RISE OF THE ZOMBIES: HOW REVIVING LONG-DEAD CORPORATIONS AT CERCLA SITES CAN SAVE YOUR CLIENT MONEY

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Introduction

The seventh season of AMC's hit drama *The Walking Dead* is under way, but the zombies more pertinent to your environmental law practice are ones you may not even know exist. In recent years, attorneys have pioneered the practice of reviving "zombie corporations"—dissolved corporations that possess untapped insurance assets—for the purposes of contributing to site cleanup efforts. A successful "zombie practice" can go a long way to facilitating rapid site cleanups and, just as importantly, minimizing your own client's potential liability.

What Is a Zombie Corporation?

Even if a corporation is no longer in business, it still may have unexhausted insurance policies. Courts are increasingly allowing claimants to "revive" these "zombie corporations" and make claims against such policies. The seminal opinion is *In re Krafft-Murphy*, which held that under Delaware law, unexhausted insurance policies constitute "property" accessible to any creditors that become known *after* dissolution. *See* 82 A.3d 696, 704 (Del. 2013). This makes good policy sense—if a corporation insures its environmental practices and pays its premiums, there is a good argument for requiring insurers to pay when reimbursement-eligible events occur as a result of activities conducted during the coverage period.

Dissolved corporations take two forms: "dead" corporations, which have dissolved but have not distributed their assets, and "dead and buried" corporations, which have distributed their assets to shareholders. *GTE Products*, 844 F. Supp. at 1012. If a "dead" corporation has not been "buried"—that is, it retains some assets—those resources may be available to respond to claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.* However, some courts have gone even further, allowing claims to proceed against "dead and buried" corporations, provided that certain conditions are met.

In general, CERCLA overlays state corporate law, and does not abrogate or circumvent it. *See United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (CERCLA's broad legislative purpose, absent conflict, is insufficient to replace "the entire corpus of state corporate law"). But if the two schemes clash, state law yields to the federal statute, which "defines a 'person' liable under the statute to include a 'corporation' . . . without regard to its current status." *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 1990 WL 322940 (N.D. Ill. July 6, 1990); *see also Bestfoods*, 524 U.S. at 63 (where conflict of laws exists, "it would be violative of Congressional intent to have to pierce the veil of each and every fictional corporation between a subsidiary and its ultimate controlling parent"); *AM Properties Corp. v. GTE Products Corp.*, 844 F. Supp. 1007, 1012 (D.N.J. 1994) ("it does not appear that Congressional intent was to permit fifty different schemes of liability based on state statutes defining corporate capacity to be sued"). Unless states have specifically enacted corporate statutes to limit the liability of dead and buried corporations—more on that below—a dissolved corporation may still be a viable party.

Key takeaway: If you know or have reason to suspect that defunct potentially responsible parties (PRPs) possess unused insurance assets, don't let their current status deter you from naming them.

How Can a Zombie Corporation Be Revived?

Leave your bad undead puns at the courthouse door, because there is no special form or procedure for impleading a "zombie corporation"—it is enough to name the corporation as you would any other defendant. The first practical problem that will arise relates to *representation* of the zombie, though: how do you serve a zombie? The best practice is to attempt to serve the last known officer or agent. Once that individual rejects service on the grounds of corporate nonexistence, head over to the local newspaper of record. All states have laws that allow plaintiffs to sue unknown or absent defendants by publishing notice of the suit in one or more newspapers, assuming the plaintiff has made reasonable efforts to locate the defendant. The exact parameters vary from state to state, but service by publication is the tool most likely to wake the undead corporation.

Once service of process is complete, a related issue is the identity of the zombie client. The corporation, which no longer exists, cannot be a client. And in CERCLA matters, insurers, who are often defending under a reservation of rights, cannot be the client, either. (In fact, "zombie corporation" practice underscores the importance of insurer-retained independent counsel, since the insurers are probably displeased that they must commit resources to an insured that no longer exists!) Thus, attorneys may ask the court to appoint a third-party trustee to manage the dissolved corporation's undistributed property—including the insurance assets. In some states, this procedure may be prescribed by law. *See Krafft-Murphy*, 82 A.3d at 704 (finding that court may appoint receiver to defend allowed claims). Oftentimes, the trustee's fees are split between the insurer and the site's solvent PRPs, for whom paying to "revive" a zombie corporation is a sound investment given the chance of recovering potentially substantial insurance assets.

As with solvent corporations in CERCLA litigation, revived zombie corporations may elect to settle their liability. In fact, since zombie practice requires insurers to expend resources on former clients that no longer pay premiums, insurers may be even *more* eager to settle a zombie corporation's liability—yet another reason that counsel should diligently investigate and pursue the assets of zombie corporations if the site's archeological record suggests that such assets may exist. Generally, if a settlement proposal is reached, PRPs must get the court to approve said proposal in order to ensure fairness to the zombie corporation's interests and proportionality to the zombie corporation's contributions to the total liability at the site.

Key takeaway: By preparing a detailed case before asserting a claim against a zombie corporation, you may be able to secure a speedy settlement offer from an insurer who is even more motivated than usual to get litigation off its books.

Trends in Zombie Litigation and Legislation

Before you rush excitedly to your site's historical records to find defunct PRPs and add them en masse to your CERCLA lawsuit, be aware that there are limitations to the "zombie corporations doctrine." Many states, eager to rein in the logistical headaches that result from the unfettered liability of long-dead corporations, have enacted statutes that bar claims against dead corporations *even if* they have the prized untapped insurance assets. Again, this makes some policy sense—lawmakers want to provide incentives for directors to wind up the corporation's affairs formally, instead of allowing corporations to continue to accrue liability.

Generally, a corporation may file a notice of dissolution with the applicable secretary of state's office, which starts a windup period for parties to bring forward previously unasserted claims against the corporation. *See, e.g.*, Florida Stat. 607.1407 (barring claims not brought within four years of filing date of dissolution notice). Similarly, Oregon's public notice statute permits enforcement of claims against a dissolved corporation's undistributed assets within five years of the date of dissolution. *See* O.R.S. §§ 60.644.

In practice, however, courts have shown a tendency to permit claims against zombie corporations' insurance assets. Allowing PRPs to access insurance assets does no harm to corporations that comply with the safe harbor windup periods, but still allows claimants who were unknown at the time of dissolution to seek relief from a party—the insurers—that had insured the claimed loss. The U.S. District Court for the District of Oregon has concluded that insurance policies constitute "assets" *even if* the corporation is otherwise "dead and buried." *See Ironwood Homes, Inc. v. Bowen*, 2010 WL 2465384 (D. Ore. June 14, 2010). And the *Krafft-Murphy* opinion goes even further. Delaware law has two windup periods: it requires dissolved corporations to defend against any claims that are "likely to arise or become known" within ten years of dissolution, *and* provides for a three-year period for the directors to wind up the corporation. The *Krafft-Murphy* court held that *neither* period operated as an absolute time bar, instead finding that the policies were *contingent* assets that vest if and when a third party filed a claim against them. A court may be especially inclined to take this pragmatic approach if it is struggling to allocate liability at a cleanup site with relatively few solvent parties.

Key takeaway: Even if state law looks like it might inhibit your zombie revival efforts, don't despair. This is an unsettled area of law, and both precedent in other jurisdictions and sound policy considerations may bear in favor of allowing claims against dead and buried corporations to proceed.

The Future of Zombie Claims

For decades, CERCLA attorneys have struggled with how to treat the pesky "orphan shares" of liability that often become the subject of contentious litigation between solvent PRPs, all of whom are diligently trying not to be left holding the bag. In an increasing number of cases, "zombie insurance" practice provides a better way forward, allowing PRPs to spread out cleanup liability and ensure fairer treatment for all parties. All those hours you spent reconstructing your site's ancient history did not go to waste after all.

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