Chancery Court: Receiver May Be Necessary to Resolve Decades-Old Asbestos Claims

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In its Nov. 9 decision in *In re Krafft-Murphy Company,* the Delaware Court of Chancery addressed several important issues that a board of directors and its legal advisers should consider in connection with the dissolution of a corporation. Ruling on a motion to dismiss for insufficiency of service of process and failure to state a claim, the Court of Chancery held that service of process could be effected upon Krafft-Murphy Company Inc., a dissolved Delaware corporation, and that sufficient facts had been alleged that conceivably could show that the appointment of a receiver was necessary to litigate asbestos-based personal injury claims initiated more than 10 years after the corporation had been dissolved.

When it was an operating corporation, Krafft-Murphy was engaged in the business of plastering and spraying insulation in homes and buildings in several Mid-Atlantic states. Krafft-Murphy's products contained asbestos, and, as a result, it found itself the target of hundreds of personal injury lawsuits filed over a 20-year period beginning in the early 1990s. Krafft-Murphy ceased operations in 1991 and formally dissolved by filing a certificate of dissolution with the Delaware secretary of state on July 30, 1999.

Thereafter, Krafft-Murphy proceeded to wind up its affairs, but did so without following the so-called "long-form" notice and claims process outlined in Sections 280 and 281(a) of the Delaware General Corporation Law or adopting a formal plan of dissolution in accordance with Section 281(b) of the General Corporation Law. However, Krafft-Murphy had purchased liability insurance to cover its potential asbestos-related tort liability, and over the course of 10 years following its dissolution, Krafft-Murphy's insurers litigated these cases on behalf of the corporation. Beginning in 2009, the insurers began moving to dismiss new claims brought against Krafft-Murphy after July 30, 2009, claiming that there was an absolute statutory bar prohibiting claims brought against a dissolved Delaware corporation more than 10 years after the date of dissolution. As a result of the insurers' refusal to litigate new asbestos claims, this action was initiated in the Court of Chancery to appoint a receiver to litigate the claims on behalf of the corporation.

With respect to the motion to dismiss for insufficiency of process, the Court of Chancery held that, notwithstanding the expiration of the automatic three-year period of continuation of a dissolved corporation's existence provided by Section 278 of the General Corporation Law, a dissolved corporation may be served with process in an action for appointment of a receiver under Section 279 of the General Corporation Law, which authorizes the Court of Chancery to appoint a receiver to take charge of the corporation "at any time." The Court of Chancery noted that, unlike at common law, a Delaware corporation is not fully "civilly dead" after dissolution, and its officers and directors may be "called upon to answer for the corporation" even years after the day-to-day operations of the corporation have ceased and they are no longer serving the corporation. Although Krafft-Murphy no longer maintained a registered agent in Delaware, the Court of Chancery stated that service could be effected directly upon an officer of Krafft-Murphy (if such an officer resided in Delaware) by publishing notice of the action in a newspaper in Delaware and a newspaper in the state where such officer resides (if outside of Delaware), or if no officer could be located, the Court of Chancery could fashion an alternative method of service under Court of Chancery Rule 4(d)(7).

The Court of Chancery also denied the motion to dismiss for failure to state a claim, finding that Krafft-Murphy's active insurance contracts were potential assets of the corporation from which such claims could be satisfied and that appointment of a receiver may be necessary to represent Krafft-Murphy's interest in ensuring that the insurance contracts it purchased were fully performed by the insurers. The Court of Chancery also rejected an argument that new claims brought against Krafft-Murphy more than 10 years after it dissolved were statutorily barred. Notwithstanding the language in Section 281(b) requiring a dissolving corporation to make provisions sufficient to provide compensation for claims against the corporation that are likely to arise or to become known to the corporation within 10 years after the date of dissolution, the Court of Chancery held that there is no "de facto statute of limitations" against claims brought beyond 10 years after dissolution and that a receiver may be appointed for a dissolved corporation "at any time."

This case has several practical implications for corporations considering dissolution. Directors and officers of a dissolved corporation should recognize that a Delaware corporation is almost never truly "dead." The last-

known directors and officers of a dissolved corporation should be aware that they may be served with process for claims against the corporation even decades after the operating business has ceased.

The opinion also serves as a useful guide to potential claimants on the proper methods of effectuating service upon a dissolved Delaware corporation. Even if the former officers of the dissolved corporation cannot be located, potential claimants should note that the Court of Chancery has the flexibility to craft an alternative method of service on the dissolved corporation. In this instance, the Court of Chancery permitted service to be effected on the attorney responsible for litigating and settling the asbestos cases on behalf of the insurance companies that had contracted with Krafft-Murphy.

More important, the opinion highlights the Court of Chancery's willingness to appoint a receiver for a dissolved corporation where there remains a source of funds from which potential claims can be satisfied. The insurance contracts that Krafft-Murphy had purchased to cover any potential asbestos claims here had no express expiration date and were a potential source of funds from which claimants could recover damages until the coverage limit of the contracts had been reached. The outcome of this case may have been different if the contracts had limited the coverage period to the 10-year period following dissolution instead of remaining in effect until the policy limit had been reached.

The opinion also suggests that directors may discharge their obligations to potential claimants through the purchase of adequate insurance coverage. Doing so may ultimately prove more cost-effective than reserving assets and retaining the corporation's own employees and counsel to resolve litigation, but can introduce some degree of uncertainty about when the corporation's affairs have been fully wound up after dissolution. Considering these issues on the front end of the dissolution process will better prepare the expectations of directors and officers of a Delaware corporation with respect to the length of the process and may help to provide greater certainty as to the true lifespan of the corporation.

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