To be argued by:
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(Time requested: 20 minutes)

APL No. APL-2020-00169
Appellate Division, Third Department Docket No. 529615
Saratoga County Clerk's Index No. 20184228

Court of Appeals

of the

State of New York

KIM E. SCHOCH, CNM, OB/GYN NP,

Plaintiff-Respondent,

– against –

LAKE CHAMPLAIN OB-GYN, P.C.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT LAKE CHAMPLAIN OB-GYN, P.C.

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Lake Champlain OB-GYN, P.C. ("Lake Champlain") submits this Corporate Disclosure pursuant to 22 NYCRR 500.1(f) and states that it is not a publicly held company, and has no parents, affiliates, or subsidiaries.

JURISDICTIONAL STATEMENT

Jurisdiction in this Court is premised upon an Order of this Court granting leave to appeal dated and entered November 23, 2020.

RELATED APPEALS

This appeal is one of several cases for which this Court has granted leave to appeal related to the proper disposition of proceeds arising out of the conversion of Medical Liability Mutual Insurance Company ("MLMIC"), and, specifically, whether the proceeds should be distributed to an employer that contracted for a policy of insurance covering its employee, paid all of the premiums, and served as Policy Administrator, or to the employee who was a named insured. This Court has also granted leave from the Third Department's decision in Columbia Mem. Hosp. v Hinds (188 AD3d 1337 [3d Dept 2020], lv granted 36 NY3d 904 [2021]) and the Second Department has granted leave to appeal to this Court from its decision in Maple Med., LLP v Scott (191 AD3d 81 [2d Dept 2020], lv granted 2021 NY Slip Op 62415[U]). In addition, this Court has granted motions for *amicus curiae* relief

by several interested parties. In the alternative, and to the extent not inconsistent with the arguments raised herein, defendant-appellant Lake Champlain incorporates by reference the arguments raised by the appellants in Hinds and Scott, as well as those raised by counsel for each of the institutional medical practices that have been granted *amicus curiae* relief.

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PRELIMINARY STATEMENT

Defendant-Appellant Lake Champlain OB-GYN, P.C. ("Appellant" or "Lake Champlain") appeals from the Decision of the Supreme Court, Appellate Division, Third Judicial Department entered June 18, 2020 which held that Plaintiff-Respondent Kim E. Schoch ("Schoch" or "Respondent") was solely entitled to cash consideration arising out to the demutualization of Medical Liability Mutual Insurance Company ("MLMIC").

This appeal calls for the Court to conclusively determine which of the parties herein constitutes a "Policyholder" that is entitled to the receive a share of the cash proceeds ("Cash Consideration") arising out of the conversion of Medical Liability Mutual Insurance Company ("MLMIC") from a domestic mutual property/casualty insurance company into a domestic stock property/casualty insurance company (a process commonly referred to as "demutualization"). Specifically, this Court must consider whether an employer is the "Policyholder" under Insurance Law § 7307 -- the applicable statute governing such conversions -- where, *inter alia*, the employer effectuated the mutual property/casualty policy upon its employee, paid all of the premiums on the policy, received the dividends of the policy without objection, and served as the administrator of the policy.

In holding that the employer was not entitled to the Cash Consideration under the Insurance Law, the Appellate Division, Third Department committed reversable

error by erroneously applying extrinsic, non-statutory, and non-legislative terminology and definitions that were contained in MLMIC's Plan of Conversion to interpret Insurance Law § 7307, rather than properly looking to the language of the statute itself. As a result, the lower court erroneously construed Insurance Law § 7307 (e) (3) in a manner that was inconsistent with its legislative intent as evidenced by the plain meaning of the language of the statute, the construction of the Insurance Law, and the parties' course of conduct.

The lower court's error was compounded by its misinterpretation of the intent and purpose of the Plan of Conversion ("Plan") and the Department of Financial Services ("DFS") Decision which approved the Plan. Under § 7307, MLMIC was required to adopt and gain approval from DFS for a written plan for the conversion that was consistent with the statutory requirements. However, the record of the DFS proceedings makes clear that the Plan was never viewed by MLMIC or DFS as providing for a binding or conclusive adjudication of any person's statutory rights with respect to the Cash Consideration, whether based on Insurance Law or any other authority. Nevertheless, the lower court improperly looked to the Plan of Conversion to provide the rules of decision for determining the parties' legal rights under the Insurance Law, notwithstanding the fact that the Plan itself expressly provided for an objection procedure to allow for legal challenges to be conclusively resolved by arbitration or the courts. The inclusion of such objection procedure

constituted an implicit recognition by DFS and MLMIC of the Plan's inability to conclusively determine any disputes between parties regarding their legal entitlement to the cash consideration as a matter of law.

When the statutory language of Insurance Law § 7307 is properly interpreted in a manner intended to ascertain its legislative intent, it is abundantly clear that an employer such as Lake Champlain is a "Policyholder" under the statute, and thus entitled to share in the cash consideration, where it contracted for the property/casualty insurance policy and effectuated the policy by paying all of the policy premiums.

Although the term "Policyholder" is not specifically defined in § 7307, it is defined in a related section of the Insurance Law pertaining specifically to property/casualty insurers such as MLMIC. In that section, the term "Policyholder" is defined as "a person[1] who has contracted with an insurer for property/casualty insurance[2] coverage" (Insurance Law § 501). Lake Champlain is and was a "Person" that contracted with an insurer for property/casualty insurance, and thus squarely meets the definition of "Policyholder" set forth in § 501. When § 7307 (e) (3) and § 501 are construed together, as required under established rules of statutory

[1] The definition of "Person" includes "any individual, partnership, corporation, association, or other entity" (Insurance Law § 501[e]).

[2] Under the Insurance Law § 1113, the professional liability insurance at issue here is deemed to be a species of "Personal Injury Liability Insurance" which, in turn, is a species of Property/Casualty insurance.

construction, they provide further assurance that the legislature intended the term "Policyholder" in § 7307 (e) (3) to include employers like Lake Champlain that contracted with a mutual property/casualty insurance company such as MLMIC and were responsible for payment of the premiums.

Additionally, this interpretation is also supported by the objectives, spirit, and purpose of the Insurance Law, and, specifically, the portions pertaining to mutual insurers and property/casualty insurers. The Insurance Law frequently links the act of paying premiums with the creation of various rights and obligations. In contrast, nowhere in the Insurance Law is there any support for a finding that a person insured under a property/casualty insurance policy also constitutes the "Policyholder" solely by virtue of being insured. In fact, the portions of the Insurance Law pertaining to property/casualty insurers refrain from utilizing the "policyholder" terminology prevalent in other portions of the statutory scheme when referring to the person covered by the policy of insurance. Instead, that individual is referred to as the "insured" or the "beneficiary," reflecting the legislature's understanding that, at least with respect to property/casualty insurance, the "insured" and the "policyholder" would quite possibly be different parties.

The Plan's overly simplistic definition of "Policyholder" as "the Person(s) identified on the declarations page of such Policy as the insured" cannot and does not supersede the legislature's intent with regard to the persons who qualify as a

"policyholder" entitled to cash consideration under Insurance Law § 7307. The rights of the parties can only be established by reference to the statutory language itself, as interpreted and construed by a court in accordance with legislative intent. To hold otherwise would permit a converting insurance company the extra-legislative power to amend the Insurance Law through the terms it includes in its Plan of Conversion.

Finally, the lower court's holding that payment of the cash consideration to the insured employee would not constitute an unjust enrichment was premised upon its error with regard to which party is legally entitled to the cash consideration under Insurance Law § 7307. Accordingly, payment of the cash consideration to Ms. Schoch would constitute an unjust enrichment inasmuch as Lake Champlain is legally entitled to such funds as a "policyholder" under the Insurance Law. The majority of other jurisdictions that have considered this issue in similar contexts have properly held that principles of fairness and equity dictate that consideration arising from a conversion event should be paid in proportion to the premiums paid.

STATEMENT OF FACTS

Lake Champlain is an organized professional medical practice group providing obstetrical and gynecological patient services with principal offices located in Plattsburgh, New York. (R. 222 ¶ 6). Ms. Schoch was employed by Lake Champlain as a certified nurse midwife ("CNM") from June 18, 2007 to February

27, 2015 pursuant to a written employment agreement. (R.17, R.222 ¶ 12). The employment agreement provided that Lake Champlain would "obtain and pay all premiums" for a professional medical liability insurance policy that insured Ms. Schoch. Id.

Lake Champlain purchased professional liability insurance for all its physicians, certified nurse midwives and nurse practitioners, including Ms. Schoch, from Medical Liability Mutual Insurance Company ("MLMIC"). (R.222 ¶¶ 6,12-13). Since medical malpractice insurance cannot be written as a group policy, the named insured on each policy is the individual practitioner. New York State law does not permit Ms. Schoch, or any CNM, to practice unless she is in a collaborative relationship with a licensed physician or hospital that practices obstetrics such as Lake Champlain. Thus, Plaintiff was ineligible to purchase a policy in her own right. (R.6, R.225 ¶21).

Lake Champlain contracted with MLMIC for the purchase of the subject property/casualty insurance policy that insured Ms. Schoch. (R.223-24, ¶17). Lake Champlain effectuated the policy on Ms. Schoch, as the insured, by purchasing and paying all the premiums for the policy.[3] (R.226 ¶28). Lake Champlain received all the dividends on the policy, which were paid by to it by MLMIC without objection

[3] For example, the annual premium for the policy period 7/1/2014 - 7/1/2015 was approximately $25,710. (R.225 ¶22, R. 233).

from Ms. Schoch. (R.223-24). The policy expressly states that it was issued to Lake Champlain:

> The insurance policy referenced above has been issued to the Policy Administrator named herein.

(R.230). All the policy endorsements were also "issued to Lake Champlain OB-GYN, P.C." (R.230, 237-38, 240-41, 247). The policy named Lake Champlain as the "Policy Administrator." (R.233, 245). Lake Champlain selected the coverage limits and policy term; was responsible for all communications and dealings with MLMIC; maintained all policy records; received all premium reductions; paid all policy premium increases; and was responsible for all financial aspects of the policy. (R.223-24 ¶17).

Ms. Schoch never made any contribution to any of the premium payments or other costs of maintaining the policy; was never sent, nor did she request, payment of any of the dividends paid on the policy; never assumed or performed any of the obligations attendant to membership in MLMIC; and never attempted to avail herself of any of the rights of membership in MLMIC other than now seeking to enforce a purported right to payment of the cash consideration. Id. The premiums paid by Lake Champlain were never requested by Ms. Schoch, nor treated by Lake Champlain as W-2 or other income to Ms. Schoch. (R.225).

In 2018, MLMIC announced that it was converting from a mutual insurance company into a stock insurance company in order to facilitate the sale of the

company to Berkshire Hathaway for total cash consideration in the amount of $2.502 billion. (R.75, 127). This was the first demutualization of an insurer that offered personal injury liability insurance for medical professionals in New York's history. As part of the conversion, MLMIC was required to allocate and distribute a portion of the "Cash Consideration" to each eligible policyholder (R.75) based on the amount of premiums paid during the three year-period preceding the plan of conversion. (R.77 §2.1 "Eligibility Period", R.86 §8.2). The estimated allocation to each eligible policyholder is "approximately equal to 1.9 times the sum of the premium paid." (R.157).[4]

The statutory requirements governing the conversion of an insurer from a domestic mutual property/casualty insurance company into a domestic stock property/casualty insurance company are wholly contained within Insurance Law § 7307. Pursuant to § 7307, MLMIC initiated the conversion process by adopting a resolution of its Board of Directors. Under the statute, the resolution was required to demonstrate, among other things, "the manner in which the conversion is expected to benefit policyholders and the public" (Insurance Law § 7307 [b]).

Upon passage of the resolution, MLMIC was then required by statute to submit the resolution for review by the Superintendent of the Department of

[4] Here, the equitable share of the Cash Consideration, based on the premiums of $39,340.54 paid by Lake Champlain for the policy during the applicable period is $74,747.03. (R.42 ¶31).

Financial Services ("DFS") (Id., at § 7307 [b]-[d]). Section 7307 then required the Superintendent to hold an examination of the insurer and conduct additional due diligence measures.

After performing certain due diligence steps required under § 7307 (d), DFS granted MLMIC permission to submit a Plan of Conversion (the "Plan" or "Plan of Conversion"). The Plan is and was required to "include the provisions, and be submitted in the manner and under the conditions, required by [§ 7307 (e)]."

As relevant here, § 7307 (e) provides that the "plan shall include":

> The manner and basis of exchanging the equitable share of each eligible mutual *policyholder* for securities or other consideration, or both, of the stock corporation into which the mutual insurer is to be converted and the disposition of any unclaimed shares. The plan shall also provide that each person who had a policy of insurance in effect at any time during the three year period immediately preceding the date of adoption of the resolution described in subsection (b) hereof shall be entitled to receive in exchange for such equitable share, without additional payment, consideration payable in voting common shares of the insurer or other consideration, or both. The equitable share of the *policyholder* in the mutual insurer *shall be determined* by the ratio which the net premiums (gross premiums less return premiums and dividend paid) *such policyholder* has properly and timely paid to the insurer on insurance policies in effect during the three years immediately preceding the adoption of the resolution by the board of directors under subsection (b) hereof bears to the total net premiums received by the mutual insurer from such eligible policyholders.

(emphasis added).

Consistent with Insurance Law § 7307, when MLMIC announced its agreement to be acquired by Berkshire Hathaway and converted to a stock company,

it was contemplated that the demutualization cash proceeds would be paid to the person or entity that paid the policy premiums. (R.226). As stated in the MLMIC Dateline Fall 2016 newsletter sent to Lake Champlain:

> 5. Will policyholders receive a payout?
>
> Once the transaction is completed, each owner of an eligible policy will be entitled to receive a proportionate share of all of the cash consideration paid by National Indemnity Company. In most cases, the person or entity that paid the premium will be considered as the owner of the eligible policy.

(R. 255).[5]

The MLMIC Plan of Conversion ("Plan"), as approved, ultimately provided that the cash consideration allocable to a given policy would be calculated by reference to the premiums paid on the policy and would be distributed to the "Eligible Policyholder, or its Designee," as defined in the Plan. However, the Plan further provided that the cash consideration would not be distributed, but would instead be held in escrow, whenever an objection was filed by a "Policy Administrator" or an employer that provided professional liability insurance to their employee (defined thereunder as an "EPLIP Employer") asserting legal entitlement to payment of the cash consideration. (R.87,91,171). DFS's September 6, 2019 Decision approving the Plan also recognized the inherent inability for the Plan to

[5] In anticipation of receiving the Cash Consideration, one hospital system "booked approximately $24 million in proceeds as part of their cash flow projection." Urgent Medical Care, PLLC v Amedure, 64 Misc 3d 1216[A], 2019 NY Slip Op 51188[U], *5 [Sup Ct, Greene County 2019], citing NYS Department of Financial Services Hearing Transcript.

resolve disputes regarding entitlement to the cash consideration as a matter of law, and explained that "[t]he determination of who is entitled to the cash consideration depends on the facts and circumstances of the parties' relationship and applicable law, to be decided by agreement of the parties or by an arbitrator or court." (R.151).

Lake Champlain duly filed an objection to the distribution of the cash consideration to Ms. Schoch on October 12, 2018. (R.227 ¶34, R. 266). On May 3, 2019, the parties provided MLMIC with a joint "Active Dispute Resolution Notice" requesting that the cash proceeds remain in escrow pending resolution of this dispute. (R.227 ¶38, R.279).

PROCEDURAL HISTORY OF THE SUBJECT ACTION

Thereafter, on December 28, 2018, Ms. Schoch commenced this action in Supreme Court, Saratoga County seeking a declaratory judgment that she was entitled to the cash consideration. (R.37). Lake Champlain served an Answer with Counterclaims on February 28, 2019 asserting counterclaims for declaratory judgment, unjust enrichment, monies had and received, and breach of the implied covenant of good faith and fair dealing. (R.47). Ms. Schoch served a reply to Lake Champlain's counterclaims on or about March 18, 2019. (R.60). On or about April 5, 2019, prior to any discovery, Ms. Schoch moved for summary judgment on her causes of action. (R. 8). Thereafter, on or about May 15, 2019, Lake Champlain cross moved for summary judgment. (R. 219).

In the interim between the parties' dueling summary judgment motions, the First Department decided Schaffer, Schonholz & Drossman, LLP v Title (171 AD3d 465 [1st Dept 2019]), and held that an employer that purchased a MLMIC professional liability insurance policy for its employee, and paid all of the premiums on the policy, was entitled to receive the cash consideration, and that awarding the cash consideration to the employee would result in his unjust enrichment. In support of its ruling, the First Department cited federal caselaw precedent on the distribution of insurance demutualization proceeds among employers and employees (see id.).

By Decision and Judgment dated June 7, 2019, Supreme Court (Crowell, J.) denied Ms. Schoch's motion for summary judgment, granted Lake Champlain's cross motion, and relied on Schaffer in holding that Lake Champlain was entitled to payment of the cash consideration allocable to the subject policy, including interest that had accrued while the funds were in escrow (R.5-8). Ms. Schoch thereafter appealed Supreme Court's Decision and Judgment to the Appellate Division, Third Judicial Department. (R. 8).

On April 24, 2020, while Ms. Schoch's appeal was still pending before the Third Department, the Fourth Department of the Appellate Division issued a decision in Maple-gate Anesthesiologists, P.C. v Nasrin (182 AD3d 984 [4th Dept 2020]). In a Memorandum and Order, the Fourth Department affirmed the lower court decision that had granted a motion to dismiss by certain defendant-employees

in an action brought against them by a plaintiff-medical practice that had asserted entitlement to the Cash Consideration. The Nasrin court held that the defendant-employees constituted the "Policyholder" as defined by the Plan, and that the Plan required the Cash Consideration to be paid to the defendant-employees unless they had expressly conferred their purported right to the Cash Consideration under the Plan to the plaintiff-employer, which they had not.

Less than two months later, on June 18, 2020, the Third Department issued its Opinion and Order in the subject action. The lower court declined to follow Schaffer and instead reversed Supreme Court, on the law, granted Ms. Schoch's motion for summary judgment, denied Lake Champlain's cross motion, and declared that Ms. Schoch was solely entitled to the cash consideration under Insurance Law § 7307 and that payment to her would not constitute undue enrichment (see Schoch v Lake Champlain Ob-Gyn, P.C., 184 AD3d 338, 346-347 [3d Dept 2020] lv granted 35 NY3d 918 [2020]). The Third Department failed to conduct any analysis of the legislative intent of Insurance Law § 7307 in aid of its interpretation, and, following the lead of the Fourth Department, relied almost exclusively upon the extrinsic language and definitions found in the Plan. Lake Champlain subsequently made a timely motion for leave to appeal to this Court which was granted.

In the time the instant appeal has been pending, the Second Department has now joined the First, Fourth, and Third Department in opining on the issue before

this Court. In Maple Med., LLP v Scott (191 AD3d 81 [2d Dept 2020]), the Second Department effectively adopted the same flawed analysis conducted by the Third Department, and held that a defendant-employee was entitled to receive the Cash Consideration pursuant to the terms and definitions of the Plan, and that the plaintiff-employer had failed to demonstrate his legal entitlement to the same. On February 26, 2021, the Second Department granted the plaintiff-employer leave to appeal to this Court from its decision (Maple Med., LLP v Scott (191 AD3d 81 [2d Dept 2020], lv granted 2021 NY Slip Op 62415[U]).

QUESTIONS PRESENTED

1. Whether the Appellate Division, Third Judicial Department erred when interpreting Lake Champlain's rights under Insurance Law § 7307 (e) (3) by applying the extrinsic, non-statutory language and definitions contained in the MLMIC Plan of Conversion, rather than seeking to ascertain the legislative intent of the statute by reference to the plain meaning and construction of the Insurance Law itself.

2. Whether under Insurance Law § 7307 (e) (3), an employer that, among other things, contracts with an insurer for property/casualty insurance for its employee-insured; effectuates the policy on the insured by paying all of the premiums; receives all of the dividends and refunds issued on the policy without objection from the insured; and acts as the "Policy Administrator" is a

"Policyholder" entitled to the Cash Consideration in an amount determined by reference to the amount of premiums it paid.

3. Whether the Appellate Division, Third Judicial Department erred in holding that Ms. Schoch would not be unjustly enriched by receiving the Cash Consideration.

4. Whether Ms. Schoch is solely entitled to all of the Cash Consideration.

ARGUMENT

The Third Department erred in holding that Lake Champlain was not statutorily entitled to the cash consideration under the New York State Insurance Law § 7307 (e) (3). Proper interpretation of the plain language and legislative intent expressed of the Insurance Law establishes that Lake Champlain is a "Policyholder" entitled under § 7307 (e) (3) to an equitable share of the MLMIC Cash Consideration. The lower court also erred by holding that Ms. Schoch would not be unjustly enriched by payment of the Cash Consideration. Notably, the majority view of other jurisdictions considering the issue have held that payment of the proceeds arising out of a demutualization should be paid in proportion to the premiums paid, which is consistent with both the plain meaning and construction of Insurance Law § 7307 (e) (3) and principles of fairness and equity. Alternatively, Lake Champlain

should receive from the Cash Consideration, at minimum, reimbursement of the premiums that it paid to MLMIC.

POINT I
THE LOWER COURT FAILED TO INTERPRET INSURANCE LAW § 7307 IN ACCORDANCE WITH WELL-ESTABLISHED AND CODIFIED RULES OF STATUTORY INTERPRETATION AND CONSTRUCTION

The Third Department clearly erred in holding that Lake Champlain was not statutorily entitled to the cash consideration under the New York State Insurance Law based upon its flawed interpretation of the provisions of Insurance Law § 7307 (e) (3), which utilized non-statutory definitions contained in the Plan to interpret the language of the statute. When properly interpreting the plain language and legislative intent expressed in the Insurance Law, it is clear that Lake Champlain is a "Policyholder" entitled under § 7307 (e) (3) to exchange its equitable share in MLMIC for cash consideration in an amount determined by reference to the net premiums it paid to MLMIC during the relevant time period.

It is respectfully submitted that the court below disregarded well-settled, codified rules of statutory construction and interpretation when determining that Ms. Schoch was solely entitled to the Cash Consideration under Insurance Law § 7307 (e) (3). Specifically, the court improperly interpreted the statute, and the meaning of the language therein, without any consideration of whether such interpretation reflected the legislature's intent when drafting and enacting the statute. Instead, the court eschewed analysis of the legislative intent of Insurance Law § 7307 in favor

of grafting new meaning into the statute under the guise of interpretation, and by applying non-statutory, extrinsic definitions from the Plan of Conversion which lack any probative value with regard to the statute's legislative intent.

A. The Plain Language of Insurance Law § 7307 (e) (3)

It is beyond dispute that Insurance Law § 7307 supplies the statutory requirements for converting a domestic mutual property/casualty insurer into a domestic stock property/casualty insurer, including the requirements applicable to the conversion of MLMIC. Among other things, § 7307 requires that a mutual insurer seeking a conversion must submit a plan of conversion that "shall include the provisions, and be submitted in the manner and under the conditions, required by subsection (e) [of that section]" (§ 7307 [d]).

Subdivision (e), in turn, provides in relevant part as follows:

"the plan shall include . . .

> (3) The manner and basis of exchanging *the equitable share of each eligible mutual policyholder* for securities or other consideration, or both, of the stock corporation into which the mutual insurer is to be converted and the disposition of any unclaimed shares. The plan shall also provide that each person who had a policy of insurance in effect [during the relevant period] shall be entitled to receive in exchange for *such equitable share*, without additional payment, consideration payable in voting common shares of the insurer or other consideration, or both. The *equitable share of the policyholder* in the mutual insurer shall be determined *by* the ratio which the net premiums . . . *such policyholder has properly and timely paid* to the insurer on insurance policies in effect during [the relevant time period] bears to the total net premiums received by the mutual insurer from such eligible policyholders" (emphasis added).

Whereas here, the statutory language is "clear and unambiguous," a court's task is limited to "constru[ing] it so as to give effect to the plain meaning of the words used" (Patrolmen's Benev. Ass'n of City of New York v City of New York, 41 NY2d 205, 208 [1976]; accord People ex rel Prieston on behalf of Beaubrun v Nassau County Sheriff's Dept., 34 NY3d 177, 181 [2019]; see Matter of Marian T., 36 NY3d 44, 58 [2020], quoting Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998] ["'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof'"]).

An examination of the language of Insurance Law § 7307 (e) (3) demonstrates that the statute clearly and unambiguously sets forth (1) the class of persons entitled to exchange their equitable share in the mutual insurer for consideration (each "eligible mutual policyholder"); (2) the eligibility criteria (that "had a policy of insurance in effect [during the relevant time period]"); and (3) how that policyholder's equitable share is to be calculated (by reference to the premiums paid by "such policyholder").

B. The Lower Court Misinterpreted the Plain Language of the Statute in Holding That the Term "Policyholder" in § 7307 (e) (3) Included Those Who Did Not Themselves Pay the Policy Premiums

Although the term "Policyholder" is not expressly defined in § 7307, the construction of the statute demonstrates that the legislature understood the

"Policyholder" to be the same party that "properly and timely paid" the premiums. The relevant portion of § 7307 (e) (3) unambiguously states that:

> "The equitable share of *the policyholder* in the mutual insurer shall be determined by the ratio which the net premiums . . . *such policyholder* has properly and timely paid to the insurer . . ." (emphasis added).

Stated a different way:

> "The equitable share of [Policyholder "X"] in the mutual insurer shall be determined by the ratio which the net premiums . . . [Policyholder "X"] has properly and time paid to the insurer . . ."

Thus, the plain meaning of the word "Policyholder" in the statute can be discerned solely from the language used by the legislature. Under the statute, the equitable share of Policyholder "X" in MLMIC is determined by the amount of premiums that Policyholder "X" paid. Thus, it logically follows that if Policyholder "X" did not pay *any* premiums, she or he is not entitled to an equitable share.

Nevertheless, the lower court failed to give effect to the plain meaning of the words used. Specifically, the court essentially disregarded the words "*such* policyholder," leading it to incorrectly conclude that an employee such as Ms. Schoch could rely upon payments made on their behalf by an employer to establish some right to an equitable share of the cash consideration. It is submitted that, had the legislature intended for a policyholder to be able to rely upon premium payments made by a third party on their behalf to establish entitlement to an equitable share, it would have included specific language to that effect and, at a minimum, would not

have provided that a policyholder's equitable share is determined based upon the premiums "*such* policyholder has paid" (id. [emphasis added]).

The Third Department's flawed interpretation also finds no support in the actual language or construction of the statute and it is well settled that the court cannot supply such words through the guise of interpretation (*see* Statutes § 74 [explaining that "[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended"; Weinberg v D-M Rest. Corp., 53 NY2d 499, 508 [1981] [noting "that the courts under guise of interpretation may not enlarge or change the scope of a legislative enactment"]). Thus, the court erred in holding that the statute permitted a policyholder to establish their equitable share through premium payments made to the insurer on their behalf by a third party.

Accordingly, it is clear from the plain language of the statute that the legislature intended that the "policyholder" with an equitable share in MLMIC capable of being exchanged for Cash Consideration would be the same "*such* policyholder" that paid the premiums.

C. The Lower Court Also Erred in Interpreting § 7307 (e) (3) by Relying Upon the Extrinsic, Non-Statutory, Non-legislative Definitions Contained in the Plan of Conversion Which are Irrelevant to Construing the Legislative Intent of the Statute

It is further submitted that the Third Department misapprehended its role with regard to interpreting the language of the relevant statute. The lower court's task was simply one of statutory interpretation, requiring it to interpret the statute in a manner consistent with the intent of the legislature by utilizing settled, codified rules of statutory interpretation and construction (see, e.g., Statutes § 92 ["The primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature"]). However, the court failed to even consider the legislature's intent with respect to the meaning of the words used in the statute. Instead, to arrive at its flawed interpretation, the court merely imported the definitions contained in the Plan – a non-statutory, non-legislative, extrinsic document – into Insurance Law § 7307. In essence, the court concluded that the legislative intent reflected in § 7307 was irrelevant to determining whether Lake Champlain had a statutory right to the Cash Consideration because the Plan did not expressly provide for that outcome (Matter of Chem. Specialties Mfrs. Ass'n v Jorling, 85 NY2d 382, 394 [1995] ["New language cannot be imported into a statute to give it a meaning not otherwise found therein. Moreover, a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact"] [internal bracket, quotation marks, and citations omitted]).

It is worth emphasizing that the extrinsic, non-statutory, non-legislative Plan definitions the court used to interpret the statute were drafted by an insurance company, in an entirely non-legislative process, roughly 35-years after Insurance Law § 7307 was enacted by the legislature. Thus, any suggestion that the Plan's definitions could be properly utilized by the court to fulfill its obligation to interpret § 7307 in accordance with the legislature's intent must be rejected out of hand.

In sum, the lower court's flawed analysis failed to properly interpret the statute in accordance with the legislature's intent, and thus this Court cannot permit the resulting holding to stand.

POINT II

LAKE CHAMPLAIN IS A "POLICYHOLDER" UNDER A PROPER INTERPRETATION OF INSURANCE LAW § 7307 (e) (3) AND IS THEREFORE ENTITLED TO SHARE IN THE CASH CONSIDERATION IN AN AMOUNT DETERMINED BY REFERENCE TO THE PREMIUMS IT PAID TO INSURER

When properly interpretating Insurance Law § 7307 (e) (3) using established rules of statutory construction it is evident that the legislature intended that the party that "contracted for" a policy of property/casualty insurance, and paid the premiums on the policy, is the "Policyholder" entitled to receive the cash consideration. This interpretation is further supported by the parties' course of conduct throughout the policy period.

A. In the Event That The Court is Unable to Identify Lake Champlain as the "Policyholder" by the Plain Meaning of § 7307 (e) (3) It Should Apply the Definition of "Policyholder" Contained in Insurance Law § 501

Determining the legislature's intended definition of the term "Policyholder," as used in Insurance Law § 7307 (e) (3), is crucial to the determination of which party is entitled to the cash consideration. As set forth above, it is submitted that the statute's plain language makes clear that Lake Champlain, as the party that paid the premiums, is a "Policyholder" entitled to share in the cash consideration in proportion to the premiums paid. However, in the event this Court finds such language ambiguous, the Court need only look to the definition of "Policyholder" contained in Insurance Law § 501 for clarity with regard to the proper definition of the term in § 7307 (e) (3).

Unfortunately, § 7307 does not itself contain a definition of the term "Policyholder." Thus, to construe the term in accord with the legislature's intent, the Court must look elsewhere in the Insurance Law. Notably, in the entirety of the Insurance Law, there is only one section in which the term "Policyholder" is specifically defined in the context of a contract for *property/casualty* insurance, the same species of insurance provided by the mutual property/casualty insurance companies specifically regulated under § 7307.

In this regard, Insurance Law § 501 unambiguously provides that:

> **"**Policyholder" means a person who has *contracted with an insurer* for property/casualty insurance coverage (hereinafter the "§ 501 Definition") (emphasis added).

Conveniently, the § 501 Definition specifically defines "Policyholder" in the specific context of property/casualty insurance. As stated above, § 7307 also pertains solely to property/casualty insurance context inasmuch as it regulates only the conversion of mutual property/casualty insurance companies such as MLMIC. Thus, it is submitted that the definition of "Policyholder" specifically provided by the legislature as applying in the context of property/casualty insurance would also logically apply in § 7307 which is specifically tailored to property/casualty insurance companies. The § 501 Definition provides such a definition.

Moreover, the § 501 Definition of "Policyholder" also reflects the legislature's understanding of the need for a flexible definition of "Policyholder" that varies with the unique characteristics of the species of insurance at issue.

For instance, the § 501 Definition of "Policyholder," which applies in the property/casualty Insurance context, differs substantially from the definition of "Policyholder" that is applicable in the Life/Accident/Health insurance context (compare Insurance Law § 501[g] [defining "Policyholder" in the Property/Casualty insurance context as "a person who has contracted with an insurer for property/casualty insurance coverage"]; with Insurance Law § 4210 [defining "Policyholder" in the "Life/Health/Accident insurance context to include, among

other things, "the person insured under an individual policy" and "the person who effectuates any such policy upon the person of another pursuant to [certain requirements]").

The term "Policyholder" in § 7307 should be defined in a manner that is consistent with the definition of that term in the only other section of the Insurance Law where it appears in specific relation to property/casualty insurance policies. It would defy reason to suggest that the legislature intended the definition of "Policyholder" to differ between § 501, pertaining to property/casualty insurance policies, and § 7307, pertaining to the conversion of property/casualty insurance companies. This Court has long held that "it is a bedrock rule of statutory construction that, where the same word or phrase is used in different parts of a statute[,] it will be presumed to be used in the same sense throughout, absent any indication of a contrary intent" (Mental Hygiene Legal Serv. v Sullivan, 32 NY3d 652, 659 [2019] [internal citation omitted]; see Catlin ex rel. Catlin v Sobol, 77 NY2d 552, 559 [1991] [applying "the accepted rules of construction that statutory words are generally construed according to their natural and obvious sense and that where the same word or phrase is used in different parts of a statute it will be presumed to be used in the same sense throughout"] [internal citations omitted]; STATUTES § 236; see also Pierre v Providence Washington Ins. Co., 99 NY2d 222, 241 [2002] ["Pursuant to settled federal rules of statutory construction, where the

same word or phrase is used in different parts of a statute or act, the same meaning must attach to each"] [applying federal law]). Moreover, "'it is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another'"(Mental Hygiene Legal Serv. v Sullivan, 32 NY3d 652, 659 [2019], quoting Matter of Albany Law School, 19 NY3d 106, 120 [2012]; see People v Mobil Oil Corp., 48 NY2d 192, 199 [1979] ["It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other"]; Statutes § 97 ["A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent"]).

Accordingly, settled rules of statutory construction require the conclusion that the § 501 Definition of "Policyholder" should be applied to define that term as used in § 7307 (e) (3). Such an interpretation would reflect a logical legislative intent and also ensure that the term "Policyholder" is defined consistently throughout the Insurance Law when used in the Property/Casualty insurance context.

Finally, when the § 501 Definition of "Policyholder" is applied in § 7307 (e)(3), it is clear that Lake Champlain -- as the "person that has contracted with an insurer for property/casualty insurance" -- is the "Policyholder" entitled to the cash consideration in an amount corresponding to the amount of the premiums it paid for

the property/casualty insurance policy. Lake Champlain "contracted with the insurer" MLMIC for the property/casualty insurance inasmuch as it selected and bargained for the policy, paid all of the premiums on the policy, and also served as the policy administrator. (R. 223-224). In contrast, Ms. Schoch had absolutely no involvement in selecting MLMIC as the insurer or in contracting with them for the policy. Thus, in addition to the plain language of the § 7307 (e) (3), the application of the § 501 Definition to § 7307 also requires a holding that Lake Champlain is entitled to the Cash Consideration.

B. The Parties' Practical Construction of the Term "Policyholder" Supports a Holding that Lake Champlain Was the "Policyholder" Entitled to the Cash Consideration

Even if this Court were to find that the term "Policyholder" in § 7307 cannot be ascertained from the plain language of §7307 or from the § 501 Definition, the practical construction given to the term by the parties throughout their relationship warrants a finding that Lake Champlain is the "Policyholder."

"In case of doubt, or ambiguity, in the law it is a well-known rule that the practical construction that has been given to a law by . . . those for whose benefit it was passed, takes on almost the force of judicial interpretation" (Lezette v Bd. of Ed., Hudson City School Dist., 35 NY2d 272, 281 [1974]; see City of New York v New York City Ry. Co., 193 NY 543, 549 [1908] [holding that "when the meaning of a statute is doubtful, a practical construction by those for whom the law was

enacted . . . acquiesced in by all for a long period of time . . . is entitled to great, if not controlling, influence"] [internal quotation marks and citation omitted]; Town of Amherst v Erie County, 236 AD 58, 61 [4th Dept 1932], amended sub nom. Town of Amherst v County of Erie, 236 AD 775 [4th Dept 1932], and affd, 260 NY 361 [1933]).

Here, the parties conduct demonstrates their shared belief that Lake Champlain, rather than Ms. Schoch, possessed all of the legal *rights* of membership associated with the policy. In this regard, Lake Champlain received and retained all the dividends issued by MLMIC without objection by Ms. Schoch. Upon the cancellation of the policy, Lake Champlain also received and retained the premium refund, also without objection. Ms. Schoch did not avail herself of any of the rights of membership in MLMIC -- or even attempt to do so -- until learning of the availability of the cash consideration at issue herein. Nor did Ms. Schoch participate in any way with the negotiation or administration of the policy.

In addition, the parties conduct demonstrated that Lake Champlain was understood by both sides to be responsible for all the *obligations* of membership associated with the policy. In this regard, Lake Champlain paid all the costs and premiums associated with the policy, including any and all rate increases.

Thus, the parties conduct over the duration of the policy period clearly demonstrated their shared understanding that Lake Champlain was entitled to the

rights attendant to membership in MLMIC as a "Policyholder", as well as the obligations.

POINT III

THE THIRD DEPARTMENT ERRED IN HOLDING THAT PAYMENT OF THE CASH CONSIDERATION TO MS. SCHOCH WOULD NOT RESULT IN HER UNJUST ENRICHMENT

The lower court further erred by holding that Ms. Schoch would not be unjustly enriched if she is found to be solely entitled to receipt of the Cash Consideration. It is submitted that the First Department's decision in Schaffer more appropriately reflects the correct application of unjust enrichment principles in this case. In addition, the Schaffer court's analysis is consistent with the view adopted by the majority of other jurisdictions that have considered how the proceeds of a demutualization should be distributed as between an insured and a party that purchased and paid for the insurance, and with the Insurance Law itself.

A. The Lower Court Erred in Holding that Ms. Schoch Could Not Be Held to Be Unjustly Enriched Absent Evidence of Her Engaging in Tortious or Fraudulent Conduct, or a Mistake of Fact of Law.

The lower court erred in holding that Ms. Schoch could not be unjustly enriched by the Cash Consideration without a showing that she committed a wrongful or unlawful act. "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit [one party] to retain what is sought to be recovered" (Mandarin Trading Ltd. v Wildenstein, 16 NY3d

173, 182 [2011] [internal quotation marks and citation omitted]). Notably, "a party may be legally entitled to a benefit through a contract but still equitably owe those funds to another" (see Simonds v Simonds, 45 NY2d 233, 239 [1978]; see also Restatement [Third] Restitution and Unjust Enrichment § 26, Illustration 11; Urgent Medical Care, PLLC v Amedure, 64 Misc 3d 1216(A), 2019 N.Y. Slip. Op. 51188(U) [Sup Ct, Greene County 2019]). Lake Champlain need not show that Ms. Schoch committed an unlawful or "wrongful act" to establish entitlement to summary judgment on its unjust enrichment cause of action (see Simonds v Simonds, 45 NY2d at 242 ["Unjust enrichment, however, does not require the performance of any wrongful act by the one enriched"]). As recognized by this Court, "[i]nnocent parties may frequently be unjustly enriched" (id. at 242 [holding former wife had equitable right to benefits under former husband's life insurance policies]). Contrary to the decision below, mutual mistake by the parties, even if proven, does not preclude unjust enrichment. Rather, a mutual mistake that results in one party obtaining a benefit that the other party is equitably entitled to may equally be considered an unjust enrichment regardless of its genesis. Moreover, proof of tortious or fraudulent conduct is not required to recover for unjust enrichment (see e.g., Castellotti v Free, 138 AD3d 198, 207-08 [1st Dept 2016] ["Here, the complaint's allegations show that [defendant] was enriched at [plaintiff's] expense because [plaintiff] paid the estate taxes and insurance

premiums, despite [defendant] being the sole beneficiary of the will, and that it would be against equity and good conscience to allow [defendant] to retain that windfall"]).

Here, Lake Champlain selected and bargained for the policy, paid all policy premiums, and assumed all financial risk associated with the policy. In addition, both parties conducted themselves in a manner that clearly shows they each believed Lake Champlain to be the policyholder of the policy and entitled to any benefits of membership in MLMIC that may arise. The lower court erroneously held that Schoch would not be unjustly enriched by receiving the entire demutualization "windfall" which she did not expect and which arose out of an insurance policy that she did not take any active role in procuring or maintaining. The court also effectively created new facts by holding that "the reality is that neither party here bargained for the demutualization proceeds" (Schoch, 184 AD3d at 345). In fact, the cost of the subject policy and premium amounts quoted by MLMIC would have unquestionably and inherently been impacted by MLMIC's structure as a mutual insurer along with all the possible economic advantages and disadvantages attendant to that structure. Finally, the court could have, but did not, seek to fashion a more equitable remedy, such as by allocating some portion of the Cash Consideration of $74,747.03 to Lake Champlain for reimbursement of the $39,340.54 in premiums

paid. For the foregoing reasons, it is submitted that the lower court's decision with respect to unjust enrichment was clearly in error and should be reversed.

B. The First Department's Decision in *Schaffer* Correctly Held that An Employee Situated Similarly to Ms. Schoch Was Unjustly Enriched By Payment of the Cash Consideration

It is respectfully submitted that the First Department's decision in Matter of Schaffer, Schonholz & Drossman LLP v. Title (171 A.D.3d 465 [1st Dept 2019]) correctly applied settled principles of unjust enrichment consistent with New York law.

In Schaffer, the First Department ruled that a medical practice group that contracted with MLMIC for a property/casualty policy insuring its employee, paid all policy premiums, and was the policy administrator, was entitled to the Cash Consideration from the demutualization of MLMIC. The Schaffer court held that to award the Cash Consideration to the named insured physician, who did not contract for the insurance, never paid any policy premiums, and never participated in the administration of the policy, would constitute unjust enrichment:

> Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment

171 AD3d 465.

The parties' underlying summary judgment motions here raised essentially the same facts and legal issues presented in Schaffer. Ms. Schoch did not contract for the insurance with MLMIC, did not pay any of the premiums, and was not involved in the administration of the policy. In contrast, if Lake Champlain had selected a different insurer, not entered into a contract with MLMIC, not paid the premiums, or not taken any of the other myriad actions it took to cause the policy to come into being, the Cash Consideration would never have come into being. Accordingly, as correctly determined by the Schaffer court, Ms. Schoch would clearly be unjustly enriched by being awarded a "windfall" that her actions played no role in bringing about.

C. The Majority of Other Jurisdictions That Have Considered the Proper Distribution of Demutualization Funds Have Held that Such Funds Should Be Distributed in Accordance with the Amount of Premiums Paid

The majority of other jurisdictions that have considered how demutualization proceeds should be distributed as between an employer and employee have held that the proceeds should be distributed according to the amount of premiums paid by each party. This majority view is consistent with both the plain meaning and construction of Insurance Law § 7307 (e) (3), as well as with principles of equity and fairness at the heart of an unjust enrichment cause of action (see Ruocco v Bateman, Eichler, Hill, Richards, Inc., 903 F2d 1232, 1238 [9th Cir. 1990] [holding

that the "balance of equities" weighed in favor of distributing the demutualization proceeds to the employees who paid the insurance policy premiums], cert denied 498 US 899 [1990]; Chicago Truck Drivers, Helpers & Warehouse Workers Union [Ind.] Health & Welfare Fund v Local 710, Intl. Bhd. of Teamsters, Chicago Truck Drivers, Helper and Warehouse Workers Union [Ind.] Pension Fund, 2005 WL 525427, *4, 8 [N.D. Ill., Mar. 4, 2005] [holding employees who fully funded 401(k) plan were entitled to demutualization proceeds rather than the employer who would receive an "undeserved windfall"]; see also Mell v Anthem, Inc., 688 F3d 280 [6th Cir. 2002] [affirming district court's finding that employees were not the owners of health insurance policy subject to demutualization "because as employees and retirees [the employees] 'had nothing to do with the choice of insurance carrier, nor with its governance, and they received what they bargained with the [the employer] to get: insurance coverage'"] [quoting Mell v Anthem, Inc., 2010 WL 796751, at *10 [S.D. Ohio Mar. 3, 2010]; Greathouse v E. Liverpool, 159 Ohio.App.3d 251, 257, 823 N.E.2d 539, 544 [Ohio Ct. App. 2004] [holding that "[a]s a benefit of his employment, the city provided appellant with health insurance—nothing more. Appellant cannot contend that he somehow owned the policy and was entitled to the [demutualization] stock proceeds"]; Town of N. Haven v N. Haven Educ. Association, 2004 WL 113524, at *2 [Conn. Super. Ct. Jan. 5, 2004] [commenting in application to stay arbitration of dispute concerning insurer's demutualization and

distribution of stock that "[f]airness dictates that the teachers should share in the proceeds received by the Town to the extent that the amount of the premiums paid by them bears to the total amount of the premiums paid by the Town upon which the total stock distribution was based"]).

As illustrated by the above cases, entitlement to proceeds arising from the demutualization of insurance entities has generally been determined by the respective share of the premiums that the parties seeking the proceeds have paid. Moreover, such an approach is consistent with New York Insurance Law § 7307 (e) (3), which, as discussed *supra*, provides that "[t]he equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums . . . *such policyholder has properly and timely paid* to the insurer . . . ." (emphasis added). Accordingly, it is submitted that this Court should follow the majority view of other court's in holding that entitlement to consideration arising out of the demutualization of a mutual insurer is determined based upon the amount of premiums paid. This easily-applied rule will bring New York into conformity with other jurisdictions and result in an outcome that is both equitable and consistent with the plain language, legislative intent, and construction of the Insurance Law.

D. Alternatively, Lake Champlain Should Receive From The Cash Consideration, At Minimum, The Premiums That It Paid To MLMIC.

Alternatively, should this Court determine that Lake Champlain is not entitled to the Cash Consideration of $74,747.03 (R.42 ¶31) based on its payment of all the

policy premiums, Lake Champlain submits that it should receive $39,340.54 as reimbursement for the premiums that it paid during the applicable policy period (R.42 ¶31). Otherwise, Ms. Schoch, whom the Third Department held did not bargain for the unexpected windfall of the Cash Consideration and was solely entitled to said funds, shall be unjustly enriched for the reasons discussed above.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Defendant-Appellant Lake Champlain respectfully requests that this Court reverse the Opinion and Order of the Appellate Division, Third Department and issue an Order declaring that Lake Champlain is solely entitled to receipt of the Cash Consideration at issue herein.

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