

2010

Mellor v. Wasatch Crest Mutual Insurance : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

In re: WASATCH CREST INSURANCE
COMPANY IN LIQUIDATION,

Respondent and Appellee.

* * * * *

CHRIS ANN MELLOR, individually and as
guardian of HAYDEN WILLIAMS,

Plaintiff and Appellant,

vs.

WASATCH CREST MUTUAL INSURANCE
and WASATCH CREST INSURANCE,

Defendants and Appellees.

**ANSWER BRIEF OF APPELLEE
WASATCH CREST INSURANCE
COMPANY IN LIQUIDATION**

Case No. 20100952-SC

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IN LIQUIDATION**

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PARTIES TO THE PROCEEDING

The following parties to this proceeding are also parties in this appeal:

1. **Chris Ann Mellor Williams**, in her capacity as birth parent and guardian for Hayden Williams (deceased); and
2. **Wasatch Crest Insurance Company in Liquidation.**

The following party to this proceeding is not a party in this appeal:

3. **Wasatch Crest Insurance Company.**

The following are parties to this proceeding solely by virtue of the administrative consolidation of two liquidation proceedings, but they have no interest in this appeal:

4. **Wasatch Crest Mutual Insurance Company; and**
5. **Wasatch Crest Mutual Insurance Company in Liquidation.**

The following is not a party to this appeal, but was part of the proceedings that resulted in the first decision by this Court in this case, Mellor v. Wasatch Crest Mut. Ins. Co., 2009 UT 5, ¶ 20, 201 P.3d 1004:

6. **The Utah Life and Health Insurance Guaranty Association.**

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Lennard W. Stillman (the Liquidator), in his capacity as the court-appointed Special Deputy Liquidator of Respondent and Appellee Wasatch Crest Insurance Company in Liquidation (the Liquidation Estate or WCICIL), respectfully submits this brief in response to the Opening Brief of Appellant Chris Ann Mellor (Mellor).

JURISDICTIONAL STATEMENT

Mellor asserts this Court's jurisdiction under UTAH CODE ANN. § 78A-3-102(3)(j) (2002) and UTAH R. APP. P. 4(a). Opening Brief (OB) at 4. She ignores the jurisdictional issues raised in the Liquidation Estate's Motion to Dismiss Appeal and supporting Memorandum of Points and Authorities, filed on January 21, 2011.

By Order entered on March 30, 2011, the Court deferred ruling on the motion for summary dismissal until plenary presentation on the merits. The Court further ruled that, as to the arguments concerning jurisdiction, "the parties may choose to rest on the pleadings they have submitted or may address the matter as they see fit in briefing and/or at argument." The Liquidation Estate relies on the arguments stated in its Motion to Dismiss Appeal and below.

ISSUES PRESENTED FOR REVIEW

1. Does this Court lack jurisdiction to decide Mellor's appeal because the November 1, 2010 district court order denying Mellor's summary judgment motion and reaffirming the stay entered in the Liquidation Order is not a final and

appealable judgment and there is no basis for Mellor to pursue an interlocutory appeal?

2. Assuming jurisdiction, *arguendo*, is Mellor's present attempt to challenge the Liquidator's June 29, 2010 denial of her claim barred because she failed to file an objection to that determination within sixty days, as required by Section 31A-27-332(1)(b)(i) of the Insurers Rehabilitation and Liquidation Act, UTAH CODE ANN. §§ 31A-27-101 – 31A-27-342 (2002, repealed 2007) (the Liquidation Act)?¹

3. Assuming jurisdiction and ignoring Mellor's failure to timely object to the June 29, 2010 denial of her claim, did the Liquidator correctly conclude that Mellor was fully indemnified by Medicaid and is therefore excluded from Class Three under UTAH CODE ANN. § 31A-27-335(2)(c)(iii) (2000, repealed 2007)?

¹ In 2007 the legislature repealed the Liquidation Act and enacted the Insurer Receivership Act, UTAH CODE ANN. §§ 31A-27a-101 – 31A-27a-902 (2007). The newer Receivership Act is not applicable to "a delinquency proceeding ongoing on April 30, 2007." *Id.* at § 31A-27a-119. Therefore, the older Liquidation Act applies to this proceeding, which was pending as of April 30, 2007.

STATEMENT OF THE CASE

A. Nature of the Case.

This appeal arises out of the liquidation of Wasatch Crest Insurance Company (Wasatch Crest) under the Liquidation Act. On June 29, 2010, the Liquidator issued a notice of determination denying Mellor's claim against the estate in liquidation. Mellor did not file any objection to that determination in the district court. Instead, Mellor appealed to this Court from a district court order that denied a summary judgment motion Mellor had filed before the Liquidator's determination of her claim.

The Liquidation Act sets forth precise and mandatory procedures for claims against the liquidation estate. The Act does not permit a claimant like Mellor to pursue a claim through a "summary judgment" motion, and it requires a claimant to file a timely objection to the liquidator's claim determination. The statute is unambiguous regarding the effect of a failure to file a timely objection – the Liquidator's determination becomes final. In addition, Utah law limits this Court's jurisdiction to final orders. Finally, the Liquidation Act is clear that claims subject to indemnification from other sources are excluded from Class Three payment priority. Because Medicaid has already fully paid for the medical services covered by Mellor's claim – and Mellor neither paid nor owes money for those services –

the Liquidator correctly determined that Mellor does not have a Class Three claim for losses incurred under a Wasatch Crest policy.

In this appeal, Mellor asks the Court to ignore its lack of jurisdiction, her failure to comply with the Liquidation Act's mandatory procedural requirements, and the Act's unambiguous classification provisions.

B. Course of Proceedings and Disposition Below.

Mellor's Fourth District Lawsuit. In March 2003, about five months before the Utah Insurance Commissioner placed Wasatch Crest into liquidation, Mellor filed suit against Wasatch Crest and other defendants in *Mellor v. Wasatch Crest Mutual Insurance Co.*, Civil No. 030401281 (4th Jud. Dist.) (the Fourth District Lawsuit). R. 3614-3684.² In the Fourth District Lawsuit, Mellor asserted tort and contract claims against Wasatch Crest based on Wasatch Crest's termination of coverage and failure to pay for medical services provided to her minor son, Hayden Williams, after a near-drowning accident on August 4, 2001. *Id.*

² Among the additional defendants in the Fourth District Lawsuit was Wasatch Crest Mutual Insurance Company (Mutual), which is a separate entity that never provided coverage to Mellor. Mutual was separately placed into liquidation on July 31, 2003, in Civil No. 030915528 (3d Jud. Dist., Timothy R. Hanson, J.), R. 1-12, and an Amended Order of Liquidation with a Finding of Insolvency was entered on August 11, 2003. R. 100-01. On July 31, 2003, the separate liquidation proceedings against Wasatch Crest and Mutual were consolidated for administrative purposes only. R. 82-83.

The liquidation proceeding. On July 11, 2003, the Utah Insurance Commissioner filed a petition to place Wasatch Crest into liquidation (Liquidation Petition). *See* R. 143-144. On July 31, 2003, Wasatch Crest was placed into liquidation as WCICIL, in Civil No. 030915528 (3d Jud. Dist., Timothy R. Hanson, J.) (the Liquidation Order). R. 143-154. The Liquidation Order stayed all pending proceedings against Wasatch Crest under UTAH CODE ANN. § 31A-27-317 (2002, repealed 2007). The Order also directed all pending and prospective claims against Wasatch Crest to be presented as claims against the Liquidation Estate, as required by the Liquidation Act. R. 153, ¶ 18. On August 11, 2003, an Amended Order of Liquidation was entered with a Finding of Insolvency. R. 155-156.

On November 5, 2003, Mellor filed a Proof of Claim against the Liquidation Estate for payment of the policy benefits she had sought against Wasatch Crest in the Fourth District Lawsuit. R. 5583-5584. The Fourth District Lawsuit remained stayed until February 5, 2007, when it was dismissed without prejudice based on Mellor's counsel's statement that "the liquidation action of Wasatch Crest must be addressed in the Third District, where the liquidation was filed." Docket Sheet, Fourth District Lawsuit, provided as Attachment A to this brief.³

³ This Court may take judicial notice of the docket in the Fourth District Lawsuit. *See, e.g., Billings v. Toscano*, 2010 UT App 389 (unpublished), 2010 WL 5550456 at *1 n.5.

The Initial and Amended Notices of Determination. On October 12, 2005, the Liquidator issued a Notice of Determination (Initial NOD), which denied Mellor's claim based on the Liquidator's belief that the claim was being administered by the Utah Life and Health Insurance Guaranty Association (ULHIGA). R. 4610. Mellor filed a timely objection to the Initial NOD. R. 3023-3025. On December 19, 2005, the Liquidator issued an Amended Notice of Determination (Amended NOD), which denied Mellor's claim on the merits. R. 3043. The Liquidator concluded that Hayden "was not eligible for coverage under a Wasatch Crest Insurance Company policy due to his being eligible for Medicaid as of August 1, 2001[.]" and due to the Wasatch Crest coverage having "terminated on July 31, 2001." *Id.* Because both the Wasatch Crest termination date and the Medicaid start date preceded August 4, 2001, the date of Hayden's accident, the Liquidator concluded that the Liquidation Estate could not be liable for Wasatch Crest's failure to pay Hayden's medical benefits.

On February 14, 2006, Mellor objected to the Amended NOD. R. 3128-3351. The denial of coverage in the Amended NOD was submitted to a court-appointed referee who agreed with the Liquidator on August 2, 2006. R. 3957-3962. On August 18, 2006, Mellor objected to the Referee's Findings of Fact and Recommendation. R. 4497-4610. On August 6, 2007, the district court approved the Referee's Findings of Fact and Recommendation. R. 4939-4942.

The first appeal. Mellor appealed the district court’s decision to this Court. R. 4963-4964. In a decision filed January 27, 2009, the Court concluded that “the terms of the Wasatch Crest plan did not operate to terminate Hayden’s coverage as a matter of law when Hayden became eligible for Medicaid coverage.” *Mellor v. Wasatch Crest Mut. Ins. Co.*, 2009 UT 5, ¶ 20, 201 P.3d 1004 (*Mellor I*). See also *id.* at ¶¶ 11-21. However, the Court did not order payment of the claim, nor did it address either the priority (class) or amount of the claim – issues that neither the Liquidator nor the district court had reached (in light of their determinations of non-coverage). Also holding that Mellor has standing to bring a claim in the liquidation proceeding on behalf of her minor son, the Court ultimately permitted Mellor to “pursue an action for recovery of benefits owing to Hayden under the plan.” *Id.* at ¶ 21.

Mellor’s summary judgment motion. This appeal concerns events that occurred after the first appeal. In *Mellor I*, by allowing Mellor to “pursue . . . benefits,” the Court implicitly ordered the Liquidator to reconsider Mellor’s claim. Under the Liquidation Act, the statutory proof of claim process is the exclusive means to prosecute a claim against the Liquidation Estate. Consequently, only the Liquidator could determine in the first instance whether Mellor’s claim would be allowed, and if so, how the claim should be classified. However, in January 2010, before the Liquidator had issued a new determination, Mellor filed papers in the

liquidation proceeding styled as a “motion for summary judgment.” Mellor sought an order requiring the Liquidation Estate to reimburse Medicaid for expenses Medicaid had paid from August 1, 2001 through July 31, 2003. R. 5143-5325.

The Liquidator moved to dismiss the “summary judgment motion” as an improper filing in a liquidation proceeding. The Liquidator’s filings explained that under the Liquidation Act, there is no “complaint,” “answer,” or provision for summary judgment motions to be filed in the district court. Rather, the statutory claim process is the exclusive avenue for prosecution of claims against a liquidation estate under the Liquidation Act. R. 5565-5567, 5642-5645.

Alternatively, the Liquidator moved to stay the summary judgment motion until he could issue an amended determination of the claim. R. 5564-5565, 5644-45. In the further alternative, the Liquidator argued against summary judgment on the merits for two reasons. *First*, because Medicaid had paid all of Hayden’s bills, Medicaid is the real party in interest. As a non-policyholder, Medicaid could not assert a claim under the Wasatch Crest policy. *Second*, even assuming that Mellor had the claim, it could not be a Class Three claim as her summary judgment motion assumed, because Medicaid had fully indemnified Mellor for all her losses by paying for all of Hayden’s medical care. At best, the Liquidator contended, Mellor might have a Class Six claim. R. 5576-5580, 5642-5650.

The Second Amended Notice of Determination. On June 29, 2010, while Mellor's summary judgment motion was pending, the Liquidator issued his Second Amended Notice of Determination (Second Amended NOD). R. 5653. The Liquidator again denied Mellor's claim on the merits, concluding that she had suffered no unreimbursed loss under UTAH CODE ANN. § 31A-27-335(2)(c)(iii) (2000, repealed 2007) (defining Class Three claims), because she had been fully indemnified by a third party, Medicaid.

The district court's order. On November 1, 2010, the district court issued the order from which Mellor purports to currently appeal. R. 5702-5708. In *dicta*, the court addressed the merits of the parties' respective arguments, concluding that Mellor is a Class Six, not Class Three, claimant because Medicaid paid for Hayden's medical expenses. R. 5707-5708. Ultimately, the court denied Mellor's summary judgment motion and reaffirmed the stay entered in the Liquidation Order. R. 5708. This appeal followed. R. 5714-5715.

C. Statement of Facts.

In addition to the procedural events outlined above, the following facts are pertinent to determination of this appeal.

On August 4, 2001, when Hayden's accident occurred, he was insured under a Wasatch Crest policy provided to Hayden's father through his employment, which Hayden's father elected to continue after his termination from employment,

under the federal Consolidated Omnibus Budget Reconciliation Act of 1985.

R. 5049, ¶ 2. Wasatch Crest accepted premium payments on that policy through November 7, 2001. *Mellor I*, 2009 UT 5, ¶ 2.

Mellor applied for Medicaid coverage for Hayden two weeks after the accident. *Id.*, ¶ 3. When Medicaid approved the application in September 2001, it backdated Hayden's effective coverage date to August 1, 2001, to ensure Medicaid coverage for Hayden's past and future medical expenses arising from the accident. *Id.*

Wasatch Crest continued to pay for Hayden's medical expenses until November 2001, when it asserted that its coverage ended once the Medicaid coverage began on August 1, 2001. *Id.*, ¶ 4. Wasatch Crest asked Hayden's providers to return amounts paid to them by Wasatch Crest and to instead obtain Medicaid's payment for those services. *Id.* Most of the providers complied with that request. *Id.*

The Utah State Office of Recovery Services (ORS) is the state agency charged with the responsibility to administer Utah's Medicaid program. On October 3, 2002, ORS entered into a Collection Agreement with Mellor. R. 4644-4647. The Collection Agreement authorized Mellor to include in her civil case against Wasatch Crest – the not-yet-filed Fourth District Lawsuit – a claim by ORS for reimbursement of Medicaid amounts paid to Hayden. R. 4644.

On September 7, 2006, ORS filed a Notice of Representation of Medicaid Claim (Notice of Representation) in the WCICIL liquidation proceeding. R. 4641-4647. The Notice of Representation asserted that the Collection Agreement allowed ORS's claim for reimbursement of Medicaid benefits to be included in Mellor's claim against the Liquidation Estate. R. 4641. The Liquidator's September 13, 2006 Response to the Notice of Representation expressly advised Mellor, Medicaid, and the ORS that "the ORS has not filed a claim in the liquidation estate as is required of any claimant or third party who seeks payment from the insolvent estate, and does not have a direct claim against the estate." R. 4661; *see also* R. 4662-4663.

Neither ORS nor Medicaid ever filed a claim on its own behalf in the liquidation proceeding.

For the Court's prior summary of most of these facts in *Mellor I*, *see* 2009 UT 5, ¶¶ 2-4.

SUMMARY OF ARGUMENT

The common thread in this case is Mellor's disregard for the controlling Utah statutes, rules, and case law:

1. Under clear court rules and well-established case law, this Court lacks appellate jurisdiction over the district court's non-final Memorandum Decision and Order. An order denying a motion for summary judgment and confirming the

existence of a stay is not a final judgment. Mellor agrees that there is no legal authority for filing this appeal on an interlocutory basis. The Court should reject her argument, unsupported by law, that she may leap-frog the procedures mandated under the Liquidation Act, because waiting to appeal until she has a final judgment “would simply waste time and resources.”

2. Under the unambiguous language of the Liquidation Act, UTAH CODE ANN. § 31A-27-332(1) (2002, repealed 2007), Mellor was required to object to the Liquidator’s denial of her claim within sixty days of the Second Amended NOD. She failed to do so. As a consequence, (a) the Second Amended NOD became final on August 29, 2010, the sixty-first day after the Liquidator’s determination; (b) the district court and this Court lack authority to review that determination on its merits; and (c) Mellor is permanently foreclosed from attacking that determination. This Court should therefore reject all of Mellor’s arguments challenging the Second Amended NOD.

3. Under another unambiguous provision of the Liquidation Act, UTAH CODE ANN. §§ 31A-27-335(2)(c)(iii) (2000, repealed 2007), Mellor’s claim is excluded from Class Three because Medicaid has indemnified her in full for her loss. Mellor’s attempts to evade the statute’s plain language lack merit. Mellor’s claim is not a claim under a Wasatch Crest policy because she had no coverage as of the date the liquidation took effect and she had no filed-but-unresolved claims

for benefits as of that date. Mellor's coverage had ended and Wasatch Crest had rejected her claims almost two years earlier; therefore, her claim against the Liquidation Estate arose exclusively out of her inchoate claims in the Fourth District Lawsuit, which are non-policyholder creditor claims and fall outside the scope of Class Three. Nor is Mellor prosecuting a claim of a governmental entity under a Wasatch Crest policy – neither ORS nor Medicaid filed a proof of claim against the Liquidation Estate. Finally, the indemnification exclusion from Class Three is unambiguous and plainly applies here because Medicaid paid all of Hayden's medical expenses. The Liquidation Act expressly prohibits Mellor's equitable arguments against application of the indemnification exclusion in this case, and the equities do not favor Mellor. It is fair, and consistent with the purposes underlying the Liquidation Act, to exclude from Class Three the claim of a fully-indemnified former policyholder, so that more assets of the Liquidation Estate are available to compensate policyholders and competing creditor claimants as of the liquidation date.

In truth, no inequities flow from the Second Amended NOD, denying Mellor's claim. Mellor is not out-of-pocket one cent – she owes nothing to Hayden's medical providers. Hayden's medical providers have all been paid. Medicaid chose not to protect its interest in reimbursement by filing a claim against the Liquidation Estate. The true real party in interest appears to be

Mellor’s attorneys, whose contingent attorneys’ fees will be paid based on the amount Mellor recovers on her claim, and who seek to circumvent the statutory distribution schedule. On the other side of the equation, the Liquidator has a fiduciary duty to determine and pay competing claims in accordance with the Liquidation Act. In this case, the claim was denied for failure to satisfy the Act’s substantive and procedural requirements. On these facts, even if the purported “equities” were relevant – they are not – the Liquidator reached the fair and correct determination.

ARGUMENT

I. STANDARDS OF REVIEW AND PRESERVATION OF ERROR.

Mellor has not complied with Utah Rule of Appellate Procedure 24(a)(5), which requires an appellant’s brief to state for each issue “the standard of appellate review with supporting authority,” and either “citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court.” Based on Mellor’s failure to meet these requirements, this Court would be justified in “declin[ing] to address any of [her] arguments.” *MacKay v. Hardy*, 973 P.2d 941, 947 (Utah 1998). *See also* UTAH R. APP. P. 24(k) (“Briefs which are not in compliance may be disregarded or stricken[.]”); *Beehive Tel. Co. v. Public Serv. Comm’n of Utah*, 2004 UT 18, ¶¶ 12-16, 89 P.3d 131 (“Compliance [with the Rules of Appellate

Procedure concerning briefing] is mandatory and failure to conform to these requirements may carry serious consequences.”).

This Court’s determination of its own jurisdiction, including whether a district court decision is final, is a question of law. *Anderson v. Wilshire Investments, L.L.C.*, 2005 UT 59, ¶ 7, 123 P.3d 393. “[M]atters of statutory construction are questions of law that are reviewed for correctness.” *Hill v. Estate of Allred*, 2009 UT 28, ¶ 36, 216 P.3d 929 (citations and internal quotation marks omitted).

II. THIS COURT LACKS APPELLATE JURISDICTION BECAUSE THE ORDER ON APPEAL IS NOT A FINAL JUDGMENT.

On January 21, 2011, the Liquidation Estate filed its Motion to Dismiss Appeal for lack of appellate jurisdiction. On March 31, 2011, after briefing, this Court entered its Order deferring the jurisdictional dispute until plenary presentation on the merits. The Liquidation Estate incorporates in this brief all arguments made in its January 21, 2011 Memorandum of Points and Authorities in support of dismissal.

A. Under Bedrock Law, the November 1, 2010 Order Is Not a Final Judgment.

With the exception of certain interlocutory appeals (which Mellor does not purport to pursue here), this Court’s jurisdiction is limited to appeals from final orders and judgments. *Bradbury v. Valencia*, 2000 UT 50, ¶ 9, 5 P.3d 649. The

Court has “strictly adhered to [the final judgment] rule because limiting appeals to final judgments preserves scarce judicial resources . . . [and] also maintains ‘the proper relationship between this Court and the trial courts.’” *Powell v. Cannon*, 2008 UT 19, ¶ 12, 179 P.3d 799 (citing, *inter alia*, *Loffredo v. Holt*, 2001 UT 97, ¶ 11, 37 P.3d 1070; *Bradbury*, 2000 UT 50, ¶ 11).

The district court’s November 1, 2010 Order from which Mellor appeals is not final for two independent reasons. *First*, the order confirms a stay, which is not a final judgment. The district court’s separate ruling related to the priority of Mellor’s claim is *dictum* because it was not essential to the dispositive ruling that Mellor’s claim is stayed. *Second*, even if the order could possibly be read as denying Mellor’s summary judgment motion on its merits, an order denying summary judgment is not a final judgment.

An order confirming a stay “neither end[s] the controversy between the litigants nor dispose[s] of the subject matter of the litigation.” *Powell*, 2008 UT 19, ¶ 18 (dismissing appeal from an order compelling arbitration and staying litigation, based on lack of appellate jurisdiction); *Cade v. Zions First Nat’l Bank*, 956 P.2d 1073, 1080 (Utah App. 1998). Here, the November 1, 2010 order did not end the controversy between Mellor and the Liquidator. Nor did it decide Mellor’s claim on the merits. The district court held only that Mellor’s claim against the

Liquidation Estate must be pursued in accordance with the Liquidation Act.

R. 5708. Thus, the order was not a final judgment.

An order denying summary judgment is “strictly a pretrial order,” *Switzerland Cheese Ass’n, Inc. v. E. Horne’s Market, Inc.*, 385 U.S. 23, 25 (1966), not a final order. *See also Denison v. Crown Toyota Motors, Inc.*, 571 P.2d 1359, 1360 (Utah 1977) (dismissing appeal from denial of summary judgment “because it is not a final order”). The November 1, 2010 order denied Mellor’s (procedurally improper) summary judgment motion because the Liquidation Order and Act precluded consideration of her claim except as part of the liquidation proceeding, R. 5708, *i.e.*, after Mellor filed a timely objection to the Liquidator’s Second Amended NOD. As an order that merely denied summary judgment, it is not a final and appealable judgment.

Although the district court discussed some of the issues raised in Mellor’s summary judgment motion, those comments were *dicta* because they were “not essential to the resolution of the issue in the case.” *Consolidation Coal Co. v. Emery Cty.*, 702 P.2d 121, 125 (Utah 1985). This Court does not have jurisdiction to review *dicta*. *Salt Lake Cty. Comm’n v. Salt Lake Cty. Atty.*, 1999 UT 73, ¶ 25 n.9, 985 P.2d 899 (“Because the trial court’s hypothetical discussion is *dicta* and of no precedential value, we have no occasion to pass on its legal correctness.”).

B. Mellor's Finality Arguments Lack Merit.

The Liquidator presented the above-cited authority and more in his January 21, 2011 Memorandum of Points and Authorities in support of dismissal, which he incorporates into this brief. In response, Mellor did not challenge any of the finality principles discussed above, nor did she offer any legal authority to support her premature appeal. Instead, Mellor argued that the November 1, 2010 order is a final judgment because the district court's *dicta* resolves the ultimate issue in this case, namely, the correct classification of Mellor's claim, and "[t]here is simply nothing left for the district court to decide." See Memorandum of Points and Authorities in Opposition to Motion to Dismiss Appeal, at 5 (March 25, 2011) (Mellor's Points and Authorities).

The November 1, 2010 order made clear that the district court was *not* finally determining Mellor's claim against the Liquidation Estate. The court noted the issuance of the Second Amended NOD and Mellor's "option of challenging the latest Notice of Determination" within the liquidation proceeding.⁴ R. 5706. And the court made clear that it was not issuing a decision on the merits of Mellor's claim but, instead, merely "grant[ed] WCICIL's Motion to Stay because when the Court declared Wasatch Crest insolvent, it stayed further proceedings in the

⁴ In fact, though not mentioned in the order, by that time Mellor had failed to timely object to the Second Amended NOD. See *infra* at 21-26.

underlying lawsuit.” R. 5708. Accordingly, contrary to Mellor’s characterization of the November 1, 2010 order, it did not fully resolve Mellor’s claim.

Mellor offered a second justification for her premature appeal: that she grew tired of waiting for issuance of the Second Amended NOD after *Mellor I*, and her impatience somehow imbued this Court with jurisdiction. *See* Mellor’s Points and Authorities at 3 (asserting that Mellor sought summary judgment because “[a]t no time[after *Mellor I*] did the Liquidator put in place a time frame or process to promptly and fairly resolve Mellor’s claim”). But that response is a non-sequitur because it attempts to justify only Mellor’s procedurally improper *summary judgment motion*, not her premature *appeal*.

Equally important, Mellor errs in assuming that the Liquidator was dragging his feet on her claim after remand. To the contrary, he was working to resolve important issues – classification and amount of Mellor’s claim – that were not addressed in the Amended NOD. Significantly, he learned new information once the claim was remanded – that is, Medicaid had paid all of Hayden’s medical expenses. R. 5146, ¶ 17, 5577. Upon remand, the Liquidator devoted time and energy to confirming the extent of Medicaid’s indemnification and to settlement

discussions with Mellor’s counsel. *See, e.g.*, Exs. A-C to Affidavit of Brian S, King (March 25, 2011) (King Aff.), attached to Mellor’s Points and Authorities.⁵

Even if Mellor’s frustration with the speed of redetermination after remand were legitimate – which it is not – there is no “impatience” exception to the final judgment doctrine. Mellor has posited that the Liquidator was “unreasonable” in asserting that Mellor needed to follow the Liquidation Act’s procedures. Mellor’s Points and Authorities at 8. She argues that the Liquidator’s supposedly unreasonable conduct “should excuse any procedural irregularities” in her premature appeal. *Id.* But that is not the law.

Mellor seems to believe that she may simply do whatever she thinks is most efficient in the circumstances, without regard to the procedures mandated in the Liquidation Act or the law that generally limits this Court’s jurisdiction to review of final judgments. This Court should correct her misimpression by dismissing this premature appeal based on lack of appellate jurisdiction.

⁵ In arguing for appellate jurisdiction, Mellor and her counsel have confused the separate identities of the Liquidation Estate and the ULHIGA. *See* King Aff. at ¶¶ 2-10. ULHIGA is an association authorized by statute to protect persons against failure in the performance of contractual obligation under a life, accident or health insurance policy. UTAH CODE ANN. §§ 31A-28-102 (2001). With respect to the Liquidation Estate, ULHIGA is only a creditor. *Id.*, § 31A-28-114(3)(a). It is not authorized to act on behalf of WCICIL or its Liquidator. Mellor’s counsel also mistakenly believes that WCICIL and/or the Liquidator are governed by a “board”. King Aff. at ¶¶ 7-8. The Liquidator is a court-appointed officer of the district court and there is no governing board.

III. MELLOR MAY NOT CHALLENGE THE LIQUIDATOR’S DENIAL OF HER CLAIM BECAUSE SHE FAILED TO FILE THE REQUIRED OBJECTION TO THE SECOND AMENDED NOD.

UTAH CODE ANN. § 31A-27-332(1) (2002, repealed 2007) provides in full:

(1)(a) When a claim is disallowed in whole or in part by the liquidator, written notice of the determination and of the right to object shall be given promptly to the claimant or the claimant's attorney of record, if any, by first-class mail at the addresses shown in the proof of claim.

(b)(i) Within 60 days from the mailing of the notice required by Subsection (1)(a), the claimant may file objections with the court.

(ii) *If objections are not filed within the period provided in Subsection (1)(b)(i), the claimant may not further object to the determination.*

(Emphasis added.) The statute explicitly requires a claimant to object to a liquidator’s disallowance of a claim, by filing an objection with the district court within 60 days from the date the liquidator mailed the notice of determination. Subsection 1(b)(ii) unambiguously states that a claimant’s failure to file an objection with the district court within that 60-day period precludes the claimant from “further object[ing] to the determination.” These provisions, read together, are mandatory: a failure to timely object precludes the claimant from challenging the determination.⁶

⁶ The Liquidation Act does not permit the district court to extend the 60-day deadline for filing objections. *Compare In re General Determination of Rights to*

In this case, the Liquidator served his Second Amended NOD, denying Mellor's claim, on June 29, 2010. R. 5653. The Second Amended NOD expressly advised Mellor of the objection requirement, the sixty-day deadline for filing her objection, and the consequences of a failure to do so:

If you disagree with the Liquidator's determination of your claim either in full or in part you have the right to object to the determination of your claim. *To object to the determination you must file a written objection* carrying the heading, In Re Wasatch Crest Insurance Company in Liquidation, Judge Toomey, Civil Case No. 030915527, Third Judicial District Court, 450 South Street, Salt Lake City, Utah 84111, **within sixty days from the date of this notice**. You must also send a copy of the objection to the Liquidator at the address on this letterhead. *If you fail to file a written objection with the Court and with the Liquidator, within the specified time, you will have waived your right to object and the Liquidator's determination will stand and you will have no further right of appeal.*

Id. (bolded text in original; italics added).⁷

the Use of Water, 2004 UT 106, ¶¶ 33-39, 110 P.3d 666 (construing UTAH CODE ANN. § 73-4-10 (1989) as permitting a retroactive extension of time for filing objections to the state engineer's proposed determination of water rights in a general adjudication, but only because that statute expressly permits the district court to extend the deadline for objections).

⁷ Although the claimant's and her attorney's actual knowledge has no bearing on the statutory requirement of a timely objection, it is worth noting that Mellor and her counsel undeniably did understand the requirement to file a timely objection under the Liquidation Act. Mellor followed that procedure in 2006, after the earlier determination of her claim. R. 4497-4610.

Accordingly, under the Liquidation Act, Mellor was required to file an objection in the district court before August 28, 2010. She did not comply with the statute. To this day, Mellor has not filed an objection to the Second Amended NOD. The result of that failure, under the statute and as expressly confirmed in Second Amended NOD, is that “the Liquidator’s determination . . . stand[s]” and Mellor “ha[s] no further right of appeal.” R. 5653. *See* UTAH CODE ANN. § 31A-27-332(1)(b)(2) (2002, repealed 2007). In other words, the Second Amended NOD is a final decision, which Mellor may not challenge.

The district court’s October 29, 2010 order does not address the consequences of Mellor’s failure to object to the Second Amended NOD. Instead, it notes in passing that Mellor had not had an opportunity to object to that determination. R. 5706. That statement is incorrect. Mellor had the entire 60 days provided by statute to file an objection to the Second Amended NOD, but she failed to do so.

Mellor’s statement that the Second Amended NOD “was never formally served on Mellor or her counsel,” OB at 13, ¶ 46, is also inaccurate. The Liquidation Estate attached the Second Amended NOD to its reply brief supporting dismissal of Mellor’s summary judgment motion, which was served by first class mail on Mellor’s attorney of record, and thus on Mellor herself, as required by the statute. R. 5651.

Appellate courts are not limited to the district court's bases for decision. Rather, this Court may rule "based on any legal ground or theory apparent on the record." *Berry v. Greater Park City Co.*, 2007 UT 87, ¶ 31, 171 P.3d 442 (quoting *State v. Robison*, 2006 UT 65, ¶ 19, 147 P.3d 448, and *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158) (internal quotation marks omitted). Here, if the Court exercises jurisdiction over this appeal, it should hold that Mellor may not pursue her current attacks on the Second Amended NOD because she did not file a timely objection with the district court. Statutory requirements for judicial review must be followed. Litigants may not use collateral procedures to evade statutory prerequisites to district and appellate court jurisdiction.

For example, in *Commercial Security Bank v. Phillips*, 655 P.2d 678 (Utah 1982), a circuit court denied the plaintiff banks' request for contractual interest rates on certain judgments. Instead of filing an appeal from that inferior court decision to the district court, as required by Utah statutes and the Utah Constitution, plaintiffs petitioned for mandamus in the district court. The district court reached the issue on the merits and ruled against the banks. This Court affirmed, but on the distinct basis that "mandamus is not available as a substitute for an appeal[,]" and, therefore, "plaintiffs did not have the option of substituting the extraordinary remedy of mandamus" for the remedy of an appeal. *Id.* at 680 (footnote omitted). *See also, e.g., Webster v. Jones*, 587 P.2d 528, 530 (Utah

1978) (a criminal defendant’s failure to appeal his conviction to the district court presented an “insuperable obstacle” to his later *habeas corpus* petition: “When he failed to [appeal from the judgment and sentence], *they should be considered to be at rest* and not subject to what would be in effect a belated appeal by the use of habeas corpus proceeding.”) (emphasis added and footnote omitted)⁸; *Lucero v. Kennard*, 2004 UT App 94, ¶¶ 10-12, 89 P.3d 175 (a criminal defendant who “chose not to appeal his plea or conviction to the district court for a trial de novo,” and instead filed a petition for post-conviction relief, “[v]oluntarily eschew[ed] the opportunity” to constitutionally challenge his conviction, and the district court lacked jurisdiction and should have summarily dismissed the petition), *aff’d*, 2005 UT 79, 125 P.3d 917.

Like the appellants in the foregoing cases, Mellor “voluntarily eschewed” the remedy provided in the Liquidation Act. She chose not to file an objection to the Second Amended NOD within the statutory time limit of sixty days. As in the cited cases, once the sixty days passed, the Liquidator’s determination became final and “should be considered to be at rest.” Mellor may not bypass the

⁸ In *Webster*, the Court nevertheless reviewed the judgment because the petitioner challenged his conviction as violating “basic constitutional rights” and the writ of *habeas corpus* “may be used in certain exigent circumstances,” including where “there has been such unfairness or failure to accord due process of law that it would be wholly unconscionable not to re-examine the conviction.” 587 P.2d at 530. No comparable circumstances exist here.

Liquidation Act's mandatory procedures by challenging the Second Amended NOD in the context of this appeal from the district court's denial of her procedurally improper summary judgment motion. This Court should rule that the Second Amended NOD is a final decision that Mellor may not challenge.

IV. MELLOR'S CLAIM IS NOT A CLASS THREE CLAIM.

The overriding purpose of the Liquidation Act is to mitigate losses to policyholders, creditors, and the public when an insurer is impaired or insolvent. *See* UTAH CODE ANN. §§ 31A-27-307(1), -307(3) (1999, repealed 2007). The Act allocates the limited assets of an insolvent insurer among various "classes" of claimants by establishing a priority of distribution. *Id.*, § 31A-27-335 (2000, repealed 2007). To effectuate the statutory purpose of avoiding or, at least, mitigating creditors' losses, "[e]very claim in each class of claims" must be paid in full "before the members of the next class receive any payment." *Id.* § 31A-27-335(1)(a). Mellor's appeal tries to circumvent this rule, in order to leap-frog the statutory classification schedule and obtain Class Three payment on what is, at best, a Class Six claim.

The Liquidation Act assigns the highest priority to Class One and Class Two claims, for, respectively, administrative expenses approved by the liquidator and administrative expenses of guaranty associations. *Id.*, § 31A-27-335(2)(a)-(b). The next priority is assigned to policyholders, as Class Three claimants. Class

Four is reserved for “claims of the federal government not included in Class 3,” *i.e.*, taxes, assessments, and other federal claims that are not for losses under policies. *Id.*, § 31A-27-335(2)(d). Class Five is limited to certain debts due employees for services performed. *Id.*, § 31A-27-335(2)(e). Claims of “any person, including claims of state or local governments,” which do not fit into another class, fall into Class Six. *Id.*, § 31A-27-335(2)(f)(i)(A).⁹

Class Three claims are defined as “all claims *under policies* for losses incurred,” *id.*, § 31A-27-335(2)(c)(1) (emphasis added), including the following:

- (A) claims of the federal, state, or local government;
- (B) third party claims;
- (C) claims for unearned premiums; and
- (D) claims of a guaranty association, other than those included in class two, including claims for payment of covered claims or covered obligations of the insurer.

Id., § 31A-27-335(2)(c)(i)(A)-(D). However, the same section of the Liquidation Act expressly excludes from Class Three any claim for loss for which the claimant has been indemnified: “That portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant are [*sic*] not included in this class[.]” *Id.*, § 31A-27-335(2)(c)(iii).

⁹ Classes Seven and Eight are not relevant to Mellor’s claim.

The policy underlying Section 31A-27-335(2)(c), which defines Class Three claims, is to make sure that unresolved claims for benefits, on file with the insolvent insurer at the time of liquidation, receive the highest priority in the distribution scheme, exclusive of administrative expenses. Those current policyholders, who have paid premiums and have an abiding expectation of coverage, are given preference in payment over other creditors. However, if a third party has paid the policyholder's loss claim, the insured is no longer exposed to losses and the statutory policy of protecting policyholders before other creditors is fulfilled – hence, the exclusion of “[t]hat portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant.” UTAH CODE ANN. § 31A-27-335(2)(c)(iii) (2000, repealed 2007). That exclusion furthers the Liquidation Act's basic policy of protecting policyholders and creditors from loss, by preserving funds for the Liquidator to distribute to other claimants – with no adverse effect on the indemnified claimant. The policyholder's indemnitor is entitled to make a Class Six claim against the liquidation estate, along with other general creditors.

In this case, following *Mellor I*, the Liquidator determined that the exclusion for indemnified losses applies to Mellor's claim because Medicaid had paid all her medical expenses: “The basis for the Denial is included in the attached Reply Memorandum, the essence of which is that the Claimant has been indemnified by a

third party and thus has suffered no unreimbursed loss ((see 31A-27-335(2)(c)(iii)).” R. 5653. *See also* R. 5649 (Reply Memorandum: “Because Medicaid paid Mellor’s medical bills, that loss is expressly excluded from Class Three.”). In *dicta*, the district court agreed with that reasoning. R. 5707-5708.

Mellor makes three arguments against the Liquidator’s Second Amended NOD. Initially, she obliquely asserts that her claim is filed under her terminated Wasatch Crest policy. She then contends that her claim is a “claim[] of the federal, state, or local government” under UTAH CODE ANN. § 31A-27-335(2)(c)(i)(A) (2000, repealed 2007). Finally, though she cannot contest the fact of indemnification, she argues that Class Three’s exclusion of claims for indemnified losses does not apply here for various equitable reasons.

If the Court exercises jurisdiction and also does not rule against Mellor based on her failure to have filed an objection to the Second Amended NOD, the Court should reject all of Mellor’s arguments on the merits of the classification of her claim. *First*, the Liquidation Act clearly states that Class Three is for “claims under policies for losses incurred,” but Mellor does not have a claim under a Wasatch Crest policy because no policy was in force as of July 31, 2003, when the liquidation took effect. *Second*, Mellor’s claim is not a governmental claim since only she, and not the federal Medicaid program or the Utah ORS, filed a claim and alleges a loss incurred under a Wasatch Crest policy. *Third*, even if Mellor is

assumed to present a policy claim, the exclusion of indemnified claims from Class Three plainly applies in this case; the Liquidation Act expressly precludes Mellor's equitable arguments, and none of them is valid in any event. As a result, Mellor's claim is, at best, a Class Six claim under the Liquidation Act.

A. The Claim Is Not a Claim Under a Wasatch Crest Policy Under Section 31A-27-335(2)(c)(ii).

Mellor states that her “claims against the Liquidator are claims on the Wasatch Crest insurance policy,” OB at 16, and she appears to assume that **therefore**, she has a Class Three claim for losses incurred “under [a] life and health and insurance . . . polic[y],” under UTAH CODE ANN. § 31A-27-335(2)(c)(ii) (2000, repealed 2007). We say “appears to assume” because her brief makes no argument as to why her claim falls under Section § 31A-27-335(2)(c)(ii), failing even to cite that subsection. The absence of any record or legal authority for this apparent position would justify the Court's disregard of this argument, UTAH R. APP. P. 24(k), but the Liquidation Estate addresses it nonetheless.

Mellor is confused in equating her current claim against the Liquidation Estate with “claims on the Wasatch policy.” OB at 16. The Wasatch Crest policy was terminated as of August 1, 2001, a fact that Mellor admits. R. 5146, ¶ 12. Consistent with that termination, Wasatch Crest returned Mellor's premium payments for Hayden's coverage for the period from August 1, 2001 through October 31, 2001. R. 4500, 4602. Accordingly, on July 31, 2003, when the

Liquidation Order was entered and the Liquidator was appointed, Mellor was not insured under her prior, but terminated, Wasatch Crest policy, and she had no legal right to file a claim under that policy.

Mellor appears to assume that the appointment of the Liquidator somehow revived or reinstated her terminated policy, such that she could assert a claim under that policy years after its termination. She is mistaken. Under the Liquidation Order, “[a]ll rights and liabilities of WC Insurance, and its creditors, policyholders, . . . and all other persons” were “fixed as of July 11, 2003 [the date the Liquidation Petition was filed].” R. 149, ¶ 6. The Liquidator is required to assess the insurer’s assets and claims as of the date the Liquidation Petition was filed, and not before that date. He is required to handle then-existing claims as of the date of the Liquidation Order, not from the perspective of what should or should not have been done by the company before the filing of the Liquidation Petition. His job is not to rectify pre-liquidation decisions by Wasatch Crest.

This is not to say that Mellor could not pursue a claim against the Liquidation Estate. She could do so because in March 2003, about five months before entry of the Liquidation Order, she had filed civil claims against Wasatch Crest, seeking payment of benefits under the previously terminated Wasatch Crest policy. That lawsuit is the reason Mellor may now assert a claim against the Liquidation Estate. But that lawsuit is an inchoate claim based on pre-liquidation

Wasatch Crest’s alleged *breach of* its terminated policy – not a claim *under* that terminated policy. Therefore, Mellor’s claim is not a Class Three claim, since such a claim is limited to “claims under policies for losses incurred,” under Section 31A-27-335(2)(c)(i). *See also* UTAH CODE ANN. § 31A-27-335(2)(c)(ii) (2000, repealed 2007) (“treat[ing] as loss claims” “[a]ll claims under life and health insurance . . . policies”).

B. The Claim Is Not a Governmental Claim Under Section 31A-27-335(2)(c)(i)(A).

The Liquidation Act further defines Class Three claims as “all claims under policies for losses incurred including . . . claims of the federal, state, or local government.” UTAH CODE ANN. § 31A-27-335(2)(c)(i)(A) (2000, repealed 2007). Mellor argues that “both she and ORS asserted claims against Wasatch Crest for losses incurred.” OB at 14. She characterizes her claim as “Mellor’s *and* ORS’s claim,” OB at 16, 17 (emphasis added), and she states that “ORS’s claim” is “part of the claim Mellor is pursuing.” *Id.* at 18. *See also id.* at 19 (“[ORS]. . . is asserting through Mellor a claim for a loss under the Wasatch Crest policy.”); 20 (“Mellor and ORS have presented claims to the Liquidator for losses incurred by them . . .”).

These statements in Mellor’s opening brief are wrong. To this day, neither ORS nor Medicaid has filed a proof of claim, as required by the Liquidation Act, with respect to the Medicaid benefits paid to Mellor. *See* UTAH CODE ANN.

§§ 31A-27-328(1) (1999, repealed 2007) & 31A-27-329 (1985, repealed 2007).

Only Mellor has asserted a claim.

Mellor mistakenly relies on the October 3, 2002 Collection Agreement between herself and ORS as establishing that ORS has asserted a claim against the Liquidation Estate. *See* OB at 18. However, the Collection Agreement is just an assignment agreement, in which Mellor agreed to assign to ORS any amounts *she* might collect through *her* claim.

Significantly, the Collection Agreement identified only Wasatch Crest, and not WCICIL, as the “Potential Liable Third Party(s).” R. 4644. Thus, it assigned only amounts that Mellor might recover in the Fourth District Lawsuit that Mellor would later file against Wasatch Crest, not in the proceeding against the Liquidation Estate. As this Court held in *Mellor I*, under the Collection Agreement, ORS is “an assignee of [Mellor’s] rights of recovery,” 2009 UT 5, ¶ 4, but not a claimant itself:

The Collection Agreement does nothing more than place a lien in favor of ORS on any reimbursement for medical expenses that may be recovered from *Wasatch Crest*. Thus, beyond its function of routing any potential recovery, the Collection Agreement has no relevance to the case before us.

Id., ¶ 10 (emphasis added).

Even if the Court were to construe the Collection Agreement as extending beyond the Fourth District Lawsuit to Mellor’s claim against the Liquidation

Estate, the agreement confirms that Mellor’s counsel “is representing *the recipient* [Mellor],” and not ORS, “to recover damages for *the recipient* [Mellor],” and not ORS. R. 4644 (emphasis added). Even if the Collection Agreement is construed to have permitted Mellor to include in *Mellor’s claim* amounts allegedly owed to ORS, and to have assigned any recovered amounts from Mellor to ORS, it cannot possibly be read as having authorized Mellor to assert a *claim for ORS*. To the contrary, the parties entered into the Collection Agreement as an *alternative* to “[ORS’s] direct right of recovery against any proceeds payable by an obligated third party[,]” which they expressly “acknowledge[d].” R. 4645, ¶ 2. *See also* R. 4767 (Mellor’s acknowledgment that “[her] counsel has not appeared for ORS.”).¹⁰

Mellor fares no better under ORS’s September 7, 2006 Notice of Representation of Medicaid Claim, on which she also relies. OB at 15, 18. For starters, the Notice of Representation was filed over two years after the July 31, 2004, deadline for filing proofs of claims in the liquidation proceeding, as established in the Liquidation Order. R. 153, ¶ 18, 4641-4647. Moreover, the

¹⁰ This distinction is **significant**. Section 31A-27-335(2)(c)(1) includes claims by government agencies only to the extent they are claims “under policies.” A “direct” ORS claim for amounts it paid would not be a policy claim – it would be a Class Six creditor’s claim for indemnification. And as discussed above, to the extent a policyholder’s claim has been indemnified, it is also excluded from Class Three.

Notice does not purport to assert a claim on behalf of ORS. It merely “allow[s] the [unasserted] Medicaid claim to be included in [Mellor’s] claim.” R. 4641.

Mellor confuses the issue further when she states that her claim “included losses incurred and claims paid by the federal and state government.” OB at 15. Section 31A-27-335(2)(c)(i)(A) defines Class Three claims as including “*claims of* the federal, state, or local government” – not “*losses incurred and claims paid by* the federal and state government.” “Claims of” a governmental entity, as used in the statute, refers to a claim made against the Liquidation Estate. “Claims paid by the federal and state government,” as used in Mellor’s brief, refers to payment of her claim for Medicaid coverage. She is mixing apples and oranges.

Mellor’s statement that ORS “gave clear notice to the Liquidator of Medicaid’s interest in the Mellor claim and its right to be reimbursed[,]” OB at 15, is also irrelevant to the issue of classification. The Liquidator disallowed Mellor’s claim based on Medicaid’s indemnification of Hayden’s medical expenses, not based on his knowledge or lack of knowledge that Mellor had agreed to assign the proceeds of her claim to ORS.

This Court must apply an unambiguous statute as written. *State v. Wallace*, 2006 UT 86, ¶ 9, 150 P.3d 540. Mellor does not suggest that Section 31A-27-335(2)(c)(i)(A) is ambiguous, and it is not. Because Mellor’s claim is not a claim

under a policy by a governmental entity, it is not a Class Three claim under Section 31A-27-335(2)(c)(i)(A).

C. Because Medicaid Fully Indemnified Mellor's Loss, Section 31A-27-335(2)(c)(ii) Excludes the Claim From Class Three.

Even if Mellor could establish a claim under a Wasatch Crest policy (she cannot), the Liquidator properly disallowed her claim because she received full indemnification from Medicaid for Hayden's medical expenses. As a result, any such theoretical claim is subject to the exclusion for "[t]hat portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant." UTAH CODE ANN. § 31A-27-335(2)(c)(iii) (2000, repealed 2007).

The Liquidator's conclusion in the Second Amended NOD that Mellor "has been indemnified by a third party and thus has suffered no unreimbursed loss," R. 5653, was undeniably correct as a matter of fact. It is undisputed that Medicaid paid Hayden's medical bills, in the total amount of \$181,351.51, before entry of the Liquidation Order on July 31, 2003. R. 5191-5192. *See also* OB at 8, ¶¶ 16, 19 (confirming fact of Medicaid payment and amount paid). Mellor was fully indemnified by Medicaid and she owes nothing to any provider for the medical services covered by her claim. In fact, those providers were required to accept the Medicaid payments as payment in full for the services provided to Hayden. *See*

42 C.F.R. § 447.15 (2010). Thus, Medicaid has indemnified Mellor against loss due to medical expenses resulting from Hayden's accident.

Unable to rebut the fact of indemnification, Mellor instead advances various equitable arguments why the Court should not apply the indemnification exclusion as written. Her arguments individually and collectively lack merit.

1. The Statute Prohibits Mellor's Equitable Arguments.

At the outset, the Liquidation Act precludes Mellor's equitable pleas: "A claim by a shareholder, policyholder, or other creditor may not be permitted to circumvent the priority classes through the use of equitable remedies." UTAH CODE ANN. § 31A-27-335(1)(d) (2000, repealed 2007).

The Court should reject Mellor's effort to avoid this statutory bar by characterizing her "claims against the Liquidator" as "claims on the Wasatch Crest insurance policy, a written contract, rather than equitable claims." OB at 16. Setting aside Mellor's mischaracterization of her claim as arising under the terminated Wasatch Crest policy, *see supra* at 30-32, her response does not change the fact that she is seeking to "circumvent the priority classes" through equitable arguments that the Liquidation Act prohibits.¹¹

¹¹ Section 31A-27-335(1)(d) refers to "the use of equitable remedies," which includes the equitable arguments that Mellor advances here. The obvious intent of the statute is to preclude claimants from avoiding the statutory priority scheme through appeals to equity. The legislature's intent can be accomplished only if the

2. The Fact of Medicaid Payments Cannot Override Unambiguous Statutory Provisions.

Mellor's primary equitable argument is that the indemnification exclusion should not apply where, as in this case, Medicaid was the indemnifying third party. Again, Mellor does not suggest that Section 31A-27-335(2)(c)(i)(A) is ambiguous. Nor could she. The statute clearly and unequivocally states that any part of any losses "for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant are not included in this class[.]" Its meaning is plain: if a claimant against the liquidation estate has been indemnified, or is entitled to indemnity for the underlying losses, the claim is excluded from Class Three, even if it otherwise would have been a Class Three claim. This Court must apply the unambiguous statute as written. *State v. Wallace*, 2006 UT 86, ¶ 9, 150 P.3d 540.¹²

phrase "equitable remedies" is read to include both equitable *claims* and equitable *arguments*. *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 195 W.Va. 537, 466 S.E.2d 388 (1995), is instructive. There, a claimant asserted various reasons why the receiver should accept her untimely filed claim. Although the claimant made only equitable arguments, not equitable claims, the West Virginia Supreme Court of Appeals invoked, among other provisions of the Model Liquidation Act, WEST VA. CODE § 33-24-27, which is identical to UTAH CODE ANN. § 31A-27-335(1)(d). 466 S.E. 2d at 392.

¹² Mellor may try to rely on the Court's policy statements regarding Medicaid coverage in *Mellor I*, see 2009 UT 5, ¶¶ 17-20, but those statements should have no bearing in this appeal. In *Mellor I*, the Court considered the purposes underlying federal and state law in resolving an ambiguity in the pre-liquidation

Despite the clarity of the indemnification exclusion in Section 31A-27-335(2)(c)(iii), Mellor argues that “this general language [in that section] is insufficient to override the explicit reference in U.C.A. §31A-27-335(2)(c)(1)(A) to claims of the federal and state government for losses incurred being class three claims.” OB at 15. What Mellor describes as the “general language” in Section 31A-27-335(c)(iii) does exactly what Mellor says it is “insufficient” to do: it provides that claims that would otherwise be Class Three claims (because they are listed in Section 31A-27-335(2)(c)(i)(A)-(D)) are excluded from Class Three if a third party has indemnified the claimant for the underlying losses. And Section 31A-27-335(c)(iii) draws no distinctions based on the source of the indemnification. So long as “indemnification is provided by other benefits or advantages recovered or recoverable by the claimant” – whoever the indemnitor may be – the claim is excluded from Class Three.

3. UTAH CODE ANN. § 26-19-5 and § 26-19-7 (2005) Are Inapplicable.

As a related equitable basis for disregarding the indemnification exclusion in this case (despite its unambiguous applicability), Mellor contends: “U.C.A. §26-

Wasatch Crest insurance plan. Here, the controlling statute is not ambiguous. Therefore, it would be improper to decide the scope of the indemnification exclusion based on anything other than the language of Section 31A-27-335(2)(c)(iii) itself. *Salt Lake Cty. v. Holliday Water Co.*, 2010 UT 45, ¶ 31, 234 P.3d 1105.

19-5 makes clear that the lien ORS has for repayment of Hayden's expenses '... has priority over all other claims to the proceeds ...' except claims for attorney fees and costs as authorized under U.C.A. §26-19-7(2)(c)(ii)." OB at 15-16. This argument misstates the record and the law.

Mellor assumes that ORS has a lien against amounts allegedly owed by the Liquidation Estate under UTAH CODE ANN. § 26-19-5(1)(b) (2005). The Liquidation Estate takes no position on that issue, which this Court need not resolve, because that section does not purport to override the indemnification exclusion in Section 31A-27-335(2)(c)(i)(A).

Section 26-19-5(1)(b) provides in full:

Any claim [of ORS] under Subsection (1)(a) [of Section 26-19-5] or Section 26-19-4.5 to recover medical assistance provided to a recipient is a lien against any proceeds payable to or in behalf of the recipient by that third party. This lien has priority over all other claims to the proceeds, except for attorney's fees and costs authorized under Subsection 26-19-7(2)(c)(ii).

The statute recognizes, under certain circumstances, an ORS lien on proceeds payable to a Medicaid recipient, but it says nothing about the classification of a claim filed by the recipient in the liquidation proceeding. Accordingly, it is irrelevant to whether Mellor's claim falls under Class Three.

UTAH CODE ANN. § 26-19-7(2)(c)(ii) (2005) is also irrelevant. Mellor asserts that this provision and unidentified "language of the United States Code"

require that, “as a condition of receipt of federal dollars, the Utah state Medicaid program must maintain a program to pursue reimbursement of funds paid out by Medicaid but for which third parties are later determined to be responsible.” OB at 16. Once again, Mellor misunderstands what the Utah statute says in multiple ways.

First, Section 26-19-7 imposes no duty on ORS; rather, it requires a claimant like Mellor to take a number of steps upon filing a claim against a third party. *Second*, that section draws a clear distinction between ORS’s right to file a claim (which ORS did not do here), and its alternative right to forego filing a claim and instead to enter into a collection agreement with the claimant, to ensure that funds recovered by the claimant are assigned to ORS (which ORS and Mellor did here, though only with respect to funds recovered from Wasatch Crest, not the Liquidation Estate). *Compare* UTAH CODE ANN. § 26-19-7(2)(a)(i) (2005) (“*if the department has a claim or lien pursuant to Section 26-19-5. . .*”) (emphasis added), *and* UTAH CODE ANN. § 26-19-7(2)(b)-(c) (2005) (providing for a collection agreement). *See also* UTAH CODE ANN. § 26-19-7(4)(a)-(c) (2005) (distinguishing between “the recipient’s claim” and “the department’s [or state’s] claim”).

In short, Section 26-19-5 and Section 26-19-7 do not support Mellor’s equitable arguments. In fact, they do not even say what Mellor would have this Court believe they say, and they instead further explain why the indemnification

exclusion in Section 31A-27-335(2)(c)(iii) applies in this case and excludes Mellor's claim from Class Three.

4. Exclusion of Mellor from Class Three Does Not Result in an Impermissible Windfall.

As a final equitable argument, Mellor contends that disallowance of her claim "allows Wasatch Crest to receive a windfall due to its own bad act in refusing to pay a valid claim." OB at 17. Yet again, Mellor ignores the fact that Wasatch Crest is not a party to this case and has ceased to exist as an operating entity as a result of the Liquidation Order. The only "Wasatch Crest entity" in this proceeding is WCICIL, through which the Liquidator is charged with "do[ing] all acts necessary or appropriate for the accomplishment of the liquidation of [Wasatch Crest.]" R. 148, ¶ 1.

In any event, the denial of Mellor's claim yielded no windfall – whether to Wasatch Crest or the Liquidation Estate. Wasatch Crest was insolvent when liquidation was ordered. It had insufficient assets to satisfy its liabilities. The amounts that the Liquidator concluded should not be paid to Mellor became available to pay other claimants. Unlike a private litigant, the Liquidation Estate and its Liquidator have no personal interests in retaining assets or denying payment to lawful claimants. At the conclusion of the liquidation proceedings, all assets are distributed to the appropriate creditors of the Liquidation Estate in accordance with

the priority scheme devised by the Utah legislature; there are no residual assets that accrue to the benefit of the Liquidation Estate or the Liquidator.

Nor did pre-liquidation Wasatch Crest receive any windfall by terminating the policy once Medicaid coverage began, even though this Court concluded in *Mellor I* that the termination was in error. *See* OB at 17-18. Pre-liquidation Wasatch Crest returned all premiums that Mellor paid for Hayden's coverage after August 1, 2001, when Medicaid coverage commenced and Wasatch Crest erroneously believed that coverage under its plan ended. R. 4500, 4602. Accordingly, there was no windfall because pre-liquidation Wasatch Crest received nothing, *i.e.*, no premiums, in exchange for its alleged liability to Hayden's medical providers. And as a matter of equity, there was no harm to Mellor, Hayden, or Hayden's providers because Medicaid paid for all of Hayden's medical treatment.

D. Mellor's Claim Is, at Best, a Class Six Claim.

The Liquidator correctly determined that Mellor's claim does not qualify for assignment to Class Three. It also does not fall within Classes One, Two, Four, and Five. Accordingly, at best, the claim falls within Class Six, which includes claims of "any person, including claims of state or local governments, except those specifically classified elsewhere in this section[.]" UTAH CODE ANN. § 31A-27-335(2)(f)(i)(A).


The Second Amended NOD did not reach the question of potential assignment to Class Six. R. 5653. For reasons discussed above, this Court should not reach that issue either. *First*, the Court should dismiss the appeal for lack of **appellate** jurisdiction. *Second*, even assuming jurisdiction, the Court should confirm the finality of the Liquidator's Second Amended NOD because Mellor failed to file a timely objection to that determination. If the Court nevertheless addresses the merits of the Second Amended NOD, and affirms the Liquidator's rejection of Class Three classification but concludes that Mellor may pursue a Class Six claim, the Court should remand for the Liquidator to determine the amount Mellor may recover.

CONCLUSION

For the reasons stated above and in the Liquidation Estate's Memorandum of Points and Authorities in Support of Its Motion to Dismiss Appeal, Wasatch Crest Insurance Company in **Liquidation** respectfully requests the Court to dismiss the appeal for lack of jurisdiction, or in the alternative, to affirm the Liquidator's denial of Mellor's claim.

DATED this 20th day of July, 2011.

HOLLAND & HART LLP

A handwritten signature in black ink, appearing to read "John P. Harrington", is written over a horizontal line.

John P. Harrington (#5242)

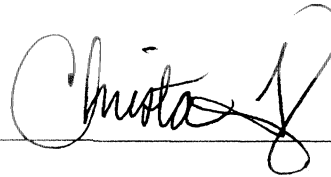
*Attorneys for Appellee Wasatch Crest
Insurance Company in Liquidation*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE WASATCH CREST INSURANCE COMPANY IN LIQUIDATION** was sent via United States first class mail, postage prepaid, on the 20th day of July, 2011 addressed as follows:

Brian S. King, Esq.
336 South 300 East, Suite 200
Salt Lake City, UT 84111

Maxwell A. Miller
PARSONS BEHLE & LATIMER
201 South Main, Suite 1800
Salt Lake City, UT 84111



ATTACHMENT A

4TH DISTRICT CT - AF
UTAH COUNTY, STATE OF UTAH

CHRIS ANN WILLIAMS MELLOR vs. WASATCH CREST MUTUAL INSURANCE

CASE NUMBER 050102878 Contracts

CURRENT ASSIGNED JUDGE
CHRISTINE JOHNSON

PARTIES

Plaintiff - CHRIS ANN WILLIAMS MELLOR
Represented by: ROBERT J SCHUMACHER

Defendant - WASATCH CREST MUTUAL INSURANCE

Defendant - WASATCH CREST INSURANCE COMPAN

Defendant - AMERICAN GROUP ADMINISTRATORS

ACCOUNT SUMMARY

CASE NOTE

PROCEEDINGS

09-23-05 Case filed
09-23-05 Judge DEREK P PULLAN assigned.
09-23-05 Note: Provo Case #030401281
09-28-05 Filed: Notice (Defendent in liquidation action in 3rd District)
10-07-05 Filed: Notice of Transfer for Randall Smart Return in Mail-Will
send to New Address
12-05-06 Order to Show Cause scheduled on February 01, 2007 at 08:30 AM
in Courtrm 1, 3rd Floor with Judge PULLAN.
12-05-06 Notice - NOTICE for Case 050102878 ID 9487780
Order to Show Cause.
Date: 2/1/2007
Time: 08:30 AM Location: Courtrm 1, 3rd Floor
DEREK P PULLAN

The parties and/or counsel in this case are to appear before this
Court and show cause why this case should not be dismissed.
If you do not appear, the Court will enter an Order of Dismissal
without further hearing.

12-11-06 Filed: Returned Mail - Wasatch Crest Mutual Insurance - Unable
to Forward

CASE NUMBER 050102878 Contracts

12-11-06 Filed: Returned Mail - Wasatch Crest Insurance Company - Unable to Forward

12-11-06 Filed: Notice

01-10-07 Note: The case was taken off of OTSC hold

02-01-07 Minute Entry - Minutes for Order to Show Cause

Judge: DEREK P PULLAN

Clerk: melanies

No Parties Present

Audio

Tape Number: 0711P CR1 Tape Count: 8.51.50

HEARING

TAPE: 0711P CR1 COUNT: 8.51.50

This matter was set for an Order to Show Cause on the Court's own motion. Parties have failed to appear. A pleading from the Plaintiff's counsel was filed stating the liquidation action of Wasatch Crest must be addressed in the Third District

Court where the liquidation was filed. This matter is therefore dismissed without prejudice.

02-05-07 Case Disposition is Dismsd w/o prejudice

Disposition Judge is DEREK P PULLAN

03-31-07 Note: Archived Physical File CV07-09 DESTROY 8/07

09-26-07 Note: CASE HAS MET RETENTION SCHEDULE- FILE DESTROYED 9/26/2007

01-02-08 Judge DAVID MORTENSEN assigned.

06-30-09 Judge CHRISTINE JOHNSON assigned.