

**ORIGINAL**

In the  
**Supreme Court of Ohio**

**IN RE ALL CASES AGAINST SAGER  
CORPORATION**

**SAGER CORPORATION,  
A Dissolved Illinois Corporation  
*Appellant***

Case No. 10-1705

On Appeal from the Cuyahoga County  
Court of Appeals  
Eighth Appellate District

Court of Appeals Case No.  
CA-09-93567

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**APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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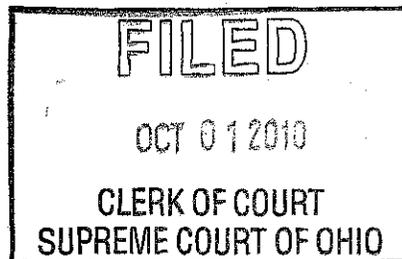


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## **I. INTRODUCTION**

Appellant Sager Corporation (“Sager”) respectfully claims an appeal of right from the decision of the Court of Appeals, Eighth Appellate District, as this case involves substantial constitutional questions. Sager further invokes the discretionary jurisdiction of this Court to hear this appeal because this case involves a question of public or great general interest. The decision of the Court of Appeals permits suits to be filed against Sager, even though Sager, an Illinois corporation, dissolved over 10 years ago and under Illinois law ceased to be subject to suit as of 2003. The decision reaches this result in contravention of United States Supreme Court precedent and in violation of the Commerce Clause, the Due Process Clause and the Full Faith and Credit Clause of the United States Constitution. Beyond these constitutional violations, the decision sets Ohio apart from other states in refusing to honor the law of the state of incorporation in determining whether a foreign corporation is subject to suit, and does so in violation of explicit Ohio statutes and precedent to the contrary. The decision therefore discourages corporations incorporated in other states from doing business in Ohio by causing uncertainty and inconsistency in determining which state’s corporation law will govern their corporate existence. For these reasons the Court should accept the appeal.

## **II. STATEMENT OF THE CASE**

There is no dispute that Sager properly dissolved under Illinois law in 1998 and, under that state’s law, has not been susceptible to suit since 2003. The issue presented by this case is whether Ohio courts may circumvent Illinois law in this regard and permit new suits to be filed against Sager, through the artifice of appointing an Ohio receiver to accept service of process, or whether Ohio courts must, under the U.S. Constitution, Ohio precedent and Ohio statutes, adhere to the rule followed in virtually all other states and apply the law of the state of incorporation to determine whether a foreign dissolved corporation is subject to suit.

### III. STATEMENT OF FACTS

Sager was incorporated in Illinois in 1921. Sager engaged in the manufacture and supply of protective clothing and apparel for the industrial workplace. At all times Sager was incorporated and had its principal place of business in the state of Illinois.

In 1998, Sager sought to conclude its affairs and commenced the dissolution process mandated by its state of incorporation under the Illinois Business Corporation Act. 805 Ill. Comp. Stat. Ann. § 5/1.01 et seq. (West 2002). On June 17, 1998, articles of dissolution were filed with the Illinois Secretary of State. From that point forward, Sager was prohibited from carrying on any further business, except as necessary to wind up and liquidate its existing affairs. 805 Ill. Comp. Stat. Ann. § 5/12.30(a) (West 2002).

Illinois's corporate survival statute provides a five-year post-dissolution period during which any existing claim not yet asserted must be made by or against an Illinois corporation (or its court-appointed receiver). 805 Ill. Comp. Stat. Ann. § 5/12.80 (West 2002). Specifically, pursuant to a provision entitled, "Survival of remedy after dissolution," the statute preserves a

civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced **within five years** after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

*Id.* (emphasis added). Sager was thus susceptible to suit for an additional five-year period ending on June 17, 2003. Thereafter, Sager ceased to exist for all purposes, including litigation.

On September 4, 2007, long after the expiration of this statutory period, plaintiff Commodore Bowens filed a civil suit against 197 defendants, including Sager, in the Cuyahoga County Court of Common Pleas, represented by Bevan and Associates, LPA, Inc. ("Bevan"). Because Sager had ceased to exist, Sager filed a motion for summary judgment on July 1, 2008, on the ground that it was no longer subject to suit. Bowens did not specifically oppose this

motion. Instead, on February 17, 2009, Bevan filed a motion to appoint an Ohio receiver for Sager on behalf of all of its clients on the Cuyahoga County asbestos docket, in an apparent effort to counter Sager's corporate dissolution motion in the *Bowens* case. Bevan argued that a receiver was needed because "Sager currently has no agent for service in the State of Ohio." Sager opposed this motion relying on the grounds it had articulated in moving for summary judgment (*i.e.*, it was no longer subject to suit under Illinois law), and arguing that Ohio law prohibits appointment of an Ohio receiver for a dissolved foreign corporation.

The trial court granted the Motion to Appoint Receiver on June 3, 2009. Although Sager showed that Ohio choice-of-law rules required application of Illinois law to determine whether Sager was subject to suit, the trial court applied Ohio's own corporation laws. The court stated:

Even though Sager is a foreign corporation, Sager subjected itself to the laws of Ohio for winding up affairs when it conducted business in Ohio. That which a state may do with its corporations of its own creation it may do with Sager. The alleged conduct of Sager gives this Court jurisdiction over winding up of affairs of the voluntarily dissolved corporation. The Court may apply R.C. §1701.01 through §1701.98 to Sager.

Revised Code sections 1701.01 to 1701.98 constitute the Ohio General Corporation Law, applicable by its terms only to corporations "formed under the laws of this state." R.C.

1701.01(A). The trial court thus held that Ohio laws that apply only to **Ohio** corporations permitted resurrection of a dissolved **non-Ohio** corporation (by appointment of a receiver to accept service on its behalf): "The defunct corporation persists for the purpose of winding up its affairs in Ohio. Ohio law provides that the Court appoints a receiver to fairly accept the process of claims, process defenses and marshal assets accordingly." While Sager argued that applying Ohio law to determine whether Sager was susceptible to suit would be unconstitutional, the trial court failed to address these arguments.

The Court of Appeals affirmed, but on entirely different grounds. Instead of holding that Sager was subject to the Ohio corporation code by doing business in Ohio, the Court of Appeals held that an Ohio court has “authority to appoint a receiver over the remaining assets of a defunct foreign corporation that caused injury to persons in Ohio.” Op. at 5. The court acknowledged that the purpose of the Bevan receivership motion was “to appoint an Ohio receiver for Sager to wind up the affairs and accept service of process” (Op. at 1)—that is, to make Sager **susceptible to suit**. But the court glossed over this purpose and treated the receivership as being mainly limited to the collection and distribution of “the remaining assets of an already dissolved corporation . . . specifically, the distribution of potential insurance proceeds to potential third party beneficiaries (the persons injured by exposure to Sager’s asbestos-containing products).” Op. at 4-5. The court claimed that the receivership therefore did not implicate any interest of Sager or its directors, officers or stockholders, and did not raise any “due process” concern. Op. at 6-7. The Court of Appeals did not address whether its ruling accorded with the Full Faith and Credit Clause or the Commerce Clause, despite Sager’s extensive arguments to the contrary.

The Court of Appeals journalized its opinion on August 19, 2010. Sager timely noticed an appeal and filed this memorandum within 45 days thereafter. S.Ct. Prac. R. 2.2(A)(1).

**IV. THE COURT SHOULD ACCEPT THIS APPEAL BECAUSE THE COURT OF APPEALS’ DECISION, PERMITTING CLAIMANTS TO RESURRECT A DISSOLVED ILLINOIS CORPORATION IN VIOLATION OF ILLINOIS LAW AND CONTRARY TO SETTLED AMERICAN JURISPRUDENCE, VIOLATES THE U.S. CONSTITUTION, VIOLATES OHIO LAW AND RENDS THE FABRIC OF CORPORATION LAW**

**A. Proposition of Law No. 1: As a constitutional matter, and as a matter of Ohio statutes and precedent, whether a dissolved corporation is susceptible to suit must be determined by the law of its state of incorporation, not by the law of the forum state**

Illinois law firmly upholds the Illinois Legislature’s determination to set a time limit within which to bring suits against dissolved Illinois corporations. In a case indistinguishable

from this one, the Illinois Appellate Court barred a suit filed against a dissolved asbestos defendant after the statutory grace period, even “where unexhausted liability policies covering the dissolved corporation are still in existence. [Permitting such a suit] would be contrary to the tenor of cases covering Illinois law on the subject, which indicate even fraud is insufficient to extend the grace period . . . .” *Vance v. North Am. Asbestos Corp.* (1990), 203 Ill.App.3d 565, 570, 561 N.E.2d 279. *See also Blankenship v. Demmler Mfg. Co.* (1980), 89 Ill.App.3d 569, 574, 411 N.E.2d 1153 (statute reflects legislative intent to establish definite point in time when corporation ceases to exist). Illinois law thus prohibits new suits to be filed against Sager.

The decisions of the courts below in this case nevertheless purport to permit Sager to be sued by appointing a receiver to accept service on Sager’s behalf. The Court of Appeals’ decision implicitly acknowledged that Illinois law would not permit such a receivership to circumvent the bar of dissolution, yet approved the receivership under Ohio law on the pretense that the receiver would deal only in Sager’s “property” or “assets,” specifically, alleged insurance policies, whose “proceeds” could be “distributed” to “potential third-party beneficiaries.” The U.S. Supreme Court has specifically rejected this pretense, holding that due process does not permit ignoring a defendant’s non-susceptibility to suit to create jurisdiction to attach insurance assets. *Rush v. Savchuk* (1980), 444 U.S. 320, 329-331.

The Court of Appeals’ error was not merely one of form, but one of significant constitutional substance. For at the root of the Court of Appeals’ decision is the notion that each state is free to determine for itself whether a corporation created by another state **exists** for purposes of litigation. Besides being emphatically rejected by nearly two centuries of American jurisprudence, that proposition violates the Commerce Clause, the Full Faith and Credit Clause, and the Due Process Clause.

1. **American jurisprudence establishes that corporations are creatures of their state of incorporation, and whether they exist for purposes of suit is determined by that state's law**

The principle that a corporation's life ends just as it begins—according to the law of its state of incorporation—is as old as our republic. “Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.” *Trustees of Dartmouth College v. Woodward*, (1819), 17 U.S. (4 Wheat.) 518, 636. *See also CTS Corp. v. Dynamics Corp. of America*, (1987), 481 U.S. 69, 89 (a corporation's “very existence and attributes are a product of state law” and “[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations . . .”).

The corollary to this principle, just as well established, is that one state cannot apply its own corporation laws to permit suit against a foreign corporation that does not exist under the law of its state of incorporation. *Pendleton v. Russell*, (1891), 144 U.S. 640, 645 (state adjudications that fail to give full faith and credit to the corporation laws of other states are invalid; overturning Tennessee judgment against dissolved New York corporation). Whether a corporation exists and may be sued must be decided by the law of its state of incorporation, not the law of the forum. *Oklahoma Natural Gas Co. v. Oklahoma* (1927), 273 U.S. 257, 259-60.

There, the Court said:

corporations exist for specific purposes, and only by legislative act, so that, if the life of the corporation is to continue even only for litigating purposes, it is necessary that there should be some statutory authority for the prolongation. **The matter is really not procedural or controlled by the rules of the court in which the litigation pends.** It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.

*Id.* (emphasis added). As *Oklahoma Natural Gas* makes clear, whether or not a corporation may be sued is not “procedural,” but has to be determined by the law of the “State which brought the corporation into being.” *Id.* Moreover, **permitting suits** against a corporation, the Court noted,

is the functional equivalent of **extending its existence**, which cannot be done in violation of the law of its creation: “[D]issolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant. **To allow actions to continue would be to continue the existence** of the corporation *pro hac vice*.” 273 U.S. at 259 (boldface emphasis added). See also *Chicago Title & Trust Co. v. 4136 Wilcox Bldg. Corp.* (1937), 302 U.S. 120, 128 (applying *Oklahoma Nat. Gas* to Illinois’s corporate survival statute; “There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized.”); *In re Peer Manor* (C.A.7, 1943), 134 F.2d 839, 841 (“The state of Illinois has the power of life and death over its corporations.”).

Ohio has long followed this rule. In *Stetson v. City Bank of New Orleans* (1853), 2 Ohio St. 167, this Court observed that Ohio corporation laws stated to apply to “any” corporation must be interpreted to apply only to Ohio corporations, specifically, statutes “that operate upon the corporation itself, directly **or indirectly** abridging, or annulling its corporate powers, or in any way controlling it in the exercise of them.” *Id.* at 174 (emphasis added). In *Weiser v. Julian*, the court found that a foreign corporation no longer had the capacity to sue or be sued, rejecting the claim that Ohio corporation statutes applied to it. (*Hamilton Co.* 1921), 15 Ohio App. 171, 180-81. The court said that the section of the Ohio corporation code at issue “can only refer to Ohio corporations.” *Id.* at 181. See also *Western Express Co. v. Wallace* (1945), 144 Ohio St. 612, 617 (acknowledging that once a business is incorporated in a particular state, “wherever it goes for business it carries its charter, as that is the law of its existence”) (citation omitted).

*Stetson’s* rule continues to be Ohio’s rule. The Ohio Revised Code, both in its structure and its express provisions, makes very clear that Ohio law does not purport to regulate or affect

the manner in which foreign corporations dissolve and wind up their affairs. This is evident in two ways. First, the Revised Code devotes a separate chapter to foreign corporations—Chapter 1703—which addresses various issues attending the transaction of business by foreign corporations in Ohio. R.C. 1703.01-1703.99. That Chapter makes no provision, however, for the appointment of a receiver, and it contains no provisions addressing the manner in which foreign corporations conclude their affairs. *See id.* Indeed, there is no provision in Ohio law permitting appointment of a receiver for a dissolved foreign corporation.

Second, the chapter in which provisions **are** made for the appointment of receivers and the “winding up” of corporate affairs—Chapter 1701—is expressly limited in its application “**only to domestic corporations.**” R.C. 1701.98 (emphasis added). All uses of the word “corporation” in Chapter 1701, unless otherwise qualified, refer only to domestic corporations. R.C. 1701.01 (“Definitions”) (defining both “Corporation” and “domestic corporation” as a “corporation for profit **formed under the laws of this state**”) (emphasis added).<sup>1</sup>

Other states also routinely hold that whether a corporation exists and may be sued is determined by the law of its incorporation. The most recent authority in the country, decided earlier this year, barred an identical asbestos tort claim, adhering to this rule. *Greb v. Diamond Int’l Corp.* (2010), 184 Cal.App.4th 15, 20-21, 108 Cal.Rptr.3d 741, 744-45 (whether corporation exists is determined by the state of incorporation; “wind-up” statutes that extend the corporate life for creditor claims “are recognized in other states including the forum state”; citing

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<sup>1</sup> The fact that Ohio has embraced the settled rule is evident not only from its statutes, but also from Ohio’s decision to adopt the choice-of-law principles of the Second Restatement of Conflict of Laws. *See Morgan v. Biro Mfg. Co.* (1984), 15 Ohio St.3d 339, 341-42, 474 N.E.2d 286; *Ohayon v. Safeco Ins. Co.*, 91 Ohio St.3d 474, 2001-Ohio-100, 747 N.E.2d 206. The Second Restatement specifically provides: “Whether the existence of a corporation has been terminated or suspended is determined by the local law of the state of incorporation.” Restatement (Second) of Conflict of Laws § 299 (1971).

*Oklahoma Natural Gas* and Restatement (Second) of Conflict of Laws § 299). *See also Greer v. Big 5 Corp.*, 2009 UT App 103; *Velasquez v. Franz* (1991), 123 N.J. 498, 510-11, 589 A.2d 143; *Willey v. Brown* (Me.1978), 390 A.2d 1039, 1042; *Casselman v. Denver Tramway Corp.* (1978), 195 Colo. 241, 244, 577 P.2d 293; *Pacific Intermountain Express Co. v. Best Truck Lines, Inc.* (Mo.App.1974), 518 S.W.2d 469, 472.

In sum, Ohio explicitly follows the universally-acknowledged rule that the law of the state of incorporation governs a dissolved corporation's capacity for litigation.

**2. The Commerce Clause forbids states from applying inconsistent rules to issues that must be determined by one state's law**

The courts below ignored this well-settled rule. The Court of Appeals interpreted an Ohio statute that permits appointment of receivers for "dissolved corporations" to apply to "foreign dissolved corporations," even though the statute itself does not include foreign corporations in its ambit. *Op.* at 3-4 (relying on R.C. 2735.01). This interpretation allows suits against foreign corporations in violation of their law of incorporation and therefore violates the Commerce Clause of the U.S. Constitution. U.S. CONST. Art. I, § 8, cl. 3. The Supreme Court has repeatedly invalidated legislation under the Commerce Clause when it imposes an undue burden of inconsistent regulation on interstate business, particularly where the state purports to override the choice-of-law inherent in selecting the state of incorporation. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.* (1987), 481 U.S. 69, 89; *Edgar v. MITE Corp.* (1982), 457 U.S. 624.

The Commerce Clause endows Congress with an affirmative power "to regulate Commerce" while simultaneously limiting the power of states negatively to affect interstate commerce. *See, e.g., Cooley v. Board of Wardens* (1852), 53 U.S. (12 How.) 299; *Edgar*, 457 U.S. at 640. States are barred from legislating in a manner that "may adversely affect interstate commerce by subjecting activities to inconsistent regulations." *CTS Corp.*, 481 U.S. at 88. *See*

also *Southern Pacific Co. v. Arizona* (1945), 325 U.S. 761, 767 (“ever since *Gibbons v. Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to . . . regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”). The Court applies this constitutional rule specifically to corporation law, giving effect to an entrenched principle—that a corporation’s “very existence and attributes are a product of state law.” *CTS*, 481 U.S. at 89 (citing *Trustees of Dartmouth College v. Woodward* (1819), 17 U.S. (4 Wheat.) 518, 636).

**3. The Due Process Clause bars Ohio from upending the justified expectations of corporations that their existence will be determined only by the state of their incorporation**

The law of the state of incorporation is so commonly understood to determine a dissolved corporation’s capacity for suit that application of any other state’s law is grossly unfair to stakeholders who justifiably expect the state of incorporation to govern that issue, thereby violating the due process right to fair procedures in civil suits.

The Due Process Clause of the Fourteenth Amendment guarantees that each person shall be accorded a certain “process” before they are deprived of life, liberty or property. U.S. CONST. amend. XIV, § 1. With regard to civil lawsuits, the Due Process Clause provides a general guarantee of fair procedure. *Zinerman v. Burch* (1990), 494 U.S. 113, 126. In particular, the Supreme Court has repeatedly held that the Due Process Clause places limitations on state choice-of-law determinations. See *Allstate Ins. Co. v. Hague* (1981), 449 U.S. 302, 313 (plurality opinion) (under the Due Process Clause, a state’s choice-of-law must be “neither arbitrary nor fundamentally unfair”); *Home Ins. Co. v. Dick* (1930), 281 U.S. 397, 408 (Texas court violated due process in applying Texas law to Mexican contract); *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.* (1934), 292 U.S. 143 (invalidating on Due Process grounds Mississippi judgment refusing to enforce contract made in Tennessee). See generally Russell J.

Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 Iowa L. Rev. 449 (1959) ("Weintraub").

**4. The Full Faith and Credit Clause requires Ohio to give effect to the corporation law of Illinois**

The Court of Appeals' refusal to apply the Illinois corporate survival statute also violates the constitutional obligation to accord full faith and credit to Illinois's public acts. The Full Faith and Credit Clause of the U.S. Constitution states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. Art. IV, § 1. In tandem with the Due Process clause, the Full Faith and Credit Clause prohibits unreasonable choice-of-law. Weintraub, 44 Iowa L. Rev. 449. If the forum state is confronted with a conflict between its policy and that of a sister state, Full Faith and Credit requires the conflict to be solved by applying the law of the state with the greater governmental interests. *Pacific Employers Ins. Co. v. Indus. Acc. Comm.* (1939), 306 U.S. 493, 502-03. If, however, there is no conflict between forum law and the statute of a sister state, as here, that statute is due full faith and credit. See *Franz v. Buder* (C.A.8, 1926), 11 F.2d 854, 860.

**B. The rulings below unconstitutionally fail to give effect to Illinois law**

Resurrecting Sager through use of Ohio law violates the Commerce Clause, the Due Process Clause and the Full Faith and Credit Clause. The risk and burden of inconsistent regulation caused by the Court of Appeals' decision are clear. Under the law of Sager's state of incorporation, Sager no longer exists; it has already completed the winding-up process required of all Illinois corporations, and it remained amenable to suit for five years post-dissolution, as required by Illinois's corporate survival statute. It looked to and complied with **Illinois** law to complete its dissolution, as it was required to do. However, under the Court of Appeals' interpretation of Ohio law, Sager's reliance on its own state's law was for naught: Ohio (or any other state, for that matter) is free to upend those expectations years later, by declaring the

corporation's existence subject to another state's rules. The Court of Appeals' rule would subject corporations to hopelessly inconsistent regulations and undermine the need for national uniformity. Its decision therefore violates the Commerce Clause. The ruling disregards parties' justified expectations—based upon nearly 200 years of legal authority—that the law of the state of incorporation controls, and thus constitutes the kind of arbitrary and fundamentally-unfair choice-of-law the Supreme Court has repeatedly invalidated under the Due Process Clause. Finally, because there is no conflict between Ohio law and the Illinois corporate survival statute, the Court of Appeals' ruling improperly fails to give the Illinois statute full faith and credit.

**C. A court cannot circumvent the law of the state of incorporation by appointing a receiver to collect insurance "assets"**

The courts below avoided the requirement—set both by the Constitution and Ohio's own statutes and precedent—that they apply Illinois law to determine whether Sager was subject to suit, but each through different means. The trial court simply applied Ohio law to Sager as if it became an Ohio corporation merely by doing business here. Perhaps recognizing that error, the Court of Appeals did not treat Sager as if it were an Ohio corporation but reached the same (equally incorrect) result by characterizing a receivership established **to permit suit** against Sager as somehow not implicating Sager's susceptibility to suit at all, but as involving merely collection of insurance. That mischaracterization ignores reality and provides no justification, for several reasons, for ignoring Illinois law or U.S. Supreme Court precedent directly on point. First, the receivership necessarily permits litigation against Sager, which extends its existence in violation of Illinois law, no matter what legal construct is used to reach that result. The United States Supreme Court made clear that **"To allow actions to continue would be to continue the existence of the corporation,"** which cannot be done in violation of the law of the state of incorporation. *Oklahoma Natural Gas*, 273 U.S. at 259 (emphasis added).

Second, the court read the general receivership statute, R.C. 2735.01, as permitting appointment of receivers for “**foreign dissolved corporations**” as well as Ohio corporations, even though the statute does not purport to apply to foreign corporations.<sup>2</sup> Moreover, the statute cannot be interpreted to apply to foreign corporations. Indeed, this Court noted in *Stetson* that Ohio corporation code provisions “annulling” or “abridging” corporate powers **had** to be interpreted to be limited to Ohio corporations: “[M]any of the provisions of these statutes are necessarily confined to corporations deriving their existence from our own laws . . . . The legislature having no extraterritorial power, **must be presumed** to intend to confine their operation to institutions within its jurisdiction.”). 2 Ohio St. at 174 (emphasis added). This mandate applies whether the Ohio statute operates “**directly or indirectly**” on the foreign corporation. *Id.* (emphasis added). Thus, R.C. 2735.01 cannot be interpreted to permit Ohio law to resurrect a foreign corporation **indirectly**, through appointment of a receiver.

Third, the particular vehicle the Court of Appeals used to subject Sager to suit—treating tort suits as being merely about collecting insurance proceeds, with the susceptibility of the tort defendant to suit being irrelevant—itself has been rejected by the United States Supreme Court as unconstitutional. In *Rush v. Savchuk* (1980), 444 U.S. 320, the Court ruled that seeking to establish personal jurisdiction over a tort defendant in a foreign state by “attaching” his insurance policy merely because the insurance company did business there did not comport with due process. *Id.* at 329-30. In reaching its holding, the Court emphasized that existence of insurance cannot form the basis for jurisdiction over a tort defendant not otherwise subject to suit:

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<sup>2</sup> Whether R.C. 2735.01 applies to “**foreign dissolved corporations**” has never been considered by this Court. Thus, the issue is one of first impression. In addition, although the Court of Appeals asserted that the cases Sager relied upon pre-dated the enactment of R.C. 2735.01, and thus were somehow superseded by the statute, this was incorrect: The statute was first passed, with nearly identical language, in 1852. 1852 Ohio Laws 97.

The insurance policy is not the subject matter of the case, however, nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction . . . .

*Id.* at 329. And it was insufficient to assert that the “true” relief was sought against the insurer:

The State's ability to exert its power over the “nominal defendant” is **analytically prerequisite** to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the “garnishee” into the action.

*Id.* at 330-31 (emphasis added). Thus, the Constitution does not permit, as a matter of due process, ignoring the susceptibility to suit of an alleged “nominal defendant” to create jurisdiction to attach insurance assets. *Id.* See also *Wittenauer v. Bennett* (S.D. Ohio Sept. 8, 2008), 2008 U.S. Dist. LEXIS 86636 (under *Rush*, allegation that uninsured motorist carrier was “real party in interest” was no basis to assert jurisdiction over non-resident tort defendant).

The logic of *Rush* applies with even more force here. An analytical prerequisite to availability of any insurance proceeds is Sager's **liability**: “liability policies require, as a condition precedent to the insurer's liability, that the insured be liable to a third person.” Allan D. Windt, *Insurance Claims and Disputes* § 6.6 (Thomson/West 2010). If Sager cannot be held liable—because it does not exist and can no longer be sued—then no claims can be made against its liability insurance policies, and they never ripen into “assets” at all. *Javorek v. Superior Ct. (Larson)* (1976), 17 Cal.3d 629, 641 (an insurer “has no liability to pay until [the policyholders'] liability is determined. If it is determined that [the policyholders] have no liability, **the insurer's liability never accrues**”) (emphasis added). Just like the garnishment at issue in *Rush*, the receivership here permits suits against a “nominal defendant” to reach “insurance proceeds,” but ignores that the defendant cannot be sued and that there are no insurance proceeds if the defendant cannot be liable. Thus, the receivership, blessed by the Court of Appeals precisely because it reached this result, instead should be condemned as unconstitutional.

**D. The Court of Appeals improperly applied an “abuse of discretion” standard**  
The Court of Appeals improperly decided this case under an “abuse of discretion” standard, saying that standard applies to the appointment of receivers. The court ignored the reality that this case involves statutory interpretation, choice of law, and analysis of constitutional principles to determine whether an Ohio court has the **power** to appoint a receiver here, mandating a “de novo” review.” “[T]he interpretation of statutory authority . . . is a question of law,” such that “review is *de novo*.” *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163 ¶ 8. Likewise, “a trial court’s choice of law determination” is reviewed “under a *de novo* standard.” *Nationwide Mut. Fire Ins. Co. v. Rose*, Lorain App. No. 05CA008814, 2007-Ohio-1216 ¶ 7.

## V. CONCLUSION

The decisions of the courts below unconstitutionally render a dissolved foreign corporation subject to suit in Ohio even though, under its own state’s law, the time for suits against it elapsed long ago; Sager therefore claims an appeal of right. Sager further invokes the discretionary jurisdiction of this Court to correct the courts’ clear error, because Ohio commerce depends upon consistent application of the laws of Ohio and of other states, and the decisions below fail to honor the justified and long-held expectations of corporations that their existence and, therefore, their susceptibility to suit are governed by the law of their incorporation.

Accordingly, the Court should accept this appeal.

Date: October 1, 2010

Patrick F. Hofer (pro hac vice pending)  
TROUTMAN SANDERS LLP

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail on October 1, 2010, to the following:

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 93567

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IN RE: ALL CASES AGAINST  
SAGER CORPORATION

SAGER CORPORATION

APPELLANT

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JUDGMENT:  
AFFIRMED

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Civil appeal from the Cuyahoga County Court  
of Common Pleas, Civil Division  
Case No. SD-073958

BEFORE: Sweeney, J., Kilbane, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: August 19, 2010



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THE STATE OF OHIO Cuyahoga County	SS.	I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL		
NOW ON FILE IN MY OFFICE		8-19-10 28
WITNESS MY HAND AND SEAL OF SAID COURT THIS		
DAY OF <u>Sept</u>	A.D. 20	<u>10</u>
GERALD E. FUERST, Clerk		
By <u>M. Walker</u>		Deputy

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FILED AND JOURNALIZED  
PER APP.R. 22(C)

AUG 19 2010  
GERALD E. FURST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEP.

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JAMES J. SWEENEY, J.:

Appellant, Sager Corporation ("Sager"), appeals from the trial court's order that granted appellee, Bevan & Associates, L.P.A., Inc.'s ("Bevan"), motion to appoint receiver.<sup>1</sup> For the reasons that follow, we affirm.

According to the record, Sager incorporated in Illinois in 1921 and as part of its business made products with asbestos materials, such as gloves and curtains. Sager benefitted from the sale of its asbestos-containing products in Ohio. Sager obtained an Illinois Certificate of Dissolution on June 17, 1998. Since then, Ohio citizens, represented by Bevan and other law firms, have commenced claims against Sager in Cuyahoga County following the manifestation of their asbestos-related injuries.

Bevan believes that, despite Sager's dissolution, certain of its assets remain in existence in the form of unexhausted insurance policies. It is alleged that these assets may afford coverage to the Ohio asbestos litigants for injuries suffered as a result of exposure to Sager's products. It is further alleged that Sager acquired these assets for this very purpose.

In February 2009, Bevan moved the court to appoint an Ohio receiver for Sager to wind up the affairs and accept service of process. Sager, who had

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<sup>1</sup>Other plaintiffs joined this motion and petitioned the court to appoint a receiver for Sager.

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entered an appearance in at least one civil suit,<sup>2</sup> opposed the motion arguing that it was not subject to suit and its belief that Ohio law precluded appointment of an Ohio receiver for a dissolved foreign corporation.

The trial court granted the motion to appoint receiver after considering both briefing and oral arguments on the matter. Sager appeals the trial court's decision pursuant to R.C. 2505.02(B)(2), presenting the following error for our review:

"I. The trial court erred in granting a motion to appoint receiver and in appointing an Ohio receiver on behalf of Sager Corporation, a dissolved Illinois Corporation [ ] in violation of Ohio choice-of-law rules, Ohio Statutes, Ohio jurisprudence, and the United States Constitution."

The appeal before us has the peculiar procedural posture of the receivership being the only issue. We review a trial court's order appointing a receiver under the deferential abuse of discretion standard. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 573 N.E.2d 62.

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<sup>2</sup>The parties refer to this as the "*Bowens* case." We note that the trial court granted Sager's motion for summary judgment for plaintiff's failure to identify a Sager product connected to his injuries, which rendered Sager's lack of corporate existence claims moot and undecided in that matter.

A. Jurisdiction

The appointment of receivers by the court of common pleas is governed by the provisions of R.C. 2735.01, which provide in relevant part:

“A receiver may be appointed by the supreme court or a judge thereof, the court of appeals or a judge thereof in his district, the court of common pleas or a judge thereof in his county, or the probate court, in causes pending in such courts respectively, in the following cases:

“\* \* \*

“(E) When a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

“(F) In all other cases in which receivers have been appointed by the usages of equity.”

The above-quoted statute clearly vested the trial court with jurisdiction to appoint a receiver for Sager, which is a dissolved corporation.

Contrary to Sager’s interpretation, this statute does not limit the trial court’s authority to appoint receivers to only domestic, that being Ohio, corporations. Without qualification the statute applies to a corporation that has been dissolved, which would include foreign corporations. Finally, the case law Sager relies upon to support its position that the trial court lacks jurisdiction to appoint a receiver over a dissolved foreign corporation is inapplicable as it pre-

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dates the effective date of R.C. 2735.01, which explicitly authorizes the trial court to do so.<sup>3</sup>

The statute alternatively empowered the trial court to appoint a receiver for the usages of equity. The trial court's opinion comprehensively sets forth equitable reasons for appointing a receiver in order to process the insurance assets that remain available to compensate persons who Sager injured in Ohio.

#### B. Choice of Law

The parties frame the choice-of-law determination as depending upon the resolution of Sager's corporate existence. However, this matter involves the appointment of a receiver<sup>4</sup> over the remaining assets of an already dissolved corporation. Bevan was not seeking the appointment of a receiver in order to dissolve Sager, but instead to administer the remaining assets of Sager; specifically, the distribution of potential insurance proceeds to potential third-

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<sup>3</sup>See *Am. Fruit & S.S. Co. v. Dox* (Sup.Ct. 1906), 4 Ohio N.P. (n.s.), 16 Ohio Dec. 501; *Kulp v. Fleming* (1901), 65 Ohio St. 321, 340, 62 N.E. 334). Similarly, case law regarding a court's lack of jurisdiction to interfere with internal affairs of viable foreign corporations has no application to discerning the trial court's jurisdiction to appoint a receiver for a dissolved corporation pursuant to R.C. 2735.01(E).

<sup>4</sup>"A 'receiver' is defined as '[a]n indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and receive its rents, issues, profits, and apply or dispose of them at the direction of the court \* \* \*. A fiduciary of the court, appointed as an incident to other proceedings wherein certain ultimate relief is prayed. He is a trustee or ministerial officer representing the court \* \* \*.'" *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 573 N.E.2d 62, quoting, Black's Law Dictionary (6 Ed.1990) 1268.

party beneficiaries (the persons injured by exposure to Sager's asbestos-containing products). Indeed, the court's authority to appoint a receiver for Sager in Ohio required that Sager was either "dissolved" or had "forfeited its corporate rights." R.C. 2735.01(E).<sup>5</sup>

It is true that the law of the incorporating state determines issues relating to the internal affairs of the corporation. *Bryan v. DiBella*, Franklin App. No. 08AP-418, 2009-Ohio-1101, ¶13. But, as set forth below, the underlying tort actions require the application of Ohio law and involve the rights of "third parties external to the corporation" to collect from remaining assets of the defunct corporation and, therefore, the internal-affairs doctrine is not relevant. See *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218, ¶45-49.

Ohio law would control the trial court's authority to appoint a receiver over the remaining assets of a defunct foreign corporation that caused tortious injury to persons in Ohio. *Ohayon v. Safeco Ins. Co.*, 91 Ohio St.3d 474, 2001-Ohio-100, 747 N.E.2d 206.

Central to the trial court's appointment of a receiver in this case was that "assets of Sager have not been exhausted." Order, pp. 1-2. The trial court

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<sup>5</sup>Although there is general reference to the governance of foreign corporations in Ohio pursuant to Chapter 1703, it is unclear whether Sager complied with the statutory requirements, including R.C. 1703.17(B)(3) and (E).

reasoned that Ohio law applied to the underlying tort actions of third parties against Sager. These third parties have a potential interest in Sager's remaining insurance assets should they obtain a judgment. *Dyczkiewycz v. Tremont Ridge Phase I Ltd. Partnership*, Cuyahoga App. No. 91773, 2009-Ohio-495, ¶13. The receiver will administer the remaining insurance assets of the defunct corporation to Ohio citizens that were injured by the tortious conduct of Sager in this State.

Sager insists that it is error to appoint a receiver because of its alleged corporate non-existence under Illinois law, particularly 805 Ill.Comp.Stat. Ann. §5/12.80.<sup>6</sup> The issue, however, at this juncture is whether any of Sager's assets remain undistributed, which can be collected and distributed by the receiver in order to compensate Ohio citizens, and who were injured by the tortious conduct of Sager in this State prior to its dissolution in Illinois. Sager does not claim it has no remaining assets, nor has it disputed Bevan's contention that unexhausted insurance policies remain in effect.

Sager contends the appointment of a receiver violates due process by extending the life of the corporation beyond what was expected by its directors, officers, and stockholders under Illinois law. However, there is no due process

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<sup>6</sup>Illinois's corporate survival statute provides for a five-year period after a corporation's dissolution in which civil actions can be prosecuted against or defended by the corporation "in its corporate name."

violation because the appointment of a receiver does not extend its corporate life; the receiver “will merely be a vehicle through which [the asbestos claimants] will seek recovery from the insurers.” See *In re Tex. E. Overseas, Inc.*, (Del.Ch. Jan. 26, 2010), C.A. 4326-VCN;<sup>7</sup> see, also, *In re Tex. E. Overseas, Inc.* (Del.Ch. Nov. 30, 2009), C.A. No. 4326-VCN. In fact, the receiver’s power is limited to “property of the corporation,” which protects the corporate directors, officers, and stockholders of the dissolved corporation from any exposure in the event of a judgment that cannot be satisfied from corporate property, i.e., a judgment in excess of insurance coverage. R.C. 1701.89(A).<sup>8</sup>

The Ohio Supreme Court instructs, “[a] court in exercising its discretion to appoint or refuse to appoint a receiver must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and effectiveness of other

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<sup>7</sup>In *Texas Eastern*, like this matter, a party (Ameripride) petitioned the court to appoint a receiver for Texas Eastern Overseas (“TEO”), a corporation that had been dissolved for 15 years and was beyond the three-year survival period for claims against it, to obtain contribution from its insurers in the event it was found liable for environmental pollution in a pending federal action.

<sup>8</sup>Sager relies on 805 Ill.Comp.Stat. Ann. 5/12.60 in maintaining that Illinois law required the trial court to appoint an Illinois resident as the receiver; however, that statute explicitly governs “Practice in actions under Section 12.50 [grounds for judicial dissolution], 12.55 [shareholder remedies; public corporations], and 12.56 [shareholder remedies; non-public corporations],” none of which apply to this matter.

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remedies.” *State ex rel. Celebrezze*, 60 Ohio St.3d at 73, fn. 4, quoting, 65 American Jurisprudence 2d (1972) 873, 874, Receivers, Sections 19, 20. We are not to disturb the trial court’s appointment absent a “clear abuse of sound judicial discretion.” The trial court found that “the defunct corporation persists for the purpose of winding up its affairs in Ohio. Ohio law provides that the Court appoint a receiver to fairly accept the process of claims, process defenses, and marshal assets accordingly.” Because there is no dispute that corporate assets exist notwithstanding Sager’s dissolution and that these assets may afford insurance coverage to Ohioans injured by exposure to Sager’s products, the trial court did not abuse its discretion by appointing a receiver in this matter.

Sager’s sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

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A certified copy of this entry shall constitute the mandate pursuant to  
Rule 27 of the Rules of Appellate Procedure.

  
JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR

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