139}\) Model Act § 74.

\(^\text{140}\) N.Y. Bus. Corp. Law § 906(a) (McKinney 1963).
Most corporate statutes expressly provide for the survival of pre-dissolution claims against the corporation, but limit the time for the assertion of such claims. Some statutes also preserve the capacity of the corporation to sue and to be sued for purposes of winding up. Still other statutes continue the existence of the dissolved corporation for the purposes of suing and being sued, with or without time limitations. Under the Model Act, any action on a pre-dissolution claim must be commenced within two years after dissolution. New York bars claims not filed within a specified period of at least six months after publication of notice requiring the filing of claims after dissolution.

Pre-dissolution claims which are timely asserted should, of course, be satisfied out of corporate assets. Assuming compliance with statutory dissolution procedures, pre-dissolution claims which are not timely asserted would be barred against the corporation, its assets, directors, officers, and shareholders.

If the corporation has not complied with the statutory dissolution procedures, the claims would not be barred, and the corporation would remain liable. If the corporation remains suable but has distributed all of its assets, any judgment against it could not be satisfied, but could determine the extent of the corporate liability as a basis for asserting the claim against the distributing directors or the recipient shareholders. If the corporation is liable and fails to satisfy the claim, the directors and shareholders might be liable.

---

141 E.g., Model Act § 105. Such "limitations on claims" statutes would bar claims after the time limit, precluding their assertion not only against the corporation but also against directors or shareholders. See note 129 supra.

142 See note 117 supra. Quaere, whether winding up continues so long as there are outstanding claims against the dissolved corporation.

143 Such "limitations on corporate existence" statutes, in contrast with "limitations on claims" statutes (see notes 130-131 supra), do not bar the claims after the time limitation. Rather, the assertion of claims against the corporation, but not necessarily against its distributing directors or recipient shareholders, is precluded.

144 Quaere, in the absence of an express statutory requirement, whether the action should be conditioned upon the prior procurement of a judgment against the corporation. See J. Pomeroy, supra note 86, § 1415, at 1068. In McWilliams v. Excelsior Coal Co., 298 F. 884, 886 (8th Cir. 1924), the court stated:

This liability may be enforced where the debt has been judicially established against the corporation in an action against it, but, where the corporation has ceased to exist, it is entirely proper for the validity of the debt to be presented and determined in the equitable action to enforce the above liability of the stockholder.

In New York, a creditor of a corporation, to have standing to sue under N.Y. Bus. Corp. Law §§ 719(a), 720(a) (McKinney 1963), must be a judgment creditor. Id. § 720(b). Prior to the Business Corporation Law, this procedure was followed, although in Sherill Hardwood Lumber Co. v. New York Bottle Box Co., 118 Misc. 636, 195 N.Y.S. 22 (Sup. Ct. 1922), to avoid a futile gesture, the court allowed joinder of the defendant directors in an action
3. Liabilities of Distributing Directors for Pre-Dissolution Claims

If pre-dissolution claims are barred against the corporation, they would also be barred against the directors who were responsible for the distribution of the corporation's "net assets" to shareholders. Absent barring, directors might be liable for pre-dissolution claims, although only to the extent of the improper distributions they had authorized.

Under the common law and in equity, sometimes codified by statutes, directors, after dissolution, became trustees of the corporate property for the benefit of the corporation's creditors and shareholders.

Some modern corporate statutes expressly provide that the directors of a dissolved corporation shall not be deemed to be trustees of its assets and that title to such assets shall not vest in them but shall remain in the corporation. While such statutes make it clear that liquidating directors are not trustees holding the legal title to corporate assets, they leave open the question of the extent of the remaining fiduciary duties of liquidating directors to creditors and the extent of the liabilities of such directors for the breach of such duties. Under the "trust fund theory," directors are presumably liable only to persons whose claims are known or should have been known. Actions thereunder would be subject to laches and statutes of limitations applicable to equitable claims.


concurred in the distribution of corporate assets to shareholders without adequate provision for all known debts, obligations, and liabilities of the corporation, shall be jointly and severally liable to the corporation for the value of such distributed assets, to the extent that the debts, obligations, and liabilities of the corporation are not thereafter paid and discharged. Actions for such liabilities sometimes are subject to special statutes of limitations.

Under such statutory formulations, directors would be personally liable, to the extent of the distributed corporate assets, for known pre-dissolution claims but not for unknown pre-dissolution claims. "Known" liabilities might include those which, by the exercise of due care, should have been known to the directors. A director would not be liable if, in the circumstances, he discharged his duties in good faith and with due care.

Any director against whom such a claim is asserted is entitled to contribution from his fellow directors who voted for or concurred in the distribution, from the shareholders who received such assets, knowing the distribution to have been wrongful, and possibly from recipient shareholders without such knowledge.

An occasional statute authorizes actions against directors or officers for wrongful transfers of corporate assets. Such a statute probably does not add much to the liabilities of directors but does expand the group with standing to sue by providing that actions against directors might be maintained by the corporation, a receiver, trustee in bankruptcy, officer, director, judgment creditor, or shareholder.

---

148 E.g., Model Act § 48(c); cf. N.Y. Bus. Corp. Law § 719(a) (McKinney 1963) (directors liable to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons as a result of such action). New York provides that an action for such relief may be brought by, among others, a judgment creditor or by a shareholder suing derivatively. Id. § 720(b). The statutory liability of directors could be construed as a procedural device to facilitate recovery by claimants against the relatively small number of directors. While shareholder liability is predicated on directorial liability by these statutes, the liability of the recipient shareholders should not be limited to this mode of recovery. See note 162 infra.


153 E.g., N.Y. Bus. Corp. Law §§ 717, 719(c) (McKinney 1963).

154 E.g., Model Act § 48(c); N.Y. Bus. Corp. Law § 719(c) (McKinney 1963).

155 E.g., Model Act § 48(c).


157 E.g., id. § 720(a). See Appendix B infra.

158 N.Y. Bus. Corp. Law § 720(b) (McKinney 1963).
Many statutes expressly provide that the liabilities thereunder are in addition to any other liabilities imposed by law upon directors\textsuperscript{160} or that such provisions shall not affect any liability otherwise imposed by law upon any director.\textsuperscript{160} Under statutes with or without such a provision, the extent of the liabilities of directors under common law and equitable principles has received little judicial attention. Even if the degree of liability would be the same under such principles and under the corporate statute, the statutory liability is often to the corporation, and possibly to judgment creditors of the corporation, but not necessarily to other claimants, such as creditors with unliquidated claims, as is the case under the “trust fund theory.”

4. Liabilities of Recipient Shareholders for Pre-Dissolution Claims

Pre-dissolution claims that have been barred against the corporation would similarly be barred against the shareholders. In the absence of such a bar, however, shareholders receiving liquidation distributions might be liable to pre-dissolution claimants. Obviously, each shareholder’s liability would not exceed the value of the corporate assets received by him.

Under the “trust fund theory,” recipient shareholders would hold any liquidation distributions in trust for corporate creditors. Claimants, even with unliquidated claims, would have standing to sue, absent laches or any applicable statutes of limitations.\textsuperscript{161} Corporate statutes have supplemented but not necessarily replaced the “trust fund theory.”\textsuperscript{162}

\textsuperscript{159} E.g., Model Act § 48.
\textsuperscript{160} E.g., N.Y. Bus. Corp. Law §§ 719(f), 720(c) (McKinney 1963).
\textsuperscript{161} See Updike v. United States, 8 F.2d 913 (8th Cir. 1925), wherein the court clearly outlines this theory:

[T]he assets of a dissolved corporation may be followed as in the nature of a trust fund into the hands of stockholders, and . . . 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.

\textsuperscript{162} G. Glenn, supra note 79, § 250. While Glenn disagreed with the “trust fund theory,” he drew on the reasoning of Updike and concluded that equity would allow an unliquidated creditor to pursue corporate assets into the hands of transferee shareholders.

Under the Model Act, unknown claimants still require the protection of the “trust fund theory.” Known claimants are adequately protected by the provision for mailed notice of dissolution and by the statutory liabilities of distributing directors and recipient shareholders for distributions made without payment or adequate provision for known claims. Unknown claimants can sue the corporation during the two-year post-dissolution period, but at that time the corporation would have no assets. Thus, without
Under modern statutory formulations, recipient shareholders are liable if they receive liquidation distributions made without adequate provision for "known" corporate liabilities.\textsuperscript{163} Their liabilities, under such statutes, are dependent upon the distributing directors either having been found liable to the corporation\textsuperscript{164} or having paid such liabilities.\textsuperscript{165} Such directors may be entitled to contribution from recipient shareholders\textsuperscript{166} as well as from concurring directors.\textsuperscript{167} The Model Act limits the directors' rights of contribution against recipient shareholders to those who received assets knowing such distribution to have been improper\textsuperscript{168} and also provides that any liabilities of recipient shareholders should be in proportion to the amounts they received.\textsuperscript{169}

In New York, the directors are subrogated to the "rights of the corporation" against the shareholders who received an improper distribution of assets.\textsuperscript{170} Such "rights of the corporation" are not defined, but the statute apparently assumes that a dissolved corporation, at least for the benefit of its creditors and shareholders, can recover improper liquidation distributions from recipient shareholders.\textsuperscript{171} Special statutes of limitations sometimes apply.\textsuperscript{172}

the "trust fund theory," an unknown claimant would be remediless. Section 48 of the Model Act, which is limited in scope and expressly non-preemptive, does not preclude this result, since it imposes additional liability only on directors who disregard known claims and recognizes their possible right to contribution from recipient shareholders who knew of the impropriety of the distribution.

The New York statute has rendered resort to the "trust fund theory" less necessary. Claimants, upon written or published notice from the corporation, are entitled to file and have their claims satisfied out of corporate assets before they are distributed to shareholders. If distributing directors fail to provide for filed claims, they would be liable to the corporation, and, if they pay the claim, they would be subrogated to the rights of the corporation against recipient shareholders. If the directors fail to pay the claim, however, the statutory remedy seems to be incomplete, and the claimant should be able either to enforce the rights of the corporation against the recipient shareholders or to proceed against them under the "trust fund theory."

\textsuperscript{163} E.g., \textit{Model Act} § 48(c); \textit{N.Y. Bus. Corp. Law} §§ 719(a)(3), (d)(1) (McKinney 1963).

\textsuperscript{164} E.g., \textit{N.Y. Bus. Corp. Law} § 719(d)(3) (McKinney 1963).

\textsuperscript{165} E.g., \textit{Model Act} § 48(c).

\textsuperscript{166} E.g., id.; \textit{N.Y. Bus. Corp. Law} § 719(d)(3) (McKinney 1963).

\textsuperscript{167} E.g., \textit{Model Act} § 48(c); \textit{N.Y. Bus. Corp. Law} § 719(c) (McKinney 1963).

\textsuperscript{168} \textit{Model Act} § 48(c).

\textsuperscript{169} Id.

\textsuperscript{170} \textit{N.Y. Bus. Corp. Law} § 719(d)(3) (McKinney 1963).

\textsuperscript{171} The theory of this recovery is expressed as follows: The unlawful transfer of corporate assets, besides being a violation of law, operates to the damage of the corporation, and, to the extent that it depletes corporate assets available to creditors for the satisfaction of their claims, operates to their damage.


\textsuperscript{172} E.g., \textit{N.Y. Civ. Prac. Law} §§ 213(l), (3) (McKinney 1963).
Where a liquidation distribution constitutes a conveyance fraudulent as to someone with a pre-dissolution claim, such a claimant might be able to recover the corporate assets from the recipient shareholder.  

C. Liabilities For Post-Dissolution "Claims"

The lawyers who formulated corporate statutory revisions failed to appreciate the increasing compassion of sales law codifiers and torts re-restaters for persons injured by products and largely ignored post-dissolution "claims." The comprehensive coverage of pre-dissolution claims by corporate statutes supports the possibility that common law and equitable principles thereby might be preempted. In contrast, the statutory application to post-dissolution claims is so tenuous as to make it more probable that common law and equitable principles apply to the extent they are not inconsistent with the statute.

173 Recipient shareholders, of course, give no consideration, much less fair consideration, for the corporate assets distributed to them (other than their right to share in the "net assets"). Under the Uniform Fraudulent Conveyance Act, adopted in 25 jurisdictions, recipient shareholders are subject to the claims of a creditor. The latter is defined as a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent. Uniform Fraudulent Conveyance Act § 1, 9B UNIFORM LAWS ANNOT. 73 (1966); Federal Bankruptcy Act § 67(d), 11 U.S.C. § 107(d) (1964). See United States v. 58th St. Plaza Theatre, Inc., 287 F. Supp. 475, 498 (S.D.N.Y. 1968) (stating "conveyances are fraudulent as to present and future creditors, even if the transferor was solvent at the time of the transfers, if the transferor was left with 'unreasonably small capital' or if he 'intends or believes that he will incur debts beyond his ability to pay as they mature'"; Ashbaugh v. Sauer, 268 Mich. 467, 256 N.W. 486 (1934) (holding tort claimant to be "creditor" from date of tort); Horan v. John F. Trommer, Inc., 129 N.Y.S.2d 539 (Sup. Ct., aff'd mem., 283 App. Div. 774, 128 N.Y.S.2d 595 (1st Dep't 1954) (distributing directors-recipient shareholders held liable to creditor of dissolved corporation to extent of corporate assets received by them).

Professor Glenn, in his treatise on fraudulent conveyances, concludes that an improper distribution to shareholders should not be treated as a fraudulent conveyance, but rather the remedy should be through the corporate statutory scheme. 2 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 604 (rev. ed. 1940).

New York, until 1963, had an awkwardly drafted corporate statutory provision making distributing directors and recipient shareholders liable to creditors, among others, for the transfer of corporate funds in violation thereof. Former N.Y. STOCK CORP. LAW § 15 (McKinney 1951). This statute was characterized as "even more stringent" than the Uniform Fraudulent Conveyance Act with respect to conveyances to officers, directors, or shareholders. United States v. 58th St. Plaza Theatre, Inc., 287 F. Supp. 475, 499 (S.D.N.Y. 1968). The 1963 revisers omitted § 15 from the new Business Corporation Law "as superfluous since the subject matter is adequately covered in the Debtor and Creditor Law and in the Bankruptcy Act [Uniform Fraudulent Conveyance Act]." N.Y. BUS. CORP. LAW, § 719, at 720 (McKinney 1963). See Warren, supra note 83, at 545-46:

If the corporation had been a going concern, such a transfer of assets to stockholders would have been objectionable as a fraudulent conveyance. Very likely the bank was rendered immediately insolvent by the transfer, but, even if it were not, the transfer, under the law as it then was, would have been fraudulent as against existing creditors if ultimately the bank became insolvent.
The term post-dissolution "claims" is used in preference to post-dissolution "liabilities" to avoid any implication that such claims can be asserted against a dissolved corporation, its assets, directors, or shareholders. Whether or not they can, and, if so, against whom, to what extent, under what circumstances, and subject to what time limitations, are the principal questions now to be considered.

Post-dissolution "claims" include those which arise upon physical injury after dissolution under the negligence theory, or under the strict liability theory when analogized to negligence. Claims under the breach of warranty theory, or under the strict liability theory when analogized to breach of warranty, accrue upon tender of delivery of the goods. Since such tender presumably occurs while the corporation is doing business prior to dissolution, the likelihood of post-dissolution "claims" under this theory is minimal.\(^\text{174}\)

Depending upon the language of the applicable corporate statute, potential liabilities for post-dissolution "claims," as for pre-dissolution claims, might exist against

1. **Liabilities of Participating Corporate Personnel for Post-Dissolution "Claims"**

Participating corporate officers or other employees responsible for any post-dissolution "claims," regardless of other possible liabilities in their capacities as directors or shareholders, would be liable from the time the cause of action accrued. Such liability would not be affected by corporate dissolution, but would be subject to applicable statutes of limitations.

\(^{174}\) Any claim arising out of the carrying on of business by the dissolved corporation should be enforceable by or against the corporation under statutes precluding the defense of ultra vires, under the de facto doctrine, or under principles of estoppel. *Model Act § 7. See Garzo v. Maid of the Mist Steamboat Co.*, 303 N.Y. 516, 524, 104 N.E.2d 882, 887 (1952); Wilkins v. Siracl Realty Corp., 174 Misc. 1002, 21 N.Y.S.2d 1017 (Sup. Ct. 1940); I. Kantrowitz & S. Slutsky, *White on New York Corporations* § 1006.08[3] (13th ed. 1966). *See also Seavy v. I.X.L. Laundry Co.*, 60 Nev. 324, 108 P.2d 823 (1941) (dissolved Nevada corporation and shareholders held liable for post-dissolution claim under statute providing that dissolved corporation continues for purpose of suing and being sued where shareholders continued to carry on business). Most post-dissolution claims arise from the improper continuation of business during the winding up period, in contrast with most post-dissolution products liability claims which arise thereafter.
2. Liabilities of Dissolved Corporation for Post-Dissolution “Claims”

Post-dissolution “claims” can arise against a dissolved corporation only to the extent that the corporate statute continues it in existence for the purpose of being sued. Judicial construction of such statutes is rare. Traditional canons of construction lead to contradictory results: statutes extending post-dissolution corporate existence, being in derogation of the common law, should be strictly construed; to the extent that they are remedial, they should be liberally construed.

Few corporate statutes deal expressly with post-dissolution “claims” against the corporation. Most of the statutes contain language to the effect that the corporation may do all acts required to liquidate the business; some of the statutes specify that for the purpose of winding up the corporation may sue and be sued.

Other statutes provide that dissolved corporations shall continue for the purpose of suing and being sued, with or without time limitations. Like the Model Act, many statutes provide that corporate existence shall continue until “dissolution,” at which time corporate existence shall cease, “except for the purposes of suits.”

The Model Act and numerous other statutes expressly provide for the survival of pending actions and existing claims by or against the corporation, permitting actions on such claims within two years after dissolution. Obviously, post-dissolution “claims,” which by definition do not exist at the time of dissolution, can hardly “survive.” Provision

175 See text accompanying note 199 infra.
177 See text accompanying notes 127-28 supra. Only one paragraph in Fletcher’s work on private corporations deals with 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 a 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.


178 See text accompanying notes 90 & 116-17 supra.
179 See note 190 supra. Under such a formulation, post-dissolution claims should be assertable against the corporation within any time limitation and possibly against distributing directors or recipient shareholders even after such period, since the limitation is on corporate existence rather than on claims.

180 Such a formulation, if construed as a limitation on corporate existence rather than on claims, would preclude the assertion of post-dissolution claims against the dissolved corporation (Christensen v. Boss, 179 Neb. 429, 138 N.W.2d 716 (1965)) but not necessarily against distributing directors or recipient shareholders. Cf. note 196 infra.
for the "survival" of post-dissolution "claims" not in existence at the time of dissolution would be a contradiction in terms.

a. Under Model Business Corporation Act. The Model Act expressly permits actions by or against a dissolved corporation on pre-dissolution claims if commenced within two years after such dissolution. The existence of the corporation ceases upon the issuance of the certificate of dissolution, except for the purposes of suits as provided in the Act. The only explicit provision in the Act for suits by or against a dissolved corporation is section 105 providing for the survival of remedies for pre-dissolution claims if action thereon is commenced within two years after the date of dissolution. A literal reading of the Model Act would preclude the assertion against the corporation of post-dissolution "claims" whether they arise during the two-year period or thereafter.

Only three reported cases—two in lower federal courts and one in a Pennsylvania county court—have been found discussing the suability, under the Model Act formulation, of a dissolved corporation on a post-dissolution claim. In Chadwick v. Air Reduction Co., decided by the United States District Court for the Northern District of Ohio, a dissolved Ohio corporation was sued for negligence in the manufacture and sale of an incubator and for breach of warranty. The Ohio corporate statute expressly provided, like the Model Act, that any claim existing or, unlike the Model Act, which would have accrued, against a dissolved corporation might be prosecuted. The question of

---

181 Model Act § 105.
182 Id. § 93. In contrast, New York provides that the dissolved corporation shall function for purposes of winding up, including suits, as if dissolution had not taken place, except as otherwise provided therein or by court order. See text accompanying notes 97 & 117 supra.
183 For oblique references to suits by or against corporations in dissolution, see Model Act §§ 92(e), 93, 98.
185 On the theory that the two-year period is a limitation on claims, see note 196 infra. The contrary argument would be that corporate existence ends upon the issuance of the certificate of dissolution, except for suability on pre-dissolution claims within the next two years and on post-dissolution claims without such two-year limitation. Under the latter construction, post-dissolution claims, whether arising during or after the two-year period, could be asserted against distributing directors and recipient shareholders. See notes 97 & 182 supra.
   (A) When a corporation is dissolved ... the corporation shall cease to carry on business and shall do only such acts as are required to wind up its affairs, but for such purpose it shall continue as a corporation.
   (B) Any claim existing or action or proceeding pending by or against the
whether an action could be maintained against the dissolved corporation on a cause of action which accrued after the date of dissolution was found to be one of first impression. Adopting the principle that statutes extending the vitality of a dissolved corporation for purposes of suit are remedial in nature and should be given a liberal construction, the court held that the Ohio statute permitted a dissolved corporation to be sued on a post-dissolution claim. Distinguishing the Ohio statute from those based on the Model Act, the court stated by way of dictum:

The Court has reviewed the statutes of several states treating on this matter of the continued existence of a dissolved corporation for purposes of litigation, and finds that there is a wide range of phraseology therein. Many of the said statutes, however, bear a strong resemblance to section 98 [renumbered section 105 in 1969] of the Model Business Corporation Act. Section 98 [105], in its pertinent part, provides that dissolution of a corporation shall not take away or impair any remedy available against such corporation for any right or claim existing, or any liability incurred, prior to dissolution. 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 pre-dissolution torts only.

The later federal case, Bishop v. Schield Bantam Co., involved an Iowa corporate statute which, like the Model Act, provided for the survival of remedies against a dissolved corporation for any claim existing prior to dissolution if action thereon was commenced within two years after the date of dissolution. The Iowa corporation had
been dissolved in 1964; personal injuries were allegedly suffered in 1965, a year and a half after dissolution; and the action for breach of warranty and negligent manufacture of a truck crane was commenced in 1967, three and one-half years after dissolution. The defense was that the action was not commenced within the two-year survival period as required by the Iowa statute. The United States District Court for the Northern District of Iowa, finding no Iowa authorities after exhaustive research, quoted the dictum from the Chadwick case to the effect that, under the Model Act formulation, a dissolved corporation “may be sued for pre-dissolution torts only.” The court held that the action on the post-dissolution claim, having commenced more than three and one-half years after dissolution, was barred under the Iowa statute. The basis for the holding is ambiguous, however. One possibility indicated by the court’s quotation of the Chadwick dictum is that a dissolved corporation may be sued only for pre-dissolution claims. On the other hand, the court also seemed to apply the two-year limitation on any action “thereon” to bar the post-dissolution claim. The latter rationale implies that post-dissolution claims might be allowed if brought within the two-year period even though this limitation literally applies only to pre-dissolution claims.

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 . . . .

Id. The Iowa legislature supplemented the Model Act provision by adding:

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.

Id. 193 293 F. Supp. at 95.

194 Id. at 96.

Plaintiff urges that the added language “otherwise winding up its affairs,” includes the defending of actions brought against the corporation. The court is of the view that the Supreme Court of Iowa would not adopt plaintiff’s position. Statutes relative to litigation against a dissolved corporation are liberally construed. . . . In the first paragraph of the Iowa statute specific language was provided relative to the problem of the survival of rights or claims against dissolved corporations. . . . In the light of such specific reference it 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. The policies inherent in the dissolution and winding up the affairs of a corporation all dictate to the contrary. . . . 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 winding up provisions of the statute.

Id. (emphasis added) (citations omitted).
A literal reading of the Model Act, the dictum in the Chadwick case, and the holding in the Bishop case indicate that a dissolved corporation cannot be sued on post-dissolution claims, with the possible exception of post-dissolution claims arising during the two-year period following dissolution if suit is commenced within such two-year period.\textsuperscript{195} The Wisconsin survival provision, patterned after the Model Act, has been interpreted as precluding \textit{all} claims against the dissolved corporation after the two-year period.\textsuperscript{196}

In the Pennsylvania case,\textsuperscript{197} suit was brought against the former officers, directors, and shareholders of a dissolved Pennsylvania corporation. The corporation, when selling property prior to its dissolution, had agreed to assume responsibility for collecting improvement costs chargeable against certain named persons, but underwent voluntary or nonjudicial dissolution prior to the time when the improvements were made. The Pennsylvania corporation statute had a "survival of remedy for preexisting claims" provision\textsuperscript{198} like the Model Act.

The court stated, obiter dictum, that the dissolved corporation, which was not a party to the action, was not suable on a post-dissolution claim under the Pennsylvania provision, adding that such provision was in derogation of the common law\textsuperscript{199} and implying that it should be strictly construed. The court observed that a remedy for a nonexistent claim could hardly be preserved.

b. \textit{Under New York Business Corporation Law.} Under the New York Business Corporation Law, in contrast to the Model Act, dissolution occurs at the first stage, upon the filing of the "certificate of dissolution," prior to winding up. New York, like the Model Act, has a "survival of remedy for pre-dissolution claims" provision. It also has a

\textsuperscript{195} See text accompanying note 184 \textit{supra}.
\textsuperscript{196} Wis. Stat. § 180.787 (Supp. 1970); See Young, Some Comments on the New Wisconsin Business Corporation Law, 1952 Wis. L. Rev. 5, wherein the author concludes that while the dissolution of a corporation shall not destroy any remedy available either to or against the corporation, suit must be started on the claim within two years. The limitation, thus, is not on the corporation's existence, but on the cause of action. \textit{Id.} at 15. This interpretation, it has been stated, similarly applies to shareholders and directors and limits remedies against them to two years after dissolution. Tyrrell, \textit{Introduction to the Business Corporation Law}, 22 Wis. Stat. Ann. xxv, xxxv (1957). See also Security Nat'l Bank v. Cohen, 31 Wis. 2d 656, 143 N.W.2d 454 (1966); Schoone, \textit{supra} note 79; notes 110 & 180 \textit{supra}.
limited post-dissolution period for the assertion of claims—six months for the filing of claims as compared with the Model Act's two-year period for commencing actions. In contrast to the Model Act, New York's "suability of dissolved corporation" and "filing and barring of claims" provisions are not expressly limited to pre-dissolution claims.

Under the New York statute, the suability of a dissolved corporation for post-dissolution claims, especially those arising after the six-month period, is an unresolved question. The basic statutory premise is that a dissolved corporation shall function for purposes of winding up, including suing and being sued, in the same manner as if dissolution had not taken place, except as otherwise provided in the statute or by court order. The only relevant statutory provisions are those for the survival of pre-dissolution claims and for the barring of claims not timely filed.\(^\text{200}\)

\(^{200}\) New York Joint Legislative Committee To Study Revision of Corporation Laws, Research Release No. 89, Oct. 1, 1958, recommended, \textit{inter alia}, the survival of a remedy "for any liability incurred prior to such dissolution, if suit is brought and service of process had within three years from the date of such dissolution." \textit{Id.} at 2. Among the several survival statutes described were § 98 of the Model Act (now § 105) and statutes based on it and the Ohio statute, but without any reference to post-dissolution or even contingent claims. Verbatim statutory texts of the Model Act, the then New York General Corporation Law, and 10 other jurisdictions, including Ohio, were quoted without specific mention of the latter's inclusion of the phrase "or which would have accrued against it" (\textit{Ohio Rev. Code Ann.} § 1701.88(B) (Page 1964)). The consultant recommended that the proposed New York Business Corporation Law make explicit that dissolution does not impair any remedy arising from any liability "prior to the dissolution" (Research Release No. 89, \textit{supra} at 12-13), concluding that "[i]n providing for the survival of a remedy after dissolution, policy is best served by making the most explicit provisions to cope with particular problems that might arise in the winding up period in their absence." \textit{Id.} at 14. \textit{See N.Y. Bus. Corp. Law} §§ 1005(a)(1), 1006(a), 1009 (McKinney 1963). \textit{See also} note 117 \textit{supra}.

If the claim arises under a contract entered into prior to dissolution, it should clearly be enforceable. Similarly, if it arises out of a transaction appropriate for the winding-up of the corporation's affairs, there should be no objection to enforcing it either on behalf of or against the corporation.

4 I. KANTROWITZ & S. SLUTSKY, \textit{supra} note 174 (footnotes omitted).

Meager case authority exists on this point. In City of New York v. New York & S.B. Ferry & Steam Transp. Co., 104 Misc. 438, 172 N.Y.S. 495 (Sup. Ct. 1918), \textit{aff'd mem.}, 190 App. Div. 939, 179 N.Y.S. 914 (1st Dep't 1920), \textit{rev'd}, 231 N.Y. 18, 131 N.E. 554 (1921), the lower court, in construing and rejecting a claim based on a breach of a covenant against encumbrances, gave an excellent analysis of the post-dissolution problem. In reviewing, Judge Cardozo felt that such a covenant was a contingent claim, pre-dissolution in nature, and allowable. He did not take issue with the dissolution discussion itself and in fact stated: "Dissolution or bankruptcy, does, indeed, draw a dividing line as the result of accidents of time between claims capable of being proved, and those required to be rejected." 231 N.Y. at 24, 131 N.E. at 556.

In Commissioners of the State Ins. Fund v. H.L. & F. McBride, Inc., 195 Misc. 362, 90 N.Y.S.2d 416 (Sup. Ct. 1949), the court allowed a claim based on a pre-dissolution
The New York statute provides that for the purpose of winding up the affairs of a dissolved corporation, it may be sued as if dissolution had not taken place. No New York cases have been found definitively construing this provision. Three conclusions are possible as to the claims on which the dissolved corporation continues to be suable: (1) only pre-dissolution claims; (2) pre-dissolution claims and only those post-dissolution claims arising prior to the end of the six-month period; or (3) all post-dissolution claims as well as pre-dissolution claims. Arguably, since the 1963 elimination of the third stage of "termination," a dissolved corporation continues "in limbo" and remains suable until winding up is completed, and winding up is not completed until all claims, whether pre- or post-dissolution, have been satisfied. If this, the broadest of the three possible constructions, is followed, the dissolved corporation would be liable on post-dissolution claims, subject possibly to the "barring of claims" provision and, in any event, to applicable statutes of limitations.

The New York statute also provides that claims that are barred after the six-month period expressly include "unliquidated or contingent claims" and those of claimants "with whom the corporation has unfulfilled contracts." Again, no cases have been found deciding whether post-dissolution claims, whether or not arising prior to the end of the six-month period, are subject to this "filing and barring of claims" provision. To the extent that they are, post-dissolution claims that are not so filed would be forever barred at the end of the six-month period against the dissolved corporation, its assets, directors, officers, and shareholders, except where the court allows tardily filed claims.

Since the claims subject to this provision include "unliquidated or contingent claims" and those of claimants "with whom the corporation has unfulfilled contracts," post-dissolution claims, if they fit such accident to be asserted against the corporation. A subsidiary claim which did not accrue until after dissolution, however, was held to be barred.

Sanitary Brass Works, Inc. v. Rubin & Marcus, Inc., 110 Misc. 565, 566, 180 N.Y.S. 619 (County Ct. 1920), implies that if his claim did not accrue prior to dissolution, plaintiff might bring his action against the directors as trustees of the dissolved corporation's assets. Since directors are no longer trustees in New York, the validity of this dictum has become even more questionable.


201 N.Y. BUS. CORP. LAW § 1006(a)(4) (McKinney 1963).
202 See note 112 supra.
203 N.Y. BUS. CORP. LAW § 1007(a) (McKinney 1963).

Section 1007(a) is broader than § 1006 in its reference to "all creditors and claimants,
PRODUCTS LIABILITY & DISSOLUTION 905

description, would be subject to the filing requirements. The claims would thus be barred after the six-month period despite the anomalous result that such a construction would require filing by a person whose claim has not yet arisen, and would therefore bar a non-existent claim. However, this harsh result might be avoided by court allowance, for a satisfactory reason, of tardily filed claims against "any remaining assets of the corporation." That the claim had not arisen prior to the end of (or possibly even during) the six-month period should be a satisfactory reason for tardy filing and the allowing of such claim as one junior to the allowed claims filed during the six-month period. The phrase "any remaining assets of the corporation" clearly includes corporate assets still in the possession of the dissolved corporation after provision for all allowed claims filed during the six-month period, and arguably, includes corporate assets distributed to shareholders.

including any with unliquidated or contingent claims and any with whom the corporation has unfulfilled contracts." N.Y. Bus. Corp. Law § 1007(a) (McKinney 1963) (emphasis added).

Posing problems are (1) the drafting of the text of the notice to such "creditors and claimants" and (2) the "due diligence" required to ascertain the names and addresses of persons believed to be creditors or claimants against the corporation. Id.

The Legislative Studies and Reports to § 1007 includes the comment that, "[u]nliquidated and contingent claims' have been included with those that will be barred if not presented within six months." Id. § 1007 (Legislative Studies and Reports).

In contrast, the Model Act uses only the phrase "any right or claim existing, or any liability incurred, prior to such dissolution . . . ." Model Act § 105.

The Court of Appeals in In re Lexington Sur. & Indem. Co., 272 N.Y. 210, 5 N.E.2d 204 (1936), which involved a claim on post-dissolution default under a pre-dissolution surety bond, defined a "contingent" claim or liability as:

"A claim which may never accrue; one which has not accrued and which is dependent on the happening of some future event; one that depends for its effect on some future event, which may or may not happen." . . . Also contingent liability. . .

This court has repeatedly referred to surety bonds as contingent prior to default.

Id. at 214, 5 N.E.2d at 205, quoting 13 C.J. Contingent Claim 114 (1917).


See Bernard Semel, Inc. v. Fleishaker (Sup. Ct. 1970), in N.Y.L.J., Sept. 30, 1970, at 18, col. 5 (holding that although plaintiff, suffering damage on August 9, 1965, did not file a timely claim under N.Y. Bus. Corp. Law § 1006(b) (McKinney 1963) [sic] against a corporation dissolved on October 2, 1964, plaintiff might nonetheless show a satisfactory
If a dissolved corporation were suable, a further unresolved question would be whether an execution of judgment against it would have to be returned unsatisfied before the post-dissolution claim could be asserted against distributing directors or recipient shareholders.\(^\text{207}\)

c. Under Other Corporate Statutes. Under statutes continuing the existence of a dissolved corporation for the purpose of suing and being sued, dissolution would not affect the accrual or assertion of post-dissolution claims against it while such existence continues.\(^\text{208}\) After the expiration of such period, if limited in time, post-dissolution claims might still be asserted against distributing directors and recipient shareholders, since this limitation is on the existence of the corporation and not on the claim itself.\(^\text{209}\)

3. Liabilities of Distributing Directors for Post-Dissolution "Claims"

Under the Model Act formulation, assuming full compliance with dissolution procedures, no claim against the corporation can exist after the two-year post-dissolution suability period. On this theory, arguably, distributing directors could not be liable for any physical harm suffered after such period.\(^\text{210}\)

Under New York law, if the post-dissolution claims are barred, the bar would protect the directors as well as the corporation itself and the shareholders.\(^\text{211}\)

In jurisdictions which merely provide that dissolution shall not impair existing claims and remedies without time limitation, or which extend corporate existence for purposes of being sued, or under other reason for not doing so under id. § 1007(b)—an issue to be determined at trial, therefore precluding summary judgment).\(^\text{207}\) Horan v. John F. Trommer, Inc., 129 N.Y.S.2d 529 (Sup. Ct.), aff'd mem., 283 App. Div. 774, 128 N.Y.S.2d 595 (1st Dep't 1954) (holding claimant could establish his debt and challenge the alleged liquidation distribution within single suit without the necessity of first securing judgment against corporation where the circumstances justified classifying the distributions as transfers in fraud of creditors). See notes 144 & 161-62 supra.

\(^\text{208}\) See notes 130-31 supra.

\(^\text{209}\) See notes 129 & 196 supra.

\(^\text{210}\) See note 20 supra. If, before distributing the corporate assets to shareholders and prior to the filing of the articles of dissolution, the directors paid or made adequate provision for all corporate liabilities, they would not be liable for post-dissolution claims thereafter arising during the two-year period. Absent directors' liability, the recipient shareholder would not be liable. Cf. Heaney v. Riddle, 343 Pa. 453, 458-59, 23 A.2d 456, 459 (1942) (claim arising after dissolution of corporation held not impaired by reason of prior distribution of assets of corporation if such distribution was not effected in accordance with law; dictum that if accounting had been made and notice given, distribution of corporate assets, under decree of court, could then have been lawfully effected without any subsequent liability to plaintiff).

\(^\text{211}\) N.Y. BUS. CORP. LAW § 1007(b) (McKinney 1963).
more explicit statutes providing that dissolution shall not impair claims, post-dissolution claims against the corporation can accrue. Even under such statutes, however, it is unlikely that distributing directors would be liable.

Modern statutes make liable only those directors who authorized the distribution of corporate assets without making adequate provision for "known" liabilities.\textsuperscript{212} Except for post-dissolution "claims" which might arise during a post-dissolution winding up period, directors ordinarily would neither know nor have reason to know of post-dissolution "claims," and hence should not be liable under such statutory formulations.\textsuperscript{213}

Nor should the distributing directors be liable under the "trust fund theory," since they distributed the assets without knowledge or reasonable cause to know of such "claims."\textsuperscript{214} If directors were liable, however, their liability could not exceed the amount of the improper distribution, and they might be able to seek contribution from their fellow distributing directors and recipient shareholders.\textsuperscript{215}

\textsuperscript{212} E.g., Model Act § 48(c); N.Y. Bus. Corp. Law §§ 719(a)(3), (c) (McKinney 1963); see text accompanying notes 149-53 supra.

\textsuperscript{213} See text accompanying notes 151-53 supra.

\textsuperscript{214} See text accompanying notes 84 & 146-48 supra. In Heaney v. Riddle, 343 Pa. 453, 23 A.2d 456 (1942), the court observed:

[T]he corporation could not dissolve and distribute its assets among its stockholders without its liquidating trustees retaining sufficient assets to provide for the corporate debts, including contingent claims and obligations under executory contracts . . . . The assets of a dissolved corporation constitute a trust fund for creditors and stockholders . . . and when defendants, as liquidating trustees, distributed the assets among themselves as stockholders they made themselves personally liable, by reason of such breach of their trust, to a creditor whose right to priority could not be thus destroyed.

\textit{Id.} at 456, 23 A.2d at 458 (citations omitted). In Pine Manor Homes, Inc. v. Duval, 20 Pa. D. & C.2d 451, 76 Mont. Co. L. Rep. 296 (1959) (on motion to dismiss amended complaint), the court stated that the issue was whether the directors as "liquidating trustees" of the dissolved corporation were required to make provision for the alleged liability owed to the plaintiff, and that this in turn was dependent on whether or not the plaintiff was a "known creditor" within the meaning of the corporate statute, so as to require the directors to give plaintiff notice of dissolution and to provide for the contingent liability. \textit{Id.} at 456, 76 Mont. Co. L. Rep. at 500-01. The amended complaint alleged that the directors knew of the existence of a potential liability to the plaintiff. The court concluded that these averments were sufficient allegations that the plaintiff was a "known creditor," enabling the plaintiff to proceed to trial to prove such contention. This holding and the earlier holding by the same judge (Pine Manor Homes, Inc. v. Duval, 17 Pa. D. & C.2d 281, 75 Mont. Co. L. Rep. 255 (1958); see text accompanying notes 197-99 supra) appear inconsistent. The earlier holding turned on the finding that the potential contingent liability, based on a pre-dissolution contract, was not a "liability" incurred prior to dissolution. In contrast, this subsequent holding was that the claimant was a "known creditor."

\textsuperscript{215} See note 86 supra.
4. Liabilities of Recipient Shareholders for Post-Dissolution "Claims"

Recipient shareholders, of course, are not liable unless there is a valid claim.

The Model Act formulation, assuming full compliance with dissolution procedures, precludes the existence of any claim against the corporation after the post-dissolution two-year solvency period. Arguably, the Act would also preclude the assertion of claims against recipient shareholders for physical harm occurring after, and possibly during, such period.216

In New York, if post-dissolution "claims" are barred by the corporate statute, this bar expressly protects the shareholders, as well as the corporation itself and the directors.217 Otherwise, recipient shareholders, to the extent of corporate assets received, but not necessarily in proportion to the amounts received, might be personally liable.

In jurisdictions providing that dissolution will not impair existing claims and remedies, extending corporate existence for purposes of being sued, or expressly recognizing post-dissolution "claims" against the corporation, recipient shareholders would face potential liability.

Modern corporate statutes make recipient shareholders liable to the distributing directors who fail to make adequate provision for "known" liabilities of the dissolved corporation.218 Only in a rare case of directorial liability would shareholders be subject to such statutory liability—at least where the corporate assets were received with knowledge of the impropriety of the distribution, and possibly only to the extent of the amounts they received.219 The statutory emphasis on "known" liabilities suggests an intention to encompass only pre-dissolution claims against recipient shareholders, leaving open the question of the extent to which the corporate assets received by them would still be subject to post-dissolution "claims."

No case has been found in which a liquidation distribution to a shareholder was set aside on the ground that it constituted a conveyance fraudulent as to a future claimant.220

216 See text accompanying notes 149-56, 196 & 210-11 supra.
217 N.Y. Bus. Corp. Law § 1007(a) (McKinney 1963); see text accompanying notes 203-07 supra.
218 See text accompanying notes 163-65 supra.
219 See notes 168-69 supra.
220 See note 173 supra. See also Menconi v. Davison, 80 Ill. App. 2d 1, 225 N.E.2d 139 (1967) (dictum that one who becomes creditor subsequent to transfer of assets may reach those assets only on proof of actual fraud). The contention that corporate statutes control is less persuasive with reference to post-dissolution claims, concerning which the
The critical liabilities of recipient shareholders for post-dissolution "claims" are those which might exist apart from corporate statutes that do not preclude such liabilities. The "trust fund theory" has been applied for over a century to satisfy pre-dissolution claims out of the distributions of the "net assets" of dissolved corporations made to shareholders, whether or not such shareholders knew or had reason to know of such claims. No reason appears why the "trust fund theory," absent legislation to the contrary, should not be applicable to protect persons injured by defective products after dissolution or the end of any post-dissolution "suiability of dissolved corporation" period.

D. Judicial Dissolution Immunities

Judicial dissolution can result in greater immunity from claims against the dissolved corporation or its directors or shareholders. Such dissolution is not limited to involuntary proceedings but can occur in voluntary or nonjudicial dissolution in which judicial supervision of liquidation is sought.

Under the Model Act, the court may require the filing of claims within designated time limitations, may prescribe the form of notice to be given claimants, and may bar claimants who fail to file on time.

corporate statutes are mainly silent, than with reference to pre-dissolution claims, the statutory treatment of which is relatively complete.

221 See text accompanying notes 80-85 supra.

222 A future claimant, arguably, is never a creditor of the dissolved corporation. This conceptual hurdle, however, might not prevent the application of the "trust fund theory" in favor of future creditors. See note 161 supra.

Equity ameliorated the harsh consequences of dissolution at common law by enabling the creditor to trace corporate assets. In Pine Manor Homes, Inc. v. Duval, 17 Pa. D. & C.2d 261, 75 Mont. Co. L. Rep. 255 (1958), the court stated:

Plaintiff's remedy, if any [on a claim maturing after dissolution under a pre-dissolution contract], is under the common law, against directors for an improper distribution of assets in dissolution by failing to provide for creditors or against shareholders for receiving assets which should have been preserved for creditors.

Id. at 284, 75 Mont. Co. L. Rep. at 257. The uncertainty expressed in the Pine Manor case derives from modern statutes that have codified the "trust fund theory" to some extent, but do not deal expressly with post-dissolution claims.

In the absence of definitive statutory coverage, this philosophy could well be extended to fill the equity gap created by dissolution today. A corporation could conceivably mass produce a defective product until the market declines and then dissolve, leaving a multitude of potential claims in its wake.

Equity, with its progressive view, could provide the means whereby a post-dissolution claimant could prevent the immunization of corporate assets even after they had been lawfully transferred in accordance with dissolution procedures. Such a utilization of equity is in harmony with its former task of bringing formative corporation law up to date. Moreover, it certainly would not collide with the current trend of products liability, which places the burden of injury on as wide a spectrum of society as possible.

Dissolution can offer no sound reason, other than finality, why it should disrupt this policy. In the absence of a sound legislative solution, equity should provide a remedy.
Upon the entry or filing of the decree of dissolution, corporate existence ceases.

In New York, the court has broad powers to make orders concerning adequacy of notice to claimants, recognition and barring of claims, payment of claims, retention of assets for such purpose, determination of adequacy of provisions for payment of liabilities (including possible products liability insurance coverage), disposition or destruction of corporate records, issuance of injunctions against the commencement or maintenance of suits by creditors, making of liquidation distributions to shareholders, and payment to the state of any assets distributable to a creditor or shareholder who is unknown or cannot be found.

If the statutory dissolution procedures are followed, and there is full disclosure to the court of any unfulfilled contracts or other contingent claims or potential liabilities, the dissolved corporation and its directors and shareholders should enjoy the protection of judicial supervision.

This procedure is not necessarily hostile to injured consumers. Since the court is given broad latitude in judicial dissolution or judicial supervision of liquidation, it might be persuaded to require additional notice or to prescribe a longer than six-month period for the filing of claims.

E. Products Liability Insurance Coverage

Products liability insurance coverage can afford substantial protection to the manufacturing corporation prior to its dissolution.

Under the new standard Comprehensive General Liability Policy,\(^2\) which became effective on October 1, 1966, the insurer’s liability is limited to physical injury that occurs during the policy period; the dissolution of the insured might terminate the policy. For an injury occurring after the termination of the policy, even though the product was sold prior to such termination, there would be no insurance coverage.\(^3\)

For insurance protection against post-dissolution “claims,” a policy would have to be maintained for the period during which claims can be asserted. This depends on the applicable statutes of limitations and


their possible tolling during the plaintiff’s infancy or other incapacity.\textsuperscript{225} In addition, the policy should protect not only the dissolved corporation but also any corporate personnel, directors responsible for liquidation distributions, and recipient shareholders who might be liable for post-dissolution “claims.”

CONCLUSION

Post-dissolution “claims” for products liability, to a much greater extent than pre-dissolution claims, pose special problems under most corporate dissolution statutes, even where there has been full compliance with statutory dissolution procedures.

Resolution of the problems by legislatures and by the courts is required. The most difficult dilemma is presented when the physical injury from a defective product occurs after the corporate assets have been distributed among the shareholders. Since suing the corporation then is an empty formality, such suits, if not barred, should not be prerequisite to any otherwise available remedies against distributing directors and recipient shareholders.

The allocation of risks, whether by statute or judicial decision, should not depend on when technical “dissolution” occurs under the applicable statutory formulation, but on the balancing of interests of the injured person and of the dissolved corporation, its directors, and shareholders. A compromise must be drawn between compensating injured persons and settling the affairs of dissolved corporations. Finally, the solution should promote predictability and certainty.

The period for asserting claims against a corporation which is being dissolved obviously should be sufficiently long to permit both adequate winding up and due process to claimants and preferably should precede the distribution of the assets of the corporation among its shareholders.\textsuperscript{226} To the extent of any assets distributed to shareholders without adequate provision having been made for claims asserted during such period, whether technically pre- or post-“dissolution,” the recipient shareholders should be liable up to their respective distributions, with possible right of contribution against their fellow recipient shareholders. Although many existing corporate statutes are

\textsuperscript{225} See text accompanying notes 24-27, 32-34, 43-62 & 68-69 supra; text accompanying notes 229-31 infra.

\textsuperscript{226} This approach follows the New York dissolution procedure, as opposed to the Model Act pattern under which dissolution follows winding up and precedes the two-year suability period.
capable of this construction, legislative clarification would seem desirable.

Post-dissolution "claims" that cannot be asserted against the corporation because they arise after the suability period should not be assertable against the distributing directors who neither knew nor should have known of the claims and who, qua directors, hold no corporate assets. Whether they should be assertable against recipient shareholders is the ultimate question.

If the recipient shareholders are to be held liable, the "trust fund theory," or a modern counterpart with a less controversial designation, is available for application to post-dissolution "claims" either by the courts, or preferably, by legislation. On the other hand, if recipient shareholders are not to be held liable, application of the "trust fund theory" should be expressly negatived by legislation.

What forms, then, might a legislative solution take?

The corporation in dissolution, its directors, and shareholders obviously would favor a very short suability period, commencing with the beginning of the winding up period. Injured persons would urge a longer period running from the time of physical harm and subject to tolling. A very short period is more easily justified, of course, where there is provision for written notice to known claimants and notice by publication to any other possible claimants.

An acceptable compromise would be to have the period for the assertion of claims run contemporaneously with the winding up period and be for at least two years or during winding up, whichever

---

227 See note 79 supra. See also note 222 supra.

228 This follows the New York procedure for the publication of notice and the mailing of notice to known claimants. See notes 121-22 supra. In contrast, the Model Act provides for the mailing of notice to each known creditor or the giving of notice prescribed by the court. See notes 92 (due process requirements) & 102 supra.

The Pennsylvania statute (PA. STAT. ANN. tit. 15, § 2104(B) (Supp. 1971)) requires, in addition to mailed notice to each known creditor or claimant of a corporation in dissolution, notice by certified or registered mail to each municipality in which its registered office or principal place of business in the state is located. The statute also requires publication of notice in the county in which the registered office of the corporation is located once a week for two successive weeks in two newspapers published in the English language, one of which shall be a newspaper of general circulation and the other the legal newspaper, if any, designated by the rules of court for the publication of legal notices; otherwise, in two newspapers of general circulation published in the county in which the registered office of the corporation is located.

Id.

229 Such a compromise would constitute a departure from the Model Act procedure and would follow the New York pattern. The Model Act is presently inconsistent in this respect. In the case of voluntary dissolution, the two-year suability period follows winding
is longer. Only after two years (or any longer winding up period) might articles of dissolution be filed. Upon the issuance of the certificate of dissolution, the existence of the corporation would cease for all purposes. Such a rule would shorten the time for the assertion of some claims, especially those arising shortly before or during the winding up period, and would preclude subsequent claims.

Claims arising after the winding up period should never be asserted under such a rule. This obvious hardship possibly can be justified on the grounds that the acts of the corporation, upon which the complaint is based, occurred more than two years before, when the corporation was still carrying on business. The corporate personnel involved might be difficult to trace, memories would be hazy, records may have been lost, the allegedly defective product would have been under the control of others for more than two years, and the purchaser of the product, his family, household, guests, and possibly others would have had unliquidated claims for breach of warranty for more than two years. Such a rule would be no less Draconian than the result under present dissolution statutes that expressly bars pre-dissolution claims unknown to the corporation if such claims are not timely asserted even though the claimant is unaware of the dissolution, under the seventy-year old Connecticut general personal injuries statute of limitations, or under the statute of limitations section of the Secur-

up which precedes “dissolution.” In the case of judicially supervised liquidation, winding up and suability precede entry of the decree of dissolution.

Infancy or other incapacity should not lengthen the period since some qualified person may assert the claim as the representative of the injured person. Actually, this period would not be a statute of limitations but rather a limitation on the cause of action, rendering tolling inapplicable.


This paradox is vividly expressed by Judge Frank:

Except in topsy-turvey land, you can’t be born before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons . . . a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff.

Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (dissenting opinion) (footnotes omitted).

231 See note 56 supra.

232 CONN. GEN. STAT. ANN. § 52-534 (Supp. 1970); see note 69 supra. One notewriter has suggested that products liability cases be subject to the following statute of limitations, patterned after the Connecticut statute:

No action to recover damages from injury to the person or to real or personal property caused by the use or consumption of a defective product shall be brought except within one year of the date when the injury is sustained or discovered or
ties Act of 1933.\textsuperscript{233}

Under this approach, all claims, whether pre- or post-“dissolution,” would receive similar treatment under the same comprehensive corporate statutory provisions. Assuming compliance with statutory dissolution procedures, the corporation would not be suable after the winding up period. It would then be judgment proof since all of its “net assets” would have been distributed to shareholders. However, the distributing directors\textsuperscript{234} and recipient shareholders would be liable for any distribution of corporate assets during the period to the prejudice of any creditor who asserts his claim before the end of the period.\textsuperscript{233}

in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than five years from the date of the sale or installation of the product by the party sought to be held.

Note, supra note 69, at 790-91. In support, the writer argues:

This statute attempts to attain a balance between the necessity of providing the consumer with adequate time within which to discover a defect and institute an action and the need to provide the manufacturer with a definite period of liability and a date at which his susceptibility to suit terminates. The enactment of such a statute would resolve the confusion in the area and furnish consumers, manufacturers, and the legal profession with a predictable, workable, and understandable standard on which to base the selection and application of statutes of limitations in products liability actions.

\textit{Id.} at 791. Combining the Connecticut approach with the Model Act dissolution provisions, a products liability statute of limitations could be drafted to read:

No action to recover damages caused by the use, or consumption, of a defective product shall be commenced more than two years after the suffering of physical harm by the plaintiff or after tender of delivery of goods by the defendant.

If such a statute of limitations were enacted, appropriate changes in the corporate statute dissolution provisions, and the Uniform Commercial Code, would also have to be made to avoid inconsistencies.

\textsuperscript{233} 15 U.S.C. § 77m (1964):

No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under 77l(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.

\textsuperscript{234} This would require deletion of the word “known” from statutory provisions such as § 48(c) of the Model Act so that it would read substantially as follows:

\begin{itemize}
  \item \textup{(c)} The directors of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.
\end{itemize}

\textsuperscript{235} This would require deletion of the phrase “knowing such dividend or distribution to have been made in violation of this Act” from such statutory provisions as the penultimate paragraph of § 48 of the Model Act, so that it would read substantially as follows:

Any director against whom a claim shall be asserted under or pursuant to this section for the payment of a dividend or other distribution of assets of a
For any claims not timely asserted, whether arising before, during, or after such period, neither the corporation, distributing directors, nor its recipient shareholders would be liable.

To legislate this approach under the Model Act, two principal changes would be necessary: (1) equate the winding up period with the period for assertion of claims against the corporation (suitability period) and (2) equate the treatment of all claims against the corporation, whether technically pre- or post-"dissolution." Such a statutory provision might read substantially as follows:

SECTION 105. TERMINATION OF REMEDIES AND CLAIMS

The filing of a statement of intent to dissolve a corporation shall not affect any remedy in favor of such corporation or against it, its directors, officers, or shareholders, for any claim, whether arising before, during, or after such period, nor its recipient shareholders would be liable.
ing before or after such filing, if action or other proceeding thereon is commenced prior to the issuance of the certificate of dissolution. After such issuance, no claim whatsoever may be asserted by such corporation or against it, its directors, officers, or shareholders.

Absent statutory 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.

APPENDIX A

MODEL ACT DISSOLUTION PROCEDURE TIMETABLE*
(1969 Revision)

Pre-Dissolution Period

1. Filing of “statement of intent to dissolve” (§§ 85, 86):
   (a) corporation to cease to carry on its business, except insofar as may be necessary for winding up thereof (§ 86);
   (b) corporate existence to continue until issue of certificate of dissolution or entry of decree dissolving corporation (§ 86).

2. Mailing of notice of filing to each known creditor of corporation (§ 87(a)).

3. Payment by corporation of its liabilities (§ 87(b)).

4. After paying or adequately providing for payment of all its obliga-

---


* The corporation, at any time during liquidation, may apply for judicial supervision of liquidation (§§ 87(c), 97(c)). Involuntary or judicial dissolution may be sought by the attorney general (§§ 94-96, 97(d)), a shareholder (§ 97(a)), or a creditor (§ 97(b)); court may appoint a liquidating receiver (§§ 98, 99); corporate assets to be applied to expenses of liquidation and payment of corporate liabilities, and any remaining assets to be distributed among shareholders (§ 98); court may require all creditors to file claims within not less than four-month period and shall prescribe notice to be given to creditors and claimants (§ 100); creditors and claimants failing to file timely claims may be barred, by court order, from participating in distribution of corporate assets (id.); when expenses of liquidation and all liabilities of corporation shall have been paid and all of its remaining assets distributed to its shareholders, or in case assets are not sufficient to satisfy such expenses and liabilities, all assets have been exhausted, court shall enter decree dissolving corporation, whereupon existence of corporation shall cease (§ 102); filing of certified copy of decree of dissolution with secretary of state by court clerk (§ 103); two-year suability period on pre-dissolution claims applicable to dissolution by decree of court when court has not liquidated assets and business of corporation (§ 105).
tions, distribution of remainder of its assets among shareholders (
§ 87(b)).

5. Filing of "articles of dissolution" when all obligations of corporation
have been paid or adequate provision has been made therefor, and
all remaining assets of corporation have been distributed to its
shareholders (§ 92):
(a) that all liabilities of corporation have been paid or that ade-
quate provision has been made therefor (§ 92(c));
(b) that all remaining assets of corporation have been distributed
among its shareholders (§ 92(d));
(c) that no suits are pending against corporation or that adequate
provision has been made for satisfaction of any judgment which
may be entered against it in any pending suit (§ 92(e)).

Post-Dissolution Period

6. Upon issuance of "certificate of dissolution," corporate existence to
cease, except for purposes of suits, other proceedings, and other ap-
propriate corporate action by shareholders, directors, and officers as
provided in Act (§ 93).

7. Dissolution, either by issuance of certificate of dissolution, or by
court decree when court has not liquidated assets, or by expiration
of period of duration, not to impair any remedy by or against
corporation, its directors, officers, or shareholders, on any claim
incurred prior to such dissolution if action thereon is commenced
within two years after date of such dissolution (§ 105).

8. Corporate assets distributable to missing creditors or shareholders
to be deposited with state treasurer (§ 104).

APPENDIX B

NEW YORK DISSOLUTION PROCEDURE TIMETABLE**

Post-Dissolution Period

1. Filing of "certificate of dissolution" (§ 1004):
   (a) corporation dissolved upon such filing (id.);
   (b) corporation to carry on no business except for purpose of
       winding up (§ 1005(a)(1)).

2. Winding up (§ 1005(a)(2)).

3. Payment by corporation of its liabilities (§ 1005(a)(3)).

** At any time after the filing of the certificate of dissolution, the
corporation, or with court approval, any creditor, claimant, director, officer,
or shareholder may petition to continue liquidation under court super-
vision (§ 1008(a)). See note 121 supra.

Provisions of §§ 1005-08 applicable to corporation dissolved by expira-
tion of its period of duration or under Tax Law § 203(a) (§ 1009), and
subject to provisions of article 11 to judicial dissolution thereunder (§ 1117).

Judicial dissolution effective upon filing of final order of dissolution by
secretary of state (§ 1111(d)).
4. After paying or adequately providing for payment of its liabilities, distribution of any remaining assets among its shareholders (§ 1005 (a)(3)(B)).

5. Dissolved corporation to function for purpose of winding up in same manner as if dissolution had not taken place except as otherwise provided in law or by court order (§ 1006(a)); e.g.,
(a) directors not to be deemed trustees of corporate assets and title to such assets not to vest in them (§ 1006(a)(1));
(b) corporation may sue or be sued (§ 1006(a)(4)).

6. Dissolution not to affect any remedy by or against corporation, its directors, officers, or shareholders on any claim existing or liability incurred before such dissolution except as provided in §§ 1007-08 (§ 1006(b)).

7. Giving of notice requiring all creditors and claimants, including any with unliquidated or contingent claims and any with whom corporation has unfulfilled contracts, to present claims within at least six-month period (§ 1007(a)):
(a) mailing of notice to each person believed to be creditor or claimant whose name and address are known or can with due diligence be ascertained (§ 1007(a));
(b) publication of notice at least once a week for two successive weeks in newspaper of general circulation in county in which office of corporation was located at date of dissolution (id.).

8. Claims not timely filed or disallowed to be forever barred as against corporation, its assets, directors, officers, and shareholders, except to such extent, if any, as court may allow them against any remaining assets of corporation in case of creditor who shows satisfactory reason for failure to file his claim (§ 1007(b)).

9. Payment to state comptroller, as abandoned property, of assets distributable to missing creditors or shareholders (§ 1005(c)).