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Feature Article

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Schrödinger's Case Law: The Life and Death of Claims Against Dissolved Corporations

In 1935, Austrian physicist Erwin Schrödinger devised a thought experiment that has come to be known popularly as "Schrödinger's Cat." Without delving too deeply into the complex quantum mechanics implicated by the experiment, the cultural legacy of Schrödinger's Cat is the idea that, something may "simultaneously" be two otherwise mutually exclusive things. Schrödinger contemplated that a cat, in a sealed box, depending upon the outcomes of certain unobservable and unpredictable events, may be understood to be *simultaneously* alive and dead—but when the box is opened, and the events' outcomes (or lack thereof) observed, the cat's life or death would be conclusively determined, as the cat's vital state could not be "both" or "neither." *See* Melody Kramer, *The Physics Behind Schrödinger's Cat Paradox*, NAT'L GEOGRAPHIC (Aug. 14, 2013), https://www.nationalgeographic.com/news/2013/8/130812-physics-schrodinger-erwin-google-doodle-cat-paradox-science/ (last visited Sept. 17, 2019); *see also* Paul Halpern, *Schrödinger's Cat Lives On (Or Not) at the Age of 80*, PBS (Nov. 10, 2015), https://www.pbs.org/wgbh/nova/article/schrodingers-cat-lives-on-or-not-at-the-age-of-80/ (last visited Sept. 17, 2019).

While the quantum mechanics contemplated by Schrödinger have limited application to Illinois law (and their comprehension likely far beyond my intellectual reach), the duality enjoyed by Schrödinger's Cat is an apt metaphor for the current state of Illinois law as it relates to suits against dissolved corporations.

According to the National Federation of Independent Businesses, on average, one third of American small businesses will not survive the first two years, half do not survive the first five years, and two thirds fail in the first ten years. *See* NFIB, *Why Do Small Businesses Fail?* (Mar. 20, 2017), https://www.nfib.com/content/resources/start-a-business/why-do-small-businesses-fail/ (last visited Sept. 17, 2019) (citing figures provided by Bureau of Labor Statistics, Business Employment Dynamics). Accordingly, litigation involving dissolved corporations occurs with anticipated regularity. While the corporate entity involved in the suit may not have active corporate existence, there may be insurance obligations, indemnities, or other liabilities assumed by the previously-extant corporation that attract litigation interest. However, the line establishing whether a corporation is "alive" or "dead" has dramatically changed in the last few years, perhaps to the point where attorneys may not even realize that the legal terrain has shifted beneath their feet.

For decades, plaintiffs' remedies against dissolved corporations have been preserved *beyond* corporate termination by 805 ILCS 5/12.80 (Section 12.80), which permitted actions against dissolved corporations so long as the action was commenced within five years after the date of dissolution.

The leading decision interpreting Section 12.80 is *Pielet v. Pielet*, 2012 IL 112064 (2012). In *Pielet*, the plaintiff invoked Section 12.80 in support of a breach of contract action against corporate defendants who had acquired the assets of a dissolved scrap metal business. *Pielet*, 2012 IL 112064, ¶¶ 3, 13-14. The Illinois Supreme Court conducted a comprehensive examination of Section 12.80 and ultimately held that the breach of contract claim failed as a matter of law because the cause of action did not accrue until after the corporation dissolved. *Id.* ¶ 49. Given the *Pielet* holding,

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potential plaintiffs with claims against struggling (but not yet dissolved) corporations faced a race to the courthouse to assert their claims before the corporate defendant's dissolution. Since *Pielet* was decided in October 2012, it has been cited in nearly 220 decisions across Illinois state and federal courts.

However, on July 21, 2014, the Illinois General Assembly amended Section 12.80, with the revisions taking effect on January 1, 2015. The version of the statute that had been operative from 2001 through 2014 (*i.e.*, the one that the Illinois Supreme Court examined in *Pielet*) read, in relevant part:

> The dissolution of a corporation . . . shall not take away nor impair any civil remedy available to or against such corporation, its directors, 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 five 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 language of the amended statute is similar, but differs in a way that dramatically expands Section 12.80's scope, profoundly impacting the vitality of claims against dissolved corporations. The new statute, effective as of July 1, 2015, reads, again, in relevant part (with the new added language emphasized for effect):

> The dissolution of a corporation . . . shall not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability **accrued or** incurred, **either** prior to, **at the time of, or after** such dissolution if action or other proceeding thereon is commenced within five 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. **This provision does not extend any applicable statute of limitations.**

By this amendment, the "race to the courthouse" effectively ended, and plaintiffs with claims against a dissolved corporate defendant may still bring them up to five years after corporate dissolution (assuming that any applicable statute of limitation is not offended) regardless of whether the claim accrued before, during, or after the defendant's dissolution.

Despite this tectonic shift in Illinois law, there has been very little judicial commentary since the statute's amendment. Even more perilously, *Pielet* remains good law, as it has neither been overturned nor been criticized in any published decision. Only two cases could even be considered "negative treatment," and neither of them expressly overrule or otherwise invalidate the court's findings in *Pielet*. *See Certain Underwriters at Lloyd's London v. Burlington Ins. Co.*, 2015 IL App (1st) 141408, ¶¶ 20-21 (1st Dist. 2015) (cited *Pielet*, but did not address the statutory change); *see also McGinley Partners, LLC v. Royalty Properties, LLC*, 2018 IL App (1st) 171317, ¶ 40 n.6 (1st Dist. 2018) (casually noting the statutory change in a footnote).

When statutes are enacted after judicial opinions are published, the legislature is presumed to act with knowledge of the established case law and the prior judicial interpretations there made. *People v. Bailey*, 375 Ill. App. 3d 1055, 1061 (2d Dist. 2007) (citing *People v. Hickman*, 163 Ill. 2d 250, 262 (1994) and *Carver v. Bond.Fayette/Effingham Reg'l Bd. of School Trustees*, 146 Ill. 2d 347, 353 (1992)).

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Given the current co-existence of valid, yet contradictory statutory and judicial authority, *Pielet*, much like Schrödinger's ill-fated (or perhaps perfectly fine?) feline, remains both alive and dead—uncompromised by any case law, yet *Pielet*'s entire underlying principle has already been completely gutted by the Illinois General Assembly.

In July 2019, a case pending in the 18th Judicial Circuit Court, DuPage County saw this duality play out in a dissolved corporate defendant's motion to dismiss the plaintiff's indemnity claim against it. The dissolved corporate defendant contended that the indemnity claim at issue did not accrue until after the corporation's 2015 dissolution, and argued that per *Pielet*'s "comprehensive analysis" of Section 12.80, the plaintiff's claim was barred as a matter of law and subject to dismissal.

However, the plaintiff there responded that the statutory amendment to Section 12.80 went into effect on January 1, 2015; several months *before* the defendant's corporate dissolution. Therefore, the *Pielet* "comprehensive" analysis was legally empty because *Pielet* examined statutory language that was no longer operative. The trial court agreed with the plaintiff; finding that the indemnity claim retained its vitality under Section 12.80 as it was brought within five years of the defendant's corporate dissolution, and that the amended statute permitted such claims to proceed.

The revision of Section 12.80 has profound consequences for both the defense and plaintiff's bar and will serve as a trap for the unwary or uninformed. Had the defendant in the DuPage County matter reviewed Section 12.80's most recent (and therefore, operative) iteration, the time and client cost expended on the unsuccessful dispositive motion would have been avoided. Similarly, attorneys for plaintiffs (or counter-plaintiffs) with an incomplete comprehension of the interplay between *Pielet* and the amended Section 12.80 may prematurely bury otherwise viable claims. This knowledge is crucial, because common law civil procedure principles dictate that unlike cats, claims and motions do not have nine lives.

About the Author

Michael P. Sever is partner at *Foran Glennon Palandech Ponzi & Rudloff, P.C.*, where he concentrates his practice in commercial litigation, construction litigation, casualty litigation, subrogation, products liability, and professional liability defense. Mr. Sever has represented companies and design professionals in cases involving construction negligence, contract enforcement, trucking accidents, premises liability, and personal injury defense. Mr. Sever also represents the world's largest collector car auction in a variety of matters, including dispute resolution, contract enforcement, litigation, and trademark registration. Mr. Sever earned his B.A. from Marquette University in 2006 and his J.D. from Saint Louis University School of Law in 2010. He is admitted to practice in the state courts of Illinois and Wisconsin, as well as the United States District Courts for the Northern District of Illinois, and the Eastern District of Wisconsin.

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