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Continuing Corporate Existence for Post-Dissolution Claims: The Defective Products Dilemma

During the past few decades, California courts consistently have demonstrated support for the policies underlying products liability principles by expanding existing theories and formulating new theories of recovery for persons injured by defective products.¹ The concept of caveat emptor gradually has become a doctrine of the past,² particularly in cases involving consumer products capable of causing injury.³ Products liability principles were formulated, in part, to place responsibility for injuries on those persons manufacturing and distributing defective products and to encourage manufacturers to make products they place on the market as safe as possible for consumer use.⁴ Cur-

1. See generally *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (development of market share liability); *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 514 (1977) (strict liability extended to successor corporations); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1962) (adoption of strict products liability); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944); *Cavers v. Cushman Motor Sales, Inc.*, 95 Cal. App. 3d 338, 157 Cal. Rptr. 142 (1979).

2. See Anderson, *Current Problems in Products Liability Law and Products Liability Insurance*, 31 INS. COUNS. J. 436, 437 (1964). The doctrine of caveat emptor began its journey into history about 200 years ago after the start of the industrial revolution. By the mid 1800's, it was established that a seller could be held liable only to his *immediate* purchaser for selling a defective product. A landmark case in the development of products liability law was decided in 1916 when it was held that manufacturers and distributors could be liable for injuries negligently caused to *anyone*, regardless of privity of contract. See generally *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

3. See note 2, *supra*.

4. See 24 Cal. 2d at 461-62, 150 P.2d at 440-41 (1944). Justice Traynor eloquently advocated the adoption of strict liability principles in his concurring opinion:

[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the reoccurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market, it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

rently, manufacturers' and insurers' efforts to limit recovery and restrict remedies developed under products liability have resulted in the enactment of products liability statutes of repose in several states.⁵ Because these statutes might bar claims before they accrue, they have generated many constitutional challenges.⁶ California has not adopted a products liability statute of repose. A similar bar to recovery does exist under California law, however, when a person's cause of action accrues after a corporation dissolves and there is no successor corporation or other seller in the chain of distribution on which to place liability.⁷

California Corporations Code Sections 2010 and 2011 continue corporate existence for specified purposes after dissolution.⁸ These sections are intended to provide finality and certainty upon dissolution for corporations and shareholders.⁹ Section 2010(a) provides that after dissolution the existence of a corporation continues for the purpose of winding up corporate affairs, prosecuting and defending actions or proceedings by or against it, collecting and paying debts, determining the disposition of corporate property, and collecting and dividing corporate assets.¹⁰ Section 2011(a) allows former shareholders to be sued in the name of the corporation for causes of action arising prior to dissolution.¹¹

This discussion will review the policies underlying products liability claims, demonstrating that while most claims that could arise against a dissolved corporation can be satisfied, products liability claims accruing after dissolution are notable exceptions. Courts have recognized the need to give plaintiffs the opportunity to seek compensation for injuries caused by defective products. Currently in California, however,

5. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statute of Repose*, 30 AM. U.L. REV. 579, 579 (1981). These statutes restrict the time period within which a plaintiff may bring an action. They require that a cause of action be asserted within a short time period after injury, discovery of an injury, or after an injury should have been discovered. A longer time limit—usually six to ten years—after the date of manufacture or sale bars the assertion of any claims occurring thereafter. *Id.*

6. *Id.* at 580-81; see also Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 1977 INS. L.J. 535 [hereinafter cited as Massery].

7. Liability in California for defective products was extended to successor corporations beyond corporate law principles in *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

8. See generally CAL. CORP. CODE §§2010, 2011.

9. See *id.*

10. CAL. CORP. CODE §2011(a) provides:

In all cases where a corporation has been dissolved, the shareholders may be sued upon any cause of action against the corporation arising prior to its dissolution.

11. *Id.* §2010(a) provides:

A corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.

no provision for recovery from the corporation or the shareholders exists if a product manufactured or distributed by a corporation causes injury after dissolution.

This comment will trace the development of creditors' equitable remedies against dissolved corporations and the enactment of statutes continuing the corporate existence for specified purposes after dissolution. Although claims accruing after dissolution are not mentioned specifically in California Corporations Code Sections 2010 or 2011, an analysis of these sections demonstrates that courts have interpreted the survival of remedy provision as denying a remedy to persons injured by products subsequent to dissolution. A comparison of California Corporations Code Sections 2010 and 2011 with the survival of remedy provisions of the Model Business Corporation Act and comparable state statutes demonstrate that states differ in their approaches to the survival of remedy problem. This comment will suggest that because manufacturers and distributors should bear ultimate responsibility for injury-producing products they market and because the courts are foreclosed by statute from extending liability, the California Legislature should extend liability to corporations or their former shareholders for injuries caused by defective products accruing after dissolution. In addition, specific alternatives for achieving an extension of liability will be proposed.

THE POLICIES UNDERLYING PRODUCTS LIABILITY CLAIMS

An understanding of the policies underlying products liability claims is helpful in examining the need for an extension of corporate liability to actions arising after dissolution. The California Supreme Court has led the nation in formulating and adopting theories for recovery for persons injured by defective products.¹² Injuries caused by defective products place the plaintiff in a unique position with respect to the manufacturer or distributor because injury-causing events occur with no prior warning.¹³ With the help of the courts, plaintiffs have overcome many of the obstacles that formerly prevented a recovery.¹⁴

12. California was the first state to adopt strict products liability. *See generally* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

13. A manufactured product with the potential to cause serious injury at an unspecified future date has been compared to a time bomb that is ready to explode. *See* Nelson v. Volkswagen of America, Inc., 315 F. Supp. 1120, 1122 (D.C.N.H. 1970); Brief of Plaintiff at 3, Beckwith v. Web Wilson Tools, Inc., Nos. 78-8257 and 79-3749 (Super. Ct. Washoe County, Nevada, filed July 23, 1981) (copy on file at the *Pacific Law Journal*).

14. *See* notes 20-23 and accompanying text *infra*.

A. The Unique Nature of Products Liability Claims

Products liability claims arising after dissolution are different from other claims a creditor might have against a dissolved corporation. Because most obligations owed by a corporation arise during its existence, they must be settled upon dissolution before the remaining assets are distributed to the shareholders.¹⁵ If an obligation owed to a creditor has not been satisfied but a distribution to shareholders has been made, a suit may be brought by the creditor against the former shareholders under Section 2011(a).¹⁶ Contracts entered into before dissolution may be enforced after dissolution.¹⁷ A defrauded claimant has recourse against corporate representatives, responsible for the fraud or other intentional breach of trust even if it is discovered after dissolution.¹⁸ In contrast, products liability claimants face the possibility of no recovery if the injury occurs after dissolution.¹⁹

B. The Expansion of Products Liability

Products liability was initially created in response to the inherent unfairness of laws that protected sellers against suit when no privity existed between the seller and the person injured.²⁰ The next obstacle

15. California Corporations Code section 1905(a)(2), dealing with voluntary dissolution provides:

[W]hen a corporation has been completely wound up without court proceedings therefor, a majority of the directors then in office shall sign and verify a certificate of dissolution stating:

That its known debts and liabilities have been actually paid, or adequately provided for, or paid or adequately provided for as far as its assets permitted, or that it has incurred no known debts or liabilities, as the case may be. If there are known debts or liabilities for payment of which adequate provision has been made, setting forth the name and address of the corporation, person, or governmental agency that has assumed or guaranteed the payment, or the name and address of the depository with which deposit has been made or such other information as may be necessary to enable the creditors or other person to whom payment is to be made to appear and claim payment of the debt or liability.

When an involuntary proceeding has been commenced, California Corporations Code section 1806 provides:

[T]he jurisdiction of the court includes:

(a) The requirement of the proof of all claims and demands against the corporation, whether due or not yet due, contingent, unliquidated or sounding only in damages, and the barring from participation of creditors and claimants failing to make and present claims and proof as required by any order.

(b) The determination of compromise of all claims of every nature against the corporation or any of its property, and the determination of the amount of money or assets required to be retained to pay or provide for the payment of claims.

16. CAL. CORP. CODE §2011(a).

17. See *Curran v. State of Arkansas*, 56 U.S. (15 How.) 304, 311 (1853); *Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 182 P.2d 182 (1947).

18. See 16A W. FLETCHER, *THE LAW OF PRIVATE CORPORATIONS* §8141 (rev. vol. 1979) [hereinafter cited as *FLETCHER*].

19. See notes 94-119 and accompanying text *infra*.

20. See Andersen, *Current Problems in Products Liability Law and Products Liability Insurance*, 31 *INS. COUNS. J.* 436, 439 (1964). See also *MacPherson v. Buick Motor Co.*, 217 N.Y. 382,

between a plaintiff injured by a product and the manufacturer responsible for its defect was removed when warranties were extended beyond the purchaser to the ultimate consumer.²¹ Strict products liability finally was adopted by the California Supreme Court because it recognized the need to eliminate perhaps the most difficult hurdle plaintiffs faced in proving that the defendant caused an injury.²² Instead of proof of negligence, a plaintiff only had to prove that the product was defective when it left the seller and that the defect caused the injury.²³ Thus, complete responsibility was placed on manufacturers and distributors marketing dangerous products.

The policies underlying products liability have been analyzed exhaustively.²⁴ A major policy consideration is that by imposing this type of liability manufacturers undoubtedly would be encouraged to create a safer product.²⁵ Conversely, limiting liability diminishes this incentive²⁶ and comes at the expense of the plaintiff.²⁷ In addition, rather than shielding manufacturers from unwarranted claims, limiting liability usually results in protecting defendants from valid claims that may arise.²⁸

The California Corporations Code Sections 2010(a) and 2011(a) which set forth the corporate continuance and survival of remedy provisions have been interpreted to limit corporate responsibility in prod-

111 N.E. 1150 (1916) (the court held that a seller's duty to make a product safe extended to all persons the seller knew might be injured by the product).

21. See generally *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 226 N.Y.S.2d 363 (1962); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773 (1961).

22. Requiring plaintiffs to prove negligence was a difficult task that often prevented a recovery, especially in production defect cases. The manufacturers might not have violated safety standards of the industry in question, yet defective products did come off of the assembly line. See J. ADAMS, *ADVANCED TORTS* 173 (1982 rev. ed.) (copy on file at the *Pacific Law Journal*).

23. Some states follow the wording of the Restatement (Second) of Torts (1965) which provides that the product be shown to have left the manufacturer or distributor in a defective condition *unreasonably dangerous* to the user or consumer.

24. See generally Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969); Donovan, *Recent Developments in Products Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code*, 19 MAINE L. REV. 181 (1967); Jenkins, *The Product Liability of Manufacturers: An Understanding and Exploration*, 4 AKRON L. REV. 135 (1971); Pasley, *The Protection of the Purchaser and Consumer Under the Law of the U.S.A.*, 32 MOD. L. REV. 241 (1969); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Reitz & Seabolt, *Warranties and Product Liability: Who Can Sue and Where?*, 46 TEMP. L.Q. 527 (1973); Shanker, *Pigeonholes, Privity and Strict Products Liability*, 21 CASE W. RES. L. REV. 722 (1970); Speidel, *Products Liability, Economic Loss and The UCC*, 40 TENN. L. REV. 309 (1973); Titus, *Restatement (Second) of Torts Section 402A and The Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

25. See Massery, *supra* note 6, at 542.

26. See Massery, *supra* note 6, at 542.

27. See Massery, *supra* note 6, at 542.

28. See Massery, *supra* note 6, at 542.

ucts liability cases accruing after dissolution.²⁹ To fully appreciate current analyses of the California Corporations Code Sections that deny a remedy to a plaintiff seeking redress for an injury caused by a defective product after a corporation has dissolved, a brief examination of the background of modern corporate continuance statutes is necessary.

DEVELOPMENT OF STATUTES CONTINUING THE CORPORATE EXISTENCE

A corporation exists at the pleasure of the state,³⁰ and its activities are subject to regulation by the legislature.³¹ Equity courts developed theories to protect the rights of creditors of corporations because little statutory regulation existed in this area before the twentieth century.³² Modernly, every state has enacted a statute extending the corporate existence for specified purposes beyond dissolution.³³

A. *The Right to Recover in Equity*

Under the common law, dissolution of a corporation ended its existence for all purposes.³⁴ A corporation could neither sue nor be sued, and all causes of action existing by or against it abated.³⁵ It was irrelevant whether dissolution took place by expiration of time, absolute repeal of its charter and acceptance by the legislature, judgment in forfeit, or any other legal means.³⁶ Similarly, all debts owed to or by the corporation were extinguished³⁷ and the corporation could no longer contract, convey or receive property, or exercise any other power granted by its charter.³⁸ California courts, before the adoption of a continuance statute, followed the common law and refused to recognize

29. See generally CAL. CORP. CODE §§2010(a), 2011(a). See notes 98-120 and accompanying text *infra*.

30. See FLETCHER, *supra* note 18, §7966.

31. See FLETCHER, *supra* note 18, §2, at 5-7.

32. See notes 34-49 and accompanying text *infra*.

33. See notes 50-69 and accompanying text *infra*.

34. See Henn & Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865, 879 (1971) [hereinafter cited as Henn & Alexander]; Schoone, *Shareholder Liability Upon Voluntary Dissolution of Corporations*, 44 MARQ. L. REV. 415, 416 (1961) [hereinafter cited as Schoone]; Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321, 323 (1976) [hereinafter cited as Wallach]; Comment, *Suits By and Against Dissolved Corporations*, 48 IOWA L. REV. 1006 (1963) [hereinafter cited as *Dissolved Corporations*].

35. See FLETCHER, *supra* note 18, §8142.

36. See FLETCHER, *supra* note 18, §8142.

37. See Henn & Alexander, *supra* note 34, at 880.

38. The reasons for these rules suited the times in which they were applied. The corporate structure as it exists today was unknown, and since grants were made to the corporation for public or charitable uses, the theory was that grants were made only for the life of the corporation after which the realty reverted to the grantor and the personalty escheated to the king. See *Dissolved Corporations*, *supra* note 34, at 1007.

the legal existence of a corporation for purposes of suit after dissolution.³⁹ Persons with claims existing prior to dissolution, however, had their remedies preserved in equity against former shareholders of the corporation through the "trust fund" theory.⁴⁰

Because the common law refused to recognize the right of creditors to recover any debts or obligations owed to them by dissolved corporations, the "trust fund" theory was developed.⁴¹ This theory recognized the rights of creditors by providing that the assets of a corporation, although distributed to the shareholders upon dissolution, were subject to an equitable charge and were held "in trust" for the benefit of creditors.⁴² In the same manner that the representative of a deceased person's estate could sue and be sued for obligations existing before a person's death, the shareholders, as representatives of the corporation, held its distributed property subject to the payment of all existing liabilities.⁴³ Directors who distributed assets improperly were liable to those persons rightfully entitled to them to the extent of the assets improperly distributed.⁴⁴ The directors then could seek reimbursement from the shareholders who had received the assets.⁴⁵ A shareholder could be held severally liable for corporate debts,⁴⁶ but the extent of liability was limited to the amount of assets received.⁴⁷ The shareholder could afterwards seek contribution from other shareholders.⁴⁸

Although equity provided remedies which would otherwise have ceased to exist upon dissolution, state legislatures began to enact continuance statutes that specified the activities a corporation could engage in after dissolution and the responsibilities it was required to fulfill before it could dissolve.⁴⁹ The following section compares the survival

39. See, e.g., *California Nat'l Supply Co. v. Flack*, 183 Cal. 124, 126, 190 P. 634, 635 (1920); *Sharp v. Eagle Lake Lumber Co.*, 60 Cal. App. 386, 390, 212 P. 933, 935 (1923).

40. This term, coined the "trust fund" theory, as it applies to creditors' rights has nothing to do with splitting property into legal and equitable titles. Some commentators disagree with the use of this term as it is applied to creditors' rights. See Henn & Alexander, *supra* note 34, at 880.

41. Creditors also had no authority to prevent corporate dissolution even though these obligations existed at the time the legal right to dissolve was granted. See Schoone, *supra* note 34, at 416.

42. This doctrine is traced to Justice Story's opinion in *Mumma v. The Potomac Co.*, 33 U.S. (8 Pet.) 281 (1834), which provided that dissolution of a corporation did not end a contractual obligation and that state laws governing dissolution could not interfere with existing contractual obligations. The theory was again expressed in *Curran v. State of Arkansas*, 56 U.S. (15 How.) 304, 311 (1853) when the court analogized a dissolved corporation to a deceased person, stating that the obligation of existing contracts survive after dissolution.

43. See Schoone, *supra* note 34, at 417.

44. See Henn & Alexander, *supra* note 34, at 880.

45. See Henn & Alexander, *supra* note 34, at 881.

46. See Schoone, *supra* note 34, at 419.

47. See Henn & Alexander, *supra* note 34, at 881.

48. See Schoone, *supra* note 34, at 419.

49. See Wallach, *supra* note 34, at 324, 329.

of remedy provision of the Model Business Corporation Act with the comparable statutes of Ohio, Massachusetts, and California.

B. The Enactment of Continuance Statutes

To ensure the protection of the rights of creditors and to correct many of the inequities existing at common law, all state legislatures now have enacted statutes continuing the life of the corporation for specified purposes after dissolution.⁵⁰ The approach taken by states to the survival of remedy problem varies greatly, however.⁵¹ The length of time a corporation may be sued following dissolution and the continued availability of the "trust fund" theory following liquidation and the distribution depends on the interpretation courts give to the wording of the statute.

1. The Survival of Remedy Problem

Many states follow a format similar to that contained in the Model Business Corporation Act⁵² (hereinafter referred to as the Model Act). Even among these states, however, the provisions are not entirely uniform.⁵³ Under the Model Act, a person may assert a claim against the corporation within two years after dissolution for any right or claim existing, or any liability incurred *prior to such dissolution*.⁵⁴ This extended filing period is unlike the statute of limitations period for causes of action because the time limit does not take into account when a right or claim accrues.⁵⁵ Instead the corporate entity is required to continue for an additional period of time so that actions that have not expired by

50. See FLETCHER, *supra* note 18, §8224. See generally *McGoon v. Scales*, 76 U.S. (9 Wall.) 23 (1869) (the constitutionality of these statutes was attacked, but the Supreme Court upheld their validity).

51. See generally MODEL BUS. CORP. ACT §105, ¶1 (1971).

52. For an excellent discussion of the differences between state statutes, see the annotations immediately following the text in the Model Business Corporation Act, Section 105, Paragraph 1 (1971).

53. See generally MODEL BUS. CORP. ACT §105 annotations.

54. See MODEL BUS. CORP. ACT §105, ¶1 (1971) which states:

The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this Act, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two years so as to extend its period of duration.

55. See MODEL BUS. CORP. ACT §105, ¶1 (1971); Wallach, *supra* note 34, at 325.

the date of dissolution may be brought.⁵⁶

Some state statutes do not require that claims asserted in the post-dissolution period must have accrued before dissolution.⁵⁷ These statutes simply extend corporate existence for all purposes for a period of time beyond dissolution.⁵⁸ Massachusetts requires all corporations to continue in existence for three years after dissolution.⁵⁹ Causes of action must be asserted during this time or they will be barred.⁶⁰ The statute does not specify, however, that causes of action asserted during this time must have arisen prior to dissolution.⁶¹ Thus, if a claim accrues during the three-year extension, it may also be asserted within that time.⁶²

Another approach to the survival of remedy problem is found in the Ohio provision⁶³ requiring that upon dissolution a corporation shall cease to do business except as necessary to wind up its affairs, but that any claim that exists or any action or proceeding pending by or against the corporation or *which would have accrued* against it may be litigated to judgment, with the right to appeal preserved.⁶⁴ This language probably is intended to encompass all claims that could arise subsequent to dissolution and that could have been asserted against the corporation

56. See MODEL BUS. CORP. ACT §105, ¶1 (1971).

57. See *id.* See also DEL. CODE ANN. tit. 8, §278; MASS. GEN. LAWS ANN., c. 156B, §102.

58. See KAN. STAT. ANN., §17-6807. See note 57 *supra*.

59. See MASS. GEN. LAWS ANN., c. 156B, §102 which states:

Every corporation whose corporate existence for other purposes is terminated (1) by dissolution under the provisions of section ninety-nine, one hundred, or one hundred and one, (2) by the expiration of the period for its duration limited by its articles of organization, or (3) in any other manner, shall nevertheless be continued as a body corporate for three years after the time when its existence is terminated, for the purpose of prosecuting and defending suits by or against it and of enabling it gradually to settle and close its affairs, to dispose of and convey its property and assets remaining after the payment of its debts and obligations, but not for the purpose of continuing the business for which it was established; provided, that the corporate existence of such a corporation, for the purposes of any suit brought by or against it prior to the commencement of, or during, said period of three years, shall continue beyond said period for a further period of ninety days after the final judgment in the suit.

60. See *id.*; *Gonzalez v. Progressive Tool & Die Co.*, 455 F. Supp. 363, 365 (E.D.N.Y. 1978).

61. MASS. GEN. LAWS ANN., c. 156B, §102.

62. See 455 F. Supp. at 368.

63. OHIO REV. CODE ANN. §1701.88 which states:

(A) When a corporation is dissolved voluntarily or when the articles of a corporation have been canceled or when the period of existence of the corporation specified in its articles has expired, the corporation shall cease to carry on business and shall do only such acts as are required to wind up its affairs, but for such purpose it shall continue as a corporation.

(B) Any claim existing or action or proceeding pending by or against the corporation or which would have accrued against it may be prosecuted to judgment, with right of appeal as in other cases, but any proceeding, execution, or process, or the satisfaction or performance of any order, judgment, or decree, may be stayed as provided in section 1701.89 of the Revised Code.

(C) Any process, notice, or demand against the corporation may be served by delivering a copy to an officer, director, liquidator, or person having charge of its assets or, if no such person can be found, to the statutory agent.

64. *Id.*

had there been no dissolution.⁶⁵ Since it is difficult to predict when a product liability claim will arise, a statute of this type allows a corporation to wind up its affairs and distribute its assets but allows the corporate existence to be revived for the purpose of defending against a subsequently arising suit.⁶⁶

2. The Survival Provision in California

The current California statute enumerating the purposes for which dissolved corporations continue to exist after dissolution is found in Corporation Code Sections 2010 and 2011.⁶⁷ This statute differs from the Model Act provision extending corporate existence for two years beyond dissolution.⁶⁸ A dissolved California corporation continues to exist only to wind up its affairs, and after dissolution former shareholders may be sued in the name of the corporation upon any cause of action held against the corporation prior to dissolution.⁶⁹ The effect of this statute on the right to pursue a cause of action in equity after dissolution is thus brought into question. Did the California legislature intend to provide an exclusive remedy only for causes of action accruing prior to dissolution, thus barring any remedy for actions arising thereafter?

C. Interaction Between Statutes and Equitable Remedies

Support exists for the view that statutes have supplemented rather than replaced the "trust fund" theory for claims arising prior to dissolution.⁷⁰ This is particularly true with statutes that provide for a post-dissolution continuance period but that require the distribution of assets to shareholders upon dissolution.⁷¹ Known claimants of a corporation may be protected by statutory provisions requiring that they receive mailed notice of the pending dissolution.⁷² After dissolution, but before the expiration of the continuation period, unknown claimants must recover their judgments from the shareholders because presumably nothing is left in the corporation to recover.⁷³

Section 2010(a) of the California Corporations Code expressly pro-

65. *Id.*

66. See notes 85-93 *infra*.

67. See generally CAL. CORP. CODE §§2010, 2011.

68. Compare CAL. CORP. CODE §§2010, 2011 with MODEL BUS. CORP. ACT §105, ¶1 (1971).

69. See CAL. CORP. CODE §2010(a).

70. See Henn & Alexander, *supra* note 34, at 894.

71. See, e.g., MASS. GEN. LAWS ANN., c. 156B, §102; MODEL BUS. CORP. ACT §105, ¶1 (1971).

72. See Henn & Alexander, *supra* note 34, at 894-95 n.162.

73. See Henn & Alexander, *supra* note 34, at 894-95 n.162.

hibits the existence of a corporation beyond the winding up period,⁷⁴ except for the purpose of being sued in quiet title actions.⁷⁵ Because California requires that corporate existence terminate, Section 2011(a) provides a codified version of the “trust fund” theory by allowing shareholders to be sued for an indefinite period of time following dissolution.⁷⁶ This remedy is available to persons with causes of action arising *prior* to dissolution, thus eliminating many claims that develop *after* dissolution—specifically, post-dissolution claims arising from injuries caused by defective products.⁷⁷

Courts use caution in the area of post-dissolution claims and will usually grant a defendant’s motion to quash service of process unless the statute clearly authorizes suit against the corporation or its former shareholders. The discussion which follows examines judicial interpretation of post-dissolution continuance statutes when a cause of action arises subsequent to dissolution.

1. Judicial Interpretation of Corporate Continuance Statutes

Generally, the drafters of corporate dissolution statutes have ignored the problem of post-dissolution claims.⁷⁸ Apparently courts have not applied the “trust fund” theory to post-dissolution products liability claims, although there is no reason suggested for not using the theory in those instances if it does not conflict with the purposes of the statute.⁷⁹ Perhaps the continuance statutes were enacted merely to provide a remedy at law, thereby saving a claimant the trouble of proving to the court that, before filing the equitable claim, all legal remedies either did not exist or had been exhausted.⁸⁰ In this respect legislatures may have had no intention to preempt the applicability of the “trust fund” theory.⁸¹ On the other hand, statutes similar to the Model Act specifically allow plaintiffs to bring actions existing *prior* to dissolution and thus raise the question of whether the drafters merely provided a codification of equitable principles or intended to preclude post-dissolution

74. See CAL. CORP. CODE §2010(a).

75. See *id.* §2011(c).

76. See *id.* §2011(a).

77. See *id.*

78. See Henn & Alexander, *supra* note 34, at 896; see also FLETCHER, *supra* note 18, §8141 which contains only one paragraph discussing the liability of dissolved corporations for post-dissolution claims.

79. See Wallach, *supra* note 34, at 331. See also CAL. CORP. CODE §2011(a) (use of the trust fund theory for post-dissolution claims is precluded in California because the statute allows service of process on shareholders only for pre-dissolution causes of action).

80. See Wallach, *supra* note 34, at 331. The claimant would probably have to win a judgment against the dissolved corporation and then attempt to execute against the corporation’s property without successfully recovering completely. *Id.*

81. See Wallach, *supra* note 34, at 331.

claims.⁸² Few cases are reported that have allowed a plaintiff to sue a dissolved corporation for a post-dissolution claim when the state statute specifically provides that a cause of action existing prior to dissolution may be brought.⁸³ Perhaps this is because traditionally statutes are construed narrowly when a liberal interpretation might lead to a questionable result.⁸⁴ A federal district court in *Chadwick v. Air Reduction Co.*⁸⁵ allowed a dissolved corporation to be sued on a claim arising after dissolution pursuant to the Ohio statute⁸⁶ permitting a remedy for all claims *which would have arisen* against the corporation but for dissolution of the corporation.⁸⁷ The court distinguished the Ohio statute from the Model Act and others like it by stating that the Model Act clearly was intended to allow only pre-dissolution claims against a dissolved corporation.⁸⁸ It was the opinion of the court that the Ohio statute intentionally departed from the Model Act and that the statute should be accorded its full meaning.⁸⁹ The court interpreted the phrase “[a]ny claim existing or action or proceeding pending by or against the corporation” as sufficiently broad to include all pre-dissolution torts,⁹⁰ “action or proceeding” as referring to pending litigation, and “claim” as connoting a cause of action not yet filed;⁹¹ therefore, the court concluded that “a claim which would have accrued against it” would be meaningless unless it applied to post-dissolution claims.⁹² The court also held that the intentional inclusion of “any claim” inferred a potential for liability beyond those incurred as part of the winding up process.⁹³

2. *Judicial Interpretation of Corporations Code Sections 2010(a) and 2011(a)*

The California dissolution statute makes no mention of post-dissolu-

82. See notes 104-119 and accompanying text *infra*.

83. There are certain situations in which a late suit may be filed. An Illinois Court of Appeal allowed a suit to be filed after the two year continuance period had expired because a parent corporation had induced the plaintiff to delay in filing claims against a subsidiary. *See generally* *Edwards v. Chicago & N.W. Ry. Co.*, 79 Ill. App. 2d 48, 223 N.E.2d 163 (1967). The Illinois Supreme Court suggested that a suit would not be barred after two years if the corporation's directors failed to notify known creditors of the intent to dissolve as required by statute. *See generally* *People v. Parker*, 30 Ill. 2d 486, 197 N.E.2d 30 (1964).

84. *See* *Henn & Alexander*, *supra* note 34, at 898.

85. 239 F. Supp. 247 (N.D. Ohio 1965).

86. *See generally id.*; OHIO REV. CODE ANN. §1701.88.

87. *See* 239 F. Supp. at 251.

88. *See id.*

89. *See id.* Compare OHIO REV. CODE ANN. §1701.88(A) with MODEL BUS. CORP. ACT §105, ¶1 (1971).

90. *See* 239 F. Supp. at 251.

91. *See id.*

92. *See id.*

93. *See id.*

tion claims.⁹⁴ The statute does, however, extend corporate existence for the time necessary to wind up its affairs.⁹⁵ Plaintiffs have urged that winding up provisions similar to Section 2010(a) and provisions similar to Section 2011(a), which subject shareholders to suit in the name of the corporation after dissolution, be interpreted to allow suits against dissolved corporations and their shareholders for causes of action arising after dissolution.⁹⁶ These arguments shall now be examined individually.

a. The "Winding Up" Provision—California Corporations Code Section 2010(a)

California courts interpret the winding up provision under Corporations Code Section 2010(a) as limiting upon dissolution the power of the corporation to contract or conduct business except as necessary to bring an end to its existence.⁹⁷ Although an argument has been made that defending against suits accruing after dissolution is a part of the winding up of corporate affairs,⁹⁸ no reported California case has tested this assertion. The issue has been reached, however, in a case involving the Iowa corporate continuance statute that includes a "winding up" provision similar to the provision found in Section 2010(a) of the California Corporations Code.⁹⁹ In *Bishop v. Schield Bantam Company*,¹⁰⁰ the plaintiff argued that the language "otherwise winding up its affairs" was intended to allow post-dissolution suits to be brought against the corporation.¹⁰¹ The court rejected this argument, reasoning that it was unlikely that within this clause the intent of the legislature was to allow an indefinite period of time within which the corporation and its officers and directors could be subject to suit.¹⁰² In the opinion of the court, to allow the continuing possibility of lawsuits was contrary to the purpose behind dissolution and winding up, producing the potential for "a continuous dribble of business activity contrary to the intent of the winding up provisions of the statute."¹⁰³

94. See CAL. CORP. CODE §§2010, 2011.

95. *Id.* §2010(a).

96. See notes 97-119 and accompanying text *infra*.

97. See generally *Bank of Alameda County v. McColgan*, 69 Cal. App. 2d 464, 159 P.2d 31 (1945).

98. See *Bishop v. Schield Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968).

99. See generally *Bishop v. Schield Bantam Co.*, 293 F. Supp. 94 (N.D. Iowa 1968).

100. *Id.*

101. *Id.* at 96.

102. *Id.*

103. *Id.*

b. California Corporations Code Section 2011(a)

Assuming that the winding up period under Section 2010(a) is held only to encompass business activity aimed at terminating the existence of the corporation and not including the possibility of asserting post-dissolution products liability claims, Corporations Code Section 2011(a) should be examined to determine whether a remedy is provided.¹⁰⁴ This Section, which codifies the common law "trust fund" theory, and allows former shareholders to be sued in the corporate name for causes of action arising prior to dissolution,¹⁰⁵ has recently been held to preclude service of process upon shareholders if suit arises after dissolution.¹⁰⁶

In *Beckwith v. Web Wilson Tools, Inc.*,¹⁰⁷ a Nevada judge granted a motion to quash service of process upon a former shareholder of a dissolved California corporation.¹⁰⁸ The plaintiff sought damages for the wrongful death of her husband, claiming that he was killed when an AC elevator unexpectedly opened and dropped a portion of a nine and five-eighths inch diameter well-casing pipe on him.¹⁰⁹ The elevator had been manufactured by a corporation, since dissolved.¹¹⁰ Plaintiff sued the defendant who had been a major shareholder of the corporation.¹¹¹ Service of process upon him was held invalid, however, because Section 2011(a) specifically states that causes of action arising prior to dissolution may be asserted against the former shareholders of a dissolved corporation, but the defendant's corporation had been dissolved prior to the accident.¹¹² Thus the plaintiff was left without a remedy.¹¹³ The plaintiff argued that it was unfair to leave an injured party without a remedy when the corporate assets, distributed for the benefit of shareholders upon dissolution, were completely insulated from subsequent products liability claims.¹¹⁴ The defendant responded that because Section 2011(a) permitted suit against former shareholders

104. See notes 105-107 and accompanying text *infra*.

105. See generally CAL. CORP. CODE §2011(a).

106. See notes 107-117 and accompanying text *infra*.

107. See Motion For Judgment on The Pleadings, *Beckwith v. Web Wilson Tools, Inc.*, Nos. 78-8757 and 79-3749 (Super. Ct., Washoe County, Nevada, filed May 6, 1980) (copy on file at the *Pacific Law Journal*).

108. See Order of Motion to Quash, *Beckwith v. Web Wilson Tools, Inc.*, No. 78-8757 (Super. Ct., Washoe County, Nevada, filed Aug. 13, 1981) (copy on file at the *Pacific Law Journal*).

109. See Brief of Plaintiff, *Beckwith v. Web Wilson Tools, Inc.*, Nos. 78-8757 and 79-3749 (Super. Ct., Washoe County, Nevada, filed June 10, 1981) (copy on file at the *Pacific Law Journal*).

110. See *id.*

111. See *id.*

112. See Order of Motion to Quash, *Beckwith v. Web Wilson Tools, Inc.*, No. 78-8757 (Super. Ct., Washoe County, Nevada, filed Aug. 13, 1981) (copy on file at the *Pacific Law Journal*).

113. See *id.*

114. See Brief of Plaintiff, *Beckwith v. Web Wilson Tools, Inc.*, Nos. 78-8757 and 79-3749 (Super. Ct., Washoe County, Nevada, filed July 23, 1981) (copy on file at the *Pacific Law Journal*).

upon causes of action arising prior to dissolution, by clear implication actions against shareholders arising after dissolution are barred.¹¹⁵ The defendant also cited the reasoning of the court in *Gonzalez v. Progressive Tool & Die Co.*¹¹⁶ that post-dissolution claims pose problems that should be resolved by the legislature and not the judiciary.¹¹⁷ If all courts give Section 2011(a) this same strict interpretation,¹¹⁸ a plaintiff may be left entirely without a remedy when there are no other "sellers" in the chain of distribution of the defective product or when there is no successor corporation upon which to place liability.¹¹⁹

PROVIDING A REMEDY FOR POST-DISSOLUTION PLAINTIFFS

There is a recognized need to provide a remedy for persons injured by defective products.¹²⁰ There is also a need to provide predictability and certainty for corporations and their shareholders upon dissolution.¹²¹ Under current law the balance between these interests rests on the side of dissolved corporations and their former shareholders. A plaintiff may have a remedy available if the dissolving corporation is "succeeded" by another corporation¹²² or if there are other sellers in the chain of distribution on which to place liability.¹²³ In those circumstances a plaintiff would not need to resort to an action against the dissolved corporation or its former shareholders.¹²⁴ Any remedy provided against a dissolved corporation, therefore, should be made avail-

115. See Brief of Defendant, *Beckwith v. Web Wilson Tools, Inc.*, Nos. 78-8757 and 79-3749 (Super. Ct., Washoe County, Nevada, filed Aug. 6, 1981) (copy on file at the *Pacific Law Journal*).

116. 455 F. Supp. 363 (E.D.N.Y. 1978).

117. *Id.* at 369.

118. In *North Am. Asbestos v. Superior Court*, 128 Cal. App. 3d 138, 179 Cal. Rptr. 889 (1982) the First District Court of Appeal held that California Corporations Code section 2010 does not apply to suits against dissolved foreign corporations. *Id.* at 143, 179 Cal. Rptr. at 891. The Court in this case denied a motion to quash service of summons made upon a trustee of a dissolved Illinois corporation when service was made in accordance with the requirements found in the Code of Civil Procedure sections 410.60, 416.20. Even though the suit was brought after the two-year continuance statute in Illinois had expired, under Illinois law the two year limitations period might be extended under certain circumstances.

119. See note 124 *supra*.

120. See *Nelson v. Volkswagen of America, Inc.*, 315 F. Supp. 1120, 1122 (D.C.N.H. 1970). See Massery, *supra* note 6, at 542.

121. See *Henn & Alexander, supra* note 34 at 911.

122. In 1977 the California Supreme Court extended products liability under tort principles to successors who acquired the assets of the corporation that originally manufactured the defective product. See generally *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). The rule before *Alad* stated that the purchaser did not assume the seller's liabilities unless (1) there was an express or implied agreement of assumption, (2) the transaction amounted to a consolidation or merger of the two corporations, (3) the purchasing corporation was a mere continuation of the seller, or (4) the transfer of assets to the purchaser was for the fraudulent purpose of escaping liability for the seller's debts. *Id.* at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578. The *Alad* court extended liability to all successor corporations that continue the business of the predecessor corporation. *Id.* at 33-34, 560 P.2d at 8, 136 Cal. Rptr. at 579.

123. See generally *Prosser, Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

124. See notes 122-123 *supra*.

able only in those instances when the plaintiff would be otherwise without a remedy. This section will explore possible solutions to the existing problem.

A. Extending Corporate Existence for a Time Certain

Section 105 of the Model Act recommends that corporate existence continue for two years beyond dissolution¹²⁵ but, like the California statute, it specifically provides a remedy only for actions held against the corporation prior to dissolution.¹²⁶ In contrast, the Massachusetts statute¹²⁷ extends corporate existence for three years without restricting the continuance period to pre-dissolution claims.¹²⁸ This approach provides relief for some plaintiffs but only if they are injured and file their claims within the specified time period.¹²⁹ Whether a statute of this nature would be helpful to potential products liability plaintiffs is questionable, however, because corporate continuance statutes were designed specifically to allow dissolving corporations to wind up their affairs rather than to provide a solution for potential products liability claims that may arise after the expiration of the continuance period.¹³⁰ Thus, for products liability purposes, a statute of this type is arbitrary at best.

A more helpful statute could be patterned after a statute of repose provision. Although California has not enacted a products liability statute of repose, date-of-sale statutes of limitations have been enacted in at least twenty-one states¹³¹ with the support of manufacturers and insurers.¹³² Statutes of repose retain the applicable inside statute of limitations dating from the time of the injury, the time of discovery of the injury, or the time the injury reasonably should have been discovered.¹³³ These statutes also include an outer time limit dating from the manufacture or sale of the product.¹³⁴ Claims accruing after the

125. See MODEL BUS. CORP. ACT §105, ¶1 (1971).

126. *Id.*

127. MASS. GEN. LAWS ANN., c. 156B, §102.

128. *Id.*

129. See *Gonzalez v. Progressive Tool & Die Co.*, 455 F. Supp. 363, 365 (1978) (unless suit is brought against a dissolved corporation within three years of dissolution, the corporation is deprived of its capacity to be sued).

130. MASS. GEN. LAWS ANN., c. 156B, §102 provides:

[A] dissolved corporation will continue to exist for a period of three years following dissolution for the purpose of presenting and defending suits by or against it and of enabling it gradually to settle and close its affairs, to dispose of and convey its property and to make distribution to its stockholders of any assets remaining after the payment of its debts and obligations.

131. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 588 (1981) [hereinafter cited as McGovern].

132. See Massery, *supra* note 6, at 535.

133. See Massery, *supra* note 6, at 536.

134. See Massery, *supra* note 6, at 536.

outside limit are barred.¹³⁵ While a statute of repose might unjustifiably limit a plaintiff's remedy¹³⁶ against a corporation not yet dissolved, a survival of remedy provision patterned after a statute of repose would supply more protection to persons who might be injured after dissolution than would a statute patterned after the Massachusetts provision. A recent study indicated that 97.3 percent of all products involved in products liability actions were purchased within six years of the plaintiff's injury.¹³⁷ A statute applying an inside statute of limitations, yet allowing service of process upon a corporation or the shareholders for up to six years beyond the date of sale if a corporation has dissolved, would provide most plaintiffs with the opportunity to recover. If an injury occurs beyond the time limit, however, neither a statute patterned after the Massachusetts provision nor a date-of-sale statute would permit a recovery. A provision requiring unlimited liability is necessary to afford all persons who might be injured by a product after dissolution an opportunity to recover.

B. Allowing the Corporation To Be Revived for Suit Indefinitely

A dissolution statute patterned after the statute adopted in Ohio¹³⁸ would grant the greatest protection to potential victims of defective products. Under this type of statute, plaintiffs may sue in causes of action *which would have accrued*¹³⁹ but for dissolution, and thus a corporation would be subject to suit indefinitely unless a product liability statute of repose limits its applicability. Even absent direct recourse against former shareholders, any judgment presumably would have to be satisfied by the former shareholders pursuant to the "trust fund" theory.¹⁴⁰ An amendment to Section 2011(a) is needed to allow a corporation to be sued or its shareholders to be sued in the name of the corporation for causes of action arising prior to dissolution or which would have arisen but for dissolution. Corporate investors who would otherwise be liable to plaintiffs could be protected if corporations that manufacture or distribute potentially harmful products are required to insure against potential suits before the corporation dissolves, and if insurance is provided for that purpose.¹⁴¹ This would allow a corpora-

135. See Massery, *supra* note 6, at 536.

136. See generally Massery, *supra* note 6, at 536. For a detailed account of the statutes of repose enacted throughout the country see generally McGovern, *supra* note 131.

137. See Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C. L. REV. 663, 664 n.10 (1978).

138. OHIO REV. CODE ANN. §1701.88.

139. See *id.*

140. See Wallach, *supra* note 34, at 331 (there is no indication in the underlying nature of the theory to suggest it would not be applicable in such cases).

141. Although a comprehensive discussion of post-dissolution products liability insurance is

tion to wind up its affairs completely and provide a remedy to persons who might be injured years after the corporate existence has been extinguished.

CONCLUSION

The law governing both corporate law and products liability principles has been evolving separately for over two centuries. The courts have been developing avenues of recovery for plaintiffs injured by defective products. State legislatures have established laws governing corporate dissolution and setting forth the length of time and purposes for which a corporation may continue to exist after dissolution. This comment has examined the problem presented when a corporation dissolves before a product it has manufactured or sold actually causes injury. California Corporations Code Sections 2010 and 2011 preclude any recovery for injuries received after dissolution. Section 2010(a) provides that a corporation continues to exist only for the purpose of winding up its affairs. Section 2011(a) states that shareholders may be sued in the name of the corporation after dissolution upon causes of action arising prior to dissolution. Interpretation of these sections has led to judicial conclusions that the legislature only intended to provide a remedy for pre-dissolution claims. An amendment to the Corporations Code is needed to ensure that persons injured after dissolution by defective products manufactured or distributed before dissolution will have a remedy. Of the three alternatives discussed, a provision requiring a corporation to completely dissolve but permitting it to be revived for suit upon injury allows the corporation to complete its business and wind up its affairs while providing a remedy to those who might later be injured by one of its products. A statute of this type would strike the best balance between the potentially conflicting interests of a dissolved corporation and a person subsequently injured by a defective product.

Theresa A. Nuhn

beyond the scope of this comment, providing and requiring insurance for certain dissolving corporations is offered as a possible solution to "trust funding" problems that could develop if a claimant is forced to trace the assets of the corporation into the hands of the former shareholders. The greater the period of time that elapses between dissolution and injury, the greater the difficulty in tracing the assets and the greater the likelihood that the "trust fund" held by the shareholders will be depleted. In these situations, the availability of insurance would guarantee the existence of a continuing fund from which successful post-dissolution plaintiffs could draw, and yet would alleviate the possible hardship to shareholders who have long since depleted the assets received upon dissolution.