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Corporations: Wisconsin Corporate Dissolution Anomaly

Howard H. Boyle Jr.

WISCONSIN CORPORATE DISSOLUTION ANOMALY

When a corporation voluntarily dissolves, there arise problems as to the disposition of rights which have become extant during corporate existence. Wisconsin, like most states, has enacted dissolution statutes which purport to deal with such problems. It is the sufficiency of these statutes not only as to protection afforded rights but also as to maintenance of procedure consistent with free enterprise lassiez faire that is the matter here discussed.

In Wisconsin voluntary dissolution can be accomplished with a minimum of regulatory interference. Nothing in the articles of incorporation to the contrary, duplicate copies of a resolution to dissolve, passed by two-thirds of the voting stock, are sent to the Secretary of State. One of the copies is returned to the corporation with the Secretary's certificate annexed and thereupon filed with the Register of Deeds. The dissolution has then been consummated.[1] At "common law" because dissolution of a corporation was said to be analogous to the death of a natural person, all rights against the corporation were regarded as automatically lapsed.[2] The Wisconsin statutes, although still entertaining the unreal notion of the common law, alleviate confusion caused by such abrupt cessation of rights by providing further in the dissolution statutes that the corporation "shall nevertheless continue... for three years thereafter for the purpose of [winding up]" and "the directors... of such corporation at the time of its dissolution shall... continue to act as such during the said term of three years."[3] At the end of the three year period the corporation has ceased to exist for any purpose.[4] The procedure for voluntary dissolution in Wisconsin is simple and easy to follow. The question is whether or not it is adequate.

When a natural person dies, statutes provide in detailed manner for the administration of his estate and the satisfactory disposal of all creditor claims. It is a quite different case when the corporate "person" dissolves or "dies." Then the statutes provide merely for the three year period in which the corporation will be deemed still in existence

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[1] WIS. STAT. 181.03.

[2] TAYLOR, PRIVATE CORPORATIONS § 20-21 (5th ed. 1902); 16 FLETCHER, CYCLOPEDIA CORPORATIONS § 8113 (perm. ed. 1942); KENT, COMM. 307n (2nd ed. 1932) where it is indicated that the common law rule was never applied to business corporations. Justice Siebecker in Lindeman v. Rusk, 125 Wis. 210, 230, 104 N.W. 119, 125 (1905) quotes Kent, *ibid*, and continues, "The (old) rule had its origin at a time when corporations dealt almost exclusively with municipal, ecclesiastical and eleemosynary affairs, and when the modern business corporation was unknown."

[3] WIS. STAT. 181.02.

[4] State ex rel. Pabst v. Circuit Court for Milwaukee County, 184 Wis. 301, 199 N.W. 313 (1924); Drzewiecki v. Stempowski, 232 Wis. 447, 287 N.W. 747 (1939); 16 FLETCHER, CYCLOPEDIA CORPORATIONS § 8173 (perm. ed. 1942) and cases there cited.

for the sole purpose of winding up its affairs. Such provision alone cannot satisfactorily dispose of all creditor claims. It is true that this statutory commutation of the corporation's existence does give to creditors an advantage not possessed at common law. At least one court felt that creditors were being magnanimously treated by this concession, and held that it was a new right of substance.[5] However, comparison should be made between present rights before dissolution and after, not between rights after dissolution as they were at common law and as they are under the statute. The fact of the matter is that creditors' rights are not adequately protected upon a corporation's voluntary dissolution. The main difficulty is that the corporation after the winding up period drops out of the picture, leaving all unsettled rights up in the air. In *State ex rel Pabst v. Circuit Court*,[6] plaintiff lessor, in December 1920, brought an action against the Pabst Brewing Co. to obtain an injunction restraining the defendant from committing waste on certain premises she had leased to it and for mandatory inunction to compel restoration of the premises to their original condition. At about the same time the defendant dissolved in accordance with the Wisconsin statutes. The plaintiff served notice of trial within a short time but no further proceedings were taken until after three years had elapsed. The Court held that the action against the corporation abated, stating: "It is manifest that an action cannot proceed against a dead person. Here the corporation is dead and as to it the action abates." In *Drzewiecki v. Stempowski*,[7] Frank and Mary Drezewiecki executed a negotiable promissory note to the Strozyk-Zalewski Co. The payee corporation assigned the note to Nepomocyna Stempowski. The obligors received no adequate notice of this assignment and made payments to the president of the original obligee. Payment would have been an adequate defense against the assignee were it not for the fact that the payee corporation had voluntarily dissolved, and the three year winding up period was past before certain of these payments were made. It was held that because the payee corporation was no longer in existence, there could be no payment thereto which would be a defense against the assignee's claims. The case of *West Milwaukee v. Bergstrom Manufacturing Co.*[8] further illustrates the kind of confusion which results in practice. The Bergstrom Co. in 1932 was assessed $131.98 in taxes by the plaintiff village. In December 1936, without having paid these taxes, the Bergstrom Co. dissolved. The village commenced action on December 5, 1938 but trial was not had until

[5] International Pulp Equipment Co. Ltd., v. St. Regis Kraft Co., 54 F.Supp. 745 (Del. 1944).
[6] State ex rel. Pabst v. Circuit Court for Milwaukee County, 184 Wis. 301, 199 N.W. 313 (1924).
[7] 232 Wis. 447, 287 N.W. 747 (1939).
[8] 242 Wis. 137, 7 N.W.(2d) 587 (1945).

December 29, 1941, which was more than three years after dissolution. The Court said that the action against the corporation had abated.

Ordinarily when creditors' rights arise, a statute of limitations specifies the length of time that they shall have vitality. The corporate debtor can shorten this statute of limitations by dissolving.[9] Before dissolution the balance sheet may indicate to the creditor that he is adequately secured. Upon dissolution, with only three years to wind up, satisfactory liquidation may be impossible because of the nature of the corporate property, or because of market conditions. Further, the Wisconsin statute puts the title to corporate realty in the stockholders as tennants in common upon the dissolution of the corporation.[10] If such property is needed for the payment of debts, no ancillary procedure is provided creditors to reach it.

It must be noted that even though the corporation ceases with finality at the end of the three year period,[11] debts it has incurred are not thereby extinguished[12] nor are actions commenced within the three year period fully abated.[13] The right continues, but in view of the corporation's last gasp, it must be against someone else. The statute does not say whom.

This practical problem of confusion in remedies for enforcement of

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[9] The ordinary statute of limitations for legal claims is six years, for equitable claims ten years. The statutory winding up period cuts these times as far as actions *against the corporation* are concerned to three years. An article by George D. Hornstein, *Voluntary Dissolution—A New Development in Intracorporate Abuse,* 51 YALE L. J. 64 (1941) relative to loss of rights as a consequence of dissolution also points to the shortening of the statute of limitations but from the consideration of corporate derivative actions rather than creditor actions. An arbitrary period placing a special limit on the time after dissolution within which suits on behalf of the corporation can be instituted, Mr. Hornstein explains, detracts from the rights that would be the stockholders' were it not for such dissolution. He also points out that the stockholders seeking to institute a derivative action may be thwarted by the corporation's dissolution in two additional ways. 1) The defendant would plead, with some probability of success, the doctrine of *forum non conveniens,* "namely, that upon dissolution there should be relegated to the courts of the state of incorporation both the question of the propriety of dissolution and of the duty of the Trustees in Dissolution to bring action." Derivative action under such a doctrine would either not materialize if the defendants were from out of state, or would be unappealing if the stockholders were faced with a large expense in going to the state of incorporation to sue. 2) The stockholder complainant might have to bear the entire expense of litigation himself if the judgment were awarded to him personally rather than in the name of the defunct corporation, i.e. no contribution. The reform which will be suggested above would cure these ills.

[10] WIS. STAT. 181.04(1); Drzewiecki v. Stempowski, 232 Wis. 447, 452, 287 N.W. 747 (1939).

[11] *Supra,* note 4.

[12] Village of West Milwaukee v. Bergstrom Manufacturing Co., 242 Wis. 137, 7 N.W.(2d) 587 (1945); State ex rel. Pabst v. Circuit Court for Milwaukee County, 184 Wis. 301, 199 N.W. 213 (1924); Huber v. Martin, 127 Wis. 412, 105 N.W. 1031 (1906); Crossman v. Vivenda Water Co., 150 Cal. 575, 89 Pac. 335 (1907).

[13] West Park Realty Co. v. Porth, 192 Wis. 307, 212 N.W. 651 (1927); Lindeman v. Rusk, 125 Wis. 210, 104 N.W. 119 (1905).

creditors' rights has its source in one basic and misshapen idea, which is that the analogy existing in law between the death of an individual and the "death" of a corporation is one of necessity. Probate proceedings are inevitable because no human agency can predict the death of a natural person. But it lies within the power of human law to keep the corporate person alive until all of its affairs are finally and definitely settled. It is *not* necessary to kill it, and then administer the estate through a representative. What the Wisconsin statute does, and it is no exception in the forty-eight states, is to kill the corporation outright, allow it to remain in a comatose condition for three years, then neglect to provide for any further probate procedure. Some of the results of this situation have been noted. Its ineptness can be emphasized by examining the matter of criminal liability of a corporation which has been dissolved. The dissolution being regarded as death in many instances has caused the criminal action to abate. If it so happens that, as in Wisconsin, a corporation is continued after dissolution for "suit" or "action", "suit" or "action" has been interpreted as "civil".[14] Again the statute fails. When it is realized the actual perpetrators of the crime live on to enjoy the benefits of it, the explanation is indeed shallow.[15]

What must be done to supply these missing links in our law of corporate dissolution? The answer is plain and simple: have a statute amendment under which the "death" of the corporation takes place after the winding up of affairs rather than before, with winding up procedure commenced upon cessation of carrying on regular business. Under this change in approach the statutes of limitation are unaffected, and orderly liquidation can be had. The property of the corporation will remain in its name. All rights will be adjusted and settled before the corporation is allowed to "die." The objection of encumbered business procedure can be disposed of by permitting the directors and officers of the corporation to liquidate as business considerations dictate and accomplish final dissolution merely by filing certification that all obligations have been satisfied or provided for.[16] A final problem, of course, is the protection of those creditors the officers have warranted as being satisfied or provided for but who in reality were not. They would have a remedy notwithstanding, but of necessity a less desirable one.[17] Making directors and officers personally liable in the event of

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[14] United States v. Safeway Stores, 140 F(2d) 834 (C.C.A. 10th 1944).

[15] Marcus, *Suability of Dissolved Corporations—A Study in Interstate and Federal-State Relationship*, 58 HARV. L. REV. 675 (1945).

[16] Were the statute to fix no time, undue delay in winding up the affairs of the corporation would be avoided by the judical requirement of "reasonable time." Holliday v. Cornett, 224 Ky. 356, 6 S.W.(2d) 497 (1928).

[17] "The decree of dissolution is not subject to collateral attack because of false statement in the application in regard to discharge of claims." Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335 (1907); Wells Fargo Bank v.

ommission in their final report of any outstanding claims is a necessary final provision for a contingency that will occasionally develop.

A revised dissolution statute must also deal with the status of contracts executory at the time the carrying on of regular business ended. A great variety of suggestions for an adequate provision dealing with this matter could be presented.[18] It cannot be forgotten here that the problem concerns *voluntary* dissolution. It appears unjust for a corporation by its own act to detract from contractual benefits it has conferred for consideration received. Also it goes without saying that the dissolution procedure provided in any statutory revision should be made exclusive for all Wisconsin corporations.

Perhaps a reconstructed dissolution statute should include safeguard provisions to prevent majority abuse of the procedure for its own disportionate advantage.[19] A sense of decency commands that a majority interest not be free to dissolve when such a move is purely a squeeze maneuver to oust minority stockholders, or where the corporation has contracted not to dissolve. It has been stated that mere dissent among stockholders does not present an excuse for dissolution where the corporation is operating in a successful manner for the benefit of all the stockholders and there is no disagreement among the directors,[20] and likewise where two factions each own half the stock and new officers cannot be elected, the company being solvent and earning profits.[21] On the other hand valid grounds for dissolution can be found in insolvency[22] or irreconcilable conflict between equally divided interests.[23] Of course, where dissolution is beneficial to all stockholders and not injurious to the public, it may reasonably be allowed.[24] Such questions involve policy factors which should find expression in the amended statute. It is suggested that some such requirement as "proper business purpose" be a condition precedent to dissolution procedure.

HOWARD H. BOYLE, JR.

Union Trust Co. et al v. Blair, 26 F.(2d) 532 (C.C.A. D.C. 1928) (by implication). *Contra*: In re Packer City Tire and Rubber Co., 39 S.D. 48, 162 N.W. 897 (1917); Elston et al v. Elston Co., 131 Me. 149, 159 Atl. 731 (1932).

[18] 16 FLETCHER, CYCLOPEDIA CORPORATIONS § 8120 (perm. ed. 1942); 8 THOMPSON, CORPORATIONS § 6514 (3rd ed. 1927); 2 COOK, CORPORATIONS § 642 (7th ed. 1913); MACHEN, MODERN LAW OF CORPORATIONS § 373 (1908); WAIT, INSOLVENT CORPORATIONS § 336 (1888).

[19] 16 FLETCHER, CYCLOPEDIA CORPORATIONS § 8016 (perm. ed. 1942); 8 THOMPSON, CORPORATIONS § 6453 to 6460 (3rd ed. 1927).

[20] Cook v. Cook, 270 Mass. 534, 170 N.E. 455 (1930).

[21] In re George Ringler & Co., 70 Misc. 576, 127 N.Y. Supp. 934 (1911).

[22] In re Vassar Foundry Co., 293 Fed. 248 (E.D. Mich. 1923), *aff'd* 2 F.(2d) 240 (C.C.A. 6th 1924).

[23] Application of Brown Bros. Inc., 111 Misc. 294, 181 N.Y. Supp. 460 (1920); In re McLoughlin, 176 App. Div. 653, 163 N.Y. Supp. 547 (1917); Hitch v. Hawley, 132 N.Y. 212, 30 N.E. 401 (1892).

[24] *Supra*, note 21; State ex rel. New First National Bank v. White, 223 Mo. App. 36, 7 S.W.(2d) 474 (1928).