

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

REPLY BRIEF OF APPELLANT SAGER CORPORATION

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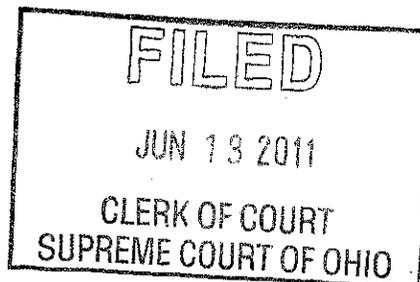


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I. INTRODUCTION

Appellant Sager Corporation (“Sager”) respectfully submits its Appellant’s Reply Brief in response to the Merit Brief of Appellees All Plaintiffs Represented by Bevan & Associates (“Bevan”) (“Appellees Br.”).

In the Merit Brief of Appellant Sager Corporation (“Appellant Br.”), Sager methodically laid out why Ohio law does not permit an Ohio court to appoint a receiver for a dissolved foreign corporation for the purpose of resurrecting it and subjecting it to suit. First and foremost, Ohio looks to and enforces the law of the state of incorporation when determining whether a corporation is subject to suit. Sager demonstrated that the Court of Appeal’s effort to circumvent this rule, by permitting appointment of a receiver, violated Ohio law, because Ohio courts have no jurisdiction to appoint a general receiver for a foreign corporation, just as they have no jurisdiction to dissolve foreign corporations or to regulate their internal corporate affairs. Sager showed that Ohio statutes permitting appointment of a receiver applied only to Ohio corporations, and that no statute or rule of equity permitted receiverships for non-Ohio corporations. Moreover, the United States Constitution, Sager showed, draws a sharp distinction between corporations engaged merely in “interstate commerce” outside their home state and those who actively “do business” outside their home state, and the Constitution bars states from exercising corporation-law power over foreign corporations engaged only in “interstate commerce,” like Sager. Sager explained in detail that the artifice employed by the Court of Appeals to avoid all of this adverse law—attempting to create jurisdiction to hear a tort suit based on treating a non-suable defendant as a “mere vehicle” to get at insurance—itself had been specifically rejected by the United States Supreme Court as violating due process. Finally, Sager showed that permitting a state to revive a dissolved foreign corporation (to permit tort litigation

against the corporation, in this instance) in violation of its home state's law, through whatever means, would violate the Due Process Clause, the Commerce Clause, and the Full Faith and Credit Clause of the U.S. Constitution.

The law, as Sager demonstrated, is clear, well established and overwhelming. Perhaps it is not surprising, therefore, that in their opposition Appellees largely ignore Sager's arguments, and ignore the law. Indeed, ignoring the law is the only way Appellees can succeed, and it is evident that Appellees want this Court to follow their lead in this respect. Unfortunately, the courts below did so, employing wholly different approaches, attempting somehow to circumvent overwhelming law which mandated denial of the Motion to Appoint Receiver. Appellees seek to have this Court do the same. To Appellees, the law is merely "some vague argument" (Appellee Br. at 20) that can be cavalierly brushed aside—and ignored.

To ignore the law, however, is to invite lawlessness, an invitation this Court of course has always refused. Far from ignoring the law, this Court honors the Constitution, enforces Ohio statutes and adheres to its precedents pursuant to *stare decisis*. "Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849 ¶ 1. Because this Court's precedents, Ohio statutes and the U.S. Constitution indisputably prohibit appointment of a receiver for a dissolved foreign corporation to subject it to suit in violation of its home state's law, and Appellees provide no serious argument to the contrary, the judgment and orders of the courts below should be reversed.

II. ARGUMENT

A. Standard of Review

Appellees ignore Sager's argument that whether a court has the *power*, under statute, law or equity, to appoint a receiver is a legal question, appellate review of which is *de novo*. Instead,

Appellees rely on this Court's ruling that whether a court *should* appoint a receiver based upon the facts and circumstances of the case, assuming it has the power, is reviewed on an abuse-of-discretion standard. Appellees' Br. at 12 (citing *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St. 3d 69, 73, 573 N.E.2d 62)). Although Sager pointed out that in *Castlebrook Ltd. v. Dayton Properties Ltd. P'ship* (1992), 78 Ohio App.3d 340, 604 N.E.2d 808, and *Cunningham v. Ohio Police & Fire Pension Fund*, 175 Ohio App.3d 566, 2008-Ohio-218, 888 N.E.2d 453, the Court of Appeals recognized that the power to appoint a receiver is a matter of law, and errors of law are reviewed *de novo*, Appellees do not cite or discuss these cases. Nor do Appellees contest the argument that the abuse-of-discretion standard *assumes* that a trial court has the discretion to act, and does not apply when the trial court has no power to act and therefore no discretion.

Instead, Appellees accuse Sager of improperly raising the standard of review for the first time in this Court and failing to respond to their argument in the Court of Appeals. This is incorrect. Sager responded to Appellees' erroneous argument on the standard of review in the Court of Appeals, pointing out that a trial court's legal errors on statutory interpretation, constitutional issues, and choice of law are reviewed *de novo*. Appellant's Reply, filed in the Court of Appeals Nov. 25, 2009, at 1 n.3.

B. Recent Cases Further Support Sager's Arguments

In its Appellant's Brief, Sager noted that the most recent authority in the country, determining the same legal issues as here, applied the rule that the law of the state of incorporation determines whether a foreign dissolved corporation may be sued, and held that asbestos bodily injury claims against the corporation were barred. Appellant Br. at 15 (citing *Greb v. Diamond Int'l Corp.* (2010), 184 Cal.App.4th 15, 108 Cal.Rptr.3d 741, *review granted*, (Cal.) 114 Cal.Rptr.3d 199, 237 P.3d 530). Since Sager filed its opening brief, however, another decision has been rendered, which further supports Sager's arguments. *Lilliquist v. Copes-*

Vulcan, Inc. (May 13, 2011), 2011 PA Super. 102, 2011 Pa. Super. LEXIS 608 (Reply Appendix (“Rpy. Appx.”) 1). In *Lilliquist*, the Pennsylvania appellate court affirmed the trial court’s order denying a motion seeking appointment of a receiver for a dissolved Alabama corporation, holding that, under the Full Faith and Credit Clause of the U.S. Constitution and well-settled Pennsylvania law, Pennsylvania courts are obliged to give effect to the law of the state of incorporation in matters of organization and dissolution of corporations. 2011 Pa. Super. LEXIS 608, at *5. The court observed that this rule had been recognized as the general rule in both the First and Second Restatements of Conflict of Laws. *Id.* at *6 & n.1. Because Alabama permitted suits against dissolved corporations for two years following publication of notice of dissolution, the court held that the asbestos suit at issue, filed after the survival period, was barred. *Id.* at *8. Moreover, the court specifically rejected plaintiff’s effort to have a Pennsylvania receiver appointed for the corporation to “manage its assets,” namely its insurance policies:

Because all of Lilliquist’s claims are barred as a matter of law, no ‘presently existing legal right’ exists that would permit the appointment of a receiver under these circumstances.

Moreover, the appointment of a receiver to manage SVI’s insurance funds for Lilliquist’s benefit would constitute a cause of action against SVI’s assets—which, as explained hereinabove, is not permitted under Alabama law (as accorded full faith and credit by this Court). In addition, the appointment of a receiver to allow Lilliquist to collect SVI’s insurance funds would constitute a direct action against the insurer of an alleged tortfeasor, which is generally not permitted in Pennsylvania.

Id. at *9-10. Pennsylvania law on honoring the law of the state of incorporation, on appointment of receivers and on direct actions is indistinguishable from Ohio law on these issues. *See H.S. Leyman Co. v. Piggly-Wiggly Corp.* (Ct.App.1944), 45 Ohio L.Abs. 528, 68 N.E.2d 486, 489 (law of state of incorporation determines whether corporation may be sued); *Hoiles v. Watkins*

(1927), 117 Ohio. St. 165, 175, 157 N.E. 557 (appointment of receiver improper where “[t]here is no wrong to be redressed and no right to be enforced”); R.C. 2721.02(B) (prohibiting direct actions). Accordingly, *Lilliquist* directly supports Sager’s arguments that (1) under the Full Faith and Credit Clause and conflict-of-laws principles, a state must give effect to the law of the state of incorporation in determining whether a foreign dissolved corporation is subject to suit; (2) a receiver may not be appointed to resurrect such a corporation in violation of its home state’s law; (3) a receiver cannot be appointed to collect insurance funds when suits against the insured are barred; and (4) appointment of a receiver to collect insurance would violate state law prohibitions on direct actions against insurers.

C. Appellees Ignore the Law

Appellees devote considerable effort to accusing Sager of shortcomings in an apparent effort to distract the Court from their own failure to address Sager’s arguments. Although, as further discussed below, each accusation has no merit, Appellees’ gambit of distraction and misdirection should not prevail. The following points in Sager’s opening brief are either completely or substantially ignored in Appellees’ Brief and should be treated as conceded:

- The United States Supreme Court has held that states must give full faith and credit to other states’ law on corporate dissolution, and whether a corporation is subject to suit is determined by its home state’s law, not the law of the forum. (Appellant Br. at 13 (citing *Pendleton v. Russell* (1892), 144 U.S. 640; *Oklahoma Natural Gas Co. v. Oklahoma* (1927), 273 U.S. 257)).
- Multiple states hold that whether a foreign dissolved corporation may be sued is resolved by the law of the state of incorporation, a rule codified in the First and Second Restatements of Conflict of Laws. (Appellant Br. at 14-15).

- This is the law of Ohio, as reflected in multiple decisions. (Appellant Br. at 15-16 (citing *H.S. Leyman Co. v. Piggly-Wiggly Corp.* (Ct.App.1944), 45 Ohio L.Abs. 528, 68 N.E.2d 486; *Weiser v. Julian* (1921), 15 Ohio App. 171; *Stetson v. City Bank of New Orleans* (1853), 2 Ohio St. 167)).
- This Court has already ruled that Ohio courts have no jurisdiction to exercise visitorial powers—the right to supervise a corporation’s legal powers, as through appointment of a general receiver— over a foreign corporation (Appellant Br. at 18-19 (citing *Relief Ass’n v. Equitable Life Assur. Soc.* (1942), 140 Ohio St. 68, 42 N.E.2d 653)). Multiple Ohio cases specifically rule that Ohio courts have no jurisdiction to appoint a receiver for a foreign corporation (Appellant Br. at 20-21 (citing *American Fruit & Steamship Co. v. Dox* (Super.Ct.1906), 16 Ohio Dec. 501, 4 Ohio N.P. (n.s.) 155; *Woods v. Equitable Debenture Co.* (1900), 11 Ohio Dec. 154, 8 Ohio N.P. 125; *Szilagyi v. Bertalan* (Ct.App.1992), No. 63435, 1992 Ohio App. LEXIS 6505)).
- These rules apply with respect to all foreign corporations, but states are further constitutionally barred from exercising *any* corporation-law powers over foreign corporations engaged only in “interstate commerce” (such as Sager). (Appellant Br. at 22-25).
- Ohio does not even purport to apply its corporation law (including with respect to appointment of receivers) to foreign corporations, limiting its corporation code to Ohio corporations. (Appellant Br. at 22 (citing R.C. 1701.01(A) & 1701.98)).

Each of these points constitutes a complete bar to appointment of a receiver for Sager, yet Appellees virtually ignore them. Together, they form an insurmountable barrier to the relief

Appellees seek, and the rulings of the courts below should accordingly be reversed.

D. Appellees' Efforts at Misdirection Are Unavailing

In addition to ignoring much of Sager's argument, Appellees attempt to misdirect the Court in several ways. First, they claim that this case involves an issue of tort choice of law. Appellees Br. at 14-16. Appellees see no distinction between "tort law issues" and "corporation law issues," and would have all issues in a tort case decided according to tort choice-of-law principles. But the very case on which Appellees principally rely specifically *rejected* that proposition, saying different choice-of-law principles apply to different issues, even in a single tort case. *Ohayon v. Safeco Ins. Co.* (2001), 90 Ohio St.3d 474, 2001-Ohio-100. There, Ohio insureds whose son was involved in a traffic accident in Pennsylvania sought to have Pennsylvania law apply to their uninsured motorists coverage. The trial court held that their claims "are largely based upon tort law and thus tort law governs," and applied Pennsylvania law to the insurance contract. This Court firmly rejected that view, holding that under Ohio choice-of-law principles and the Second Restatement, the insureds' claims against the insurer were *contract* claims, even though sought in a tort case, and were therefore subject to *contract* choice-of-law rules. *Id.* at 480 ("This court has determined that an action by an insured against his or her insurance carrier for payment of UIM benefits is a cause of action sounding in contract, rather than tort, even though it is tortious conduct that triggers applicable contractual provisions."). Here, whether Sager has the capacity to be sued is a *corporation law* issue, and Ohio choice-of-law principles on *corporation law* mandate application of Illinois law. Restatement (Second) of Conflict of Laws § 299(1) (1971) ("Whether the existence of a corporation has been terminated or suspended is determined by the local law of the state of incorporation"); *Gries Sports Enterprises, Inc. v. Modell* (1984), 15 Ohio St.3d 284, 287, 473 N.E.2d 807 (citing corporation-law sections of Second Restatement as authoritative). Appellees

do not argue otherwise.¹

The first error of the courts below, therefore, was in failing to apply settled Ohio choice-of-law rules compelling application of Illinois corporation law to determine Sager's existence.² But even if Ohio law applied to determine whether to appoint a receiver, Ohio law holds that Ohio courts have no jurisdiction to do so. Though Sager devoted pages of its opening brief demonstrating the error of the Court of Appeals' ruling in that regard, Appellees hardly address the argument.

Instead, throughout their brief, Appellees engage in misdirection with the goal of leading this Court astray. For example, Appellees claim that “[i]t is undisputed that Sager sold some of these products in the State of Ohio, particularly to the U.S. Steel facility in Lorain, Ohio” (Appellees Br. at 9); that plaintiffs were injured in Ohio by asbestos-containing products manufactured or supplied by Sager (*id.* at 16); that “the conduct leading to the injuries occurred in Ohio (*id.*);” and that “the relationship between the parties centered at Plaintiffs’ worksites in Ohio where Sager sold and supplied asbestos products” (*id.*). Appellees make these claims for two reasons: (1) to avoid dealing with the appropriate corporate law principle; and (2) to suggest that “Sager availed themselves of the laws and protection of the State of Ohio” (*id.* at 9) and “freely chose to conduct business here” (*id.* at 23, 24, 33-35), such that disregarding Illinois corporation law would purportedly not violate due process. Yet all of these claims are

¹ Indeed, Appellees’ continued reference to “tort law issues” since the trial court briefing demonstrates the error underscoring Appellees’ position and that of the lower courts. *If* Sager were currently amenable to tort suits in Ohio, Ohio tort rules would apply as to burden of proof, negligence issues, etc. But that is not this case. This case is premised on corporation law and, specifically, the ability (or lack thereof) to resurrect a dissolved foreign corporation for *purposes* of tort liability. This Court should correct that error, which permeates Appellees’ argument and the two lower court decisions.

² Appellees continue to rely on Section 300 of the Second Restatement, but fail to rejoin Sager’s argument that that section does not apply to corporations engaged in “interstate commerce” and is limited to assets located in the state, which do not exist here. Appellant Br. at 29 30 n.12.

fundamental mischaracterizations. Sager of course disputes that its products caused injury to anyone.³ Moreover, there is *no* evidence that Sager ever “did business” in Ohio—as distinct from selling goods in “interstate commerce” here. The well-recognized distinction between “doing business” and “engaging in interstate commerce” determines whether Ohio can constitutionally even seek to apply its corporation law to Sager (*Bendix Autolite Corp. v. Midwesco Enterp., Inc.* (1988), 486 U.S. 888, 892-93), but it is a distinction that Appellees do not even acknowledge. Instead, they repeatedly assert, falsely, that Sager “freely chose to do business” in Ohio, and claim that Sager is now subject to Ohio corporation law. To the contrary, the only evidence is that Sager made products in other states which were allegedly used in Ohio, activity which is quintessential “interstate commerce” that does *not* subject the manufacturer to the corporate supervision of other states. Appellant Br. at 29. Even though there is no evidence that Sager “chose to do business” in Ohio at all, even if it did, Ohio precedent holds that Ohio courts have no jurisdiction to appoint a receiver for foreign corporations, even those “doing business” here. Appellant Br. at 26-29.

E. Appellees Cannot Distinguish Controlling Case Law

Unable to overcome the insurmountable obstacle the law puts in their way, Appellees seek to distinguish a few of the cases Sager cites, but their claims have no merit.

Sager cited *American Fruit & Steamship Co. v. Dox* (Super.Ct.1906), 16 Ohio Dec. 501, 505, 4 Ohio N.P. (n.s.) 155, for the proposition that Ohio courts do not have jurisdiction to appoint a receiver for a foreign corporation. Sager noted that *American Fruit* foreshadowed this

³ Although Appellees emphasize the injuries suffered by plaintiff Commodore Bowens, they fail to advise the Court that Sager *was dismissed* from the *Bowens* case on summary judgment because there was no evidence that Mr. Bowens was even exposed to Sager’s products. Supp. Rec. 38 & 45. This grant of summary judgment also gives the lie to Appellees’ claim that Appellees were given insufficient opportunity to develop “evidence of further contacts directly with Ohio.” Appellee Br. at 21. Appellees had a full opportunity to develop any such evidence in *Bowens*, and the trial court dismissed Sager because of the failure of that evidence.

Court's holding in *Relief Association* that "the courts of one state shall not exercise visitorial powers over a corporation created by or domiciled in another state." *Relief Ass'n v. Equitable Life Assur. Soc.* (1942), 140 Ohio St. 68, 42 N.E.2d 653, Syllabus. Appellees do not even cite or discuss *Relief Association*, nor do they dispute that visitorial powers include the power to appoint a receiver, so their attempt to distinguish *American Fruit* is beside the point: *Relief Association* stands as complete bar to their claims. Even so, their asserted distinctions are groundless. First, Appellees claim *American Fruit* involved a "foreign corporation of another country," but the case says it involves "real estate" in Spanish Honduras, not a corporation formed there. 16 Ohio Dec. at 502. More importantly, the foreign corporation had an *office* in Ohio and a *managing agent* in Ohio, giving the corporation a much more substantial nexus to Ohio than Sager, but the court nevertheless concluded that it had no jurisdiction to appoint a receiver. *Id.* Second, Appellees claim that *American Fruit* was decided prior to the "statutes at issue" here and before the Court adopted the Second Restatement of Conflict of Laws. To the contrary, Sager showed that R.C. 2735.01, upon which Appellees rely, was first passed in 1852, well before *American Fruit*. Appellant Br. at 27. In addition, *American Fruit* is consistent with, not contrary to, the Restatement's principle that issues of corporate organization and dissolution are to be decided under the law of the state of incorporation. As a result, the Court's adoption of the Restatement does not undercut *American Fruit* at all. Finally, Appellees claim that the assets sought to be collected in *American Fruit*—money from shareholders—was somehow less "actual and existing" than the contingent obligations of an insurer under an insurance policy. It is hard to imagine an asset more "actual" than money, but an insurer's contingent obligation is not an "asset," because it does not accrue until there is a judgment against the insured, and if the insured

is not liable, it never accrues. Appellant Br. at 33. Since *American Fruit* denied a receiver where *money* was at issue, all the more should the courts below have denied a receiver here.

Sager also relied on this Court's decision in *Hoiles v. Watkins* (1927), 117 Ohio St. 165, 157 N.E. 557, which construed the predecessor to R.C. 2735.01. The Court delineated Ohio jurisprudence on appointment of receivers, saying, among things, that a receivership may be sought only in a case over which the court already has jurisdiction; that a receivership may not be ordered when the plaintiff has no currently-existing right to the property at issue; and that appointment of a receiver is permitted only where courts of equity historically permitted it. Sager showed that the receivership here violated each of these rules. Appellees assert the facts of *Hoiles* are distinguishable, but nothing about the law recited by the Court depended on those facts, and that law applies with equal force here. Contrary to Appellees' assertion, Sager did not rely on *Hoiles* to say that a receiver cannot be appointed for a foreign corporation, as the case did not involve a foreign corporation. Rather, *Hoiles* shows that the type of receivership sought there—a general receivership giving the receiver the power to sue for the corporation and take possession of its assets, resulting in the receiver having the full power of the corporation—is indistinguishable from the type of receivership ordered by the courts below. Ohio cases clearly hold that Ohio courts have no jurisdiction to order a general receivership for foreign corporations. Thus, the Court of Appeals' effort to distinguish the Sager receivership as being somehow appropriately limited is completely rejected by *Hoiles*, and none of Appellees' claimed distinctions suggests otherwise.

Finally, Sager relied on *Alms & Doepke Co. v. Johnson* (1954), 98 Ohio App. 78, 128 N.E.2d 250, and *Owen v. Bennett* (Ct.App.), No. 2005-L-194, 2006-Ohio-5170, to show that a tort defendant's insurance policies are not assets that a tort plaintiff can seek to collect prior to

obtaining a tort judgment. Sager thus showed that the tort plaintiffs here cannot claim Sager's insurance policies as "assets" to which they are entitled, a necessary prerequisite to seeking a receivership. Appellees do not take issue with the holdings of these cases, but claim that the cases involved efforts to "bypass" the tortfeasor to "seek relief directly from the insurance carrier," unlike this case. Appellee Br. at 30. But that is precisely what Appellees seek to do here, because Sager is dissolved and not subject to suit, and Appellees seek to bypass that obstacle to seek insurance proceeds directly.⁴ As *Alms & Doepke* said, "[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.*" 98 Ohio App. at 87 (emphasis added). Appellees cannot bypass Ohio law to obtain the result they seek.⁵

F. Appellees' Effort to Evade Illinois Law Is Unfounded

Illinois's corporate survival statute, 805 Ill. Comp. Stat. § 5/12.80, acts "to continue the life of a corporation for [five] years for the purpose of settling its affairs . . . after dissolution of the corporation. After this [five]-year period, the corporation can neither sue nor be sued." *Sharif v. Int'l Dev. Group Co.* (C.A.7, 2005), 399 F.3d 857, 860 (quoting *Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co.* (C.A.7, 1980), 629 F.2d 1183, 1185). Appellees, however, attempt to deride the Illinois statute as "an arcane corporate/insurance company protection

⁴ Appellees attempt to criticize Sager for failing to admit whether it has insurance. In fact, it is Appellees' burden to prove the existence of, and their right to, any property in order to seek appointment of a receiver, a burden they completely fail to meet. Sager points out this failure to show that the Motion to Appoint Receiver was in truth never about "collecting assets," which were not even alleged or proven, but about setting up Sager as a nominal defendant to bypass Ohio and Illinois law, in order to seek insurance proceeds later (which Appellees admit, *see* Appellee Br. at 17).

⁵ Appellees make the same argument attempting to claim that the receivership "vehicle" approved by the Court of Appeals does not violate due process under *Rush v. Savchuk* (1980), 444 U.S. 320. Appellee Br. at 31-32. Again, bypassing the obstacle of Sager's dissolution is exactly the goal of that "vehicle," which treats Sager as a "nominal defendant" while the true purpose is to reach insurance. That vehicle is indistinguishable from the *quasi in rem* artifice rejected in *Rush*.

statute.” Appellee Br. at 14. Far from being arcane, Illinois’s law mirrors that of many states, which have enacted survival statutes to “remedy the harshness of the common-law rule” abating all rights of recovery by or against a corporation upon dissolution and to balance the rights of claimants with the need for predictability in business affairs. Indeed, survival statutes have been routinely upheld since the early twentieth century. *See Oklahoma Natural Gas Co. v. Oklahoma* (1927), 273 U.S. 257, 259-60 (holding that litigation against a dissolved corporation can continue only if permitted by legislation of its home state).

Appellees also make the patently false assertion that other courts have “Consistently Chosen Not To Apply 805 ILCS 5/12.” Appellee Br. at 21. In fact, federal and other state courts routinely enforce that statute. *See, e.g., Technological Ents. v. Kikani*, No. 245736, 2004 Mich.App. LEXIS 2142 (finding that 805 Ill. Comp. Stat. § 5/12.80 barred a claim that had accrued prior to dissolution but was brought “more than five years after the dissolution”) (Rpy. Appx. 2); *L.V. Castle Invest. Group, Inc. v. Comm’r* (C.A.11, 2006), 465 F.3d 1243 (upholding U.S. Tax Court finding that Illinois corporation did not have capacity to file a petition because, pursuant to 805 Ill. Comp. Stat. § 5/12.80, the wind up period had expired); *Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co.* (C.A.7, 1980), 629 F.2d 1183 (holding that under the predecessor statute to 805 Ill. Comp. Stat. § 5/12.80, a corporation can neither sue nor be sued after the survival period); *Sharif v. Int’l Dev. Group Co.* (C.A.7, 2005), 399 F.3d 857, 861 (same); *T-K City Disposal, Inc. v. Commercial Union Ins. Co.* (N.D.Ill.1991), 761 F. Supp. 552, 554 (same).⁶

⁶ In fact, Sager has been dismissed from many asbestos tort cases on the grounds that it no longer exists under 805 Ill. Comp. Stat. § 5/12.80. For example, Sager has been dismissed from cases in Indiana and Pennsylvania. *See* orders attached at Appendix 2 to Appellant’s Reply, filed in the Court of Appeals Nov. 25, 2009. Indeed, the Cuyahoga Court of Common Pleas is the only court in the country that has failed to grant Sager summary judgment on this basis.

Far from supporting the extravagant claim that “Illinois’ corporations have met with little success” in “hav[ing] this Illinois statute enforced,” Appellees cite only two cases, both of which are distinguishable and have been criticized as wrongly decided. Appellee Br. at 21-24 (citing *North Am. Asbestos Corp. v. Superior Ct.* (1986), 180 Cal.App.3d 902, 255 Cal.Rptr. 877; *Dr. Hess & Clark, Inc. v. Metalsalts Corp.* (D.N.J.1954), 119 F.Supp. 427).

In *Metalsalts*, a dissolved Illinois corporation was subjected to liability in New Jersey, despite the expiration of the winding-up period provided by Illinois’s survival statute, on the grounds that it failed to follow the procedure prescribed by New Jersey for the surrender of its certificate of authority to do business in the state. 119 F.Supp. at 428. This decision is unpersuasive for two reasons. First, as pointed out in *Johnson v. Helicopter & Airplane Serv. Corp.* (D.Md.1975), 404 F.Supp. 726, 736, the “reasoning” of *Metalsalts* “fails immediately under the language of Rule 17(b)” of the Federal Rules of Civil Procedure, which requires “capacity of a corporation . . . to be determined by the ‘law under which it was organized’ . . . mean[ing] that unless a corporation establishes an independent existence in a foreign jurisdiction, its capacity to be sued is governed *only* by the state of its incorporation.” The *Johnson* court also criticized *Metalsalts* on the ground that:

once a corporation has undertaken to dissolve itself and has ceased to do the business which it was incorporated to do, the statute of the state of its incorporation which brings the corporation to a definite end should not be subverted by provisions which govern the corporation's capacity in a state in which it chose to do business while it was still a viable entity.

Id. at 737. Second, *Metalsalts* is inapposite here because Sager did not “do business” in Ohio and therefore was never required to obtain a certificate of authority; furthermore, there is no procedure in Ohio that would prolong a dead foreign corporation’s capacity if bypassed. This “element” of the case was dispositive in *Metalsalts*; otherwise, the court acknowledged, “no

action could be commenced against the corporation after two years from the date of its dissolution.” 119 F.Supp. at 428.

Similarly, *North American Asbestos* is both distinguishable and wrongly decided. In deciding that an Illinois corporation could be sued in California, despite the passing of Illinois’s statutory winding-up period, the court purported to apply *California* choice of law rules, which employ “governmental interests analysis.” 180 Cal.App.3d at 906-07. Under those rules, the court said, California had a greater interest than Illinois in applying its law regarding “suits against dissolved corporations” in California. California’s choice-of-law regime is entirely distinct, however, from Ohio’s choice-of-law system, which, under the Second Restatement, establishes a bright-line rule directing courts to apply the law of the state of incorporation. Restatement (Second) of Conflict of Laws § 299. Even so, the court misapplied California law in reaching its decision. California has a corporate survival statute that permits suits against dissolved corporations indefinitely, but this provision is expressly limited to “domestic corporations.” In the past, the California Court of Appeals had stated unequivocally: “It is clear that the California survival law does not apply to suits against dissolved foreign corporations.” *North Am. Asbestos Corp. v. Superior Ct.* (1982), 128 Cal.App.3d 138, 144, 179 Cal.Rptr. 889. Only four years later, however, the court reinterpreted the same language, involving the same Illinois corporation, to mean “domestic and foreign corporations,” relying on a provision in the California Constitution, *previously repealed*, prohibiting foreign corporations from transacting business “on more favorable conditions” than domestic corporations. 180 Cal.App.3d. at 908. As the dissent persuasively demonstrated, the majority grossly misinterpreted California’s constitution and its corporate survival statute as applicable to foreign corporations when it was expressly limited to “domestic corporations.” *Id.* at 911-13. More recently, another California

appellate decision, barring an asbestos tort suit against a dissolved foreign corporation, refused to follow *North American Asbestos*, finding it inconsistent with California law that “has routinely held the law of the state of incorporation determines the consequence of corporate dissolution.” *Greb*, 184 Cal.App.4th at 23, 108 Cal.Rptr.3d at 747. *See also Riley v. Fitzgerald* (1986), 178 Cal.App.3d 871, 876, 223 Cal.Rptr.889 (“It is settled law in California that the effect of corporate dissolution or expiration depends upon the law of its domicile. . . .”). Accordingly, *North American Asbestos* can hardly be deemed relevant or persuasive.

G. Appointment of a Receiver Violates the U.S. Constitution

Appellees only superficially address the Due Process, Full Faith & Credit and Commerce Clause arguments presented by Sager. They claim that applying Ohio law to foreign corporations would not violate the Commerce Clause because foreign corporations would be treated the same as Ohio corporations and suffer no discrimination. Appellees ignore, however, that the Commerce Clause prohibits not only discrimination against foreign corporations but also regulation that threatens chaos and inconsistency among the states, and therefore threatens interstate commerce. *CTS Corp. v. Dynamics Corp.* (1987), 481 U.S. 69, 88-89 (“This Court’s recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulation.”); Appellant Br. at 44-47.

Appellees offer no rejoinder to Sager’s observation that, if Ohio can apply its law to resurrect Sager, then any state can apply its own law, creating patent inconsistency on an issue that must have only one answer. This Court long ago recognized the necessity for consistency in the realm of corporate internal affairs. *Relief Ass’n*, 140 Ohio St. 76, 42 N.E.2d at 657 (“If an Ohio court may thus pass upon the internal management and apply the applicable statutes, so may the courts of the various states in which the corporation does business, . . . with varying results, all of which interfere with the corporation’s internal management under the laws of its creation or

domicile.”). Consistency is even more necessary, of course, when determining corporate existence, since a corporation either exists or not, and it cannot exist in some states but not in others.

Moreover, Appellees fail to address the additional mandate for consistency arising from the Full Faith and Credit Clause. Appellant Br. at 47-49. As Sager showed, the U.S. Supreme Court has ruled that states must give full faith and credit to other states’ laws on corporate dissolution. *Pendleton v. Russell* (1891), 144, U.S. 640, 645. Appellees do not address *Pendleton*.

Instead, Appellees seek refuge in three cases: (1) *Clark v. Williard* (1934), 292 U.S. 112; (2) *Horn Silver Mining Co. v. New York* (1892), 143 U.S. 305; and (3) *Trounstine v. Bauer, Pogue & Co.* (S.D.N.Y.1942), 44 F.Supp. 767. *Clark* actually directly supports Sager here. The Court held that Montana was obliged to interpret the incidents of dissolution of an Iowa corporation under Iowa law, not Montana law, and reversed the decision of the Montana Supreme Court to the contrary, saying it failed to give Iowa law full faith and credit. 292 U.S. at 121. Furthermore, *Clark* does not qualify *Oklahoma Natural Gas*, as Appellees suggest, but rather cites it with approval. *Id.* at 120. Moreover, the language Appellees rely on from *Clark* supports appointment of a receiver for a foreign corporation only for assets physically located in the state (which do not exist here), and then only in furtherance of a receivership established in the corporation’s home state (which also does not exist here). *Id.* at 128-29. Thus, *Clark* provides Appellees no support.

Horn Silver Mining Co. is irrelevant because it holds only that a state can put conditions on foreign corporations actively doing business within its borders; it does not purport to hold that a state may resurrect a foreign corporation already dissolved under another state’s law.

Finally, Appellees' reliance on the district court decision in *Trounstine* is misplaced. First, *Trounstine* did not even address constitutional issues. Second, that case involved a suit commenced *before* the corporation dissolved; the only issue was whether the case had to be prosecuted to judgment during the three-year winding-up period. 44 F.Supp. at 770. On that basis alone, *Trounstine* is readily distinguishable, since here the suits brought against Sager were brought *after* its five-year winding-up period and were therefore already barred. Third, on appeal, the Second Circuit looked to and applied the *law of the state of incorporation* (Delaware), not New York law (as had the trial court) to determine that the suit against the corporation could continue. *Trounstine v. Bauer, Pogue & Co.* (C.A.2, 1944), 144 F.2d 379, 382. It further made clear that the trial court's decision was premised on the corporation's decision to be "qualified to do business" in New York, which further distinguishes the case from this one. *Id.*

Moreover, to the extent *Trounstine* could be read to suggest that states have the power to resurrect foreign corporations regardless of the law of the state of incorporation, that suggestion is contrary to precedent, *Oklahoma Natural Gas*, 274 U.S. at 259-60; *Chicago Title & Trust Co. v. 4136 Wilcox Bldg. Corp.* (1937), 302 U.S. 120, 128 ("How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power."), and contrary to the rules that bind federal courts, Fed. R. Civ. P. 17(b) ("Capacity to sue or be sued is determined . . . for a corporation, by the law under which it was organized."). Accordingly, *Trounstine* cannot be relied upon for any proposition regarding corporate capacity.

H. Sager Has Not Improperly Raised Issues for the First Time on Appeal

Appellees' repeated accusations that Sager raised issues for the first time in this Court are demonstrably false. From its first filing in the trial court to its briefs here, Sager has argued that (1) Illinois law bars suit against Sager; (2) Ohio choice of law rules require application of Illinois

law; (3) Ohio corporation statutes apply only to Ohio corporations, and therefore do not apply to Sager; (4) Ohio courts have no jurisdiction to appoint a receiver for a foreign corporation; and (5) any effort to appoint a receiver for Sager would violate the U.S. Constitution. Sager raises nothing new now.

In addition, Sager appropriately addresses in this Court, as is its right, the fundamental errors first introduced in the analysis of the Court of Appeals, errors it can address only now. Unlike the trial court, the Court of Appeals posited a theory under which insurance policies could be treated as assets that tort claimants could collect, for the purpose of resurrecting a dissolved corporation as a nominal defendant, in turn for the purpose of establishing jurisdiction that otherwise would not exist. The Court of Appeals' theory fails for multiple reasons under Ohio statutes and precedent, and Sager is entitled to present all of them. Moreover, the jurisprudential artifice created and blessed by the Court of Appeals was specifically condemned by the Supreme Court as violating due process. *Rush v. Savchuk* (1980), 444 U.S. 320. Sager is of course able to object to the Court of Appeals' ruling on that ground.⁷

I. The Public Policy of Ohio Is to Respect Illinois's Corporate Law

In the absence of a legal justification for ignoring the Illinois statutes governing the winding-up of Sager's affairs, Appellees submit that permitting suit against Sager is good "public policy." Appellee Br. at 39-41. Appeals to "public policy" cannot justify ignoring Ohio statutes, settled Ohio choice-of-law principles, and the U.S. Constitution. Moreover, the Ohio legislature has already determined Ohio public policy in this area, and it has chosen to respect

⁷ Appellees claim that *Rush* is distinguishable because it involved concocting "personal jurisdiction," whereas Sager is subject to personal jurisdiction by virtue of Ohio's long-arm statute. Appellee Br. at 30-31. But Sager is not subject to personal jurisdiction because it does not exist and cannot be sued; this is precisely why Appellees seek to have a receiver appointed in Ohio to accept service of process for Sager. Thus, the receivership seeks to manufacture jurisdiction over Sager that otherwise would not exist, using an artifice that *Rush* prohibits.

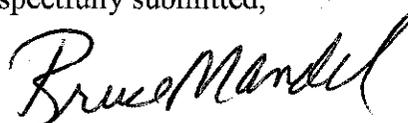
the prerogative of other states to determine the manner in which corporations organized under their statutes expire. *See* Appellant Br. at 22, 25. In addition to being the constitutional choice, the comity Ohio law exhibits in its corporate code and choice of law rules is also good public policy because it establishes a predictable set of rights and obligations for winding up corporate affairs. Far from encouraging the gamesmanship Bevan hypothesizes,⁸ applying the law of the state of incorporation fulfills justified expectations that corporations come into being and dissolve under the same, single, state's law.

III. CONCLUSION

For the foregoing reasons and the reasons stated in Sager's opening brief, the Court should reverse the orders and judgment of the courts below and vacate the trial court's orders (1) granting the Motion to Appoint a Receiver and (2) appointing a receiver for Sager.

Date: June 13, 2011

Respectfully submitted,



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⁸ Appellees envision a "nightmare" scenario whereby "the corporation could continually relieve itself of liabilities for products they manufacture . . . by simply dissolving on a regular basis, distributing the assets to shareholders, and then having those same shareholders take those assets and form a new corporation." Appellee Br. at 40. Such a transaction would be fraud, and courts in Illinois and elsewhere subject the new corporation to the old's liabilities as its "mere continuation," thereby protecting claimants. *See Vernon v. Schuster* (1997), 179 Ill.2d 338, 345-46, 688 N.E.2d 1172 (describing scenario as "mere continuation," one of four exceptions to general rule terminating liability upon dissolution "equally recognized in most American jurisdictions"). Accordingly, Bevan's "nightmare" scenario cannot occur. Moreover, no one suggests that Sager dissolved fraudulently here.

CERTIFICATE OF SERVICE

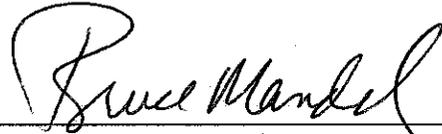
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SUZANNE S. LILLIQUIST, EXECUTRIX OF THE ESTATE OF CARL W. LILLIQUIST, DECEASED, and SUZANNE S. LILLIQUIST, IN HER OWN RIGHT,
 Appellant v. COPE-S-VULCAN, INC.; CRANE CO.; CROWN CORK & SEAL
 COMPANY; ELECTROLUX HOME PRODUCTS; HONEYWELL, INC.;
 HUNTER SALES CORPORATION; I U NORTH AMERICA, INC., AS SUCCE-
 SSOR BY MERGER TO THE GARP COMPANY, FORMERLY KNOWN AS THE
 GAGE COMPANY, FORMERLY KNOWN AS PITTSBURGH GAGE AND SUP-
 PLY COMPANY; INGERSOLL-RAND CORPORATION; PLOTKIN BROTHERS
 SUPPLY, LLP; POWER PIPING; SAFETY FIRST INDUSTRIES, INC., IN ITS
 OWN RIGHT AND AS SUCCESSOR-IN-INTEREST TO SAFETY FIRST SUP-
 PLY, INC.; SVI CORPORATION, F/K/A SVI NEWCO, INC., F/K/A STOCKHAM
 VALVES & FITTINGS, INC.; TRECO CONSTRUCTION SERVICES, INC.,
 F/K/A THE RUST ENGINEERING COMPANY; UNITED CONVEYOR CORPO-
 RATION, Appellees

No. 621 WDA 2010

SUPERIOR COURT OF PENNSYLVANIA

2011 PA Super 102; 2011 Pa. Super. LEXIS 608

February 15, 2011, Argued

May 13, 2011, Filed

PRIOR HISTORY: [*1]

Appeal from the Order of the Court of Common Pleas, Allegheny County, Civil Division, No. G.D. 09-002780. Before COLVILLE, J.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant executrix filed a personal injury asbestos action against appellee, an Alabama corporation. Appellee filed a motion for summary judgment based upon corporate dissolution, which was granted by the Allegheny County, Pennsylvania, Court of Common Pleas, Civil Division. The executrix appealed.

OVERVIEW: The executrix argued on appeal that her due process and equal protection rights were violated by the dismissal of her suit because appellee still was conducting business by settling lawsuits in other states, and that the trial court should have appointed a receiver. The appellate court held that under the full faith and credit provision of *U.S. Const. art. IV, § 1*, it was obligated to apply the law of Alabama to the issue of whether appel-

lee could be sued after its dissolution. Appellee was dissolved in accordance with Alabama law and complied with former *Ala. Code § 10-2B-14.07(b)* by publishing a notice of corporate dissolution stating that all claims filed more than two years after publication of the notice would be forever barred. As the executrix did not file a claim against appellee until more than two years after the notice was published, pursuant to former *§ 10-2B-14.07(c)*, her claims were barred under Alabama law. Because all of the her claims were barred as a matter of law, no "presently existing legal right" existed that would permit the appointment of a receiver under these circumstances.

OUTCOME: The order was affirmed.

CORE TERMS: dissolved, notice, receiver, appointment of a receiver, claimant, summary judgment, incorporation, dissolution, newspaper, appoint, unknown, discovery, corporate dissolution, legal right, full faith and credit, insurance funds, identification, appearance, appointed, presently, entity, manage, claims filed, equal protection, participated, hereinabove, cognizable, tortfeasor, defending, domestic

LexisNexis(R) Headnotes***Constitutional Law > Relations Among Governments > Full Faith & Credit***

[HN1] Pursuant to *U.S. Const. art. IV, § 1*, Pennsylvania courts must accord full faith and credit to the public acts, records, and judicial proceedings of every other state.

Business & Corporate Law > Corporations > General Overview***Business & Corporate Law > Corporations > Dissolution & Receivership > General Overview******Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview***

[HN2] With respect to issues of corporate law, the organization and dissolution of corporations are governed by the laws of the state of incorporation. In this regard, the Pennsylvania Supreme Court has recognized that in circumstances when the issue involves whether or not a dissolved corporation may be sued, Pennsylvania courts will apply the law of the state of incorporation. If a corporation is dissolved by the state of incorporation, another state will recognize that the association has been deprived of the legal attributes of incorporation.

Business & Corporate Law > Corporations > Dissolution & Receivership > Termination & Winding Up > Distribution of Assets > Creditor Rights

[HN3] See former *Ala. Code § 10-2B-14.07*.

Civil Procedure > Remedies > Receiverships > Receivers > Appointments

[HN4] Pennsylvania's courts will appoint receivers only in aid of some recognized, presently existing legal right. Even where some presently existing legal right exists, receivers will not be appointed unless the chancellor is convinced the right is free from doubt, the loss irreparable, with no adequate legal remedy, and the relief sought is necessary.

COUNSEL: John R. Kane, Pittsburgh, for appellant.

Teresa F. Sachs, Philadelphia, for SVI, appellee.

JUDGES: BEFORE: BOWES, DONOHUE and SHOGAN, JJ. **OPINION BY** DONOHUE, J.

OPINION BY: DONOHUE

OPINION

OPINION BY DONOHUE, J.:

Appellant, Suzanne S. Lilliquist ("Lilliquist"), both in her own right and as the executrix of the estate of Carl W. Lilliquist (Deceased), appeals from the trial court's grant of summary judgment dismissing all claims against Appellee, SVI Corporation f/k/a SVI Newco, Inc. and f/k/a Stockham Valves & Fittings, Inc. ("SVI"). For the reasons that follow, we affirm.

On February 11, 2009, Lilliquist filed this personal injury asbestos action in the Court of Common Pleas of Allegheny County, naming 54 entities as defendants (including SVI). On April 9, 2009, counsel entered an appearance on behalf of SVI, which pursuant to *Rule 1041.1 of the Pennsylvania Rules of Civil Procedure* constituted a denial of all factual averments in Lilliquist's complaint, an allegation of all affirmative defenses, and claims for indemnification and contribution from other parties. *Pa.R.C.P. 1041.1(c)*. SVI subsequently participated in discovery between the parties. On September 29, 2009, SVI filed a motion [*2] for summary judgment based on lack of product identification, and after Lilliquist identified a witness (William Timcheck) with information relevant to the identification of SVI's products, counsel for SVI appeared at Timcheck's deposition and participated in the questioning. By court order dated December 8, 2009, the trial court granted SVI's motion for summary judgment on product identification with respect to *Restatement (Second) of Torts § 402*, but denied it with respect to Lilliquist's negligence claim.

The next day, December 9, 2009, SVI filed a "Motion for Summary Judgment Based Upon Corporate Dissolution," and on December 22, 2009, SVI served Lilliquist with discovery in the form of supplemental interrogatories and document requests. On January 4, 2010, Lilliquist filed a response opposing SVI's motion based upon corporate dissolution, which included a request that the trial court appoint a receiver to manage the assets of SVI. After oral argument, on February 24, 2010, the trial court granted SVI's motion for summary judgment. Lilliquist settled with the remaining defendants on the eve of trial.

This timely appeal followed, in which Lilliquist raises the following four issues:

1. [*3] Whether a receiver should be appointed when assets of a dissolved corporation have been mismanaged and will be wasted to the detriment of Pennsylvania creditors if appointment is not made?

2. Did the trial court have jurisdiction to appoint a receiver over [SVI]?

3. Did [SVI] subject itself to the jurisdiction of the trial court by participating in discovery and actively defending the instant case?

4. Was [Lilliquist's] Due Process and Equal Protection of the Laws [sic] violated where [SVI] exists and conducts business through the settling of lawsuits in other states?

Appellant's Brief at 4.

In its written opinion pursuant to *Pa. R.A.P. 1925(a)*, the trial court determined that SVI "does not exist as a legal entity for purposes of prosecuting or defending a lawsuit in Pennsylvania," and that as a result of its "non-existence" SVI was not subject to the trial court's jurisdiction. Trial Court Opinion, 8/10/10, at 7. These conclusions are questionable. SVI continues to "exist" as a corporate entity, at least for the purpose of resolving post-dissolution claims filed against it. And SVI subjected itself to the jurisdiction of the trial court when it entered an appearance of counsel and litigated [*4] the claims against it (including participation in discovery) in accordance with the trial court's case management orders. *Fleehr v. Mummert*, 2004 PA Super 273, 857 A.2d 683, 685 (Pa. Super. 2004) ("A defendant manifests an intent to submit to the court's jurisdiction when the defendant takes 'some action (beyond merely entering a written appearance) going to the merits of the case...'", *appeal denied*, 585 Pa. 697, 889 A.2d 89 (2005)).

We nevertheless affirm the trial court's order dismissing all claims against SVI and denying Lilliquist's request for a receiver. *See, e.g., Gbur v. Golio*, 600 Pa. 57, 92 n.6, 963 A.2d 443, 465 n.6 (2009) (appellate court may affirm decision on any grounds supported by the record on appeal). We do so without wading any further into the ontological and jurisdictional issues posed by Lilliquist in this appeal. Instead, as explained hereinbelow, to decide this case it is sufficient to recognize that this Court is constitutionally obligated to apply the law of Alabama, that the law of Alabama provides that all claims filed more than two years after published notice of corporate dissolution are forever barred, and that the trial court properly refused to appoint a receiver since [*5] Lilliquist did not assert any legally cognizable right to a remedy.

[HN1] Pursuant to *Article IV, § 1, of the United States Constitution*, Pennsylvania courts must accord "full faith and credit" to "the public Acts, Records, and

judicial Proceedings of every other State." *U.S. CONST. art. IV, § 1*. [HN2] With respect to issues of corporate law, the organization and dissolution of corporations are governed by the laws of the state of incorporation. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations."). In this regard, our Supreme Court has recognized that in circumstances when the issue involves whether or not a dissolved corporation may be sued, Pennsylvania courts will apply the law of the state of incorporation. *Quarture v. C.P. Mayer Brick Co.*, 363 Pa. 349, 353, 69 A.2d 422, 424 (1949). In *Quarture*, our Supreme Court refused to enforce a contract entered into by a New Jersey corporation after the corporation's charter had been revoked by the State of New Jersey. *Id.* at 353-54, 69 A.2d at 424-25; *see also Wettengel v. Robinson*, 288 Pa. 362, 370, 136 A. 673, 675 (1927) [*6] (status of dissolved foreign corporation is governed by law of foreign state). In addition to recognition of the constitutional principle of "full faith and credit," the Supreme Court in *Quarture* also cited with approval the Restatement of Conflicts § 158, which provides in relevant part that "[i]f a corporation is dissolved by the state of incorporation, another state will recognize that the association has been deprived of the legal attributes of incorporation..." Restatement of Conflicts § 158.¹

1 The more recent Restatement (Second) of Conflicts contains a substantially similar provision (numbered *section 299*): "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 Conflicts § 299*.

Alabama statutory law proscribes the procedures by which its domestic corporations may be dissolved, how they may resolve known and unknown claims, and the time limits associated with resolution of unknown claims. With regard to known claims, the dissolved corporation must give the claimant notice in writing of the dissolution and explain in said notice that the claim must be received within 120 days [*7] or it will be lost. *ALA. CODE § 10-2B-14.06* (1975). The procedure with regard to unknown claims is as follows:

§ 10-2B-14.07. Unknown claims against dissolved corporation. (a) [HN3] A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:

(1) Be published one time in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this state, its registered office) is or was last located;

(2) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(3) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), **the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within two years after the publication date of the newspaper notice:**

(1) A claimant who did [*8] not receive written notice under *Section 10-2B-14.06*;

(2) A claimant whose claim was timely sent to the dissolved corporation but not acted on;

(3) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

Id. at § 10-2B-14.07 (emphasis added).

Accordingly, under Alabama law all unknown claims are barred if the claim is not filed within two years from the date of newspaper publication notice. In the case *sub judice*, Lilliquist does not contest that SVI dissolved in accordance with Alabama statutory requirements. Lilliquist likewise does not contest that SVI published a newspaper notice of dissolution on January 25, 2007, in accordance with the dictates of *section 10-2B-14.07(b)*. Because Lilliquist did not file a claim against SVI until February 11, 2009, pursuant to *section 10-2B-14.07(c)* her claims are barred under Alabama law. Accordingly, the trial court did not err in granting summary judgment to SVI dismissing all of Lilliquist's claims.

Lilliquist contends that even if her claims were properly dismissed pursuant to Alabama law, the trial court nevertheless erred in refusing to appoint a receiver to manage SVI's remaining assets (namely, [*9] its insurance funds). We disagree. It has long been the law of this Commonwealth that [HN4] our courts will appoint receivers only in aid of some recognized, presently existing legal right. *McDougal v. Huntingdon & Broad Top Mountain Railroad & Coal Co.*, 294 Pa. 108, 117, 143 A. 574, 578 (1928). Even where some "presently existing legal right" exists, our Supreme Court has made clear that "[r]eceptors will not be appointed unless the chancellor is convinced the right is free from doubt, the loss irreparable, with no adequate legal remedy, and the relief sought is necessary. *Id.* Because all of Lilliquist's claims are barred as a matter of law, no "presently existing legal right" exists that would permit the appointment of a receiver under these circumstances.

Moreover, the appointment of a receiver to manage SVI's insurance funds for Lilliquist's benefit would constitute a cause of action against SVI's assets -- which, as explained hereinabove, is not permitted under Alabama law (as accorded full faith and credit by this Court). In addition, the appointment of a receiver to allow Lilliquist to collect SVI's insurance funds would constitute a direct action against the insurer of an alleged tortfeasor, [*10] which is generally not permitted in Pennsylvania. *See, e.g., Carrozza v. Greenbaum*, 2004 PA Super 464, 866 A.2d 369, 387 n.29 (Pa. Super. 2004) ("Generally speaking, well-settled Pennsylvania law provides that an injured party may not maintain a suit directly against the insurer to recover on a judgment rendered against the insured tortfeasor absent a statute or policy provision on which such a right may be predicated."), *affirmed on other grounds*, 591 Pa. 196, 916 A.2d 553 (2007).

Finally, Lilliquist contends that the trial court's order violates her constitutional rights to due process and equal protection under the law because an Ohio intermediate appellate court has permitted the appointment of a receiver in an action against a dissolved Illinois corpora-

tion. *In re All Cases Against Sager Corp.*, 188 Ohio App. 3d 796, 2010 Ohio 3872, 936 N.E.2d 1034 (Ohio App. 8 Dist. 2010). In this regard, Lilliquist argues that as a Pennsylvania plaintiff she enjoys the same rights as an Ohio plaintiff, and that because the Ohio courts have permitted the appointment of a receiver, this Court must also do so. Appellant's Brief at 15. Lilliquist cites to no legal authority, however, to support her contention that Pennsylvania courts must recognize as cognizable [*11] any alleged legal rights granted by the courts of a sister state. As set forth hereinabove, in our view it is our obligation to apply Alabama law in the present circumstances, and that pursuant to Alabama law Lilliquist's

claims against SVI are barred and no receiver may be appointed. No constitutional mandate requires that we rule to the contrary based upon a potentially conflicting decision by a court in another state.²

2 We take no position as to whether the *Sager* case was correctly decided. We do note, however, that the court in *Sager* relied in part upon an Ohio statute permitting the appointment of a receiver where "a corporation has been dissolved." *Sager*, 936 N.E.2d at 1035 (citing R.C. § 2735.01).

Order affirmed.



TECHNOLOGICAL ENTERPRISES, LTD., Plaintiff-Appellant, v KHAVAL KIKANI, a/k/a DHAVAL R. KIKANI, Defendant-Appellee.

No. 245736

COURT OF APPEALS OF MICHIGAN

2004 Mich. App. LEXIS 2142

August 12, 2004, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Macomb Circuit Court. LC No. 2002-004161-CZ.

DISPOSITION: Affirmed.

CORE TERMS: dissolution, dissolved, venue, shareholders, renew, present action, legal capacity, capacity to sue, independent action, present suit, plain language, garnishment, accrued, statutory exception

JUDGES: Before: Murray, P.J., and Markey and O'Connell, JJ.

OPINION

PER CURIAM.

Plaintiff appeals as of right from a Macomb Circuit Court order granting summary disposition in favor of defendant on the basis that plaintiff, as a dissolved Illinois corporation, lacked the legal capacity to commence this independent action to renew a 1992 judgment that was entered in the Oakland Circuit Court. We affirm.

Plaintiff argues that the circuit court erroneously determined that it lacked the capacity under Illinois law to bring the present action. We disagree. We review a decision on a summary disposition motion de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich. 422, 426; 670 N.W.2d 651 (2003).

The parties agree that this issue is governed by Illinois law. The parties' arguments principally focus on an Illinois statute, 805 Ill Comp Stat Ann 5/12.80, which provides:

The dissolution of a corporation either [*2] (1) by filing articles of dissolution in accordance with Section 12.20 of this Act, (2) by the issuance of a certificate of dissolution in accordance with Section 12.40 of this Act, (3) by a judgment of dissolution by a circuit court of this State, or (4) by expiration of its period of duration, shall not take away nor impair any 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. [Emphasis added.]¹

¹ This is the current version of the statute, as amended, effective July 1, 2001. Although plaintiff has submitted an earlier version of the statute, there is no substantive difference between the current and former version with regard to the controlling language in this case.

[*3] We begin by considering the plain language of this statute. On its face, the emphasized language appears to remove certain civil actions based on a right or claim existing prior to the dissolution of a corporation from whatever other restrictions there are in Illinois law against a dissolved corporation to bring suit if an action on the claim "is commenced within five years after the date of such dissolution." In this case, suit is being brought based on a judgment that was entered in 1992, which preceded plaintiff's dissolution in 1993. However, the present action was not filed until 2002, more than five years after the dissolution. Thus, the plain language of 805 Ill Comp Stat Ann 5/12.80 prevents plaintiff from having the legal capacity to bring this suit.

Plaintiff, however, argues that (1) 805 Ill Comp Stat Ann 5/12.80 does not apply because it only applies to claims existing at the time of dissolution, not to claims arising thereafter, and (2) that for this reason, the statutory five-year period does not constitute a bar to plaintiff's present action to renew the original judgment, which arguably did not accrue under [*4] MCL 600.5809(3) until after plaintiff's dissolution in 1993. We disagree. Plaintiff's claim to renew the judgment clearly accrued before plaintiff's dissolution, inasmuch as the judgment was entered in 1992. Under MCL 600.5809(3), an action "for a new judgment or decree" may be brought on a prior judgment within "the applicable period of limitations." Because it could have brought suit to renew the judgment at any point after the judgment was entered in 1992, plaintiff's claim for a renewed judgment accrued before its dissolution in 1993. Accordingly, the trial court correctly concluded that plaintiff lacked the capacity to bring or maintain this lawsuit.² Neither *Canadian Ace Brewing Co v Joseph Schlitz Brewing Co*, 629 F.2d 1183 (CA 7, 1980), nor *Citizens Electric Corp v Bituminous Fire & Marine Ins Co*, 68 F.3d 1016 (CA 7, 1995), support plaintiff's position. The *Canadian Ace* Court applied Illinois law to suits brought by a dissolved corporation and individual former shareholders of that corporation. *Id.* at 1185 and n 2. In this regard, *Canadian Ace* notes that former shareholders [*5] of a corporation are permitted to bring an action on a judgment entered in favor of the corporation before its dissolution, based on a recognition of "the rights of former shareholders to succeed, in their individual capacities, to rights owned by their corporation prior to its dissolution." *Canadian Ace*, *supra* at 1186 (emphasis added). However, the only plaintiff in the present case is a dissolved corporation.

2 Further, even if 805 Ill Comp Stat Ann 5/12.80 did not apply, as defendant notes, under Illinois common law, dissolved corporations cannot sue. *Henderson-Smith & Assoc, Inc v Nahamani Family Service Center, Inc*, 323 Ill. App. 3d 15, 19-20; 752 N.E.2d 33, 256 Ill. Dec. 488 (2001).

In *Citizens Electric*, suit was brought against a dissolved corporation for environmental contamination three days before the five-year period allowed by 805 Ill Comp Stat Ann 5/12.80 expired. *Citizens Electric*, *supra* at 1018. [*6] Eventually, after a settlement agreement was reached, the plaintiff class began garnishment proceedings against the dissolved corporation's insurers. *Id.* The court rejected application of 805 Ill Comp Stat Ann 5/12.80 because the garnishment action was brought as part of the same proceeding in which the suit against the dissolved corporation was brought and not as an independent suit. *Id.* at 1018, 1020. Unlike *Citizens Electric*, however, this case is an independent action initiated by the filing of a new complaint, not an enforcement action brought in the same case as that previously filed by plaintiff. Thus, *Citizens Electric* does not provide a basis for concluding that plaintiff had the capacity to bring the present suit.³

3 Plaintiff also incorrectly relies upon *McGraw v Parsons*, 142 Mich. App. 22, 24-25; 369 N.W.2d 251 (1985), for that case held that an action on a judgment is a continuation of the original action for purposes of personal jurisdiction over a defendant. It did not address a party's capacity to sue.

[*7] We also note that plaintiff's reliance on venue principles is misguided. Plaintiff's argument suggesting that the case was dismissed based on improper venue is simply incorrect. In granting defendant's motion for summary disposition, the circuit court did not address whether venue was proper in Macomb County. See *Keuhn v Michigan State Police*, 225 Mich. App. 152, 153; 570 N.W.2d 151 (1997) ("Venue relates to and defines the particular county or territorial area within the state or district in which the cause must be brought or tried."). While the circuit court mentioned that the present suit was brought in a different county than the one in which the original consent judgment was obtained, that remark was not directed to whether venue was proper in Macomb County, but instead to whether the present action should be considered a new action. It follows that plaintiff's reliance on Michigan venue statutes is misplaced.

In sum, we conclude that the circuit court properly granted summary disposition in favor of defendant. Under Illinois law, a dissolved corporation does not have the capacity to sue unless it is acting pursuant to a statutory exception [*8] to the common-law rule precluding a dissolved corporation from bringing suit. Plaintiff has not established the applicability of any statutory exception.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Jane E. Markey