MILES & STOCKBRIDGE P.C.

Reincarnation Through Insurance: Recent Cases Address Viability of Suits Against Dissolved Corporations That Have Unexhausted Insurance Policies

By Joseph W. Hovermill and Alexander P. Creticos, Miles & Stockbridge P.C

LAW.COM

This article was first published on the Law.com Contributor Network on June 30, 2014.

At common law, the legal dissolution of a corporation constituted the death of its corporate existence, terminating its existence for all purposes, including its capacity to be sued. Because this outcome led to the harsh result that creditors and injured parties with potential claims against the corporation were left without a remedy, courts originally developed murky equitable doctrines (such as constructive trusts) to allow those parties to pursue distributed corporate assets. Ultimately, corporate dissolution statutes were modified and so-called "corporate survival statutes" were adopted that typically expressly provided for the manner in which a dissolved corporation could continue to be sued post-dissolution.

A number of states, like New Jersey, New York, California, and Alaska resolved the issue by providing that a dissolved corporation can continue to be sued indefinitely subject only to the limits provided by applicable statutes of limitations. Many states, however, like Michigan, Connecticut, Kentucky, and Missouri, to name a few, adopted some version of the ABA's Model Business Corporation Act ("MBCA"), which creates an absolute bar to claims not brought within a specified number of years of a corporation's dissolution.

In states that allow their corporations to continue to be sued indefinitely, the primary driver for pursuing dissolved corporations often is the dissolved corporation's unexhausted insurance coverage, which would have otherwise covered the claim had the corporation remained active. This issue most recently came up in the case of *Germain v. A.O. Smith Water Prods. Co.*, in which New York's courts interpreted New Jersey statutory law. In *Germain*, a plaintiff sued a number of defendants for asbestos-related injuries, including the company Jenkins Bros. ("Jenkins"), which allegedly manufactured asbestos-containing valves prior to surrendering its authority to do business in New York in 1985 and ultimately dissolving in 2004. 981 N.Y.S.2d 635, at *2 (N.Y. Sup. Ct. Oct. 23, 2013).

Jenkins' insurer argued that no claims could be brought against it because its dissolved insured had no capacity to be sued, contending that "once the winding up process of a dissolved New Jersey corporation is completed there is no longer a corporation against which suits may be commenced." *Id.* at *7. Both the trial and the appellate court disagreed, determining that because New Jersey's statutory scheme provides no absolute bar date, like the MBCA, dissolved New Jersey corporations such as Jenkins are subject to indefinite suit, limited only by the applicable statute of limitations. *See id.* at *4–5; *Germain v. A.O. Smith Water Prods. Co.*, 984 N.Y.S.2d 335, 336 (N.Y. App. Div. 2014) (concluding that the plain language of the governing

New Jersey statute "places no restriction on how long a dissolved corporation maintains its capacity to be sued for its tortious conduct committed pre-dissolution"). Because New Jersey law "grants an injured party a cause of action against a tortfeasor's liability insurer if a judgment obtained against the insured remains unsatisfied," this holding permitted the plaintiff to proceed against Jenkins, which would not be able to satisfy any judgment rendered in the action, in an effort to ultimately obtain payment from the dissolved corporation's insurers. *Germain*, 981 N.Y.S.2d at *3, 5; *see also Germain*, 984 N.Y.S.2d at 336 (affirming the trial court's decision and noting that "contractual coverage obligations should not be nullified on the mere happenstance that the corporation was dissolved at the time these latent injuries manifested").

The inquiry becomes more complicated in jurisdictions, like Delaware, that have neither absolute bar dates, nor case law providing that corporations are subject to indefinite suit, as the recent case of *Anderson v. Krafft-Murphy Co.* exemplifies. In *Anderson*, a number of tort claimants with pending asbestos-related actions sued to have a receiver appointed to enable them to recover for the alleged asbestos-related liabilities of Krafft-Murphy Company, Inc., a dissolved corporation. 82 A.3d 696, 697 (Del. Sup. Ct. 2013). Krafft-Murphy, which had dissolved in 1999, held "no assets other than unexhausted liability insurance policies" by the time suit was filed. *Id.* at 697, 699.

The defense argued that the plaintiffs were time barred from pursuing any claims against Krafft-Murphy, *id.* at 698, since the Delaware Code provides that a dissolved corporation shall be continued only "for the term of [three] years from such expiration" for, among other purposes, "the purpose of prosecuting and defending suits," Del. Code Ann. tit. 8, § 278. The court agreed that under the plain language of the statute, a dissolved corporation ceases to exist "as a *body corporate* . . . and is not amenable to suit after the expiration of [the statute's] three year period." *Anderson*, 82 A.2d at 705.

The court further found, however, that "[f]rom that it does not follow . . . that [the statute] extinguishes the corporation's underlying liability to third parties." *Id.* Rather, the court determined that Delaware's statutory scheme enables a dissolved corporation to sue and be sued, through a receiver, after the expiration of the three-year period of repose. *Id.*; *see also* Del. Code Ann. tit. 8, § 279 (permitting appointment of a receiver, upon a showing of good cause, "to take charge of the corporation's property . . . with power to prosecute and defend, in the name of the corporation, . . . all such suits as may be necessary or proper for the purposes aforesaid").

The court noted that one basis for appointing a receiver for a dissolved corporation arises when the corporation continues to hold undistributed property after the three-year repose period expires. *Anderson*, 82 A.2d at 704. Concluding that "unexhausted liability insurance policies held by a dissolved corporation constitute" undistributed property within the meaning of the statute, the court held that the trial court should have appointed a receiver to defend the dissolved corporation's interests in the litigation. *Id.* at 704, 709–10.

Notably, in reaching this determination, the court contrasted Delaware's statute with those that contain an absolute bar date similar to the MBCA, intimating that it would have reached a different decision had suit against the dissolved corporation been statutorily barred. *Id.* at 708–09. Indeed, as the court acknowledged in its opinion, a number of courts in jurisdictions with absolute bar dates have expressly rejected attempts to sue dissolved corporations through a receiver on the basis that unexhausted liability insurance constitutes an undistributed asset of the corporation. *See, e.g., Gilliam v. Hi-Temp Prods., Inc.*, 677 N.W.2d 856, 874 (Mich. App. 2003) (determining that an unexhausted liability insurance policy was "not an asset of a dissolved corporation that has distributed all assets capable of distribution where the period permitted for filing claims has expired" under the statutory bar date); *Blankenship v. Demmler Mfg. Co.*, 411 N.E.2d 1153, 1157 (Ill. App. 1980) (concluding that "the existence of an insurance policy is irrelevant" where the claim at issue is filed after the absolute bar date); *In re Sager Corp.*, 967

N.E.2d 1203, 1210–11 (Ohio 2012) (declining to appoint a receiver for a dissolved Illinois corporation on the basis of the existence of unexhausted insurance policies on the ground that, once the absolute bar date passes, the corporation cannot be sued and, therefore, there can be no judgment for its insurers to satisfy); *Lilliquist v. Copes-Vulcan, Inc.*, 21 A.3d 1233, 1236–37 (Pa. Super. 2011) (reaching the same conclusion under Alabama law).

These recent decisions reflect that the availability of unexhausted insurance policies is an important consideration in the analysis of the viability of suit against a dissolved corporation, but they do not squarely address a number of complicated asset distribution and insurance coverage issues that could arise in slightly different factual scenarios. To highlight just one example, what if the unexhausted insurance policies cover the dissolved corporation's shareholder (which would fall within the definition of "Named Insured" in some policies) and the policy assets are expressly distributed to the shareholder to defend itself against potential successor liability claims? Ultimately, these decisions and the questions they raise show that if the shareholders of dissolving corporations are to have any certainty about insurance assets, the issue clearly needs to be thoughtfully addressed as part of the dissolution process, perhaps expressly with the insurers involved, or litigation may continue for some time.

Disclaimer: This is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the authors and do not necessarily reflect the opinions or positions of Miles & Stockbridge P.C., its other lawyers, or American Lawyer Media.

Joseph W. Hovermill is a principal with Miles & Stockbridge's Products Liability and Mass Torts Practice Group and co-leads the firm's National Coordinating and Trial Counsel Practice. Alexander P. Creticos is an associate in the Products Liability and Mass Torts Practice Group. Joe and Alex focus their practices on the defense of products liability matters, including mass torts, toxic torts, and those involving consumer products.