To be Argued by:
CARL L. FINGER
Time Requested: 15 Minutes

Court of Appeals
State of New York

MAPLE MEDICAL LLP,

Plaintiff-Appellant,

- against -

JOSEPH SCOTT, M.D.,

Defendant-Respondent,

- and -

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Defendant.

APL-2021-00045

Westchester County
Index No. 51103/19

MAPLE MEDICAL LLP,

Plaintiff-Appellant,

- against -

DIANA GOLDENBERG, M.D.,

Defendant-Respondent,

- and -

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Defendant.

APL-2021-00046

Westchester County
Index No. 51105/19

MAPLE MEDICAL LLP,

Plaintiff-Appellant,

- against -

DIANA AREVALO, M.D.,

Defendant-Respondent,

- and -

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Defendant.

APL-2021-00047

Westchester County
Index No. 51106/19

Caption and Appearances Continued on the Following Page

BRIEF FOR PLAINTIFF-APPELLANT

FINGER & FINGER
A Professional Corporation
Attorneys for Plaintiff-Appellant
158 Grand Street
White Plains, New York 10601
(914) 949-0308
carl@fingerandfinger.com

Appeal Press, LLC - (914) 761-3600 appealpress.com (18840)

MAPLE MEDICAL LLP,

Plaintiff-Appellant,

- against -

APL-2021-00048

NINA SUNDARAM, M.D,

Defendant-Respondent,

- and -

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Westchester County
Index No. 51107/19

Defendant.

MAPLE MEDICAL LLP,

Plaintiff-Appellant,

- against -

APL-2021-00049

MARIO MUTIC, M.D.,

Defendant-Respondent,

- and -

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Westchester County
Index No. 51108/19

Defendant.

MAPLE MEDICAL LLP,

Plaintiff-Appellant,

- against -

APL-2021-00050

LISA H. YOUKELES, M.D.,

Defendant-Respondent,

- and -

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Westchester County
Index No. 51109/19

Defendant.

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Regulations

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Maple Medical LLP ("Maple") submits this Corporate Disclosure pursuant to 22 NYCRR 500.1(f) and states that it is not a publicly held company, and has no parents, affiliates, or subsidiaries.

JURISDICTIONAL STATEMENT

Jurisdiction in this Court is premised upon an Order of this Court granting leave to appeal dated and entered February 26, 2021.

RELATED APPEALS

This appeal is one of several cases for which this Court has granted leave to appeal related to the proper disposition of proceeds arising out of the demutualizaion of Medical Liability Mutual Insurance Company ("MLMIC") between, on the one hand the medical practice and employer that obtained a policy of insurance covering its physician/employee, paid all of the premiums, and served as Policy Administrator or, on the other hand to the physician/employee as a named insured. This Court has also granted leave from the Third Department's decision in *Columbia Mem. Hosp. v Hinds* (188 AD3d 1337 [3d Dept 2020], lv granted 36 NY3d 904 [2021]) and the Fourth Department has granted leave to appeal to this Court from its decision in *Kim E. Schoch, CNM, OB/GYN NP v. Lake Champlain OB-GYN, P.C., APL-2020-00169.* In addition, this Court has granted motions for *amicus curiae* relief by several interested parties.

I. QUESTIONS PRESENTED

1. Whether the Second, Third, and Fourth Departments erroneously concluded that New York State Insurance Law § 7307(e)(3) entitles the named employee insureds to "receive" and "retain" the Cash Consideration from the demutualization of MLMIC?

   Answer: Yes because the Insurance Law provides that policyholders are entitled to "receive" the Cash Consideration upon their timely and proper payment of premiums but does not conclusively decide who, between the employer and payer of premiums and the employee "policyholder", may keep or retain the Cash Consideration.

2. Whether an employer that pays the premiums for a group insurance policy can prevail on a claim for unjust enrichment against the policyholder?

   Answer: Yes. The Appellate Division, First Department concluded that unjust enrichment applied in favor of employers because the employers procured for and paid the policies that gave rise to the Cash Consideration. *Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465, 96 N.Y.S.3d 526 (1st Dept. 2019).

II. PRELIMINARY STATEMENT

Respondent-Appellee, Maple Medical LLP ("Maple" or "Respondent") filed

the underlying action to prevent the unjust award of the proceeds of a demutualization of MLMIC[1] its medical malpractice carrier (the "Cash Consideration") to its employee physicians that Maple insured through payment of its insurance premiums. While the New York insurance statutory scheme, past case law involving group practice insurance policies, and principles of equity dictate that the Cash Consideration go to the medical practice, it is only through a quirk of medical insurance practice that requires the individual insureds be named as "policyholders" instead of the group that spawned this litigation and numerous others.

The same legal issue founded on virtually identical facts was before the Appellate Division, First Department in *Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465, 96 N.Y.S.3d 526 (1st Dept. 2019) ("*Schaffer*"). In *Schaffer*, the First Department ruled that the physician's receipt of Cash Consideration would have unjustly enriched her (Dr. Title) because she had already received the benefit of her bargain with her employer. *Id.* While the parties bargained for and expressly agreed to a salary, benefits and malpractice insurance, paid for entirely by her employer, an additional award of Cash Consideration based on the demutualization of malpractice policy that she did not pay any premiums for would have been an undue windfall.

[1] Medical Liability Mutual Insurance Company.

> 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.**

Id. (emphasis added) (citations omitted).

The *Schaffer* decision confirms that Maple is indisputably entitled to the MLMIC distribution. Just as in *Schaffer*, Dr. Scott's employment agreement with Maple provided that Maple would provide medical malpractice insurance and pay the premiums. Further, Maple selected and administered the policies, and paid the premiums for the policies, pursuant to Dr. Scott's employment agreement. Dr. Scott did not bargain for the proceeds of a demutualization of MLMIC malpractice policies; thus Dr. Scott cannot invoke any contractual right to the proceeds.

In contrast to the First Department, the Second, Third, and Fourth Departments[2] have misapplied the Insurance Law to conclude that the Cash Consideration belonged to the policyholder regardless of whether the policyholder paid any premiums. By so doing, they failed to give any weight to the plain language of the Insurance Law which, *inter alia*, plainly sets forth a distinction between the "receipt" and "retention" of funds. Furthermore, the Second, Third and Fourth

---

Columbia Mem. Hosp. v Hinds (188 AD3d 1337 [3d Dept 2020]; *Kim E. Schoch, CNM, OB/GYN NP v. Lake Champlain OB-GYN, P.C.*, APL-2020-00169; *Maple–Gate Anesthesiologists, P.C. v. Nasrin*, 182 A.D.3d 984, 122 N.Y.S.3d 840

Departments misapplied the equitable doctrine of unjust enrichment by holding that the physician/employee would be unjust enriched by retaining the Cash Consideration because both parties received their bargained-for consideration (payment of salary and malpractice benefits in exchange for professional services), there would be a windfall to either party a conclusion not supported by the case law.

The genesis of this disputed lies in the fact that Insurance Law § 7307 is silent on which party is entitled to permanently "keep" or "retain" the MLMIC funds, identifying only which party is should "receive" such Cash Consideration. Despite the explicit distinction in the statute between "receipt" and "retention", Second, Third and Fourth Department ignore this distinction and gave a meaning to the statue neither supported by its text or context -- that who receives the Cash Consideration is dispositive of which party is entitled to permanently retain it.

Not only does this conclusion ignore the plain text of Insurance Law § 7307, the Second, Third and Fourth Departments further ignored language in this section that explicitly conditioned "receipt" of the Cash Consideration to the timely and proper payment of premiums. Thus, the Second, Third and Fourth Departments effectively nullified the text of the statue to give no effect to this language and award the Cash Consideration to the policyholder/physician despite the fact that with exception in every case including in the underlying action hereto, did not pay any premiums.

Consequently, the principles set forth in *Schaffer* that the medical practice, Maple, is entitled to the Cash Consideration, was the proper ruling that should be adopted by this Court.

III. STATEMENT OF THE FACTS

The facts in this case are essentially undisputed. Appellants Joseph Scott, M. D., Diana Goldenberg, M.D., Diana Arevalo, M.D., Nina Sundaram, M.D., Mario Mutic, M.D., and Lisa H. Youkeles, M.D. ("Doctors") are licensed physicians previously employed by Maple pursuant to a written employment agreement. (R. 212). As part of the Doctors' employment agreements, Maple agreed to pay for professional medical malpractice insurance coverage for the Doctors, at no cost to each of them. (R. 212) Although Maple procured and paid for the policies, medical malpractice insurance cannot be written as a group policy and must name individual insureds on the policies. As a result, individual physicians including Dr. Richard Frimer, a partner in Maple's practice are named on the policies instead of Maple. (R. 239)

In July 2016, MLMIC applied to the New York Department of Financial Services ("DFS") to convert from a mutual insurance company to a stock insurance company. MLMIC announced the sale of the company to Berkshire Hathaway by email dated July 18, 2016, which stated in pertinent part:

> [T]he person or entity that paid the premium will be considered as the owner of the eligible policy" and that "each owner of an eligible policy will be entitled to receive in cash a proportionate share of all of the cash consideration...

(R. 288, "Email Announcement").

Thereafter, MLMIC continued to release information pertaining to the transaction reiterating that "the person or entity that paid the premium will be considered as the owner of the eligible policy" and that "each owner of an eligible policy will be entitled to receive in cash a proportionate share of all of the cash consideration paid.". (R. 297, "Newsletter"). MLMIC further prepared a Plan of Conversion dated June 15, 2018 (hereinafter "Plan") (R. 63). However, contrary to the foregoing pronouncements and the understanding of all involved, the Plan indicated that the person or entity that paid the premium would not be considered as the owner of the eligible policy. In short, the Plan defined "Policyholder" as "*the person(s) identified on the declarations page of such Policy as the insured.*" (Definitions, "Eligible Policyholder" R. 68). Thus, by this definition, the party that paid the premium would not be entitled to receive a proportionate share of all the cash consideration paid from the demutualization. This sudden and sea change in the definition of policyholder, owner of the policy, and party who would be entitled to the cash consideration, came almost two years after the initial announcement. Equally momentous is that the Plan also changed the party that would be entitled to vote on the whether to approve the plan of demutualization and the sale, only weeks before the

vote whether to approve the sale and demutualization. (Definitions, "Eligible Policyholder" R. 68)

The revisions set forth in the labyrinthine Plan provided that cash consideration would be paid to policyholders/members in exchange for the extinguishment of the policyholder membership interests. Pursuant to the Plan, "Each Eligible Policyholder (or it's designee) shall receive a cash payment in an amount equal to the applicable conversion." (R. 77, § 8.2 (a)). 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." (R. 68, § 2.1 "Designees") According to the Plan, in the absence of an explicit designation from the policyholder/member, the policy administrator would not receive cash consideration.

In short, the revised definitions of the Policyholder and Eligible Policyholder in the Plan would not be the party that paid the premium as originally disclosed in the Email and the Newsletter. The prior disclosures never indicated that the Policy Administrator was or would be a substantive designation or, more importantly, that the failure of the party acting as Policy Administrator but not having been formally designated Policy Administrator would have any substantive impact.

Shortly after the Plan a Notice of Public Hearing was published (R. 123, "Notice") The Notice stated that eligible policyholders would be eligible to receive the cash consideration but did not clearly indicate who would be considered an eligible policyholder. It also stated that "an eligible policyholder may designate another party (such as a policy administrator or employer) to receive that policyholder's share of the cash consideration by timely completing and returning to MLMIC a designation form to be provided by MLMIC." (R. 222) The Notice of Public Hearing further stated that "previous appointments of designees by policyholders for certain purposes (such as submitting premium payments or receiving dividends on the policyholder's behalf) are not valid for this purpose."

The Public Hearing was held on August 23, 2018 (R. 164). The problem wrought by the Plan's revision to who is a "policyholder" was aired at the public hearing by multiple policy administrators who testified about how the Plan denied the entities justly and long-believed entitled to the cash distributions – that is the groups like Maple that obtained the policies and paid the premiums. (R. 184)

New York Insurance Law § 7307 codifies a plan of conversion to be enacted when a demutualization occurs. The conversion plan must be presented to and approved by the Superintendent of the New York State Department of Financial Services ("DFS"). The statute further sets forth the calculation of how demutualizing companies should distribute compensation corresponding to equitable share

associated with each policy:

> The equitable share of the policyholder in the mutual insurer shall be determined by the ratio which ***the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance policies*** in effect during the three years immediately preceding the adoption of the resolution...***bears to the total net premiums received by the mutual insurer from such eligible policyholders.***

N.Y. INS. LAW § 7307(e)(3) (emphasis added).

Insurance Law § 7307(e)(3) is seemingly straightforward in directing that the proceeds of a demutualization be distributed to "policyholders" based on the amount of premiums "such policyholder" has paid. Under a typical group policy, the employer pays the premiums and is the listed policyholder removing all doubt as to which party would be the recipient of the proceeds of demutualization. However, medical malpractice insurance cannot be written as a group policy, necessitating the naming of individual physicians on the policy.

On September 6, 2018, the DFS issued a Decision approving the demutualization of MLMIC. (R. 162) Recognizing that disputes might arise concerning the proper beneficiary of the cash consideration for a particular policy, the Plan set forth a procedure whereby objections could be filed with MLMIC, which would in turn trigger an escrow of the relevant cash consideration until the dispute was resolved either by agreement of the parties or by a judicial ruling. (R. 82) However, throughout the decision the DFS failed to apply the express language of § 7307(e)(3) by failing to hold that the policyholders, are the parties that paid the

premiums on the policy of insurance, *i.e.* the medical practice. By classifying the insured physicians as the "policyholders" contrary to all of the prior declarations and policy, and contrary to the statutory language that requires, *inter alia*, calculation of the distribution ***such policyholder has properly and timely paid*** *to the insurer on insurance policies in effect*, the DFS decision stood to unjustly enrich the physicians and deprive the medical practices of their due proceeds as well as disenfranchising them from voting on whether to approve the demutualization.

In order to remove any doubt as to its entitlement to the Cash Consideration, Maple filed the underlying action against 6 of its employee physicians.[3]

IV. ARGUMENT

Insurance Law § 7307 Is Not By Itself Dispositive of Which Party Is Entitled To Keep The Demutualization Cash Consideration

It is axiomatic that the "literal language of a statute controls 'unless the plain intent and purpose of [the] statute would otherwise be defeated.'" *Lynch v. City of New York*, 35 N.Y.3d 517, 523 (2020) (citation omitted).

[3] In addition to the underlying matter, *Maple Med. LLP v. Scott*, 2019-09157 (Index No. 51107/2019 Sup. Ct. Westchester Cty. Jul. 7, 2019), the following cases were filed and decided: *Maple Med. LLP v. Sundaram*, 2019-09161; *Maple Med. LLP v. Mutic*, 2019-09162 (Index No. 51103/2019 Sup. Ct. Westchester Cty. Jul. 7, 2019); *Maple Med. LLP v. Youkeles*, 2019-09160 (Sup. Ct. Westchester Cty. Jul. 7, 2019); *Maple Med. LLP v. Goldenberg*, 2019-09160 (Index No. 51108/2019 Sup. Ct. Westchester Cty. Jul. 7, 2019); *Maple Med. LLP v. Arevalo*, 2019-09159 (Index No. 51109/2019 Sup. Ct. Westchester Cty. Jul. 7, 2019) (collectively the "Six Actions").

The demutualization of MLMIC in this case triggered Insurance Law § 7307(e)(3), which provides *in toto*:

> The manner and basis of exchanging the equitable share of each eligible mutual policyholder for securities or other consideration, or both, of the stock corporation into which the mutual insurer is to be converted and the disposition of any unclaimed shares. The plan shall also provide that **each person who had a policy of insurance** in effect at any time during the three year period immediately preceding the date of adoption of the resolution described in subsection (b) hereof **shall be entitled to receive** in exchange for such equitable share, without additional payment, consideration payable in voting common shares of the insurer or other consideration, or both. **The equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums** (gross premiums less return premiums and dividend paid) **such policyholder has properly and timely paid to the insurer on insurance policies in effect during the three years immediately preceding the adoption of the resolution by the board of directors** under subsection (b) hereof bears to the total net premiums received by the mutual insurer from such eligible policyholders. In computing a policyholder's equitable share, no credit shall be given for any net premiums which result from an endorsement which is effective on or after the date of adoption of the resolution; except that credit shall be given for any net premiums resulting from an audit or retrospective premium adjustment which is billed within one hundred eighty days after such date, provided such premium is paid timely. If the equitable share of the eligible policyholder entitles such policyholder to the purchase of a fractional share of stock, the policyholder shall have the option to receive the value of the fractional share in cash or purchase a full share by paying the balance in cash.

(emphasis added).

However, the literal language of the statute only identifies which party should "receive" the Cash Consideration but does not identify which party is entitled to

"keep" or "retain" those monies.[4] The DFS's Decision acknowledges this distinction by recognizing that "the release of the escrow shall have no substantive effect on the parties' positions with respect to who is entitled to the payment under the relevant law." (R. 186) This determination (not to direct payment solely to the policyholder) is reiterated in DFS's subsequent Order (R. 380), and is consistent with the interpretation of the Insurance Law that the statute merely addresses what party shall serve as the initial recipient of the funds. Thus, "receiving" the Cash Consideration is not dispositive of the ultimate issue, namely which party is entitled to keep the Cash Consideration – an issue left to either agreement or litigation between the parties. *Cf. Simonds v. Simonds*, 45 N.Y.2d 233, 239, 408 N.Y.S.2d 359, 380 N.E.2d 189, 192 (1979) (claimant's equitable interest in insurance policies was superior to that of a named beneficiary who has given no consideration).

While Insurance Law § 7307(e)(3) mandates that demutualization proceeds be paid to the "policyholder", the Insurance Law states that the cash consideration is calculated based upon a ratio of "the net premiums...*such policyholder has properly and timely paid to the insurer"* and the "*total net premiums received by the mutual insurer from such eligible policyholders."* N.Y. Ins. Law § 7307(e)(3)

[4] Numerous statutes explicitly create a distinction between "receiving" and "retaining funds." *See e.g.* RENT & EVICT § 2105.6 ("the landlord shall be authorized to demand, **receive and retain**")(emphasis added); RENT STAB § 2525.4 ("no owner...shall demand, **receive or retain** a security deposit")(emphasis added); RENT & EVICT § 2205.5 ("no person shall demand, **receive or retain** a security deposit")

(emphasis added). Thus, the somewhat inadvertent nature of who is the policyholder here, as a result of medical practice insurance requiring the doctor to be "policyholder" is only the starting point of the analysis and not dispositive of the inquiry.[5]

The literal and correct implication of this statutory language is that Dr. Scott is not entitled to any cash consideration since he did not pay any premiums at all since the equitable share is explicitly based on the premiums paid. Thus, the required calculation would always result in zero dollars to the physician/employee. The New York Insurance Law contemplates that the cash consideration should be paid both to the "policyholder" and to whomever paid the premiums to the insurer. Of course, if the policyholder does not contribute any money to the mutual fund, then there will be money to mature and pay out. Thus, the Insurance Law only bears on the issues to strongly suggest the common sense and equitable outcome – that the party paying the premiums, in this case Maple, be the recipient of the Cash Consideration.

The Second Department sidesteps the direct implication of 7307's language by relying on an interpretation of the decision of the Department of Financial Services issued on September 6, 2018 adopting MLMIC's plan of conversion (the

[5] Similarly, it is irrelevant whether a party has or has not been designated as the "Policy Administrator" of the MLMIC policy. The only consequence of a designation as a "Policy Administrator" and, in turn as a "Designee," as defined by the Plan, is the ability to directly payment of the Cash Consideration from the MLMIC escrow account without court intervention or arbitration.

"the DFS Decision") (R. 162). The DFS opined that the statute's award of the Cash Consideration is not "determinative because [Insurance Law §7307(e)(3)] refers to the 'policyholder,' which might or might not be the person who paid the premiums." (R. 162 at 12).

Thus, the DFS Decision only articulated that Insurance Law § 7307 "is not determinative" of the right to the Cash Consideration"[6]

Further, by failing to properly reference the policyholder as the party that paid the premium, the DFS Decision arbitrarily overrides the statute by approving the Plan's definition of the Policyholder as the insured rather than the statutory definition of the Policyholder as the party that has **properly and timely paid** the insurance premiums. Thus, in failing to properly define the Policyholders in accordance with N.Y. Ins. Law § 7307(e)(3), the Superintendent determined not only to permit the payment of cash consideration to the incorrect parties, but disenfranchised the true parties in interest from voting on the whether to approve the demutualization. The DFS Decision consequently had the improper and unjust effect of denying Policyholders (as defined by N.Y. Ins. Law § 7307(e)(3)) the right to vote on whether to approve the

---

[6] The DFS director noted:

The Determination of who is entitled to the cash consideration depends upon the facts and circumstances of the parties' relationship and applicable law, to be decided either by agreement of the parties or by an arbitrator or court.

(R. 186)

demutualization. Those "Policyholders", *i.e.* the medical practices, paid for, negotiated, procured, renewed, and otherwise managed and informed all insurance policies issued by MLMIC.

Thus, the Second Department's conclusion that the physician/employee should receive the Cash Consideration by virtue of being the policyholder (in name only) vests the physician/employee with an "ownership interest" in the demutualization proceeds is without merit.

By contrast, the First Department rejected this interpretation when it held that the employer was entitled to the Cash Consideration, not the physician whose name appears as policyholder on the declaration page of the policy. *Schaffer*, 171 A.D.3d 465, 96 N.Y.S.3d 526 (R. 310). In fact, the DFS in its Decision acknowledged the anomaly of a 'policyholder' who has not paid the premiums, conceding that such policyholder "might or might not be the person who paid the premiums." (R. 184).

The Second Department Incorrectly Decided that the Physician/Employee Could not be Unjustly Enriched by the Demutualization Proceeds

The Second Department incorrectly applied the principles of equity in determining that Dr. Scott's retention the Cash Consideration would not constitute unjust enrichment. The requisite elements to prevail on a claim for unjust enrichment are present:

1) the defendant was enriched;

2) at the plaintiff's expense; and

3) in equity and good conscience, defendant ought not to be allowed to retain what the plaintiff seeks to recover.

Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 (2011).

When considering an unjust enrichment claim, a court's "essential inquiry" is one of "equity and good conscience." *Paramount Film Distrib. Corp. v. State,* 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695 (1972). Fundamental to this claim is that there need not be proof that the unjustly enriched party, here Dr. Scott, did anything "wrong" or unjust:

> Unjust enrichment ... does not require the performance of any wrongful act by the one enriched" (*Simonds v. Simonds,* 45 N.Y.2d 233, 242, 408 N.Y.S.2d 359, 380 N.E.2d 189). "Innocent parties may frequently be unjustly enriched" (*id.*). "What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it' "(*id.* at 242, 408 N.Y.S.2d 359, 380 N.E.2d 189, quoting *Miller v. Schloss,* 218 N.Y. 400, 407, 113 N.E. 337; *see Paramount Film Distrib. Corp. v. State,* 30 N.Y.2d at 421, 334 N.Y.S.2d 388, 285 N.E.2d 695).

Alan B. Greenfield, M.D., P.C. v. Long Beach Imaging Holdings, LLC, 114 A.D.3d 888, 889, 981 N.Y.S.2d 135, 137 (2d Dept. 2014).

In ruling that the Petitioner/Plaintiff medical practice was entitled to the proceeds of the demutualization of MLMIC, the Appellate Division, First Department ruled that the insured/individual physician would be unjustly enriched

if permitted to keep the proceeds since the medical practice procured, bargained for, paid for and was entitled to the proceeds:

> 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** (*see Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1238 [9th Cir1990], *cert denied* 498 U.S. 899 [1990]; *Chicago Truck Drivers, Helpers & Warehouse Workers Union [Ind.] Health & Welfare Fund v. Local 710, Intl. Bhd. of Teamsters, Chicago Truck Drivers, Helper and Warehouse Workers Union [Ind.] Pension Fund,* 2005 WL 525427, *4, 8, U.S. Dist LEXIS 42877, *10–11, 21–22 [ND Ill, Mar. 4, 2005]).

Schaffer, Schonholz & Drossman, LLP v. Title, 171 A.D.3d 465, 96 N.Y.S.3d 526 (1st Dept. 2019) (the "*Schaffer* Decision").

The Second Department, borrowing heavily from the Third Department's decision in *Columbia*, opined that inasmuch as the demutualization of MLMIC was an occurrence unforeseen by either the employer or employee, award of the Cash Consideration to either party would constitute a windfall. This observation is not supported by the facts at hand nor is it party of the inquiry mandated by the caselaw. A party may be unjustly enriched by a third party (MLMIC) and it is the essence of unjust enrichment that "[i]t is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties **or others** have placed in the possession of one person money, or its equivalent, under such circumstances that

in equity and good conscience he ought not to retain it" a party may be unjustly enriched by the actions of a third party or "others." *State v. Barclays Bank of New York, N.A.,* 76 N.Y.2d 533, 540, 563 N.E.2d 11, 15 (1990) (emphasis added); *see also*, *Shah v. Exxis, Inc.*, 138 A.D.3d 970, 972, 31 N.Y.S.3d 512, 515 (2d Dep't 2016) (potential unjust enrichment claim against individual owner based on payment made to his company); *Mobarak v. Mowad*, 117 A.D.3d 998, 1001, 986 N.Y.S.2d 539, 542 (2d Dep't 2014).

Since it was apparent to the First Department that the issue at bar presented a novel question not squarely governed by any prior precedent it looked to decisions outside New York for guidance. However, the Second Department in the instant case rejected the authorities cited by the First Department as inapplicable because "[t]hose cases involved employee benefit plans subject to ERISA and, as a result, ERISA and federal law principles governed." (_____) However, this conclusion was in error and the Second Department completely failed to explain why these decisions do not merit a result contrary to its holding. In fact, in given the dearth of precedent associated with demutualizations of this sort, with determinations under 7307 of who constitutes a policy holder, especially in a medical malpractice situation, the cases relied upon by the First Department are all but determinative. In fact, reviewing these decisions reveals that they did not turn on finding specific to

ERISA, but rather were decided according to core principles of equity that apply directly herein.

In *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.* the Ninth Circuit Court of Appeals faced a similar set of facts, with employer and employee contending over the proceeds from the conversion of a mutualized fund. 903 F.2d 1232 (9th Cir. 1990) In affirming the district court's holding the party that paid the premiums was entitled to the proceeds, the *Ruocco* Court articulated the key consideration in determining how to disseminate the proceeds of a group procured disability insurance plan where, as here, it is not governed by any express contractual requirement. *Id.* at 1238 ("Union Mutual was required to distribute this retained surplus to policyholders prior to its conversion from a mutual insurance company to a wholly-owned subsidiary of a publicly-owned stock corporation.") The basic common-sense principle enunciated by *Ruocco* and followed by *Schaffer* and the trial court herein is that in the absence of an express contractual provision addressing demutualization the party that pays for the policy is entitled to the proceeds of any conversion.

> **In this case, the district court found that the balancing of equities weighed in favor of the plan participants because the premiums for the plan were paid for by the participants and because "[o]utside of minor administrative costs, BEHR[employer] paid nothing."** The court also found that if the surplus were distributed to the defendants, the fund would not inure to the benefit of the plan participants, but rather "as a result of BEHR's incentive bonus plan, would fall in large part into the hands of BEHR's Executive Committee which had voted to keep the distribution." We

> agree with the district court that the balance of equities weighs in favor of the plaintiff class.

Id. at 1238 (emphasis added).

Of course, the result reached by the *Ruocco* Court is completely consistent with the framework established by the DFS (*see supra*).

The Ninth Circuit further cited to *Wright v. Nimmons,* a case decided by United States District Court for the Southern District of Texas for the similar proposition that where a trust plan is silent as to the distribution of assets, if the employer has "exclusively funded a plan," the "unbargained for distribution of excess assets to participants represents an unintended windfall for employees". 641 F.Supp. 1391, 1406–07 (S.D.Tex.1986).

Ruocco has been relied on not only by the First Department but other courts to reach a result analogous to the one reached here. The United States District Court for the Northern District of Illinois followed the Ninth Circuit and also held that the inquiry of how to distribute unanticipated proceeds hinges on determining whether the employer or employees paid the premiums.

> [A]warding 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.....
>
> * * *
>
> 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 . . . .

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, *8 (N.D. Ill. Mar. 4, 2005)

These principles are not specific to ERISA cases. On facts that parallel the equities before the Court now, the United States Court of Appeals for the Sixth Circuit concluded that the owner of a group policy was the party that chose the carrier and paid the premiums was the owner of the policy and thus eligible to receive the proceeds of a demutualization. In *Mell v. Anthem*, the plaintiffs/employees sought to recover the proceeds from the demutualizion of an Insurance company (Anthem). 688 F.3d 280 (6th Cir. 2012) In affirming the grant of summary judgment to Defendants, the employers who paid for the policies at issue, the Sixth Circuit noted the following:

> The district court interpreted the statute to mean that policyholders are typically "owners" of the group policy. The district court therefore found that Plaintiffs cannot be the owners of the group policy because as employees and retirees Plaintiffs 'had nothing to do with the choice of insurance carrier, nor with its governance, and they received what they bargained with the City to get: insurance coverage' . . . .
>
> Accordingly, by virtue of the process of demutualization we are compelled to conclude that Plaintiffs are precluded from recovering any of the proceeds from Anthem's demutualization. Based on the reading of the merger documents, it is clear that Anthem did not create new membership rights for

> employees enrolled post-merger. Therefore, the Class B members were not eligible policyholders under the Anthem plan and were thus not entitled to receive Anthem's demutualization proceeds.

Id., at 289 (emphasis added)

Ultimately, *Ruocco, Chicago Truck Drivers* and *Mell,* federal decisions from three difference federal circuits (two appellate level), are therefore relevant, because they clearly demonstrate that the preeminent analysis when considering the distribution of demutualization proceeds is a balancing of the equities.

V. CONCLUSION

The decision of the Second Department should be reversed and vacated in all respects.

Dated: April 22, 2021
White Plains, New York

Carl L. Finger

Carl L. Finger, Esq.
Finger & Finger, A Professional Corporation
158 Grand Street
White Plains, New York 10601
(914) 949-0308

Attorneys for Respondent-Appellee

PRINTING SPECIFICATION STATEMENT

1. The within brief was generated on a computer;

2. The margins are one (1) inch on all sides;

3. The typeface is Times New Roman 14 point;

4. The line spacing is double space;

5. The word count is 4,998.