Saratoga County Clerk Index No. 20184228
Appellate Division, Third Department Case No. 529615

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.

MOTION FOR LEAVE TO APPEAL

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

Plaintiff-Respondent,

- against -

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Defendant-Appellant.

NOTICE OF MOTION FOR LEAVE TO APPEAL

Appellate Division, Third Department
Docket No. 529615

Saratoga County Supreme Court
Index No. 20184228

PLEASE TAKE NOTICE that, upon the annexed Statement in Support of Motion for Leave to Appeal, upon the briefs and record filed in the Appellate Division, Third Department on the prior appeal in this action, and upon all papers and prior proceedings in this action, the undersigned will move this court at the courthouse of the Court of Appeals, 20 Eagle Street, Albany, New York, on August 3, 2020, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 5602(a)(1) granting Defendant-Appellant Lake Champlain OB-GYN, P.C., leave to appeal to the Court of Appeals from the order of the Appellate Division, Third Department entered June 18, 2020 which unanimously reversed the order and judgment of the Supreme Court, Saratoga County (Crowell, J.) entered on June 17, 2019 granting summary judgment in favor of Defendant-Appellant Lake Champlain OB-GYN, P.C. and declaring that Defendant be awarded the $74,747.03

cash consideration from Medical Liability Mutual Insurance Company's demutualization, plus prejudgment interest for the time the proceeds were in escrow; and which order of the Appellate Division, Third Department entered on June 18, 2020 granted the motion of Plaintiff-Respondent Kim E. Schoch, CNM, OB/GYN NP and declared that Plaintiff is solely entitled to the $74,747.03 cash consideration from Medical Liability Mutual Insurance Company's demutualization, plus prejudgment interest for the time the proceeds were in escrow; and for such other and further relief as this court finds just and proper.

PLEAE TAKE FURTHER NOTICE, that opposition papers, if any, must be filed with the Clerk's office on or before the return date per Rule 500.21(c) and should state concisely any arguments for denial of the motion per Rule 500.22(d).

Dated: July 15, 2020

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STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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I. PRELIMINARY STATEMENT

In October 2018, Medical Liability Mutual Insurance Company ("MLMIC") converted from a mutual insurance company into a stock corporation in what was the first demutualization of a mutual insurance company in New York's history. This application for leave to appeal requests that this Court resolve a split among the Appellate Division departments as to who is entitled to share in the $2.502 billion in proceeds from this unprecedented demutualization pursuant to the procedures set forth in Insurance Law § 7307(e)(3) and the MLMIC Plan of Conversion approved by the Department of Financial Services. Numerous courts have issued conflicting decisions, and a split exists among the First, Third and Fourth departments of the Appellate Division as to whether the demutualization proceeds should go to the named insured on the MLMIC policy or to the insured's employer that purchased and bargained for the policy and paid all of the premiums.

Defendant-Appellant Lake Champlain OB-GYN, P.C. ("Lake Champlain") seeks leave to appeal from the Opinion and Order of the Appellate Division, Third Department dated and entered June 18, 2020 reversing the order and judgment of the Supreme Court, Saratoga County (Crowell, J.) entered on June 17, 2019 which granted summary judgment in favor of Lake Champlain declaring it to be entitled to receive the cash consideration from the MLMIC demutualization. The Third Department order further granted summary judgment to Plaintiff-Respondent Kim

E. Schoch OB/GYN NP ("Schoch") and declared that Schoch is solely entitled to said cash consideration. Finally, the Third Department awarded prejudgment interest to Schoch on the full amount of the cash consideration commencing with the date the cash consideration was placed into escrow despite the parties having agreed to place the consideration into escrow by executing and delivering a joint Active Dispute Resolution Notice to MLMIC.

II. JURISDICTIONAL SHOWING PURSUANT TO RULE 500.22(b)(3)

The Court of Appeals has jurisdiction over the instant motion and proposed appeal under CPLR 5602(a)(1) because (1) the action originated in Supreme Court, (2) the June 18, 2020 order appealed from is not appealable as a matter of right, and (3) the order appealed from is a final determination as defined in CPRL § 5611 whereby it disposes of all the issues in the action.

III. DISCLOSURE STATEMENT PURSUANT TO RULE 500.22(b)(5)

Defendant-Appellant Lake Champlain OB-GYN, P.C. is not a publicly held company. It has no parents, subsidiaries or affiliates.

IV. PROCEDURAL HISTORY OF THE CASE AND TIMELINESS OF THE MOTION PURSUANT TO RULE 500.22(b)(2)

Plaintiff-Respondent Schoch commenced this action on December 28, 2018. (R.37). Defendant-Appellant Lake Champlain served an Answer with Counterclaims on March 18, 2019. (R.47). By motion dated April 8, 2019, Plaintiff-Respondent moved for summary judgment seeking declaratory relief. (R.9). By

cross-motion dated May 15, 2019, Defendant-Appellant cross-moved for summary judgment seeking declaratory relief. (R.219). No discovery occurred in the action. (R.283 ¶11). The parties' motions for summary judgment sought a declaratory judgment as to who is entitled to $74,747.03 in proceeds from the demutualization of MLMIC. By Decision and Judgment entered June 17, 2019, the Supreme Court (Crowell, J.) granted summary judgment in favor of Defendant-Appellant. (R.5). The Supreme Court ruled on grounds of *stare decisis* based on the Appellate Division, First Department's ruling in *Schaffer, Schonholz & Drossman, LLP v Title*, 171 AD3d 465 [1st Dept 2019]. (R.7). By Opinion and Order dated and entered June 18, 2020, the Appellate Division, Third Department unanimously reversed the judgment of the Supreme Court, granted summary judgment to Plaintiff-Respondent and declared that plaintiff is solely entitled to the MLMIC demutualization proceeds. (Ex. A). Notice of entry of said order was served via NYSCEF on June 18, 2020. (Ex. B). Defendant-Appellant moves herein for leave to appeal within thirty (30) days of the entry and service of the order of the Appellate Division. Accordingly, the instant motion is timely under CPLR 5513(b).

V. QUESTIONS PRESENTED

Q1. Is an employer who purchased a MLMIC policy of insurance that insured an employee entitled to a distribution of the demutualization proceeds, i.e., "Cash Consideration," as a matter of law and equity where the employer selected

and bargained for the policy, paid the policy premiums, received the dividends, received the policy refunds and administered the policy?

A. The Appellate Division, Third Department said no.

Q2. Would awarding Plaintiff-Respondent the Cash Consideration where Plaintiff did not bargain for the demutualization proceeds or pay any premiums on the policy result in Plaintiff's unjust enrichment?

A. The Appellate Division, Third Department said no.

Q3. Is Plaintiff-Respondent solely entitled to all of the Cash Consideration and prejudgment interest commencing with the placement of the Cash Consideration into escrow?

A. The Appellate Division, Third Department said yes.

Q4. Does Defendant-Appellant state a claim for monies had and received and/or breach of the implied covenant of good faith and fair dealing?

A. The Appellate Division, Third Department did not reach this issue.

Q5. Should this matter be remanded to the lower court for discovery on Defendant-Appellant's affirmative defenses and counterclaims?

A. The Appellate Division, Third Department did not reach this issue.

VI. RELEVANT FACTS

Defendant-Appellant Lake Champlain OB-GYN, P.C. is an organized professional medical practice group providing obstetrical and gynecological patient services with principal offices located in Plattsburgh, New York. (R.222 ¶6). Plaintiff-Respondent Kim E. Schoch, CNM 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 Schoch. *Id*.

As set forth in the affidavit of Jeffrey A. Dodge, D.O., Lake Champlain purchased professional liability insurance for all of its physicians, certified nurse midwives and nurse practitioners, including 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 does not permit Schoch to practice as a CNM unless she is in a collaborative relationship with a licensed physician or hospital that practices obstetrics such as Lake Champlain. Thus, Schoch was ineligible to purchase a policy in her own right. (R.6, R.225 ¶21).

Lake Champlain selected, bargained for, contracted and purchased the MLMIC policies for each of its professionals, including the policy that insured

Schoch. (R.223-24, ¶17). Lake Champlain paid all of the premiums for the policy that insured Schoch. *Id*. (R.226 ¶28). For example, the annual premium for the policy period 7/1/2014 - 7/1/2015 was approximately $25,710. (R.225 ¶22, R. 233). 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.233). All of the policy endorsements were also issued to "Lake Champlain OB-GYN, P.C." (R.230, 237-38, 240-41, 247). For example, the endorsement refunding the premium upon policy cancellation was issued to Lake Champlain:

> This **Endorsement** effective 02/28/2015
>
> issued to Lake Champlain OB-GYN, P.C.
> 206 Cornelia Street
> Suite 306
> Plattsburgh, NY 12901

(R. 230) (emphasis in original). 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 dividends and premium reductions; paid all policy premium increases; and was responsible for all financial aspects of the policy. (R.223-24 ¶17).

Schoch never objected when Lake Champlain received and kept the policy dividends or premium reductions, including the policy cancellation premium refund

of $8,664.00 when Schoch left her employment. (R.223 ¶16, R.224 ¶19). Schoch never made any contribution from her salary to pay premiums. The premiums paid by Lake Champlain were never requested by Schoch, or treated by Lake Champlain, as W-2 or other income to Schoch. (R.225, ¶24).

In 2018, MLMIC converted from a mutual insurance company to a stock insurance company that was sold to Berkshire Hathaway Group for cash consideration in the amount of $2.502 billion. (R.75, 127). This was the first demutualization of a medical malpractice insurance company in New York 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). 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).

The MLMIC Plan of Conversion ("Plan") provides for payment of the cash proceeds, by default, to each "policyholder." The Plan, however, recognizes that the "named insured" may not be the party legally entitled to the Cash Consideration, and that a "Policy Administrator" may have a legal right to the proceeds. As stated by

the New York State Financial Department's ("DFS") September 6, 2018 Decision approving the Plan, "[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).

The stated intent of the Plan and distribution of the demutualization proceeds is to comply with procedure set forth in New York Insurance Law § 7307, which calls for the amount of the consideration paid to be based upon the policyholder's equitable share in the mutual insurer and states that "[t]he 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 . . . ." *Id*. at 7307(e)(3). Schoch did not pay any of the policy premiums, which were paid by Lake Champlain. (R.226, ¶28).

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, ¶29). 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).

In anticipation of receiving the Cash Consideration, one hospital system "booked approximately $24 million in proceeds as part of their cash flow projection."[1] Here, Lake Champlain requested that Schoch consent to the payment of the MLMIC cash proceeds to Lake Champlain as the Plan Administrator, which Schoch refused. (R. 50 ¶31); (R.61 ¶5).

In recognition of the unique circumstances of the demutualization, the MLMIC Plan provides an objection process for a Policy Administrator who claims that it, rather than the named insured, "has a legal right to receive [the] Cash Consideration." (R.171 ¶A.14); (R.87 §8.3, R.91). Here, Lake Champlain filed an objection with MLMIC on October 12, 2018. (R.227 ¶34, R. 266). MLMIC is holding the Cash Consideration in escrow pending "joint written instructions" from the named insured and Policy Administrator as to how the cash proceeds are to be distributed or "a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator or … the Eligible Policyholder." (R. 171 ¶A15, R.150). On May 3, 2019, the parties provided

[1] *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.

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).

Schoch did not bargain for insurance coverage through MLMIC or for the benefit of the demutualization proceeds. Schoch's briefing to Supreme Court acknowledged that the "present dispute is over the Cash Consideration from the October 1, 2018 demutualization of MLMIC; it does not arise out of or relate to the Employment Agreement, which does not address or assign ownership of the MLMIC Cash Consideration or Membership Interest." Schoch relied on these facts to avoid arbitration of the dispute (R.34 ¶12) under the Employment Agreement's mandatory arbitration clause (R.25 ¶25), which Lake Champlain's answer raised as an affirmative defense. (R.49 ¶16).

VII. THE QUESTIONS PRESENTED MERITS REVIEW BY THE COURT

A. A Split Exists Among the Departments of the Appellate Division

A split exists among the First, Third and Fourth departments of the Appellate Division as to whether the MLMIC demutualization proceeds should be distributed to (i) an employer who selected and purchased the policy and paid the premiums or (ii) an employee who is the named insured.

In *Matter of Schaffer, Schonholz & Drossman LLP v Title* (171 AD3d 465 [1st Dept 2019]), the First Department ruled that a medical practice group, who was the Policy Administrator and paid all of the policy premiums, was entitled to the cash

proceeds from the demutualization of MLMIC. The *Schaffer* court held that to award the cash proceeds to the named insured physician who never paid any policy premiums 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 at 465. 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.)*.

Subsequently, in *Maple-Gate Anesthesiologists, PC. v Nasrin* (182 AD3d 984 [4th Dept 2020]), the Fourth Department split with the First Department and ruled that an employer who paid all of the policy premiums had no "legal or equitable right of ownership to the demutualization proceeds" (*id*. at 842). The Fourth Department's decision did not cite or discuss any caselaw precedent involving the demutualization of insurance companies.

In the instant case, the Third Department split with the First Department and joined the Fourth Department in ruling that the demutualization proceeds were not bargained for by either party, constituted an unexpected windfall, and that Defendant

Lake Champlain failed to establish a claim of unjust enrichment. The Third Department further awarded Plaintiff Schoch the entire Cash Consideration in the amount of $74,747.03 with no credit to Defendant for its payment of $25,710 in premiums. (R.225 ¶22, R. 233). The Third Department also awarded Plaintiff pre-judgment interest on the demutualization proceeds despite Plaintiff's sole cause of action being one for declaratory relief, an equitable remedy, and despite the parties submitting a joint Active Dispute Resolution Notice to MLMIC requesting that the money be maintained in escrow to permit the dispute to be resolved by the courts.

B. Other Jurisdictions Apply Principles of Equity and Fairness to Allocate Demutualization Proceeds to Employers and/or Employees Based on Their Share of Premiums Paid—Which is Consistent with New York Insurance Law §7307(e)

As cited by the First Department in *Schaffer*, other courts have decided the issue of entitlement to insurance demutualization proceeds among employers and employees pursuant to principles of equity and fairness. The proper standard of review to determine whether a party has an equitable claim to share in the proceeds —which is also consistent with the process laid out in New York Insurance Law § 7307(e)—is to calculate the amount of premiums that the employer/employee paid. This is the majority view of courts throughout the nation in considering the demutualization of insurers providing employee disability insurance, health insurance, 401k retirement benefits, etc. (*see Ruocco v Bateman, Eichler, Hill, Richards, Inc.*, 903 F2d 1232, 1238 [9th Cir 1990], *cert denied*, 498 US 899 [1990]

[holding that the "balance of equities" weighed in favor of distributing the demutualization proceeds to the employees who paid the disability insurance policy premiums]; *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 [ND 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], quoting *Mell v Anthem, Inc.*, 2010 WL 796751, at *10 [SD Ohio Mar. 3, 2010] [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'"]; *Greathouse v E. Liverpool*, 159 OhioApp3d 251, 257 [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, No. CV030474463, Jan. 5, 2004] [commenting in application to stay arbitration of dispute concerning medical 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, distribution of the MLMIC Cash Consideration should be determined by the parties' respective share of the premiums that they paid. This rule is consistent with New York Insurance Law § 7307(e)(3), which provides that "[t]he 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 . . . ." The rule is also consistent with principles of equity and fairness, and particularly applicable to the facts here. As recognized by the Third Department, the MLMIC demutualization proceeds were an "unexpected windfall" that was "never bargained for by the parties." (Ex. A, p. 8-9). Notably, however, this unexpected windfall would not have arisen without Lake Champlain specifically selecting and bargaining for a MLMIC policy, paying all of the premiums, and assuming all of the financial risk associated with the policy.

C. The Demutualization Cases Relied Upon by Plaintiff-Respondent and the Third Department are Inapposite

Plaintiff-Respondent Schoch relied below on *Dorrance v United States* (809 F3d 479 [9th Cir 2015]) which is a tax case. Unlike the MLMIC conversion, in

Dorrance, the demutualization proceeds were shares of stock that were not valued based on the payment of policy premiums (*see id*. at 497 ["Thus, the value at demutualization was not derived from something paid for by the [policyholder]"). Here, in contrast, the value of the MLMIC Cash Consideration is directly 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). Moreover, the Ninth Circuit, which decided *Dorrance*, has also held that where the distribution of demutualization proceeds is based on premium payments, that "the balancing of equities weighed in favor of the plan participants because the premiums for the plan were paid by the participants and because…'[the other party] paid nothing'" (*Ruocco v Bateman, Eichler, Hill, Richards, Inc.*, 903 F2d at 1238).

Similarly, Schoch's reliance on *Bank of New York v Janowich* (470 F3d 264, 274 [6th Cir 2006]) is misplaced. First, *Bank of New York* involved annuity contracts that were purchased after the termination of an employer funded employee benefit plan. The annuities were purchased from benefits that were already due the employees. The employer had no interest in the annuity contracts, and thus no right to the demutualization proceeds (*see id.* at 271). Here, in contrast, the MLMIC policy is the subject of the demutualization. Second, the demutualization plan in *Bank of New York* was silent as to any rights of the employer. In contrast, the MLMIC Plan of Conversion and DFS Decision approving the Plan expressly acknowledge that the

employer policy administrator who paid the premiums, rather than the named insured, may be entitled to the demutualization proceeds (R.87 ¶8.3, R.91, R.171 ¶A.14, R.149-51), depending "on the facts and circumstances of the parties' relationship and applicable law…." (R.151).

D. Insurance Law § 7307(e)(3) Did Not Contemplate the Demutualization of a Medical Malpractice Liability Insurer.

MLMIC is the first mutual medical malpractice insurer to demutualize in New York. In New York, medical malpractice insurance generally cannot be written as a group policy (*see Urgent Medical Care, PLLC v Amedure*, 64 Misc 3d 1216[A], 2019 NY Slip Op 51188[U] [Sup Ct, Greene County 2019]).[2] As recognized during the DFS hearing on the MLMIC conversion, in a group policy the employer would be the policyholder notwithstanding the individual named insureds being covered by the policy.[3] But for this anomaly, Schoch would lack standing to challenge the distribution of the Cash Consideration, and Lake Champlain would receive a return

[2] "Both Insurance Law § 3435 and Regulation 135 (11 NYCRR 153) permit the issuance of group property/casualty insurance only with respect to public and not-for-profit insureds. Thus, under New York law with the limited exception of a risk retention group authorized under Federal law, group property/casualty insurance for physician groups may not be written in New York (*see* Office of General Counsel, Department of Financial Services, *New York Medical Professional Liability Insurance* [June 4, 2008] OGC Op No 08-06-02, available at https://www.dfs.ny.gov/insurance/ogco2008/rg080602.htm); *Urgent Medical Care PLLC v Amedure*, 64 Misc 3d 1216[A], 2019 NY Slip Op 51188[U] [Sup Ct, Greene County 2019] [citation in original].

[3] *See* Public Hearing in the Matter of Medical Liability Mutual Insurance Company), August 23, 2018, Transcript at p. 170, last accessed on July 13, 2020, available at https://www.dfs.ny.gov/system/files/documents/2019/01/mlmic_transcript_ 20180823.pdf.

on its investment of selecting and bargaining for the MLMIC policy, paying all premiums, and assuming all financial risk associated with the same.

E. Neither the New York Insurance Law nor the MLMIC Plan of Conversion Defines Who is a "Policyholder" Entitled to the Distribution of the MLMIC Demutualization Proceeds

The New York Insurance Law does not define "policyholder" under Insurance Law § 7307(e) or provide that the "policyholder" is necessarily entitled to a distribution of the MLMIC demutualization proceeds. Rather, § 7307(e) provides the process for determining the amount of demutualization consideration that shall be paid in exchange for a policyholder's equitable share in the mutual insurer and specifies that such consideration shall be payable to "each person who had a policy of insurance in effect at any time during the three-year period immediately preceding the [demutualization]."

Notably, § 7307(e) uses the term "policyholder" when referring to the manner and method of calculating the equitable share in the mutual insurer from which the amount of consideration is to be calculated. However, when referencing who is entitled to receive the consideration in exchange for the policyholder's equitable share, the statute more broadly states that the consideration is payable to "each person who had a policy of insurance in effect at any time during the three-year period immediately preceding the [demutualization]." This is consistent with the DFS Decision 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)

Schoch argues in conclusory fashion that she is a "policyholder" and thus entitled to receive the cash consideration by virtue of her status as a "member" of MLMIC pursuant to Insurance Law § 1211 and because she designated Lake Champlain as her "agent" on the MLMIC insurance application. (R.29). Lake Champlain in turn submits that it is entitled to the cash consideration because it "had a policy in effect" during the relevant time period, selected and purchased that policy, was the Policy Administrator on the policy, paid all the premiums on the policy, and the policy and its endorsements were "issued to" it. (R.224 ¶17).

Insurance Law § 1211 upon which Schoch relies does not mention demutualization and does not address, let alone create, any right of a "policyholder" or "named insured" or "member" to demutualization proceeds. As discussed in Point VII.B. above, such nominal designations are not determinative in balancing the parties' legal and equitable rights. Schoch, however, argues that under the DFS Decision approving the MLMIC Plan of Conversion, the policy's "named insured" is automatically entitled to the demutualization proceeds absent an assignment of said proceeds to the Policy Administrator. Schoch's argument, which the Third and

Fourth departments accepted,[4] was the topic of significant contention by policy administrators (employers) and medical providers (employees).[5] Contrary to the Third Department's ruling (Ex. A, p.6), the DFS Decision did not limit a Policy Administrator's right under the Plan's dispute resolution process to assert its legal and equitable ownership interest in the Cash Consideration. To the contrary, the DFS's Decision approving the Plan acknowledged that:

> If a Policy Administrator … has not been specifically designated to receive the Cash Consideration allocated to an Eligible Policyholder, but nevertheless believes that it has a legal right to receive such Cash Consideration, such Policy Administrator … may send MLMIC [an objection and] … The allocated Cash Consideration will be held in escrow … until MLMIC receives joint written instructions from the Eligible Policyholder and the Policy Administrator … as to how the allocation is to be distributed, or a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator or … or the Eligible Policyholder.

(R.91); (R.171 ¶A.14).

The DFS was well-aware of the instant dispute that spawned litigation

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[4] The Third Department held that "Plaintiff was the named insured on the relevant MLMIC policy. Hence, per the relevant statute and the conversion plan's definitions, plaintiff was entitled to the cash consideration." (Ex. A, p. 5 [citing *Maple-Gate Anesthesiologists, P.C. v Nasrin*, 182 AD3d 984, 985 [4th Dept 2020]]).

[5] The DFS Decision rejected the argument of insureds like Schoch "who contend that all of the cash consideration should be paid to [policyholders]." (R.149). Instead, the DFS recognized the competing claim of "medical groups and hospitals that contend that the cash consideration should be paid to them in the circumstances where they paid the premiums on behalf of policyholders and/or acted as policy administrators" (*id*.).

throughout the State[6], and the agency's 28-page Decision easily could have rejected the claims of hospital/medical group employers who paid the policy premiums and claimed a right to the cash consideration.[7] Instead, the DFS held:

> Nor does the definition of Policy Administrator under the particular facts or applicable law represent the Department's view that anyone that falls within this definition is (or is not) entitled, under the particular facts or applicable law, to receipt of the cash consideration. The 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.
> . . . .
> The Department, while making clear that the parties to these disputes maintain all legal rights to pursue their claims, encourages all parties involved in the Objection Procedure to resolve their differences in a prompt, fair and equitable manner.

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[6] *See Urgent Medical Care, PLLC v Amedure*, 64 Misc 3d 1216(A), 2019 N.Y. Slip. Op. 51188(U) [Sup Ct, Greene County 2019] ("These examples are emblematic of multiple oral and written testimonies that were provided to the Department of Financial Services regarding the claims of employers having paid the premiums to MLMIC and having acted as the owners of the policy, despite not being the policyholders or, in some cases, even declared as the policy administrator.").

[7] As noted by one commentator, the DFS "punted on the question of who would be paid. During public comment, both the physicians who were in many cases the nominal policyholders and the practices, hospitals, and others that acted as policy administrators and paid the premiums raised their hands as prospective payees. DFS did not decide the issue; rather, it left it to be determined through dispute resolution processes, including mediation, arbitration, and court proceedings" (Daniel J. Hurteau, *New questions arise following the latest ruling on MLMIC distributions*, Litigation and Insurance Alert [May 4, 2020], available at https://www.nixonpeabody.com/en/ideas/articles/2020/05/04/new-questions-arise-following-the-latest-ruling-on-mlmic-distributions; *see also* Daniel J. Hurteau, *New questions arise following the latest ruling on MLMIC distributions*, NYLJ, May 29, 2020, available at https://www.law.com/newyorklawjournal/2020/05/29/new-questions-arise-following-the-latest-ruling-on-mlmic-distributions/).

(R.151). The agency's deliberate decision not to adjudicate the legal merit of the competing claims demonstrates why this dispute warrants review by this Court.

F. This Court Should Recognize the Equitable Remedy of Unjust Enrichment for New York State Employers and Employees Who Receive Unexpected Insurance Demutualization Windfalls That Were Not Bargained-For

Lake Champlain submits that this Court should recognize the remedy of unjust enrichment under New York law for employers and employees who paid premiums and claim a right to receive unexpected insurance demutualization windfalls that were not bargained for. Recognition of this equitable claim would align New York with the standard of review in other jurisdictions (*see* Point VII.B *supra*), and be in harmony with New York law, as discussed below.

"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 at 239; 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]. Defendant Lake Champlain is not required to show that Schoch committed a "wrongful act" to establish unjust enrichment (*see Simonds v Simonds*,

45 NY2d 233, 242 [1978] ["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]).

Accordingly, and contrary to the decision below (Ex. A, pp. 7-9), mutual mistake by the parties does not preclude unjust enrichment. Similarly, 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. Yet, the Third Department ruled that Schoch was entitled to the entire demutualization "windfall," which she did not bargain for, and allocated no portion of the surplus cash consideration of $74,747.03 to Lake Champlain for reimbursement of the $39,340.54 in premiums paid. The Third Department also assessed pre-judgment interest against Lake Champlain on the amount of the Cash Consideration despite (i)

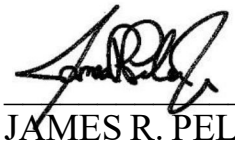
Schoch having only asserted an equitable cause of action for declaratory relief (*see* CPLR 5001[a] [stating that "in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion"]) and (ii) despite the fact that Schoch and Lake Champlain submitted a joint Active Dispute Resolution Notice to MLMIC jointly requesting that the Cash Consideration be maintained in escrow and not disbursed until a final, non-appealable court order. Defendant submits that such a result is unjust and that the award of pre-judgment interest constituted an improvident exercise of discretion (to the extent that discretion was exercised). It is respectfully submitted that the First Department in *Schaffer* correctly applied the law of unjust enrichment consistent with the New York law and the standard of review applied by other jurisdictions in allocating insurance demutualization proceeds among employers and employees.

Alternatively, the Third Department should have remanded this case to Supreme Court for further discovery on the parties' claims and defenses, including Lake Champlain's defenses and counterclaims for unjust enrichment, monies had and received and breach of the implied covenant of good faith and fair dealing.

VIII. CONCLUSION

For the reasons above, Lake Champlain respectfully requests that this Court grant leave to appeal the Opinion and Order of the Appellate Division and award such other and further relief as it deems just and proper.

Dated: July 15, 2020
Albany, New York



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Certificate of Compliance
Pursuant to Part 500.13(c)(1) of the Rules of Practice of the
Court of Appeals, State of New York

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, statement of status of related litigation, corporate disclosure statement, statement of questions presented required by subsection (a), or any addendum containing material required by subsection 500.1(h), is 5,583 words.

Exhibit A

Opinion and Order of the Appellate Division, Third Department dated June 18, 2020

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 18, 2020 529615

KIM E. SCHOCH,
Appellant,
v OPINION AND ORDER

LAKE CHAMPLAIN OB-GYN, P.C.,
Respondent.

Calendar Date: May 20, 2020

Before: Garry, P.J., Egan Jr., Mulvey, Devine and Colangelo, JJ.

Nolan Heller Kaufman LLP, Albany (Justin A. Heller of counsel), for appellant.

Dreyer Boyajian LLP, Albany (James R. Peluso of counsel), for respondent.

Mulvey, J.

Appeal from a judgment of the Supreme Court (Crowell, J.), entered June 17, 2019 in Saratoga County, which, among other things, issued a declaration in defendant's favor.

Plaintiff, a certified nurse midwife and obstetrics/gynecology nurse practitioner, was employed by defendant from June 2007 to at least June 2014.[1] One of the

[1] Although defendant asserts that it employed plaintiff through February 2015, the precise dates of employment are unimportant for our purposes.

terms of the parties' employment agreement required defendant to maintain and pay the premiums for a professional liability insurance policy. Defendant satisfied that term by obtaining from Medical Liability Mutual Insurance Company (hereinafter MLMIC) a malpractice policy that listed plaintiff as the sole insured. Plaintiff signed a form designating defendant as the policy administrator of the MLMIC policy, thereby appointing defendant as her agent and giving defendant the right to, among other things, make changes to the policy and receive dividends. Defendant paid all the premiums on the MLMIC policy covering plaintiff.

In July 2016, MLMIC applied to the Department of Financial Services (hereinafter DFS) for permission to file a plan to convert from a mutual insurance company to a stock insurance company. In accordance with Insurance Law § 7307 (e) (3), MLMIC's conversion plan provided that anyone who was a MLMIC policyholder from July 2013 to July 2016 would receive a cash consideration in exchange for the extinguishment of his or her policyholder membership interest. Plaintiff did not sign a special consent form distributed by MLMIC to policyholders that would designate someone else (i.e., defendant) to receive her share of the cash consideration. Pursuant to a provision in the conversion plan, defendant objected to the distribution of the cash consideration – in the amount of $74,747.03 – to plaintiff, and MLMIC placed the disputed cash consideration in escrow pending resolution of the dispute. Eventually, DFS approved the conversion plan, MLMIC's members voted in favor of it and MLMIC completed the demutualization.

Thereafter, plaintiff commenced this declaratory judgment action asserting that, as the policyholder with a membership interest in MLMIC and absent an assignment of her membership interest to defendant, she is entitled to receive the cash consideration. Defendant raised affirmative defenses and counterclaims asserting, among other things, unjust enrichment and requested a declaration that the cash consideration must be distributed to defendant. After joinder of issue, plaintiff moved and defendant cross-moved for summary judgment. Supreme Court, concluding that it was bound by a recent First Department

decision (Matter of Schaffer, Schonholz & Drossman, LLP v Title, 171 AD3d 465 [2019]), denied plaintiff's motion, granted defendant's cross motion and declared that defendant was entitled to a judgment awarding it the cash consideration, on the basis that plaintiff would be unjustly enriched if she received the money. Plaintiff appeals.

Plaintiff contends that, pursuant to statute, the conversion plan, DFS's decision approving the plan and under the common law, she is entitled to the cash consideration because she was the policyholder with a membership interest in MLMIC. Defendant argues that these same sources entitle it to receive the cash consideration because it paid the premiums and had control over the policy. Alternatively, defendant argues that plaintiff would be unjustly enriched if she were to receive the cash consideration.

Before the conversion, MLMIC was a mutual insurance company, meaning that it was owned by, maintained and operated for the benefit of its members. By statute, "[e]very policyholder shall be a member of such corporation" (Insurance Law § 1211 [a]). Accordingly, policyholders have a dual relationship with a mutual insurance company, in that they have both a membership interest (e.g., the right to vote and receive dividends) and contractual rights (i.e., the obligations of the insurance company under the policy) (see Dorrance v United States, 809 F3d 479, 482 [9th Cir 2015]; Bank of New York v Janowick, 470 F3d 264, 267 [6th Cir 2006], cert denied 552 US 825 [2007]; 17 Steven Plitt et al., Couch on Insurance 3d § 39:37 [1995]; see also Insurance Law § 1211 [a]).

By statute, a plan for conversion from a mutual insurance company to a stock insurance company

> "shall . . . provide that each person who had a policy of insurance in effect at any time during the three year period immediately preceding [a specified date] 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 [those] three years . . . bears to the total net premiums received by the mutual insurer from such eligible policyholders" (Insurance Law § 7307 [e] [3]).

The first quoted sentence of this statute explains who is entitled to receive the consideration, whereas the second quoted sentence explains how the consideration for each eligible person is to be calculated. Consideration is owed to anyone who had a policy of insurance in effect during the relevant time period. Under MLMIC's conversion plan, the consideration is payable to eligible policyholders or their designees. Designee is defined to mean someone who a policyholder specifically designated to receive the proceeds from demutualization; an ordinary designation as policy administrator does not convey the right to receive the cash consideration. The conversion plan defines member of the corporation as a policyholder, which is further defined as the person identified on the policy's declarations page as the insured. Plaintiff was the named insured on the relevant MLMIC policy. Hence, per the relevant statute and the conversion plan's definitions, plaintiff was entitled to the cash consideration (see Maple-Gate Anesthesiologists, P.C. v Nasrin, 182 AD3d 984, 985 [2020]).

Defendant's designation as policy administrator gave it no greater right to the cash consideration, and plaintiff did not explicitly assign that right to defendant and declined to do so (see Maple-Gate Anesthesiologists, P.C. v Nasrin, 63 Misc 3d 703, 709 [Sup Ct, Erie County 2019], affd 182 AD3d 984 [2020]). Although the conversion plan gives a policy administrator the

right to object if it believes that it has a legal right to the cash consideration, the right to object carries no rights, in and of itself, to the consideration, and the objector must prove its claimed legal right thereto. Defendant has failed to provide any proof in that regard, as it has not demonstrated that plaintiff assigned it that right through a designation form or contractual arrangement.

Instead, defendant relies on its payment of premiums, as well as language in the conversion plan, DFS's decision approving the plan, and the statute stating that the amount of the cash consideration is based partly on the amount of premiums that "such policyholder has properly and timely paid to the insurer" (Insurance Law § 7307 [e] [3]).[2] However, as noted above, this language pertains to how the considerations are calculated, rather than to whom they must be paid. The reference to "policyholder" immediately preceding the word "paid" – the latter of which is the word that defendant focuses on – supports our interpretation (see Columbia Mem. Hosp. v Hinds, 65 Misc 3d 1205[A], 2019 NY Slip Op 51508[U], *4 [Sup Ct, Columbia County 2019]). Indeed, DFS's decision, in addressing similar comments raised by a different medical employer, concluded that an employer is not entitled to the consideration merely based on its payment of the premiums on an insurance policy, because the same provision refers to "policyholder," which may or may not be the person who paid the premium (see Maple-Gate Anesthesiologists, P.C. v Nasrin, 63 Misc 3d at 709 ["No distinction is made between a policyholder who pays the premium out of his (or her) own pocket versus a policyholder whose employer pays the premium as part of an employee compensation package. Insurance Law § 7307 does not confer an ownership interest . . . to anyone other than the

[2] Defendant also relies on a 2016 MLMIC newsletter article discussing the proposed demutualization. The article states that, "[i]n most cases, the person or entity that paid the premium will be considered as the owner of the eligible policy," who is entitled to the cash consideration. This informal opinion, provided two years before the conversion, should not be relied upon because it is contradicted by later, formal information provided in the conversion plan and other documents.

policyholder"]). DFS explained in its decision that Insurance Law § 7307 defines the policyholders eligible to receive cash considerations but recognizes that they may have assigned such legal rights to others; that is why MLMIC's conversion plan includes a procedure for objections and holding considerations in escrow pending resolution of any disputes (see id. [noting that DFS's decision "tied eligibility for the objection and escrow process to when the policyholder had, in fact, assigned the right to cash consideration to another person or entity"]). According to DFS, the determination of who is entitled to the cash in these situations depends on the facts and circumstances of the parties' relationship and the applicable law. Defendant attempts to take this last portion of DFS's decision out of context, as if all determinations of the proper payee are based on the parties' relationship. However, that only applies if an objector raises a legitimate assertion that it is entitled to the consideration based on an assignment from the policyholder (see id.), which does not exist here. Accordingly, pursuant to the language of the statute, the conversion plan and DFS's decision, MLMIC should pay the cash consideration to plaintiff.

Having determined who is legally entitled to receive the cash consideration, we must now address defendant's alternate argument, namely, whether plaintiff would be unjustly enriched if she received the cash consideration as required by the statute and MLMIC's conversion plan (see Urgent Med. Care, PLLC v Amedure, 64 Misc 3d 1216[A], 2019 NY Slip Op 51188[U], *7 [Sup Ct, Greene County 2019] [noting that an employee who was a policyholder had "legal title to the proceeds" of MLMIC's demutualization, but requiring further proceedings based on possible unjust enrichment]). To recover under a theory of unjust enrichment, defendant must show (1) that plaintiff was enriched, (2) at defendant's expense, and (3) that it is against equity and good conscience to permit plaintiff to retain what is sought to be recovered by defendant (see Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011]; New York State Workers' Compensation Bd. v Program Risk Mgt., Inc., 150 AD3d 1589, 1594 [2017]). "The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another" (Clifford R. Gray, Inc. v LeChase Constr. Servs.,

LLC, 31 AD3d 983, 988 [2006] [citations omitted]). "Generally, courts will look to see if a benefit has been conferred on the [plaintiff] under mistake of fact or law, if the benefit still remains with the [plaintiff], if there has been otherwise a change of position by the [plaintiff], and whether the [plaintiff's] conduct was tortious or fraudulent" (Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 [1972] [citation omitted], cert denied 414 US 829 [1973]; accord Goel v Ramachandran, 111 AD3d 783, 791 [2013]; Clark v Daby, 300 AD2d 732, 732 [2002], lv denied 100 NY2d 503 [2003]). An allegation that the other party "received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment" (Goel v Ramachandran, 111 AD3d at 791 [internal quotation marks and citation omitted]).

Here, the parties' employment agreement provided that plaintiff would perform professional services for defendant. In exchange, defendant would pay her a stated salary and provide specified benefits including, as relevant here, obtaining and paying the premiums for professional liability insurance covering plaintiff. The record indicates that defendant purchased, controlled and maintained such a policy from MLMIC in plaintiff's favor. Defendant was the policy administrator, selected the coverage and terms, and was responsible for all financial aspects of the policy. Notably, defendant paid annual premiums of approximately $25,710; plaintiff paid nothing toward the premiums and those amounts were not counted as income to plaintiff. Defendant received from MLMIC dividends, premium reductions and the return of premiums when the policy was canceled upon plaintiff leaving defendant's employ, all without any objection by plaintiff.

Defendant contends that it would be unjust for plaintiff to receive the cash consideration because defendant paid all the premiums on the MLMIC policy upon which the consideration is based. Plaintiff argues that she was the policyholder and the employment agreement provided the insurance policy as an employment benefit, so she is entitled to the cash consideration for her membership in MLMIC based on that policy. Although "[a] party may not recover in unjust enrichment where the parties

have entered into a contract that governs the subject matter" (Pappas v Tzolis, 20 NY3d 228, 234 [2012] [internal quotation marks, ellipsis and citation omitted]), the parties' employment agreement did not specifically address demutualization proceeds (see Sergeants Benevolent Assn. Annuity Fund v Renck, 19 AD3d 107, 112 [2005]). The lack of discussion in the contract on this topic is understandable, inasmuch as "no rights to demutualization proceeds arise until the demutualization is announced, absent a clear earlier agreement" (Bank of New York v Janowick, 470 F3d at 274), and MLMIC's demutualization was unexpected, as it was the first for a professional liability insurance company in this state.

Defendant asserts that the cash consideration would be a windfall to plaintiff. While true, the converse is also true; the consideration would be a windfall to defendant if defendant were to receive it. "Demutualization has been referred to as a 'windfall' in some cases because it is often unclear if parties knew the ownership stake even existed prior to the demutualization plan" (Urgent Med. Care, PLLC v Amedure, 64 Misc 3d 1216[A], 2019 NY Slip Op 51188[U] at *4 [citations omitted]; see Columbia Mem. Hosp. v Hind, 65 Misc 3d 1205[A], 2019 NY Slip Op 51508 at *5). The reality is that neither party here bargained for the demutualization proceeds. Moreover, neither party actually paid for them, because membership interests in a mutual insurance company are not paid for by policy premiums; such rights are "acquired . . . at no cost, but rather as an incident of the structure of mutual insurance policies," through operation of law and the company's charter and bylaws (Dorrance v United States, 809 F3d at 485; see Columbia Mem. Hosp. v Hinds, 65 Misc 3d 1205[A], 2019 NY Slip Op 51508 at *5).[3] Had defendant selected a different company to provide malpractice insurance to cover plaintiff, defendant would have met its contractual obligation to provide and pay for that insurance

[3] "These rights are not transferable and upon termination of a policy, the policyholder receives nothing for any membership rights" (Dorrance v United States, 809 F3d at 485). These rights apparently have a monetary value only if the mutual insurance company demutualizes or liquidates while solvent (see id. at 486).

while plaintiff would have received the benefit of such coverage. Under those circumstances, neither party would receive a cash consideration. Thus, the demutualization proceeds were unexpected and will be a windfall to whichever party receives them. The fact that one party will receive these benefits does not mean that such party has unjustly enriched itself at the other's expense (see Goel v Ramachandran, 111 AD3d at 791), i.e., that it "is in possession of money or property that rightly belongs to another" (Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC, 31 AD3d at 988).

Looking at the circumstances that the Court of Appeals listed for courts to consider when evaluating a claim of unjust enrichment (see Paramount Film Distrib. Corp. v State of New York, 30 NY2d at 421), the benefit of the cash consideration would be paid to plaintiff based on the statute and the conversion plan – a correct reading of the law, rather than a mistake. No factual mistake exists, other than the parties' mutual failure to consider the potential for demutualization when negotiating their employment agreement. Furthermore, both parties benefitted from defendant's fulfillment of its contractual obligation to provide malpractice insurance and pay for the premiums, inasmuch as the insurance provided coverage to protect the liability interests of plaintiff both individually and as an employee of defendant.[4] Neither party changed its position based on demutualization and plaintiff's conduct was neither tortious nor fraudulent. Hence, we conclude that defendant failed to meet its burden to establish its affirmative defense and counterclaim alleging unjust enrichment. Based on our analysis, we decline to follow Matter of Schaffer, Schonholz & Drossman, LLP v Title (171 AD3d 465 [2019], supra), which summarily held, without any analysis, that awarding an employee a cash consideration related to MLMIC's demutualization would constitute unjust enrichment where the employer had paid the policy premiums (id. at 465; compare Maple-Gate Anesthesiologists, P.C. v Nasrin, 182 AD3d at 985-986 [dismissing action by employer alleging unjust enrichment and

[4] Defendant received protection from the policy because, as plaintiff's employer, defendant may also be named in a malpractice complaint based on plaintiff's actions.

conversion of demutualization proceeds by employees]). Accordingly, plaintiff was entitled to a declaratory judgment entitling her to receive the cash consideration from MLMIC's demutualization.

Garry, P.J., Egan Jr., Devine and Colangelo, JJ., concur.

ORDERED that the judgment is reversed, on the law, with costs, defendant's cross motion denied, plaintiff's motion granted, and it is declared that plaintiff is solely entitled to the $74,747.03 cash consideration from Medical Liability Mutual Insurance Company's demutualization, plus interest for the time the proceeds were in escrow, and defendant's claim thereto is invalid.

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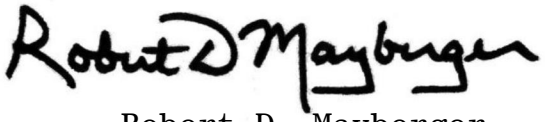

Robert D. Mayberger
Clerk of the Court

Exhibit B

Notice of Entry dated June 18, 2020

SUPREME COURT
STATE OF NEW YORK

APPELLATE DIVISION
THIRD DEPARTMENT

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

Plaintiff-Appellant,

-against-

LAKE CHAMPLAIN OB-GYN, P.C.,

Defendant-Respondent.

NOTICE OF ENTRY

Docket No. 529615

PLEASE TAKE NOTICE that the within is a true copy of the Opinion and Order of the Hon. Robert C. Mulvey, J., Hon. Elizabeth A. Garry, P.J., Hon. John C. Egan Jr., J., Hon. Eugene P. Devine, J., and Hon. John P. Colangelo, J., dated and entered June 18, 2020.

Dated: June 18, 2020
Albany, New York

NOLAN HELLER KAUFFMAN LLP

By: _____
Justin A. Heller, Esq.
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TO: James R. Peluso, Esq.
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Attorneys for Respondent
Lake Champlain OB-GYN, P.C.
(*Via NYSCEF*)

Exhibit C

Affidavit of Service dated June 18, 2020

SUPREME COURT
STATE OF NEW YORK

APPELLATE DIVISION
THIRD DEPARTMENT

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

Plaintiff-Appellant,

-against-

LAKE CHAMPLAIN OB-GYN, P.C.,

Defendant-Respondent.

AFFIDAVIT OF SERVICE VIA NYSCEF

Docket No. 529615

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

BRENDAN J. CAROSI, being duly sworn, deposes and says that he is over the age of 18 years; that he resides in Malta, New York; that he is a partner of Nolan Heller Kauffman LLP, the attorneys of record for the Plaintiff-Appellant; that he served a true and correct copy of the **Opinion and Order** of the Hon. Robert C. Mulvey, J., Hon. Elizabeth A. Garry, P.J., Hon. John C. Egan Jr., J., Hon. Eugene P. Devine, J., and Hon. John P. Colangelo, J., dated and entered June 18, 2020, together with a true and correct copy of the **Notice of Entry** of same, upon:

James R. Peluso, Esq.
Dreyer Boyajian LLP
75 Columbia Street
Albany, New York 12210
Attorneys for Respondent
Lake Champlain OB-GYN, P.C.

ON JUNE 18, 2020, VIA NYSCEF, which served the above documents on: James R. Peluso, Esq. (jpeluso@dblawny.com); Justin A. Heller, Esq. (jheller@nhkllp.com); and Brendan J. Carosi, Esq. (bcarosi@nhkllp.com).

BRENDAN J. CAROSI

Sworn to before me this
18th day of June, 2020.

Maryellen E. Wood
Notary Public, State of New York

MARYELLEN E. WOOD
Notary Public, State of New York
No. 01WO4827384
Qualified in Albany County
Commission Expires 04/30/20 22

NI2020-2106082335-758078

Exhibit D

Unreported Decisions

2005 WL 525427
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) HEALTH AND WELFARE FUND, Plaintiff,
v.
LOCAL 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHICAGO TRUCK DRIVERS, HELPER AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, Defendants.

No. 02 C 3115.
|
March 4, 2005.

Attorneys and Law Firms

Michael Joseph Kralovec, Joseph R. Lemersal, Sara J. Rowden, Nash, Lalich & Kralovec, Chicago, IL, for Plaintiff.

Stephen Jay Feinberg, Marvin Gittler, Asher, Gittler, Greenfield, Cohen & D'Alba, Joseph M. Burns, Sherrie E. Voyles, David George Huffman-Gottschling, Jacobs, Burns, Orlove, Stanton & Hernandez, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

GUZMÁN, J.

***1** Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund ("Health and Welfare Fund") seeks a declaratory judgment against Local 710, International Brotherhood of Teamsters ("Local 710") and Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund ("Pension Fund") that the demutualization compensation for four employee-benefit plans of Principal Financial Group ("Principal") is a plan asset and should revert to the participants of the plans. Before the Court is the Health and Welfare Fund's motion for summary judgment and Local 710's motion for partial summary judgment. For the reasons provided in this Memorandum Opinion and Order, the Court grants in part and denies in part both motions.

FACTS

This controversy stems from Principal's conversion from a mutual insurance company into a public stock company, a process known as a "demutualization." Principal adopted its plan for demutualization on March 31, 2001. (Pl.'s LR 56.1(a)(3) ¶ 27.) When a mutual insurance company undergoes a demutualization, eligible policyholders receive compensation. (*See* Local 710's LR 56.1(a)(3) ¶ 2; Local 710's Ex. 1, Letter from Principal to Policyholders of 10/26/01.) This compensation is given because policyholders lose ownership interests in the mutual insurance company when it becomes a stock company. (Local 710's Ex. 1, Letter from Principal to Policyholders of 10/26/01.) In the instant case, the Health and Welfare Fund received compensation from Principal for four different employee benefit plans: an in-house pension plan, a severance plan, a life insurance plan, and a 401(k) plan. The Health and Welfare Fund now seeks a declaratory judgment as to whom is entitled to the demutualization compensation. The issues in this case are whether the demutualization compensation is an asset of the plans, and, if so, whether the compensation reverts to the participants of the plan or to the employers.

Local 710 is a local union affiliated with the International Brotherhood of Teamsters. (Pl.'s LR 56.1(a)(3) ¶ 5.) The Chicago Truck Drivers, Helpers and Workers Union Independent (the "CTDU") merged into Local 710 on February 1, 2001. (*Id.* ¶ 7.) The CTDU was an independent labor union representing employees in the trucking, warehousing, and related industries in and around the Chicago area. (*Id.* ¶ 6.) After the merger, the CTDU ceased operation as a labor organization, and Local 710 is a successor to the rights and liabilities of the CTDU. (*Id.* ¶¶ 12-13.) The Health and Welfare Fund and Pension Fund were established by the CTDU for the benefit of CTDU members covered by collective bargaining agreements with participating employers. (*Id.*)

The first of the benefit plans at issue in this case, a retirement plan for their office employees (the "in-house pension plan"), was established by the Health and Welfare Fund, the Pension Fund, and the CTDU in 1961. (*Id.* ¶ 14.) This plan was funded through a group annuity contract with Bankers Life and Casualty and later Principal. (*Id.*) It was funded by

contributions from the Health and Welfare Fund, the Pension Fund, and the CTDU on behalf of their employees. (*Id.* ¶ 15.) The plan was terminated in 1987. (*Id.* ¶ 16.) When the plan was terminated, all active employees who would have been eligible for a benefit received a lump sum payment, while former employees who had retired and were receiving benefits continued to receive a defined monthly benefit through a group annuity contract with Principal. (*Id.* ¶¶ 17-18.) This contract was fully funded at the time of the discontinuation of the plan. (Pl.'s Ex. 3, Boudreau Aff. ¶ 20.) The Health and Welfare Fund received a check from Principal in the amount of $1,200,280.00 as demutualization compensation in connection with the in-house pension plan. (Pl.'s LR 56.1(a)(3) ¶ 31.)

***2** The supplemental retirement and security plan ("severance plan") was established in 1969. (*Id.* ¶ 22.) Like the in-house pension plan, the severance plan is funded by an annuity contract with Principal. (*Id.* ¶ 23.) The severance plan is currently in effect for employees of the Health and Welfare Fund and the Pension Fund, but employees of the CTDU left the severance plan and received their benefit payments on or before the CTDU and Local 710 merged. (Pl.'s Ex. 3, Boudreau Aff. ¶¶ 26-27.) The Health and Welfare Fund received a check from Principal in the amount of $78,329.00 as demutualization compensation in connection with the severance plan. (Pl.'s LR 56.1(a)(3) ¶ 30.)

The employees' savings plan ("401(k) plan") was established in July, 1983. (*Id.* ¶ 20.) This plan is a voluntary program for employees and is funded by contributions by the employees. (*Id.* ¶ 21.) The 401(k) plan is in effect for the employees of all three parties in this case-the Health and Welfare Fund, Pension Fund, and Local 710. (Pl.'s Ex. 3, Boudreau Aff. ¶ 32.) The Health and Welfare Fund received a check from Principal in the amount of $85,766.00 as demutualization compensation in connection with the 401(k) plan. (Pl.'s LR 56.1(a)(3) ¶ 31.)

Finally, the member life, accidental death, and dismemberment policy (the "life insurance plan") was established in February 1992. (*Id.* ¶ 24; Pension Fund's Ex. F, U.S. Dep't of Labor's Pension & Welfare Benefits Admin. Office of Regs. & Interpretations Advisory Op. 94-31A.) This plan was funded by contributions from the Health and Welfare Fund, the Pension Fund, and the CTDU on behalf of their respective employees. The benefits of this plan are paid through a group policy with Principal. (Pl.'s LR 56.1(a)(3) ¶ 26.) Employees of the Health and Welfare Fund and the Pension Fund currently participate in the plan, but the CTDU ceased participation in the life insurance plan upon its merger with Local 710. (Pl.'s Ex. 3, Boudreau Aff. ¶ 35.) The Health and Welfare Fund received 541 shares of Principal common stock as demutualization compensation in connection with the life insurance plan. (Pl.'s LR 56.1(a)(3) ¶ 32.)

Local 710 argues that the compensation from the demutualization reverts to the employers-the Health and Welfare Fund, the Pension Fund, and Local 710 as successor to the CTDU, with the exception of the 401(k) plan. (*Id.* ¶ 34.) The Health and Welfare Fund, on the other hand, argues that the demutualization compensation should be used for the benefit of the participants of the various plans. (*Id.* ¶ 35.) The Health and Welfare Fund brought suit, seeking a declaratory judgment of the rights of the parties to the demutualization compensation. (Compl.¶ 32.) Before the Court is the Health and Welfare Fund's motion for summary judgment seeking a declaratory judgment that the demutualization compensation is a plan asset to be used for the benefit of the participants of the plans and Local 710's motion for partial summary judgment, seeking a declaration that the demutualization compensation reverts to the employers.

DISCUSSION

***3** Pursuant to Federal Rule of Civil Procedure 56(c), the court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). When considering the evidence submitted by the parties, the court does not weigh it or determine the truth of asserted matters. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All facts must be viewed and all reasonable inferences drawn in the light most favorable to the non-moving party. *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 234 (7th Cir.1995). "If no reasonable jury could find for the party opposing the motion, it must be granted." *Hedberg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 931 (7th Cir.1995).

Summary judgment is appropriate in this case because there are no material facts in dispute. Therefore, the movants are entitled to a judgment as a matter of law.

The first issue is whether the demutualization compensation is a plan asset of the various plans. ERISA does not define plan assets. *See Bannistor v. Ullman,* 287 F.3d 394, 402 (5th Cir.2002). The U.S. Department of Labor has issued advisory opinions that address the issue of whether the demutualization compensation is a plan asset. (Pension Fund's Ex. A, U.S. Dep't of Labor's Pension & Welfare Benefits Admin. Office of Regulations & Interpretations Advisory Op. 92-02A (2002); Pl.'s Ex. 5, EBSA Advisory Op.2001-02A n. 1 (2001).) "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Mead Corp. v. B.E. Tilley,* 490 U.S. 714, 722, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989). An agency's advisory opinions are not binding authority, but they are "entitled to deference, such that the interpretation will be upheld so long as it is reasonable." *Reich v. McManus,* 883 F.Supp. 1144, 1153 (N.D.Ill.1995). "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

According to the Department of Labor:

> The proceeds of the demutualization will belong to the plan if they would be deemed to be owned by the plan under ordinary notions of property rights.... In the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, or where the policy is paid for out of trust assets, it is the view of the department that all of the proceeds received by the policyholder in connection with a demutualization would constitute plan assets.

(Pl.'s Ex. 5, EBSA Advisory Op.2001-02A n. 1 (2001).) Determining whether the demutualization compensation consists of a plan asset under ordinary notions of property rights requires "consideration of any contract or other legal instrument involving the plan documents. It also requires the consideration of the actions and representations of the parties involved." (Pension Fund's Ex. A, U.S. Dep't of Labor's Pension & Welfare Benefits Admin. Office of Regulations & Interpretations Advisory Op. 92-02A (2002).)

***4** In *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.,* 903 F.2d 1232 (9th Cir.1990), the Ninth Circuit Court of Appeals considered the issue of whether stock issued as demutualization compensation for a long-term disability insurance plan could revert to an employer. This plan was wholly funded by contributions from the participants of the plan. *Id.* at 1238. The court held that allowing the compensation to revert to the employers would give the employers an undeserved windfall. *Id.* As a result, the "balancing of equities" weighed in favor of allowing the demutualization compensation to revert to the employees. *Id.*

Like the disability plan in *Ruocco,* the contributions to the 401(k) plan in this case were made entirely by the employees, outside of minor administrative costs. Therefore, the demutualization compensation should revert to the employees. This conclusion was undisputed and is now stipulated by the parties. (*See* Pension Fund's Resp. Pl.'s Mot. Summ. J. at 11-12; Local 710 Mem. Opp'n Pl.'s Mot. Summ. J. at 14; Joint Mot. Partial Dismissal & Release of Funds ¶ 4.) Moreover, like the plan in *Ruocco,* the 401(k) plan in this case is an employee pension benefit plan wholly funded by the participants of the plan. Because the plan was fully funded by the employees, they are entitled to the compensation as a result of their loss of ownership in Principal. As in *Ruocco,* awarding this compensation to the employers would give them an undeserved windfall-they would be receiving money as a result of the investment of the participants of the plans, not their own efforts. Accordingly, the demutualization compensation attributable to the 401(k) plan reverts to the employees.

Determining whether the demutualization compensation is a plan asset for the remaining plans is a closer issue. Following the guidelines of the EBSA, this Court will follow ordinary notions of property rights and look to the plan documents and representations by the parties to determine whether the demutualization compensation is a plan asset. There is no evidence that the parties made any representations other than in the plan documents as to whether or not the demutualization compensation is a plan asset. Therefore, this Court will focus on the language of the plans to determine this issue.

After examining the plan documents, this Court holds that the demutualization compensation is a plan asset for the in-house pension plan and the severance plan, but not for the insurance plan. At first blush, the compensation would

appear not to be a plan asset for any of the remaining plans because it is undisputed that these plans were funded by the employers. Determining that the compensation reverts to the plans and not the employers could therefore result in an undeserved windfall to the plans. However, both the in-house pension plan and severance plan are "employee pension benefit plans." As a result, the compensation would be presumed to be a plan asset under the EBSA Advisory Opinion unless language in the plan documentation suggests otherwise.

***5** In interpreting the language of a contract, a court's primary purpose is to discern the intent of the parties. *See Volt Info. Scis., Inc. v. Bd. Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 488, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). In this case, however, neither the in-house pension plan nor the severance plan specifically addresses the issue of demutualization compensation. The demutualization compensation would therefore be presumed to be a plan asset under the EBSA Advisory Opinion 2001-02A quoted above. The plans do address the issue of whether any dividends awarded under the plans would revert to the employers or become plan assets. Both plans declare that "[d]ividends declared under the Group Contract and forfeitures shall be applied to reduce future Employer Contributions." (Pl.'s Ex. B, Health & Welfare Fund & Pension Fund Employees Retirement Plan at 21, Pl.'s Ex. D, Health & Welfare Fund & Pension Fund Employees Restated Supplemental Retirement & Security Plan at 22.) This language suggests that the dividends would become plan assets used to pay for the plans, rather than simply reverting to the employers to be used however they wish. Like dividends, the demutualization compensation at issue in this case comes from Principal. The language in the plans regarding dividends shows that the parties intended future compensation from Principal to become a plan asset. Although the language of the plans with regard to the disposition of dividends alone is not determinative, coupled with the EBSA's view that demutualization compensation ordinarily becomes a plan asset for an employee pension plan, it is sufficient to convince the Court that the demutualization compensation is a plan asset for the in-house pension plan and the severance plan.

Local 710 argues that the language in the plans regarding dividends should not affect the outcome of this case because demutualization compensation is not a dividend. (Local 710's Mem. Opp'n Pl.'s Mot. Summ. J. at 10.) It is true that the demutualization compensation is not a dividend, but it is awarded to policyholders in exchange for loss of ownership interests in the company. Dividends are payments by a company to its stockholders. RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPALS OF CORPORATE FINANCE 64 (5th ed.1996). When a mutual insurance company demutualizes, it compensates policyholders for the loss of their ownership interests, which therefore includes their ability to receive dividends. *See id.* at 417-38.

Local 710 points out that Principal "will continue to pay policy dividends as declared." (Pl.'s Ex. K, Plan of Conversion of Principal Mut. Holding Co. at A-3.) However, this language only means that Principal will continue to pay *declared* dividends. It does not mean that Principal can award new dividends in the future. In addition, there is no evidence that Principal has awarded dividends for any of the plans at issue in this case. Therefore, the fact that demutualization compensation is not a dividend is insufficient to overcome the strong presumption that it is a plan asset given the specific facts of this case.

***6** Although the demutualization compensation is a plan asset for the in-house pension plan and severance plan, this does not necessarily mean that it reverts to the participants of the plans. The plans state: "No part of the plan assets shall be paid to the Employer at any time, except that, after the satisfaction of all liabilities under the Plan, any assets remaining will be paid to the Employer. The payment may not be made if it would contravene any provision of law." (Pl.'s Ex. B, Health & Welfare Fund & Pension Fund Employees Retirement Plan at 47; Pl.'s Ex. D, Health & Welfare Fund & Pension Fund Employees Restated Supplemental Retirement & Security Plan at 56.) Under the terms of the plans, therefore, the demutualization compensation, as a plan asset, may be distributed to the employers if the plan has satisfied all of its liabilities.

Because the in-house pension plan has been terminated, it has satisfied all of its liabilities to the participants and their beneficiaries. The Pension Fund argues that since former employees are continuing to receive benefits under this plan, the plan has not satisfied all of its liabilities. (Pension Fund's Resp. Mot. Summ. J. at 13.) However, it is undisputed that these participants are receiving their benefits under a plan that was fully funded at the time of the termination of the in-house pension plan. Therefore, the in-house pension plan has no "liabilities" and the demutualization compensation reverts to the contributing employers-the Health and Welfare Fund, the Pension Fund, and Local 710 as successor to the CTDU.

The plan provides that residual assets may be distributed to an employer so long as no provision of law is violated. ERISA addresses the issue of whether residual assets may be distributed to an employer:

(d) Distribution of residual assets....

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if -

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

....

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities ... such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries....

29 U.S.C. § 1344 (2003). The in-house pension plan satisfies all of these requirements. As noted above, all liabilities of the plan have been satisfied and the plan provides for a distribution of the assets to the employers. In addition, no provision of law has been violated, and the Health and Welfare Fund does not cite to any law that would be violated by distributing the compensation to the employers. Finally, it is undisputed that the employers were responsible for the contributions to the plans, not the employees. Therefore, no equitable distribution to the participants need be made.

***7** The Health and Welfare Fund argues that the compensation cannot be distributed to three employers, *i.e.,* the Health and Welfare Fund, the Pension Fund, and Local 710, because the language of the statute is in the singular. The statute provides "any residual assets of a single-plan may be distributed to *the* employer...." 29 U.S.C. § 1344(d) (emphasis added). The Court is not persuaded that this language prevents the compensation from being distributed to three employers when all three employers have made contributions to the plan. This is especially true because, as the Health and Welfare Fund points out, the plans at issue in this case are single-employer plans despite the fact that multiple employers fund the plans. (*See* Mem. Supp. Mot. Summ. J. at 7.) The Court therefore holds that the demutualization compensation for the in-house pension plan reverts to the three employers that are parties in this case-the Health and Welfare Fund, the Pension Fund, and Local 710.

Unlike the in-house pension plan, the severance plan has not been terminated and is currently in full force and effect for employees of the Health and Welfare Fund and the Pension Fund. Because the plan provides that the assets of the plan shall not be distributed to the employers until after satisfaction of all liabilities of the plan, the demutualization compensation does not revert to the employers. The compensation should be used to reduce future contributions by the two remaining employers in the case-the Health and Welfare Fund and the Pension Fund. If at some point the Health and Welfare Fund and the Pension Fund satisfy all of their liabilities under the plan, Local 710 would then be entitled to a share of the demutualization compensation, using the same reasoning as applied to the in-house pension plan.

Unlike the in-house pension plan and the severance plan, the life insurance plan is not an employee pension plan. A "pension plan" is defined by ERISA as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond....

29 U.S.C. § 1002(2)(A). Unlike a pension plan, the life insurance plan fits under the ERISA definition of "an employee welfare benefit plan" because it provides "benefits in the event of ... death...." 29 U.S.C. § 1002(1)(A). The EBSA discussed the disposition of demutualization compensation for an employee welfare benefit plan in the Advisory Opinion 2001-02A, which states:

> [I]n the case of an employee welfare benefit plan ... the appropriate plan fiduciary must treat as plan assets

> the portion of the demutualization proceeds attributable to participant contributions .... [and] the plan fiduciary should give appropriate consideration to those facts and circumstances that the fiduciary knows or should know are relevant to the determination, including the documents and instruments governing the plan....

***8** (Pl.'s Ex. 5, EBSA Advisory Op.2001-02A at n. 2.)

In this case, it is undisputed that the employers made all of the contributions to the plans. Therefore, there is no reason to treat any portion of the demutualization compensation as a plan asset. In addition, there is nothing in the language of the plan to suggest that the parties intended demutualization compensation to become a plan asset. Unlike the in-house pension plan and the severance plan, there is no language in the life insurance plan regarding dividends. The plan is silent with respect to possible assets such as dividends or demutualization compensation. As a result, the employers have made no representations suggesting that demutualization compensation would be a plan asset in the language of the plans. Therefore, the Court holds that the demutualization compensation is not a plan asset for the life insurance plan and that it reverts to the Health and Welfare Fund, the Pension Fund, and Local 710.

The Pension Fund argues that Local 710 is not entitled to any of the demutualization compensation for the life insurance plan because Local 710 has not contributed to the plan. (Pension Fund's Resp. Pl.'s Mot Summ. J. at 11.) It is undisputed that the CTDU made contributions to the life insurance plan, however, and it is also undisputed that Local 710 is a successor to all the rights and liabilities of the CTDU. Therefore, Local 710 is entitled to a share of the demutualization compensation attributable to the contributions made by the CTDU.

CONCLUSION

For the reasons provided in this Memorandum, the Court grants in part and denies in part the Health and Welfare Fund's Motion for Summary Judgment [doc. no. 12-1] and Local 710's Motion for Partial Summary Judgment [doc. no. 19-1]. The Court enters a declaratory judgment that: (1) the demutualization compensation attributable to the 401(k) plan reverts to the participants of the plan as stipulated in the Joint Motion for Partial Dismissal and Release of Funds; (2) the demutualization compensation attributable to the severance plan must be used to offset future employer contributions; and (3) the demutualization compensation attributable to the in-house pension plan and life insurance plan reverts to the employers. This case is hereby terminated.

SO ORDERED

All Citations

Not Reported in F.Supp.2d, 2005 WL 525427

2004 WL 113524

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

TOWN OF NORTH HAVEN et al.
v.
NORTH HAVEN EDUCATION ASSOCIATION.

No. CV030474463.
|
Jan. 5, 2004.

Attorneys and Law Firms

Ciulla & Donofrio LLP, North Haven, for Town of North Haven.

Tyler Cooper & Alcorn, New Haven, for North Haven Board of Education.

Christopher Hankins, Hartford, for North Haven Education Association.

Opinion

ROBERT I. BERDON, Judge Trial Referee.

***1** This is an action brought by the plaintiffs, Town of North Haven (Town) and the North Haven Board of Education (Board) against the North Haven Education Association (Association) seeking a declaratory judgment that the-issues raised by the shares of Anthem common stock received by the Town as a result of the demutualization of Anthem Blue Cross/Blue Shield is not arbitrable under the employment contract between the Association and the Board and the plaintiffs seek a permanent injunction to that effect.

The Board is a separate entity from the Town. The Board is the employer of the members of the Association, has its own budget, and provides certain benefits for its employees including the teachers who are represented by the Association. These benefits are paid pursuant to the provisions of the contract between the Board and Association. The specific contract at the time that Anthem was demutualized covered the period of September 1, 2000 through August 31, 2004. (Contract.) One of the benefits under the Contract was that the Board would provide the teachers medical coverage through Anthem. Article XXVII of the Contract specifically provides the following: "The *Board shall* provide for each teacher ... the following medical ... benefits. Teachers participating in the insurance coverages ... shall contribute ten percent (10%) of the premium cost of the applicable coverage ... [for] ... Anthem Blue Cross/Blue Shield Century Preferred (PPO) Plan, with a $15.00 co-pay on the Home and Office Benefit." (Emphasis supplied.) The Board, instead of paying the premium directly to Anthem and obtaining its own policy, received this coverage through the Town's policy with Anthem.

During the period of 2001-02 Anthem was demutualized. As a result, Anthem distributed shares of stock to the Town based upon the premiums paid by the Town and Board including the premiums paid by the teachers. The Town sold the stock for the sum of $1,505,564. The teachers neither received their proportionate share of the $1,505,564 nor was that portion of the health premiums paid by the teachers reduced as a result of the Anthem stock distribution. Through the Association's lens, the distribution of Anthem stock was in reality a return of premiums and the members of the Association should share to the extent of the premiums paid by its members.

On February 14, 2002, the Association pursuant to the Contract filed the following grievance against the Board: "Article XXVII requires all teachers half or full time ... to contribute ten percent (10%) of the premium cost of the applicable coverage ... through payroll deduction. The Board/Town of North Haven is receiving a share value rebate that represents past premium contributions from Anthem Blue Cross Blue Shield and the employee share of said shares should be paid to the teacher/participants." The Superintendent of Schools and the Board denied the grievance. Thereafter, the Association filed a demand for arbitration before the American Arbitration Association in accordance with the Contract describing the nature of the dispute as follows: "The Board of Education has withheld from teachers a portion of a returned insurance premium, which results in an overpayment of premium by teachers. This violates the Agreement's Medical Insurance Benefits provision."

***2** Although there is only one issue before the Court-that is, whether the issue or issues pertaining to the Anthem stock distribution as a result of its demutualization are subject to arbitration under the Contract-the Court feels compelled to comment on the fairness of the position of the Board and Town. *Fairness* 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. [1] The number of shares of Anthem stock received by the Town was based in part on the ten percent of the premiums paid by the teachers to the Board and eventually received by the Town. The position that the Board and Town in this case take is indefensible.

"Whether a dispute is an arbitrable one is a legal question for the court rather than for arbitrators, in the absence of a provision in the agreement giving arbitrators such jurisdiction. The parties may manifest such a purpose by an express provision or by the use of broad terms such as were employed in [*International Brotherhood v. Trudon & Platt Motor Lines, Inc.,* 146 Conn. 17, 21 (1958)]. But unless they do, the determination of the question of the arbitrability of a particular dispute is the function of the court. (Citations omitted in part.) *Connecticut Union of Telephone Workers, Inc. v. Southern New England Telephone Company,* 148 Conn. 192, 197 (1961). In the present case, the parties agree that the issue of whether the dispute is arbitrable is one for the Court.

"In determining whether a party is bound to arbitrate, the courts look at the language employed in the contract. A contract is to be construed as a whole and all relevant provisions will be considered together. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity and words do not become ambiguous simply because lawyers or laymen contend for different meanings." (Citation omitted; internal quotations marks omitted.) *Scinto v. Sosin,* 51 Conn.App. 222, 239 (1998).

The Court, accordingly, looks to the Contract between the Association and the Board. The Board points out that it is a separate entity from the Town and it was the Town that was the policyholder of Blue Cross which enabled it to obtain the shares of Anthem stock upon the demutualization of Anthem. However, the Board unilaterally decided to fulfill its Contract obligation with the Association through the Town. The contract is clear that it was the Board's obligation to obtain the coverage with Anthem. Article 27 of the Contract provides: "the Board shall provide for such coverage with Anthem." Although the plaintiffs produced an abundance of evidence that the Board and the Town to prove that they were separate entities, there was not a scintilla of evidence that the Board was required to obtain the coverage through the policy of the Town. If the Board had fulfilled its contractual obligation for medical coverage directly, as the contact obviously contemplated, it would have received the shares of stock from Anthem. If that had occurred, the issue of whether the teachers should share in the proceeds would be arbitrable.

***3** Notwithstanding that the policy was in the name of the Town and the Anthem stock was distributed to the Town this grievance filed by the Association is arbitrable under the Contract. The Contract defines grievance as follows: " 'Grievance' shall mean a claim by a teacher or group of teachers or the Association based upon an alleged violation, misinterpretation or misapplication of a specific contract provision." Article XXX, § 30.1a. The issue involves the obligation on the part of the members of the Association to pay ten percent of the premium as required by Article XXVII. It clearly is a grievance that falls within the provisions of the Contract. [2]

After providing for levels of review for a grievance filed (which was done in this case XI) the Contract provides that- the "Association shall submit such grievance to the American Arbitration Association for processing by a single arbitrator in accordance with the voluntary rules and regulations of the American Arbitration Association then in effect except as modified herein within eight (8) days of the receipt of the Board's decision."

The issues in this case become confused because this action was also brought by the Town to avoid arbitration. The Town in this matter, however, is a mere interloper. The Association does not seek to arbitrate the issues with the Town. The demand for arbitration filed by the Association seeks an arbitration with the Board, to wit: "North Haven Board of Education c/o Mary Jane Sheehy, Supt." [3] Although the proceeds received from the sale of the stock may have gone into the pocket of the Town as a result of the actions of the Board, it remains a dispute which is the proper subject of an arbitration between the Association and the Board.

Any question as to the arbitrability of the issue is put to rest when the "positive assurance" test is applied. "It has ... been clearly established that the *Warrior* 'positive assurance' test is the law in Connecticut. Under the positive assurance test, judicial inquiry ... must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance ... An order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an

interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Citations omitted; internal quotation marks omitted in part.) *Board of Education v. Frey,* 174 Conn. 578, 582 (1978); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960).

The Court concludes that the issue with respect to that portion of the proceeds realized from the sales of Anthem stock which was received as a result of the ten percent paid by the participating members of the Association is subject to the arbitration clause of the Contract. Accordingly, the request of the plaintiffs Town of North Haven and North Haven Board of Education for a declaratory judgment and injunction are denied[4] and the North Haven Board of Education is ordered to proceed with the arbitration in accordance with the Contract.

All Citations

Not Reported in A.2d, 2004 WL 113524, 36 Conn. L. Rptr. 292

Footnotes

1 A *rough calculation* of the amount at issue based upon the premiums paid by the Town for the year 2002 are as follows: The Town paid total premiums to Anthem in the amount of $5,950,000 of which $3,640,000 or 61 percent was attributed to the employees of the Board; 61 percent of $1,505,564 the Town received as a result of the sale of Anthem stock attributed to the premiums the Board paid is $918,394; 10 percent paid by the employees of the board would amount to $91,839. The litigation costs to prosecute and defend this case could exceed $91,839, the approximate amount that is at issue.

2 Indeed, the Superintendent of Schools and the Board considered the claim of the Association as a grievance. They both denied the Association's grievance when presented to them under levels two and three of formal grievance procedures. Article XXX of the Contract.

3 Application made to the American Arbitration Association, dated January 23, 2003, Exhibit E.

4 The defendant has called to the Court's attention that there are two other trial court opinions, contrary to this opinion, which are on appeal, involving the same issue. They are: *Wallingford Board of Education v. Wallingford Education Association* (Docket No. CV03-0472527, J.D. of New Haven dated New Haven, dated May 14, 2003, DeMayo, J.), and *Region 14 Board of Education v. Nonnewaug Teachers' Association* (Docket No. CV03-0089873, J.D. of Litchfield, Pickard, J.) (35 Conn. L. Rptr. 46). If this decision is appealed, counsel should alert the Staff Attorney's Office so the three cases can be assigned to the same panel of judges. In the alternative, the Association and/or the Board may wish to move to have it decided by the Supreme Court of Connecticut calling to its attention the other pending appeals. Conn. Practice Book § 65-2.

New York Official Reports

Unreported Disposition
64 Misc.3d 1216(A), 117 N.Y.S.3d 459 (Table), 2019 WL 3331795 (N.Y.Sup.), 2019 N.Y. Slip Op. 51188(U)

***1** Urgent Medical Care, PLLC, Plaintiff,
v.
Amy J. Brueckner Amedure, Defendant.

Supreme Court, Greene County
19-0121
Decided on July 12, 2019

CITE TITLE AS: Urgent Med. Care, PLLC v Amedure

ABSTRACT

Insurance
Liability Insurance
Cash Proceeds from Demutualization of Insurance Company —Unjust Enrichment

Equity
Unjust Enrichment
Cash Proceeds from Demutualization of Insurance Company

Urgent Med. Care, PLLC v Amedure, 2019 NY Slip Op 51188(U). Insurance—Liability Insurance—Cash Proceeds from Demutualization of Insurance Company—Unjust Enrichment. Equity—Unjust Enrichment—Cash Proceeds from Demutualization of Insurance Company. (Sup Ct, Greene County, July 12, 2019, Elliott, J.)

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OPINION OF THE COURT

Raymond J. Elliott, III, J.

When a person lawfully receives a payment for an ownership interest that was created through payments made by another person, can a claim be stated, based in equity, for unjust enrichment? In short, that is the issue this motion requires the Court to resolve.

Defendant worked as a doctor in a practice owned by Plaintiff. Plaintiff paid Defendant's malpractice premiums. Due to the demutualization of a malpractice insurance provider, ***2** Defendant received a payment of nearly double the amount of three years' worth of premium payments for her ownership interest in that company. Plaintiff is suing Defendant alleging that Defendant has become unjustly enriched through receipt of these proceeds since Plaintiff paid the premiums throughout the relevant period and believes it has an equitable claim to the distribution. Before the Court is Defendant's Motion to Dismiss. Plaintiff has submitted an Amended Summons and Complaint correcting the previously erroneously named Plaintiff. Defendant does not contest the amendment; however, she elects to have her Motion applied to the new pleadings.

MOTION TO DISMISS

In determining a motion to dismiss a complaint, the court's role is ordinarily limited to determining whether the complaint states a cause of action (*see Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002]). The court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 874 [2007]). "The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law, a motion for dismissal will fail" (*Harris v IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010]).

"A motion [to dismiss] must be decided without regard to evidence submitted by defendants, unless that evidence 'conclusively establishes the falsity of an alleged fact'" (*ARB Upstate Communications LLC v R.J. Reuter, L.L.C..*, 93 AD3d 929, 930 [3d Dept 2012], *citing Gray v Schenectady City School Dist.*, 86 AD3d 771, 772 [3d Dept 2011]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of the motion to dismiss" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2nd Dept 2006], citing *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Even were this Court to have doubts about the viability of the claim, the existence of potentially meritorious claims within the record, even if inartfully pleaded, requires denial of a motion to dismiss (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

Unjust Enrichment

Although "unjust enrichment is not a catchall cause of action to be used when others fail" (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]), the Court of Appeals has noted the broad equity jurisdiction of the Courts and our power to correct unjust enrichment, going so far as to cite Aristotle in this context, stating "[l]aw without principle is not law; law without justice is of limited value. Since adherence to principles of 'law' does not invariably produce justice, equity is necessary" (*Simonds v Simonds*, 45 NY2d 233, 239 [1978]). To recover under a theory of unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*New York State Workers' Compensation Bd. v Program Risk Mgt., Inc.*, 150 AD3d 1589, 1594 [3d Dept 2017] [internal quotation marks, brackets and citations omitted]; *see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

"The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another" (*Clifford R. Gray, Inc. v LeChase Const. Servs., LLC*, 31 AD3d 983, 988 [3d Dept 2006]). This requirement of ownership is in the context of an ***3** equitable claim, not legal ownership rights; therefore, 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 at 239; *see also* Restatement [Third] Restitution and Unjust Enrichment § 26, Illustration 11). "'The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*Goel v Ramachandran*, 111 AD3d 783, 791 [2013], *quoting Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]).

"[I]t is not prerequisite of unjust enrichment claim that one enriched commit wrongful or unlawful act" (*Mayer v Bishop*, 158 AD2d 878, 878 [3d Dept 1990], *lv denied* 76 NY2d 704 [1990]). A claim for unjust enrichment "is undoubtedly equitable and depends upon broad considerations of equity and justice" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d at 421. "In determining whether this equitable remedy is warranted, a court should look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent" (*Betz v Blatt,* 160 AD3d 696, 701 [2d Dept 2018] [internal quotation marks and citations omitted]). Ultimately, "to determine whether there has indeed been unjust enrichment the inquiry must focus on the 'human setting involved', not merely upon the transaction in isolation" (*Mayer v Bishop*, 158 AD2d at 880, quoting *McGrath v Hilding*, 41 NY2d 625, 629 [1977]).

Statement of Facts

In 2018, Medical Liability Mutual Insurance Company (hereinafter MLMIC) approved a demutualization, resulting in a payment based on the ownership interest in the insurance policy at issue in this suit, which Plaintiff believes to be approximately $57,000 [Amended Complaint ¶ 19]. Defendant worked as a doctor for Plaintiff from 2009 until December 2018. Defendant swears she obtained a policy with MLMIC to provide malpractice coverage prior to her employment with Plaintiff [Defendant's Affidavit: ¶ 7]. Defendant states that not until 2011, when she ended her private practice, did Plaintiff assume responsibility for the MLMIC premiums [Defendant's Affidavit: ¶ 7-8]. Defendant asserts that she agreed to diminished compensation and the premium payments were "in lieu of" an increase in salary [Defendant's Affidavit: ¶ 8].

Plaintiff alleges that "[a]s a provider of health care services, Plaintiff's liability protection needs required all employees, providing health care services, to be covered by insurance" [Amended Complaint ¶ 4]. Therefore, "during the course of her employment and specifically for the period

of July 15, 2013 through July 14, 2016, [Defendant] was covered with malpractice insurance by [Plaintiff]" [Plaintiff's Affidavit: ¶ 4]. Plaintiff alleges that "[d]espite the fact that [it] was maintaining the policy and making the premium payment directly to the insurer, through a clerical error, [Plaintiff] was mistakenly listed as the policy administrator" [Plaintiff's Affidavit: ¶ 6]. Further, Plaintiff asserts that "the premiums were simply an operating/overhead expense of [Plaintiff]" and not an employee benefit [Plaintiff's Affidavit: ¶ 7].

Demutualization

The New York Superintendent of Financial Services' September 6, 2018, decision (hereinafter DFS Decision) explains the nature of the demutualization and the ownership stake as follows:

> A mutual insurance company is owned by and operated for the benefit of its policyholders. A policyholder's ownership interest in a mutual company is known as a ***4** "membership interest." These membership interests provide policy holders with certain benefits, including the right to vote on matters submitted to a vote of members such as the election of directors, and the right to receive a distribution of profits earned by the mutual insurance company in the form of a dividend. Membership interests are not freely transferrable; they exist only in connection with a policyholder's ownership of a policy.
>
> When a demutualization occurs, membership interests in the mutual insurance company are converted to equity interests in the converted stock insurance company and eligible policyholders of the mutual insurance company thereby become shareholders of the converted stock insurance company. Under the Insurance Law, a plan of conversion is the operative document governing a demutualization, with such document subject to various procedural requirements and the Superintendent's approval. In the case of a property/casualty insurer such as MLMIC, such approval is subject to the standards set forth in Insurance Law § 7307 (h) (l) [DFS Decision p. 3-4].

Demutualization has been referred to as a "windfall" in some cases because it is often unclear if parties knew the ownership stake even existed prior to the demutualization plan (*see e.g. Bank of New York v Janowick*, 470 F3d 264, 272 [6th Cir 2006] ["Here, it is clear that none of the parties expected to receive the demutualization proceeds, which will constitute a windfall to whoever receives them"]; *see also Ruocco v Bateman, Eichler, Hill, Richards, Inc.*, 903 F2d 1232, 1238 [9th Cir 1990]; *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Bhd. of Teamsters, Chicago Truck Drivers, Helper & Warehouse Workers Union (Indep.) Pension Fund*, No. 02 C 3115, 2005 WL 525427, at *4 [ND Ill March 4, 2005]). Following the trend of demutualization in the life insurance industry one expert wrote, regarding property/casualty insurance as at issue here, that "[m]ost policyholders in such companies--including not only individuals but businesses, non-profit institutions, and municipalities--are undoubtedly unaware that they have substantial rights as owners which could be realized in the form of stock ownership, or in cash or otherwise, upon demutualization" (Peter M. Lencsis, *Demutualization of New York Domestic Property/casualty Insurers*, NY St BJ 42 [October 1998]).

MLMIC Demutualization

A recent Supreme Court case (Sedita III, J.) lays out the relevant history of this transaction:

> The MLMIC Board of Directors approved a proposed transaction by which MLMIC would demutualize, convert to a stock insurance company, and be acquired by the National Indemnity Company (NICO) for $ 2.502 billion. The MLMIC Board later adopted a plan of conversion, whereby cash consideration would be paid to policyholders/members in exchange for the extinguishment of the policyholder membership interests. Pursuant to § 8.2 (a) of the Plan of Conversion (the Plan), "Each Eligible Policyholder (or it's designee) shall receive a cash payment in an amount equal to the applicable conversion." Pursuant to § 2.1 of the Plan, an "eligible policyholder" was the person designated as the insured, while a "designee" meant employers or policy administrators, "designated by Eligible Policyholders to receive the portion of the Cash Consideration allocated to such Eligible Policyholders." The Plan did not provide for the policy administrator to receive cash consideration absent such a designation from the policyholder/member.
>
> The New York Superintendent of Financial Services held a public hearing and approved the Plan. In her September 6, 2018 decision (DFS Decision), the Superintendent wrote: "MLMIC's eligible

policyholders will receive cash consideration. Insurance Law § 7307 (e) (3) expressly defines those persons who are entitled to receive the proceeds of the Demutualization as each person who had a policy in effect during the three-year period preceding the MLMIC Board's adoption of the resolution (the 'Eligible Policyholders') and explicitly provides that each Eligible Policyholder's equitable share of the purchase price shall be determined based on the amount of the net premiums paid on eligible policies" (DFS Decision, p.4).

The DFS Decision also acknowledged testimony and written comments from medical groups. Nearly identical to the plaintiff's contentions in this case, the medical groups had argued that the cash consideration belonged to them because they had paid the premiums on behalf of the policyholders and/or had acted as the policy administrators. Addressing these arguments, the Superintendent of Financial Services wrote: "Insurance Law § 7307 (e) (3) defines the policyholders eligible to be paid their proportional shares of the purchase price, but also recognizes that such policyholders may have assigned such legal right to other persons. Therefore, the plan appropriately includes an objection and escrow procedure for the resolution of disputes for those persons who dispute whether the policyholder is entitled to the payment in a given case." Such a claim would be, "decided either by agreement of the parties or by an arbitrator or court" (DFS Decision, p.25).

(*Maple-Gate Anesthesiologists, P.C. v Nasrin*, 63 Misc 3d 703, 704 [Sup Ct, Erie County 2019, Sedita III, J.]).

Ownership Interest: Policyholder vs. Policy Administrator

Both Insurance Law § 3435 and Regulation 135 (11 NYCRR 153) permit the issuance of group property/casualty insurance only with respect to public and not-for-profit insureds. Thus, under New York law with the limited exception of a risk retention group authorized under Federal law, group property/casualty insurance for physician groups may not be written in New York (*see* Office of General Counsel, Department of Financial Services, *New York Medical Professional Liability Insurance* [June 4, 2008] OGC Op No 08-06-02, available at https://www.dfs.ny.gov/insurance/ogco2008/rg080602.htm). Therefore, as a matter of course, medical malpractice insurance must generally be acquired for each provider rather than for a group. Thus, regardless for who paid the premium, the providers were the policyholders.

"A court may take judicial notice of matters of public record, such as an incontrovertible official document or other reliable documents, the existence and accuracy of which are not disputed, and information culled from public records" (10A Carmody-Wait 2d § 56:33; *see Matter of 60 Mkt. St. Assoc. v Hartnett*, 153 AD2d 205, 208 n [3d Dept 1990], *affd* 76 NY2d 993 [1990]; *Matter of Sunhill Water Corp. v Water Resources Commn.*, 32 AD2d 1006, 1008 [3d Dept 1969]). As both parties rely significantly on the demutualization process approved by the New York Superintendent of Financial Services, this Court finds it appropriate to take judicial notice of the entire record of the process as provided through the New York Superintendent of Financial Services (*see* Department of Financial Services, Public Hearings and Decisions: Medical Liability Mutual Insurance Company [MLMIC] Demutualization Plan of Conversion from Property and Casualty Mutual Insurance Company to Property and Casualty Stock Insurance Company, available at ***5** https://www.dfs.ny.gov/reports_and_publications/public_hearings [Last Accessed July 12, 2019]).

Although the provider was the policyholder, MLMIC's counsel explained in written testimony that "a Policy Administrator is a Person designated by a Policyholder to act as administrator of the Policy for certain specified purposes. Designations are made on a form provided by MLMIC as part of the application process or at any point in time selected by the Policyholder. The form has been available on-line continuously throughout the Eligibility Period. Designations received as part of the application process are reflected on the declaration page of the applicable Policy. Policy Administrators can also be 'otherwise designated' by the submission of the prescribed form by the Policyholder following the issuance of the Policy. In such a case, the Policy Administrator would not be named on the declarations page of the Policy until the Policy is renewed, but an endorsement to the Policy would be issued in the interim" (Willkie Farr & Gallagher LLP, *Written Testimony at Public Hearing In the Matter of Medical Liability Mutual Insurance Company,* [August 28, 2018], available at https://www.dfs.ny.gov/docs/about/hearings/mlmic_08232018/willkie.pdf).

As part of the hearing process, several representatives for hospitals and other practices expressed concerns regarding the distribution of proceeds of the demutualization.

MLMIC's Plan of Conversion (MLMIC, *Plan of Conversation of Medical Liability Mutual Insurance Company*, available at https://www.mlmic.com/wp-content/uploads/2018/09/mlmic_plan_of_conversion.pdf [June 15, 2018]), included "Schedule I: Objection Procedures." This procedure created a process for Policy Administrators to object to the distribution to the policyholder, causing the payment to be escrowed. The fact that the plan itself contemplated objections between policy administrators and policyholders creates, at least some, inference of acknowledge that these proceeds would be in dispute.

A significant point of contention exists regarding the nature of the policy administrator designation. Dr. Richard Frimer of Maple Medical LLP testified that his practice made all the premium payments "actually suffering sometimes to pay the premiums" (Department of Financial Services, Hearing Transcript, 124-134, [August 23, 2018], available at https://www.dfs.ny.gov/system/files/documents/2019/01/mlmic_transcript_20180823.pdf [hereinafter Hearing Transcript]). Frimer testified that despite MLMIC's estimate of 40 percent of policyholders having a different policy administrator, the common practice for many practices, including his own was for premiums to be paid on behalf of employees without designation [Hearing Transcript p.127-128]. Frimer also asserted that although the designation may have existed within the period at issue for calculating the proceeds, the designation has not always existed, thereby longtime employees could have a policy beginning before designation was even possible [Hearing Transcript p.131].

Frimer's testimony was further corroborated by one hospital system that went so far as book approximately $24 million in proceeds as part of their cash flow projection due to their belief that as the payor of the premiums, they were entitled to the payment [Hearing Transcript p.156-176]. That testimony also noted the obstacle to group policies forcing the current conflict [Hearing Transcript p.170]. In response to this testimony, the Superintendent specifically noted that that "nothing in this procedure prevent anyone from exercising whatever legal rights they have" [Hearing Transcript p. 175].

These examples are emblematic of multiple oral and written testimonies that were provided to the Department of Financial Services regarding the claims of employers having paid ***6** the premiums to MLMIC and having acted as the owners of the policy, despite not being the policyholders or, in some cases, even declared as the policy administrator. Notably, MLMIC's counsel submitted written testimony that stated, "In all events [regarding declaration of a Policy Administrator] there must be an affirmative designation in writing on MLMIC's prescribed form. The mere acceptance of a policy application and premium on a Policy from a Person not designated by the Policyholder as a Policy Administrator does not confer the status of Policy Administrator on such Person" [Willkie Farr & Gallagher LLP, *Written Testimony*].

The DFS Decision stated that "[t]he Objection Procedure provides a reasonable framework for the resolution of disputes between certain policyholders and entities that claim to be Policy Administrators. Importantly, the Objection Procedure does not, in any way, impact any person's rights to resolve their dispute in any forum of their choosing or as required by contract or law. Rather, the sole purpose of the Objection Procedure is to create a category of disputed claims for which the cash consideration attributable to such claims will be placed in an escrow and released by MLMIC upon one of two events: MLMIC either receives (a) 'joint written instructions from the Eligible Policyholder and the Policy Administrator . . . as to how the allocation is to be distributed,' or (b) 'a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator . . . or the Eligible Policyholder'" (DFS Decision p.23).

First, the Court need not now resolve the dispute regarding what creates a policy administrator. Second, the Court does not, at this time, credit or give weight to the testimony provided at the hearing except to merely put context to the DFS Decision. Both the Superintendent's statement at the hearing and the decision's clear language stating that "the Objection Procedure does not, in any way, impact any person's rights to resolve their dispute in any forum of their choosing or as required by contract or law" clearly establish that the Department of Financial Services did not resolve the issues around equitable claims nor did they seek to in any way limit the ability of parties to bring these claims.

Precedent

There is a dearth of case law regarding demutualization of a property/casualty insurance company. Significantly, much of the case law that does exist is in the context of mutual life insurance and is driven by state law as well as the Federal Employee Retirement Income Security Act (hereinafter ERISA).

In *Maple-Gate Anesthesiologists, P.C. v Nasrin*, (*supra*), Supreme Court considered similar claims to those at issue here. The Court dismissed the complaint finding there was no claim of ownership and, therefore, no claim of unjust enrichment. Notably, in that case there were written employment agreements defining the relationship between the parties, which stated that "professional liability insurance premiums as an 'employment benefit for and on behalf of' the employee" (*Maple-Gate Anesthesiologists, P.C. v Nasrin*, 63 Misc 3d at 704). Neither party claims such an agreement exists here.

The only Appellate Court decision regarding this issue is from the First Department in *Schaffer, Schonholz & Drossman, LLP v Title* (171 AD3d 465, 465 [1st Dept 2019]). There, the Court ruled on stipulated facts that were submitted and relied on ERISA demutualization (*Id*.). The Court found that despite respondent being named as the policyholder, plaintiff had paid the premiums and all costs related to the policy and there was no record of bargaining for the benefit of demutualization proceeds, so [a]warding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment" (*Id*.) Here, the parties contest the nature ***7** of the understanding by which Plaintiff assumed payment of the premiums.

The Motion to Dismiss Must be Denied

In essence, an unjust enrichment claim accrues when one person has obtained money from the efforts of another person under such circumstances that, in fairness and good conscience, the money should not be retained (*see Miller v Schloss*, 218 NY 400, 407 [1916]). In such circumstances, the law requires the enriched person to compensate the other person (*see Bradkin v Leverton*, 26 NY2d 192, 196-197 [1970]). Such a claim is based not in legal title, but in equity (*see Simonds v Simonds*, 45 NY2d at 239).

Here, viewing the Complaint in the light most favorable to Plaintiff and giving it all reasonable inferences, Plaintiff has stated a claim for unjust enrichment. Plaintiff paid the premiums. Plaintiff claims that, but for a mistake of fact, it would be the policy administrator, and it was its payments and efforts that created the proceeds from demutualization. Defendant vigorously disagrees and properly notes she has legal title to the proceeds. Legal title does not end the inquiry (*see Simonds v Simonds*, 45 NY2d at 239; *Castellotti v Free*, 138 AD3d 198, 207 [1st Dept 2016]). "In determining a motion to dismiss . . ., the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom. The question of credibility is irrelevant, and should not be considered " (*Gonzalez v Gonzalez*, 262 AD2d 281, 282, [2d Dept 1999]). Therefore, it is not currently before the Court to resolve whether Plaintiff's claims are true or even plausible, but only if they state a claim. Here, Plaintiff has clearly stated such a claim.

According, it is

ORDERED, Defendant's Motion to Dismiss the Amended Complaint is denied.

This shall constitute the Decision, Order and Judgment of the court. This Decision, Order and Judgment is being returned to the attorney for Plaintiff. All original supporting documentation is being filed with the Greene County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that rule relating to filing, entry and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: July 12, 2019

Catskill, New York

RAYMOND J. ELLIOTT, III

Supreme Court Justice

Papers Considered:

1. Defendant's Notice of Motion to Dismiss dated March 28, 2019; Defendant's Affidavit in Support of the Motion to Dismiss sworn March 28, 2019; Attorney's Affirmation in Support of the Motion to Dismiss dated March 28, 2019; Defendant's Memorandum of Law in Support of the Motion to Dismiss dated March 28, 2019; Annexed Exhibits 1-8.

2. Plaintiff's Attorney Affirmation in Opposition to the Motion to Dismiss dated April 22, 2019; Plaintiff's Affidavit sworn April 19, 2019; Annexed Exhibit A.

3. Defendant's Reply Affirmation in Further Support of the Motion to Dismiss dated April 26, 2019; Annexed Exhibits 1-2.