

California Supreme Court Holds Suits Against Dissolved Foreign Corporations Subject to Survival Statutes of State of Incorporation

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Greb v. Diamond International Corp., ___ Cal.4th ___, ___ Cal. Rptr.4th ___ (February 21, 2013)

In a victory for liability insurers against the asbestos plaintiffs' bar, the California Supreme Court ruled in *Greb v. Diamond International Corp.*, that California's statutory provision that a dissolved corporation continues to exist perpetually for purposes of being named as a defendant in a suit does not apply to dissolved foreign corporations. Instead, the law of the state of incorporation governs how long a foreign corporation can be sued after it is dissolved, even for suits by injured California residents. Diamond International Corporation was a dissolved Delaware corporation, and the Supreme Court held that the three-year Delaware survival statute barred an asbestos bodily injury suit in California filed more than three years after the corporation was dissolved under Delaware law. The practical effect is that the dissolved corporation's insurers do not have any liability for suits filed more than three years after the Delaware dissolution, because the plaintiff cannot obtain a judgment against the insured necessary to bring a direct action against the liability insurer.

California law had been conflicting on this issue since the mid-1980's, with the most recent decision (1986) holding that the California perpetual survival statute applied to foreign corporations. *North American Asbestos Corp. v. Superior Court*, 180 Cal.App.3d 902, 225 Cal.Rptr. 877 (1986). This essentially allowed asbestos plaintiffs to bring suits against dissolved foreign corporations decades after the survival period authorized by their state of incorporation in hopes that the trial judge would follow the decision applying California law out of sympathy for the asbestos plaintiff.

The Supreme Court decision is a long and convoluted analysis of legislative history and case law. The decision is significant only that it discourages forum-shopping in California for plaintiffs with claims against dissolved foreign corporations who could not bring suit in the state of incorporation because their claim would be barred under the applicable survival statute.

In addition to asbestos bodily injury claims, this decision could have an effect on construction defect claims for latent defects against foreign contractors, subcontractors and material suppliers. Latent defect claims may be brought up to 10 years after completion of the project, and may involve continuous undiscovered property damage, such as leaks causing damage within walls and flooring. If the foreign corporation is dissolved in a state with a short survival statute, claims against that corporation (in reality, against liability insurance triggered by undiscovered property damage) will typically be barred even though the damage was not discovered by the time the survival period expired.

The ultimate effect of this decision is hard to predict, but insurers (and their defense counsel) of dissolved foreign corporations in California should always investigate the applicable state survival statute to determine if the suit is barred.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Charles E. Wheeler at cwheeler@cozen.com or 619.685.1754.