

DIRECT ACTIONS AGAINST INSURERS TO RECOVER INSURANCE POLICY PROCEEDS FOR DEFUNCT DEFENDANTS

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Federal and state courts are split on the issue of whether a plaintiff may bring a direct action against the insurers of a dissolved corporation to recover insurance policy proceeds. You might ask, “Why would plaintiffs want to waste time suing insolvent corporations?” The answer is that insurance contracts may be considered the property of a dissolved corporation, even after the corporation’s winding-up period has expired. See *In re Kraft-Murphy Co., Inc.*, 82 A.3d 696 (Del. 2013) (holding that contingent contractual rights were the property of a dissolved corporation).

Plaintiffs attempt to collect insurance policy proceeds from defunct defendants in a number of factual scenarios. Some common situations are when plaintiffs allege latent injuries, such as from asbestos or other exposures, when property damage from construction defects or contamination from pollution is discovered years later, or when a plaintiff has been injured by a product that was manufactured or distributed decades ago.

REASONS COURTS ALLOW RECOVERY OF INSURANCE POLICY PROCEEDS FROM DEFUNCT DEFENDANTS

In cases involving a plaintiff’s allegations of latent injuries against a dissolved

corporation, courts have allowed recovery of insurance proceeds from now-defunct defendants where the tortious conduct was committed pre-dissolution. For example, in *In re New York City Asbestos Litigation*, 116 A.D.3d 571 (N.Y. App. Div. 2014), a New York appellate court found that an insurer’s obligation to provide coverage under a liability policy was not nullified on the mere happenstance that the insured corporation was dissolved when the latent injuries manifested themselves in its workers.

Courts have also allowed recovery against insurers of dissolved corporations on allegations of latent injuries in cases where the exposure occurred before the state’s corporate dissolution statute was in effect and because the state’s direct action statute recognized an exception that allowed suits directly against the insurance company (a) when the insured is insolvent, (b) when the insured is dead, and (c) when the insured cannot be served. See *Marchand v. Asbestos Defendants*, 44 So.3d 355 (La. Ct. App. 2010).

In cases where plaintiffs allege construction defects against a dissolved corporation, courts have allowed recovery of remaining insurance proceeds where the

plaintiff sued the dissolved corporation for damages resulting from its pre-dissolution conduct, and the damages occurred or are discovered after the dissolution. In *Penasquitos, Inc. v. Superior Court*, 812 P.2d 154 (Cal. 1991), the Supreme Court of California found that although a party may not sue shareholders on a claim that arose after the dissolution, analysis of the California Corporate Code disclosed a legislative intent to permit parties to bring suit against dissolved corporations for damages that occur or are discovered after dissolution.

In cases where plaintiffs allege property damage due to contamination or pollution against a dissolved corporation, courts have allowed a suit to recover insurance proceeds where the corporation did not voluntarily dissolve. In *Bernstein v. Bankert*, 698 F. Supp.2d 1042 (S.D. Ind. 2010), a federal court in Indiana, found that a defunct defendant was not voluntarily dissolved pursuant to Indiana Business Corporation Law, but it was administratively dissolved because no notice of the dissolution was given to its creditors. Therefore, the defunct defendant was not entitled to the benefit of the two-year stat-



ute of limitations provided by Indiana law for voluntary dissolution.

REASONS COURTS DO NOT ALLOW RECOVERY OF INSURANCE POLICY PROCEEDS FROM DEFUNCT DEFENDANTS

Courts have not allowed plaintiffs in product liability claims to recover insurance policy proceeds where the cause of action accrued after the dissolution of the company, pursuant to the state's corporate dissolution statute. For example, in *Blankenship v. Demmler Mfg. Co.*, 411 N.E.2d 1153 (Ill. App. Ct. 1980), the Illinois Appellate Court held that a plaintiff may not reassert an action, even if discovery reveals that an insurance policy covers the injuries caused by the defective machine. The dissolved corporation may not be revived; thus, the insurance policy could not be reached.

Similarly, courts have not allowed plaintiffs alleging claims of latent injuries to recover where the case was filed against the dissolved corporate defendant outside the state's prescribed statutory grace period. See e.g., *Adams v. Employers Ins. Co. of Wausau*, 49 N.E.3d 924 (holding that

Illinois statute permitting suit within five years after dissolution precluded employees' claims). Courts have also disallowed recovery on the same basis in cases involving property damage caused by contamination. See, e.g., *OXY USA, Inc. v. Quintana Production Co.*, 79 So.3d 366 (La. Ct. App. 2011) (holding that the plaintiff did not have a procedural right of action to seek contribution and indemnification from dissolved corporations' insurers more than three years after Texas corporations had been dissolved)

CONCLUSION

There are multiple reasons why a court will either allow or deny recovery of insurance policy proceeds from defunct defendants. However, insurers with remaining policy limits under policies sold to dissolved entities may benefit from investigating whether the applicable corporate law in the state where the dissolved entity was organized permits suits against dissolved corporations and, if so, under what circumstances.



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