

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

AMICUS CURIAE BRIEF OF THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT

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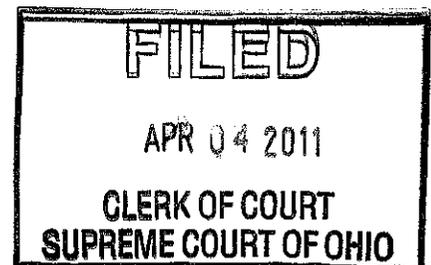


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INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose membership consists of attorneys and supervisory or managerial employees of insurance or other corporations who devote a substantial portion of their time to the defense of civil damage suits. The mission of OACTA is to "provide a forum where we can work together and with others on common problems and promote and improve the administration of justice in Ohio." Accordingly, OACTA has a substantial interest in ensuring that Ohio remains an attractive state in which to do business for foreign corporations, and in protecting the insurers of those foreign corporations, who may themselves be Ohio corporations.

STATEMENT OF THE FACTS

OACTA incorporates by reference the Statement of the Facts found in Appellant Sager Corporation's Merit Brief.

INTRODUCTION

OACTA agrees with Sager Corporation that subjecting a foreign corporation to suit, contrary to the laws of its state of incorporation, violates the Due Process Clause, the Commerce Clause and the Full Faith and Credit Clause of the U.S. Constitution. Beyond these arguments, the Eighth District Court of Appeals' decision, if upheld, has vast practical implications that reach far beyond the pockets of any potential liability insurer of the dissolved Sager Corporation. The consequences of allowing Ohio courts to circumvent sound choice of law analysis and constitutional principles to subject dissolved corporations and their insurers to never-ending litigation in Ohio, would be disastrous to Ohio's industry and commerce.

The logical extension of the Eighth District Court of Appeals' decision is that every foreign corporation who merely places a product into the stream of commerce would become a

"domestic corporation" of the state of incorporation as well as the State of Ohio. This would lead to legal chaos and a potential forum-shopping nightmare. Additionally, an insurance company would be hesitant to provide coverage to any foreign corporation doing business in Ohio for fear that the corporation would never fully dissolve despite the laws of the state of incorporation. This would be another deterrent to foreign corporations that would otherwise wish to conduct business in Ohio.

The Eighth District's ruling is also inequitable to liability insurers. Allowing an action to go forward against a dissolved foreign corporation which has not been susceptible to suit under the laws of the state of incorporation since 2003 is unfairly prejudicial to the liability insurer of the dissolved corporation. The insurer will have a difficult time defending such an action after corporate documents have been destroyed and witnesses are either no longer available, or no longer have any incentive to cooperate in the defense.

Even if the receiver appointed by the Eighth District Court of Appeals were to somehow obtain possession of any liability policies once belonging to Sager Corporation, he or she would have no right to liquidate and distribute policy proceeds without an underlying tort judgment against Sager Corporation. The obligation of a liability insurer to distribute liability insurance proceeds is not triggered until a claim against its insured has been adjudicated, and a judgment has been rendered against the insured which is covered by the policy. This would first and foremost require a lawsuit against the dissolved corporation. However, appropriate choice of law analysis dictates that Illinois corporation law applies to bar such an action against Sager Corporation, and the mere fact that Sager Corporation may have unexhausted liability policies does not resurrect and subject the long dissolved foreign corporation to suit in Ohio.

For these and other reasons more fully set forth below, OACTA strongly urges reversal of the Eighth District Court of Appeals' decision.

ARGUMENT

Proposition of Law No. I:

Ohio courts may not apply Ohio corporation law to, or otherwise exercise jurisdiction over, dissolved foreign corporations, after they are no longer amenable to suit under the laws of the state of their incorporation.

- 1. Whether a corporation continues its existence, and is amenable to suit, after it has dissolved or been suspended is decided by the state of incorporation.**

Whether a corporation continues its existence, and is amenable to suit, after it has dissolved is decided by the law of its state of incorporation. Restatement (Second) of Conflict of Laws § 299(1) ("(1) Whether the existence of a corporation has been terminated or suspended is determined by the local law of the state of incorporation. (2) The termination or suspension of a corporation's existence by the state of incorporation will be recognized for most purposes by other states."). See, also, *Oklahoma Natural Gas Co. v. Oklahoma* (1927), 273 U.S. 257, 259-60, 47 S. Ct. 391, wherein the U.S. Supreme Court stated:

[C]orporations exist for specific purposes, and only by legislative act, so that, if the life of the corporation is to continue [post-dissolution] 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. See, also, *Smith v. Halliburton Co.*, 118 N.M. 179, 183-184, 879 P.2d 1198 (N.M. Ct. App. 1994) (stating that the "majority of other jurisdictions have determined that corporate survival statutes are not procedural provisions that are analogous to statutes of limitation; rather, they contain matters to be controlled by the law of the state of incorporation" and citing *Sedgwick v.*

Beasley, 84 U.S. App. D.C. 325, 173 F.2d 918, 919 (D.C. Cir. 1949)); *Indiana Nat'l Bank v. Churchman*, 564 N.E.2d 340, 342 (Ind. Ct. App. 1990) (finding that corporate survival statutes give life to a right otherwise destroyed by a corporate dissolution); *Leviathan Gas Pipeline Co. v. Texas Oil & Gas Corp.*, 620 So. 2d 415, 418 (La. Ct. App. 1993); *Van Pelt v. Greathouse* (1985), 219 Neb. 478, 364 N.W.2d 14, 20 ("a statute of limitations relates to the remedy only and not to substantive rights . . . a survival statute operates on the right or claim itself" (citation omitted)); 16A Fletcher, supra § 8167, at 542 (statutes continuing corporate life after dissolution are not applicable to foreign corporations).

Similarly, Ohio courts also have followed this rule:

A corporation exists by force of legislative enactment. Its inception and the duration of its power are determined by law, and these laws have fluctuated in time and place. . . . When the time approaches for its dissolution, whether it shall be struck down and divested instantly of all power, or shall be permitted to linger with diminished or diminishing powers until it sinks into innocuous desuetude is dependent on the will of its creator as expressed in legislative enactment. And who shall have the right to question its existence and the measure of its powers is likewise determined by the author of its being.

H.S. Leyman Co. v. Piggly-Wiggly Corp. (1944), 1st Dist. No. 6225, 1944 Ohio App. LEXIS 56668, 68 N.E.2d 486, 489 (emphasis added). See, also, *Weiser v. Julian* (1921), 15 Ohio App. 171, 180-81, 1 Ohio L. Abs. 375 (applying this rule and finding that a foreign corporation no longer had the capacity to sue or be sued, rejecting the claim that Ohio corporation statutes applied to it, and stating that the section of the Ohio corporation code at issue "can only refer to Ohio corporations.") (citing *Stetson v. City Bank of New Orleans* (1853), 2 Ohio St. 167).

Clearly, Ohio corporation law specifically applies only to domestic corporations, unless otherwise stated. See, e.g., O.R.C. § 1701.01(A), which states that, as it applies to sections 1701.01 to 1701.98 of the Revised Code, "'Corporation' or 'domestic corporation' means a

corporation for profit formed under the laws of this state." Similarly, "'Foreign corporation' means a corporation for profit formed under the laws of another state, and 'foreign entity' means an entity formed under the laws of another state." O.R.C. § 1701.01(B). See, also, the 1955 Committee Comment to O.R.C. §1701.01, which reinforces this point and states, "Since Chapter 1701 is limited to corporations for profit (except for a small number of sections where specific reference is made to 'foreign corporations' or to 'non-profit corporations'), the term 'corporation' is defined in division (A) to mean a domestic corporation for profit." In fact, the Ohio legislature has only dedicated a relatively small and separate portion of the Ohio Revised Code to foreign corporations. See, O.R.C. § 1703.01, et seq. These statutes have mainly to do with administrative details such as licensing and collection of fees.

In its decision in this case, the Eighth District Court of Appeals applied the wrong choice of law analysis. The Eighth District Court of Appeals misinterpreted *Ohayon v. Safeco Ins. Co.*, 91 Ohio St.3d 474, 2001-Ohio-100, 747 N.E.2d 206, for the proposition that "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." *In re All Cases Against Sager Corp.*, 2010-Ohio-3872, ¶18, 188 Ohio App. 3d 796. However, at issue in *Ohayon*, was whether coverage under a UIM policy issued in Ohio should be determined by the law of the state in which the accident occurred or the law of Ohio, the state in which the policy was issued. Key to this Court's decision in *Ohayon* was whether the particular issue was one of contract or tort as this would guide the choice of law analysis. Interestingly, this Court's reasoning in *Ohayon* directly contradicts the Eighth District Court of Appeals' assertion that the law of the state in which the injury occurs applies:

Relying on this language from *Mayse*, the trial court in this case applied a tort choice-of-law analysis to determine which state's law applies. The trial court thus

applied the Restatement's presumption that the law of the place of injury controls unless another jurisdiction has a more significant relationship. See *Morgan v. Biro Mfg.*, 15 Ohio St. 3d at 341-342, 15 Ohio B. Rep. at 465, 474 N.E.2d at 289, citing 1 Restatement of Conflicts at 430, Section 146. Because Jonathon was injured in Pennsylvania, the trial court determined that Pennsylvania law should control.

The trial court's choice-of-law analysis, however, was flawed. If the Ohayons had filed a civil action for damages against the Pennsylvania tortfeasor in an Ohio court, the measure of damages--if any--recoverable from the tortfeasor would have been the essential issue before the court, and our state's tort choice-of-law analysis, as expressed in *Mayse*, would indeed determine which local law to apply. See *id.*

In the case at bar, however, the measure of damages recoverable from the Pennsylvania tortfeasor is not the critical issue. Jonathon Ohayon has already settled with the Pennsylvania tortfeasor for the \$ 100,000 limit of the tortfeasor's liability insurance. Instead of seeking damages from the tortfeasor for liability in tort, the Ohayons now seek a declaration that they may stack the stated per-person limits of UIM coverage contained in their insurance contract with Safeco, and that Safeco is not entitled to set off the amounts Jonathon has already received in settlement. The resolution of these stacking and setoff issues is a coverage issue, separate and independent from the measure of damages assessed to the tortfeasor. The resolution of these coverage issues depends on (1) the applicable UIM provisions of the insurance contract executed by the parties, contained in Part C of that contract; and (2) the enforceability of those contractual provisions under state law. These are issues to be resolved under the law of contracts, to which the court of appeals correctly applied the Restatement's contract choice-of-law analysis.

Ohayon at 482.

Similarly, in the instant case, the critical issue is not the measure of damages recoverable by the tort claimants. Rather, the critical issue is whether a dissolved Illinois corporation is amenable to suit in Ohio after it is no longer amenable to suit under Illinois corporation law¹.

The Restatement's corporate choice of law analysis should have been applied, the result of which

¹ See, 805 Ill. Comp. Stat. Ann. § 5/12.80, which is entitled "Survival of remedy after dissolution," and which states that 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."

would be to apply Illinois corporation law and bar any action against Sager Corporation. Restatement (Second) of Conflict of Laws § 299(1)

The California Supreme Court is currently reviewing a strikingly similar case, wherein a California appellate court, in stark contrast to the Eighth District Court of Appeals' decision here, upheld a lower court's decision to sustain the demurrer of a dissolved Delaware corporation and dismissed an asbestos tort claim against the dissolved Delaware corporation with prejudice. See, *Greb v. Diamond Int'l Corp.* (2010), 184 Cal. App. 4th 15, 108 Cal. Rptr. 3d 741. This case has been fully briefed and is currently awaiting oral argument in the California Supreme Court.

In *Greb*, the plaintiffs filed a complaint against the dissolved Delaware corporation more than three years after the dissolved foreign corporation's dissolution. Despite California corporation law, which sets forth no time limitation for suing a dissolved California corporation, the trial court applied Delaware law, which prohibits actions by or against dissolved corporations more than three years after their dissolution. The trial court concluded that the dissolved Delaware corporation was not amenable to suit.

The California Court of Appeals, in a thoughtful and well-reasoned opinion, affirmed the trial court decision and noted that California corporation law provides, with very limited exception, that the California Corporations Code only applies to domestic corporations, unless it expressly states otherwise. *Greb* at *24. The court stated:

In the first place, plaintiffs do not cite to any authority for the proposition that foreign corporations are covered under California's general corporation law division. It is also a substantial stretch to conclude that a corporation from another state can fairly be characterized as one "organized" under the California Corporations Code. Moreover, plaintiff's position conflicts with *Corporations Code section 162*, which provides: "'Corporation,' unless otherwise expressly provided, refers only to a corporation organized under this division or a corporation subject to this division under the provisions of *subdivision (a) of Section 102*." In our view, these statutes evince a clear intent to limit the Corporations Code's general application to domestic corporations.

Greb at *28.

In conclusion, the *Greb* court stated:

To adopt the interpretation propounded by appellant would render particular sections such as *section 102 and section 162 of the California Corporations code* meaningless. With *Corporations Code section 2115* as an example, we conclude the Legislature well knew when to expressly apply particular statutes in the code to foreign corporations. *Corporations Code section 2010*, however, does not do so.

Greb at *29.

Like the California Corporations Code, Ohio corporation law applies only to domestic corporations unless otherwise specified. This was intended by the Ohio General Assembly and is consistent with constitutional and choice of law principles that require that the law of the state of incorporation determines whether or not a dissolved corporation is amenable to suit. Here, like the Delaware statute in *Greb*, the time period set forth in the Illinois dissolution statute that applies to Sager Corporation has long since expired and the same should be applied by this Court to bar any action against Sager Corporation.

Proposition of Law No. II:

Ohio courts may not appoint receivers for dissolved foreign corporations under O.R.C. § 2735.01.

- 1. O.R.C. § 2735.01 must be read harmoniously with the entire Ohio Revised Code so that "corporation" includes only domestic corporations.**

"It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *State v. Moaning* (1996), 76 Ohio St.3d 126, 128, 1996-Ohio-413, 666 N.E.2d 1115. Utilizing the rules of statutory construction contained in R.C. §§ 1.12, 1.51, and 1.52, a specific statute, enacted later in time

than a preexisting general statute, will control where a conflict between the two arises." *Davis v. State Personnel Bd. of Review* (1980), 64 Ohio St.2d 102, 105, 413 N.E.2d 816.

Additionally, O.R.C. §1.49 reads:

§ 1.49. Ambiguous statutes

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

See, also, *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 585, 651 N.E.2d 995 (allowing in pari materia review to deduce meaning when a statute is facially ambiguous). Under this canon of construction, a court reads all statutes relating to the same general subject matter together and interprets them in a reasonable manner that "give[s] proper force and effect to each and all of the statutes." *Id.*, citing *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, 1994-Ohio-209, 643 N.E.2d 1129.

In its decision, the Eighth District Court of Appeals stated that O.R.C. § 2735.01 vested the trial court with jurisdiction to appoint a receiver for Sager. (Slip Op., ¶13.) O.R.C. § 2735.01 provides 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.

In its opinion, the Eighth District Court of Appeals stated:

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.

(Slip Op., ¶14.)

Here, O.R.C. §1701.01, unequivocally states that the word "corporation", unless otherwise qualified, refers only to domestic corporations and is in conflict with the Eighth District Court of Appeals' interpretation of the word "corporation" in O.R.C. § 2735.01. In fact, the Eighth District Court of Appeals' interpretation conflicts with the whole of Ohio corporation law, in which the Ohio General Assembly has taken great pains to make a distinction between foreign and domestic corporations, and which purposely does not provide a way for a court to appoint a receiver for a foreign corporation. Here, the more recent and more specific O.R.C. § 1701.01, and related Committee Comments, would apply to govern a court's interpretation of the word "corporation" in O.R.C. § 2735.01, and whether it includes foreign corporations. Clearly, when read harmoniously with O.R.C. § 1701.01 and the entirety of Ohio corporation law, the word "corporation" as found in O.R.C. § 2735.01 should be read only to include domestic corporations.

At the very least, the word "corporation" as found in O.R.C. § 2735.01 is ambiguous. Pursuant to O.R.C. § 1.49, a court should consider the above listed factors to interpret the ambiguity. Here, the object sought to be attained is clearly the ability to control the unexhausted

liability policies that provided insurance coverage to Sager during its corporate existence. As discussed above, further below, and in Sager's Merit Brief, a dissolved foreign corporation like Sager is no longer amenable to suit after the expiration of the wrap-up period. Sager's liability being extinguished by Illinois law, Sager's liability insurance no longer can be called upon to cover that liability, and it is similarly extinguished. Therefore, these liability policies cannot ripen into an "asset" whether in the hands of a receiver or anyone else. Even if the object sought was some actual purported "asset", and even if a foreign corporation like Sager was still amenable to suit, or even if Sager was a domestic corporation, it is unclear how a receiver would pay such unliquidated and unproven claims without a judgment.

Additionally, under the doctrine of *in pari materia*, the court should determine the meaning of the statute in light of other statutes on the same subject matter. The balance of the Ohio Revised Code, with the exception of Chapter 1703, which applies expressly to foreign corporations, applies only to domestic corporations. In fact, O.R.C. § 1701.90(A), which applies only to domestic corporations, specifically states:

(A) Whenever, after a corporation is dissolved voluntarily or the articles of a corporation have been cancelled or the period of existence of a corporation has expired, a receiver is appointed to wind up the affairs of the corporation, all the claims, demands, rights, interests or liens of creditors, claimants and shareholders shall be determined as of the day on which the receiver is appointed. Unless it is otherwise ordered, such appointment vests in the receiver and his successors the right to the immediate possession of all the property of the corporation, which shall, if so ordered, execute and deliver conveyances of such property to the receiver or his nominee.

Clearly, O.R.C. § 2735.01 is related to § 1701.90. In fact, it is so closely related that despite attempting to circumvent Chapter 1701, the Eighth District Court of Appeals cited to O.R.C. §

1701.90(A)² for the proposition that the receiver's power is limited to the "property of the corporation." (Slip Op., ¶21.) Under long standing rules of statutory interpretation, O.R.C. § 2735.01 must be read in harmony with the rest of the Ohio Revised Code to allow for only what the General Assembly intended it to do, which was to apply only to domestic corporations over which Ohio corporation law has control.

Moreover, O.R.C. § 2735.01 was clearly enacted to aid judgment creditors in certain situations where executing a judgment has become exceedingly difficult or impossible through other means. There is no amendment or comment by the Ohio Legislature that indicates an intention to give courts a way to circumvent or supersede established choice of law and statutory principles. On the contrary, the more recently enacted and revised O.R.C. § 1701.01 and related comments indicate a clear intent of the Ohio Legislature that the word "corporation" without qualification applies only to domestic corporations. Meanwhile, Chapter 1703, which applies expressly to foreign corporations, makes no provision for a receiver. This was a conscious and deliberate choice by the Ohio legislature, and the Eighth District Court of Appeals' finding that § 2735.01 provides for the appointment of a receiver for any corporation, foreign or domestic, expressly conflicts with this legislative intent and the balance of the Ohio Revised Code, established choice of law, and constitutional principles.

The consequences of a construction of O.R.C. § 2735.01 that allows a court to appoint a receiver for dissolved foreign corporations, as used by the Eighth District Court of Appeals here, causes a procedural, constitutional, and public policy nightmare. Such a construction interferes with a state's right to choose how to dissolve and wrap up the affairs of a corporation organized

² In ¶21 of its opinion, the Eighth District Court of Appeals actually cites to § 1701.89(A), but it is assumed that this was a clerical error, as it is clearly § 1701.90(A) ("Receiver for winding up affairs of corporation") and not § 1701.89(A) ("Jurisdiction of court over winding up affairs of voluntarily dismissed corporation") which relates to the Court's proposition therein.

and dissolved under its own laws. Allowing a receiver to possess and potentially distribute unexhausted liability insurance policy proceeds is unprecedented and contrary to Ohio law. Meanwhile, a construction that applies O.R.C. § 2735.01 only to domestic corporations, like that urged here, would create none of these issues, and would be in harmony with Ohio's Corporation Code and with well established principles of comity.

Proposition of Law No. III:

The unexhausted liability policies of a dissolved foreign corporation are not corporate "assets" subject to distribution by a receiver to tort claimants.

- 1. Insurance policies are contracts between an insurer and an insured that serve to protect an insured from liability, and are not "property" or corporate "assets" to compensate tort claimants.**

An insurance policy is a contract between an insurer and an insured. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* (2006), 112 Ohio St. 3d 482, 486, 2006-Ohio -6551, 861 N.E.2d 121 (citing *Ohayon v. Safeco Ins. Co. of Illinois* at 478). In fact, the "'long-standing principle' has been that 'the relationship between the insurer and the insured is purely contractual in nature.'" *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* at 486 (citing *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107, 109, 472 N.E.2d 1061).

It is important to note that there is a distinction between civil damages and the right to recover on a claim under an insurance policy. *Ackerman v. State Farm Mut. Auto. Ins. Co.*, 1st Dist. No. C-990332, 1999 Ohio App. LEXIS 5886 (citing *Smith v. Mancino* (1997), 119 Ohio App. 3d 418, 695 N.E.2d 354). Simply, the right to seek civil damages belongs to a tort claimant, and the right to recover on a claim under an insurance policy belongs to an insured.

Indeed, an Ohio court has recognized that a tort claimant has no property rights to the third party liability policy of a tortfeasor.

In *Alms & Doepke Co. v. Johnson* (1954), 98 Ohio App. 78, 128 N.E.2d 250, the court conducted an analysis of what property rights a tort claimant has in a third party's liability insurance policy. There, a judgment creditor sought to garnish insurance proceeds it said were owing to its judgment debtor because she had been in a car accident with the tortfeasor insured. The judgment creditor claimed that the debtor, as a tort claimant, had a right to the proceeds under the alleged tortfeasor's insurance policy. The court rejected the effort to garnish any insurance proceeds. Garnishment was available only with respect to the tort claimant's *property*, and "[s]he had no property right of any sort in the policy of insurance." *Alms & Doepke Co.* at 81. The court stated that the insurer "owed no duty under the policy, or otherwise, to [the tort claimant]" and, indeed, "its duty to defend and indemnify the insured placed it in opposition to her." *Alms & Doepke Co.* at 80. "[U]ntil the injured person obtains a judgment against the insured, such injured person has a mere possibility of a right against the insurer. It does not vest until he has obtained a judgment." *Id.* at 87. Moreover, the court noted, unless the conditions to coverage are satisfied, including the insured's duty to give prompt notice, duty to forward demands and summonses, and duty to assist and cooperate in the defense of suits, a cause of action against the insurer *never* arises nor vests in *either* the insured or the injured person. *Id.* at 88. *Alms & Doepke Co.* therefore makes clear that neither an insured nor an injured party may claim that a liability insurance policy is a purported "asset" owing to either of them until there is a judgment of liability against the insured and the conditions to coverage are satisfied.

Courts in other jurisdictions have made similar findings. See, e.g., *Javorek v. Superior Ct. (Larson)* (1976), 17 Cal.3d 629, 641, 552 P.2d 728 (rejecting argument that liability insurance policy may be attached as "property" of insured in advance of tort judgment and stating that 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"). See, also, *Gilliam v. Hi-Temp Prods., Inc.* (Mich. Ct. App. 2003) 260 Mich. App. 98, 677 N.W.2d 856, wherein the court considered whether an asbestos related tort claimant could recover from an insurance policy belong to a dissolved corporation under a Michigan statute that permits a creditor to reach "assets" of dissolved corporations. The *Gilliam* court stated:

Indeed, the contracts of insurance existed to provide indemnification to Hi-Temp in the event it was found liable for a tort claim. See *Samuels v Acme Market*, 845 F. Supp. 292, 294 (E.D. Pa. 1994). That is, their *only* value is the protection they provided from tort liability judgments. We cannot accept plaintiffs' contention that an asset is simply something that the corporation owns or has. In fact, the definition of the word "asset" is "[a] useful or valuable quality or thing." *The American Heritage Dictionary of the English Language* (1981). If there have been no tort claims triggering claims for defense or indemnification by Hi-Temp, or the deadline for the filing of any claims covered by the policies has expired, the policies are of no value. They cannot be "distributed." They are no longer assets of the corporation. Accordingly, we conclude that an expired third-party liability insurance policy is not an asset that would permit the conclusion that a dissolved corporation "has not made complete distribution of its assets" within the meaning of § 851(2).

Gilliam at 118. See, also, *AM Prop. Corp. v. GTE Prods. Corp.* (D.N.J. 1994) 844 F. Supp. 1007, 1015, 1994 U.S. Dist. LEXIS 2945 (holding that a Delaware corporation that dissolved over three years prior to suit could not be sued because the corporation's liability insurance did not constitute an asset that would subject it to liability); *City of S. Bend v. Century Indem. Co.* (Ind. Ct. App. 2005) 821 N.E.2d 5, 13 (ruling that insurance is not an asset of a long-dissolved corporation because "there was no liability for the insurance to cover."); *Blankenship v. Demmler Mfg. Co.* (Ill. Ct. App. 1980) 411 N.E.2d 1153 (holding that an "undistributed insurance asset" would not provide the basis for an action against a corporation outside the statutory period for suit).

In its decision, the Eighth District Court of Appeals cited to *Dyczkiewicz v. Tremont Ridge Phase I Ltd. Partnership*, Cuyahoga App. No. 91773, 2009-Ohio-495, ¶13 to support its

conclusion that "[t]hese third parties have a potential interest in Sager's remaining insurance assets should they obtain a judgment." (Slip Op., ¶19.) However, upon closer review, *Dyczkiewycz* is inapposite. *Dyczkiewycz* involved a plaintiff who had received a default judgment against a domestic corporation that was not dissolved. The court in *Dyczkiewycz* ruled that the trial court had abused its discretion by failing to appoint a receiver pursuant to O.R.C. § 2735.01(A), (C), and (F). Here, the tort claimants have no judgment against Sager Corporation, a dissolved foreign corporation. It is also important to note that O.R.C. § 2735.01(E), the purported authority for the Eighth District Court of Appeals' decision in the instant case, was not implicated in *Dyczkiewycz*.

Similarly, the unreported Delaware state court case, *In re Tex. E. Overseas, Inc.*, C.A. No. 4326-VCN, 2009 Del. Ch. LEXIS 198, cited by the Eighth District Court of Appeals later in its decision, is easily distinguishable. In its opinion, the Eighth District Court of Appeals dismisses Sager Corporation's argument that 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. The Eighth District Court of Appeals cited to *In re Texas E. Overseas, Inc.*, and stated that "there is no due process 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.'" (Slip. Op., ¶21.)

In re Texas E. Overseas, Inc., involved the related California District Court action of *AmeriPride Svcs., Inc. v. Valley Indus. Svc., Inc.* concerning a Federal CERCLA claim. Defendant in that case, Texas E. Overseas, Inc. ("TEO"), a dissolved Delaware corporation, filed for summary judgment on the basis that it was no longer amenable to suit. The California District Court ordered the parties to litigate the issue of whether TEO was amenable to suit in Delaware

state court. See, *AmeriPride Svcs., Inc. v. Valley Indus. Svc., Inc.* (E.D. Cal. 2008), No. Civ. S-00-113 LKK/JFM, 2008 U.S. Dist. LEXIS 96831, at *14-15 (ruling that Delaware law controlled whether the corporation was subject to suit and only a Delaware court could appoint a receiver for it and stating that 8 Del. Code § 279 “provides a specific procedure for parties seeking to sue outside this limit, and plaintiff has not attempted to follow this procedure here.”).

Subsequently, in the *In re Texas E. Overseas, Inc* case, the Delaware state court applied Delaware corporation law to the Delaware corporation. Specifically, the court applied 8 Del. Code §279, which provides:

When any corporation organized under this chapter shall be dissolved in any manner whatsoever, the Court of Chancery, on application of any creditor, stockholder or director of the corporation, *or any other person who shows good cause therefor*, at any time, may . . . appoint 1 or more persons to be receivers, of and for the corporation, to take charge of the corporation's property . . . with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid.

This aspect of the case actually supports Sager Corporation’s arguments that Illinois law alone determines its susceptibility to suit. *In re Texas E. Overseas, Inc.* provides no authority for applying forum corporation law to a foreign dissolved corporation or to appoint a receiver for it. In this case, it is important to note that Illinois law has no provision similar to 8 Del. Code §279. In addition, the court's analysis in *In re Texas E. Overseas, Inc.* is questionable.³ The assertion that insurance is an “undistributed asset” justifying appointment of a receiver was undertaken largely without citation to any authority. It is also interesting to note that the Eighth District

³ OACTA respectfully submits that the *In re Texas E. Overseas, Inc.* decision, and the Eighth District Court of Appeals' reliance thereon poses a host of broader jurisdictional issues that have been fully addressed by Sager Corporation in its Appellant's Brief (see Proposition of Law No. IV). OACTA adopts Sager Corporation's arguments therein, and incorporates them by reference here.

Court of Appeals' decision in this case is the only decision, of an unrelated case, to rely on the *In re Texas E. Overseas, Inc.* decision.

An insurance policy protects the interests of the insured, and it is certainly not a fund for tort claimants with unlitigated claims. Simply, the contingent right to indemnity and defense found in an insurance policy applies to an ongoing business concern for as long as it can be subject to tort liability. An insurance policy is not a purported "asset" of a defunct corporation. If a corporation is dissolved and it is beyond the time frame for commencement of suit, that corporation is dead. Once the corporation dies, the potential for liability is extinguished, and there is no longer any basis for coverage, and the right to indemnity and defense becomes worthless. Such insurance policy has no continuing value. Accordingly, any unexhausted liability policy once belonging to Sager Corporation cannot properly be deemed an alleged asset subject to distribution by a receiver.

CONCLUSION

For all of these reasons, amicus curiae, OACTA, respectfully urges this court to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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