To be argued by: Justin A. Heller
Time requested: 10 minutes

Appellate Division Docket No. 529615

New York Supreme Court
Appellate Division – Third Department

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

Plaintiff-Appellant,

- against -

LAKE CHAMPLAIN OB-GYN, P.C.,

Defendant-Respondent.

APPELLANT'S BRIEF

NOLAN HELLER KAUFFMAN LLP
Justin A. Heller, Esq.
Brendan J. Carosi, Esq.
Attorneys for Plaintiff-Appellant
Kim E. Schoch, CNM, OB/GYN
80 State Street, 11th Floor
Albany, New York 12207
(518) 449-3300

Saratoga County Supreme Court
Index No.: 20184228

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED (3)

1. Is Plaintiff-Appellant entitled to her share of the Cash Consideration paid in exchange for the extinguishment of her Policyholder Membership Interest in Medical Liability Mutual Insurance Company ("MLMIC"), pursuant to controlling New York Insurance Law (§ 7307[e][3]), the MLMIC Plan of Conversion, the Decision of the New York State Department of Financial Services ("DFS") approving the Plan, and New York common law?

   Answer: The court below held that under the doctrine of *stare decisis*, it was bound to follow the decision in *Matter of Schaffer, Schonholz & Drossman, LLP v. Title* (171 A.D.3d 465 [1st Dep't 2019]), and denied Plaintiff-Appellant's motion, and granted Defendant-Respondent's cross-motion, for summary judgment.

2. Is Plaintiff-Appellant entitled to a determination of this Court that she would not be unjustly enriched by receiving her share of the Cash Consideration paid in exchange for the extinguishment of her MLMIC Policyholder Membership Interest?

   Answer: The court below held that Plaintiff-Appellant would be unjustly enriched by receiving her share of the Cash Consideration, based on the decision in *Schaffer*.

3. Was the court below bound by the First Department's decision in *Schaffer*?

Answer: The court below held that it was bound to follow *Schaffer* under the doctrine of *stare decisis*.

NATURE OF THE CASE

Plaintiff-Appellant Kim E. Schoch, CNM, OB/GYN NP ("Plaintiff") submits this Brief in support of her appeal of the Decision and Judgment of the Saratoga County Supreme Court (Crowell, J.) dated June 7, 2019 and entered June 17, 2019 ("Judgment") that denied Plaintiff's motion, and granted the cross-motion of Defendant-Respondent ("Defendant"), for summary judgment (R.5-8).

The question before the court below was straightforward. After MLMIC demutualized (resulting in the extinguishment of its Policyholders' Membership Interests), who was entitled to the Cash Consideration paid in exchange for Plaintiff's Policyholder Membership Interest: (i) *Plaintiff*, who became a MLMIC Policyholder—and thereby acquired a Membership Interest—as part of the bargained-for exchange of consideration under her Employment Agreement; or (ii) *Defendant*, which paid Plaintiff's MLMIC premiums pursuant to its contractual obligation under the Employment Agreement? The answer to that question was simple, compelled by, *inter alia*, the statutory framework of the Insurance Law, the plain terms of the Employment Agreement, and controlling unjust enrichment law.

Simply put, as the Policyholder under her MLMIC policy, Insurance Law § 7307(e)(3) mandated that Plaintiff receive the Cash Consideration paid on account of the extinguishment of her Membership Interest. This statutory right to the Consideration was incorporated into MLMIC's Plan of Conversion and confirmed

in the DFS Decision approving the Plan, with the limited exceptions being where the Policyholder either expressly designated the employer to receive the Consideration, or assigned it to the employer. Neither of those exceptions occurred here.

Faced with Plaintiff's clear entitlement to the Cash Consideration, Defendant sought to circumvent the Insurance Law, Plan of Conversion and DFS Decision by arguing that its appointment as Plaintiff's Policy Administrator and payment of her policy premiums entitled it to the Consideration on a theory of unjust enrichment. Defendant's argument entirely ignored that (a) as Policy Administrator, it was merely Plaintiff's agent, conferred with only the limited rights set forth in the Policy Administrator Designation Form (none of which entitled to the Consideration), (b) it paid the premiums as an express term of the parties' Employment Agreement, and (c) Plaintiff provided the contractually agreed-upon consideration for those premium payments. Simply put, Defendant's counterclaim for unjust enrichment failed as a matter of black letter New York law because the premium payments forming the basis of Defendant's claim were governed by the Employment Agreement, and Plaintiff provided the agreed-upon consideration for those payments (i.e., her provision of services for Defendant's benefit).

Before the foregoing could be presented to the court below, however, the First Department issued a Decision in *Matter of Schaffer, Schonholz & Drossman, LLP v. Title* (171 A.D.3d 465 [1st Dep't 2019]) ("*Schaffer*"), which, in four sentences,

summarily held that the doctor/policyholder would be unjustly enriched by receiving the Cash Consideration because her employer had paid her policy premiums. The First Department, acting as a court of original jurisdiction under CPLR 3222, did *not* cite to the Insurance Law, did *not* reference the MLMIC Plan of Conversion or the DFS Decision approving the Plan, did *not* rely upon *any* New York unjust enrichment law, and did not provide *any* reasoning for its conclusion. Instead, the First Department relied solely upon two ERISA cases, notwithstanding that (i) neither ERISA case involved a state law unjust enrichment claim, and (ii) *Schaffer* had nothing to do with ERISA.

Even though *Schaffer* was not binding on the court below because it is distinguishable procedurally and factually, conflicts with established Court of Appeals and Third Department unjust enrichment precedent, was based on deficient legal arguments to the Appellate Division, and relied solely upon inapposite ERISA cases, the court below held that it was bound to follow *Schaffer* "until such time as the Third Department or the Court of Appeal[s] issues a contrary decision" (R.7). It is respectfully submitted that the court below erred in so holding. In any event, this Court certainly is not bound by another Appellate Division's decision and, for the reasons herein, should not follow *Schaffer*. *See People v. Superintendent, Woodbourne Corr. Facility*, 170 A.D.3d 12, 16 (3d Dep't 2019) (Fourth Department's decision is not binding on this Court.) (citing *Matter of County of St.*

Lawrence v. Daines, 81 A.D.3d 212, 219 (3d Dep't 2011).

It bears emphasis that in contrast to *Schaffer* (and in turn the court below), three New York courts that have substantively analyzed the statutory and regulatory framework governing the MLMIC conversion—together with basic structure and operation of mutual insurance companies, and controlling unjust enrichment law—strongly support Plaintiff's entitlement to the Cash Consideration:

- *Maple-Gate Anesthesiologists, P.C. v. Nasrin* (96 N.Y.S.3d 837 [Sup. Ct. Erie Cty. 2019]) ("*Maple-Gate*"): In a well-reasoned decision relying on Insurance Law § 7307, the Plan of Conversion, the DFS Decision and established New York unjust enrichment law, the Erie County Supreme Court held that the policyholders were entitled to the Cash Consideration, and that based on facts similar to those herein, the employer's unjust enrichment claim should be dismissed.

- *Columbia Mem. Hosp. v. Hinds* (2019 NY Slip Op 51508(U) [Sup. Ct. Columbia County 2019]) ("*Hinds*"): The Columbia County Supreme Court held that *Schaffer* was distinguishable on its facts, and in any event the court was "free to correct prior erroneous interpretations of the law." (*Id.*, ¶¶5-6 [citing *In re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 518-19(1985)]). The court affirmed that Insurance Law § 7307(e)(3) repeatedly refers to the Policyholders as those eligible to receive the Cash Consideration, and underscored that the Consideration, "by law, is not a return to the hospital of any insurance premiums it paid on behalf of the

defendant, it represents the policyholder's share in MLMIC." *Id.*, ¶5.

- *Shoback v. Broome Obstetrics and Gynecology, P.C.* (Index No. EFCA2018003334 [Sup. Ct. Broome County Sept. 12, 2019]) ("*Shoback*")[1]: Although the Broome County Supreme Court concluded that it was bound to follow the *Schaffer* decision even though it disagreed with it, it confirmed that "[t]he language of the Plan [of Conversion] is clear and unambiguous, and as such must be accorded the plain meaning of its terms"—namely that "plaintiff is entitled to the money." In short, the *Shoback* court held that "Defendant's argument - that it paid the premiums and as such is entitled to the funds, is unpersuasive." *Id.* at 4. The court stressed that the employer "paid the premiums as part of its obligation under the Employment Agreement," and plaintiff "provided services and in return defendant was confident that she was covered (and hence it was covered) in terms of malpractice insurance." *Id.* In short, the "arrangement benefitted both parties," and the mere fact that the Cash Consideration was "a 'windfall', or 'a pot of money no one expected or even envisioned'... does not, per se, render it illicit or unjust." *Id.* at 4-5.

For the reasons herein, Plaintiff respectfully requests that this Court decline to follow *Schaffer*, reverse the Judgment of the court below, and grant Plaintiff's Motion for summary judgment.

[1] A copy of the *Shoback* Decision is provided as an Addendum to this Brief.

STATEMENT OF FACTS

I. MLMIC's Ownership Structure.

Prior to its October 1, 2018 demutualization and conversion to a stock insurance company, MLMIC was a mutual insurance company (R.75). A mutual insurance company is owned by its members, and the members are the individual policyholders (R.78-79). *See* Insurance Law § 1211(a). Under MLMIC, the ownership interests of the Members/Policyholders are called "Policyholder Membership Interests"; and the Policyholder is the person listed as the "Insured" under their policy (R.79).

II. Plaintiff's MLMIC Policy.

Plaintiff was employed as a certified nurse midwife with Defendant from June 18, 2007 until June 2014 (R.11 ¶2). During her employment with Defendant, Plaintiff was the sole Insured—and thus the sole Policyholder—under her individual MLMIC malpractice policy (R.11 ¶4, R.79, R.233-34). Under the terms of her Employment Agreement, one of the benefits that Defendant agreed to provide in exchange for Plaintiff's services was the payment of her malpractice insurance premiums (R.11 ¶3).

To effectuate payment of her MLMIC premiums, Plaintiff signed a Policy Administrator Designation Form designating Defendant as the "Policy Administrator" of her MLMIC policy (R.12 ¶5, R.29). The Policy Administrator

Designation Form expressly provided that the Policy Administrator would act as the agent of the insured—i.e., "for the paying of Premium[s], requesting changes in the policy, ... and for receiving dividends and any return Premiums when due" (R.29). In accordance with its contractual obligation, Defendant paid Plaintiff's MLMIC premiums on her behalf during her employment (R.223 ¶12).

III. MLMIC's Conversion.

On July 16, 2016, MLMIC applied to the New York State Department of Financial Services ("DFS") for permission to file a plan to convert from a mutual insurance company to a stock insurance company (R.180). Under Insurance Law § 7307(e)(3), when a mutual insurance company converts to a stock insurance company, its plan of conversion:

> "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 [to seek approval of the conversion] 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." (Emphasis added).

Rather than give Policyholders shares of the new stock insurance company, MLMIC's Plan of Conversion provided that the "Eligible Policyholders" (or their "Designees") would receive $2.502 billion in cash consideration ("Cash Consideration") for the extinguishment of their Policyholder Membership Interests (R.75 para. 3, R.86 ¶8.1). The MLMIC Plan of Conversion defined "Eligible

Policyholders" as Policyholders during the period July 15, 2013 through July 14, 2016; and "Designees" as Policy Administrators (or EPLIP Employers)[2] specifically designated by the Eligible Policyholder to receive the Cash Consideration (R.77).

In addition, the Plan set forth a procedure by which a Policy Administrator could object to the distribution of the Cash Consideration to the Eligible Policyholders; and upon receipt of an objection, MLMIC would hold the Consideration in escrow pending receipt of (i) "joint written instructions" from the Eligible Policyholder and Policy Administrator, or (ii) a non-appealable court order or arbitration award respecting the distribution of such Consideration (R.85 ¶6.3(f), R.91 para. 4).

After holding an August 23, 2018 public hearing regarding MLMIC's proposed Plan of Conversion, the Superintendent of DFS issued a Decision dated September 6, 2018 (the "DFS Decision") approving the Plan (R.127, R.161). The DFS Decision authorized a closing of the conversion transaction only upon the approval of the Policyholders as of July 14, 2016 (R.131 ¶2, R. 128 n.1). The Policyholders approved the Plan of Conversion on September 14, 2018, and the transaction closed on October 1, 2018.[3]

---

[2] Plaintiff's policy was not an Employee Professional Liability Insurance Policy (EPLIP); thus, any reference in the Plan of Conversion or DFS Decision to EPLIP Employers is irrelevant here and has been omitted.

[3] *See* "Record Date Policyholders Vote to Approve MLMIC Plan of Conversion," MLMIC Blog, available at https://www.mlmic.com/blog/physicians/policyholders-approve-conversion (last accessed 10/22/2019).

It is undisputed that Plaintiff was an Eligible Policyholder (R.40 ¶¶13-15, R. 47 ¶6, R.230-247); that the amount of the Cash Consideration at issue is $74,747.03 (R.50 ¶26, R.60 ¶3); that Plaintiff did not make Defendant a "Designee" to receive her share of the Cash Consideration (R.50 ¶31, R. 56 ¶81, R. 61 ¶5, R. 65 ¶46); that Defendant filed an objection to the distribution of the Cash Consideration to Plaintiff (R.42 ¶34, R. 47 ¶3); and that MLMIC is therefore holding the money in escrow pending the resolution of the within dispute (R.43 ¶36, 50 ¶27).

ARGUMENT

I. PLAINTIFF IS ENTITLED TO THE CASH CONSIDERATION PAID ON ACCOUNT OF HER MLMIC MEMBERSHIP INTEREST, WARRANTING SUMMARY JUDGMENT AS TO HER CAUSE OF ACTION FOR DECLARATORY JUDGMENT

A. As an Eligible Policyholder, Plaintiff is Entitled to the Cash Consideration.

As Policyholder, Plaintiff indisputably was the owner of her Policyholder Membership Interest,[4] and was thus entitled to receive her share of the Cash Consideration. This right is codified in Insurance Law § 7307(e)(3), which provides that when a mutual insurance company converts to a stock insurance company, its plan of conversion shall include:

> "[t]he 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 [to seek approval of the conversion] 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." (Emphasis added).

[4] *See, supra*, Statement of Facts (at I) (MLMIC is owned by its Members, the Policyholders, who hold "Policyholder Membership Interests." The Plan of Conversion defines "Policyholder" as the person listed as the "Insured" under their policy. Here, Plaintiff was the sole Insured under her MLMIC policy and, thus, the owner of her Policyholder Membership Interest).

This requirement of the Insurance Law was incorporated into MLMIC's Plan of Conversion:

- "Eligible Policyholders, or their Designees, will receive Cash Consideration in consideration of the extinguishment of their Policyholder Membership Interest." (R.75 para. 3).

- The Cash Consideration shall be paid to eligible policyholders "in respect of the extinguishment of all Policyholder Membership Interests." (R.76 para. 2).

- "Each Eligible Policyholder (or its Designee) shall receive a cash payment equal to the applicable Conversion Payment." (R.86 ¶8.2).

In its September 6, 2018 Decision, the DFS confirmed the foregoing:

- "A Mutual insurance company is owned by and operated for the benefit of its policyholders. A policyholder's ownership interest in a mutual insurance company is known as a 'membership interest'.... Membership interests ... exist only in connection with a policyholder's ownership of a policy." (R.129 ¶II[B]).

- "[I]nstead of receiving stock in the converted stock company, MLMIC's Eligible Policyholders will receive cash consideration." (R.130 ¶II[B][1]).

In sum, the Insurance Law, the MLMIC Plan of Conversion, and the DFS Decision unequivocally provide that as an Eligible Policyholder, Plaintiff is entitled to receive her share of the Cash Consideration. *See Maple-Gate*, 96 N.Y.S.3d at 841 ("Insurance Law § 7307 does not confer an ownership interest in...the cash consideration to anyone other than the policyholder."). *See also Shoback*, at 4 ("The language of the Plan is clear and unambiguous, and as such must be accorded the

plain meaning of its terms. According to those terms, [the Policyholder] is entitled to the money." [Citation omitted]); *Hinds*, 2019 NY Slip Op 51508(U), ¶¶ 1-2 ("The DFS Decision confirmed...that it is in the Insurance Law 7307 (e)(3) which explicitly defines those policyholders who are eligible to receive the purchase price consideration."); *Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60-62 (2013) ("[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." [Citation omitted.]).

B. The Role of Policy Administrator Does Not Confer a Right to Receive or Share in the Cash Consideration.

Defendant's claimed entitlement to the Cash Consideration rests on the fact that it was Plaintiff's Policy Administrator and, in that capacity, paid her MLMIC insurance premiums (*See, e.g.*, R.49 ¶20, R.53-54 ¶58, R.55, ¶70). It bears emphasis that a Policy Administrator is the "agent" of the Policyholder and is only conferred limited rights respecting the policy—i.e., "for the paying of Premium[s], requesting changes in the policy, ... and for receiving dividends and any return Premiums when due" (R.12 ¶5, R.29; see also R.150 para. 3). None of those limited rights entitled Defendant to the Cash Consideration, as set forth herein.

Moreover, since the Insurance Law, the MLMIC Plan of Conversion, and the DFS Decision make clear that the *Eligible Policyholders* are entitled to the Cash Consideration (*see, supra*), it is axiomatic that a *Policy Administrator* is not, by

virtue of its limited rights as the Policyholder's agent, entitled to receive or share in the Cash Consideration. Indeed, MLMIC repeatedly emphasized that a Policy Administrator may receive Cash Consideration only if the Policyholder expressly designates as such:

- Policyholder Information Statement: "The amount distributable to Eligible Policyholders shall be paid directly to each Eligible Policyholder unless such Eligible Policyholder has affirmatively designated in writing (using a designation form to be provided by MLMIC) a Policy Administrator ...to receive such amount on its behalf ...." (R.169 ¶A.5; *see also* R.170-171 ¶A.12).

- Plan of Conversion: "The amount distributable to each Eligible Policyholder shall be paid directly to such Eligible Policyholder unless such Eligible Policyholder has affirmatively designated a Policy Administrator ... to receive such amount on its behalf, in which case such amount shall be distributed to such Designee." (R.85 ¶6.3[f]).[5]

Notably, MLMIC explained to its constituents that prior Policy Administrator designations did not entitle those Administrators to receive the Cash Consideration. (*See* R.31 [June 2018 MLMIC Notice]: "...current policy administrator designations on file with MLMIC do not extend to the distribution of the cash amounts allocated to eligible policyholders.").[6]

---

[5] It is undisputed that Plaintiff did not sign the Consent Form required by MLMIC to make Defendant a "Designee" for receipt of the Cash Consideration (R.13 ¶9; R.42 ¶33; R.56 ¶ 81).

[6] *See also* "MLMIC Provides Clarification of Ability to Make Assignments of Cash Consideration"; MLMIC Blog, August 7, 2018, accessible at https://www.mlmic.com/blog/dentists/clarification-of-ability-to-make-assignments-of-cash-consideration ("[T]he previous appointments do not extend to the distribution of the cash consideration.").

In short, there is nothing about the status of "Policy Administrator" that confers any right to receive the proceeds of Membership Interests. Clearly, if a Policy Administrator were entitled to the Consideration by reason of its prior designation, the Plan of Conversion would have provided so. It did not – the Plan requires an express designation by the Policyholder. *See Bank of N.Y. v. Janowick,* 470 F.3d 264, 274 (6th Cir. 2006) ("the mutual company's demutualization plan defines…rights [to proceeds]."). *See also Shoback*, p.3. ("The rights to the proceeds of a demutualization of a mutual insurance company are defined by the company's 'Conversion Plan'." [citing *Bank of N.Y.*]); *Maple-Gate*, 96 N.Y.S.3d at 841-42 ("Being designated as the policy administrator did not make the plaintiff a policyholder, did not make the plaintiff a member of MLMIC and did not entitle the plaintiff to the cash consideration." [Emphasis added]).

C. Defendant's Payment of Premiums Did Not Confer a Right to the Cash Consideration.

Defendant's contention that its payment of Plaintiff's premiums entitled it to the Cash Consideration is incorrect for several reasons.

First, as explained above, a Policy Administrator by definition pays the policy premiums; and, despite payment of premiums, the Plan of Conversion (as well as Insurance Law § 7307[e][3] and the DFS Decision) expressly provided that the Consideration was to be paid to Eligible Policyholders, and not to Policy Administrators unless specifically so designated.

Second, Defendant's contention misunderstands the basic structure and operation of a mutual insurance company. It is well-settled that "[t]hose who purchase policies from mutual insurance companies receive both membership interests ... and contract rights." *Bank of New York*, 470 F.3d at 267. Membership interests are acquired "at no cost" as "an incident of the structure of mutual insurance policies." *Dorrance v. U.S.*, 809 F.3d 479, 481 & 485 (9th Cir. 2015). On the other hand, "premium payments go toward the actual cost of the...[contractual] insurance benefits provided," with any surplus returned as premium refunds.[7] *Id.* The foregoing was expressly recognized by the Supreme Court in *Shoback*:

> "Policyholders in a mutual insurance company acquire two separate types of rights - contractual rights and membership rights. The contractual rights are paid for by the premiums, and pay for the cost of the insurance itself. ...
>
> The membership rights are acquired at "no cost", and are in fact, a benefit of being the policyholder, *Dorrance v. United States*, at 485. They do not arise as a result of paying the premiums, but are intrinsic to the owner of the policy, the policyholder." *Shoback*, at 4 (citing *Dorrance*).

The Ninth Circuit Court of Appeals' holding in *Dorrance* (*id.* at 486) is apt:

> "The membership rights were assigned a monetary value at the time of the exchange only as a consequence of the demutualization process. The error of the Dorrances and the district court was to assume that the value received upon demutualization was linked

[7] *See also Dorrance*, 809 F.3d at 487-88 (quoting IRS Revenue Ruling 71-233 ["Payment by each policyholder of the premiums called for by the insurance contracts issued by X represents payment for the cost of insurance and an investment in his contract but not an investment in the assets of X. His proprietary interest in the assets of X arises solely by virtue of the fact that he is a policyholder of X." (Emphasis added)]).

> with some premium value paid by the policyholders in the past. But the stock the Dorrances received in exchange for the membership rights cannot be understood as a partial return on their past premium payments and it is well understood that policyholders do not contribute capital to the companies."

Like in *Dorrance*, Plaintiff's MLMIC premiums were not paid for or allocated to her Policyholder Membership Interest. Thus, Defendant's argument that its payment of premiums entitled it to the Cash Consideration from the extinguishment of Plaintiff's Membership Interest is unavailing. *See Shoback*, at 4 (discussing *Dorrance* and noting that "Defendant's [employer's] argument - that it paid the premiums and as such is entitled to the funds, is unpersuasive."

Third, Defendant's payment of Plaintiff's MLMIC premiums was a contractual obligation under the Employment Agreement, for which Defendant received a bargained-for exchange of consideration: Plaintiff agreed to devote her professional services (and generate revenue) on behalf of Defendant; and, in exchange, Defendant agreed to pay Plaintiff compensation and, among other things, administer and pay the premiums on her MLMIC Policy (R.18 ¶¶3-4, R.24 ¶16).

Defendant does not dispute that it received what it bargained for – Plaintiff's services, and the resulting revenue – and in turn, Plaintiff received, among other things, a MLMIC insurance policy, which included a Membership Interest in MLMIC. Any interest that Defendant alleges to have in Plaintiff's Membership Interest—which was incidental to the MLMIC Policy she obtained under her

Employment Agreement—would need to have been, but was not, provided for in her Employment Agreement. Further, as the *Shoback* court observed:

> "[D]efendant paid the premiums as part of its obligation under the Employment Agreement with plaintiff. She provided services and in return defendant was confident that she was covered (and hence it was covered) in terms of malpractice insurance. This arrangement benefited both parties." *Shoback*, at 4.

Finally, Defendant's argument that it is entitled to the Cash Consideration because it received dividends or premium refunds in its capacity as Policy Administrator (*see, e.g.*, R.52 ¶43) is plainly without merit. Mutual insurance company dividends "bear[] no relation to a dividend upon stock..." (*Menin v. N.Y. Life Ins. Co.*, 188 Misc. 870, 871 [Sup. Ct. N.Y. Cty. 1941]); they are "a partial return" of premiums. *Towne Bus Corp. v. Ins. Co. of Greater N.Y.*, 18 Misc. 3d 1121(A), 2008 NY Slip Op 50149(U), ¶ 4 (Sup. Ct. N.Y. Cty. Jan. 18, 2008); *Dorrance*, 809 F.3d at 481. As explained in detail above, the MLMIC payout represents cash consideration payable to Policyholders in exchange for the extinguishment of their Policyholder Membership Interests. The Consideration is therefore clearly not a dividend/premium refund. *See Dorrance*, 809 F.3d at 486 ("But the stock the Dorrances received in exchange for the membership rights cannot be understood as a partial return on their past premium payments...." [Emphasis added]). *See also Hinds*, 2019 NY Slip Op 51508(U), ¶ 5 ("This cash contribution, by law, is not a return to the hospital of any insurance premiums it paid on behalf of

the defendant, it represents the policyholder's share in MLMIC."); *Maple-Gate*, 96 N.Y.S.3d at 841 ("Unlike a [premium] refund, the cash consideration was clearly intended to be in exchange for the extinguishment of the defendants' membership interest in MLMIC."). As such, Defendant's receipt of dividends/premium refunds is entirely irrelevant to Plaintiff's entitlement to the Cash Consideration.

D. DFS Flatly Rejected That the Payor of Premiums Is Entitled to the Cash Consideration Under the Insurance Law or Plan of Conversion.

At the DFS hearing on the proposed Plan of Conversion, Maple Medical, LLP—a policy administrator that paid its physicians' MLMIC premiums—argued that the payors of the premiums (not the Policyholders) are entitled to the Cash Consideration under Insurance Law § 7307(e)(3) (R.149 para. 3). The DFS flatly rejected Maple Medical's position in the DFS Decision:

> "One commenter referred to the provision in Insurance Law § 7307(e) stating that in calculating each such person's equitable share one must factor in the amount 'such policyholder has properly and timely *paid* to the insurer on insurance policies in effect during the three years immediately preceding...' (emphasis added). The commenter suggested that this means that the person that paid the premium is automatically entitled to the proceeds of the sale. The Superintendent finds that this is **not determinative** because the same provision refers to the 'policyholder,' which might or might not be the person who paid the premiums." (*Id.* [emphasis added]).

Notably, in its Complaint, Defendant relied on the same § 7307(e)(3) excerpt as Maple Medical in support of its claimed entitlement to the Consideration (R.50 ¶28).

Following issuance of the DFS Decision, Maple Medical commenced an Article 78 proceeding (*Matter of Maple Medical LLP, et al. v. New York State Dept. of Fin. Servs., et al.* [Index No. 65929/2018, Sup. Ct. Westchester County]) to challenge the Plan of Conversion's definition of "Policyholder" by way of the DFS Decision. Maple Medical argued that Insurance Law § 7307(e)(3) requires that "policyholders be defined under the conversion plan as the parties who actually paid the premiums and not the doctors who are insured under the policies." (R.216 para. 3). The Westchester County Supreme Court refused to disturb the DFS Decision, holding that DFS had a rational basis for approving the Plan, including its definition of Policyholders (and their entitlement to the Cash Consideration (*id.*). *See also Maple-Gate*, 96 N.Y.S.3d at 842 ("The DFS Decision reiterated that it was the policyholder who was entitled to the cash consideration.").

In sum, while Insurance Law § 7307(e)(3) "sets forth a formula regarding how to calculate the amount of consideration the policyholder would receive…[,] [n]o distinction is made between a policyholder who pays the premium out of his own pocket versus a policyholder whose employer pays the premium as part of an employee compensation package." *Maple-Gate*, 96 N.Y.S.3d at 841 (emphasis added). *See also Hinds*, 2019 NY Slip Op 51508(U), ¶ 4 (quoting *Maple-Gate*). Accordingly, as noted above, the Maple-Gate court concluded that "Insurance Law § 7307 does not confer an ownership interest in the stock or to the cash consideration

to anyone other than the policyholder." *Maple-Gate* at 841 (emphasis added).

E. Plaintiff Did Not Assign Her Membership Interest or Right to the Cash Consideration to Defendant.

As explained above, the payment of premiums does not entitle a Policy Administrator to the Cash Consideration, and the Plan provides that the Consideration is to be paid to the Policyholder unless the Policyholder has expressly designated the Policy Administrator to receive it. See, e.g. *Maple-Gate*, 96 N.Y.S.3d at 841-42 ("Being designated as the policy administrator did not make the plaintiff a policyholder, did not make the plaintiff a member of MLMIC and did not entitle the plaintiff to the cash consideration.").

Accordingly, the Plan's objection and escrow provisions cannot be interpreted to mean an employer could have a valid claim to the Cash Consideration by virtue of its status as Policy Administrator or payment of Premiums. Such a construction would be entirely circular and would eviscerate the plain terms of the Plan. Instead, "[m]ore was required." *Id.* at 842. That "more" was delineated in the DFS Decision:

> "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." (R.149 para. 4).

See also Maple-Gate, 96 N.Y.S.3d at 842 (DFS Decision recognized that Policyholders may have assigned their legal right to the Cash Consideration to

others, and "tied eligibility for the… escrow process to when the policyholder had, in fact, assigned the right to cash consideration….").

Consistent with the foregoing, MLMIC's June 2018 Notice to Policyholders, stated: "If there is a preference to have such distributions paid to a policy administrator as a matter of convenience or *as a result of contractual obligations* between you and your policy administrator, please execute the enclosed consent form…." (R.31 [emphasis added]).

As the *Maple-Gate* court underscored, where there is no signed consent or assignment, "this alone is fatal to the [practice's] claim that it is entitled to the cash consideration." 96 N.Y.S.3d at 842. Here, it is undisputed that Plaintiff did not sign the Consent Form, and there is no allegation—let alone any evidence (there being none)—that Plaintiff agreed to assign to Defendant her Membership Interest or right to the Consideration.

Based on the foregoing, Plaintiff respectfully submits that Defendant's administration of Plaintiff's MLMIC Policy (including payment of premiums on her behalf) did not and does not entitle it to Plaintiff's share of the Cash Consideration. Rather, as the Eligible Policyholder, Plaintiff is entitled to the Consideration from the extinguishment of her MLMIC Membership Interest. Accordingly, the court below erred in granting summary judgment in favor of Defendant rather than in Plaintiff's favor.

II. *SCHAFFER* SHOULD NOT HAVE BEEN FOLLOWED BY THE COURT BELOW, AND INDEED THIS COURT IS NOT BOUND BY AND SHOULD NOT FOLLOW IT.

In *Schaffer*, the First Department—hearing the case in the first instance, on submitted facts, pursuant to CPLR 3222—summarily held in four-sentences that the doctor/policyholder would be unjustly enriched if she received the Cash Consideration. The First Department determined that equity favored the employer without considering or citing the New York Insurance Law, the Plan of Conversion, the DFS Decision, or New York unjust enrichment law, and without providing any reasoning for its conclusions. The *Schaffer* court's failure to cite to the Insurance Law, which expressly provides that mutual insurance companies are owned by their members, the policyholders (§ 1211), and must receive consideration in exchange for their membership interests (§ 7307), is glaring.[8]

Nevertheless, the court below held that it was bound to blindly follow the First Department's Decision in *Schaffer* "until such time as the ... Third Department or the Court of Appeal[s] issues a contrary decision." (R.7). The court below provided no further rationale for its Decision. *Schaffer*, however, was not binding on the court below because it is distinguishable procedurally and factually from this case, conflicts with established Court of Appeals and Third Department unjust enrichment precedent, was based on deficient legal arguments, and relied solely upon inapposite

[8] This is most likely attributable to the fact that neither of the parties in the *Schaffer* case ever cited to or discussed Insurance Law § 7307 in their briefs (*see, infra*, Point II[D]).

ERISA cases to decide a non-ERISA matter governed by state law. Moreover, it is axiomatic that, in any event, the First Department's Decision in *Schaffer* is not binding on this Court.

A. The Unique Procedural Posture and Facts in *Schaffer* Are Distinguishable.

In *Schaffer*, the parties commenced an action under CPLR 3222 and requested that the First Department hear the case and issue a declaratory judgment based solely on stipulated facts. By contrast, the parties here are not operating under the unique procedural posture of CPLR 3222. Moreover, in *Schaffer*, the parties stipulated that the MLMIC policy was issued to the employer (the doctor had been "added onto the professional liability insurance policy issued to Schaffer, Schonholz & Drossman LLP") (R.293 ¶12). Here, it is undisputed that Plaintiff's policy was an individual policy, and Plaintiff was the sole Insured and sole Policyholder under her policy (R.11 ¶4, R.233-236, R.245). This distinguishing fact is significant inasmuch as (a) here, Plaintiff's claims are premised on her being the sole Policyholder, and therefore the sole owner of her MLMIC Membership Interest, and (b) the ERISA cases relied upon by the *Schaffer* court concerned group insurance policies issued to employers, rather than the individual MLMIC policy issued to Plaintiff herein.

B. The Lower Court's (and *Schaffer* Court's) Conclusion That Plaintiff Did Not Bargain for the Consideration Fundamentally Misunderstands That She Bargained for Her MLMIC Policy and Received Her Membership Interest as an Incident Thereto.

Underlying the lower court's Decision (based on *Schaffer*) is the misconception that Plaintiff did not "bargain" for the Cash Consideration. Even putting aside that the employer did not bargain for the Consideration,[9] the above conclusion is fundamentally at odds with the terms of the parties' Employment Agreement, the basic structure and operation of a mutual insurance company, and the corresponding statutory scheme under the Insurance Law.

In accordance with the Employment Agreement, Plaintiff agreed to provide her professional services in exchange for, among other things, Defendant's agreement to provide her with (and pay for) a malpractice policy (R.18 ¶¶3-4, R.24 ¶16). When Defendant selected MLMIC as the insurer, Plaintiff received the rights that came with her MLMIC policy.[10] As explained above (at Points I[A] & [C]), under the Insurance Law, "when the [policyholders], at the [employer's] behest,

---

[9] It is beyond cavil that Defendant did not bargain for Plaintiff's Membership Interest or the proceeds thereof (i.e., the Cash Consideration). As Plaintiff's Policy Administrator, Defendant was entitled to receive dividends/refunded premiums only. The Cash Consideration is not a dividend/premium refund. (*See, supra*, Point I[C]).

[10] The controlling provisions of the Insurance Law (§§ 1211 and 7307) were enacted in 1984. Further, Defendant began paying for Plaintiff's MLMIC policy on June 18, 2007, over six years before the eligibility period began for purposes of MLMIC's conversion (R.223 ¶12, R77). Accordingly, Defendant knew (or should have known)--and cannot claim ignorance--as to the fact that Plaintiff obtained a Policyholder Membership Interest as an incident to becoming a Policyholder, and that upon demutualization, the Policyholders would be entitled to the Cash Consideration under the Insurance Law.

signed up for professional liability policies issued by MLMIC, they acquired certain rights and benefits, including membership in MLMIC." *Maple-Gate*, 96 N.Y.S.3d at 841 (emphasis added). *See also Shoback*, at 4 ("Policyholders in a mutual insurance company acquire two separate types of rights – contractual rights and membership rights."). As also explained above (at Point I[A]), the Insurance Law and Plan of Conversion are clear that when a mutual insurance company converts to a stock insurance company, the policyholders are entitled to the cash consideration paid on account of the extinguishment of their membership interests.

Schaffer (and in turn the lower court) notably ignored these basic concepts by disconnecting the Membership Interest from the MLMIC policy and positing that the employee did not bargain for the inherent rights attendant to becoming a MLMIC policyholder. But in so doing, the *Schaffer* and lower court disregarded (a) that under the Insurance Law, the employee obtained a Membership Interest by virtue of becoming--and when she became--a MLMIC Policyholder, and (b) that the employer's payment of its employee's MLMIC premiums was part of a bargained-for exchange of consideration under the employment agreement.[11]

In sum, the argument that Plaintiff did not "bargain" for the Membership Interest or Cash Consideration is unavailing. Plaintiff bargained for a malpractice policy. When Defendant elected to provide Plaintiff with a MLMIC policy, she

[11] Indeed, the *Schaffer* court did not reference the parties' employment agreement at all.

received the rights of a MLMIC policyholder. Those rights included her Membership Interest for which the Cash Consideration was paid.

C. *Schaffer* Was Not Binding on the Court Below (and Should Not Be Followed by This Court) Because It Conflicts with Established Court of Appeals and Third Department Precedent.

It is axiomatic that a trial court is not required to follow another Appellate Division department's decision where the Court of Appeals or its own department has pronounced a contrary rule of law. *See generally Mountain View Coach Lines, Inc. v. Storms,* 102 A.D.2d 663, 664 (2d Dep't 1984); *Vidal v. Maldonado*, 23 Misc. 3d 186, 213 (Sup. Ct. Bronx Cty. 2008). Here, *Schaffer*'s holding--that the policyholder's receipt of the Cash Consideration would constitute unjust enrichment--was not binding on the court below (and should not be followed by this Court) because it conflicts with established Court of Appeals and Third Department precedent.

It is well-settled that the unjust enrichment "doctrine is a narrow one; it is 'not a catchall cause of action to be used when others fail.'" *E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 455 (2018). An allegation that a party "received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment.... Critical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust." *Goel v.*

Ramachandran, 111 A.D.3d 783, 791 (2d Dept 2013) (internal citations omitted).[12]

The typical unjust enrichment cases are those where defendant received a benefit from plaintiff "'without adequately compensating plaintiff therefor'" (*Smith v. Chase Manhattan Bank, USA, N.A.*, 293 A.D.2d 598, 600 [2d Dep't 2002]), or those "in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." *E.J. Brooks Co.*, 31 N.Y.3d at 455; s*ee also Maple-Gate*, 96 N.Y.S.3d at 841 ("an unjust enrichment claim presupposes that the plaintiff has an ownership interest in the property or benefit it seeks to recover from the defendants."). Neither situation applies here.

First, as explained above, under the Employment Agreement, Plaintiff agreed to devote her professional services to generating revenue for Defendant, in exchange for which Defendant agreed to provide Plaintiff with, among other things, her malpractice policy. Defendant was therefore compensated for, and cannot base an unjust enrichment claim on, its payment of premiums. *See Smith*, 293 A.D.2d at 600 (no unjust enrichment claim where "the benefits received were less than what these purchasers bargained for."); *Fruchthandler v. Green*, 233 A.D.2d 214, 215 (1st Dep't 1996) (dismissing plaintiff's unjust enrichment claim because defendant provided consideration for the benefit plaintiff provided).

[12] *See also Clark v. Daby*, 300 A.D.2d 732, 732 (3d Dep't 2002) ("the mere fact that the plaintiff's activities bestowed a benefit on the defendant is insufficient to establish a cause of action for unjust enrichment").

Second, *Schaffer* (and the court below) failed to explain how Plaintiff's receipt of money rightfully belonging to her under the Insurance Law, Plan of Conversion and DFS Decision is improper or inequitable, or how the Cash Consideration belongs to Defendant (something neither the defendant in *Schaffer* or the Defendant here even allege). *See CDR Creances S.A. v. Euro-Am. Lodging Corp.*, 40 A.D.3d 421, 422 (1st Dep't 2007) ("unjust enrichment cause of action was properly dismissed for failure to identify any improper benefit"); *Clifford R. Gray, Inc. v. LeChase Constr. Servs.*, LLC, 31 A.D.3d 983, 988 (3d Dep't 2006) ("[P]laintiff asserts no facts suggesting that defendant is in possession of money or property belonging to plaintiff."); *A & A Assocs. v. Olympic Plumbing & Heating Corp.*, 306 A.D.2d 296, 297 (2d Dep't 2003) (Plaintiff raised no issue of fact as to whether respondents derived a benefit that belonged to plaintiff, which is necessary for an unjust enrichment claim.). *See also Shoback* at 4-5 ("a 'windfall' does not, per se, render it illicit or unjust. The Court is certainly inclined to agree with the plain language of the Plan and the Insurance Law that in this case, plaintiff, the policyholder should be entitled to receive [the Cash Consideration].").

Moreover, under established Court of Appeals and Third Department precedent, an unjust enrichment claim is precluded where the claim arises out of the subject matter of a written agreement:

> "'[T]he theory of unjust enrichment lies as a quasi-contract claim.' It is an obligation imposed by equity to prevent injustice,

> in the absence of an actual agreement between the parties concerned. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded.'" *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009).[13]

Defendant's unjust enrichment claim is squarely based on having provided Plaintiff with her MLMIC policy and paid her premiums pursuant to the Employment Agreement. However, the Agreement unequivocally defined the parties' rights and obligations as to her policy and the premium payments. Specifically, Plaintiff agreed to provide full-time medical services to Defendant's patients and generate revenue for Defendant; and in return, Defendant agreed to, *inter alia*, provide and pay for her malpractice policy. Moreover, since Defendant agreed to pay Plaintiff's premiums as part of the bargained-for, contractual exchange of consideration, and Plaintiff acquired a Membership Interest as an incident to being a Policyholder, then that Membership Interest was part and parcel of the contractual benefit that Defendant provided in exchange for her services.

The foregoing is also supported by the long-established New York rule of construction that "'unless a contract provides otherwise, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it

---

[13] *See also Catlyn & Derzee, Inc. v. Amedore Land Developers, LLC*, 166 A.D.3d 1137, 1140 (3d Dep't 2018) ("The existence of the valid, enforceable contract governing the subject matter at issue therefore precludes any recovery" for unjust enrichment."); *Carr v. Birnbaum*, 75 A.D.3d 972, 974 (3d Dep't 2010) ("Finally, given the existence of an enforceable agreement regarding the disputed subject matter, plaintiffs are not entitled to recover under a theory of unjust enrichment.").

were expressed or referred to therein.'" *Burns v. Burns*, 163 A.D.3d 210, 213 (4th Dep't 2018) (*quoting Dolman v. United States Tr. Co.*, 2 N.Y.2d 110, 116 [1956]). *See also Kasen v. Morrell*, 6 A.D.2d 816, 817 (2d Dep't 1958) (same). In other words, Defendant's agreement to provide Plaintiff with (and pay for) a malpractice insurance policy must be "interpreted consistently with the corresponding statutory scheme." *Burns*, 163 A.D.3d at 213. That statutory scheme confirms that Plaintiff obtained a Membership Interest when she became, and by virtue of her becoming, a MLMIC Policyholder; and when that Membership Interest was extinguished, she was entitled to the Cash Consideration paid for it. *See* Insurance Law § 1211(a) (a mutual insurance company is owned by its members, and the members are the policyholders) & § 7307[e][3]) (upon demutualization, policyholders are entitled to consideration in exchange for the extinguishment of their membership interests).

In sum, since the Employment Agreement indisputably governed Defendant's payment of premiums, its unjust enrichment claim based on those same payments fails as a matter of law. *See IDT Corp.*, 12 N.Y.3d at 142 (dismissal of unjust enrichment claim was warranted because plaintiff's payment of the fees at issue "arose from services governed by an engagement letter"); *Maldonado v. DiBre*, 140 A.D.3d 1501, 1507 (3d Dep't 2016) ("Finally, inasmuch as this dispute involves the application and interpretation of [the parties'] written agreement[], Supreme Court properly dismissed Defendants' unjust enrichment claim.").

D. Only Limited Arguments Were Presented to the First Department in the *Schaffer* Case.

Even assuming *arguendo* that *Schaffer* did not conflict with the above controlling precedent, *Schaffer* would still not have been binding precedent on the court below.

It is well-settled that "a case 'is precedent only as to those questions presented, considered and squarely decided.'" *Wellbilt Equip. Corp. v. Fireman*, 275 A.D.2d 162, 168 (1st Dep't 2000) (emphasis added); *Williams v. AGK Commc'ns, Inc.*, 143 Misc. 2d 845, 848 (Sup. Ct. Onondaga Cty. 1989).[14] In *Schaffer*, the parties' Briefs presented extremely deficient arguments that, among other things, lacked any citation to the controlling statute and case law, and omitted documentary evidence (*e.g.*, DFS Decision)—thereby eviscerating any precedential value of the decision.

Specifically, petitioner-employer's opening Brief (a) was entirely devoid of any reference to the controlling statute governing demutualization (Insurance Law § 7307[e][3]), the MLMIC Plan of Conversion, or the DFS Decision, (b) failed to cite any New York case law as to the employer's alleged entitlement to the Cash Consideration, and (c) did not argue—let alone use the words—unjust enrichment (R.305-322). Instead, the employer selectively quoted inapposite ERISA cases (which involved questions of Federal law unique to ERISA employee benefit plans)

[14] *See also Goddard v. Martino*, 40 Misc. 3d 1050, 1057 (Sup. Ct. Dutchess Cty. 2013).

to support its conclusory argument that it was entitled to the Cash Consideration based on its payment of the doctor's MLMIC premiums (*id.*).

In opposition, the doctor simply argued that she was entitled to the Consideration because she was the named Policyholder, (a) without explaining *why* under the Insurance Law, the Plan of Conversion, the DFS Decision, and New York law, (b) without citing § 7307(e)(3) or any New York case law, and (c) without referencing unjust enrichment (R.324-336). On reply, the employer impermissibly argued unjust enrichment for the first time and, in support thereof, cited (a) non-binding arbitration decisions,[15] (b) dicta from a Connecticut case concerning only the question of arbitrability under the parties' contract,[16] (c) inapposite ERISA cases, and (d) one distinguishable First Department case[17] (R.338-355).

Based on the above limited briefing, and relying solely upon two ERISA cases,[18] the First Department issued a Decision that, *in four sentences*, summarily

---

[15] *See New York Cent. Mut. Fire Ins. Co. v. 563 Grand Med., P.C.*, 4 Misc. 3d 1020(A), 2004 NY Slip Op 50979(U) at ¶ 3, n.2 (Sup. Ct. Otsego Cty. 2004) ("These [arbitration] decisions have no precedential value as they are not determinations of law, and because an arbitrator is not bound by substantive law or rules of evidence.").

[16] *Town of N. Haven v. N. Haven Educ. Ass'n*, 2004 Conn. Super. LEXIS 15 (Conn. Super. Ct. Jan. 5, 2004).

[17] *Castellotti v. Free* (138 A.D.3d 198 [1st Dep't 2016]) (a) was an appeal of a motion to dismiss (and thus did not reach the merits of the unjust enrichment claim), (b) involved an alleged oral agreement that failed under the statute of frauds (as opposed to the controlling Employment Agreement at issue herein), and did not involve the unjust enrichment arguments made by Plaintiff below (or herein).

[18] *See, infra*, Point II(E).

held that the doctor would be unjustly enriched by receiving the Cash Consideration. *Schaffer*, 171 A.D.3d 465. Again, the First Department cited no New York Insurance Law, made no reference to the Plan of Conversion or the DFS Decision, relied upon no New York unjust enrichment law, and provided no reasoning for its conclusion. *Id.* Significantly, "a precedent is less binding if [like *Schaffer*] it is little more than an ipse dixit, a conclusory assertion of result, perhaps supported by no more than generalized platitudes." *People v. Hobson*, 39 N.Y.2d 479, 490 (1976).

In short, it is beyond cavil that the issues raised below (and herein)—including that Insurance Law § 7307(e)(3), the Plan of Conversion and the DFS Decision warrant a declaratory judgment in Plaintiff's favor; that MLMIC premiums were not paid for, or allocated to, the Membership Interests, but rather were paid for as part of the contractual exchange of consideration between the parties; and that Defendant's contractual obligation to pay Plaintiff's premiums as part of their exchange of consideration precludes Defendant's unjust enrichment claim—were "neither briefed nor presented to the [First Department] for adjudication," nor were they "squarely decided." *Wellbilt Equip. Corp.*, 275 A.D.2d at 168. *See also Goddard*, 40 Misc. 3d at 1057 ("There is no indication that this issue was ever presented to or considered by the Third Department, and it was certainly never

squarely decided.").[19] As such, *Schaffer* was not binding precedent on the court below and, likewise, should have no precedential value on this appeal.

E. The ERISA Cases Cited in *Schaffer* Are Plainly Inapposite.

The two ERISA cases cited in *Schaffer*—(i) *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.* (903 F.2d 1232 [9th Cir. 1990]) ("*Ruocco*"); and (ii) *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Brotherhood. of Teamsters* (2005 U.S. Dist. LEXIS 42877 [N.D. Ill. Mar. 4, 2005]) ("*Chi. Truck*")—are plainly inapposite because neither involved a state law unjust enrichment claim.[20]

Instead, both *Ruocco* and *Chi. Truck* concerned whether demutualization proceeds were ERISA "plan assets"—a question clearly not involved here. Whether the proceeds were "plan assets" was material because ERISA plan assets generally cannot "inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries...." 29 U.S.C. § 1103(c)(1). Ultimately, the *Ruocco* and *Chi. Truck* courts determined whether the demutualization proceeds were plan assets (and if so, to whom they were entitled) by looking to the applicable Department of Labor ("**DOL**") ERISA

---

[19] *See also Rodriguez v. City of N.Y.*, 31 N.Y.3d 312, 321-22 (2018) ("Thoma never addressed the precise question" at bar; "[t]he decision itself never considered the import of article 14-A....").

[20] Indeed, ERISA would have preempted a state law unjust enrichment claim. *See* 29 U.S.C. § 1132(a)(3) [ERISA § 502(a)(3)]; *Cleghorn v. Blue Shield*, 408 F.3d 1222, 1225 (9th Cir. 2005).

advisory opinions,[21] ERISA statutes,[22] and any contracts or legal instrument related to the ERISA plans.

Significantly, neither *Ruocco* nor *Chi. Truck* references any plan-related contracts or documentation that provided guidance as to the distribution of the demutualization proceeds. By contrast, in the instant case, the Plan of Conversion and the DFS Decision, as well as Insurance Law §§ 1211(a) and 7307(e)(3), expressly provide that (a) the Policyholders are the owners of their Membership Interests, and (b) absent a designation or assignment to the Policy Administrator (neither of which occurred here), the Policyholders are entitled to the Cash Consideration paid on account of the extinguishment of their Membership Interests. *See RLJCS Enters. v. Prof'l Benefit Trust, Inc.*, 438 F. Supp. 2d 903, 912 (Dist. Ct. N.D. Ill. 2006) (declining to "balance the equities" as in *Ruocco* because "in the instant case, there was a contract that governed the administration of the Trust, and that contract stated that the Trust, not the plaintiffs, owned the policies.").

Simply put, the foregoing demonstrates that the facts and legal issues in *Ruocco* and *Chi. Truck* bear no resemblance to those here. ERISA is not implicated

---

[21] *Ruocco* pre-dated the applicable ERISA advisory opinions (cited in *Chi. Truck*), and it appears that neither the ERISA statutes, nor any plan-related documents, provided any direction as to the distribution of demutualization funds. As such, the court resorted to balancing the equities. In *Chi. Truck*, however, the court was guided by the DOL ERISA advisory opinions. 2005 U.S. Dist. LEXIS 42877 at ¶¶ 8-10, 20-21.

[22] In *Chi. Truck*, the demutualization funds were considered plan assets of the In-House Pension Plan, but the funds reverted to the employer pursuant to ERISA's residual asset rule (29 U.S.C. § 1344[d]).

in the instant case; thus, the determinations in *Ruocco* and *Chi. Truck* as to ERISA plan assets are neither relevant nor persuasive. Rather, it is Insurance Law § 7307(e)(3), the Plan of Conversion, the DFS Decision, established New York unjust enrichment law, and the employment agreement that govern. Moreover, as opposed to *Ruocco* and *Chi. Truck*, the Plan of Conversion (and § 7307 and the DFS Decision) provided that absent a designation or assignment in favor of the Policy Administrator, the Cash Consideration was to be distributed to Policyholders. (*See, supra*, Point I[E]). Accordingly, *Schaffer*'s reliance on the above ERISA cases was misplaced.

In sum, Plaintiff respectfully submits that *Schaffer* was not binding on, and should not have been followed by, the lower court—and should not be followed by this Court. At best, *Schaffer* is an "'errant footprint barely hardened overnight'" which the Court should avoid treating "'as an inescapable mold for future travel.'" *People v. Gonzales*, 96 A.D.2d 847, 848 (2d Dep't 1983) (quoting *Hobson*, 39 N.Y.2d at 488).

III. THE NEW YORK COURTS THAT HAVE SUBSTANTIVELY ANALYZED THE CONTROLLING STATUTORY AUTHORITY AND DOCUMENTARY EVIDENCE SUPPORT PLAINTIFF'S POSITION.

It bears emphasis that the New York courts that have substantively analyzed the controlling statutory and documentary authority, together with the basic structure and operation of mutual insurance companies and controlling unjust enrichment

law—all as described herein—support Plaintiff's position here. Specifically, in *Maple-Gate Anesthesiologists, P.C. v. Nasrin* (96 N.Y.S.3d 837 [Sup. Ct. Erie Cty. 2019]), the Erie County Supreme Court ardently dismissed the complaint of a medical practice that claimed it was entitled to the Cash Consideration based on its payment of premiums. In so doing, the *Maple-Gate* court, among other things, (a) confirmed that "Insurance Law § 7307 does not confer an ownership interest ... to the cash consideration to anyone other than the policyholder," (b) stressed that unlike a premium refund (to which the practice had been entitled to as Policy Administrator), "the cash consideration was clearly intended to be in exchange for the extinguishment of the defendants' membership interest in MLMIC," and (c) held that "[b]eing designated as the policy administrator did not make the plaintiff [employer] a policyholder, did not make the plaintiff a member of MLMIC and did not entitle the plaintiff to the cash consideration." 96 N.Y.S.3d at 841-42.

In *Columbia Mem'l Hosp. v. Hinds* (2019 NY Slip Op 51508(U), ¶¶ 1-2 [Sup. Ct. Columbia Cty. 2019]), the court affirmed that Insurance Law § 7307(e)(3) "repeatedly refers to those eligible for cash consideration as the 'policyholder," and that the statute makes no distinction "'between a policyholder who pays the premium out of his own pocket versus a policyholder whose employer pays the premium as part of an employee compensation package.'" *Id.*, ¶ 4 (quoting *Maple-Gate*). Rejecting the argument that the policyholder did not bargain for the Cash

Consideration, the court explained:

> "In all likelihood neither party appreciated that a windfall could occur as a result of the MLMIC sale, because, quite simply, they did not appreciate the meaning and the value of an ownership stake prior to the demutualization plan. It cannot therefore be said that this cash contribution was negotiated or bargained for, but is simply rather an operation of law, and therefore no one's interest in the actual contract was compromised. This cash contribution, by law, is not a return to the hospital of any insurance premiums it paid on behalf of the defendant, it represents the policyholder's share in MLMIC." *Id.*, ¶ 5 (citations omitted).

Moreover, the *Columbia Mem'l Hosp.* court acknowledged *Schaffer* and the doctrine of stare decisis, but held that *Schaffer* was distinguishable based on the specific facts stipulated to therein. The court emphasized that, "it is equally well established that courts are free to correct prior erroneous interpretations of the law," such as *Schaffer*. 2019 NY Slip Op 51508(U), ¶¶5-6 (citing *In re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 518-19 [1985]).

Finally, in *Shoback v. Broome Obstetrics and Gynecology, P.C.* (Index No. EFCA2018003334, at 4 [Sup. Ct. Broome Cty. 2019]) (see Addendum A hereto), the court confirmed that "[t]he language of the Plan is clear and unambiguous, and as such must be accorded the plain meaning of its terms"—namely that "plaintiff is entitled to the money." In short, the *Shoback* court held that "Defendant's argument - that it paid the premiums and as such is entitled to the funds, is unpersuasive." The court further explained:

> "Here, the defendant paid the premiums as part of its obligation under the Employment Agreement with plaintiff. She provided services and in return defendant was confident that she was covered (and hence it was covered) in terms of malpractice insurance. This arrangement benefitted both parties. ... The bottom line is that the cash consideration that is generated as a result of demutualization is a 'windfall', or 'a pot of money no one expected or even envisioned.' Here, it was a result of a restructuring of a mutual insurance company into a stock company. However, negative connotations aside, the fact that this is a 'windfall' does not, per se, render it illicit or unjust. The court is certainly inclined to agree with the plain language of the Plan and the Insurance Law that in this case, plaintiff, the policyholder should be entitled to receive it." *Shoback*, at 4-5.[23]

Although the *Maple-Gate*, *Columbia Mem'l Hosp.* and *Shoback* decisions, like *Schaffer*, are not binding on this Court, they support the Court's reversal of the lower court's Judgment, and grant of declaratory judgment in Plaintiff's favor.

IV. DEFENDANT'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES SHOULD HAVE BEEN DISMISSED AS A MATTER OF LAW.

Defendant's counterclaims and defenses are premised on the erroneous contention that, having provided and paid for Plaintiff's policy, Defendant is entitled to Plaintiff's share of the Cash Consideration. However, as thoroughly explained above, Defendant's counterclaims and defenses are directly contrary to the Employment Agreement, the Insurance Law, the MLMIC Plan of Conversion, the DFS Decision, the basic concept of a mutual insurance company, federal court case

[23] Ultimately, the *Shoback* court held that as a trial court, it was bound to "a higher court's existing precedent 'even though [it] may disagree.'" Shoback, at 5.

law regarding demutualization, and New York common law, all of which support Plaintiff's claim to the funds.

Notably, while Defendant's Answer (R.47-58) contained four counterclaims and numerous affirmative defenses, Defendant's opposition to Plaintiff's motion raised only its First Counterclaim seeking declaratory judgment, and its Second Counterclaim and eighth affirmative defense asserting unjust enrichment.[24]

As explained above, Defendant's theory of unjust enrichment is without merit, and Plaintiff, not Defendant, is entitled to a declaratory judgment. Defendant did not raise its other counterclaims and defenses in opposition to Plaintiff's motion, and therefore abandoned them. *See NY Commercial Bank v. J. Realty F Rockaway, Ltd.*, 108 A.D.3d 756, 757 (2d Dep't 2013) ("the defendants never raised that affirmative defense in their opposition papers [to summary judgment] and, thus, by their failure to do so, waived it."); *Trifera, LLC v. Kachris*, 2018 NY Slip Op 51973[U], *2 (Sup. Ct. Albany Cty. 2018) (declining to address affirmative defenses not raised in opposition to motion for summary judgment).

[24] *See* Defendant's Notice of Cross Motion seeking summary judgment "on its First Counterclaims for Declaratory Judgment" (R.219-220), and Attorney Affidavit in opposition to Plaintiff's motion and support of Defendant's cross-motion (R.286 ¶ 25) ("Here, [Defendant's] Verified Answer with Counterclaims seeks declaratory judgment that it is entitled to the cash proceeds....").

CONCLUSION

Based upon the foregoing, and on the Record herein, Plaintiff-Appellant respectfully requests that this Court reverse the Decision of the Court below in its entirety and grant declaratory judgment in her favor.

Dated: October 23, 2019
Albany, New York

NOLAN HELLER KAUFFMAN LLP

By: _____

Justin A. Heller, Esq.
Brendan J. Carosi, Esq.
Attorneys for Plaintiff-Appellant
80 State Street, 11th Floor
Albany, New York 12207
(518) 449-3300

PRINTING SPECIFICATIONS STATEMENT PURSUANT TO COURT RULE 1250.8 (j)

Brief prepared on:	Computer
Font Spacing:	Proportionally Spaced
Typeface:	Times New Roman
Point Size - Footnotes:	12 point
Point Size – Remainder:	14 point
Line Spacing Block Quotes and Footnotes:	Single-spaced
Line Spacing Remainder:	Double-spaced

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 authorities, proof of service, printing specifications statement, and/or any authorized addendum containing statutes, rules, regulations, etc. is 10058.

ADDENDUM "A"

At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, Binghamton, New York on the 28th day of June, 2019.

PRESENT: HON. MOLLY REYNOLDS FITZGERALD
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

JENNIFER M. SHOBACK, CNM, f/k/a JENNIFER M. DAVIDSON, CNM,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: EFCA2018003334

BROOME OBSTETRICS AND GYNECOLOGY, P.C,

Defendant.

This declaratory action asks the court to answer the question: When a mutual liability insurance company demutualizes, who is entitled to the distribution payment - the employer, who has paid the premiums, or the employee who is the policyholder?

FACTS

Plaintiff, Jennifer Shoback, was employed by defendant, Broome Obstetrics, as a certified nurse midwife from July, 2015 - August, 2017. Her employment was pursuant to an Employment Agreement which provided the employer would maintain, at its expense, a policy of liability insurance on plaintiff's behalf.

Defendant provided a policy through Medical Liability Mutual Insurance Company,

then a mutual insurance company. Plaintiff was the policyholder and, so as to enable it to make the premium payments, named defendant as her policy administrator. There is no dispute that defendant made all premium payments.

In 2016 MLMIC applied to the New York State Department of Financial Services to file a Plan to convert from a mutual insurance company, a company owned by the policy holders, to a stock insurance company. Such a conversion must comply with the mandates of Insurance Law § 7307, which provides at the time of demutualization, the eligible policyholders of said company shall receive either a cash consideration and/or stock in exchange for the extinguishment of their equitable share of the company.

In this case, the mandates of § 7307 were assimilated into MLMIC's "Conversion Plan". Under New York Insurance Law, such a conversion is allowable only if the policy holders receive consideration for their equitable share. Here, MLMIC chose cash as the consideration. The total amount paid to MLMIC policy holders for the extinguishment of their membership interests would total $2.502 billion. In the case at bar, the disputed cash consideration is $49,273.59.

Plaintiff contends that the policy was provided to plaintiff as compensation for her services and that the cash consideration in question is a result of the extinguishment of a membership interest in the company. As the owner of the policy, and thus the membership interest, the cash consideration should come to her. Defendant argues that since it paid all the premiums on the policy, equity demands it receive the money and that plaintiff will be unjustly enriched if the funds go to her.

Plaintiff has moved for summary judgment, seeking an order from the court declaring that she is entitled to the demutualization distribution funds. In support of her

motion, plaintiff has submitted an attorney's affidavit with attachments, plaintiff's affidavit with attachments, including, inter alia, her employment agreement with defendant, and a memorandum of law in support of her motion. Defendant opposes the motion arguing that it is premature, and that plaintiff has failed to make a prima facie showing of entitlement to summary judgment. In support of its opposition, defendant has filed an attorney's affidavit with attachments including the affidavit of Marybeth Vanderpoole, Practice Manager of Broome Obstetrics and Gynecology, P.C., and a memorandum of law.

LEGAL ANALYSIS

The rights to the proceeds of a demutualization of a mutual insurance company are defined by the company's "Conversion Plan", *Bank of New York v Janowick*, 470 F3d 264, 274 (2012). The Plan in this case was approved by the New York State Department of Financial Services on September 6, 2018 and approved by the policyholders on September 14, 2018. It provided that the policyholders "or their designees" would receive cash for the extinguishment of their membership interests. The plan defines Policyholder as "the Person(s) identified on the declarations page of such Policy as the insured", and Eligible Policyholders as those *policyholders* that had a policy in effect between July 15, 2013 through July 14, 2016. It defines Policy Administrator as the person designated on the declarations page to administer the policy on behalf of the policyholder, and Designees as those 'Policy Administrators...*to the extent designated by the Eligible Policyholders* to receive the portion of the Cash Consideration allocated to such Eligible Policyholder'(emphasis added).

It is undisputed that plaintiff was the insured named on the declarations page, and as such the policyholder; and defendant was the policy administrator. To date, despite

repeated requests from defendant, plaintiff has not named defendant her designee.

The language of the Plan is clear and unambiguous, and as such must be accorded the plain meaning of its terms, *Goldman v Emerald Green Prop. Owner's Assn., Inc.*, 116 AD3d 1279 , 1280 (2014). According to those terms, plaintiff is entitled to the money.

Defendant's argument - that it paid the premiums and as such is entitled to the funds, is unpersuasive. Policyholders in a mutual insurance company acquire two separate types of rights - contractual rights and membership rights. The contractual rights are paid for by the premiums, and pay for the cost of the insurance itself. "The premiums paid covered the rights under the insurance contract, not any membership rights...premium payments go toward the actual cost of the insurance benefits provided", *Dorrance v U. S.*, 809 F3d 479, 485[1].

Here, the defendant paid the premiums as part of its obligation under the Employment Agreement with plaintiff. She provided services and in return defendant was confident that she was covered (and hence it was covered) in terms of malpractice insurance. This arrangement benefitted both parties.

The membership rights are acquired at "no cost", and are in fact, a benefit of being the policyholder, *Dorrance v United States*, at 485. They do not arise as a result of paying the premiums, but are intrinsic to the owner of the policy, the policyholder.

The bottom line is that the cash consideration that is generated as a result of demutualization is a "windfall", or "a pot of money no one expected or even envisioned", *Dorrance* at 486. Here, it was a result of a restructuring of a mutual insurance company

---

[1] Defendant argues that Dorrance is not relevant as it is a tax case. While the facts may differ from the case at bar, the legal import of the case lies in its analysis of the demutualization process.

into a stock company. However, negative connotations aside, the fact that this is a "windfall" does not, per se, render it illicit or unjust. The court is certainly inclined to agree with the plain language of the Plan and the Insurance Law that in this case, plaintiff, the policyholder should be entitled to receive it.

However, all of the foregoing is academic in light of *Matter of Schaffer, Schonholz & Drossman, LLP v Title,* 171 AD3d 465, an April, 2019 decision out of the 1st Department. The case involved the very issue before this court (in fact involving the same demutualization of MLMIC), who is entitled to the cash consideration. The Appellate Division found that the medical practice - the entity that had paid the premiums - was entitled to receive the funds and that any other result would unjustly enrich the individual practitioner. Despite a thorough search, the court has not discovered any third department cases that have ruled on this issue. "Where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals", *D'Alessandro v. Carro,* 123 AD3d 1, 6 (2014); *Tzolis v. Wolff,* 39 AD3d 138, 142 (2007); *Mountain View Coach Lines v Storms,* 102 AD2d 663, 664 (1984).

State trial courts must follow a higher court's existing precedent "even though they may disagree", *People v Rivera,* 5 NY3d 61 (2005).

Thus plaintiff's motion for summary judgment is denied. This constitutes the Decision and Order of the Court

Dated: September 10, 2019

HON. MOLLY REYNOLDS FITZGERALD
SUPREME COURT JUSTICE

cc: Justin A. Heller, Esq.
Jared R. Mack, Esq.
Judith E. Osburn, Broome County Chief Court Clerk

FILED
SEP 12 2019
BROOME COUNTY CLERK