LEGISLATION

The Uniform Insurers Liquidation Act

Corporations doing business in several states have long faced the problem of ancillary receiverships when forced into insolvency. Because of limited extraterritorial powers of receivers, delinquency has produced a series of diversified liquidation proceedings, which have in turn wreaked havoc with the affairs of the company.[1] Although there has been a vast improvement in national bankruptcy legislation, with the passage of the Chandler Act in 1938,[2] so that the receivership device has been abandoned to a large degree by most corporations, insurance companies have been excluded from the Act.[3] Consequently, they must still rely upon receivership and local statutory substitutes for insolvency proceedings. To cope with the continued existence of the many problems of decentralization, and the expense and delay of ancillary receiverships still necessary for insurers, the Uniform Act was adopted.[4] Like most uniform legislation, the Act attempts to cover a broad field. If it is to be extensively used, it must afford remedies for problems that have defied solution for a long time. In order to evaluate its efficiency, therefore, it is necessary to compare the existing law with the new provisions that are embodied in the Act.

I. Administration of the Assets

One of the more difficult of the problems [5] which confront the equity receiver of the defunct corporation is his inability to secure extraterritorial recognition. The dogma is familiar that "the receiver cannot maintain an action in his capacity as receiver outside the state of his appointment".[6] But within the purview of the great majority of the *state* courts, however, the *privilege* to sue has been awarded receivers from other jurisdictions as a

1. Van Schaick, *Some Legal Aspects of Insurance Administration* (1933) 58 A. B. A. Rep. 572, 573 *et seq.*

2. Bankruptcy Act of 1938, 52 Stat. 840, 11 U. S. C. A. (Supp. 1938), amending Bankruptcy Act of 1898, 30 Stat. 544 (1898), 11 U. S. C. A. (1927).

3. *Id.* at 845, 11 U. S. C. A. § 22 (Supp. 1938), amending Bankruptcy Act of 1898 at 547, 11 U. S. C. A. § 22 (1927).

4. Uniform Insurers Liquidation Act, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-ninth Annual Conference (1939) 232-239, hereafter referred to as the Uniform Act. Although this act was adopted only July 8, 1939, it has already been enacted by New York. 27 N. Y. Cons. Laws (McKinney, 1940) §§ 517-524.

5. The problems have been exhaustively analyzed by First, *Extraterritorial Powers of Receivers* (1932) 27 Ill. L. Rev. 271; Laughlin, *Extraterritorial Powers of Receivers* (1932) 45 Harv. L. Rev. 429; Rose, *Extraterritorial Actions by Receivers* (1933) 17 Minn. L. Rev. 704. The need for centralized control has been voiced in the *Annual Report of Special Committee on Equity Receiverships* (1927) N. Y. C. Bar Ass'n 299, 312, 315.

6. Goodrich, Handbook on the Conflict of Laws (2d ed. 1938) 509. This doctrine has been firmly entrenched in the Federal courts since the renowned case of Booth v. Clark, 17 How. 322 (U. S. 1854). Recognition of a foreign receiver as a matter of right has likewise been denied by the state courts. See cases cited 3 Beale, A Treatise on the Conflict of Laws (1935) 1585, n. 2; 1 Clark, The Law and Practice of Receivers (2d ed. 1929) 808, n. 193; Rose, note 5 *supra*, at 717, n. 44. In order for a receiver to maintain a suit in another jurisdiction as a matter of right, some other sort of proceeding was essential, whereby, for example, the foreign receiver sued upon the judgment which he had recovered on a corporate claim, or as a party to the contract. See Goodrich, *op. cit. supra* note 6, at 514; Rose, note 5 *supra*, at 718-719. The latter writer points out also that the law has made a distinction between voluntary and involuntary (possibly statutory) assignments. Such a differentiation illustrates the extent to which various courts have been carried in their enthusiasm to protect local creditors. *Id.* at 706-707. See also Note (1932) 41 Yale L. J. 593, 597-600.

matter of comity in the absence of harm to local creditors.[7] Thus, it has been averred ". . . to be in harmony with those legal principles by which the intercourse of foreign states is regulated for every government, when its tribunals are appealed to, to render every assistance in its power in furtherance of the execution of . . . authority (from the appointing court) . . .".[8] On the other hand, a few state courts [9] and the Federal courts,[10] with the exception of isolated cases,[11] have denied recognition even on the basis of comity, despite the absence of any consequent inconvenience to local creditors.

The only alternative, then, was to secure the appointment of an ancillary receiver in each state where either corporate property or a debtor of the insolvent was located.[12] Since such a procedure, necessarily entailing burdensome expense and delay, is generally considered an action completely independent of delinquency proceedings in the domiciliary state,[13] a court of another jurisdiction could withhold recognition even then by refusing the appointment.[14] But it is plain that such a refusal would produce a series of disconnected receivership proceedings [15] and would prevent an orderly

7. See GOODRICH, *op. cit. supra* note 6, at 512-514; RESTATEMENT, CONFLICT OF LAWS (1934) § 564.

8. Hurd v. Elizabeth, 41 N. J. L. 1, 4 (1879). An equally forceful statement appears in Hardee v. Wilson, 129 Tenn. 511, 518-519, 167 S. W. 475, 477 (1914): "The privilege of suing in jurisdictions other than that of their appointment is almost universally conceded to receivers now, as a matter of comity or courtesy, unless such a suit is inimical to the interest of local creditors . . . or unless such a suit is in contravention of the policy of the forum."

9. Murtey v. Allen, 71 Vt. 377, 45 Atl. 752 (1899); Filkins v. Nunnemacher, 81 Wis. 91, 51 N. W. 79 (1892); *see* Malone v. Johnson, 45 Tex. Civ. App. 604, 610, 101 S. W. 503, 506 (1907). This appears to be the old view, as exemplified by HIGH, A TREATISE ON THE LAW OF RECEIVERS (3d ed. 1894) § 239, which asserts that ". . . the principles of comity . . . will not warrant a receiver in bringing an action in a foreign jurisdiction".

10. Sterret v. Second National Bank, 248 U. S. 73 (1918); Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561 (1905); Fowler v. Osgood, 141 Fed. 20 (C. C. A. 8th, 1905). See in addition, cases cited by Rose, note 5 *supra*, at 711, n. 20.

11. Lewis *et ux.* v. Clark, 129 Fed. 570 (C. C. A. 9th, 1904); Lewis v. American National Stores Co., 119 Fed. 391 (C. C. E. D. La. 1902); Rogers v. Riley, 80 Fed. 759 (C. C. D. Ky. 1896). In all three cases, the court permitted suits by foreign receivers in the absence of domestic creditors and local policy.

12. See First, note 5 *supra*, at 273; Rose, note 5 *supra*, at 714; Note (1930) 43 HARV. L. REV. 805, 806. In regard to domiciliary appointment, there has been some discussion as to the individual to be designated in that capacity. See Havighurst, *Some Aspects of the Illinois Insurance Code* (1937) 32 ILL. L. REV. 391, 407, where the author asserts the possibility of political pressure. There is present also among ancillary courts the fear of being mere rubber-stamps under the control of the primary court. It is well, therefore, that the Uniform Act simplifies the rule by specifying the insurance commissioner to serve as receiver. Sec. 2 (1). See note 18 *infra*. This provision is desirable also because it eliminates the item of receivers' fees, since the commissioner is to receive no extra compensation. Likewise, it makes for uniform control and facilitates the general administration of the company.

13. Paxton v. McCartney, 103 Ind. App. 697, 6 N. E. (2d) 719 (1937). See GLENN, LIQUIDATION (1935) § 585; Rose, note 5 *supra*, at 714.

14. Bluefields S. S. Co. v. Steele, 184 Fed. 584 (C. C. A. 3d, 1911); Clark v. Supreme Council O. C. F., 146 Cal. 598, 80 Pac. 931 (1905) (where the appointment was refused because of a prior attachment by a local creditor). See also note 13 *supra*.

15. See note (1930) 43 HARV. L. REV. 805, 807. Illustrative of this destructive process in the federal courts is the oft-cited case of Farmers' Loan & Trust Co. v. Northern Pac. Ry., 72 Fed. 26 (1896), where four distinct sets of receivers, embracing four circuits and ten districts, were appointed in what was once tersely labelled a "judicial scandal". On the other hand, however, appears the more rational view of Mabon v. The Ongley Eiectric Co., 156 N. Y. 196, 50 N. E. 805 (1898), which refused ancillary appointment, not because of a denial of extraterritorial recognition to the primary receiver, but rather to avoid unnecessary expense. See also Moscow Fire Ins. Co. v. Bank of N. Y. & Trust Co., 280 N. Y. 286, 20 N. E. (2d) 758 (1939).

administration. Another objectionable feature of the necessity of securing ancillary appointment is the fact that the delay involved and the possible failure to secure such appointment might prevent the receiver from collecting corporate claims, with the result that some debtors would escape payment.[16]

This lack of extraterritorial cooperation, disastrous as it inevitably was, elicited various legislative attempts at reform. The insurance companies, expressly excluded from the Federal Judicial Code,[17] were aided somewhat by statutory provisions which vested title in the receiver to all the insolvent's assets, wherever located.[18] With the added weapon of the magical "title"—despite much quarreling to be done concerning the appropriate theory [19]—the receiver was necessarily, by virtue of the full faith and credit clause of the Federal Constitution,[20] accorded recognition in other jurisdictions.[21] But notwithstanding the presence of a so-called "statutory successor", it was held in the second *Clark v. Williard* case [22] to be discretionary with the court whether a foreign statutory successor will prevail over local creditors. In other words, the *right to sue* did not insure *control* over local assets, and this without any constitutional objection: "Choice is uncontrolled as between one policy and the other, so far as the Constitution of the Nation has any voice upon the subject." [23] Apparently, then, each state, sovereign within its own sphere, has the right to determine its own policy. Such policy is usually governed by the potency of the desire to avoid inconvenience and expense to local claimants, as well as the inherent

16. Van Schaick, *National Uniformity in Liquidation of Insurance Companies* (1933) PROC. NAT. CONV. INS. COMM. 101. The further problem, namely that ancillary appointment is necessary to prevent valid attachment proceedings, is discussed note 33 *infra*.

17. Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77 (1923). The relevant portion of the Code is Section 56, 36 STAT. 1102 (1911), 28 U. S. C. A. 117 (1927). The section provides that where the controversy involved ". . . property of a fixed character . . . (which) lies within different states in the same judicial circuit . . .", the receiver of one federal court was ". . . vested with full jurisdiction and control over all the property within such circuit . . .". That the *Karatz* case, *supra*, represents an arbitrary limitation, see *Report of Receivership Committee*, note 7 *supra*, at 314.

18. See, e. g., CAL. CODES, LAWS AND CONST. AMEND. (Deering, Supp. 1935) act 3748, § 1101; Ill. Laws 1937, § 216, p. 789; IND. STAT. ANN. (Baldwin, Supp. 1935) § 9496.4; 3 MICH. COMP. LAWS (1929) § 12266; 27 N. Y. CONS. LAWS (McKinney, 1939) § 522; PA. STAT. ANN. (Purdon, 1930) tit. 40, § 206; Vt. Laws 1937, no. 188, § 6. All of these statutes designate the insurance commissioner or director as receiver or liquidator. For a list and discussion of the various types of statutes regulating the liquidation of insurance companies, see Legis. (1933) 33 COL. L. REV. 722, 724-726.

19. See Laughlin, note 5 *supra*, at 453 *et seq.*, where the author presents a detailed analysis of the theory underlying this title-vesting legislation. See also First, note 5 *supra*, at 283-284; Kearns, *Interstate Receivership Practice* (1934) 28 ILL. L. REV. 752, 766-767. The pertinent provisions of the Uniform Act are discussed p. 95 *infra*.

20. U. S. CONST. Art. IV.

21. Clark v. Williard, 292 U. S. 112 (1934); *cf.* Converse v. Hamilton, 224 U. S. 243 (1912) (foreign receiver allowed to sue stockholder). See (1933) 19 VA. L. REV. 649, 650.

22. 294 U. S. 211 (1935).

23. *Id.* at 215, where Justice Cardozo made this interesting statement also: "Other states give the local creditor a free hand, with the result that he may seize what he can find, though the assets of the debtor are dismembered in the process."

It is important to bear in mind that by virtue of the privileges and immunities clause, a state cannot prevent a non-resident creditor from filing his claim in that state. Mieyr v. Federal Surety Co., 97 Mont. 503, 34 P. (2d) 982 (1934). This is certainly true if the rule of Blake v. McClung, 172 U. S. 239 (1898) is of any effect. See Note (1939) 87 U. OF PA. L. REV. 328. See also Mulder and Solomon, *Effect of the Chandler Act Upon General Assignments and Compositions* (1939) 87 U. OF PA. L. REV. 763, 779.

wish to retain control over assets within its jurisdiction.[24] When such considerations will be deemed of sufficient strength to warrant the invocation of the limitations of the right of the foreign statutory successor likewise seems to be subject to a very wide latitude.[25] Manifestly, such a policy can be carried to disastrous extremes.[26] At any rate, the discretionary power wielded by the courts will be moulded by whatever factor weighs heavier on the scales of convenience, solicitude for local creditors or a desire for dispatch in the administration of the defunct corporation. Domination by the former necessarily tends to defeat the latter.

Such is the situation—uncertain and perplexing—that confronts the industrious receiver who seeks to administer the affairs of the insolvent in the most desirable manner, efficiently and equitably. Since the mere investiture of title in the receiver does not insure preference over local creditors,[27] there remained the disturbing likelihood that some few individuals would secure full reimbursement, at the expense of proportionately diminished shares for the others, even though they deserved equal treatment. To remove this undesirable feature of the existing law, the Uniform Act provides: "The domiciliary receiver of an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action, . . . *located in this state*. . . ."[28] This section, in conjunction with the clause that gives the domiciliary receiver of a resident insurer "title to all of the property, . . . wherever located, . . . and . . . the right to *recover* the same . . ."[29] will apparently prevent the inequitable preferences that frequently resulted from the courts' enthusiasm to protect local creditors.[30] By virtue of these reciprocal pro-

24. Note (1930) 30 MICH. L. REV. 1322, 1326 and n. 20.

25. *Id.* at 1327-1328 and note 26. Thus it has been held that the mere presence of local creditors will suffice. Hieronymous Bros. v. China Mutual Ins. Co., 6 Ala. App. 97, 60 So. 452 (1912).

26. See Laughlin, note 5 *supra*, at 466.

27. See p. 94 *supra*.

28. Sec. 3 (1). The italicized phrase (italics supplied) would seem to distinguish this provision from the ordinary statutory language. Under the latter, state *X* would be inclined to favor local creditors over a receiver who derives his title from state *Y* (see p. 94 and note 23 *supra*), whereas under the instant statute a receiver from state *Y* would be more likely to be recognized in state *X* since his title comes from state *X* itself. For the latter jurisdiction to rule otherwise, would be to stultify itself. Similar provisions already exist in the laws of three states. Ill. Laws 1937, § 216, p. 789; 27 N. Y. CONS. LAWS (McKinney, 1940) § 519 (2); Vt. Laws 1937, No. 188, § 6. It is interesting to note that the statutes of Illinois and Vermont are exact copies of the Uniform Act drafted and adopted by the National Convention of Insurance Commissioners in 1936. PROC. NAT. CONV. INS. COMM. (1936) 30-32. New York, which has since adopted the Uniform Act, likewise once had the act of the Insurance Commissioners. 27 N. Y. CONS. LAWS (McKinney, 1939) §§ 517-524.

Note also, that although the Uniform Act designates the state of incorporation as the domiciliary state [§ 1 (5)], there has been some discussion as to the proper situs for a domiciliary or primary receiver. See Kearns, note 19 *supra*, at 755 (where the author distinguishes between real and theoretical domicile).

29. Sec. 2 (2). The further provision in Section 10, whereby "The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets . . ." would seem to be of great aid. A parallel provision in existing legislation reads thus: "The general assets located in this State of a delinquent company domiciled in a reciprocal state shall be administered by the insurance . . . agency of such reciprocal state . . . ." Ill. Laws 1937, § 218, p. 790; Vt. Laws 1937, No. 188, § 8. As to the effect of "title" and the statutory language necessary to vest it, see Note (1932) 30 MICH. L. REV. 1322, 1330-1332.

30. It is important to note, however, that the absence of any express reference to real property leaves the same doubt that is present under existing law, namely, whether the investiture of title to the corporate "property" includes land and other immovables. See 8 COUCH, CYCLOPEDIA OF INSURANCE LAW (1931) 6883; Rose, note 5 *supra*, at 721; Van Schaick, *loc. cit. supra* note 16; Legis. (1935) 48 HARV. L. REV. 835, 837, n. 11.

visions, then, there would seem to be no further need for expensive ancillary proceedings,[31] which were formerly necessary not only to insure success over local creditors,[32] but also to prevent the latter from securing valid attachment liens.[33]

With this unimpeachable power to recover all the property of the corporation, regardless of its situs, already secured, the domiciliary receiver is further aided by the power to employ "special deputies" who are empowered to the same extent as, but under the supervision of, the primary receiver.[34] This insures a uniform administrative device which in turn secures the benefit of quickly organized and completely cooperative assistance, and thus centralizes not only control, but also complete responsibility, in the insurance commissioner, who is designated as the domiciliary receiver. The elimination of judicial interference,[35] although possibly a removal of a perhaps wise check upon a political appointee,[36] nevertheless does provide for a quick, easy and inexpensive administration.

A final problem in the administration of a defunct corporation involves the well-settled rule that the mere appointment of a receiver has no effect on attachment, garnishment or other similar proceedings in another jurisdiction;[37] appointment of ancillary receivers was essential.[38] So it was that creditors in distant areas, cognizant of the pending insolvency or actual dissolution of their debtor corporation, by various twists of judicial process, secured themselves with a lien or some other sort of preference,[39] thus diminishing the fund available for distribution to the remaining claimants. The apparently omnipresent solicitude for local credtors has carried this doctrine to such an extent as to include liens acquired by attachment even after the appointment of a foreign receiver.[40] The sole form of protec-

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The definition of "general assets" in § 1 (8) of the Uniform Act would seem to be inadequate. In view of the uncertainty of the law today, it is submitted that an express reference to realty would have been more satisfactory in removing this doubt concerning the titles to land in the various states.

31. See p. 99 *infra*, where it is pointed out that, from the point of view of the claimant, ancillary proceedings are still necessary under the Act.

32. See note 12 *supra*.

33. Subsequent to ancillary appointment, the corporate property is deemed to be *in custodia legis* and exempt from the ordinary judicial processes whereby liens in the form of attachments, for example, are secured. See RESTATEMENT, CONFLICT OF LAWS (1934) § 546 and comment *c*; Rose, note 5 *supra*, at 714.

34. THE UNIFORM ACT § 2 (3): ". . . he may appoint one or more special deputy (commissioners) to act for him. . . ."

A parallel provision exists in those states which have adopted the act proposed by the National Convention of Insurance Commissioners: they exempt from the prohibition of suits in a reciprocal state against an insurer for whom a liquidator had been appointed those actions "initiated, or consented to, . . ." by the domiciliary receiver. Ill. Laws 1937, § 216, p. 790; Vt. Laws 1937, No. 188, § 6.

35. The Act requires the court's approval of all receivership expenses, including the salaries of all deputies, thus placing ultimate control with the court. THE UNIFORM ACT § 2 (3).

36. This was suggested in the discussion of the Act before its adoption.

37. RESTATEMENT, CONFLICT OF LAWS (1934) § 546.

38. *Id.* at comment *c*.

39. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-NINTH ANNUAL CONFERENCE (1939) 230-231.

40. Mieyr v. Federal Surety Co., 97 Mont. 503, 34 P. (2d) 982 (1934) (where the foreign receiver was a statutory successor). This rule has been applied also where the attaching creditor is a non-resident of the ancillary state. Catlin v. Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250 (1889). See note 23 *supra*. *A fortiori*, the creditor who attached prior to the appointment of the receiver will prevail. The undesirable result from this procedure has been somewhat mitigated by decisions favoring the foreign receiver where the creditor attaching locally is subject to the jurisdiction of the appointing court [Gilman v. Ketcham, 84 Wis. 60, 54 N. W. 395 (1893)], or is deemed

tion available to a receiver from another jurisdiction was to obtain ancillary appointment before attachment.[41] To cope with this situation, it is provided that "During the pendency of delinquency proceedings in this or any reciprocal state no action or proceeding in the nature of an attachment, garnishment, or execution shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding." [42] This will obviate the danger of any inequitable preference from this source, at least. But the Act omits any mention of the status of voluntary payments by the insurer which result in a preference to one or more creditors. By such a device, an unfair result is still possible.[43]

Another undesirable feature, however, apparently still remains. Nowhere in the Uniform Act is there any provision for some sort of relation between the domiciliary receiver and the appointment of ancillary receivers. Section 3 (1) provides for such appointment only upon the application of either the insurance commissioner or resident claimants of such ancillary state.[44] It would perhaps be better to give the former some voice, if not control, in the matter of ancillary appointment. Although it is true that there is basis for close cooperation between the two,[45] the very existence of both might well be unnecessary and avoided.

II. Determination of Claims

A further major problem in the liquidation of an insurer is the existence of various types of claims, scattered as they are, and the concomitant question of their recognition in a jurisdiction other than that of their origin. The lack of uniformity among the states as to what claims will be honored in liquidation is caused by the confused state of the law as to the effect of insolvency on the rights of policy-holders.[46] Various stages of delinquency proceedings have been specified as the signal for the tolling of the rights and

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to be governed by "notice" of the corporate charter [O'Malley v. Wilson, 182 Ga. 97, 185 S. E. 109 (1936)].

41. See note 38 *supra.*

42. The Uniform Act § 9. The wording of the last phrase is to provide for the contingency of the proceeding falling through, in which case all previously secured liens would revive.

43. It is interesting to compare this portion of the Act with the relevant sections of the Bankruptcy Act, 52 Stat. 840, 11 U. S. C. A. (Supp. 1938). Section 60 declares as a voidable preference a transfer (which is broadly defined in Section 1) by the debtor to the creditor within four months of bankruptcy and while the debtor is insolvent, if the creditor receiving the payment has reasonable cause to believe that the debtor is insolvent. Section 67a (1), dealing with the same subject matter as that in Section 9 of the Uniform Act, is stricter in that insolvency of the debtor is required. On the other hand, Section 60 makes the Bankruptcy Act broader in its scope because it includes voluntary payments.

44. Sec. 3 (1) reads: "The [commissioner] (in an ancillary state) shall file a petition requesting . . . (his) appointment (as ancillary receiver) (a) if he finds that there are sufficient assets . . . in this state to justify the appointment . . . or (b) if ten or more persons resident in this state having claims against such insurer file a [petition] with the [commissioner] requesting the appointment of such ancillary receiver." Note that it is the commissioner in the ancillary state, and not the domiciliary receiver, who determines the sufficiency of the assets. See p. 99 *infra* with regard to this problem from the point of view of the individual claimant.

45. The Act provides for a certain, unified procedure once the administration has commenced. §§ 2 (2), (3) and 3 (2).

46. See 8 Couch, Cyclopedia of Insurance Law (1931) §§ 2042, 2043, 2044.

liabilities of all interested parties.[47] In other words, depending upon the jurisdiction, insurance policies, representing contingent claims, are considered cancelled as of the specified time.[48] And because of this lack of uniformity among the states when liquidation requires extraterritorial recognition, the situation arises wherein one policy-holder will recover for the loss covered by the policy, whereas another holding the identical policy, will be denied recognition, merely because he resides in another state.[49] To eliminate these unfounded preferences among creditors of the same class, the instant statute has adopted the procedure formerly in operation in New York.[50] It would crystallize the rights and liabilities of the interested parties—and thus tend towards equality among similarly situated claimants —wherever located—as of the time of ". . . entry of the order directing possession to be taken . . .",[51] with the concurrent provision allowing the filing of proof of claims ". . . on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings".[52] The proposed rule would produce unanimity among the courts as to what claims are provable in insolvency; the proper decree would have the same effect in one state as in another.

Still another hindrance to a speedy administration is the question of the proper procedure, after the determination, as above, of what claims are provable, for the presentation of claims. Is it essential that a creditor, to whom is owing just a small sum, notify the domiciliary receiver of his claims; or would it suffice to present them in the state of his residence; or would it perhaps even be wise to introduce his claim in every jurisdiction where delinquency proceedings have been instituted? In view of the minuteness of the debt, the last suggestion, albeit wise, and its importance to this claimant notwithstanding, is plainly beyond reach, and to require any such procedure would be to impose an unfair burden.[53] Moreover, although the law provides that creditors ". . . regardless of where they are domiciled can prove their claims and be paid in any state in which a receiver has been appointed",[54] there remains the very strong likelihood of there being no receivership proceedings in either his resident state, or any state nearby. Such proceedings would undoubtedly be desirable from the point of view of the claimant, since they would eliminate the expense of traveling to the

47. Thus, the adjudication of insolvency, or a subsequent injunction restraining further operations, or a decree of dissolution—or even the mere institution of proceedings for such a decree—these several successive steps have been variously designated as the point at which the rights involved are to crystallize. See Legis. (1933) 33 COL. L. REV. 722, 726; (1932) 41 YALE L. J. 916.

48. In effect, this means that by its insolvency or dissolution, the insurer or its receiver gives "notice" to policyholders that the company is from then on unable to fulfill its part of the contract of insurance, the rationale being that such "notice" affords the various parties with the opportunity to "cover" their investment by securing other insurance. See Legis. (1933) 33 COL. L. REV. 722, 728; Legis. (1937) 37 COL. L. REV. 1031, 1034.

49. This is perhaps best illustrated by a hypothetical instance: a policy-holder in state *X*, where policies are considered cancelled only upon the actual dissolution of the company, will be denied his claim by a receiver in state *Y*, where the corresponding law decrees such cancellation as of the mere institution of delinquency proceedings, when the loss occurs in the interim. On the other hand, an individual in state *Y*, holding an identical policy, will be allowed recovery. (It is fundamental here that these various steps are separate and distinct.) See, e. g., Federico Macaroni Mfg. Co. v. Great Western Fire Ins. Co., 173 La. 905, 139 So. 1 (1932); Frink v. National Mutual Fire Ins. Co., 90 S. C. 544, 74 S. E. 33 (1912).

50. 27 N. Y. CONS. LAWS (McKinney, 1939) §§ 514 (2), 544 (3). Identical provisions still exist in Illinois. See Ill. Laws 1937, § 194, p. 781, and § 209 (3), p. 786.

51. THE UNIFORM ACT § 2 (2).

52. *Id.* at § 4 (1).

53. See Van Schaick, note 16 *supra*, at 102.

54. RESTATEMENT, CONFLICT OF LAWS (1934) § 552.

situs of the closest receiver. In fact, the latter procedure might not even be worthwhile in view of the distance to be traveled as well as the possibility of there being only a limited amount of assets available there. At any rate, if he be the only claimant from that area, such proceedings would not be available under the Uniform Act.[55] Might it not prove more advantageous to all concerned, then, to provide for some sort of administrative device whereby such a claim could be considered on a par with all others, without entailing cumbrous ancilliary proceedings?

Along these lines, the Illinois and Vermont statutes, after affording claimants with ". . . the privilege of proving their claims in such reciprocal state",[56] proceed to provide for the isolated individual in the hypothetical instance given above in this fashion: "The court in charge of the proceeding in this state shall, if necessary, appoint one or more referees before whom such claims may be proved in such reciprocal state." [57] The contingency referred to by the clause "if necessary" would seem to be the exact situation suggested; the result—ample protection for all. Unfortunately, however, the Uniform Act contains no parallel provisions. It is likewise to be noted that ancillary proceedings, despite their expense and possible inaccessibility, are still necessary to enable a claimant to file outside the domiciliary state.[58] Manifestly, since the widely scattered operations of insurers are likely to produce any number of similar instances of isolated creditors, the failure of the Act to provide the appropriate machinery to cope with this contingency is indeed to be regretted.

Apparently, then, the Uniform Act merely codifies the existing law when it provides that ". . . claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary receiver".[59] There is, however, no mention of what law is to govern the rules of provability. To adopt the principle of the Restatement on the Conflict of Laws, that "the manner in which (and time within which) a claim can be proved in a state is determined by the law of that state",[60] is to defeat the express purpose of the Act.[61] Since creditors are enabled to file and prove claims in any state wherein an ancillary liquidator has been appointed, it would follow that the terms of such filing and proof would vary directly with the laws of each state. It is plain that such a procedure would militate against the attainment of the desired equality. Rather should the domiciliary substantive law prevail, with individual local hearings when required.[62] Even more desirable, however, would be a provision for a system of uniform rules of provability. Although the adoption of the suggested interpretation of the statute would subject all claimants to similar consideration, there is no reason why the chance choice of the insurer's domicile should determine the appropriate rules in the event of the company's insolvency.[63]

55. Sec. 3 (1) is reproduced in note 44 *supra*.

56. Ill. Laws 1937, § 212, p. 789; Vt. Laws 1937, No. 188, § 2.

57. *Ibid.* Although this procedure involves a certain amount of expense, it is patently less costly than ancillary appointment.

58. Sec. 4 (1) reads: ". . . claimants residing in reciprocal states may file claims . . . with the ancillary receiver, if any, in their respective states . . . ." Furthermore, the provision in § 2 (3) for "special deputies" does not seem to be of any aid in this instance.

59. Sec. 4.

60. (1934) § 555 (time) and § 556 (manner).

61. Sec. 12: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it." Similar "uniform purpose" clauses appear in the three states already often cited. Ill. Laws 1937, § 219, p. 790; 27 N. Y. CONS. LAWS (McKinney, 1940) § 517; Vt. Laws 1937, No. 188, § 1.

62. Legis. (1937) 37 COL. L. REV. 1031, 1034.

63. *Ibid.*

A final aspect of the problem of the determination of claims involves the policy of many courts, prompted by the convenience of centralized administration and the consequent diminished delay and expense,[64] to remit the corporate assets within their borders to the insurer's domicile.[65] Such a procedure would apparently eliminate the inequitable preferences that flowed from solicitude for local creditors. It would seem that a claimant need only present his demands to an ancillary receiver,[66] who would then transfer the assets along with the proofs of claim, to the primary state, there to be administered as part of the entire fund. Closer analysis, however, erases any illusion of a panacea. Although the decision of the United States Supreme Court in *Blake v. McClung* [67] insures a creditor of pro rata participation irrespective of where he proves his claim, it is nevertheless likewise true that one state might require new proof, despite any allowance in another jurisdiction.[68] And it is more than likely that a court that is imbued with an enthusiasm for local creditors will refuse remittance,[69] even though it is in the best interests of the estate to secure as speedy an administration as is compatible with the desire to do equity.[70] Illustrative of this narrow view is a Pennsylvania case,[71] where the court refused to remit funds to the primary receiver until locally domiciled creditors had been paid in full, non constat that such a ruling would seem to create an unconstitutional preference.[72] Or, rather than administer the estate themselves, various ancillary courts will transmit the assets under their control to the domiciliary state only upon the acceptance of certain conditions which are calculated to secure the desired degree of protection for those who have filed their claims locally.[73] In one instance the receiving court refused its

64. See *Report of Receivership Committee,* note 5 *supra,* at 314; Note (1932) 41 YALE L. J. 757, 759.

65. GLENN, LIQUIDATION (1935) § 595 (where the author distinguishes state and federal practice); RESTATEMENT, CONFLICT OF LAWS (1934) §§ 553 (where the rule is stated to apply ". . . even though local creditors have presented their claims".), 545 (2) (court will remit if it is ". . . conducive to the convenient settling of the estate").

66. The need for ancillary receivers and the concomitant problems are discussed pp. 94 (from the point of view of the administration of the estate) and 99 *supra* (from the point of view of the individual claimant).

67. 172 U. S. 239 (1898) declaring unconstitutional a Tennessee statute which set up as a condition to foreign companies doing business in that state a preference for local creditors. See note 23 *supra.* See also, in connection with "retaliatory" legislation, (1932) 16 MINN. L. REV. 433, 435.

68. Note (1934) 82 U. OF PA. L. REV. 848.

69. Clark v. Painted Post Lumber Co., 89 N. J. Eq. 409, 104 Atl. 728 (1918) (where the court deemed a threatened discrimination sufficient). A more desirable view was taken in O'Malley v. Wilson, 182 Ga. 97, 185 S. E. 109 (1936); the court brushed such reasoning aside in the absence of concrete evidence. On the other hand, where the refusal is based on some valid reason of convenience or necessity, it would seem to be proper. See Note (1932) 41 YALE L. J. 757, 759.

70. *Report of Receivership Committee,* note 5 *supra,* at 316.

71. Frowert v. Blank, 205 Pa. 299, 54 Atl. 100 (1903).

72. Under the "equal protection" clause as interpreted in Blake v. McClung, 172 U. S. 239 (1898). See note 67 *supra.*

73. Commissioner of Insurance v. National Life Ins. Co., 280 Mich. 344, 273 N. W. 592 (1937), where the court held that the ancillary court could affix any condition it desired to the remittance (the case involved a government tax lien). However, remittance, though discretionary, cannot be refused aribtrarily. Southern B. & L. Ass'n v. Miller, 118 Fed. 369 (C. C. A. 4th, 1902). Yet some of the restrictions imposed are rather onerous. Drury v. Doherty, 127 Misc. 263, 215 N. Y. Supp. 613 (Sup. Ct. 1926). On other occasions, the apparent purpose of the remitting court is to afford valid and desirable protection to domestic claimants. Buswell v. Supreme Sitting of Order of Iron Hall, 161 Mass. 224, 36 N. E. 1065 (1894) (pro rata distribution required); Matter of People (Norske Lloyd Ins. Co.) 242 N. Y. 148, 151 N. E. 159 (1926) (where the foreign receiver was in a foreign country and the claims were relatively small);

receiver the permission to acquiesce to any such terms;[74] patently the result was inimical to all concerned.[75] Still another court saw the problem as requiring the exercise of the court's sound discretion under the peculiar facts of each case.[76] To solidify these diverse views into one rule, the Uniform Act states that "the final allowance of such claim (of a resident of a reciprocal state) by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount, and . . . as to its priority, . . .".[77] There is, of course, a companion provision with respect to resident claimants of a non-domiciliary corporation.[78] Within the purview of such an enactment, once his claim has been proved, a creditor need feel no qualms as to its reception in another state. Likewise, a court need experience no trepidation concerning the welfare of its local creditors as it transmits assets to the primary receiver in another state.

III. Distribution of the Assets

With the administrative machinery thus prepared, the next chronological step in the proceedings is the actual distribution of the assets. Involved here is the question of priorities among the various claimants, and once more the pertinent statutes of the individual states are replete with varying rules.[79] For example, only four jurisdictions recognize a preference in the case of workmen's compensation claims.[80] In others, wages, taxes and other government claims are given priority.[81] The jurisdictional controversy involved in these diversities is brought clearly into perspective by the realization that the tendency appears to be to deny recognition to these preferences beyond the situs of their orgiin.[82] Thus it has been held that the statutory preference accorded workmen's compensation claims is available only to those whose claims arise within the enacting state.[83] Uniformity is achieved under the instant statute by the provision for determination of preferences by the laws of the domiciliary state,[84] in conjunction with the stipulation, "All such claims whether owing to residents or non-residents shall be given equal priority of payment from general assets regardless of where such assets are located."[85] However, setting up the law

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Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233 (1916) (sending claimants to the foreign receiver would have been burdensome). For a discussion of the various phases of this problem, in the light of the decided cases, see First, note 5 *supra* at 277; Kearns, note 19 *supra*, at 770-772, and n. 62; Legis. (1935) 48 Harv. L. Rev. 835, 842-843.

74. Bank Commissioner v. Granite State Provident Ass'n, 70 N. H. 557, 49 Atl. 124 (1901).

75. *Cf.* Moscow Fire Ins. Co. v. Bank of N. Y. & Trust Co., 280 N. Y. 286, 20 N. E. (2d) 758 (1939).

76. Sands v. Greely, 88 Fed. 130 (C. C. A. 2d, 1898); see Laughlin, note 5 *supra*, at 445-446. See also note 72 *supra*.

77. Sec. 4 (2). It is desired to point out once more that the necessity of ancillary appointment, although some of its defects have been eliminated, yet remains.

78. Sec. 5 (2).

79. Legis. (1937) 37 Col. L. Rev. 1031, 1035.

80. *Id.* at n. 35.

81. *In re* taxes, see (1935) 10 Tul. L. Rev. 149. Another type of priority, established by judicial process rather than by statute, is the so-called "six-months rule" in connection with supply claims in railroad receiverships. See (1934) 34 Col. L. Rev. 230.

82. See Van Schaick, note 16 *supra*, at 103.

83. See Legis. (1937) 37 Col. L. Rev. 1031, 1036 and n. 36.

84. The Uniform Act § 6 (2). Similar provisions are to be found in Ill. Laws 1937, § 213, p. 789; 27 N. Y. Cons. Laws (McKinney, 1940) § 522 (1); Vt. Laws 1937, No. 188, § 3.

85. The Uniform Act § 6 (1).

of the domiciliary state as the basis of the rules of preference is subject to the same criticism directed at it as supplying the rules of provability.[86] As there, so here, a uniform system for the regulation of priority, regardless of the state of incorporation, would appear to be more satisfactory.

Another troublesome aspect of this phase of the problem involves that portion of the Act dealing with priority of secured claims. Section 8 provides for the operation of the so-called Bankruptcy Rule, to the effect that a creditor can liquidate his security—whether it be a mortgage, pledge, etc.—and then claim the deficiency in the distribution of the general assets "on the same basis" as unsecured creditors.[87] It is a difficult question as to whether this gives each claimant the full value of his diligence in obtaining some sort of security.[88]

But the Act sets up a different rule for that type of secured claim which consists of the special deposits required of foreign insurers by statutes in every state.[89] Although it is generally agreed that such a fund constitutes a trust for the benefit of the specified class of policy-holders,[90] difficulty arises when the claimant attempts to procure reimbursement for the deficiency. Each state had its own policy with regard to this matter, with the result that similarly deserving creditors received varying degrees of satisfaction. In view of the fact that these deposits were felt to be unscientifically conceived and so generally unimportant with reference to the insurer's ordinary operations, the Uniform Commissioners decided that they would not be treated on the same level as individual secured claims. Consequently, Section 7 provides that the holder of a special deposit claim does not participate in the general distribution until the unsecured creditor has received a share equal pro rata to the amount produced by the lien representing the security.[91]

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86. See note 84 *supra.*

87. The identical section is in force in New York. 27 N. Y. CONS. LAWS (McKinney, 1940) § 522 (4). This so-called "Bankruptcy Rule", as distinguished from the receivership rule, is defined in § 57 (h) of the Bankruptcy Act, 52 STAT. 866 (1938), 11 U. S. C. A. § 93 (h) (1938).

With regard to the amount of the deficiency, § 8 provides it to be conclusive as adjudicated in ancillary proceedings or any other proceedings "in which the domiciliary receiver has had notice and opportunity to be heard". Although one of the earlier drafts of the Act reserved the determination of the amount of delinquency to the domiciliary receiver, it was subsequently realized that this, in effect, nullified the value of the ancillary proceedings. As it now reads, the section solves the problems of extraterritorial recognition as a valid claim of the balance that remains after the resort to the various securities has decimated the local assets.

88. It has been asserted that making the creditor resort to his security first and then sue for the deficiency deprives him of the benefits to be obtained by the reverse process. See Note (1923) 8 MINN. L. REV. 232.

89. The statutes are collected and discussed in 1 COUCH, *op. cit. supra* note 46, § 245a.

90. 8 COUCH, *op. cit. supra* note 46, at 6692. Consequently the specified group is preferred as to payment from that fund. *Ibid.*; GOODRICH, *op. cit. supra* note 6, at 521. See THE UNIFORM ACT § 7; Ill. Laws 1937, § 215 (2) (c), p. 289; 27 N. Y. CONS. LAWS (McKinney, 1940) § 522 (3); Vt. Laws 1937, No. 188, § 5 (c). Before New York adopted the Uniform Act, it was decided that the Bankruptcy Rule prevailed. *In re* Southern Surety Co., 282 N. Y. 54, 24 N. E. (2d) 845 (1939); (1940) 88 U. OF PA. L. REV. 1018.

91. ". . . such sharing (for deficiency on a special deposit claim) shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from the special deposit."

This is the so-called "Kentucky Rule". It, as well as the other possible bases of recovery, are discussed by Hanson, *The Secured Creditor's Share of an Insolvent Estate* (1936) 34 MICH. L. REV. 309.

Illinois and Vermont provide that ". . . unsecured creditors shall be preferred to secured creditors to the extent necessary to equalize the advantage gained by virtue of such security". Ill. Laws 1937, § 215 (1), p. 789; Vt. Laws 1937, No. 188, § 5.

IV. Conclusion

In its various aspects, the Uniform Act has endeavored to delve into and solve the numerous problems inherent in the liquidation of an interstate insurance company. A summary of the remarks above indicates that in some vital spots, as for example with regard to the inferior position of the small isolated claimant, or the lack of control by the domiciliary receiver over ancillary proceedings, the Act has not fulfilled its purpose. On the other hand, it has stopped up many of the gaps in the law formerly so productive of uncertain and unfair results. Thus, the domiciliary receiver need no longer seek ancillary appointment to assure himself of control over all assets, wherever located. Nor need there be any fear of various creditors securing some sort of judgment lien to the exclusion of other similarly situated claimants.

A final survey reveals that the Act fails to mention the highly controversial issue of jurisdiction over receivership proceedings among and between state and federal courts.[92] Several more recent decisions by the Supreme Court of the United States [93] indicate a trend towards imposing most of the burden of the process of liquidation on the state courts, where it would seem to be more aptly treated. Possibilities of limitations on this tendency, on the other hand,[94] would perhaps warrant an outline somewhere in the Uniform Act of some sort of procedural device which would tend to produce a more harmonious relationship between the courts of the state and federal systems. Universal adoption of the Act would then insure greater cooperation throughout the delinquency proceedings.

This criticism, however, along with the several others that have been ventured, does not destroy the value of the proposed statute. On the contrary, in both substance and form it seems well equipped to remedy the patent defects that menace the structure underlying the extraterritorial operations of receivers and liquidation proceedings. More harmonious cooperation among states and between state and federal courts is essential, not only to enable the receiver to administer the affairs of the insurer with dispatch and precision, but also to enable him to award claimants with the full value of their demands, without subjecting either to undue hardship. Perhaps, on the other hand, the problem is ". . . peculiarly one to be handled under the provisions of a federal statute",[95] and it is indeed to be wondered why the insurance company should not be included in the Bankruptcy Act itself.[96] In the meantime, despite the sentiment that ". . . uniform state legislation is no more than a Utopian dream",[97] adoption of the Uniform Act is strongly urged not as a panacea, but rather as a measure to accomplish a great deal in the facilitation of the liquidation—with all its concomitant problems—of interstate insurers.

L. R.

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92. For a general discussion of these problems, see Glenn, Liquidation (1935) § 580; Shirley, *Conflicting Jurisdiction in the Appointment of Receivers* (1938) 16 Tex. L. Rev. 471; Notes (1927) 41 Harv. L. Rev. 70, (1930) 43 Harv. L. Rev. 805, (1935) 45 Harv. L. Rev. 1400, (1937) 24 Va. L. Rev. 79.

93. Penn General Casualty Co. v. Pennsylvania *ex rel.* Schnader, 294 U. S. 189 (1934); Gordon v. Ominsky, 294 U. S. 186 (1934); Pennsylvania v. Williams, 294 U. S. 176 (1934).

94. See Note (1935) 48 Harv. L. Rev. 1400, 1407.

95. Van Schaick, note 16 *supra*, at 104.

96. The reason for the original exclusion of insurers was the feeling that the state courts, better acquainted with the basically local nature of the business, could best handle them. Patently a mere cursory view of the extensive operations of the large insurance companies dispels the validity of any such assertion.

97. Van Schaick, note 16 *supra*, at 104.