

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: October 3, 2008
Decided: October 14, 2008

David J. Ferry, Jr.
Rick S. Miller
Ferry, Joseph & Pearce, P.A.
824 Market Street, Suite 904
P.O. Box 1351
Wilmington, DE 19899

Donald E. Reid
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899

Re: *In the Matter of Dow Chem. Int'l Inc. of Delaware*
Civil Action No. 3972-CC

Dear Counsel:

This case arises out of an application by petitioner, Daniel Boone, requesting that this Court appoint a receiver for respondent Dow Chemical International Inc. of Delaware (“Dow Chemical of Delaware”), a dissolved Delaware corporation. Dow Chemical of Delaware was formed in December 1971, dissolved in December 1988, and has had no assets since December 1988.¹ Petitioner is an attorney representing a group of plaintiffs pursuing tort litigation in California who will be unable to maintain a civil suit against respondent unless a receiver is appointed.² Respondent has been dissolved for almost twenty years and now petitioner seeks “to call the players back from the dressing room, get them back

¹ Aff. of Scott V. Scarpelli ¶ 3.

² Petitioner’s clients, banana farmers in Nicaragua, allege that respondent intentionally distributed and exposed them to the chemical 1,2-Dibromo-3-Chloropropane, also known as DBCP, after knowing the product posed serious medical risks.

into uniform, and require them to play a little longer.”³ In the case of Dow Chemical of Delaware, however, the game is over. For the reasons explained briefly below, the application for a receiver is denied.

Under 8 *Del. C.* § 278 there is a three-year window during which suits can be brought against a dissolved corporation.⁴ Once the three-year period has expired, no new suits can be brought against the corporation.⁵ Although § 278 grants the Court of Chancery discretion to continue the corporate existence for more than three years after dissolution, such discretion allows continuance of the corporate existence only for the purpose of resolving *pending* litigation or disposing of remaining assets.⁶ There can be no continuance after the three-year period has expired because there is nothing to continue—the dissolved corporation “is no more.”⁷ Thus, once the three-year period has expired and there is no pending litigation or assets to be disposed of, the Court no longer has discretion to “continue” the corporate existence under § 278.⁸

Petitioner acknowledges that the three-year period under § 278 has expired and, therefore, seeks the appointment of a receiver under 8 *Del. C.* § 279. Section 279 allows the “Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor,” to appoint a receiver for a dissolved corporation 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

³ *In re Citadel Indus., Inc.*, 423 A.2d 500, 506 (Del. Ch. 1980).

⁴ 8 *Del. C.* § 278.

⁵ *U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 789 (Del. Ch. 2007); *In re RegO Co.*, 623 A.2d 92, 96 (Del. Ch. 1992) (noting that § 278 continues the corporate existence beyond the three-year period “solely” for the purpose of concluding pending litigation and not to allow new tort claims to be brought against the company).

⁶ See *Virgin Islands*, 937 A.2d at 792.

⁷ *Citadel*, 423 A.2d at 504 (“[T]he emphasis is on ‘continuing’ that which is already in existence before the corporate entity, as a legal fiction, departs the legal realm and becomes only a recorded memory.”).

⁸ *Id.* at 504-05.

corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation.⁹

The power to appoint a receiver under § 279 is necessary because corporate officers have no power to act after the § 278 three-year period has expired.¹⁰ The purpose of § 279 is to benefit shareholders and creditors where there are undisposed of assets remaining after dissolution by allowing appointment of a receiver “to safeguard the collection and administration of still existing property interests of a dissolved corporation.”¹¹ Thus, § 279 provides “little solace” for one possessing an after discovered claim against a dissolved corporation with no undistributed assets.¹²

At common law, the moment a corporation was dissolved it ceased to exist as a legal entity and lost the capacity to sue and be sued.¹³ This harsh result was tempered by the enactment of § 278 which allows a time in which suits can be brought even after a corporation is dissolved. The intention of § 278 is to balance the public policy interest of ensuring that claimants have adequate time to bring claims against the corporation and the public policy interest of allowing directors, officers, and stockholders to be free from claims relating to the dissolved corporation after sufficient time has passed.¹⁴ The General Assembly, in enacting § 278, balanced these policy interests by establishing the three-year window—a window that could be extended to allow resolution of claims pending at the end of that period.¹⁵ I do not read the power of the Court to appoint a receiver for a dissolved corporation under § 279 to change the balance of the policy interests established by § 278. In short, petitioner cannot use § 279 to bypass the three-year limitation under § 278 when a dissolved corporation holds no assets.

*City Investing Co. Liquidating Trust v. Continental Casualty Co.*¹⁶ does not change this result. In *City Investing* the Delaware Supreme Court held that a liquidating trust was not shielded by § 278 from claims brought more than three years after dissolution of the predecessor corporation. The decision rested on the

⁹ 8 *Del. C.* § 279.

¹⁰ *Citadel*, 423 A.2d at 504-05.

¹¹ *Id.* at 506.

¹² *Id.* at 506-07 (noting that § 278 “has been compared to a statute of limitations”).

¹³ *See RegO*, 623 A.2d at 95.

¹⁴ *Virgin Islands*, 937 A.2d at 789.

¹⁵ *See id.* at 792.

¹⁶ 624 A.2d 1191 (Del. 1993).

“significant factual element” that the corporation established a liquidating trust, a separate legal entity, to conduct the winding up process.¹⁷ The Court reasoned that if the corporation in that case had sought to continue its existence beyond the § 278 three-year period, then it would still be subject to claims beyond that period.¹⁸ The Court was preventing a corporation from creating a separate legal entity to avoid liability while still conducting the process of winding up, a concern not present in the case of Dow Chemical of Delaware.

Petitioner seeks appointment of a receiver for a corporation that has no assets¹⁹ and was dissolved almost twenty years ago. As former-Chancellor Grover C. Brown wrote, “all things must come to an end at some point,”²⁰ and for Dow Chemical of Delaware the end has already come. For the foregoing reasons, the application for a receiver is denied.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:jmb

¹⁷ *Id.* at 1196.

¹⁸ *Id.*

¹⁹ As a practical matter, recovery of any judgment against Dow Chemical of Delaware is highly unlikely because the company has no remaining assets. The inability to collect from Dow Chemical of Delaware, however, does not leave petitioner’s clients without recourse as they are suing a number of other companies in the California action, including The Dow Chemical Company, Dole Food Company, Inc., and Standard Fruit Company.

²⁰ *Citadel*, 423 A.2d at 507.