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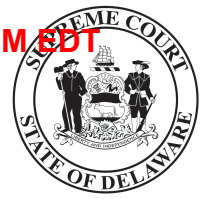

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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	:	

APPELLANT'S CORRECTED REPLY BRIEF ON APPEAL FROM COURT OF CHANCERY OF DELAWARE FOR NEW CASTLE COUNTY

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SUMMARY OF THE ARGUMENT

1. Claimants were entitled to the appointment of a receiver since 8 Del. C. §279 allows for the appointment of a receiver "at any time." Under the rule of law espoused in Texas Eastern Overseas, 2008 WL 4270799, proof of insurance can provide the basis for the appointment of a receiver. There is no language in 8 Del. §§280-282 which would limit 8 Del. C. §279's mandate that a receiver can be appointed "at any time." Finally, the contingent nature of the insurance policies does not bar a petitioner from the appointment of a receiver.

2. Insofar as Question II was argued in Claimants' Opening Brief is concerned, Appellants rest upon the papers already filed in this Court.

ARGUMENT

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 where §279 by its clear terms allows for the appointment of a receiver "at any time?"

B. Merits of the Argument

In its Opposition Brief, Krafft-Murphy offers a buffet of meandering arguments defending the Court of Chancery's ruling in granting its Motion for Summary Judgment. These arguments are proffered without context as to their widespread implications. Krafft-Murphy's original defense to the Claimants' request for the appointment of a receiver consisted of two primary arguments. First, Krafft-Murphy claimed that the three year winding up period described under 8 Del. C. §278 limited the application of 8 Del. C. §279. The crux of its argument was that Texas Eastern Overseas, 2009 WL 4270799 (Del. C. 2009), aff'd., 998 A.2d 852 (Del. 2010), should be reversed despite the fact that the opinion was affirmed by this Court and despite the fact that it has been universally held that §278 does not limit the application of §279. In making this argument, Krafft-Murphy utilized a harsh, circular

argument claiming that since Krafft-Murphy, a dissolved Delaware corporation, could not have judgment rendered against it and since the insurance policies issued in Krafft-Murphy's name are not triggered until there is a judgment, a receiver can never be appointed pursuant to §279 because there is no "property" for a receiver to take possession of. In other words, Krafft-Murphy's primary argument in front of the Court of Chancery was that insurance policies can never be accessed more than three years after the dissolution of a corporation because the expiration of the three year winding up period extinguished all the insurance policies that the dissolved corporation held in its name and barred the appointment of a receiver for the purpose of satisfying creditors of the corporation.

This argument was directly contradictory to Texas Eastern Overseas and its predecessor Delaware cases. Going back as far as Harned v. Beacon Hill Real Estate Co., 80 A. 805 (Del. C. 1911), the Delaware courts have consistently held that a dissolved corporation's corporate status may be restored for the purpose of winding up its affairs after the three year winding up period because 8 Del. C. §279 allows for the appointment of a receiver "at any time." This rule of law holds true even if the assets in question are in the form of contingent contracts. Addy v. Short, 89 A.2d 136 (Del. 1952). What was particularly troubling about Krafft-Murphy's argument to the Court of Chancery is not only that it called for the reversal of Texas Eastern Overseas so quickly after this Court affirmed it, but also because it was made at the expense of both the creditors and shareholders of Krafft-Murphy.

It cannot be disputed that directors must make provision for the creditors of the

dissolving corporation, including tort creditors that are reasonably likely to arise as much as ten years following dissolution, before any distributions to the shareholders of Krafft-Murphy may be made. Krafft-Murphy's harsh argument proffered to the Court of Chancery that its insurance policies cannot be accessed after the three year winding up period would mean that the directors could not rely upon the very insurance policies they purchased to cover the liabilities of the corporation in fulfilling their duties under 8 Del. C. §§280-282. In many cases, the liability coverage purchased by a dissolving corporation in the midst of ongoing litigation will be a corporation's most valuable asset. The interpretation of the Rule would have the effect of forcing directors to set aside more distributable assets to cover the future liabilities of the corporation and would diminish the assets available to distribute to shareholders, despite the fact that the corporation paid for insurance to cover those very liabilities. Delaware corporation law regarding dissolution offers protection to both the creditors and the director/shareholders of the dissolving corporation. Krafft-Murphy's three year argument jeopardizes the interests of both classes of people in favor of Krafft-Murphy's insurers, who are not among the class of protected persons.

The Court of Chancery never ruled on this issue, but rather accepted Krafft-Murphy's invitation to avoid the issue altogether by ruling that Krafft-Murphy may continue to litigate the cases falling in the seven year gap even though Krafft-Murphy no longer has any authority to act by virtue of its dissolved status. The Court of Chancery, therefore, neither reversed nor applied Texas Eastern Overseas, but distinguished it based upon the fact that the CERCLA suit arose less than ten years

after TEO's dissolution. The Court of Chancery then ruled upon Krafft-Murphy's alternate argument that §§280-282 acted to cut off corporate liability after ten years, which disposed of the remainder of the Petitioners case.

Krafft-Murphy continues to proffer argument to this Court that implicates its preferred argument that it should be able to simply walk away from its insurance obligations a mere three years after the formal dissolution of a corporation and leave the directors of a corporation to cover the difference with distributable assets at the expense of the shareholders. Although couched in terms of the ten year argument, Krafft-Murphy in fact argues that this Court should reverse Texas Eastern Overseas and hold that a receiver can never be appointed to allow creditors access to unexhausted insurance policies. Overturning Texas Eastern Overseas's holding that proof of insurance can trigger the appointment of a receiver would constitute a "reordering of societal risk allocation" away from the insurers who accepted premiums to undertake the risk onto the general public at large. Texas Eastern Overseas, 2009 WL 4270799, fn 37 at *5.

Through the course of its brief, Krafft-Murphy argues two basic theories. First, it argues in essence that the language in §279 allowing for the appointment of a receiver "at any time" only applies if the corporation itself continues to hold assets that can be sold off for the benefit of the shareholders. But in the case of tort claimants who hold claims against a dissolved corporation, Krafft-Murphy argues that the "at any time" language in §279 does not mean what it says and creditors cannot utilize the statute to restore a dissolved corporation's amenability to suit for the purpose of

resolving liabilities incurred while the corporation was in existence. Second, Krafft-Murphy continues to claim that it is protected from suit under §279 by virtue of the contingent nature of its policies. Delaware law does not support either theory.

1. 8 Del. C. §279 allows for the appointment of a receiver "at any time."

Under 8 Del. C. §279, a receiver can be appointed to a dissolved corporation upon good cause shown. The effect of the appointment is that the corporation's amenability to suit is restored. It has been stated that: "Section 279 is directed to the restoration of corporate existence once terminated under Section 278.... [The effect of §§278-279 is 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 1191, 1195 (Del. 1993). So one of the express purposes of §279 is to restore a corporation's amenability to suit for the purpose of settling the liabilities of the corporation.

The Petitioners in this proceeding allege in their underlying suits that they were exposed to asbestos by the activities conducted by Krafft-Murphy during its years of operation. No tortious conduct is alleged to have occurred after Krafft-Murphy shut its doors and, most certainly, not after its dissolution almost ten years after Krafft-Murphy ceased its business activities. While new claims do continue to be filed against Krafft-Murphy, it is because of the latency period in the disease processes in question. But the claims themselves all are alleged to have arisen during the course Krafft-Murphy's business operations.

The Claimants' Petition was presented to the Court of Chancery in the same context as the petition filed in Texas Eastern Overseas. In both cases, the request to the Court of Chancery was for the appointment of a receiver so that lawsuits which sought to resolve the corporate liability of a dissolved Delaware corporation could move forward in their respective jurisdictions. The Petitioners here simply want the same result; 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.

Krafft-Murphy claims that the Delaware legislature intended some sort of finality for corporate liability. However, it never points to any language in the relevant statutory scheme that would limit the express language of §279, which allows for a petition for the appointment of a receiver "at any time." That language has, until the issuance of the Court of Chancery's opinion in this case, been held to mean exactly "what it says". Harned v. Beacon Hill Real Estate Co. 80 A. 805, 808 (Del. Ch. 1911).

Therefore, if Krafft-Murphy's assertion that the Delaware scheme contemplates that §279's "at any time" language is somehow limited, it should be able to point to some specific language within the legislative scheme to achieve that end. However, no such language exists. 8 Del. C. §§ 280-282 are distribution statutes. The plain terms of the title of §281 makes that point clear because it is entitled "Payment and distribution to claimants and stockholders". The statute, by its very words, is concerned with distributable assets of a corporation and lays out a framework for how

directors are to divide up the distributable assets between the creditors and directors of a corporation. The whole purpose of §281(b) is to charge the corporation with the duty to "adopt a plan of distribution" and enumerates the class of creditors the corporation must make "provision" for before "[a]ny remaining assets" be distributed. However, absolutely no language in that section cuts off corporate liability for claims that may arise after the ten-year period. Of course, claims of future claimants could be cut off as a matter of practicality if the corporation has no remaining assets to trigger the appointment of a receiver under §279. In the Matter of Dow Chem. Int'l, Inc., 2008 WL 4603580; and In the Matter of Dow Chem. Int'l, Inc., 2008 WL 4989069. There is nothing in §281(b) which bars suit against the corporation itself. The closest the statute comes to limiting corporate liability is in §280(a)(2), and it is undisputed that Krafft-Murphy did not employ the notice option in its dissolution.

In fact, it appears that insurance policies fall squarely outside the ambit of §§280-282 altogether. In In re RegO, 623 A.2d 92 (Del. Ch. 1992), the directors opted to utilize 8 Del. C. §280(a) and seek court approval of a trust established to pay out on tort claims that were anticipated to continue to arise in the years following the company's dissolution. It was undisputed that the distributable assets of the corporation at the time of dissolution were insufficient to cover all the tort claims estimated to be filed against the company in the future. It was the provisions of the trust dealing with the disposition of RegO's insurance coverage that provide insight in the role that insurance plays in the winding up the business of a dissolving corporation that faces extensive and ongoing tort liability. The terms of the proposed

trust stated that "[a]ny Product Obligation covered by insurance will be paid up to the amount of available coverage." Id. at 101, fn. 25. So the trust, consisting of a limited pool of distributable assets, was separate and distinct from the insurance policies purchased by the corporation during its years of operations. Claimants wishing to collect on judgments obtained against RegO had to first exhaust all insurance coverage before a claim could be made on the trust. The obvious intent behind the provision was to maximize the assets available to RegO in the disposition of its extensive tort liability.

Krafft-Murphy's reliance on case law from other jurisdictions only illustrates the fact that Delaware has not provided a definitive cut off for corporate liability. Gillam v. Hi-temp Products, Inc., 677 N.W.2d 856 (Mich. Ct. App. 2003), Lilliquist v. Copes-Vulcan, Inc. and City of South Bend v. Century Indemnity Co., 821 N.E.2d 5 (Ct. App. Ind. 2005), all involved the application of statutory schemes in states that enacted the Revised Model Business Corporation Act which, by its very terms, bars suit for contingent claims against a dissolved corporation after notice of the dissolution is effectuated as described in the statute. The statute specifically states that among the claims intended to be barred are future, contingent claims. The courts in each case noted that the purpose of the bar was to cut off the liabilities of the corporation. Accordingly, those cases merely applied the specific language of their dissolution statutes absolutely barring claims against a dissolved corporation and held that the absolute bar of suits against the corporation was not altered by the availability of insurance proceeds.

Accordingly, each case looked to the individual statutory schemes as enacted in the different states in coming to their respective decisions, but not every state has enacted absolute bars to litigation on corporate liabilities like the legislatures in Michigan and Alabama have enacted. Nor does every state require a vested right be in existence before a receiver can be appointed. In California and New Jersey, for example, corporate existence is continued without any time limitation. See N.J. Stat. Ann. §14A:12-9; Cal. Corp. Code §2010. Corporations formed under the laws of those states have an endless winding-up period and retain the ability to sue and be sued in the winding-up of affairs.

Delaware, of course, has opted for a three year winding up period. However, a receiver may be appointed to continue the resolution of unfinished business of a corporation, and a petition under §279 may be filed "at any time." Therefore, the only difference between the California and New Jersey schemes and the Delaware scheme is that Delaware adds the requirement of judicial oversight past the three year winding up period. However, nothing in the Delaware legislative scheme acts to cut off corporate liability at a definitive date except as is provided for under §280(a)(2). As already noted, the Delaware legislature could have limited the application of §279 to a specific time period at the same time it amended §§ 280-282 to add specific time periods for planning under the director liability portion of the dissolution scheme. The fact that the legislature chose to leave the language of §279 intact shows its intent that corporate winding-up can occur at any time, so long as this court finds good cause.

2. Contingent Contractual Rights Can Form The Basis For The Appointment Of A Receiver Under §279.

The Supreme Court of Delaware has held that contingent contractual rights can properly trigger the application of §279. In Addy v. Short, 89 A.2d 136 (Del. 1952), this precise point was made clear. In Addy, the contingent right in question was a right to reverter in land. Krafft-Murphy attempts to distinguish that case by arguing since it is the corporation that receives the benefit of the right of reverter, there was value in the contingent right that does not exist when the contingent right flows to the benefit of creditors.

But Addy's holding was in no way as restrictive as Krafft-Murphy may wish it to be. The whole point of the Addy case was to make clear that, §278 notwithstanding, a Delaware corporation never truly dies. Because of the existence of §279, dissolved Delaware corporations remain alive enough to continue to hold title to its property interests, including contingent contractual rights. For this reason, the Supreme Court noted that a dissolved Delaware corporation continues to retain enough vitality after the expiration of the three year winding up period to be "made a defendant to a suit in the Court of Chancery for the appointment of a receiver" and "sufficiently alive to 'serve as repository of title and as obligor of a debt.'" Id. at 139-140 (quoting Wax v. Riverview Cemetery Co., 24 A.2d 431 (Del. Super. 1942)). It Under Delaware law, therefore, any property interests and any debts that a Delaware corporation holds (or possesses) at the time of its dissolution remain alive and enforceable after the three year winding up period, and §279 is the mode of

enforcement of those rights. In this case, the assets at issue are insurance policies, that though contingent in nature, were in existence at the time of Krafft-Murphy's dissolution. After the expiration of the three year winding up period, Krafft-Murphy's ownership of those indemnity contracts continued unabated under the rationale of Addy.

In its ruling, the Addy court distinguished McBride v. Murphy, 124 A. 798 (Del. Ch. 1924), a case that Krafft-Murphy relies upon. But the holding in McBride only bolsters the notion that contingent contracts remain alive, enforceable and in the possession of a dissolved corporation. In McBride, a Delaware corporation was named a residual beneficiary of a man's estate. The corporation's corporate status would expire by limitation two years and eight months prior to the time of the man's death. So at the time that the gift by devise would pass, the corporation named in the will was no longer in existence, except to the extent that is described in current §278, i.e. to continue to wind up its affairs.

The Court of Chancery held that the dissolved corporation could not take possession of the gift because it was no longer in existence at the time of the decedent's death. The court noted that the fact that the dissolved corporation's corporate status remained active at the time of the man's death did not allow the corporation to take possession of the gift because the residual property was not in the possession of the corporation on the date of its dissolution and, therefore, it constituted new property.

Confining ourselves to the metes and bounds of the franchise as defined

> by the charter, we find that it had power to acquire and hold property, and to dispose of the same. All these powers terminated upon the expiration of the corporate charter on April 1, 1901, except those that were extended for the three year period of grace, and so far as this case is concerned these were only such powers as were necessary to wind up the affairs of the corporation. ... The total corporate powers may be represented as an integer, one half of which was the power to acquire property and the other half of which was the power to dispose of it. The first half was destroyed by the termination of the charter and the second half continued by the statute as necessary to the winding up.

Id.

This language makes clear that while a corporation, through the dissolution process, loses its ability to receive property that it had no right to at the time of its dissolution, it continues to hold title to property in its name by virtue of the three year winding up period. Addy merely took that same notion one step further. There the Delaware Supreme Court made clear that property of the corporation, including contingent contractual rights, that were in the possession of the corporation at the time of dissolution, continue to remain in the possession of the corporation even after the expiration of the three year winding up period, and can provide the basis for the appointment of a receiver under §279. This case falls squarely in line with the holding of Addy. There has never been any dispute during the course of these proceedings that Krafft-Murphy was in possession of insurance policies covering its continued asbestos liabilities at the time of its dissolution. As is made clear by Addy, the contingent contracts that were in the name of Krafft-Murphy at the time of its dissolution survived both the dissolution itself and the expiration of the three year winding up period. As noted by Addy, "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." Addy. 89 A.2d at 140 (emphasis added). It is the law of Delaware that Krafft-Murphy's insurance contracts remained in force even after its dissolution, and that a receiver can be appointed under §279 to protect the rights of Krafft-Murphy's creditors.

Krafft-Murphy, however, is insistent that the absence of a judgment against it makes its insurance policies completely inaccessible because a right to those indemnity contracts does not vest until judgment. In making this argument, Krafft-Murphy again turns to authority from other jurisdictions and cites to In re All Cases Against Sager Corp., 967 N.E. 2d 1203 (Ohio 2012), for the proposition that since a judgment cannot be obtained against a dissolved corporation, there is no asset for a receiver to administer. In that case, the court stated that insurance "... does not develop into a vested right until judgment is secured." Id. At 1210. That simply is not the law of Delaware. The holding in Addy makes clear that any asset " vested or contingent" comes under the ambit of §279. The law of Delaware simply does not require that an asset be vested in order for a receiver to be appointed on behalf of a dissolved Delaware corporation.

In discussing this issue, Krafft-Murphy conveniently overlooks the one case that has applied the rule of law in Delaware of appointing a receiver under §279 was examined, where the asset in question was insurance policies covering the liabilities of the corporation. That case, of course, is In the Matter of Texas Eastern Overseas,

supra, the very case that the Claimants relied upon in filing this action. Instead, Krafft-Murphy offered a variety of excuses as to why Texas Eastern Overseas should not be discussed in conjunction with its argument that contingent indemnification rights cannot trigger the appointment of a receiver. These arguments included the same rationale as the Court of Chancery in distinguishing Texas Eastern Overseas in its February 4, 2013 opinion; i.e. that since §§280-282 forever bars suit in the name of a corporation after ten years, then the Texas Eastern Overseas decision does not control, since the CERCLA suit was brought within ten years of TEO's dissolution. The impact of §§280-282 has already been addressed in this brief. There is nothing in the language of the legislation relating to the duties of a corporation to make provision for its creditors that limits corporate liability, so such a distinction is untenable.

Krafft-Murphy's overall argument that there is the need for a judgment before a receiver is appointed, however, necessarily implicates the issue that the Court of Chancery never passed on. That issue is whether Texas Eastern Overseas should be reversed by a finding that insurance policies cannot form the basis for the appointment of a receiver more than three years following the dissolution of a corporation. This is because if Krafft-Murphy is correct that a judgment is necessary to create a vested right to insurance sufficient for that insurance to qualify as "property" of a dissolved corporation, then a receiver could not be appointed after the lapse of the three year winding up period, because judgment cannot be obtained after the lapse of the three years without the appointment of a receiver. In other words, Krafft-Murphy

effectively seeks to have this Court reverse Texas Eastern Overseas through the back door where it failed to succeed through the front door at the Court of Chancery.

Krafft-Murphy tacitly acknowledges this on page 15 of its brief. There it states: "Here, just as in Sager, the dissolved corporation has no contingent valuable right in insurance more than three years from the time of dissolution." This statement is certainly telling, and the only purpose it has is to coax this Court to adopt the law of Ohio at the expense Texas Eastern Overseas. Krafft-Murphy never discusses the specific holding of Texas Eastern Overseas to justify this result. Instead it attacks the only on the public policy grounds that the Texas Eastern Overseas court espoused in its opinion, where it was stated that it "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." Texas Eastern Overseas, 2009 WL 4270799 at *5 (Del. Ch. 2009); See Also In re Texas Eastern Overseas, Inc. 2010 WL 318266 at *2 (Del. Ch. 2010)("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.").

To be clear, Texas Eastern Overseas was not breaking new ground when espousing those grounds in public policy. Rather, that public policy is firmly embedded in Delaware corporate dissolution law. The operation of §279 is meant to prevent the use of the dissolution process to avoid corporate liabilities. City Investing Company Liquidating Trust v. Continental Casualty Co., 624 A.2d 1191, 1196 (Del. 1993). It has been stated that the Delaware dissolution laws were enacted to ensure

that the liabilities of the dissolving corporation are satisfied, and to provide the directors and shareholders of the corporation with a mechanism to collect disbursements 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). In stating that the insurers could not utilize Delaware's dissolution statutes to avoid their insurance obligations, the Texas Eastern Overseas court was merely emphasizing that the Delaware statutes are geared toward balancing the interests of the creditors of a corporation with the interests of its shareholders. Insurers simply do not play a role in the inquiry

As for the rest of the Texas Eastern Overseas decision, which was strictly grounded in the interpretation of Delaware case law, Krafft-Murphy merely cites to an order by this Court denying the very belated submission of an amicus brief was "not an issue addressed by the parties in briefing." Contrary to Krafft-Murphy's protestations, the Texas Eastern Overseas opinion and this Court's decision to affirm it decimate Krafft-Murphy's position that insurance policies are too contingent to trigger §279. This is because the facts in Texas Eastern Overseas added an entirely new level of contingency to the inquiry. In Texas Eastern Overseas, the insurance policies in question were not even issued in the name of the dissolved corporation. Rather, the policies were issued to VIS, a predecessor corporation, and the primary issue before the Court of Chancery and on appeal was whether a receiver could be appointed where the property in question was not in the name of the dissolved Delaware corporation. Thus, the question was not just whether proof of insurance

could form the basis for the appointment of a receiver under §279, but also whether a receiver could be appointed where it was hotly disputed whether the insurance in question would even cover the liabilities of the dissolved corporation at all.

In appointing a receiver, the Texas Eastern Overseas court did not require that TEO's entitlement to the policies be proven with any certainty. In fact, the court anticipated that additional litigation in a more convenient forum would need to take place to finally decide whether TEO was covered by the policies issued to its predecessor. So, the Texas Eastern Overseas court was anticipating two litigations to take place, one determining the CERCLA action, and another settling the question of TEO's coverage under the insurance policies.

Of course, it may have turned out that the policies did not cover TEO's CERCLA liabilities, but the Court of Chancery appointed a receiver anyway, and this Court affirmed the decision "on the basis of the Court of Chancery's well-reasoned decision ..." In the Matter of Texas Eastern Overseas, Inc., 998 A.2d 852 (Del. Supr. 2010). Rather, the Court of Chancery merely required that Petitioners show that it was reasonably likely that TEO's liabilities would be covered by the policies, and it was content in the inference that TEO would be covered by the policies because TEO merged with VIS. All the Petitioners had to show was that the appointment of a receiver was "worth the effort." So, the standard that the Texas Eastern Overseas courts employed was markedly more lax than Krafft-Murphy advocates here on appeal.

None of the Delaware cases supports its contention that insurance policies

cannot trigger the appointment of a receiver. In re Citadel Industries, Inc., 423 A.2d 500, (Del. Ch. 1980), was not a §279 proceeding, and it was undisputed in that case that the dissolved corporation had no assets according to a report of independent auditors, and the petitioning corporation admitted that it could not seek relief under §279 because of the lack of assets. The sole reference to insurance policies came in the form of a line of hypothetical questions, and the propriety of appointing a receiver where there is proof of insurance coverage was simply not an issue before the court. In Am Properties Corp. v. GTE Products Corp., 844 F. Supp. 1007 (D. N.J. 1994), the plaintiff attempted to sue a dissolved Delaware corporation directly, claiming that a dissolved corporation was a person as defined under CERCLA. However, reliance on this case ignores the import of Texas Eastern Overseas, which was also a CERCLA case. In Texas Eastern Overseas, as in AM Properties, the underlying federal case was dismissed. However, the plaintiff in Texas Eastern Overseas went on to petition this Court for the appointment of a receiver under §279, so that the California CERCLA litigation could proceed. It was this Court that determined that revival of the dissolved corporation through the appointment of a receiver was appropriate. So, these two cases merely illustrate the appropriate procedure for pursuing a dissolved Delaware corporation in federal CERCLA lawsuits, which is to petition this Court for a receiver. Thus, it is clear that Delaware law allows for the appointment of a receiver where there is proof of insurance covering the liabilities of Krafft-Murphy.

3. **This Is Not A Direct Action Against The Insurers of Krafft-Murphy**

The Petitioners in this case have not named the insurers of Krafft-Murphy as a

party in this proceeding or the underlying lawsuits. Instead, the Petitioners are pursuing this case against Krafft-Murphy. As made clear in Harned v. Beacon Hill Real Estate Co., 84 A.2d 229 (Del. Supr.1912), the dissolved corporation is the proper party to name when filing a petition under §279. The fact that the insurers' policies are at issue in this case does not change the named party of this proceeding or any other case. This case does not differ from any other case where suit is filed against a party for acts covered by liability insurance. In the typical personal injury case, suit is filed against the name of the tortfeasor despite the fact that insurance policies cover a potential judgment. Likewise in this case, Krafft-Murphy, the alleged tortfeasor, has been named as party defendant. In fact, this proceeding is one step removed from the typical personal injury case. The Petitioners do not seek any of the actual insurance proceeds in this case. Rather, they seek the restoration of Krafft-Murphy's amenability to suit so that the Petitioners may continue to litigate their claims against Krafft-Murphy in the underlying lawsuits.

CONCLUSION

For the reasons stated herein, the Court of Chancery's decision to grant Krafft-Murphy's Motion for Summary Judgment, denying Petitioner's Motion for Judgment in the Pleadings should be reversed.

Respectfully submitted,
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