WILLIAM B. CHANDLER III
CHANCELLOR

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

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: October 24, 2008
Decided: November 18, 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:

Petitioner Daniel Boone is seeking appointment of a receiver for respondent Dow Chemical International Incorporated of Delaware ("Dow Chemical of Delaware") so that his clients, plaintiffs in a tort action, can maintain a civil suit against respondent in California. On October 14, 2008 this Court issued a letter opinion denying petitioner's application for appointment of a receiver for Dow Chemical of Delaware.[1] As noted in the Court's earlier letter opinion, Dow Chemical of Delaware was dissolved in December 1988, almost twenty years ago. On October 21, 2008 petitioner moved for reargument pursuant to Court of Chancery Rule 59(f). Petitioner proffers two arguments as to why I should grant reargument, both of which are unconvincing.

[1] *In re Dow Chem. Int'l Inc. of Del.*, C.A. No. 3972-CC, 2008 WL 4603580 (Del. Ch. Oct. 14, 2008).

To obtain reargument the moving party must show that the "Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law"[2] such that "the outcome of the decision would be affected."[3] Petitioner does not claim that the Court misapplied the law; instead, petitioner alleges that the Court *may* have predicated its decision upon a misunderstanding of material fact.[4]

In the motion for reargument petitioner alleges that Dow Chemical of Delaware "may still hold some assets."[5] The only support that petitioner offers for this speculation is that in 1985 Dow Chemical of Delaware transferred assets to a wholly owned subsidiary, Dow Chemical International, B.V., in exchange for shares of stock in the subsidiary. Petitioner argues that a receiver is necessary to determine the status of these shares and whether respondent holds any liability insurance policies. Petitioner's motion is denied because he has failed to show that the Court predicated its decision on a misunderstanding of a material fact such that "the outcome of the decision would be affected."[6]

In denying the application for appointment of a receiver (the "Application"), the Court did not predicate its decision on a misunderstanding of a material fact. The only mention in the Application regarding assets of Dow Chemical of Delaware is that petitioner did not have access to respondent's financial records or insurance information, and that "[a] receiver would have standing to marshal liability insurance policies likely held by respondent."[7] Respondent filed an affidavit along with its opposition to the Application that stated that Dow Chemical of Delaware has had no assets since December 1988.[8] Petitioner alleged nothing to rebut this claim. In the motion for reargument petitioner claims that Dow Chemical of Delaware "may" still hold some assets and that it held assets in 1985, three years before it was dissolved. Petitioner's speculation that respondent may hold assets is not supported by anything in the record or in petitioner's motion and does not even come close to showing that I predicated my decision on a

---

[2] *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC, 2008 WL 2721743, at *1 (Del. Ch. July 3, 2008) (quoting *Forsyth v. ESC Fund Mgmt. Co. (U.S.), Inc.*, C.A. No. 1091-VCL, 2007 WL 3262205, at *1 (Del. Ch. Oct. 31, 2007)); *Deloitte & Touche USA LLP v. Lamela*, C.A. No. 1542-N, 2006 WL 345007, at *2 (Del. Ch. Feb. 7, 2006).
[3] *Id.* (quoting *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1014 (Del. Ch. 2007)).
[4] Pet.'s Mot. for Reargument ¶ 2.
[5] *Id.*
[6] *Fisk Ventures*, 2008 WL 2721743, at *1 (quoting *TractManager*, 953 A.2d at 1014).
[7] Pet.'s App. for Receiver ¶ 10.
[8] Aff. of Scott V. Scarpelli ¶ 3.

misunderstanding of a material fact. Additionally, petitioner's allegation that Dow Chemical of Delaware held assets in 1985 does not show that the company held assets after it was dissolved in 1988.

Petitioner is seeking appointment of a receiver so that his clients can maintain a tort suit against Dow Chemical of Delaware. In the letter opinion denying the Application, I stated the policies underlying 8 *Del. C.* § 278 and how those policies inform the interpretation of 8 *Del. C.* § 279:

> 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. 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. 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.[9]

In response to this clear articulation of the policies guiding appointment of a receiver for a dissolved corporation, petitioner again asks the Court to appoint a receiver to *determine if* respondent holds any assets. The only justification petitioner provides is speculation that respondent *may* hold some assets. Thus, under petitioner's approach, this Court would appoint a receiver anytime a potential plaintiff states that a dissolved corporation may still hold assets. Potential plaintiffs would be entitled to the relief they seek—appointment of a receiver that can be sued—by merely alleging that the dissolved corporation *may* hold assets. Such a result would be wholly inconsistent with the policies underlying §§ 278 and 279 and would allow plaintiffs to bypass the thee-year limitation under § 278 by merely claiming that the dissolved corporation may hold some assets. Speculating that respondent may have some assets is not sufficient to entitle petitioner to appointment of a receiver.

---

[9] *Dow Chem.*, 2008 WL 4603580, at *2 (citations omitted).

Petitioner's second argument is that a receiver should be appointed because The Dow Chemical Company ("TDCC") agreed to accept responsibility for alleged potential liabilities of Dow Chemical of Delaware in a prior tort case. Petitioner alleges that TDCC refused to enter into a similar agreement in this case, and thus petitioner was forced to pursue Dow Chemical of Delaware separately. I fail to see how this fact is even remotely relevant to petitioner's motion for reargument. It certainly has no bearing on whether Dow Chemical of Delaware has any remaining assets. I understand now, and I understood when I wrote the previous letter opinion in this case, that petitioner wants a receiver appointed so his clients can pursue a tort action against Dow Chemical of Delaware. Petitioner is not entitled to the appointment of a receiver merely because it is necessary for his clients to pursue their claims. Sections 278 and 279 govern when claims can be brought against a dissolved corporation and when a receiver should be appointed for a dissolved corporation. Petitioner acknowledges that the three-year period under § 278 has passed and has failed to show that a receiver should be appointed under § 279.

On November 4, 2008, after filing a motion for reargument and after an opposition to that motion was filed, petitioner sent a letter requesting that discovery be allowed in this case. I have already denied petitioners application for a receiver, and by this letter opinion I am denying petitioner's motion for reargument. As explained above, petitioner has not shown that I misapplied the law or predicated my decision on a misunderstanding of a material fact. Presumably, petitioner seeks discovery to determine if the Court actually misunderstood a material fact. It is too late for petitioner to go in search of such evidence. The appropriate time for any discovery in this case would have been when the merits of the application for a receiver were before the Court. I have already denied the relief petitioner sought and no discovery will be permitted at the motion for reargument stage of this proceeding.

For the foregoing reasons petitioner's motion for reargument is DENIED and petitioner's request for discovery is DENIED.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:jmb