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

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

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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.

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REPLY ARGUMENT

Summary

Plaintiff-Appellant, Maple Medical LLP's ("Maple" or "Appellant") entitlement to the proceeds of a demutualization of MLMIC (Medical Liability Mutual Insurance Company) rests on clear principles of equity, straightforward statutory application and numerous federal court decisions founded on closely analogous fact patterns. By contrast, Defendants-Respondents Scott *et al*. ("Respondents") rely on a circuitous and unsupported interpretation of New York insurance law to claim entitlement to the MLMIC demutualization proceeds ("Cash Consideration").

As set forth in Maple's opening brief and herein, the Honorable Court should follow the reasoning of 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*"), wherein the party that paid the policy premiums should receive the Cash Consideration as a matter of basic equity. By so doing the First Department cut through the thicket of statutory quibble and reverted to longstanding principles of equity.

> 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.

1) Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment.

Id. (emphasis added) (citations omitted).

The operative statutory provision (N.Y. Ins. § 7307) and DFS Decision left the issue to the courts to resolve.[1] Respondents' futile attempt to argue that the statutory language anoints the employee-physicians as "policyholders" for the purposes of receiving the Cash Consideration is belied by the equities, facts and law at hand. Consequently, the *Schaeffer* decision represents the "Occam's Razor"[2] approach required to resolve an issue that has been muddied by the spawn of subsequent litigation, namely that equity demands that the party who procured and paid for the demutualized policy should benefit from the Cash Consideration, not the party whose name is on the policy only through administrative quirk and who did not contribute one cent to the funds that ultimately constituted the proceeds of the demutualization.

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[1] Contrary to Respondents' contention the DFS Supplemental Order, did leave the issue to the courts:

> The Superintendent continues to encourage all persons involved in disputes regarding the escrowed funds to resolve their differences in a prompt, fair and equitable manner and reiterates that: (a) **the parties maintain all legal rights to pursue their claims that they otherwise have absent the [DFS Approval] Decision and this Order; and (b) whether the funds are held in escrow has no effect on the respective legal rights of the parties to such funds**.

(R at 382) (emphasis added).

[2] In scientific terms, the most straightforward or simplest of competing theories is preferred and, in this case, accurate.

In fact, the quandary that spawned the instant case before the Honorable Court is not novel and has been entertained before by other courts nationwide as cited by the *Schaeffer* Court. In most cases, as in the case at bar, the demutualization was not anticipated by any contractual provision between the parties to a policy. However, despite any number of arguments as to governing statutory or contractual language, courts consistently rely on one key fact at the heart of the issue – the party that pays for and funds the plan should receive the proceeds of demutualization. *See e.g., Wright v. Nimmons,* 641 F.Supp. 1391, 1406–07 (S.D.Tex.1986) (where the employer has "exclusively funded a plan" the "unbargained for distribution of excess assets to participants represents an unintended windfall for employees"; judgment in favor of employer), *see also, Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232 (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, *8 (N.D. Ill. Mar. 4, 2005) ("[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…"). No court and no party have effectively distinguished the aforementioned case which mandate that the proceeds be paid to Maple.

2) Under New York Insurance Law, the "Party Who Properly and Timely Paid the Premiums" Receives the Cash Consideration

Contrary to Respondents' tortured attempt to claim that the physician-employees were categorically the intended recipients of the Cash Consideration all along, the DFS decision stated that Section 7307 "is not determinative" of the right to the Cash Consideration and 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 either by agreement of the parties or by an arbitrator or court." (R at 186; DFS Approval Decision at 25).

The "facts and circumstances" between Maple and Respondents are that medical malpractice insurance *cannot* be written as a group policy. Thus, individual physicians must be identified on the policy, despite the fact that their employer (Maple) pays the premiums, just as the procurer of any group insurance policy would but without the protection from an event such as this that a group policy would evidently provide. This unintended disparity cannot create the incongruent result promoted by the Respondents.

Given this, the Second Department's decision and Respondents' arguments rest on the fallacious notion that being the nominal "policyholder" in the context of medical malpractice insurance equates to being the "insured" for the purposes of enhanced standing with MLMIC (such as "membership rights"). This is not borne out by the facts nor does Respondents' case law support this notion. In *Allstate*

Ins. Co. v. Sullivan (cited in fn. 15 of Respondents' memorandum of law) the Court deals with an automobile insurance policy issued to an individual, where the "policyholder" and "insured" are indisputably the single individual. 230 A.D.2d 732, 732, 646 N.Y.S.2d 359 (2d Dept. 1996). Similarly inapposite, the Fourth Department addressed the applicability of a homeowner's policy in *Utica Fire Ins. Co. v. Gozdziak*, 198 A.D.2d 775, 775, 604 N.Y.S.2d 371, 371 (4th Dept. 1993). Moreover, in *Rhine v. New York Life Ins. Co.*, 248 A.D. 120, 127, 289 N.Y.S. 117, 125 (1st Dept. 1936) addressed a life insurance policy held by an individual.

In this context, Section 7307 has no language that addresses or applies to the quirk of medical malpractice insurance that precludes insurance to a group. Thus, the sole guiding principle as to who the policyholder is and who is entitled the proceeds of the demutualization is the statement that such party is the party who "***properly and timely paid to the insurer on insurance policies."*** Consequently, Section 7307(e)(3)'s instruction to remit demutualization proceeds to the "policyholder" only has meaning when the identifying criterion of who has "properly and timely paid to the insurer." In this case, Maple.

Thus, the only literal application of this statutory language is that Respondents are not entitled to any cash consideration since they did not pay any premiums at all. However, the Second Department skirts this straightforward interpreting by relying on an entirely implausible reading of the sentence, based on

reasoning borrowed entirely from the Third Department's opinion in *Schoch*. *Schoch v Lake Champlain OB-GYN, P.C.*, 184 A.D.3d 338, 126 N.Y.S.3d 532 (3d Dept. 2020). In *Schoch*, instead of simply interpreting the sentence as written, the Third Department severs the word "policyholder" from "properly and timely paid to the insurer." ("The formula takes into account the amount of premiums paid. 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 policyholder") (*Id*. at 343, citing a trial court's decision in *Maple-Gate Anesthesiologists, P.C. v Nasrin*, 63 Misc. 3d 703, 709 [Sup Ct, Erie County], *affd* 182 AD3d 984).

The Second Department further explained, again only by parroting *Shoch*, that such an alternative interpretation of the plain language of the sentence was necessary because "policyholders . . . may have assigned such legal rights to others." Critically though, it is undisputed that here there was no such "assignment" of any right to receive anything by Maple. *Maple Med., LLP v Scott*, 191 A.D.3d 81, 87, 138 N.Y.S.3d 61, 66 (2d Dept. 2020). Thus, there was no basis for deviating from the plain meaning of the statute that the policyholder is the party that "properly and timely paid" the premiums, namely Maple, and is entitled to the Cash Consideration. Further, rather than

apply the statute as written, the Second Department adopted the Third Department's conclusion that "s*uch policyholder has timely and properly paid"* only "references to the amount of premiums paid applies only to calculation of the *amount* of consideration." *Id.* 191 A.D.3d at 98, 138 N.Y.S.3d at 74. However, that is not what the statute says. Thus, instead of reading Section 7307 as written, that only the party that pays is the policyholder, consistent with the equitable result reached in *Schaeffer*, the Second Department contorts principles of statutory construction and equity to reach an inequitable result. 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.

Moreover, Respondents' claim that there is no distinction between which party "receives" and which party "retains" the distributed Cash Consideration is refuted by the language of the statute which directs that "the release of the escrow" to the party receiving the escrow "shall have no substantive effect on the parties' positions with respect to who is entitled to the payment under the relevant law" or the party that ultimately retains the Cash Consideration. (R. at 186). Had DFS intended or wanted to direct payment directly to the "policyholder" it would have simply used the word policyholder instead of acknowledging that the ultimate recipient of the funds was a question unresolved by initial distribution.

3) Maple Established that Respondents Would be Unjustly Enriched by Retaining the Cash Consideration

An unjust enrichment claim is rooted in "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" *Miller v Schloss*, 218 NY 400, 407, 113 NE 337 (1916), *see also Georgia Malone & Co., Inc. v Rieder*, 19 N.Y.3d 511, 516, 973 N.E.2d 743, 746, 950 N.Y.S.2d 333, 336 (2012). Awarding the Cash Consideration to Respondents/Employees unquestionably enriches them at Maple's expense since Maple paid the funds that constitute the cash consideration, and which would otherwise be awarded the Cash Consideration. However, the converse is not true, that is Maple would not be enriched at *Respondents' expense* since Respondents did not pay any premiums, select the insurer, or select the policy. The only reason that there exists the available Cash Consideration under Insurance Law § 7307(e)(3) is because the employers, such as Maple, "properly and timely paid" the premiums. These premiums are now the funds to be distributed. It is this critical point that the Second Department ignored or overlooked in analyzing unjust enrichment and the statement that the Cash Consideration would be a windfall to either party, while half accurate with respect to Respondents only, is entirely inaccurate with regard to Maple.

The Second Department declined to follow any of the numerous federal authorities cited by the First Department because "[t]hose cases involved employee

benefit plans subject to ERISA and, as a result, ERISA and federal law principles governed" and attempted to distinguish these authorities based on factual differences. This analysis, parroted by Respondents in their opposition, misses the forest for the trees. The critical facts of these cases are instructive and should inform the analysis as it did in the *Schaeffer* decision. In *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.* an employer and employee were contending over the proceeds from the conversion of a mutualized fund. 903 F.2d 1232 (9th Cir. 1990). Given that the demutualization was unanticipated, there were no contractual provisions that governed.

> 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."

Id. at 1238 (emphasis added).

The *Ruocco* decision is completely consistent with the framework established by the DFS since the DFS analysis contemplated that, because the demutualization was not anticipated by the statutory scheme either, no definitive conclusion could be enforced. Similarly, in *Mell v. Anthem* 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. 688 F.3d 280 (6th Cir. 2012). The "facts and circumstances" in *Mell* were on 'all fours' with

this case, namely that Respondents here and the employees in *Mell* "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 . . ." *Id.* at 289. There simply is no reasonable distinction between these cases and the situation herein, and thus Maple is entitled to the proceeds of the demutualization.

Just as in *Schaffer*, Respondents' employment agreements with Maple provided that Maple would supply medical malpractice insurance and pay the premiums therefore. Maple selected, paid the premiums for the policies, and administered the policies, year after year with complete consent of the Respondents. Maple could have elected to insure its practice with a carrier other than MLMIC. Respondents could have, but did not, bargain for the proceeds of a demutualization of MLMIC malpractice policies. Nor did they pay for the proceeds in any way. Maple paid for the policies and thus the proceeds of the demutualization. Maple paid the very funds that ultimately constituted the assets being paid out as part of demutualization. Having paid the funds it is Maple and only Maple that would be injured were it not to receive the demutualization proceeds. Failure to afford Maple the benefit of the payments it made would constitute classic unjust enrichment to Respondents who would thus enjoy a windfall at the expense of Maple.

CONCLUSION

Pursuant to *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, *supra*, and *Mell v. Anthem, supra,* as a matter of equity, and to avoid the unjust enrichment of Respondents, the decision of the Second Department should be reversed and vacated in all respects and the decision of the Supreme Court (Ecker, J.) reinstated.

Dated: August 11, 2021
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