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LITIGATION

Night of the Living Dead, Inc.: indefinite corporate existence

By Julian Y. Waldo and Amy L. Bomse

As the Supreme Court has reminded us recently, corporations are in many ways like natural persons. But here's a way that corporations — at least California corporations — are different from you and me. Even when they die (dissolve), they don't really go away. As a result, when faced with subpoenas or other requests for information or documents concerning California corporations they have represented, attorneys should continue to assert the privilege as vigorously on behalf of clients that have ceased operations or dissolved as they do on behalf of those with ongoing operations. The same holds true even when it appears there is no longer any natural person to speak for the dissolved or defunct corporation.

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In California, the client holds the attorney-client privilege, and so the privilege ends when there is no longer anyone to hold it. For individual clients, the privilege ends when the deceased client's estate is finally distributed and her personal representative is discharged. Though this might sometimes take place years after the client's death, it nonetheless provides a definitive endpoint for the privilege.

But for California corporations, there is no clear analog because there is no unambiguous end to a corporation's existence. While most attorneys would probably think of corporate dissolution as the equivalent to death, this is not the case. "[A] corporation's dissolution is best understood not as its death, but merely as its retirement from active business." *Penasquitos, Inc. v. Superior Court,* 53 Cal.3d 1180, 1190 (1991).

A dissolved corporation continues to exist indefinitely for the purposes of winding up its affairs, which includes prosecuting and defending actions by or against it. Corp. Code. Section 2010(a). As a result, a dissolved California corporation cannot escape litigation merely because it is dissolved, but must defend suits the same as any other party. Seemingly, a California corporation never dies, it simply fades away, and is resurrected for the purposes of litigation anytime someone sues it. (The state Supreme Court decided in February, in *Greb v. Diamond International Corp.,* 56 Cal. 4th 243 (2013), that out-of-state corporations follow the rule of their state of incorporation; for Delaware corporations, for example, this means dissolved corporations can only be sued for three years after dissolution. See Del. Gen. Corp. Law Section 278.)

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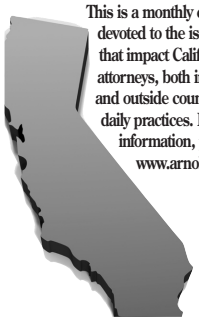

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As the court noted in *Penasquitos*, several courts have held that the only hard cutoff for suits against dissolved corporations is the applicable statute of limitation. But given that many statutes of limitation can be tolled until plaintiffs' discovery of the relevant facts or for equitable reasons, statutes of limitation are of little help in determining whether a corporation can still be sued, and therefore, whether it still exists.

This indeterminate existence means the duration of the attorney-client privilege for corporations is indeterminate as well. That was the holding in *Favila v. Katten Muchin Rosenman LLP,* where the 2nd District Court of Appeal ruled that communications between a corporation and its attorneys continued to be privileged, even though the corporation was dissolved, absent a waiver or "until all matters involving the company have been fully resolved and no further proceedings are contemplated." 188 Cal. App. 4th 189, 219 (2010).

The *Favila* court's statement that the privilege will end whenever "no further proceedings are contemplated" suggests that there is an expiration date for the privilege. But, to paraphrase the late Justice David Eagleson of the state Supreme Court, there are clear judicial days when a court can contemplate forever. Hence, attorneys should continue to assert the privilege on behalf of any California corporations they have represented even if those corporations have ceased operations or dissolved long ago. (In practice, this makes the duration of the privilege identical to the duration of attorneys' ethical duty of confidentiality, which lasts forever.)

However, asserting privilege on behalf of a dissolved corporation is not without its difficulties, as the recent *Melendrez v. Superior Court* decision shows. 2013 WL 1801708 (April 30, 2013). There, an asbestos company that had ceased operations was defending a lawsuit with the assistance of its insurer, and dissolved in the course of the litigation. The company's directors, officers and employees had all quit or died, so there was no one to sign the company's responses to certain requests for admission. The lack of personnel also prevented the attorney from signing the responses herself, because that would have partially waived the attorney-client privilege, which the attorney could not do without client approval.

On appeal from a motion to compel verified responses or deem the facts admitted, the appellate court decided that the company should be deemed to no longer exist if it was only passing on claims to its insurer to defend — despite Corporations Code Section 2010's language to the contrary. The court remanded for the trial court to gather evidence on the question, but instructed that if the company no longer existed, then the privilege — and the right to waive it — would pass to the insurer as the company's "trustee in dissolution," and therefore the insurer could assert or waive it. (Evidence Code Section 953 states that for a corporation "no longer in existence," the privilege will be held by any "successor, assign, trustee in dissolution, or any similar representative" of the corporation.)

There are two troubling aspects to this decision. First, the court's ruling that a corporation that only channels claims to its insurer does not exist is hard to square with the state Supreme Court's decision in *Penasquitos*, which unequivocally established that a corporation "continues to exist" and so can be sued precisely when its sole asset is an insurance policy.

Second, though the court's desire to find a practical route out of the morass is understandable, and the insurer was undoubtedly the entity most interested in the litigation, passing the attorney-client privilege to a third party other than the corporation's successor in interest is a novel solution that raises a host of knotty questions not addressed by the Court of Appeal. For example, will *Melendrez* support a claim in the future that the an insurance company defending claims against a dissolved entity stands in the client's shoes for purposes of asserting other rights of the dissolved corporation including, potentially, the right to bring a claim against the dissolved corporation's attorneys? Additionally, even if the insurer can waive the privilege to allow the attorneys sign discovery, to whom should the attorneys turn when facing decisions, such as settlement offers, that require client approval?

The complications created by the court's decision are unfortunate because they were very likely avoidable. Corporations Code Section 2003 allows any interested person to petition a court to appoint a director to a corporation when none can be found. Though admittedly it might be hard to find people willing to accept appointments to the board of dissolved corporations as such positions are unlikely to provide much, if any, compensation.

Attorneys who have represented California corporations that have since dissolved or ceased operating need not be discouraged by the court's decision in *Melendrez*. Though asserting the privilege in such circumstances may not be easy, with careful attention to the mechanisms provided by the Legislature, courts should be able to harmonize attorneys' duties to their clients and California's policy of indefinite corporate existence.

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