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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

<p>IN RE ASBESTOS LITIGATION,</p> <p><i>Consolidated Cases</i></p>	<p>Cause No. AC 17-0694</p> <p>LIBBY PLAINTIFFS' BRIEF IN SUPPORT OF PETITION FOR CREATION OF A RECEIVERSHIP, APPOINTMENT OF CONSERVATOR, OR GUARDIAN AD LITEM</p>
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I. INTRODUCTION

Numerous Libby Plaintiffs have filed claims against Robinson Insulation Company ("Robinson") alleging negligence and strict products liability arising out of the company's transportation, processing, production and sale of vermiculite contaminated with deadly asbestos. Plaintiffs allege that, as a direct and proximate cause of Robinson's negligent actions and omissions, Plaintiffs suffer from

asbestos-related disease. In addition, Plaintiffs allege that Robinson manufactured and sold an unreasonably dangerous product in the Libby community, leading to widespread asbestos contamination and exposure which was a substantial factor in the development of Plaintiffs' asbestos-related disease.

Robinson was incorporated on January 1, 1937, and operated its vermiculite expansion plant in Cascade County until Robinson filed for voluntary dissolution in August 1989. Robinson maintained liability insurance covering claims such as Plaintiffs'. The purpose of this motion is to secure, through receivership or comparable equitable mechanism, the interests and insurance assets of Robinson.

II. BACKGROUND

Robinson's business in Cascade County included the operation of a vermiculite expansion plant, which involved the heating of asbestos-contaminated vermiculite, received from W.R. Grace's mine near Libby, Montana, until the vermiculite exfoliated, thereby rendering it into an insulation product, which Robinson then shipped to various locations, including back to Libby.

Robinson maintained multiple liability insurance policies covering claims such as Plaintiffs.¹ The dissolution petition for Robinson (Attached as Exhibit A)

¹ The following is an excerpt from testimony of J. Brooks Robinson in 9/26/2000:

Q. Did you have liability insurance when you were operating Robinson Insulation?
A. Yes. ...

noted an outstanding damages claim against Robinson existed and asserted that “petitioner...believed that insurance coverage is available to cover any liability of Robinson Insulation Co.”

III. DISCUSSION

A. A receivership is necessary to protect the interests of Robinson and its asbestos claimant creditors, including Plaintiffs, in Robinson’s liability insurance coverage.

Plaintiffs ask this Court to appoint a receiver pursuant to §27-20-101 et seq., MCA to protect the assets contained within Robinson’s liability insurance policies and preserve them for the benefit of the persons determined to be entitled to such property. In turn, this will provide an adequate mechanism to protect both Robinson and its creditors, including the tendering of defense to the insurer.

1. A court may exercise statutory and equitable power by appointing a receiver upon a showing that adequate protection is not otherwise available for property subject to a creditor’s claim.

A receiver is a neutral party appointed by the court to take possession of property and preserve its value for the benefit of the person or entity subsequently determined to be entitled to the property. 75 C.J.S. Receivers § 1. The

Q. Who was that, if you recall?

A. There was an outfit, I don't even remember her name, the last ones we had insurance with. American Hardware Mutual I think was the name of it.

Q. Do you recall any other liability insurance carrier?

A. Well, I think it was back to Cogswell.

appointment of a receiver is both an equitable remedy inherent in the discretion of the trial court, and a statutorily granted authority. Id. at § 3

In Montana, such receivership relief is authorized by § 27-20-102, MCA:

A **receiver may be appointed by the court** in which an action is pending **when** the action is:

- (1) by a vendor to vacate a fraudulent purchase of property;
- (2) by a creditor to **subject any property or fund to the creditor's claim;**
- (3) between partners **or others** jointly owning or **interested in any property or fund**, on the application of the plaintiff or of any party whose right to or interest in the property or fund or the proceeds of the property or fund is probable and when it is shown that the **property or fund is in danger** of being lost, removed, or materially injured.

(emphasis added).

In numerous cases before this Court, Robinson is sued under a claim it wrongfully caused Plaintiffs to be exposed to toxic levels of asbestos. Accordingly, Plaintiffs are creditors and interested parties in the insurance assets of Robinson. Without the intervention of this Court, the insurance is in danger of being lost or materially damaged.

2. Robinson's dissolution did not affect its liability for the asbestos claims or its coverage under its liability policies.

Robinson remains subject to liability for currently pending claims after its dissolution. Although some jurisdictions limit liability for a dissolved corporation, Montana does not. Section 35-1-937, MCA states “the dissolution of a corporation ... does not take away or impair any remedy ... for any claim or right, whether or

not the claim or right existed or accrued prior to dissolution.” The statute was amended to cure “The problem ... by (a) specifically allowing claims accruing after the date of dissolution and (b) removing the 5 year limitation period.” § 35-1-937, MCA, committee notes.

The Montana Supreme Court considered the ability to maintain suit against Robinson, by holding that an asbestos claimant is able to “maintain an action against Robinson Insulation” notwithstanding the dissolution of the corporation. *Allen v. Atlantic Richfield Co.*, 2005 MT 281, ¶16, 329 Mont. 230, 124 P.3d 132. In so ruling, the court applied § 35-1-937 and held the statute was not subject to a construction that would allow Robinson to be protected by previous statutes of repose. *Id.* at ¶ 18.

Because of its continuing liability, Robinson has substantial interest in both the defense and indemnity coverage of its insurance policies with respect to Plaintiffs’ claims against it. Similarly, Plaintiffs are prejudgment creditors with vested rights in insurance coverage. *McLane v. Farmers Insurance Exchange*, 150 Mont. 116, 119-20, 432 P.2d 98, 100 (1967). Moreover, Plaintiffs have third party claimant rights in the insurance coverage. § 33-18-201, MCA; *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997); *Shilhanek v. D-2 Trucking, Inc.*, 2003 MT 122, ¶ 21, 315 Mont. 519, 70 P.3d 721. In addition, both Robinson and Plaintiffs have a mutual interest that the insurance protection, including the

potentially limited fund of indemnity coverage, not be exhausted in an inequitable manner by similarly situated asbestos claimants, leaving no defense or indemnity coverage for the claims in the instant action.

3. Robinson's liability insurance asset is in need of protection.

In the absence of living officers, directors or successor trustees, there is no person who can advance and protect Robinson's interests in the insurance coverage (including by tender of defense. Moreover, there may be for Robinson other insurers, coverages or excess insurers creating duties to participate in the resolution of the asbestos claims which cannot be enforced in the absence of a demand by the insured.

A receiver may be appropriate when a plaintiff demonstrates facts showing that it is necessary to prevent injury to the rights of the plaintiff pending the action. *Little v. Little*, 125 Mont. 278, 285, 234 P.2d 832, 835 (1951). The Montana Supreme Court considered instances when the appointment of a receiver may be necessary to prevent such injury,

Numerous situations, ... may arise where the necessity of a receiver would be apparent and where ... the court [may be afforded the] authority for the appointment of a receiver ..., as, where all the statutory trustees are dead, incompetent, or beyond the jurisdiction of the court; or where the trustees refuse or absolutely fail to perform the duties imposed upon them by the statute.

Mieyr v. Fed. Sur. Co. of Davenport, 97 Mont. 503, 34 P.2d 982, 985 (1934), *aff'd*, 294 U.S. 211, 55 S. Ct. 356, 79 L. Ed. 865 (1935). In *Mieyr*, the Court found that

following the dissolution of a corporation, the property of the corporation are in the hands of the shareholders as statutory trustees. The court held that a receiver was unnecessary because of the presence of shareholders, but recognized the appropriateness of a receiver if the shareholder trustees are not present.

Unlike in *Mieyr*, the shareholders of Robinson are deceased, precisely the situation contemplated by the court as to when a receiver is appropriate. Without the appointment of a receiver, Plaintiffs do not have an adequate remedy to seek recovery from Robinson, and face irreparable harm to Plaintiffs' claims.

4. Receivership is the appropriate equitable vehicle to address the insurance coverage asset concerns for a dissolved corporation.

In precisely these circumstances, receivership has been recognized as the appropriate vehicle to address all of these concerns. In *Anderson v. Krafft-Murphy Co.*, 82 A.3d 696, 697 (Del. Sup. Ct. 2013), a number of tort claimants with pending asbestos-related actions against a dissolved corporation sought the appointment of a receiver to protect the insurance coverage for the alleged liability. *Krafft-Murphy Co.*, which had dissolved in 1999, held “no assets other than unexhausted liability insurance policies” when the suit was filed. *Id.* at 697, 699. The court applied Delaware’s receivership statute, which permitted the appointment of a receiver upon a showing of good cause, “to take charge of the corporation’s property . . . with power to prosecute and defend, in the name of

the corporation, . . . all such suits as may be necessary or proper...”. Del. Code Ann. tit. 8, § 279.

The Delaware appeals court concluded that “unexhausted liability insurance policies held by a dissolved corporation” constituted undistributed property, and held that the trial court should have appointed a receiver to defend the dissolved corporation’s interests in the litigation. “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.” *Id.* at 704, 709–10. *Accord, Penasquitos, Inc. v. Superior Court*, 53 Cal.3d 1180, 812 P.2d 154, 283 Cal.Rptr. 135 (1991) (“if the corporation has liability insurance coverage, its dissolution provides no reason to excuse the insurer from defending the action and indemnifying those injured by the pre-dissolution activities of its insured”).

As in *Kraft-Murphy*, Robinson was dissolved, holds one or more liability policies, and the shareholders of the corporation are not available. As in *Kraft-Murphy*, an appointment of a receiver is appropriate and necessary to ensure an adequate mechanism to defend its interests in litigation and to protect such property for the interest of those who may be entitled to the benefit of the asset.

B. Alternative equitable remedies all invoke the same principles of asset protection.

While Montana’s receivership statute (§ 27-20-102, MCA quoted above) is an appropriate vehicle to protect all interests in Robinson’s insurance coverage for

asbestos injury claims, it is not the only statute which provides such protection. Several statutes provide parallel relief reflecting the common concern of protection of the assets of a person unable to act in his (its) own behalf.

For example, §72-5-401, et seq., MCA provides for the appointment of a “conservator” for a “person” who is incapacitated, upon application of “any person who would be adversely affected by lack of effective management of his property.” By reason of Robinson’s dissolution and the death of Robinson’s members, Robinson is unable to manage its property, and Plaintiffs are adversely affected by such lack of management.

Similarly, in order to avoid an inequitable unjust enrichment to an insurer that has been paid a premium to cover insured losses, a constructive trust may exist with respect to the insurance policy and rights thereunder. *See, e.g., In re McLean Industries, Inc.*, 132 B.R. 271, 285 (Bankr. S.D.N.Y.1991; *Fellows v. Tlingit-Haida Regional Elec. Authority*, 740 P.2d 428, 431 f.n.13 (Ak. 1987). Pursuant to §72-38-211 (4), MCA, this Court may, in view of Robinson’s disability and the absence of any living shareholder or other representative to act on Robinson’s behalf, appoint a guardian *ad litem*, pursuant to §72-38-211 (4), MCA, to protect the insurance policy *res* of such constructive trust and the interest therein of the insured (Robinson) as well as the creditors and claimants (including Plaintiffs).

C. Plaintiffs propose that Nancy Gibson, who has served as trustee for settlement trusts with respect to Libby asbestos litigation, be appointed receiver.

1. The issues that may arise with respect to the proposed receivership are those that are typical of the invocation and enforcement of rights attendant to liability insurance coverage.

While it is not possible to anticipate all of the possible issues that might arise with respect to the proposed receivership, the following matters are certain to arise:

- the tender of defense of asbestos claims against Robinson to all insurers identified by counsel for Plaintiffs;²
- demands on the insurers to attempt, in good faith, settlement of the asbestos claims
- authorization to the insurer(s) of settlement on behalf of the insured (Robinson).

In addition, it is reasonable to foresee that questions of coverage may arise warranting additional procedures including the potential need to prosecute or defend declaratory judgment actions.³

Finally, it may well be that the insurance coverage represents a limited fund, presenting a concern that such fund not be inequitably disbursed or depleted with

² Plaintiffs are necessarily highly motivated to find all possible insurance coverage for their claims against Robinson. Since the interests of Robinson and Plaintiffs with respect to establishing insurance coverage are sufficiently aligned, it is not necessary to assign to the receiver any insurance coverage investigation or discovery duties.

³ It is presumed that, in any action to adjudicate insurance coverage, one or more Plaintiffs' will appear as real party in interest. In the alternative the court could require plaintiffs to fund the receiver's coverage litigation.

respect to the competing interests of Plaintiffs in this Court and similarly situated existing or future claimants.

Plaintiffs propose that the receiver be granted plenary power to accept service and tender defense of actions to such insurers as are identified by counsel for Plaintiffs. In addition, the Plaintiffs propose that the receiver be granted power, exercisable only upon court approval of specific proposals for any of the following:

- Filing and prosecution and/or defending on behalf of Robinson any litigation to resolve any coverage disputes between Robinson and its insurers which litigation shall be the responsibility of counsel for the Plaintiffs in this case;
- Authorizing an insurer's settlement of an asbestos claim upon demonstration that a limited fund, if any exists, is adequately protected for Plaintiffs and all similarly situated claimants;
- Holding proceeds of insurance liability coverage for the benefit Plaintiffs and similarly situated asbestos claimants, and make distributions upon application to this Court; and
- To otherwise act, with respect to Robinson's insurance coverage for asbestos injury, in the mutual best interests of the Plaintiffs and similarly situated asbestos claimants as informed by counsel for such Plaintiffs and similarly situated claimants.

2. Nancy Gibson has served as a trustee for several "Libby Asbestos" settlement trusts and is an appropriate candidate for trustee.

Nancy Gibson has been practicing law in Missoula since 1985 and has a wide array of professional experience, including serving as the Trustee for various

asbestos settlement trusts regarding W.R. Grace asbestos exposures in Montana. Her practice includes preparation of trusts; trust planning; settlement planning; assisting with asset preservation; administration of estates and trusts; guardianship; conservatorship, and other protective arrangements. Most recently, Ms. Gibson served as the Trustee for the Libby Qualified Settlement Fund Trust and as Administrator for the Libby Medical Plan Trust. Ms. Gibson is qualified, capable and willing to serve as a receiver for the aforementioned purposes.

IV. CONCLUSION

Pursuant to the above discussion and authorities, this Court is requested to enter an Order appointing a receiver. A form of Order is submitted herewith for the Court's consideration.

Respectfully submitted this 1st day of March, 2018.

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