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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF KRAFFT-MURPHY COMPANY, INC., a Dissolved Delaware Corporation	:	Case No.: 85,2013
ROBERT F. ANDERSON, *et al.*, Petitioners/Intervenors Below, Appellants	:	
v.	:	
KRAFFT-MURPHY COMPANY, INC., Respondent Below, Appellee	:	

CORRECTED OPENING BRIEF OF PETITIONERS BELOW/INTERVENOR BELOW, APPELLANTS ROBERT F. ANDERSON, *ET. AL.*

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NATURE OF PROCEEDINGS

The Appellants/Petitioners-Below are hundreds of asbestos claimants represented by the Law Offices of Peter G. Angelos, PC. These claimants brought suit in the Court of Chancery of Delaware in the name of 31 representative claimants against Appellee/Respondent-Below, Krafft-Murphy Company, Inc. (Hereafter "Krafft-Murphy"), seeking the appointment of a receiver on behalf of Krafft-Murphy, a dissolved Delaware corporation. (A. 016.) During the course of these proceedings, claimants represented by the Law Offices of Brown & Gould, LLP intervened without opposition. (A. 315, 328.) For the purposes of this appeal, the original Petitioners represented by the Law Offices of Peter G. Angelos, P.C. and the Intervenors-Below will be collectively referred to as "Claimants" or "Petitioners" unless otherwise noted.

The redress sought by the Claimants was the appointment of a receiver under 8 Del. C. §279, to revive Krafft-Murphy's amenability to suit. The grounds for the request of the Claimants for the appointment of a receiver was evidence of unexhausted insurance liability policies, which Krafft-Murphy freely conceded in these proceedings do exist. Competing Motions for Summary Judgment and Judgment on the Pleadings were filed by the parties, and the Court of Chancery granted Krafft-Murphy's Motion for Summary Judgment and denied Petitioners' Motion for Judgment on the Pleadings on February 4, 2013. (A. 368, 396.) Petitioners' noted an appeal to this Court on February 27, 2013. (A. 488.)

SUMMARY OF THE ARGUMENT

1. The Court of Chancery erred in finding that the temporal planning period described under 8 Del. C. §§280-282 limits the application of 8 Del. C. §279. The ten year time period described under §281(b) merely sets temporal parameters for directors during the dissolution process to set aside funds to satisfy future claimants before it can make distribution of the distributable assets of the corporation to the shareholders. The statute does not limit the liability of the corporation itself, but rather lays out a framework under which directors can safely make distributions and shareholders can safely receive distributions without threat that they will be held personally liable toward the corporation's creditors. Section 279 describes the remedy for unsatisfied creditors for their claims against the corporation itself, and that statute allows for the appointment of a receiver "at any time." Since it is undisputed that there are unexhausted insurance policies still in existence in the name of Krafft-Murphy, Delaware law makes clear that the appointment of a receiver is necessary so that Krafft-Murphy's creditors can pursue their claims against the corporation.

2. The Court of Chancery erred in deciding that the Petitioners' request for a receiver for claimants who filed claims more than three years but less than ten years after Krafft-Murphy's dissolution were not justiciable. Delaware law makes clear that a corporation has no power to continue to wind up its affairs after the three year winding-up period expires. The Court of Chancery's reliance upon assurances made by Krafft-Murphy that it would voluntarily continue to litigate claims filed in the seven year gap was error because Krafft-Murphy can no longer wind up its affairs.

FACTUAL BACKGROUND

The facts of this appeal are largely undisputed. Krafft-Murphy was incorporated under the laws of Delaware in 1952. (A. 27-37.) Based primarily in the Washington, D.C., Maryland and Virginia areas, Krafft-Murphy engaged in the business of spray insulation. (A. 41-43.) Sometime during the late 1950's , Krafft-Murphy began applying a product called Sprayed Limpet Asbestos, which Krafft-Murphy obtained through the years via sublicense agreements from Keasbey and Mattison Company, Armstrong Contracting and Supply Company and, later, Atlas Asbestos Company. (A. 42-47, 95-99, 101-104, 122-126.) Sprayed Limpet Asbestos was a dusty, asbestos-containing insulation material. Its installation was a dusty process that required that the dry Limpet product be hand fed into a hopper, sprayed out of a nozzle, and cleaned up after the installation process was complete. (A. 80-86, 95-98, 101-104, 106-120.)

These activities exposed Krafft-Murphy to significant asbestos liabilities in Washington, D.C. and surrounding jurisdictions. Krafft-Murphy has been sued in asbestos lawsuits as early as 1989 in various courts in the region. (A. 60, 76-77.) The Petitioners in this proceeding have all filed lawsuits claiming that Krafft-Murphy caused their asbestos-related injuries because they were exposed to asbestos products supplied by and/or applied by employees of Krafft-Murphy during its years of operations. The Law Offices of Peter Angelos alone represents hundreds of plaintiffs with open asbestos claims pending against Krafft-Murphy. Additionally, new claims against Krafft-Murphy continue to be filed to this day.

Over the last decade, Krafft-Murphy has continually accepted service of process and filed answers to the complaints, by and through its counsel Neil MacDonald, who has been Krafft-Murphy's attorney over the last ten years. (A. 156-209.) Krafft-Murphy has actively litigated in the various courts it has been sued in for the past ten years. Krafft-Murphy has propounded discovery in the form of interrogatories, attended frequent depositions, filed dispositive motions praying for summary judgment, and negotiated for voluntary dismissals in a large number of cases filed by the Law Offices of Peter G. Angelos over the past ten years. (A. 156-269.) Additionally, Krafft Murphy has entered into settlement negotiations with counsel for the claimants and issued settlement checks in exchange for signed releases executed by the affected plaintiffs. (A. 271-280.) Over the past decade, Krafft-Murphy has acted, in all regards, in the same exact manner as every other viable defendant participating in asbestos litigation in the region for the past ten years, and at no time prior to 2010 raised amenability to suit as a defense or otherwise indicated to counsel for the Petitioners that it was no longer legally in existence.

Completely unbeknownst to the plaintiffs that were filing suit against Krafft-Murphy was the fact that Krafft-Murphy had formally dissolved on July 30, 1999. (A. 39-40.) Instead, Krafft-Murphy quietly shut its doors and continued to litigate its asbestos liabilities without letting on to anybody that it no longer was in corporate existence. It has been undisputed in this litigation that, in formalizing its dissolution, Krafft-Murphy did not employ the dissolution procedures under 8 Del. C. §280 by giving notice to its creditors and seeking approval from the Court of Chancery of

Delaware for a plan of dissolution, despite the fact that Krafft-Murphy was facing extensive tort liabilities at the time of its dissolution. There also has been no indication that Krafft-Murphy set up a successor entity, as described under 8 Del. C. §280(e), for the winding-up of its continued asbestos liabilities.

In fact, counsel for the Petitioners were completely unaware of Krafft-Murphy's status as a dissolved corporation until January 5, 2010, in a case being pursued by Brown & Gould, where Krafft-Murphy suddenly filed its first Motion to Dismiss, based upon its dissolution ten years prior. (A. 315-319.) The argument in favor of dismissal was premised upon the argument that Krafft-Murphy's status as a dissolved Delaware corporation made it unamenable to suit. Counsel for Krafft-Murphy would not file any motions against clients of the Law Offices of Peter G. Angelos until July 26, 2010, when Krafft Murphy filed a Motion to Dismiss in Buch v. John Crane Houdaille, Inc, Baltimore Circuit Court Case No. 24X08000414. (A. 151-154.) In fact, counsel for Krafft-Murphy did not notify any attorney in the Law Offices of Peter Angelos of its newly utilized defense, until just a few weeks prior to the filing of the Buch motion. (E. 19, 361.) Krafft Murphy has continued to file similar motions in cases filed against it by the Petitioners since the filing of the initial motion to dismiss. In each case, Krafft-Murphy has targeted newly filed claims that were filed more than ten years following Krafft-Murphy's dissolution. No motions to dismiss have been filed in any other cases.

Krafft-Murphy still holds unexhausted liability insurance contracts that cover its continued asbestos liabilities. This fact has been conceded by Krafft-Murphy in the

immediate proceedings. (A. 365-367.) Indeed, disputing the existence of liability insurance in this case would present a difficult challenge, since Krafft-Murphy has continued to actively litigate the many asbestos claims pending against it for over a decade following its dissolution. These settlements are memorialized in checks drawn off of an account maintained by Neil MacDonald's law office, and Krafft-Murphy has admitted in its Answer that those same settlements were funded by the insurers of Krafft-Murphy. (A. 271-280, 358, 362.)

But even without this concession, the Petitioners Below had evidence showing the existence of liability insurance policies covering Krafft-Murphy's asbestos liabilities. Through the litigation process, Krafft-Murphy has made admissions in the form of court filings and letters to the Law Offices of Peter G. Angelos, clearly establishing that Krafft-Murphy owns insurance policies covering its asbestos liabilities. On June 5th, 1992, Krafft-Murphy filed Answers to Interrogatories in In re Baltimore City Personal Injury and Wrongful Death Cases, Cons. No. 89236704 in the Circuit Court for Baltimore City, admitting that it continuously carried liability insurance from January 1, 1960 until July 2, 1991, and describing the coverage limits. (A. 282-285.) More recently in Sammartino v. Various Defendants, CA No. 09-73800-ER, Krafft-Murphy answered interrogatories making admissions that were substantially the same as those made in the Baltimore City interrogatories. (A. 60- 73-74.) The time periods described in the Answers to Interrogatories cover the time periods that Krafft-Murphy used Sprayed Limpet Asbestos. Over the last decade, Krafft-Murphy has settled a variety of cases with the Law Offices of Peter G. Angelos.

In at least two of those settlements, Mr. MacDonald wrote letters to the Law Offices of Peter G. Angelos on March 23, 2006 and March 17, 2009, making specific references to the insurers of Krafft-Murphy. (A. 278-280, 287-289.) Those letters referenced settlement monies being paid to the settling claimants by the insurers. One of those letters actually contained a copy of a check dated January 12, 2009 written off of an account held by CNA that had been previously tendered to one claimant. (A. 280.)

On December 6, 2010, clients of The law Offices of Peter G. Angelos, P.C. filed a Verified Petition for the Appointment of a Receiver for a Dissolved Corporation Pursuant to 8 Del. C. §279. (A. 16.) The Petition sought the appointment of a receiver for Krafft-Murphy for the benefit of all claimants represented by the Law Offices of Peter G. Angelos with outstanding claims filed against Krafft-Murphy more than three years after Krafft-Murphy's dissolution, and future clients who discover asbestos claims against Krafft-Murphy. The Petition mirrored the relief sought in a case recently decided by the Court of Chancery of Delaware named In the Matter of Texas Eastern Overseas, 2009 WL 4270799 (Del. Ch. 2009), and affirmed by this Court, In the Matter of Texas Eastern Overseas, 998 A.2d 852 (Del. 2010), where the appointment of a receiver was determined to be appropriate under 8 Del. C. §279 where there was evidence of unexhausted liability insurance policies covering the tort liabilities of a dissolved Delaware corporation.

On February 28, 2011, Krafft-Murphy filed a Motion to Dismiss the Verified Petition. (A. 290.) Krafft-Murphy argued that it was entitled to dismissal because the

Petition did not state a cause of action against Krafft-Murphy. Since Krafft-Murphy limited its filings for dismissals in the underlying actions to cases filed more than ten years following its dissolution, it was anticipated that the grounds for Krafft-Murphy's defense to the action would focus upon that class of claimants. Instead, Krafft-Murphy's primary argument asked for the wholesale reversal of Texas Eastern Overseas on the basis that evidence of unexhausted insurance policies could not trigger the application of §279 more than three years following dissolution. Despite the fact that Krafft-Murphy contended that the three year winding-up period effectively cut off its insurer's liability under their contracts, it offered assurances to the Court of Chancery that it would, nonetheless, continue to voluntarily litigate claims brought more than three years and less than ten years after Krafft-Murphy dissolved. Krafft-Murphy additionally argued that §279's application was cut off by the ten year time period described under 8 Del. C. §§280-282, which lays out a temporal framework for directors to determine how much money to set aside for future creditors before making any distributions. (A. 292-314.)

The Court of Chancery denied Krafft-Murphy's Motion to Dismiss, finding the Petitioners sufficiently alleged a cause of action. (A. 329-357.) In doing so, the Court specifically held that the temporal time periods laid out under 8 Del. C. §§280-282 did not limit the ability of a party to seek the appointment of a receiver at any time under §279. Specifically, it held that §§280-282 "is more logically understood as limiting the scope of the corporate obligation being undertaken and setting a statutorily-prescribed time horizon for directors to address when fulfilling their duties under

§281(b)." (A. 354.)

On August 1, 2012, Krafft-Murphy filed a Motion for Summary Judgment. (A. 367.) Petitioners responded with a competing Motion for Judgment on the Pleadings. (A. 396.) The Petitioners' Motion for Judgment was based upon the rule of law laid out in In the Matter of Texas Eastern Overseas, 2009 WL 4270799 (Del. Ch. 2009), aff'd., 998 A.2d 852 (Del. 2010). Petitioners argued that they were entitled to the appointment as a matter of law based upon Krafft-Murphy's concession that it had insurance policies that covered its asbestos liabilities. Krafft-Murphy's Motion for Summary Judgment was filed on the same grounds as it filed its Motion to Dismiss, arguing for the reversal of Texas Eastern Overseas and arguing that §§280-282 limited corporate liability.

On February 4, 2013, the Court of Chancery granted Krafft-Murphy's Motion for Summary Judgment and denied Petitioners' Motion for Judgment. (A. 464-487.) In doing so, it reversed its previous holding that §§280-282 do not limit the application of §279 and found that §281(b) prohibited suits against a corporation more than ten years after dissolution. With regard to the Petitioners' claims that were filed less than ten years after dissolution, the Court of Chancery held that Krafft-Murphy's assurances that it would continue to litigate that class of plaintiffs, despite the fact that it had dissolved and the three year winding-up period had expired, rendered the Petitioners' claims moot.

ARGUMENT

INTRODUCTION

There is no dispute in this case as to two critical facts. First, that though dissolved for ten years, Krafft-Murphy continues to amass tort liability as a result of its participation in the asbestos trade during its years of operation because the disease processes that result from exposure to asbestos have a significant latency period. Second, it has been conceded that Krafft-Murphy is the named insured on liability insurance policies that have yet to be exhausted. Thus, the Petitioners' request for the appointment of a receiver is at its core a revival action, and the relief sought is the restoration of Krafft-Murphy's corporate existence, so that it is once again amenable to suit for the benefit of Krafft-Murphy's tort creditors.

The Court of Chancery's opinion at issue on this appeal in this case granting Krafft-Murphy's Motion for Summary Judgment and denying the Petitioners' Motion for Judgment on the Pleadings affects two different classes of Petitioners in two distinct ways. The original Petition requested that the Court of Chancery appoint a receiver on behalf of Krafft-Murphy, so that plaintiffs holding open asbestos claims against the dissolved corporation which were filed more than three years following Krafft-Murphy's dissolution could seek redress for their injuries. The basis of this request is that there is the acknowledged unexhausted liability insurance policies that continue to provide coverage for Krafft-Murphy's asbestos liabilities, and the whole purpose of filing this immediate action is to provide all claimants with a defendant amenable to suit so that Krafft-Murphy's continued asbestos liabilities can be resolved

until there are no more claimants or until the insurance policies are exhausted.

In granting Krafft-Murphy's Motion for Summary Judgment and denying the Petitioners' Motion for Judgment on the pleadings, the Court of Chancery specifically found that 8 Del. C. §§281(b) barred suit being brought against a dissolved Delaware corporation under 8 Del. C. §279 more than ten years following the corporation's dissolution. The Court of Chancery therefore denied the Petitioners' application for the appointment of a receiver for the benefit of claimants who brought suit more than ten years after Krafft-Murphy's dissolution.

But this holding merely scratched the surface of the Petitioners' action because the majority of the plaintiffs holding open claims against Krafft-Murphy filed their claims more than three years, but less than ten years, after Krafft-Murphy dissolved. With regard to those claims, Krafft-Murphy argued throughout the receivership proceedings that Texas Eastern Overseas should be reversed because the three year winding-up period described in 8 Del. C. §278 limits the application of 8 Del. C. §279, where unexhausted insurance policies are at issue. Inexplicably, and despite Krafft-Murphy's dogged insistence that a receiver could not be appointed more than three years after the dissolution of a Delaware corporation, Krafft-Murphy made continued assurances to the Court of Chancery that it would continue to participate in and pay out on asbestos claims filed more than three years and less than ten years after Krafft-Murphy's dissolution. In making these assurances, Krafft-Murphy never explained why it would voluntarily expose itself to litigation for tort liabilities that it so staunchly believed it was no longer liable for by virtue of the expiration of the three

year winding-up period. Regardless, the Court of Chancery accepted these assurances at face value and held that the claims brought within the seven year gap were not justiciable because of Krafft-Murphy's assurances.

In issuing these holdings, the Court of Chancery never applied the very case that Petitioners relied upon in the filing of their Petition or in the filing of their Motion for Judgment on the Pleadings. Nowhere in its opinion does the Court of Chancery discuss Texas Eastern Overseas, supra, beyond distinguishing its holding because the underlying claim brought against the dissolved corporation was filed less than ten years after the corporations dissolution. Since it would be impossible to fairly discuss the Court of Chancery's holding without also discussing the Delaware law addressing §§278-279, a review of the legislative scheme and Texas Eastern Overseas is necessary.

The Delaware statutory scheme relating to the dissolution of a Delaware corporation balances two primary concerns. The first is to ensure that the liabilities of the dissolving corporation are satisfied, and the second is to provide the directors and shareholders of the corporation with a mechanism to make distributions of the remaining assets without fear of being held personally liable for the debts and liabilities incurred by the dissolving corporation. In re RegO Co., 623 A.2d 92, 96-97 (Del. Ch. 1992).

8 Del. C. §278 provides that the existence of a dissolved corporation is automatically extended for the period of three years, so that the directors can wind up the affairs of the corporation. After the expiration of the three years, the corporate

entity ceases to exist and the directors and officers of the dissolved corporation are no longer entitled to act on its behalf. In re Citadel Industries, Inc., 423 A.2d 500 (Del. Ch. 1980). However, the three year winding-up period is not the absolute end of corporate existence under Delaware law. Section 279 states:

> When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor, stockholder, or any other person who shows good cause therefor, at any time, may ... appoint one or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and properties due and belonging to the corporation, with the power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, ... and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation.

(Emphasis added).

"Section 279 is directed to the restoration of corporate existence once terminated under Section 278 or otherwise by the action of its officers and directors." City Investing Company Liquidating Trust v. Continental Casualty Co., 624 A.2d 1191, 1195 (Del. 1993). Read together, §§278 and 279 work to ensure that the corporation "remains a viable entity authorized to possess property as well as sue and be sued incident to the winding-up of its affairs." Id. The operation of §279 is meant to prevent the use of the dissolution process to avoid corporate liabilities. Id. at 1196. The passage of time described under §278 is not the death of the corporation; rather, a dissolved corporation may continue its existence by and through a receiver appointed

by the Court of Chancery. According to the plain language of §279, the appointment of a receiver can happen "at any time."

In In the Matter of Texas Eastern Overseas, Inc., 2009 WL 4270799 (Del. Ch. 2009), the Court of Chancery of Delaware examined if 8 Del. C. §279 empowered a court to appoint a receiver where there was evidence that liability insurance existed covering the liabilities of a dissolved Delaware corporation. The court in Texas Eastern Overseas responded in the affirmative. The issues presented in Texas Eastern Overseas were two fold. First, it was the contention of Texas Eastern Overseas ("TEO") that the three-year time limitation in 8 Del. C. §278 acted to limit the application of 8 Del. C. §279 to the same three year time period. Second, the court had to consider whether the alleged insurance policies issued to a predecessor corporation, that would later merge with TEO, could support a petition seeking the appointment of a receiver for TEO.

In so ordering, the court expressly found that §278 did not place any time restrictions on the court's ability to appoint a receiver under §279. The court turned to prevailing Delaware case law and noted that "§278 must be read together with §279 as a part of a broader statutory scheme." Id. at *3. To explain this "broader statutory scheme," the Texas Eastern Overseas court turned to relevant Delaware case law.

In In re Citadel Industries, Inc., 423 A.2d 500 (Del. Ch. 1980), a potential creditor of a dissolved Delaware corporation attempted to extend the corporate existence of the corporation pursuant to §278, after the three year winding-up period had already expired. 8 Del. C. §278 allows for the extension of the winding-up

process, should the Court of Chancery deem the extension permissible. The Citadel court noted, however, that in order for the three year time period to be "continued," it still had to be in effect at the time that the Court of Chancery was petitioned. Id. at 504. After the expiration of the winding-up period, "it is 8 Del. C. §279 that comes into play." Id. The Citadel court described the operation of §§278-279 as follows:

> The statutory scheme seems to contemplate two situations, one where the dissolved corporation has continued legal existence and is capable of winding-up its affairs through its own officers and directors, and the other where the dissolved corporation can no longer wind up its business because it has no legal existence, or where it is unable or unwilling to do so through its own officers and directors. §278 applies to the first situation; §279 to the second.

Id. at 506-506.

In City Investing Company Liquidating Trust v. Continental Casualty Co., 624 A.2d 1191, 1195 (Del. 1993), the Supreme Court of Delaware discussed §279's application as part of the broader statutory scheme and noted that:

> a petition under Section 279 is directed to a restoration of corporate existence once terminated under Section 278 or otherwise by the action of its officers or directors. In tandem, [§§ 278 and 279] insure that whether a corporation is dissolved voluntarily by its shareholders or for nonpayment of taxes, it remains a viable entity authorized to possess property as well as sue and be sued incident to the winding-up of its affairs.

Id. at 1195. Based upon these two cases, the Texas Eastern Oversea's court concluded that §279 was not limited by the three year winding-up period.

Harned v. Beacon Hill Real Estate Co., 80 A. 805 (Del. Ch. 1911)

substantiates that holding. There, the appointment of the receiver was challenged on the grounds that a receiver could not be appointed beyond the three-year winding-up period laid out in §278. The Court of Chancery upheld the appointment of a receiver:

> The section is also amply broad as to time within which the Court of Chancery may appoint a receiver, for it says it may be done "at any time." This means what it says, and does not mean at any time within three years, as the petitioner's counsel contends, when he seeks to apply section 40 as limiting the time of corporate existence to three years after dissolution.

Id. at 808.

It is long established under Delaware law that §§ 278 and 279 act together to allow for a corporation's directors to wind up the affairs of the corporation and give a remedy to creditors of the dissolved corporation, if the directors are unwilling or unable to do so. Under §278, a dissolving corporation's corporate status is automatically extended for a period of three years for the winding-up of corporate affairs. After the expiration of the winding-up period, the corporation can be revived at any time by any party showing good cause under §279.

After settling that an action under §279 could be brought "at any time," the Texas Eastern Overseas court focused its inquiry on whether there was sufficient proof that TEO held some sort of asset so as to trigger the application of §279. Specifically, the Texas Eastern Overseas court had to determine if the appointment of a receiver was appropriate where there was proof that VIS held insurance coverage, but there was no proof that those policies would provide coverage to TEO's liabilities generally, or that those policies would cover the clean up costs of the pollution specifically. The Court

of Chancery held that a determination as to whether TEO was entitled to coverage under the alleged policies issued to VIS was not necessary in deciding whether to appoint a receiver for TEO. Instead, the Court adopted a "reasonably likely" test for determining the appropriateness of the appointment of a receiver, leaving the determination of the actual coverage available to TEO to be decided in a more appropriate forum. Id. at * 5, fn. 39. The TEO court stated that the inquiry under §279 should be whether "the appointment of a receiver is likely to be – in a broader sense -- worth the effort." Id. *5, n. 39. As far as the intricacies of the potential coverage, the court concluded that a proceeding brought under §279 was "not an efficient venue for resolving whether a receiver has any definitive claim to the asset." Id., n. 39.

As to the general question of whether insurance policies could trigger the application of §279, the TEO court observed:

> Although the Court focuses on the policies underlying the DGCL, the more significant policy question framed by this proceeding is whether insurers should be absolved of their indemnification obligations through the mere fortuity of the dissolution of the insureds (or their successors). The result here, if AmeriPride's substantive allegations regarding contamination of the Facility site are to be believed, would avoid the reordering of societal risk allocation from the insurers who are deemed to have accepted the risks (whether they foresaw the risks that would arise from CERCLA's enactment may be a different matter) to AmeriPride.

2009 WL 4270799 at *5 (Del. Ch. 2009). It reiterated this same sentiment on TEO's subsequent Motion for Stay, where the court emphasized: "As for the insurers, 8 Del. C. §278 is not a mechanism by which they may fortuitously and from time to time

avoid liability under policies that they issued." In re Texas Eastern Overseas, Inc. 2010 WL 318266 at *2 (Del. Ch. 2010).

Texas Eastern Overseas follows settled Delaware case law where it has been found that contingent contractual rights are property that are subject to the dictates of §279. In Addy v. Short, 89 A.2d 136 (Del. 1952), the argument before the Supreme Court of Delaware was whether a contingent right (in that case the right of reverter) remained alive and in the possession of a corporation no longer in existence for more than three years. The Supreme Court noted that a dissolved corporation can own property and be sued as a defendant under §279, and "any asset of the corporation, vested or contingent, not disposed of during the winding-up period may in a proper case be administered by the Court of Chancery under [§279] and the rights of creditors and stockholders protected." Id. at 140(emphasis added). The court reasoned that even contingent rights carry value and can be subject to the appointment of a receiver.

> Whatever may be the characteristics of a possibility of reverter it is entirely clear that it is an interest of some sort of land. True, it is wholly contingent, but so far as concerns the protection of its owner under the General Corporation Law it is none the worse for that. It is sufficient to say that it is a right, and one which under some circumstances may be a valuable right. As such it is brought within the reach of the statutes. It constitutes, in the language of Section [279], 'unfinished business' of the corporation.

Id. at 140 (emphasis added).

The Texas Eastern Overseas court then concluded that the appointment of a receiver was proper where there was evidence of insurance policies covering the

continued liabilities of the dissolved corporation, a holding affirmed by this Court. What is particularly interesting about the Texas Eastern Overseas decision was that the policies in question were not issued in the name of TEO, and there was a serious dispute as to whether the policies in question would actually provide coverage to TEO. However, the Court of Chancery held, and this Court agreed, that they still triggered the application of §279 as it was "worth the effort."

That hurdle was not present in these proceedings. It is not disputed here that Krafft-Murphy still owns liability insurance policies that cover its asbestos liabilities. Petitioners' Motion for Judgment asked that the Court of Chancery apply Texas Eastern Overseas to the undisputed facts of this case and find that the appointment of a receiver was appropriate as a matter of law. It is in this context that the Petitioners' filed their complaint and dispositive motion, and it is in this context that the Court of Chancery rendered its decision.

I. The Court of Chancery Erred in Finding that 8 Del. C. §281(b) Places a Ten Year Time Limitation Upon the Appointment of a Receiver as 8 Del. C. §279 Which By its Plain Terms Allows A Petition Requesting the Appointment of a Receiver To Be Filed "At Any Time."

A. Question Presented

Did the Court of Chancery err when it found that the temporal planning period described under 8 Del. C. §281(b) cuts off corporate liability after ten years and limits the application of §279 in the appointment of a receiver at that time where §279 by its clear terms allows for the appointment of a receiver "at any time?" (See A.412-418, 436-463,464-487).

B. Standard of Review

In determining a motion under Court of Chancery Rule 12 C for judgment on the pleadings, a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party. See Warner Communications, Inc. v. Chris-Craft Indus., Inc., 583 A.2d 962, 965 (Del.Super. 1989), aff'd without opinion, 567 A.2d 419 (Del.Supr. 1989). The court must take the well-pleaded facts alleged in the complaint as admitted. Revis v. Slocomb Indus., Inc., 765 F.Supp. 1212, 1213 (D. Del. 1991). A motion for judgment on the pleadings may be granted only when no material issue of fact exists and the movant is entitled to judgment as a matter of law. Fagnani v. Integrity Fin. Corp., 167 A.2d 67, 75 (Del. Super. 1960)

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute, and judgment may be granted as a matter

of law. Court of Chancery Rule 56. All facts are viewed in a light most favorable to the non-moving party. Hammond v. Colt Indus. Operating Corp., 565 A.2d 558, 560 (Del.Super.1989). Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances. Court of Chancery Rule 56 C. When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law. Wootten v. Kiger, 226 A.2d 238, 239 (Del.1967). The burden of demonstrating that the undisputed facts support its claims or defenses falls upon the moving party. Moore v. Sizemore, 405 A.2d 679, 680 (Del.1979).

C. Merits of Argument

Despite the clear and unequivocal language of §279 that creditors of a corporation can seek the appointment of a receiver "at any time", the Court of Chancery held that the §281(b) does that what it has been repeatedly held that §8 Del. C. §278 can not: i.e., limit the language in §279 allowing a petition for the appointment of a receiver to be filed at any time. But the terms of §§280-282 do not limit a creditor's ability to bring suit under §279; rather, §§280-282 are legislative directives that set up time periods in which directors must make provision for anticipated future claims against the corporation before any distributions can be made to shareholders. Accordingly, §§ 280-282 are focused upon distributable assets and the duties and obligations of directors in divvying up those assets between the creditors of a dissolving corporation and the shareholders of the corporation, two classes of people who may hold conflicting claims to the same assets.

The Petitioners in no way seek to disturb any potential distributions made to the shareholders of Krafft-Murphy Co. during the course of its dissolution and do not seek redress against any of the directors of Krafft-Murphy Co., so the provisions of §§280-282 are simply not implicated in this proceeding. The property in question in this case were insurance policies which are not distributable in nature and are forever destined to remain in the name of Krafft-Murphy. They therefore cannot come into play during the distribution process except to the extent that directors may very well rely upon the existence of insurance policies covering the liabilities of the corporation in determining the security to be laid aside for the creditors of a corporation amongst the distributable assets of the corporation.

Nonetheless, the Court of Chancery held that a receiver could not be appointed in this case because 8 Del. C. §§280-282 cut off corporate liability after ten years. The court reasoned that if §§280-282 provided a definitive cut off date of ten years for corporate liability, then no judgment could be attained against Krafft-Murphy for claims arising more than ten years. With no ability to obtain judgment against a corporation, the court concluded that the insurance contracts cannot be triggered and, therefore, cannot become property of the corporation. This reasoning mirrored the reasoning of Krafft-Murphy in its brief, arguing that the holding in Texas Eastern Overseas should be overruled. Nothing in the language of the legislative scheme suggests that the distribution statutes utilized by Krafft-Murphy in its dissolution bars suits against a corporation after a certain period of time. The statute protects directors and shareholders who comply with its strictures, but corporate liability is still defined

by 8 Del. C. §279, which can still be invoked at any time.

In the midst of dissolution, the directors of a corporation have two choices under 8 Del. C. §§280-282 in how they dispose of their duties to pay off the creditors of the corporation and make distributions to the shareholders: 1) give notice to the creditors of the corporation of the dissolution and have a plan for the satisfaction of the debts of the corporation (including claims not yet arisen within up to ten years following dissolution) approved by the Court of Chancery; or 2) forego notice and court approval, but still provide for the satisfaction of all debts and liabilities of the corporation likely to arise within ten years of its dissolution. See 8 Del. C. §§280-282.

Sections 280 and 281(a) lay out the specifications of giving notice to known creditors via publication and mailing and requires that a petition be filed with the Court of Chancery to establish the "amount and form of security" which will need to be posted in order to ensure that the creditors of the dissolving corporation are satisfied before the directors can make distributions to the shareholders. The debts to be satisfied under §§280 and 281(a) include future unknown claims likely to arise between five and ten years. Once the known creditors are paid and the security that the Court of Chancery orders is put in trust, §281(a) allows for the directors to make distributions to the shareholders, and the directors are protected from suit by creditors under 8 Del. C. §281(c) for making the distributions.

It is undisputed that Krafft-Murphy did not utilize 8 Del C. §§280 and 281(a) in dissolving. By default, Krafft-Murphy then was charged with complying with 8 Del. C. §281(b), which states:

> (b) A dissolved corporation or successor entity which has not followed the procedures described in § 280 of this title shall, prior to the expiration of the period described in § 278 of this title, adopt a plan of distribution pursuant to which the dissolved corporation or successor entity . . . (iii) shall make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the corporation or that have not arisen but that, based on facts known to the corporation or successor entity, are likely to arise or become known to the corporation or successor entity within 10 years after the date of dissolution. ... Any remaining assets shall be distributed to the stockholders of the dissolved corporation.

8 Del. C. §281(c) and §282 protects the directors and shareholders from liability when a corporation is dissolved and makes distributions in compliance with §§280-282. In re RegO, supra, explained the purpose of §§280-282:

> These statutory provisions are innovative. They provide a judicial mechanism designed to afford fair treatment to foreseeable future, yet unknown claimants of a dissolved corporation, while providing corporate directors with a mechanism that will both permit distributions on corporate dissolution, avoid risk that a future corporate claimant will at some future time, be able to establish that such distribution was in violation of any duty owed to the corporation's creditors on dissolution.

623 A.2d at 94. The court stated that the scheme balanced the competing interests of the claimants (including future claimants) of a dissolving corporation who would be left without remedy post-dissolution if provisions were not made for the liabilities in the dissolution process and the directors and shareholders holding distributions of the dissolving corporation could be held personally liable for the debts of the corporation

if there were insufficient funds to satisfy the corporation's liabilities. Id. at 96-97. See United States Virgin Islands v. Goldman, Sachs & Co., 937 A.2d 760 (Del. Ch. 2007).

The plain terms of §§280-282 and the In re RegO opinion make clear that §§280-282 provide protection to the shareholders and directors of dissolved corporations who comply with its provisions. Noticeably missing from §§281(b) and 282 is any language barring lawsuits against the corporation itself. The statutes speak in terms of distributions and provide for certain protections for the directors and shareholders after distributions are made, but those same subsections do not lay out those same protections for the dissolved corporation itself. Section §281(b) applies only to distributable assets and only protects those who control the distributions or receive them. Section 279, on the other hand, goes to corporate liability and, as was noted by the Supreme Court of Delaware, was enacted to ensure that a dissolved corporation "remains a viable entity authorized to possess property as well as sue and be sued incident to the winding-up of affairs." City Investing Company Liquidating Trust v. Continental Casualty Co., 624 A.2d at 1195 (Del. 1993).

It is perplexing that the Court of Chancery would hold that §279 is limited by the distribution statute implicated in this proceeding, where there is no language within §281(b), or any of the subsections which lay out the protections afforded by the compliance with §281(b), which bar suit against a dissolved corporation, especially in light of the fact that Delaware courts have invariably held that a suit under §279 may be brought at any time. If the Delaware legislature had intended to limit the application of §279 by §281(b), it could have amended §279 at the same time that it

amended §§280-282 or added language within the statutory text of §§281 or 282 to bar suits against the dissolved corporation itself. In In re RegO, the language in §§280-282 was substantially different than it is today. At the time that In re RegO was decided, the scheme required that dissolving corporations provide for the security of future claims likely to arise prior to the "applicable statute of limitations". The In re RegO court noted that such language "in effect, provides no limitation to planning." 633 A.2d at 102, fn. 27. The language of the §§280-282 was changed to the current ten year scheme in 1994 by the Delaware legislature. Section 279 was left unamended and continues to allow for the appointment of a receiver "at any time".

Furthermore, there is more conclusive proof that the legislative intent of the §281(b) enactments and later amendments never intended that its provisions limit §279. This is because §280 does by its explicit terms forbid suits against a corporation in a limited circumstance. The notice option, which is described under §280, requires that a dissolving corporation publish its intent to dissolve in certain newspapers as delineated in the statute and "mail a copy of such notice by certified or registered mail, return receipt requested, to each known claimant of the corporation including persons with claims asserted against the corporation in a pending action, suit or proceeding to which the corporation is a party." 8 Del. C. §280(a)(1)(emphasis added). Once a party has published and mailed its notice to the known claimants, those potential claimants have sixty days to present the claim to the corporation. 8 Del. C. §280(a)(1)©. After the corporation receives a demand from a claimant, it can reject the claim under 8 Del. C. §280(a)(3) within 90 days of receipt, so long as the rejection

occurs at least 150 days prior to the expiration of the three year winding-up period described under 8 Del. C. §278. The known claimant must then file suit within 120 days of the rejection.

The express terms of §§280(a)(2)and(4), state that any "claim against the corporation" filed after a known creditor who receives actual notice under §280(a)(1) fails to file either the claim itself or a lawsuit following the rejection of the claim is "barred." It is only under these two subsections that any language barring suit "against a corporation" can be found in the distribution legislation, and there is certainly no such language contained in §281(b), which is the mode of dissolution that Krafft-Murphy opted for. The absence of this language in §281 or §282 in light of its existence in the notice option laid out in §280 shows that the legislature did not intend to bar claims "against a corporation" after the ten year period. If the legislature had intended to bar future claims against the corporation through the utilization of §279 brought more than ten years after the dissolution of the corporation, it had every opportunity to do so in the same subsections that provide the directors and shareholders the protections delineated under §281(c) and §282. The absence of such language proves no bar to a claim under §279.

This Court acknowledged as much in City Investing Company Liquidating Trust v. Continental Casualty Co., 624 A.2d 1191 (Del. 1993). In the course of its opinion, the Supreme Court discussed the application of §§278 and 279 with each other, and the Court discussed the continuity of corporate existence even after dissolution through the application of the two statutes. But it went on to state that "[a]n additional procedure

for dissolution under 8 Del. C. §280-282 may bar a claim asserted by a creditor beyond the three year period if the claimant, including a contingent-creditor, is afforded direct notice of the plan of dissolution. 8 Del. C. §280(a)(1)." Id., fn. 3 (citation in original)(emphasis added). This Court has acknowledged that the application of §§280-282 may limit the application of the broader legislative scheme described under §§278-279, but only in the limited situations where actual notice is given to a known creditor inside the three year winding-up period in conformity with the notice provisions of §280.

However, §280 plays no role in this case, as Krafft-Murphy did not utilize the notice option during its dissolution and distribution process, and the language barring suits "against the corporation" appears in no portion of the statutory scheme with regard to later discovered claims, especially where corporations opt to make distributions in accordance with §281(b). When the Court of Chancery concluded that §281(b) limited, the court was literally reading language into the statutory scheme that does not exist. The Court of Chancery should have stuck with its original holding that §281(b) "is more logically understood as limiting the scope of the corporate obligation being undertaken and setting a statutorily-prescribed time horizon for directors to address when fulfilling their duties under §281(b)." (A. 354) This statement is correct because the whole purpose of §§280-282 is to define director liability in making distributions and shareholder liability in receiving distributions. Nothing in the scheme protects dissolved corporations themselves, and the Court of Chancery erred in

granting summary judgment as a matter of law in favor of Krafft-Murphy on the basis that Krafft-Murphy's corporate liabilities were somehow barred by §280(b).

Since §281(b) does not limit the application of §279, the decision of Texas Eastern Overseas is likewise not restricted by §280(b) as the Court of Chancery held in this case, and the lower court erred in denying Petitioners' Motion for Judgment on the Pleadings. Under the Texas EasternOverseas opinion, an action under §279 can be brought at any time, and the appointment of a receiver is appropriate whenever proof of insurance covering the liabilities of a dissolved corporation is presented. In the case of Texas Eastern Overseas, the proof of insurance was evidence of insurance coverage for a predecessor corporation, where the question of whether that insurance would cover the liabilities of TEO was hotly disputed. That dispute does not exist in this case as Krafft-Murphy has conceded that unexhausted insurance policies exist in this case. Since §281(b) does not cut off corporate liability any more than § 278, then the rule laid out in Texas Eastern Overseas applies, and it is most certainly "worth the effort" to appoint a receiver under the rationale of Texas Eastern Overseas.

The Petitioners ask for no more and no less than the relief that was granted to AmeriPride, i.e. the revival of Krafft-Murphy's corporate status, so that the asbestos claims filed after the expiration of the three year winding-up period following Krafft-Murphy's dissolution can continue to be litigated. Texas Eastern Overseas and the cases cited therein make clear that it is appropriate appoint a receiver pursuant to §279 so that the corporate liabilities may continue to be disposed of, and any claims against the corporation may be litigated.

In denying Petitioner's request for relief, the Court of Chancery has given a veritable windfall to the insurers of Krafft-Murphy. Krafft-Murphy has over the years of its operation paid insurance premiums to its insurers to protect itself from civil litigation. To absolve the insurers of their contractual obligations would leave hundreds of asbestos claimants holding unpaid claims against a corporation that had the foresight to purchase adequate insurance to cover its asbestos liabilities. Delaware's dissolution process may not be utilized to avoid paying the creditors of the corporation. Delaware corporation law regarding dissolution seeks to offer protection to both the creditors and the director/shareholders of the dissolving corporation. Allowing insurance companies to escape the contractual obligations under the policies that were purchased by Krafft-Murphy would jeopardize the interests of both the creditors and directors/shareholders of Krafft-Murphy in favor of Krafft-Murphy's insurers, an entity not included in the class of protected parties. The decision of the Court of Chancery should, therefore, be reversed.

II. The Court of Chancery Erred When It Refused to Rule on Petitioners' Request For A Receiver for Claims Filed More Than Three Years, And Less Than Ten Years After Krafft-Murphy Dissolved, Since The Appointment Of A Receiver Is Necessary For Those Claims To Proceed.

A. QUESTION PRESENTED

Did the lower court err in finding that Petitioners' request for the appointment of a receiver for cases filed more than three years, but less than ten years, after Krafft-Murphy's dissolution were not justiciable based solely upon assurances of Krafft-Murphy that it would continue to litigate those claims, even though Delaware law does not allow a corporation to continue to wind up its affairs beyond the winding-up period described under §279? (See A.429-434, 457-458,464-487).

B. STANDARD OF REVIEW

Delaware courts do not rule on cases unless they are "ripe for judicial determination." Stroud v. Milliken Enterprises Inc., 552 A.2d 476 (Del.1989). "Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law." Id. at 480. Thus, a ripe dispute is one where litigation "sooner or later appears to be unavoidable," and one in which "the material facts are static." Id. at 481. A "common sense" approach requires the court to decide whether the interests of those who seek relief outweigh the interests of the court and of justice in "postponing review until the question arises in some more concrete and final form." Id. at 480.

C. MERITS OF ARGUMENT

When Krafft-Murphy finally revealed to the Law Offices of Peter Angelos, that it was a dissolved corporation more than a decade after the fact, it did so by the filing of motions to dismiss against claimants who filed their claims more than ten years following its dissolution. Despite the fact that no motions to dismiss were filed against claimants whose claims were filed after the expiration of the three year winding-up period, but less than ten years following Krafft-Murphy's dissolution, serious concerns arose regarding the ability of plaintiffs who filed claims within that seven year gap to litigate their claims. In filing for the appointment of a receiver for Krafft-Murphy, the Angelos claimants consisted of all plaintiffs who filed lawsuits against Krafft-Murphy more than three years after Krafft-Murphy dissolved, whether Krafft-Murphy filed motions to dismiss in their cases or not.

This decision was based purely upon the clear mandate of the Delaware law that dissolved Delaware corporations have absolutely no power to act on their own behalf outside the winding-up period laid out in §278, unless a receiver is appointed. After a corporation is dissolved, § 278 extends its corporate existence for a period of three years, wherein the corporation is enabled to wind up its affairs. After the expiration of the winding-up period, the only way a corporation can continue to wind up its affairs is through the appointment of a receiver under §279.

It has been stated that § 279 "is necessary because once the three-year period has expired ... the corporate officers have no power to continue their winding-up duties. They have no power to act because the corporation no longer has legal existence."

Citadel, 423 A.2d at 504(citations omitted). In Harned v. Beacon Hill Real Estate Co., 80 A. 805 (Del. Ch. 1911), directors of a corporation unsuccessfully attempted to sell real estate belonging to a corporation more than three years following its dissolution. The sale was determined to be invalid, and the corporation sought to have a receiver appointed so that the property could legally be sold for the benefit of the shareholders. In describing the application of current §§278-279, the Court of Chancery stated that after the expiration of the three year period, the directors of a dissolved corporation "have no power" to continue winding-up the corporation's affairs, unless a request for the appointment of a receiver is made. Id. at 808. See Also Texas Eastern Overseas, 2009 WL 4270799 at *3 (stating that once the three year winding-up period expires, "the corporation no longer has legal existence," and therefore requires a receiver or trustee to oversee its "unfinished business.")

Despite this clear and unequivocal stricture of law, Krafft-Murphy has continued to participate in litigation after the expiration of the three year winding-up period, and has actually entered into settlement agreements with Krafft-Murphy, a corporation that no longer had the legal ability to act in any regard. For the last ten years, Krafft-Murphy has literally gone rogue in direct contravention of Delaware law by continuing to wind up its affairs beyond the three year statutory period described under §278. Now that the Petitioners are aware of Krafft-Murphy's corporate status, Counsel for the Petitioners that filed suit after that three year period cannot advise its clients to continue to litigate and settle claims in cases that, at this juncture in time, completely lack legitimacy by virtue of Krafft-Murphy's status as a dissolved corporation. That

is the precise reason why the underlying Petition included all claimants who filed cases after the three year winding-up period, even though Krafft-Murphy did not target those cases for dismissal in the underlying proceedings. Without the appointment of a receiver, the Petitioners who filed their claims within the seven-year gap would face the absurd prospect of trying to obtain judgment against or enter into binding settlement agreements with a corporate non-entity.

The Court of Chancery, in deciding that the claims of the Petitioners that fall in the seven year gap were not justiciable, ignored this most basic premise of Delaware corporate law. Instead, it opted to accept at face value the assurances of Krafft-Murphy that it would not use its dissolved status as a defense in cases filed within the seven-year gap. The problem with this reliance is that Krafft-Murphy has no authority under Delaware law to continue to litigate without the appointment of a receiver. So not only is the issue ripe for litigation, it is only through the appointment of a receiver under §279 that Krafft-Murphy can be empowered to continue to litigate its liabilities for claims filed more than three years after its dissolution.

Compounding the problem is the Court of Chancery's reliance on such statements to begin with. Even if Krafft-Murphy could voluntarily continue to wind up its affairs more than three years after its dissolution without the appointment of a receiver or trustee under §279, there is absolutely nothing to bind Krafft-Murphy to its word. At any time Krafft-Murphy could change tactics and argue its lack of amenability to suit in any of the underlying cases filed within the seven-year gap, and the fact that Krafft-Murphy gave its "scouts honor" to the Court of Chancery of

Delaware will not affect the viability of Krafft-Murphy's defense in another court. This would leave the Petitioners with no other option than to go back to the Court of Chancery and file this very same proceeding in the same court based upon the same exact facts, asking for the same relief that the Petitioners have asked for in this case. This would lead to the same waste of judicial resources that the mootness doctrine attempts to avoid.

Krafft-Murphy has dissolved, and the three year winding-up period has expired. Under prevailing Delaware law, Krafft-Murphy has lost the power to "voluntarily" wind up its affairs. It has lost the power to litigate, enter into binding settlement agreements, and be subject to judgment. One wonders how it even has the authority to offer any assurances to any court. The only way to remedy the current situation is through the appointment of a receiver. Since the existence of unexhausted insurance policies has been admitted to by Krafft-Murphy, there can be no dispute that the appointment of a receiver is warranted under the Texas Eastern Overseas decision. Instead, the Petitioners' claim for relief was rejected, and Krafft-Murphy, a veritable zombie corporation, has been given leave to continue its activities in the underlying lawsuits with the blessing of the Court of Chancery. For these reasons, the Court of Chancery should be reversed.

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