

Foreign corporations get better deal upon dissolution

By Dan Jacobson

Commonly, it is thought that the dissolution of a corporation is akin to the death of a human being. That thought is a mistake. "Under [California's] statutory scheme, the effect of dissolution is not so much a change in the corporation's status as a change in its permitted scope of activity.... Thus, a corporation's dissolution is best understood not as its death, but merely as its retirement from active business." *Greb v. Diamond International Corporation*, 2013 DJDAR 2368 (Feb. 21, 2013), quoting *Penasquitos, Inc. v. Superior Court*, 53 Cal. 3d 1180, 1190 (1991).

What is dismaying about *Greb* is that its analysis concludes that California's Corporations Code makes the state a more hospitable retirement community for out-of-state corporations than it does for California corporations. One hopes that the Legislature fixes this disparity. In fact, the Supreme Court intimated that the Legislature may want to effect such a fix.

In *Greb*, Walter and Karen Greb sued Diamond International Corporation for alleged asbestos related injuries. Diamond International is a dissolved corporation, which had been incorporated under laws of Delaware.

It is not surprising that a dissolved corporation would be sued. Under

subsection (a) of what the *Greb* court called California's "survival" statute, "[a] corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof." Corporations Code Section 2010(a). Section 2010 has no time limitation. Thus, when Section 2010 applies, "the sole temporal limitation to ... is found in the applicable statute of limitations relating to each cause of action."

Plaintiffs suing dissolved corporations can achieve much more than a symbolic victory. For instance, insurance and undistributed assets of a dissolved corporation remain available to satisfy a judgment against a dissolved corporation. Corporations Code Section 2011(a)(1)(A).

The question in *Greb* was how long after dissolution does a plaintiff have to bring suit against the dissolved corporation? The answer depended on whether the law of California or the law of Delaware (where Diamond International was incorporated), applied.

"[T]he issue we face today [is] whether a foreign corporation is subject to our state's survival statute." Had the answer to that question been yes, then the court may

have performed a choice of laws analysis; but, since the answer was no, then there is no conflict in laws, and thus there is no choice of laws to be made.

The question as to whether Corporations Code Section 2010 applied to a foreign corporation was dependent on the meaning of Corporations Code Section 102(a). "[T]he statutes governing the formation, conduct, and existence of business (for profit) corporations in California are found in the many chapters and scores of sections of title 1, division 1, the General Corporation Law ... including section 2010. ... Reduced to its essence as relevant [to *Greb*], section 102(a) specifies that the General Corporation Law [including Section 2010] applies to ... 'corporations organized under this division....' (Emphasis in original).

Although it may seem apparent that a foreign corporation was not "organized under" a division of the California Corporations Code, division 1 does mandate certain things of foreign corporations. For instance, division 1 requires "all 'foreign corporations transacting intrastate business in California' [to] not only obtain a certificate of qualification to do so ... but [to] also set up and consent to a California agent for service of process, pay state fees, select a permissible corporate name for use in California, and continually update and amend their filings [in California]." The *Greb* plaintiffs

argued that, as these mandates are located in division 1, foreign corporations are "organized under this division [1]." The court rejected this reasoning, finding "no evidence that the Legislature intended ... to accomplish the ... result ascribed to it by plaintiffs."

The plaintiffs further argued that language contained in the state Constitution at the time that Section 2010 was written defines or modifies the meaning of Section 2010's words in favor of the plaintiffs. Until 1972, when the voters removed the provision in question, Article XII, [former] section 15 said, "No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State." The plaintiffs argued that this provision shows that the "original meaning" of the survival statute ... was that it covered both domestic and foreign corporations (otherwise foreign corporations would 'be allowed to transact business' in this state 'on more favorable conditions than' domestic corporations.)" But, the *Greb* court said, "the former constitutional provision, properly interpreted, simply prohibited the Legislature from explicitly granting a privilege or benefit to a foreign corporation that was withheld from domestic corporations."

In reaching its decision, the

Supreme Court overturned *North American Asbestos Corp. v. Superior Court*, 180 Cal. App. 3d 902 (1986), and clarified what it identified as dicta, in two of its own cases, *Penasquitos, Inc. v. Superior Court*, 53 Cal. 3d, 1180, 1190 (1991), and *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68 (2010).

Since Diamond International was organized under the laws of Delaware, and since Corporations Code Section 2010 does not apply to such a foreign corporation, Delaware's rule applies. Delaware law requires suit to be brought within three years after dissolution. Delaware General Corporation Law Section 278. Thus, the suit against Diamond International could not proceed.

So, at the end of the day *Greb* is very unfavorable to California corporations as juxtaposed against foreign corporations. Corporations formed under California law (and with incorporation fees paid to California) can be sued without time constraint, after dissolution (except for any time constraint found in an applicable statute of limitations). On the other hand, corporations formed under the laws of another jurisdiction (to whom incorporation fees were paid) may have a time constraint governing when they can be sued, after dissolution.

The Supreme Court rejected any policy argument, saying that "[t]he policy question concerning whether the provisions of California's survival

statute should apply to foreign as well as domestic corporations is properly a matter to be determined by the Legislature, not [the Supreme] court." It is hoped that the Legislature takes heed of this sentence, so that foreign corporations do not have an advantage in their retirement, over California corporations.

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