



Limiting Post-Dissolution Claims in Oregon and Washington

Samuel K. Anderson

Davis Rothwell Earle & Xóchihua, PC

A Washington appellate court recently held that claims arising against a corporation after it is dissolved are extinguished as of dissolution. For example, if a construction contractor built a home in 2003, and dissolved in 2004, the claims of a homeowner who discovered leaks in the home in 2005 would be barred, regardless of any later-running statute of limitations. In *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 126 Wash App 285, 108 P3d 818 (2005), a condominium homeowners association sued the developer/general contractor, a dissolved corporation, for breach of contract after construction defects caused water damage to the building's exterior walls. The condominium was constructed in 1992. The defendant was administratively dissolved in October 1995. In October 2002, the association filed suit, alleging breach of the Purchase and Sale Agreement Addendum, which read "[t]he Unit and entire project shall be completed substantially in accordance with the plans and specifications." In April 2004, the trial court dismissed the action on summary judgment.

The Ballard Court's Analysis

At common law a corporation ceased to exist upon dissolution, and all claims against it were terminated. Legislatures responded by passing statutes that continue a corporation's existence while it concludes its affairs, and by allowing a dissolved corporation to sue and be sued independent of its winding-up activities. All states have adopted some form of "survival statute." Washington enacted RCW 23B.14.050, which states that "[a] dissolved corporation continues its existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs[.]" This statute allows a Washington corporation to be sued while it is "winding up." The Legislature also enacted RCW 23B.14.340 (Washington's "survival statute"), which states that a corporation's dissolution "shall not take away or impair any remedy available against such corporation . . . for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two (2) years after the date of such dissolution."

The statute at issue in *Ballard* was RCW 23B.14.340, since the defendant had long since ceased its winding up

activities. The appeal raised two issues concerning the interpretation of RCW 23B.14.340: 1) does the statute apply to actions that arise after dissolution; and 2) if the statute does not apply to actions arising after dissolution, what limits, if any, do parties raising post-dissolution claims face? With regard to the first question, the *Ballard* court found the statute to be unambiguous on its face and to apply only to claims existing *before* a corporation dissolves.

As to the second issue on appeal, the ABA's 1984 Revised Model Business Corporation Act (RMBCA) contains two sections dealing with post-dissolution claims. Section 14.06 of the RMBCA addresses claims "known at the time of dissolution" and requires dissolving corporations to notify all known claimants, giving them a limited period of time after dissolution in which to file a claim. Section 14.07 of the RMBCA addresses claims "unknown at the time of dissolution" and provides a five-year period in which post-dissolution claims must be filed. While the Washington Legislature adopted Section 14.06 (through RCW 23B.14.340), it expressly declined to adopt Section 14.07. Therefore, the *Ballard* court found the Legislature's decision not to adopt Section 14.07 to "indicate its intent to retain the com-

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mon law rule in the context of post-dissolution claims." *Ballard*, 108 P3d at 823.

The *Ballard* court then reiterated the common law rule that claims against a corporation terminate upon the corporation's dissolution. Thus, though the court had agreed with the association's argument that its claim was not barred by RCW 23B.14.340 (because the claim accrued after the two-year period prescribed by the statute), the court affirmed the trial court's dismissal of the action based on common law. *Id.* The *Ballard* opinion goes on to "encourage the Legislature to adopt [RMBCA] Section 14.07, as it would resolve the conundrum the present statute creates." *Id.* at 824. Today, in Washington, any claim against a corporation which has not arisen by the time of the dissolution will be extinguished. As such, Washington practitioners need to consider the impact of *Ballard* when defending or suing a dissolved corporate defendant.

Post-dissolution Claims in Oregon

The *Ballard* analysis, however, does not apply to post-dissolution claims in Oregon because the Oregon Legislature adopted RMBCA Section 14.07 while Washington did not. However, with some foresight, a dissolving corporation can extinguish known claims within 120 days and future claims after a five-year period, significantly less than the ten-year construction statute of ultimate repose.

The Oregon Legislature's survival statutes model RMBCA Sections 14.06 and 14.07. Like Washington's statute, ORS 60.637 continues an Oregon corporation's existence during the winding-up period of dissolution, and further states that "[d]issolution of a corporation does not . . . [p]revent commence-

ment of a proceeding by or against the corporation in its corporate name; [or] [a]bate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." The Oregon statute goes further that Washington law in that it allows filing of actions by or against dissolved corporations for claims unknown at dissolution.

Circumventing the Statute of Repose

Similar to Washington, in Oregon all claims against a corporation that are known, but not yet presented, can be cut off at 120 days after dissolution with proper written notice to known claimants. Essentially, where a dissolving corporation has knowledge of a given claim and the corresponding claimant at the time of dissolution where no action has yet been commenced, such corporation can cut off the associated liability with a notice to such known claimant. ORS 60.641 sets out the notice procedure for disposing of known claims at dissolution. Generally, such written notice must describe the necessary form of the claim; provide a mailing address for receipt of claims; state a deadline of not fewer than 120 days from the date of the notice; and state the claim will be barred if not received by the deadline. ORS 60.641(2). Claims against the dissolved corporation are barred if a claimant who was given notice does not deliver the claim to the dissolved corporation by the deadline, or if a claimant whose claim is rejected does not commence a proceeding to enforce the claim within ninety (90) days from the rejection notice. ORS 60.641(3). Within this statute, "claim" does not include a contingent liability or a claim based on an event occurring after dissolution. ORS 60.641(4).

Claims that are *unknown* to a dis-

solving corporation at the time of dissolution may also be cut off, but the limitation period for such bar is five years after notice rather than the 120 days provided for known claims. ORS 60.644 states that a dissolved corporation in Oregon may publish a notice of its dissolution and request persons with claims to present them, or risk losing such claims. Generally this notice must be published in a newspaper of general circulation where the dissolved corporation had its principal office; describe the necessary form of the claim; include an address for receipt of claims; and state that claims will be barred unless a proceeding to enforce the claims is commenced within five years after publication of the notice. ORS 60.644(2). Such a publication will bar, after the five-year period, the claims of claimants who did not receive notice under ORS 60.641; claimants who sent timely claims but never filed suit; and claimants whose claims are "contingent or based on an event occurring after the effective date of dissolution." ORS 60.644(3). Presumably, if such publication is not made, no such five-year bar exists, though statutes of limitations and repose would still apply.

Practical Impact

For those who represent dissolved corporations in Oregon, it is important to determine whether the ORS 60.644 notice was published at the time of dissolution or thereafter, because such notice may bar all claims against that dissolved corporation, regardless of the statute of limitations. It is also prudent to advise such clients to publish these notices, particularly if there is a risk that claims against the dissolved corporation will arise more than five years down the road. ☛