The Reanimation of a Dissolved Delaware Corporation

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When does the life of a Delaware corporation end? Not as long as there are third-party claimants with claims to assert and undistributed assets available to satisfy them. In *Anderson v. Krafft-Murphy*, No. 85, 2013 (Del. Nov. 26, 2013), asbestos tort claimants in lawsuits pending in other jurisdictions against Krafft-Murphy Co., a dissolved Delaware corporation, sought the appointment of a receiver to enable them to lawfully pursue their claims against the corporation in those other courts beyond the statutory three-year winding-up period. The Court of Chancery had granted summary judgment in favor of the corporation, holding that claims filed more than 10 years after the date of dissolution were time-barred and should be dismissed, and claims filed less than 10 years after the date of dissolution could proceed without a court-appointed receiver.

Vice Chancellor Donald F. Parsons Jr. noted in the Chancery Court's opinion that under 8 Del. C. § 279, a receiver may be appointed at any time if the dissolved corporation has "still existing property interests." The court held that the corporation had no existing property interests since the corporation had no remaining assets except for unexhausted liability insurance policies that would have value and constitute property only if the corporation could be potentially held liable to third parties, but Delaware's statutory dissolution scheme establishes a 10-year limit within which a dissolved corporation can potentially be held liable for such claims.

The Delaware Supreme Court reversed. First, it held that under 8 Del. C. § 279, contingent contractual rights such as unexhausted insurance policies constitute "property" of a dissolved corporation as long as those rights are capable of vesting. Second, it held that Delaware's dissolution statutes impose no generally applicable statute of limitations that would time-bar claims against a dissolved corporation by third parties, and therefore the rights under the unexhausted liability policies could vest. Finally, it held that the existence of the "body corporate" continues beyond the expiration of the statutory winding-up period of 8 Del. C. § 278 for purposes of conducting litigation commenced before the expiration of that period, but for

litigation commenced after the expiration of that statutory period, a dissolved corporation may act only through a receiver or trustee appointed under 8 Del. C. § 279.

The opinion makes clear that Delaware's statutory corporate dissolution scheme does not contain a generally applicable statute of limitations that time-bars claims against a dissolved corporation by third parties. In this regard, the Delaware General Corporation Law differs from that of some other states, such as Illinois, where there is an absolute time limit during which claims may be brought against a dissolved corporation and after which it no longer has the capacity to sue or be sued. The statutory provisions in 8 Del. C. §§ 278-282 prolong a corporation's existence and its exposure to liability beyond dissolution. To facilitate the winding up of a dissolved corporation's affairs, Section 278 extends the corporate existence for three years beyond the date of dissolution. Section 279 independently authorizes the appointment of a receiver at any time for specified purposes, including continuing the dissolved corporation's winding-up process in cases where the corporation has undistributed property. Thus, the appointment of a receiver for a dissolved corporation can extend the life of a dissolved corporation indefinitely for the purposes specified in the statute, including participating in litigation.

Sections 280 to 281(b) outline planning procedures whereby a corporation must provide for future post-dissolution claims, pay existing claims and distribute any remaining assets to shareholders. Sections 281(c) and 282 provide a safe harbor from liability to directors and shareholders of corporations that have complied with Section 281(a) or (b). However, Sections 280 to 282 do not cut off a dissolved corporation's liability, and do not function as a general statute of limitations against dissolved corporations. Compliance with either Sections 280 to 281(a) or Section 281(b) shields directors and shareholders of the dissolved corporation from post-dissolution liability to third-party claimants, but it does not shield the corporation itself as long as undistributed property remains and a receiver is appointed to prolong the dissolved corporation's winding-up period.

In the *Krafft-Murphy* case, the court held that the unexhausted liability insurance policies represent undistributed property of the dissolved corporation. The court held that the policies were contingent contractual rights that could vest if the dissolved corporation were held liable to third parties. Since there is no general statute of limitations that bars the "long-tail" third-party tort claims brought against it, the contingent contractual claims could vest if the dissolved corporation were found liable, and therefore the unexhausted liability policies are undistributed property of the corporation.

The court also held that the only way the corporation could continue defending lawsuits against it as part of the winding up of its business would be if a receiver were appointed, since the dissolved corporation ceases to exist as a "body corporate" after the expiration of the three-year winding-up period in Section 278. From that point forward, the corporation continues solely for the purpose of any action commenced before the expiration of the three-year period. For all other purposes, including defending lawsuits brought against it after the three-year period, the corporation ceases to exist and loses its authority to manage its unfinished business. The only means by which the corporation may become re-empowered to defend its interests in the litigation is through the appointment of a receiver under Section 279.

The decision raises an interesting question that the court did not answer: Who pays for the services of the receiver? In the case of *Krafft-Murphy*, the parties agreed that the corporation's only assets were its unexhausted insurance policies. The insurers argued that a receiver was not necessary, but that was in the context of their argument that the claims against the dissolved corporation would eventually be time-barred by reason of the dissolution. The Court of Chancery agreed that a receiver was unnecessary, but that court also held that the third-party claims were barred 10 years after the date of dissolution. It is doubtful that the insurers themselves have any obligation to pay for a receiver under the terms of the liability policies. The dissolved corporation has no assets and cannot pay the receiver. This is not a case where a receiver is appointed to recover property on behalf of the dissolved corporation, in which case the receiver can be compensated from the recovery. Do the tort claimants pay the receiver's compensation from the proceeds of their claims? Does that create a potential conflict of interest for the receiver if he or she is compensated by the tort claimants who are suing the corporation?

Now that it is clear that the claimants can proceed only through the appointment of a receiver, the mechanics of the receivership, including finding a person willing to serve and funds to compensate that person, remain to be worked out. It will be interesting to see how the case proceeds on remand in the Court of Chancery.

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