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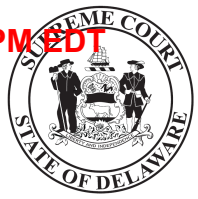

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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	Court Below – The Court of Chancery of the State of Delaware
v.	C.A. No. 6049 VCP
KRAFFT-MURPHY COMPANY, INC., Respondent Below, Appellee	

CORRECTED APPELLEE'S ANSWERING BRIEF

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Dated: June 20, 2013

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NATURE OF THE PROCEEDINGS

Appellee Krafft-Murphy Company ("Krafft-Murphy"), the defendant below, is a dissolved Delaware corporation with no undistributed assets.[1] Appellants here, the Petitioners and Intervenor-Petitioners below, are asbestos claimants who admittedly cannot sue Krafft-Murphy due to its dissolution. They seek the appointment of a receiver pursuant to 8 *Del. C.* § 279 in order that they may continue to litigate against Krafft-Murphy in courts in Maryland and the District of Columbia. On cross-motions for summary judgment and judgment on the pleadings, the Court of Chancery held that § 279 does not provide for such an appointment, and accordingly granted the motion for summary judgment and denied the motion for judgment on the pleadings. This appeal followed.

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[1] As a long-dissolved corporation, Krafft-Murphy has no interest in the outcome of this matter. Moreover, Petitioners seek the appointment of a receiver who would have no power to pursue former directors or shareholders of Krafft-Murphy for assets that may have been distributed at the time of dissolution or for any other purpose, and therefore those directors and shareholders have no interest in the resolution of these proceedings. *See* Petitioner-Appellants' Appendix at A.024 (Petition, ¶ 34). Accordingly, as stated in the Answers to the two Petitions, the real parties in interest are the following insurers of Krafft-Murphy: the Travelers Casualty and Surety Company; CNA Insurance Company, formerly Continental Casualty Company; and Great American Insurance Company.

SUMMARY OF ARGUMENT

1. **Paragraph 1 of Petitioners' Summary is denied.** Petitioners seek to resurrect a dissolved corporation by the appointment of a receiver in order to gain access to liability insurance proceeds. The Delaware dissolution statutes, 8 *Del. C.* §§ 278-81, show that the General Assembly did not contemplate receivership for this purpose. Receivers may be appointed for two purposes: to pursue assets and wind up unfinished business. However, when a corporation ceases to be subject to liability due to dissolution, its insurance is no longer an asset, nor is the defense of new cases unfinished business. Similar efforts to appoint receivers have been rejected in other jurisdictions wherever the court has considered whether insurance is an asset that will justify a receivership. *E.g., In re All Cases Against Sager Corp.*, 967 N.E.2d 1203 (Ohio 2012).

2. **Paragraph 2 of Petitioners' Summary is denied.** It is not disputed that a corporation must make provision for claims that are reasonably foreseeable within ten years of dissolution, and that Krafft-Murphy did not do so. However, there is no need to consider the appointment of a receiver to defend against these claims, because Krafft-Murphy's insurers continue to defend and, as appropriate, settle them. Petitioners have no need for a receiver for claims filed before ten years, and therefore their petition should be denied.

STATEMENT OF FACTS

This matter reaches the Court from the grant of a motion for summary judgment and the denial of a cross-motion for judgment on the pleadings. Neither party has "argued that there is any issue of material fact." Petitioner-Appellants' Appendix ("PA") at A.473. In brief, Krafft-Murphy was a plastering company, founded in 1918, PA at A.043, and incorporated in Delaware in 1952, PA at A.030-37. From the 1950's until about 1971, Krafft-Murphy also engaged in the installation of a sprayed asbestos-containing fireproofing product known as Limpet, which became about ten percent of its total business, *id.* at A.051. It purchased the product from the manufacturers, *id.* at A.129-38, *see* Petitioner-Appellants' Brief ("Pet. Br.") at 3. Krafft-Murphy had no knowledge of the dangers of asbestos when it was involved in this work. Owner-officer Frank Krafft, his children, and co-owner-officer Rick Boyle were all exposed to asbestos dust from Limpet without knowledge of the hazard, PA at A.047, A.049.

Krafft-Murphy was first sued by asbestos claimants in 1989, PA at A.060, 076-77. In 1991, it ceased operations, *id.* at A.056, and in 1999, it dissolved. *Id.* at A.039-40.[2] The dissolution did not require notice to creditors. 8 *Del. C.* § 275.

[2] It has been suggested that the company went out of business due to tort liability, *e.g.*, PA at A.332. There is no evidence to that effect, and given its insurance, the liability would not have affected the ongoing business.

When sued, Krafft-Murphy is typically one of many defendants, *see* Docket No. 14, Exh. A (in three representative suits, Krafft-Murphy was one of 23, 25, and 36 defendants). Its liability insurers have the "right and duty" to defend Krafft-Murphy in these suits. Appellee's Appendix ("AA") at B.070-94 (Docket No. 50, Ruby Aff. Exhs. B, C, D, and E (attaching relevant policy pages)). Accordingly, the insurers have openly funded and directed its defense, PA at A.358, A.365, A.374 n. 1, and Pet. Br. at 7. As appropriate, they have negotiated and paid settlements on its behalf. PA at A.278-80, 287-89.

Beginning in 2010, Krafft-Murphy filed motions to dismiss in cases filed more than ten years after dissolution on the ground that, under Delaware law, it is no longer amenable to suit. PA at A.465, *see* Pet. Br. at 32-34. In response, the petitioners below, joined by the intervenors (collectively "Petitioners"), filed the present action for the appointment of a receiver for the purpose of making the company "amenable to suit." *Id.* at 10. Petitioners contend that a receiver will permit them to reach the liability insurance; they disavow any intent to recover from Krafft-Murphy itself or from its former shareholders, officers, or directors. Petition ¶¶ 33-36, PA at A.024; Petition in Intervention ¶ 18, PA at A.325.

ARGUMENT

I. The Court of Chancery Correctly Held That 8 *Del. C.* § 279 Does Not Authorize the Appointment of a Receiver for a Dissolved Corporation Solely to Permit Claimants to Gain Access To Insurance Proceeds

Question Presented:

Did the Court of Chancery correctly determine that Delaware's receivership statute for dissolved corporations, 8 *Del. C.* § 279, does not authorize appointment of a receiver for the sole purpose of providing tort claimants access to the dissolved corporation's liability insurance?

Scope of Review:

Review is *de novo*. *Alvarez v. Castellon*, 55 A.3d 352, 354 (Del. 2012).

Merits of the Argument:

The Delaware dissolution scheme is a balanced arrangement that provides both for the final winding up of corporate affairs and for the protection of claimants. The receivership statute, 8 *Del. C.* § 279, an integral part of the arrangement, provides a mechanism to recover and distribute undistributed assets where the usual provisions prove inadequate. It is not intended to override finality solely to resurrect a corporation so that it can become subject to liability.

A. The Delaware Dissolution Statute Provides for Finality

Petitioners plainly state that their suit is "at its core a revival action" whose purpose is to "resurrect Krafft-Murphy's corporate existence." Pet. Br. at 10. A

true revival action is permitted in only a few very limited circumstances, none of which are present here. 8 *Del. C.* § 312. Petitioners do not seek to compel Krafft-Murphy to follow this revival procedure, nor could they. Instead, they are attempting to create a new type of revival that runs counter to the statutory provisions for finality for dissolved corporations.

Historically, a corporation's status as a legal person terminated at the instant of dissolution and thus, among other things, terminated all litigation. "[D]issolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant... [I]f the life of the corporation is to continue even only for litigating purposes, it is necessary that there should be some statutory authority for the prolongation." *Okla. Nat. Gas Co. v. Okla.*, 273 U.S. 257, 259 (1927); *see In re Citadel Indus., Inc.*, 423 A.2d 500, 503 (Del. Ch. 1980); *In re RegO Co.*, 623 A.2d 92, 95 (Del. Ch. 1992).[3]

Just such statutory authority is found in 8 *Del. C.* § 278, which provides that a dissolved corporation continues to exist as a body corporate "for a term of three

[3] Citing *RegO*, Petitioners contended below that insurance is "forever in the name of the corporation" and therefore must pay claims "forever." PA at A.537. That is a misreading. In *RegO*, a company established a trust and purchased insurance ***after dissolution*** to pay claims that were foreseeable at that time. The insurance was limited to a ten-year term. *RegO*, 623 A.2d at 94. The case says nothing to support the obligation of an insurer to pay claims "forever."

years," or for a longer period ordered by the Court of Chancery, for the purpose of winding up its affairs. Any suit brought by or against the dissolved corporation during that period continues until completion. *Id.* After expiration of three-year period, the Court of Chancery is not empowered to restore a corporation to existence. *In the Matter of Dow Chem. Int'l Inc. of Del.*, 2008 Del. Ch. LEXIS 147 (Del. Ch. Oct. 14, 2008). No notice to claimants is required to terminate corporate existence. 8 *Del. C.* § 278.

Petitioners contend that the absence, in §§ 281 and 282, of "language barring lawsuits against the corporation itself" implies that suits against dissolved corporations can be brought indefinitely. Pet. Br. at 25. In their view, "corporate liability ... is contemplated to go on literally forever." PA at A.526. This mistaken contention ignores the common law rule that provides the backdrop to §§ 278-281. Except as provided by statute, a dissolved corporation has no existence and cannot have any liability at all. *In re Citadel Indus., Inc.,* 423 A.2d at 503. As the Court of Chancery noted below, the General Assembly contemplated the potential for corporate liability longer than three years, and even as much as ten years, after dissolution, but no longer. PA at A.482-483.

The Court of Chancery observed in *U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 789 (Del. Ch. 2007) that the three-year term "balance[s] the competing public policy interests of ensuring that claimants against the corporation

had a time period in which to assert claims against the dissolved corporation and ensuring that directors, officers, and stockholders of a dissolved corporation could have repose from claims regarding the dissolved corporation." Nonetheless, it is not an absolution of all possible liability for a corporation and its directors, officers and shareholders. Recognizing that legitimate claims and suits might arise after the expiration of three years, the General Assembly gave a corporation a choice between two routes to follow to provide for such claims: a court-supervised procedure and a default route. Both limit the obligation to provide for future claims to those likely to arise within no more than ten years of dissolution. The ten-year period replaced an earlier requirement to make provision for suits that were filed prior to "the expiration of applicable statutes of limitation," 69 Del. Laws, ch. 266, §§ 15, 20 (1994), which was unworkably uncertain, *see In re RegO Co.*, 623 A.2d at 102 n.27. Thus the legislature cut back the obligation of corporations to provide for all likely future liabilities, and to require only provision for up to ten years of such liabilities.

A corporation choosing the elective route, 8 *Del. C.* §§ 280 and 281(a), must give notice to all known claimants, and by publication, and must petition the Court of Chancery to set the security necessary for claims that "are likely to arise or to become known to the corporation or successor entity within 5 years after the date of dissolution or such longer period of time as the Court of Chancery may

determine ***not to exceed 10 years*** after the date of dissolution." 8 *Del. C.* § 280(c)(3);[4] *see* PA at A.482-83 (Opinion at 18-19 n. 58).

The default route, 8 *Del. C.* § 281(b), instructs a dissolved corporation to "adopt a plan of distribution" that, *inter alia*, makes "such provision as will be reasonably likely" to provide compensation for pending claims and also for claims that "are likely to arise or to become known to the corporation or successor entity ***within 10 years after the date of dissolution***." *Id.* No notice to claimants of the dissolution is necessary for corporations choosing the default option. *Id.*

Under either procedure, the corporation need not make provision for liabilities that may arise or become known more than ten years after dissolution, regardless of whether such liabilities are "likely." Indeed, under the supervised procedure, the Court of Chancery may not consider such liabilities when determining the security required to pay future claims. 8 *Del. C.* § 280(c)(3).

Not all states reach the same balance between the interests of claimants and the goal of repose. But, as the opinion below observed, "Delaware is not a state where corporate existence continues without limitation... [T]his Court is not aware of any statutory authority that would extend liability for a dissolved Delaware corporation beyond ten years." PA at A.483 (Opinion at 19).

[4] All emphasis in quotations is supplied.

Thus, Krafft Murphy cannot be sued as a body corporate under the modification of the common law found in § 278, and it had no obligation to make provision for claims brought after ten years from dissolution. There is no common law or statutory authority for the "resurrection" of corporate existence in order to restore liability for such claims. Yet this is what Petitioners ask this Court to do.

B. The Receivership Statute May Not Be Utilized To Resurrect A Dissolved Corporation In Order To Subject It To Liability

Petitioners assume that a receiver can be authorized to defend and settle tort claims against the corporation, so that "it is once again amenable to suit for the benefit of Krafft-Murphy's creditors." Pet. Br. at 10; see PA at A.024 (Petition, ¶ 36). There is no authority in the statute for a receiver to play such a role.

The receivership statute, 8 *Del. C.* § 279, permits the Court of Chancery to appoint a receiver for the purpose of winding up a corporation's business. Petitioners focus on the provision that a receiver may be appointed "at any time," *e.g.*, Pet. Br. at 21, to the exclusion of the rest of the requirements. Their assertion that the court below "limited" the time that a receiver can be appointed, *id.*, shows that they still do not understand that the issue is not one of timing. As the court below stated, "[w]hile this court may appoint a receiver 'at any time,' that appointment must be for a statutory purpose," PA at A.479 (Opinion at 15), *citing In re Citadel Indus.*, 423 A.2d at 506.

"A receiver is an agent appointed by the court to take charge of, conserve, and, in most cases, administer the assets of a corporation." *In re Transamerica Airlines, Inc.*, 2006 WL 587846, at *9 (Del. Ch. Feb. 28, 2006). The receiver acts subject to the scrutiny of the Court of Chancery. 8 *Del. C.* §§ 292-98; Ct. Ch. R. 148-68. *See* Jack B. Jacobs, "*Delaware Receivers and Trustees: Unsung Ministers of Corporate Last Rites*," 7 Del. J. Corp. L. 251, 259-74 (Winter 1983). That kind of receiver is not what Petitioners seek. They ask for the appointment of a person to do nothing other than to justify the presence of Krafft-Murphy's name in suits brought outside the statutory period. No provision of § 279 authorizes a receiver for that purpose.

Section 279 provides that a receiver can be appointed for two purposes. The first is to take control of corporate assets and to collect the debts and property owing to the corporation. As the statute states, a receiver may be appointed "to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with 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***." Thus the power to sue and be sued provided in the first part of § 279 is limited to suits necessary and proper for taking charge of property and collecting debts and property due to the corporation.

The second purpose is to wind up the corporation's business. Receivers may be appointed in order "to appoint an agent or agents under them, 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." The authority to sue and be sued is inherent in this provision, but only if doing so is "necessary" for the final settlement of the corporation's "unfinished business."

Petitioners do not seek a receiver for either of these purposes. They do not seek a receiver to pursue the insurers, who at all times have honored their obligations.[5] And they do not seek a receiver to wind up "unfinished business." On the contrary, they seek to saddle the corporation with ***new*** business in the form of suits that could not otherwise be brought.

1. In The Absence Of A Judgment Against The Insured, Liability Insurance Is Neither A Property Right Nor A Debt That Would Justify The Appointment Of A Receiver

Section 279 provides that a receiver may be appointed to "take charge of property" and to collect "debts and property due and belonging to the corporation." Cases summarize this statutory description as referencing the "undistributed assets" of the corporation. E.g., *In re Citadel Indus.*, 423 A.2d at 506. A liability

[5] Nor do they seek a receiver to pursue any other alleged property. To the contrary, Petitioners state that they do not want the receiver to have the authority to pursue the former shareholders or directors, or anyone else, for property of the corporation. Pet. Br. at 22.

insurance policy is not such an undistributed asset. It is a contract that gives rise to an obligation to pay only ***after*** the insured has been held liable to a third party. This cannot happen to a dissolved corporation with respect to suits brought after the statutory term. Because Krafft-Murphy can never become liable to the Petitioners, the insurers can never owe a debt to Krafft-Murphy for such liability.

At least two courts applying Delaware law have concluded, implicitly or explicitly, that liability insurance is not a "debt or property" of a dissolved corporation that can be marshaled by a receiver. In *In re Citadel Indus.*, 423 A.2d at 506, the Court of Chancery refused to continue the existence of a corporation under § 278, explaining that doing so would have uncertain effects on "former liability insurance contracts." Yet it also held that a receiver could not be appointed pursuant to § 279 because there were no "undistributed assets." Thus, the Citadel court implicitly concluded that liability insurance contracts are not debts or property under § 279. And in *AM Properties Corp. v. GTE Prods. Corp.,* 844 F. Supp. 1007, 1015 (D.N.J. 1994), a court applying Delaware law held that a corporation's liability insurance did not constitute an asset that would subject it to suit for federal CERCLA liability.

Courts in other jurisdictions have reached the same result. Addressing the precise question now before this Court, the Ohio Supreme Court recently decided that a receiver could not be appointed for a corporation "that is no longer amenable

to suit as a vehicle to seek recovery directly from the corporation's insurance carriers." *In re All Cases Against Sager Corp.*, 132 Ohio St.3d 5, 13, 967 N.E.2d 1203, 1210 (Ohio 2012). The *Sager* court rejected the contention that liability insurance is an asset, observing that "it is only after a judgment has been secured against an insured that 'the amount of the policy to the extent of liability incurred by the insured is deemed to be an asset of the insured.'" *Sager*, 132 Ohio St.3d at 14, 967 N.E.2d at 1210-1211 (*quoting Steffens v. Am. Std. Ins. Co.*, 181 N.W.2d 174, 178 (Iowa 1970). But "[b]ecause Sager lacks capacity to be sued, no judgment can be taken against it." *Id.* at 14, 967 N.E.2d at 1211. And in the absence of a judgment, the insurance has no value. Therefore, it concluded, the insurance is not an asset that would justify the appointment of a receiver. *Id.* That result is true equally under Ohio and Delaware law.

Petitioners do not address *Sager*, or any non-Delaware authority that rejects their position, in their opening brief. However, before the Court of Chancery, Petitioners contended that *Sager* conflicts with *Addy v. Short,* 89 A.2d 136 (Del. 1952), *e.g.,* PA at A.427 (Pet. Opp. at 24). Their argument was that under Ohio law, only a ***vested*** right can form the basis for the appointment of a receiver, while under *Addy* a ***contingent*** right can do so. *Id.* This argument is a misreading of *Sager* and a misunderstanding of Delaware law. *Addy* allowed trustees to pursue a

contingent right of reverter in real property. Nothing in *Sager* would prohibit an Ohio receiver from doing the same.

In *Addy*, certain land came to a dissolved corporation by right of reverter. Other claimants contended that because the right was contingent at the time of dissolution, it was lost after the passage of three years. Therefore, they argued, by the time the trustees were appointed there was no property right for them to vindicate. In rejecting this argument, the Court held that the trustees could enforce a property right that vested in the corporation only after dissolution, because, although contingent, it was nonetheless a "valuable right" at the time the corporation dissolved, *Addy*, 89 A.2d at 140. But *Addy* is clear that the corporation must have possessed ***some*** sort of right prior to the dissolution. Indeed, *Addy* distinguished *McBride v. Murphy*, 124 A. 798 (Del. Ch. 1924), precisely because *McBride* held that a dissolved corporation "could not take title [to land]" that it had no right to at the time of dissolution. *Addy*, 89 A.2d at 141.

Here, just as in *Sager*, the dissolved corporation has no contingent valuable right in insurance with respect to lawsuits brought after three years from the time of dissolution. Krafft-Murphy's liability insurance has both actual and contingent value for any suit brought within the statutory window. As to such suits, the insurers actively defend Krafft-Murphy and, as appropriate, pay claims on its behalf. But the insurance has no such value with respect to suits brought at a later

date. Thus, in contrast to the reverter interest in *Addy*, the insurance contracts do not represent "valuable rights" with respect to Petitioners' claims.

Petitioners claim that because *Sager* uses the word "vested" at one point, it does not comport with *Addy's* instruction that a right that is contingent at the time of dissolution may later suffice for appointment of a receiver. But *Sager's* use of "vested" is not in reference to a property right belonging to a dissolved corporation. It is merely part of the observation that, because insurance proceeds do not vest ***in the tort claimant*** until a judgment has been entered against the policyholder, a claimant has no cause of action against an insurer. As the court explained, an injured person is precluded "from bringing a civil action against the tortfeasor's insurer until the injured person has first obtained a judgment" because "a tort claimant has only a potential interest in a liability-insurance policy ... That potential interest 'does not develop into a ***vested*** right until a judgment is secured.'" 987 N.E.2d at 1210-11 (citations omitted). The rule is exactly the same in Delaware, *e.g., Willis v. City of Rehoboth Beach*, 2004 WL 2419143 (Del. Super. Ct. Oct. 14, 2004) (before judgment, claimant has no rights in alleged tortfeasor's insurance). There is no difference in the law of Ohio as construed in *Sager* and the law of Delaware at issue here.

Sager is not an isolated decision. It relies on opinions from other states where efforts like those of petitioners here were rebuffed, such as *Blankenship v.*

Demmler Mfg. Co., 411 N.E.2d 1153 (Ill. App. Ct. 1980), which, in rejecting an effort to pursue an insurance policy, noted that "[n]o cause of action which accrues after dissolution may be brought against a dissolved corporation." *Id.* at 1157. It further relies on *Gilliam v. Hi-Temp Products*, 677 N.W.2d 856, 870 (Mich. Ct. App. 2003), which held that policies are not "assets" because the dissolved corporation could no longer become liable to claimants:

> [T]he contracts of insurance existed to provide indemnification to Hi-Temp in the event it was found liable for a tort claim. That is, their ***only*** value is the protection they provided from tort liability judgments... If there have been no tort claims triggering claims for defense or indemnification by [the insurer], or the deadline for the filing of any claims covered by the policies has expired, the policies are of no value... They are no longer assets of the corporation.

Id. (emphasis in original).[6]

So far as can be determined, all states with statutory schemes that terminate a dissolved corporation's amenability to suit share in this result. In *City of South*

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[6] Petitioners attempted to distinguish *Gilliam* by claiming that the Michigan dissolution statute is not like the Delaware Statute, and contended that *Williams v. Grossman*, 293 N.W.2d 315 (Mich. 1980) is more like the present situation, *see* PA at A.426. In *Williams*, suit was permitted against the personal representative of a deceased person who had insurance. *Id.* at 320. But, as *Gilliam* noted, the personal representative was already appointed and could be sued, 677 N.W.2d at 870. As *Gilliam* concluded, the result in *Williams* "has nothing to do with whether the decedent was insured." 677 N.W.2d at 872. In Michigan as in Delaware, once a corporation is dissolved and can no longer be sued, its insurance is not an asset for the benefit of claimants.

Bend v. Century Indemnity Co., 821 N.E.2d 5, 13 (Ind. Ct. App. 2005), for example, the court adopted *Gilliam* and ruled that insurance was not an asset of a long-dissolved corporation because "there was no liability for the insurance to cover." It denied a motion to appoint a receiver, because, as claims against the dissolved corporation were barred, there was nothing for a receiver to do. *Id.* at 14-15. Petitioners attempted to distinguish *City of South Bend* by seizing on the court's observation that a successor corporation which might be amenable to suit would also succeed to the dissolved corporation's insurance. That obvious point does not change the fact that where there is no such successor to liability, there is also no successor to the insurance. Here, Petitioners admit that there is no successor for them to sue; indeed, that is why they seek a receiver. Thus, the effort to distinguish *City of South Bend* merely establishes its applicability.

2. The Defense and Resolution of Newly Filed Suits Is Not "Necessary for the Final Settlement of the Unfinished Business" Of Krafft-Murphy

Petitioners argue that a receiver is appropriate because suits that have been filed, and continue to be filed, against Krafft-Murphy are "incident to the winding up of affairs" of the dissolved corporation. Pet. Br. at 25 (*quoting City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1195 (Del. 1993). But as a matter of law these suits are not "incident to the winding-up of [Krafft-Murphy's] affairs." Krafft-Murphy's affairs have wound up, with the exception of suits that

were timely brought and are being defended by the insurers. The defense of new lawsuits would not be unfinished business; if it is business at all, it would be new business, which cannot be the conducted by appointment of a receiver.

Of course, there are situations in which true unfinished business arises after the three-year term, and in such situations a receiver can be appointed to conclude that business. In *Harned v. Beacon Hill Real Estate Co.*, 80 A. 805, 808 (Del. Ch. 1911), *aff'd* 84 A. 229 (Del. 1912), a receiver disposed of an unsold farm belonging to a dissolved corporation. Similarly, in *Matter of the Milford Athletic Association, Inc.*, 1 Del. J. Corp. L. 166, 170, 1975 WL 1946 (Del. Ch. Jan. 28, 1975), a receiver effectuated the transfer of land from a dissolved corporation to the City of Milford. The property had been owned by the dissolved corporation for fifteen years, and its disposition was clearly unfinished business.

Milford relied on *Addy*, in which trustees were appointed to dispose of property that had reverted to a dissolved corporation.[7] The Court held that the reverter right was indeed a "valuable right" whose disposition constituted "unfinished business" of the corporation. *Addy*, 89 A.2d at 140. In contrast, as the Court of Chancery below held, the insurance policies "are neither valuable nor contingent" because there has been no showing that "Krafft-Murphy could be held

[7] Pursuant to § 279, former directors may be appointed to be trustees, while other persons may be appointed to be receivers. Their duties and powers are identical.

liable for tort suits brought more than ten years after dissolution. Therefore, there is no 'valuable right' so as to justify appointment of a receiver." *see* PA at A.486 (Chancery Ct. Op. at 22, n.67 (distinguishing *Addy*)).

An analogous case, *U.S. v. McDonald & Eide, Inc.*, 865 F.2d 73 (3d Cir. 1989), is instructive. The Court of Chancery appointed a receiver, who recovered misappropriated corporate assets, including income-producing leases, from former officers. The IRS then demanded payment of corporate tax on the income. The federal court held that no such tax was due, as the receiver was not a general proxy for the company and his appointment did not resurrect liabilities that had already been extinguished by operation of law. In spite of the appointment of the receiver, the corporation "did not exist." *Id.* at 76. Thus, the receiver appointed pursuant to 8 *Del. C.* § 279 can take charge of and distribute assets among the proper claimants, but he or she cannot subject the dissolved corporation to liabilities that were previously extinguished.

In sum, Krafft-Murphy had no "unfinished business" at the time of dissolution, except with respect to the suits timely brought and not yet resolved. With respect to such suits, Krafft-Murphy continues as a "body corporate," and its insurers continue to defend and pay settlements and valid claims. But with respect to new suits, "[t]here can be no continuance after the three-year period has expired because there is nothing to continue – the dissolved corporation 'is no more.'" *In*

the Matter of Dow Chem., Int'l, Inc. of Delaware, 2008 Del. Ch. LEXIS, at *1 (*quoting In re Citadel Indus., Inc.* 423 A.2d at 504-05).

C. The Decision in *Texas Eastern Overseas Corporation* Does Not Control This Case

Petitioners rely heavily on the decision in *Texas Eastern Overseas Corp.* 2009 Del. Ch. LEXIS 198 (Del. Ch. Nov. 30, 2009), *aff'd* Nov. 21, 2010 (Del. Filed March 1, 2010) ("*TEO*"). As the Court of Chancery correctly concluded, *TEO* does not decide the issue presented here. PA at A.484-86.

1. This Court's Affirmance in *TEO* Did Not Decide The Issue

The *TEO* petitioners, who were suing a dissolved Delaware corporation over environmental liability in California, sought a receiver so that insurance policies could be accessed to pay the environmental liabilities. The dissolved company's opposition was premised on the argument that no insurance coverage had been shown to exist. When the Court of Chancery reached the question of whether the applicants had "provided sufficient grounds for the Court to conclude that it is reasonably likely [that] TEO continues to hold undistributed assets," *TEO*, at *15, it assumed that insurance contracts qualifies as such "assets." That assumption, for all the reasons explained above, was incorrect. In the absence of liability, insurance contracts are not "property or debts" that can be collected by a receiver.

When *TEO* came before this Court, the American Insurance Association and the Coalition for Litigation Justice sought to file an amicus brief to make this point. This Court denied the motion, noting that the argument had not been preserved on appeal. PA at A.485 and n. 64. Thus, the issue was not considered by this Court. *See* AA at B.062-65 (Affidavit of Joseph L. Ruby, Exh. F.)[8] There is no bar to this Court's consideration of the arguments that the statute does not permit appointment of a receiver solely to become liable to claimants who wish to gain access to insurance.

2. *TEO*'s "Windfall" Argument Misapprehends The Nature Of Liability Insurance

The *TEO* court justified its decision in part on grounds that, we respectfully submit, are not based in the public policy of this State. It reasoned that the appointment of receiver in order to create liability that insurers would then pay would "avoid ***a reordering of societal risk allocation*** from the insurers who are deemed to have accepted the risks." *Id.* at *18-19 (emphasis added). But society, in the form of the General Assembly, did not require Krafft-Murphy to buy the liability insurance at issue. Krafft-Murphy plainly bought insurance, not to compensate tort claimants, but to protect its assets from them. The policies were

[8] In addition, *TEO* is distinguishable, as the Court of Chancery noted, PA at A.486, and as discussed further below.

private contracts, bought to defend Krafft-Murphy when sued and to settle and pay claims as appropriate.

The contractual provisions of the Krafft-Murphy policies make this clear. They provide that the insurers' obligations ran only to the insured. The insurers promised (subject to other terms and conditions) to pay "***on behalf of the insured*** all sums which the Insured shall become legally obligated to pay as damages because of bodily injury." AA at B.067-68 (Affidavit of Joseph L. Ruby, ¶¶ 6-9). They undertook no obligations to claimants, and did not promise to make any payments where the policyholder had no such legal obligation.

Additionally, the insurers agreed to "defend any suit against the insured seeking damages" because of bodily injury covered by the policy, "even if the allegations of the suit are false or fraudulent." *Id.* This defense obligation, which is of great value to a policyholder, is of no value to a dissolved company. When the policyholder can no longer be sued, the insurers are effectively defending themselves, which is not something they contracted to do.

In Delaware as elsewhere, "injured parties are merely incidental beneficiaries and have no right under the policy to sue the liability insurer until a judgment has been obtained against the insured." *Willis*, 2004 WL 2419143 at *14. Claimants like Petitioners are adverse to the policyholder, and strangers to the

contract between policyholder and insurer. Where the policyholder has no liability to them, the insurer has no obligation to pay.

The General Assembly surely knew that virtually all Delaware corporations have liability insurance. Nonetheless, it provided that dissolution would eventually terminate a company's amenability to suit. This legislative judgment demonstrates a considered decision, balancing the public policy in favor of finality for dissolved corporations against the risk that claimants with valid claims may not recover compensation. We respectfully submit that *TEO* does not properly reflect the public policy of Delaware as set forth in 8 *Del C.* §§ 278-81.

3. Because *TEO* Was Brought Within Ten Years Of Dissolution, It is Distinguishable From The Instant Case

As noted above, a receiver may perform all 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." 8 *Del C.* § 279. The defense of cases barred by § 278 would not ordinarily be considered to be "unfinished business of the corporation." However, given the requirement of § 281(b) that companies which dissolve without court supervision must make provision for claims that are likely to arise or become known in the ten years after dissolution, one might argue that the defense of such claims is indeed "unfinished business" that would justify appointment of a receiver if the company had not otherwise made provision for

such suits. Apparently, the claim at issue in *TEO* was such a claim. There, suit was brought about seven years after dissolution. *TEO*, at *3-4 (company dissolved in November 1992; suit brought in January 2000).

There is no statutory remedy for claimants if provision for claims likely to arise within ten years is not made. The implied remedy is an action against the former directors, as noted in *In re RegO Co.*, 623 A.2d at 97. "A director breaches her fiduciary duty to creditors if she fails to comply with the dissolution procedures set forth in 8 *Del. C.* §§ 280-82," *Akande v. Transamerica Airlines, Inc.*, 2006 WL 587846 at *7 (Del. Ch. Feb. 28, 2006); *accord*, *Gans v. MDR Liquidating Corp.*, 1990 WL 2851, at *6-8 (Del. Ch. Jan. 10, 1990).

Petitioners do not seek to sue the former directors, nor do they need to do so. Krafft-Murphy's insurers continue to defend and resolve all claims brought within the ten-year period established by § 281(b), and have stipulated that they will continue to do so. *See* PA at A.481 n.56. Thus, unlike the claimant in *TEO*, Petitioners here have no need for a remedy.

D. Bankrupt Policyholders Are Not Analogous To Dissolved Corporations

Petitioners contended below that because insurers of bankrupt companies must pay valid claims, insurers of dissolved companies should do so as well.[9] But a debtor is not relieved of liability; it is merely given the benefit of an automatic stay, 11 *U.S.C.* § 362, in order to allow the claims of creditors and investors to be paid appropriately. Thus, a liability policy continues to provide coverage where "the debtor is confronted with substantial liability claims" which it must attempt to pay. *Homsy v. Floyd (In re Vitek, Inc.)*, 51 F.3d 530, 533 (5th Cir. 1995). By contrast, after the expiration of the statutory period, a dissolved corporation is not confronted with liability claims at all.

E. Appointment of a Receiver in Order to Give Claimants Access to Insurance Would Contravene the Bar on Direct Actions

Appointing a receiver for insurance purposes would, in effect, create a direct action against insurers whenever a company has dissolved. In *Lilliquist v. Copes-Vulcan, Inc.*, 21 A.3d 1233 (Pa. Super. Ct. 2011), Pennsylvania's appellate court refused to appoint a receiver, saying that "the appointment of a receiver to allow Lilliquist to collect [the dissolved company's] insurance funds would constitute a direct action against the insurer of an alleged tortfeasor, which is generally not permitted." *Id.* at 1237. Similarly, claimants cannot sue insurers directly in

[9] This argument, we submit, has been waived, as it could have been made in Petitioners' opening brief. *See* Del. Supr. Ct. Rule 14(c)(i).

Delaware. *See, e.g., Walden v. Allstate Ins. Co.*, 963 A.2d 139, n. 6 (Del. 2008), *citing Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 533-34 (Del. Super. Ct. 1990); *accord*, *Willis v. City of Rehoboth Beach*, 2004 WL 2419143. The receivership statute should not be utilized in Delaware to evade the bar on direct actions.

II. The Court of Chancery Correctly Denied the Application for a Receiver Empowered To Defend Claims Brought More Than Three And Less Than Ten Years After Dissolution

Question Presented:

Did the Court of Chancery correctly deny the application to appoint a receiver who would be empowered to defend only claims brought more than three years but less than ten years after dissolution?

Scope of Review:

Review is de novo as to both facts and law. *Alvarez v. Castellon*, 55 A.3d 352, 354 (Del. 2012); *Crescent/Mach I Partners L.P. v. Dr. Pepper Bottling Co. of Texas*, 962 A.2d 205, 208 (Del. 2008) (justiciability is reviewed de novo).

Merits of the Argument:

The Court of Chancery's decision to refrain from ruling on the request for a receiver for suits brought after three and before ten years is correct because, as the Court found, there is no justiciable controversy with respect to the request.

In light of counsel's stipulation that Krafft-Murphy's insurers would not seek to dismiss suits filed within ten years of dissolution, the Court of Chancery correctly determined that there is no justiciable controversy requiring the appointment of a receiver for such cases. PA at A.481 n.56 (*citing Crescent/Mach I P'rs L.P. v. Dr. Pepper Bottling Co. of Texas*, 962 A.2d 205, 208 (Del. 2008)).

The three-year term of Krafft-Murphy's post-dissolution existence came to an end in July 2002. Since then, the insurers have continued to defend asbestos bodily injury cases in Krafft-Murphy's name, have obtained voluntary dismissals as to many, and have settled others by making payments. Petitioners have suffered no harm from the absence of a receiver. In spite of their knowledge of Krafft-Murphy's dissolution for almost three years, Petitioners have not moved to dismiss their suits against Krafft-Murphy in Maryland and D.C.; to the contrary, they continue to litigate them in spite of their professed concern that they cannot properly do so, Pet. Br. at 33. Petitioners further claim that without appointment of a receiver, they cannot settle cases. Yet they have done that as well, accepting payment from the insurers in exchange for releases. *Id.* at 7. So long as the courts in Maryland or the District of Columbia do not enter orders dismissing the cases filed in the three-to-ten year window, there is nothing to prevent those cases from going forward. Krafft-Murphy's insurers have stipulated before the Court of Chancery that they will not seek such dismissals, *see* PA at A.481 n.56. If Petitioners themselves do not do so, the issue will not arise. Therefore, there is no controversy that has "matured to a point where judicial action is appropriate." *Stroud v. Milliken Enters., Inc.*, 552 A. 2d 476, 480 (Del. 1989). The Court of Chancery was correct in its decision to refrain from adjudicating the issue.

CONCLUSION

As the Court of Chancery observed, once a corporation has been dissolved for three years, it is no longer a body corporate and can no longer sue or be sued. The receivership statute is not intended to change that result except in clearly defined circumstances concerning the marshaling of assets, the payment of debts, and the winding up of unfinished business. Newly filed tort suits are not among those circumstances, and the existence of unexhausted policies of liability insurance does not change that result. Such insurance, which was a valuable asset to protect the corporation when it was alive, is no more than a contract for the corporation's protection and is not an asset that can be made available solely for the benefit of claimants once the corporation is no longer amenable to suit.

Admittedly, a dissolved corporation has a responsibility to make provision for claims that, at the time of dissolution, were likely to be brought within ten years; here, Krafft-Murphy's insurers are fulfilling that responsibility, and Petitioners who brought claims during the ten-year period have suffered no harm from the dissolution and require no relief.

Accordingly, for the reasons stated herein, Petitioners are not entitled to the relief they seek, and the judgment of the Court of Chancery should be affirmed.

Respectfully submitted,

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