

MADISON AND COOK COUNTY COURTS ISSUE CONTRASTING RULINGS ON SURVIVAL OF CAUSE OF ACTION IN ASBESTOS CASES AFTER CORPORATE DISSOLUTION UNDER 805 ILCS 5/12.80

Avocet Enterprises, Inc. was named a defendant in asbestos personal injury cases in Madison County (*James Rutherford v. Aerco International, Inc., et al.*, 17-L-1103) and Cook County (*Roger Nelson v. A. O. Smith Corporation, et al.*, 17-L-3354). It filed similar motions for summary judgment (MSJ) in both cases arguing any liability it may have had was extinguished pursuant to 805 ILCS 5/12.80 of the Illinois Business Corporation Act (IBCA §12.8) when it dissolved. Avocet's motion was denied in Madison County while it was granted in Cook County. The issue ultimately turns on determination of when an asbestos injury cause of action accrues for purposes of determining if a dissolved corporation has liability.

Prior to a 2015 amendment, the IBCA §12.8 allowed a suit against a dissolved corporation up to 5 years after dissolution for any right or claim existing, or any liability incurred, prior to such dissolution. Before the amendment, the 2 elements required for a claim to survive corporate dissolution were: 1. Claim existed at time of dissolution, and 2. Claim asserted within 5 years of dissolution. Effective 1/1/2015, this statute was amended to allow a suit against a dissolved corporation up to 5 years after dissolution for any right or claim existing, or any liability accrued or incurred, either prior to, at the time of, or after such dissolution. After the amendment, the 2 elements required for a claim to survive dissolution are: 1. Claim existed, accrued, or was incurred prior to, at time of, or after dissolution, and 2. Claim asserted within 5 years of dissolution.

Madison County Ruling

Avocet was involuntarily dissolved on 7/11/14, 5 ½ months before the amendment took effect. Avocet cites *In re Johns Manville/Asbestosis Cases*, 516 F.Supp. 375, 378 (N.D.Ill. 1981) for the holding that a D can't incur liability until an injury has occurred. It cites *Nolan v. Johns-Manville Asbestos*, 85 Ill.2d 161 (1981) for the holding that an asbestos injury cause of action accrues when a plaintiff knows or reasonably should know of any injury and that the injury was caused by the wrongful acts of another. Avocet asserts, citing plaintiff's complaint, that Rutherford first became aware of his claim against it on 6/23/17, after it was dissolved. Avocet argues that Rutherford's claim is thus barred under the survival statute as it existed at the time of its dissolution. Plaintiff argues that each exposure is a separate claim and his alleged exposure relevant to Avocet occurred prior to dissolution. Therefore, the claim existed at the time of dissolution and it survived that process.

Avocet further argues that the 2015 amendment should not be applied retroactively to corporations like it that dissolved prior to the amendment's effective date. Avocet states there is no evidence of legislative intent that the 2015 version should be applied retroactively. Avocet continues that the Illinois Statute on Statutes (5 ILCS 70/4), as interpreted by *People v. Glisson*, 202 Ill.2d 449, 507 (2002) holds that procedural changes to statutes may be applied retroactively, but substantive changes may not. Avocet cites *Deick Center-Marklund Children's Home v. Illinois Health Facilities Planning Board*, 389 ILL.App.3d 300, 303 (Ill.App. 1st Dist 2009) for the holding that procedural law is the "machinery for carrying on the suit", including pleading,

process, evidence and practice. It cites *Schweickert v. AG Services of America, Inc.*, 355 Ill.App.3d 439, 442 (Ill.App. 3rd Dist 2005) for the holding that a substantive change in the law establishes, creates, or defines rights. Avocet argues the 2015 amendment is substantive because it allowed a new cause of action for “future contingent claims and liabilities” that were previously abated by dissolution under the earlier version.

The Madison County Court found the earlier version of the statute was the operative language applicable to this issue. Thus, a claim must have accrued prior to a corporation’s dissolution for it to survive the dissolution. The Court also found that “accrual” for purposes of the dissolution statute does not have the same meaning as “accrual” under the statute of limitations or repose. For dissolution analysis, the court held a claim accrues and liability is incurred at the time of alleged exposure. Since Rutherford’s alleged exposure pre-dated dissolution, the Court found Rutherford’s claim existed at the time of Avocet’s dissolution. Therefore, his claim survived dissolution, is viable for this case, and it denied Avocet’s MSJ.

Rutherford is actually not the first Madison County case in which Avocet raised this issue. It earlier made this motion in *Edward Kramer v. Air & Liquid Systems Corporation, Successor by Merger to Buffalo Pumps, Inc., et al.* 14-L-1561). Avocet’s MSJ was also denied in *Kramer*. The Cook County ruling was issued between the 2 Madison County rulings. Avocet attached as an exhibit to its *Rutherford* motion the Cook County order granting that MSJ.

Cook County Ruling

Avocet’s motion in *Nelson* was nearly identical to that in *Rutherford*. Like Madison County, the Cook County court found the amended statute “creates a new cause of action that did not exist prior to its enactment”. Therefore, the 2015 amendment was substantive and could not be applied retroactively. Similar to *Rutherford*, Nelson’s alleged exposure also pre-dated the time of Avocet’s dissolution. Nelson’s order notes the date of awareness of his injury was after the amendment. *Nelson* also found that under the earlier version “future contingent claims and liabilities were abated as of the date of dissolution, and a corporation had no liability for claims that accrued after dissolution”. The order states the amendment broadened application of the survival statute “to include claims against dissolved corporations materializing after dissolution”, and “to encompass claims or liabilities incurred after a corporation’s dissolution”.

Unlike the Madison County holding, the Cook County order does not explicitly say when Nelson’s claim against Avocet accrued for survival analysis. But implicit is the assumption that given his post-amendment date of awareness, his claim did not exist nor was any liability incurred prior to Avocet’s dissolution under the earlier version of the statute. This court granted Avocet’s MSJ on this basis, finding its dissolution extinguished Nelson’s claim.