IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF KRAFFT-MURPHY COMPANY, INC., a dissolved Delaware Corporation	:	CA No. 6049-VCP

MEMORANDUM OPINION

Submitted: July 1, 2011
Decided: November 9, 2011

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PARSONS, Vice Chancellor.

This matter comes before the Court on the basis of two competing motions related to a petition for the appointment of a receiver under 8 *Del. C.* § 279 for Krafft-Murphy Company, Inc., a defunct Delaware corporation that has been dissolved for more than twelve years. The first motion is a motion to perfect service on the company brought by the petitioners, who are claimants in various asbestos-related tort suits filed against the company in various jurisdictions in the mid-Atlantic region. The second motion is a motion to dismiss, filed by the company's insurers on behalf of the company. Because the issues underlying these motions are closely related, I address them together here.

The circumstances of this action are unusual and, according to the insurers, at least, present novel questions of first impression in Delaware pertaining to corporate dissolutions. The dispute involves whether a receiver can be appointed for a dissolved and defunct corporation for the sole benefit of claimants who suffered latent injuries at the hands of the corporation during its period of operations, but who did not bring claims related to those injuries until more than a decade after the company's dissolution.

In deciding these competing motions, I first address whether service of process may be made on a defunct corporation in a receivership action under § 279 where that corporation has been dissolved for more than three years and its former directors and officers no longer retain a personal or financial interest in the corporation. I then turn to whether a receiver may be appointed for a dissolved corporation for the limited purposes of allowing the corporation to be sued and allowing it and its claimants to take advantage of insurance contracts held by the corporation. For the reasons stated in this Memorandum Opinion, I find that, in the circumstances of this case, service of process

may be perfected on the dissolved corporation and that the petitioners conceivably may be able to show that a receiver should be appointed for the corporation to enable it to respond to claims brought against it, because the corporation's informal plan of dissolution contemplated using its insurance contracts for that purpose. Therefore, I will grant the petitioners' motion to perfect service and deny the company's motion to dismiss.

I. FACTUAL BACKGROUND

A. The Parties

Petitioners are various asbestos claimants represented by two law firms, the Law Offices of Peter G. Angelos and Brown & Gould, LLP.[1] In addition to this action, each of the Petitioners is pursuing an individual claim against Krafft-Murphy Company, Inc. in other asbestos-related personal injury actions that give rise to the present petition.

Respondent is Krafft-Murphy Company, Inc. ("Krafft-Murphy" or the "Company"), a dissolved Delaware corporation. During its existence, Krafft-Murphy was engaged in the business of plastering and spray insulating in Maryland, Virginia, and Washington, D.C. As a result of its use of asbestos-containing products in its business, the Company has been the subject of hundreds of asbestos-related personal injury lawsuits over the past two decades.

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[1] Although the original petition for receiver was filed by the Law Offices of Peter G. Angelos and its clients, the claimants represented by Brown & Gould, LLP moved to intervene in this action on June 15, 2011. I granted that motion on July 1, 2011. The Brown & Gould petitioners have adopted the arguments of the original petitioners as to both of the pending motions. Because all of the parties seeking appointment of a receiver essentially have identical interests and claims related to this action, I refer to them collectively as "Petitioners."

Although they are not named parties in this action, the alleged "real parties in interest" directing the litigation for Respondent are various insurance companies obligated to defend and settle asbestos-related claims against Krafft-Murphy under liability insurance contracts purchased while the Company was in operation. The primary insurers sponsoring this litigation are the Travelers Casualty and Surety Company, CNA Insurance Company, and Great American Insurance Company (the "Insurers").

B. Facts[2]

In response to its potentially immense tort liability arising from numerous asbestos-related litigations against it, Krafft-Murphy ceased operations in 1991 and formally dissolved in 1999. When it dissolved, Krafft-Murphy apparently had no distributable assets and made no distributions to creditors or shareholders. The Company did possess, however, liability insurance contracts that covered its asbestos-related tort liability.

During its dissolution, the Company did not provide notice of the dissolution to existing or potential creditors or claimants nor did its directors adopt a formal plan of dissolution. Nevertheless, the Company, under the direction of its Insurers, continued to defend and settle asbestos-related claims that were brought against it at any time within ten years after its date of dissolution. Beginning in 2009, however, the Company began moving to dismiss new claims brought after July 30, 2009, because that was more than

[2] Unless otherwise noted, the facts recited herein are drawn from the Petition and presumed true for purposes of Respondent's motion to dismiss.

ten years after the date of its dissolution. The Company's refusal to litigate those new claims prompted the filing of this receivership action.

C. Procedural History

This action springs from a broader series of asbestos-related tort litigation brought against Krafft-Murphy in the Circuit Court of Baltimore City, Maryland and other courts in the mid-Atlantic region. In response to various motions to dismiss made by Krafft-Murphy in these related lawsuits, Petitioners filed a Verified Petition for Appointment of Receiver for a Dissolved Corporation Pursuant to 8 *Del. C.* § 279 on December 6, 2010.

On January 19, 2011, Petitioners attempted to serve the Company through Neil J. McDonald, an attorney Krafft-Murphy had authorized to accept service on behalf of the Company in the earlier asbestos-related personal injury suits. At the direction of the Insurers, however, the Company responded by moving to dismiss this case pursuant to Court of Chancery Rules 12(b)(5) and 12(b)(6) for insufficiency of service of process and failure to state a claim.

In response to the motion to dismiss, Petitioners moved to perfect service on Krafft-Murphy by publication pursuant to 10 *Del. C.* § 3111(b) and Rule 4(d)(4), or, alternatively, under Rule 4(d)(7). The Company opposed that motion.

The competing motions to perfect service and to dismiss are closely related and involve many of the same underlying facts and questions of law. Therefore, this Memorandum Opinion addresses each motion in turn, beginning with Petitioners' motion to perfect service.

II. The Motion to Perfect Service of Process on Krafft-Murphy

A. Parties' Contentions

Respondent asserts that Krafft-Murphy cannot be served because it does not exist. According to Respondent, because the corporation dissolved more than three years ago, it no longer has a registered agent in Delaware or any directors or officers that otherwise could accept service on behalf of the Company. Furthermore, as a dissolved corporation, the Company has no principal place of business or registered office; therefore, service by way of the Secretary of State also would be impossible. In addition, Krafft-Murphy challenges the adequacy of Petitioners' attempt to effect service on the Company by serving process on McDonald. Although McDonald admittedly is authorized to accept service on behalf of the Company for tort claims seeking monetary damages, Respondent denies ever having made him a general agent for service of process on it or authorizing him to accept service in this action, which does not involve a tort claim.

Apparently conceding that service on attorney McDonald was ineffective, Petitioners have moved to perfect service on Krafft-Murphy by two alternative means. First, Petitioners contend that service may be made pursuant to Rule 4(d)(4), which provides that service may be made "[u]pon a Delaware corporation or a foreign corporation in the manner provided by statute." The relevant statutory provision, Petitioners assert, is 10 *Del. C.* § 3111(b), which states that "[i]n any action against a corporation whose officers reside out of the State, process may be served by publishing the substance thereof in a newspaper of this State, and of the state where the head officer resides, 20 days before the return thereof, and such service shall be sufficient."

Alternatively, Petitioners urge this Court to exercise the broad discretion afforded to it under Rule 4(d)(7) to make "[a]n order directing another or an additional mode of service of a summons in a special case . . . ."

B. Analysis

It is well-settled that "[n]otwithstanding the expiration of the three-year period, a dissolved corporation may be made a defendant to a suit in the Court of Chancery for the appointment of a receiver, and such receiver may be appointed *at any time* when cause therefor appears."[3] In contesting service on the basis that the corporation no longer exists, Respondent confuses the concept of the "civil death" of a corporation under the common law with the dissolution of a corporation under Delaware statutory law. As the Supreme Court held in *Harned v. Beacon Hill Real Estate Co.*,[4] "the condition of a dissolved corporation under the statute laws of this state is very different from that which would exist under the common law," under which a dissolved corporation "was absolutely dissolved, civilly dead, without life or being, and altogether at an end. . . . such is not now the law of this and many other states."[5] As discussed further *infra* in Part III.B.3, an action under 8 *Del. C.* § 279 for the appointment of a receiver may be brought

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3 *Addy v. Short*, 89 A.2d 139, 164 (Del. 1952) (citing *Harned v. Beacon Hill Real Estate Co.*, 80 A. 805, 808 (Del. Ch. 1911), *aff'd*, 84 A. 229 (Del. 1912)).

4 84 A. 229 (Del. 1912).

5 *Id.* at 234.

at any time and the appropriate defendant in such actions is the corporation itself.[6] Therefore, I reject Respondent's contention that Krafft-Murphy cannot be served in this action and turn now to determining the appropriate mode of service.

1. Service of Process is Appropriate under Rule 4(d)(4) or 4(d)(7)

As Petitioners contend, much as the corporation is not fully "civilly dead" after dissolution, the officers of a dissolved corporation retain their positions to the extent that they may be called upon to answer for the corporation after it has been dissolved and they have been discharged from their positions. In the circumstances of this case, service may be made on Krafft-Murphy under either Rule 4(d)(4) or Rule 4(d)(7). If the Company is considered a Delaware corporation for purposes of Rule 4(d)(4), then service can be made in accordance with 10 *Del. C.* § 3111(b). That is, because the Company's officers reside outside of Delaware, it can be served by publishing the substance of this action in a newspaper of this State, and of Virginia, where the head officer resides. Moreover, if due to the dissolution of Krafft-Murphy, it were considered inappropriate to apply Rule

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[6] Section 279 authorizes this Court, in its discretion, to appoint a receiver "*of and for the corporation*, to take charge of the *corporation's* property, and to collect the debts and property due and belonging to the *corporation*." 8 *Del. C.* § 279 (emphasis added); *see also Harned*, 84 A. at 234 ("But the only question for this court to determine is whether it was competent, legal and proper to make the corporation defendant in the proceeding below. We are clearly of the opinion that it was. Conceding, as we must, the power of the Court of Chancery to appoint a receiver for the company, with authority to sell the real estate it still owned, we think it logically and necessarily follows that the company should have been made defendant. In that way only would the company be apprised of the fact that application had been made to the court for the appointment of a receiver to sell its property.").

4(d)(4), I would exercise my discretion under Rule 4(d)(7) to order the Company to be served using the same form of service provided for in § 3111(b).

Rule 4(d)(7) authorizes this Court to fashion an additional mode of service so that service may be perfected on a corporation where (1) this Court has jurisdiction over an intended corporate defendant and the claims against it, and (2) "there is no other available method of service prescribed by statute or rule" under which the intended defendant may be served.[7] Here, 8 *Del. C.* § 279 provides ample basis for this Court to exercise jurisdiction over the Company and this action.[8] In addition, I find the procedures prescribed in § 3111(b) for effecting service on Respondent are adequate. This case is somewhat unusual, however, in that the real parties in interest may be the insurance companies that would cover Krafft-Murphy's exposure to asbestos-related liability. Those companies, including the Insurers, who are litigating this case on behalf of the Company, arguably are the only persons with a cognizable interest at risk if Petitioners succeed in having a receiver appointed. Accordingly, in perhaps an excess of caution, I also will order Petitioners formally to make service on attorney McDonald again to maximize the likelihood that any insurance companies interested in this proceeding by virtue of their contracts with the Company will receive notice of this action.

Thus, under Rule 4(d)(7), I authorize service to be made upon Krafft-Murphy by publishing notice of this action in newspapers in this State and in Virginia, where Frank

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[7] *Hovde Acq., LLC v. Thomas*, 2002 WL 1271681, at *5 (Del. Ch. June 5, 2002).

[8] Pet'rs' Reply Br. for Mot. to Perfect Service 3; *see Harned*, 80 A. at 808 ("In every suit there must be parties, and the corporation, though paralyzed, is still a proper party and its officers may answer for it in that suit.").

J. Krafft, the former president of Krafft-Murphy, is alleged to reside, 20 days before return thereof is due. I also require that notice be given to the relevant insurers of Krafft-Murphy by additionally serving attorney McDonald with the Complaint and a copy of this Memorandum Opinion and the accompanying Order. An Order further detailing the mode of service authorized in this case is being entered concurrently with this Memorandum Opinion

III. The Motion to Dismiss

A. Parties' Contentions

Respondent's contentions in support of its motion to dismiss are closely related to its grounds for opposing Petitioners' motion to perfect service. Respondent initially claims that because the Company dissolved in 1999, it no longer exists and, therefore, cannot sue or be sued. Alternatively, Respondent argues that, in order for a corporation to sue or be sued after the three-year statutory dissolution period provided under 8 *Del. C.* § 278, a receiver must be appointed for the corporation under 8 *Del. C.* § 279. Respondent further contends that a receiver may only be appointed where there are "debts and property due and belonging to the corporation" which the receiver effectively may marshal and distribute to the corporation's shareholders, creditors, or claimants. Because, according to Respondent, the insurance contracts held by the Company are not "debts and property due and belonging to the corporation," there is no basis for the

appointment of a receiver here.[9] Finally, Respondent contends that even if the Court of Chancery has the authority to appoint a receiver to defend against claims such as the asbestos-related claims brought by Petitioners, that authority relates only to claims brought during the ten-year period following dissolution. Once that period has expired, Respondent asserts that the statutory scheme of 8 *Del. C.* §§ 280-282 creates an absolute statutory bar against new claims being brought against the Company.

Petitioners agree that dissolved corporations cannot sue or be sued after the three-year period following dissolution unless a receiver is appointed under § 279. Contrary to Respondent, however, Petitioners assert that the insurance contracts possessed by the defunct Company are, in fact, undistributed assets. Therefore, Petitioners contend that, under § 279, this Court can appoint a receiver so that claimants may reach those assets by suing the Company. Petitioners further argue that the "10 year" language in §§ 280-282 does not bar the appointment of a receiver in the circumstances of this case. Instead, Petitioners contend that the "10 year" language in §§ 280-282 creates a parameter for directors of dissolving corporations to adhere to when making provisions designed to limit the exposure of directors and shareholders to liability for future claims against the corporation.

[9] Both parties agree that "debts and property due and belonging to the corporation" generally refer to "assets" of the corporation. Therefore, I use these terms interchangeably.

B. Analysis

1. The Applicable Standard

Pursuant to Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As recently reaffirmed by the Supreme Court, "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[10] That is, when considering such a motion, a court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[11]

This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[12] If the well-pleaded factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[13] The court, however, need not "accept conclusory

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[10] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (footnote omitted).

[11] *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

[12] *Id.* at *5 & n.13.

[13] *Id.* at *6.

allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[14]

2. Have Petitioners alleged sufficient facts to warrant the appointment of a receiver under § 279?

Respondent seeks the dismissal of the Petition for the appointment of a receiver for Krafft-Murphy under 8 *Del. C.* § 279. Therefore, the question before the Court is whether Petitioners have alleged sufficient facts that, if true, conceivably could justify the appointment of a receiver for the Company under that statute. For the reasons discussed below, I find Petitioners have alleged facts related to the Company's dissolution that conceivably could justify the appointment of a receiver under § 279. Therefore, I deny Respondent's motion to dismiss.

a. The legislative scheme reflected in 8 *Del. C.* §§ 278-279

To better understand when the appointment of a receiver for a dissolved corporation is justified under § 279, a brief discussion of the overall statutory scheme reflected in §§ 278 and 279 is warranted.

Under the common law, the dissolution of a corporation was its "civil death," the point after which the corporation could no longer sue or be sued.[15] The strict nature of this common law rule created substantial risks for creditors and claimants of dissolved corporations, "depriving them of a party to sue on their claims" once the corporation was

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[14] *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

[15] *In re RegO Co.*, 623 A.2d 92, 95 (Del. Ch. Oct. 22, 1992).

formally dissolved.[16] To mitigate the harsh results produced by this common law rule, state legislatures enacted various statutory schemes to provide mechanisms by which corporations can continue to sue and be sued during and after the winding up of their business. In Delaware, the relevant statutes are 8 *Del. C.* §§ 278-279.

Under § 278, the legal existence of a dissolved corporation automatically is extended as a "body corporate" for three years immediately following the corporation's dissolution. During this period, the corporation can sue and be sued and generally undertake any corporate action necessary to settle and wind up its business, so long as those actions are not taken "for the purpose of continuing the business for which the corporation was organized."[17] Unless this period is extended by the Court of Chancery, the statute provides that, at the end of the three-year period, the corporation's legal existence ends, "except with respect to any action, suit or proceeding begun or commenced by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution . . . ."[18] For those actions, the corporation continues to exist indefinitely until their conclusion. In this way, § 278 seeks to strike a balance between the harsh nature of the common law rule and the need for finality for the corporation and its directors, officers, and shareholders.[19]

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16 *Id.*

17 8 *Del. C.* § 278.

18 *Id.*; *In re Citadel Indus., Inc.*, 423 A.2d 500, 503 (Del. Ch. Nov. 21, 1980).

19 *See U.S. Virgin Islands v. Goldman, Sachs, & Co.*, 937 A.2d 760, 789 (Del. Ch. Dec. 20, 2007) ("The intention of [§ 278] was therefore to balance the competing

In conjunction with § 278, 8 *Del. C.* § 279 recognizes that, in certain instances, further corporate action may be required to resolve "unfinished business" of the corporation arising after the three-year statutory period. To that end, § 279 provides that the Court of Chancery may appoint a receiver for a dissolved corporation

> on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor, *at any time* . . . 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 . . . 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*.[20]

As this Court noted in *In re Citadel Industries, Inc.*,[21] "[t]he language of 8 *Del. C.* § 279 implies that its primary purpose is to safeguard the collection and administration of still existing property interests of a dissolved corporation. It functions primarily for the benefit of shareholders and creditors where assets remain undisposed of after dissolution."[22] More broadly, § 279 is the statutory mechanism by which an already dissolved corporation may conclude its "unfinished business" after its officers have been

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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.").

[20] 8 *Del. C.* § 279 (emphasis added).

[21] 423 A.2d 500 (Del. Ch. 1980).

[22] *Id.* at 506. There is no apparent dispute that Petitioners would qualify as either creditors or persons who purport to show good cause for the appointment of a receiver under § 279.

discharged and its legal existence ended.[23] Together, §§ 278 and 279 "ensure that a dissolved corporation maintains the authority and viability to sue and be sued 'incident to the winding up of its affairs.'"[24]

b. Dissolution procedures under 8 *Del. C.* §§ 280-282

In addition to the legislative modifications of the common law under §§ 278 and 279, the provisions of 8 *Del. C.* §§ 280-282 further protect the creditors and claimants of dissolved corporations by requiring corporations to adopt a plan of dissolution before the expiration of the three-year statutory period.

When a Delaware corporation decides to dissolve, it is required to "select one of two wind up procedures upon dissolution . . . [and] follow the selected procedure in winding up its affairs."[25] As this Court noted in *In re Transamerica Airlines, Inc.*,[26] the purpose of the two procedures under §§ 280-282 is to

> provide a judicial mechanism 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 and avoid risk that a future corporate claimant will, at a later time, be able to establish that such distribution

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23 *In re Tex. E. Overseas, Inc.*, 2009 WL 4270799, at * 3 (Del. Ch. Nov. 30, 2009) (citing *Citadel*, 423 A.2d at 504).

24 *Id.* (citing *City Investing Co. Liquid. Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1195 (Del. 1993)).

25 *LeCrenier v. Cent. Oil Asphalt Corp.*, 2010 WL 5449838, at *4 (Del. Ch. Dec. 22, 2010).

26 2006 WL 587846 (Del. Ch. Feb. 28, 2006).

> was in violation of a duty owed to the corporation's creditors on dissolution.[27]

If the corporation fails to follow one or the other of the two alternative statutory dissolution procedures provided under §§ 280-282, its directors may be subject to personal liability for breach of fiduciary duties to later claimants against the company[28] and its former shareholders may be liable for the full amount distributed to them in the dissolution.[29]

The two statutory procedures a corporation can follow during dissolution are (1) the "elective" procedure under 8 *Del. C.* §§ 280-281(a) or (2) the default dissolution procedure under § 281(b).[30] Elective dissolution under §§ 280-281(a) is a judicially-supervised dissolution process that provides a mechanism for the directors of the company to avail themselves of certain statutory safe harbors that mitigate the risk of later claims for breach of fiduciary duty. As explained by this Court in *In re RegO Co.*, "[i]n [its] barest outline [§§ 280-281(a)] calls for notice for the presentation of claims to the dissolved corporation; the rejection of, or the offering of security with respect to any

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27 *Id.* at *7.

28 8 *Del. C.* § 281(c); *see also Transamerica*, 2006 WL 587846, at *7 ("Delaware case law recognizes, however, that a director breaches her fiduciary duty to creditors if she fails to comply with the dissolution procedures set forth in 8 *Del. C.* §§ 280-282.").

29 8 *Del. C.* § 282(c).

30 *In re RegO Co.*, 623 A.2d 92, 97 (Del. Ch. Oct. 22, 1992).

claims presented; and the furnishing of notice of rights to petition for the appointment of a receiver."[31] Importantly, the procedure requires the dissolving corporation to

> petition the Court of Chancery to determine the amount and form of security which 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 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.[32]

In contrast to the formal notice and judicial approval procedures under §§ 280-281(a), the dissolution procedure outlined under § 281(b) simply provides that a dissolving corporation must

> prior to the expiration of the period described in § 278 of this title, adopt a plan of distribution pursuant to which the dissolved corporation . . . 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 to become known to the corporation or successor entity within 10 years after the date of dissolution.[33]

Because all dissolving corporations must follow one of the two dissolution procedures provided under §§ 280-282 in order for directors to satisfy their fiduciary duties to creditors and claimants, the dissolution procedure under § 281(b) represents the minimum

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31 *Id.*

32 8 *Del. C.* § 280(c)(3).

33 8 *Del. C.* § 281(b).

standard with which a corporation must comply during dissolution to avoid liability for its directors under § 281(c) and to limit the exposure of its shareholders under § 282(a).[34] Moreover, although § 281(c) provides that the "[d]irectors of a dissolved corporation . . . which has complied with [either procedure] shall not be personally liable to the claimants of the dissolved corporation," this Court previously has recognized that the question of whether the provisions made under the default procedure of § 281(b) are "reasonably likely to be sufficient" is almost always a litigable question.[35]

c. Petitioners have stated a claim for appointment of a receiver under § 279

Turning to the facts of this case, to survive the Insurers' motion to dismiss, Petitioners must have alleged sufficient facts that, if proven, conceivably could support a finding by this Court that there exists "unfinished business" that would necessitate the appointment of a receiver to complete the wind up of Krafft-Murphy. To this end, Petitioners make two primary allegations. First, they aver that the Company possesses active insurance contracts and that those contracts represent undistributed assets of the Company. According to Petitioners, the appointment of a receiver is warranted under § 279 so that claimants can sue the Company and collect on those contracts. Second, Petitioners argue that the insurance contracts and the Insurers' litigation of claims arising under those contracts, including claims that were filed more than three years after dissolution, represent the "plan of dissolution" for the Company. Therefore, Petitioners

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[34] *See RegO*, 623 A.2d at 97; 8 *Del. C.* § 281(c).

[35] *RegO*, 623 A.2d at 97.

assert, the Insurers' current refusal to litigate claims commenced against the Company more than ten years after its dissolution requires the appointment of a receiver to carry out the Company's plan of dissolution until its coverage has been exhausted. I next address the sufficiency of these contentions in the context of the allegations Petitioners have made related to Krafft-Murphy's dissolution.

1. Krafft-Murphy's dissolution

Krafft-Murphy formally dissolved on July 30, 1999. Under § 278, therefore, it officially ceased to be a "body corporate" on July 30, 2002. Petitioners contend that, during its dissolution, the Company neither availed itself of the safe harbor provisions of §§ 280-281(a) nor adopted an explicit plan of dissolution.[36] For the purposes of this motion, however, I find it conceivable that Krafft-Murphy dissolved under § 281(b), which does not require a formal plan of dissolution.

At the time it dissolved, the Company had been, and continued to be throughout the three-year period after dissolution, the target of numerous asbestos-related lawsuits. Indeed, it is reasonable to infer from the Complaint, as Petitioners posit, that the overwhelming liability the Company faced from both existing and anticipated asbestos-related claims prompted the directors and shareholders of the Company to "simply lock[] its doors and walk[] away in the face of a firestorm of potential asbestos liability."[37] After its dissolution, asbestos-related claims continued to be filed against the Company

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[36] *See* PAB 12-13.

[37] *Id.* at 13.

and, despite the apparent absence of an explicit plan of dissolution, the Company, through its Insurers, continued to respond to, litigate, and settle those claims for ten years following its dissolution.[38]

Although Respondent claims that it was not required to litigate claims brought after the three-year statutory period, it acknowledges that

> an argument could proceed to the effect that in order to resolve the tension between the legislature's instruction that corporations cannot be sued more than three years after their dissolution, and the absence of a statutory remedy where directors do not make provision for foreseeable suits brought during the ten-year period, that the Court of Chancery has the authority to appoint a receiver within the ten-year window to allow such suits to go forward.[39]

According to Respondent, based on this possible interpretation of the statutory scheme, it voluntarily defended all suits brought within ten years of dissolution. Respondent contends, however, that, "[w]hatever the merits of the foregoing argument, once the ten-year period has expired, there can be no statutory basis whatsoever to appoint a receiver in order to disguise what are in fact direct actions against insurers."[40] Consistent with this assertion, Respondent has moved to dismiss all new asbestos-related claims filed against the Company after July 30, 2009.

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[38] Respondent represents that it intends to continue to litigate and defend all suits commenced before the tenth anniversary of the Company's dissolution until those suits are resolved. Resp't's Opening Br. for Mot. to Dismiss ("ROB") 16 n.9.

[39] *Id.* at 16.

[40] *Id.*

2. Based on the allegations in the Petition, Petitioners conceivably could show that Krafft-Murphy had an informal plan of dissolution centered on its insurance contracts

Despite the Insurers' suggestion that they voluntarily defended and settled suits against the Company in the face of legal uncertainty related to the interaction between §§ 279 and 281(b), I find it reasonable to infer from the allegations in the Petition that the Insurers actually were obligated to do so under the Company's plan of dissolution. According to Petitioners, "[b]y acquiescing to a continued presence in the defense of claims filed after the three year winding up period, the insurers have demonstrated that they know that the insurance policies issued to Krafft-Murphy were the plan of dissolution of the directors of Krafft-Murphy."[41] The focus on a motion to dismiss, however, is not on a party's briefs, but rather on the allegations in its affirmative pleading. In this case, that is the Petition for the appointment of a receiver. Among other things, the Petition alleges that Krafft-Murphy was defending asbestos-related claims when it dissolved at the end of the three-year post-dissolution period provided for in § 278, and continuously thereafter for more than ten years after its date of dissolution. Thus, it is reasonable to infer from the Petition that, during the three years after it dissolved, the Company knew it had insurance contracts that provided coverage for asbestos-related claims and that new claims of that kind would continue to be asserted against the Company for many years to come. In addition, there is no dispute that Krafft-Murphy and its Insurers have defended and continue to defend against all such claims

[41] PAB 13.

that were filed within ten years of the dissolution. The only claims the Insurers have sought to dismiss as barred by the dissolution are those that were *commenced* more than ten years later.

The Petition further asserts that neither the Company, nor any of its insurers, notified any of the hundreds of clients of the Law Offices of Peter G. Angelos who filed claims against Krafft-Murphy of the Company's dissolution until after the ten-year post-dissolution period expired. The first such notice occurred in 2010 shortly before the Company began asserting the defense based on its earlier dissolution. In contrast, as alleged in Paragraphs 28-29 of the Petition, the Company confirmed as recently as 2009 to Petitioners' counsel that it had insurance assets available to it to cover its asbestos-related liabilities. The Petition further alleges that:

> Krafft-Murphy's continued silence regarding its dissolution over the course of the last ten years as well as its continued activity in cases in which it has been sued, including the pay-out of settlement proceeds shows that Krafft-Murphy continues to hold assets in the form of insurance policies in its name.
>
> [] Krafft-Murphy's admissions relating to its insurance policies as well as its course of conduct with the Law Offices of Peter G. Angelos comprise the basis for the reasonable belief that Krafft-Murphy Company, Inc. has insurance policies available to it for the disposal of its continuing asbestos-related liabilities. These insurance policies are, by their nature, undistributable to shareholders during the course of dissolution process and, therefore, remain the property of Krafft-Murphy until policy limits have been exhausted.[42]

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[42] Pet. ¶¶ 30-31.

From these and other facts alleged in the Petition, one reasonably can infer that the directors knew they had an obligation to establish a plan of dissolution that would provide for foreseeable future asbestos-related claims and that the Company possessed insurance policies that would, in fact, provide recourse for future claimants. Thus, it is reasonable to infer from these well-pleaded allegations that the directors of Krafft-Murphy had at least an informal plan of dissolution that consisted of having the insurance companies with which it had liability insurance contracts continue to represent it in its pending and expected future asbestos-related litigation until the Company exhausted its coverage.

If, in fact, the Insurers were required to litigate claims on behalf of the Company until the exhaustion of its insurance coverage, then, regardless of whether the insurance contracts technically are assets of the Company, the appointment of a receiver would be appropriate to ensure that the Company's plan of dissolution is completed and its affairs are fully wound up. For the foregoing reasons, I find that Petitioners' allegations as to Krafft-Murphy's plan of dissolution are reasonably conceivable and, therefore, warrant denial of Respondent's motion to dismiss.

Lastly, while I generally agree with Respondent that a receiver should not be appointed where the corporation continues to manage the winding up of its own affairs,[43] that principle is not applicable here. To the contrary, there may be a genuine question of

[43] ROB 16; *see LeCrenier v. Cent. Oil Asphalt Corp.*, 2010 WL 5449838, at *4 (Del. Ch. Dec. 22, 2010) ("The Plaintiffs make no allegation that any reason exists to interfere with [the] directors as they continue to wind up the affairs of the Company.").

fact as to the Insurers' obligations under the Company's plan of dissolution in that the Insurers now claim they no longer are required to litigate new claims, which means the interests of the Insurers and the Company may have begun to diverge. Therefore, the appointment of a receiver may be necessary to represent the interests of the Company in ensuring that the plan of dissolution is carried out, that its obligations under § 281(b) are satisfied, and that the Company receives the full benefit of the insurance contracts it purchased.

3. There is no ten-year bar from bringing suit

Finally, Respondent contends that there is an absolute bar against the appointment of a receiver under § 279 for the sole purpose of allowing claimants to bring claims against a dissolved corporation more than ten years after its dissolution. Respondent has not shown, however, that the statutory language of § 281(b) and § 279, or the overall statutory scheme, compels that conclusion.

Respondent appears to base its argument on § 281(b), which states that a dissolving corporation

> 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 to become known to the corporation or successor entity *within 10 years* after the date of dissolution.[44]

[44] 8 *Del. C.* § 281(b) (emphasis added).

But, the plain language of the statute does not indicate that § 281(b) places an absolute ten-year bar on appointing a receiver for the purpose of allowing a corporation to invoke its insurance contracts and defend against new claims brought against the Company. The statute focuses on creating an obligation for the corporation to provide compensation for reasonably foreseeable future claimants. In this context, the "10 year" language 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).

This interpretation not only is borne out by the plain language of § 281(b), it is also consistent with the language and purpose of § 279, which provides that a receiver may be appointed for a dissolved corporation "at any time." Nothing in the wording of either section implies that the legislature intended to create what would amount to a de facto statute of limitations against claims brought against a dissolved corporation beyond the ten-year period following dissolution. Therefore, I reject Respondent's argument that § 281(b) creates an absolute bar against suits seeking the appointment of a receiver for the sole purpose of responding to claims brought against a dissolved corporation more than ten years after dissolution.

C. The Dispute over Whether the Insurance Contracts are Assets of Krafft-Murphy

Respondent vigorously argues that the key issue presented here is "whether a contract between an insurer and a company that no longer exists can be deemed to be an [undistributed] asset" of a dissolved corporation and thereby support the appointment of a

receiver for the corporation under § 279.[45] Respondent contends this question has never expressly been addressed by this Court and must be answered in the negative. Petitioners disagree, arguing that under the *In re Texas Eastern Overseas, Inc.*[46] and *In re Dow Chemical International, Inc.* decisions,[47] "it is clear that insurance policies come under the ambit of § 279."[48]

Based on the specific circumstances of this case and for the reasons stated in Part III.B.2.c.2 *supra*, I need not reach the issue of whether, in the abstract, an insurance contract of Krafft-Murphy would constitute "debts and property due and belonging to the corporation" under § 279. As Petitioners note, this Court at least assumed such an insurance contract would be an asset in the *Texas Eastern Overseas* case, although the Supreme Court declined an invitation squarely to address that issue on appeal on the ground that the appellant had not presented it below.[49] In any event, having carefully considered the various cases regarding corporate dissolution relied upon by the parties in their briefs and at oral argument, I do not perceive any inconsistency between those cases and this Court's decision to deny Respondent's motion to dismiss here.

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45 ROB 6.

46 2009 WL 4270799 (Del. Ch. Nov. 30, 2009).

47 2008 WL 4603580 (Del. Ch. Oct. 14, 2008).

48 PAB 6-8.

49 998 A.2d 852 (Del. 2010).

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion, I grant Petitioners' motion to perfect service and deny Respondent's motion to dismiss. An Order implementing these rulings is being entered concurrently with this Memorandum Opinion.