

2005

Wasatch Crest Insurance Company v. LWP Claims Administrators Corp : Brief of Appellant

Utah Court of Appeals

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Brief of Appellant, *Wasatch Crest Insurance Company v. LWP Claims Administrators Corp*, No. 20051102 (Utah Court of Appeals, 2005).

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IN THE SUPREME COURT FOR THE STATE OF UTAH

<p>WASATCH CREST INSURANCE COMPANY, IN LIQUIDATION, WASATCH CREST MUTUAL INSURANCE COMPANY, IN LIQUIDATION, and D. KENT MICHIE, Liquidator,</p> <p>Plaintiffs/Appellants,</p> <p>vs.</p> <p>LWP CLAIMS ADMINISTRATORS, CORP., a California corporation, and LWP CLAIMS SOLUTIONS, INC., a California corporation,</p> <p>Defendants/Appellees.</p>	<p>ADDENDUM TO BRIEF OF APPELLANTS</p> <p>Case No. 20051102</p> <p>Trial Court No. 030915527</p>
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From the Final Judgment of the Third Judicial District Court,
Salt Lake County, Utah, Honorable Timothy R. Hanson Presiding

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IN THE SUPREME COURT FOR THE STATE OF UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION,
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and D. KENT
MICHIE, Liquidator,

Plaintiffs/Appellants,

vs.

LWP CLAIMS ADMINISTRATORS,
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants/Appellees.

**ADDENDUM TO
BRIEF OF APPELLANTS**

Case No. 20051102

Trial Court No. 030915527

From the Final Judgment of the Third Judicial District Court,
Salt Lake County, Utah, Honorable Timothy R. Hanson Presiding

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and Merwin U. Stewart, Liquidator*

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION, and
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and MERWIN
U. STEWART, Liquidator,

Plaintiffs,

vs.

LWP CLAIMS ADMINISTRATORS,
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants.

**MEMORANDUM IN SUPPORT OF
LIQUIDATOR'S MOTION FOR
SUMMARY JUDGMENT**

0309155277

Case No: 040911680

Judge Timothy R. Hanson

Plaintiffs Wasatch Crest Insurance Company, in Liquidation and Wasatch Crest
Mutual Insurance Company, in Liquidation, by and through Merwin U. Stewart, the

Utah Insurance Commissioner, in his capacity as the court-appointed liquidator (“Liquidator”) of Wasatch Crest Insurance Company, in Liquidation and Wasatch Crest Mutual Insurance Company, in Liquidation, by and through counsel of record, hereby respectfully submit this Memorandum in Support of the Liquidator’s Motion for Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure.

I. INTRODUCTION

The Utah Insurance Code gives the Liquidator the power to retrieve monies paid by an insolvent insurance company to any of its affiliates during the five years prior to the filing of the liquidation petition. Affiliate transactions are so susceptible to manipulation and abuse that the Liquidator is statutorily empowered by § 31A-27-322 to recoup those paid monies regardless of any defense asserted by the original recipient/affiliate. The Liquidator moves this Court to enter summary judgment regarding the payments received by Defendants LWP Claims Administrators, Corp. and LWP Claims Solutions, Inc. as affiliates of Plaintiffs Wasatch Crest Insurance Company and Wasatch Crest Mutual Insurance Company.

II. MATERIAL FACTS FOR WHICH NO GENUINE ISSUE EXISTS

1. Plaintiff Wasatch Crest Insurance Company was an insurance company domiciled in the State of Utah (“WCIC” or “Wasatch Crest Insurance”). Wasatch Crest Insurance was placed into liquidation by the Third Judicial District Court, in and for Salt Lake County, State of Utah, on or about July 31, 2003. *See* Complaint at ¶ 1 and Answer at ¶ 1, true and correct copies of which are attached hereto respectively as Exhibits “A” and “B”.

2. Plaintiff Wasatch Crest Mutual Insurance Company was an insurance company domiciled in the State of Utah (“WCMIC” or “Wasatch Crest Mutual”). Wasatch Crest Mutual was placed into Liquidation by the Third Judicial District Court, in and for Salt Lake County, State of Utah, on or about July 31, 2003. *See* Complaint, Ex. “A” at ¶ 2 and Answer, Ex. “B” at ¶ 2.

3. Plaintiff Merwin U. Stewart, Utah Insurance Commissioner, was appointed by the Third Judicial District Court as the liquidator of WCIC and WCMIC on July 31, 2003 (the “Liquidator”). The Liquidator has the authority and standing to bring this action pursuant to § 31A-27-310, Utah Code Ann. The Liquidator is vested by operation of law with the title to all the property, contracts, and rights of actions of the insurance company being liquidated, wherever located, as of the date of the filing of the petition for Liquidation. Pursuant to § 31A-27-314, Utah Code Ann., the Liquidator may continue to prosecute and institute in the name of the insurer or in the Liquidator’s own name, any suits or other legal proceedings in this state or elsewhere. *See* Liquidation Order, a true and correct copy of which is attached hereto as Exhibit “C”.

4. Defendant LWP Claims Administrators, Corp. was a California corporation. The name “LWP Claims Administrators, Corp” was changed to LWP Claims Solutions, Inc. *See* Complaint, Ex. “A” at ¶ 4 and Answer, Ex. “B” at ¶ 4.

5. Defendant LWP Claims Solutions, Inc. is a California corporation. *See* Utah Department of Commerce print out, attached hereto as Exhibit “D”. LWP Claims Administrators, Corp. and LWP Claims Solutions, Inc. are collectively referred to as “LWP”. Wasatch Crest Group, Inc. was the parent corporation of WCIC. LWP was

sold to John A. Igoe, the former Chairman of the Board of Directors and Chief Executive Officer of WCIC and LWP. Mr. Igoe was also the Chairman of the Board, President and Chief Executive Officer of Wasatch Crest Group, Inc., the parent corporation of WCIC and LWP. LWP was an affiliate of Wasatch Crest Group, Inc., WCIC, and WCMIC. *See* Complaint, Ex. “A” at ¶ 5; *see also* Wasatch Crest Group, Inc. Form B¹, dated April 16, 2001 at p. 5, a true and correct copy of which is attached hereto as Exhibit “E”.

Corporate History of Wasatch Crest Mutual and Wasatch Crest Insurance
Acquisition of FCL

6. Wasatch Crest Mutual was a mutual insurance company controlled by its policyholders who annually elected a Board of Directors. Effective April 15, 1994, Wasatch Crest Mutual purchased all of the issued and outstanding common stock of First Continental Life & Accident Insurance Company, a Utah domiciled insurance company (“FCL”). *See* Wasatch Crest Mutual Insurance Co. Form B, dated July 15, 1998, a true and correct copy of which is attached hereto as Exhibit “F”; *see also* Form B dated April 16, 2001, Ex. “E”.

¹ Form B is a standard form used by all state insurance departments. Form B is a report to the state regulators as to the transactions and interrelationship of the insurance company and its affiliates which must be filed annually or whenever a material transaction or change has occurred. All Form B’s referenced in this Memorandum were filed with the Utah Department of Insurance.

Creation of Wasatch Crest Insurance Company
and Merger with Wasatch Crest Casualty

7. Effective October 31, 1998, Wasatch Crest Group (the parent company of WCIC) purchased all of the issued and outstanding common shares of Utah Home Fire Insurance Company, a Utah domiciled property and casualty company, from Deseret Management Corporation. Wasatch Crest Group changed the name of Utah Home Fire Insurance to Wasatch Crest Insurance Company. Effective December 19, 2000, Wasatch Crest Casualty Company was merged into Wasatch Crest Insurance with Wasatch Crest Insurance as the surviving company. See Form B dated April 16, 2001, Ex. "E" at p. 14.

Corporate History of LWP

8. On November 16, 1999, Wasatch Crest Group purchased from LWP Commercial Claims Administrators, Inc. substantially all of the assets, real and personal property, and business operations owned by LWP Commercial Claims Administrators, Inc. pursuant to the Asset Purchase Agreement By and Among Wasatch Crest Group, Inc. and LWP Commercial Claims Administrators, Inc., John A. Igoe and Erica L. Igoe, dated November 16, 1999. Wasatch Crest Group's purchase was an asset purchase, not a purchase of the stock of LWP Commercial Claims Administrators, Inc. LWP Commercial Claims Administrators, Inc. was a third party administrator of insurance claims. Concurrent with the purchase of substantially all of the assets of LWP Commercial Claims Administrators, Inc., Wasatch Crest Group created a new corporate entity, (i.e., LWP Claims Administrators, Corp.) that took possession and title to all of the purchased assets. LWP Claims Administrators, Corp.

was incorporated in the State of California. The name of LWP Claims Administrators, Corp. was subsequently changed to LWP Claims Solutions, Inc. LWP is currently a California corporation with offices in Sacramento, California and Salt Lake City, Utah. LWP is currently a third-party administrator (“TPA”), which specializes in the administration of worker’s compensation insurance and claims associated with ski industry workers. *See* Answer, Ex. “B” at ¶ 15 at; *see also* November 16, 1999, Asset Purchase Agreement attached hereto as Exhibit “G” and November 16, 1999 Administrative Services Agreement between LWP Commercial Claims Administrators, Inc. and LWP Claims Administrators, Corp., a true and correct copy of which is attached hereto as Exhibit “H”.

Affiliate Transactions

9. On or about November 16, 1999, LWP entered into an agreement with WCIC and WCMIC whereby LWP was paid a fixed percentage fee to administer all the claims throughout the entire duration of the claims. The fee paid to LWP was calculated as a percentage of gross written premium received by WCIC or WCMIC. In addition, LWP was paid a percentage of all medical fee savings generated by LWP in the administration of the claims. LWP’s agreement with WCIC and WCMIC was not reduced to writing or disclosed to the Utah Department of Insurance. *See* May 21, 2002 Letter from Orrin T. Colby Jr. to Judy Adlam attached hereto as Exhibit “I”.

10. Effective January 1, 2001, WCIC and LWP entered into an Administrative Agreement whereby LWP administered worker’s compensation claims for WCIC on a “life of claim” basis and was paid fees as described in paragraph 19 of the

Administrative Agreement. *See* Wasatch Crest Group Form B, dated April 30, 2002 at p. 12, a true and correct copy of which is attached hereto as Exhibit “J”; *see also* January 2001 Administrative Agreement attached hereto as Exhibit “K”.

11. LWP presented to WCMIC a proposed Administrative Agreement that was to be effective January 1, 2001. The terms of the agreement were identical to the Administrative Agreement entered into between WCIC and LWP as described above in paragraph 15. *See* Answer, Ex. “B” at ¶ 18; *see also* Letter dated May 21, 2002, Ex. “I”.

12. The agreement between LWP and WCMIC was never executed; rather, the arrangement between WCMIC and LWP continued under the terms of the verbal agreement entered into in November 1999, whereby LWP would administer worker’s compensation claims for WCMIC on a “life of claim” basis. *See* Letter dated May 21, 2002, Ex. “I”.

13. Wasatch Crest Group sold LWP back to John Igoe and Erica Igoe sometime in 2002. John Igoe continued in his capacity as an officer and director of Wasatch Crest Group after the sale of LWP to John and Erica Igoe. *See* Term Sheet attached hereto as Exhibit “L”.

14. From November 16, 1999 through July 30, 2003, WCIC paid \$6,144,402.68 to LWP for claims handling services. Of the \$6,144,402.68 total, \$4,955,586.10 was in the form of a check or wire transfers, while \$1,188,816.58 was in the form of offsets. *See* Affidavit of Robert Miller, a true and correct copy of which is attached hereto as Exhibit “M”.

15. From November 16, 1999 through July 30, 2003, WCMIC paid \$534,265.96 to LWP for claims handling services. Of the \$534,265.96 total, \$474,265.96 was in the form of a check or wire transfers, while \$60,000.00 was in the form of offsets. *See id.*

III. LEGAL ARGUMENT

The Liquidator alleges in the First Claim for Relief of the Complaint that LWP has violated 31A-27-322, Utah Code Ann., which states as follows:

Recoupement from Affiliates

(1) If an order for the liquidation, rehabilitation, or conservation of an insurer authorized to do business in this state is ordered under this chapter, the receiver appointed under the order has a right to recover on behalf of the insurer from any affiliate that controlled the insurer the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation, rehabilitation, or conservation. This recovery is subject to the limitations of Subsections (2) through (6).

(2) No dividend is recoverable if the recipient shows that, when paid, the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect its solvency.

(3) The maximum amount recoverable under this section is the amount needed, in excess of all other available assets, to pay all claims under the receivership, reduced for each recipient by any amount the recipient has already paid to receivers under similar laws of other states.

(4) Any person who was an affiliate that controlled the insurer at the time the distributions were paid is liable up to the amount of distributions he received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared is liable up to the amount of distributions he would have received if they had been paid immediately. If two or more persons are liable regarding the same distributions, they are jointly and severally liable.

(5) If any person liable under Subsection (4) is insolvent, all affiliates that controlled that person at the time the dividend was declared or paid are jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate.

(6) This section does not enlarge the personal liability of a director under existing law.

(7) An action or proceeding under this section may not be commenced after the earlier of:

(a) two years after the appointment of a rehabilitator under Section 31A-27-303 or a liquidator under Section 31A-27-310; or

(b) the date the rehabilitation is terminated under Subsection 31A-27-306(2) or the liquidation is terminated under Section 31A-27-339.

Utah Code Ann. § 31A-27-322.

A. LWP was an Affiliate of WCIC and WCMIC.

An affiliate is defined as “any person who controls, is controlled by, or is under common control with, another person. A corporation is an affiliate of another corporation, regardless of ownership, if substantially the same group of natural persons manages the corporations.” Utah Code Ann. § 31A-1-301(4). As a result, LWP is an affiliate of WCIC and WCMIC because there is common management and ownership.

John Igoe, the owner and former Chairman and Chief Executive Officer of LWP Commercial Claims Administrators, Inc., served concurrently as the Acting Chairman, President and Chief Executive Officer of Wasatch Crest Group, the Chairman and Chief Executive Officer of Wasatch Crest Insurance, and the Chairman and Chief Executive Officer of LWP Claims Administrators. In those positions, Mr. Igoe initiated, approved and carried out affiliate transactions between LWP, WCIC and WCMIC by entering into Administrative Agreements with both WCIC and WCMIC on behalf of LWP.

B. As an Affiliate, LWP Must Disgorge All Funds It Received from WCIC and WCMIC Since November 16, 1999.

Pursuant to § 31A-27-322, the Liquidator is permitted to recover from any affiliate any distribution made at any time during the five years preceding the petition for liquidation. The petition for liquidation was filed on July 31, 2003. LWP became an affiliate of WCIC and WCMIC on or around November 16, 1999. Consequently, any payments on or after November 16, 1999 to LWP are recoverable.²

If a person or entity qualifies as an affiliate, then any distribution to that affiliate made in the five years prior to the filing of the liquidation petition must be repaid. There are no statutory rights to setoff or other mitigating circumstances. In essence, the Utah statute subordinates the claims of affiliates to the claims of other creditors and policyholders against the remaining assets of the liquidation estate. The Utah statute views an affiliate as an “insider” and relegates any claim of an affiliate to that of a shareholder who is granted the lowest priority claim against the liquidation estate assets.

Because of the inherent dangers of self-dealing and overreaching associated with affiliate transactions, the legislature has determined that insiders/affiliates will recover only to the extent that all other claimants are paid before an affiliate. This interpretation is supported by the language of § 31A-27-322(3), Utah Code Ann., which limits the amount to be recovered by the liquidator from affiliates to “the amount

² The statute provides for payments going back five years (July 31, 1998), but since LWP did not become an affiliate until November 1999, LWP is only responsible for disgorging payments from November 1999 through July 31, 2003.

needed, in excess of all other available assets, to pay all claims under the receivership.” In other words, the Liquidator is prevented from recovering from affiliates anything more than what is necessary to pay all claimants, which in effect is the total deficiency incurred by the liquidation estate. The pragmatic effect of the statute is to subordinate all affiliate payments made within five years of the liquidation order to the claims of all other creditors and policyholders, and thereby permitting the affiliates to recover on the same basis as the equity owners. Because any transaction between an insurance company and its affiliate is so vulnerable to abuses, the statute sweeps back into the liquidation estate of the insolvent insurance company any and all payments made by the insurance company to an affiliate within five years of the insolvency.

Because of the overwhelming threat to the financial stability of an insurance company posed by affiliate transactions, the recipient of affiliated transaction monies must repay everything they have received during the five years prior to the filing of the liquidation petition. Therefore, \$6,678,668.64, paid by WCIC and WCMIC to LWP for claims handling services must be repaid to the Liquidator.

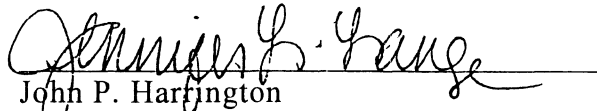
IV. CONCLUSION

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, the Liquidator moves this Court to enter an order of summary judgment that the affiliate transactions must be repaid according to U.C.A. § 31A-27-322. No material facts are in dispute. The evidence is clear that LWP received at least \$ 6,678,668.64 from WCIC and WCMIC from November 1999 through July 31, 2003, and that there was common management

and ownership between LWP, WCIC, and WCMIC. For these and all other foregoing reasons, this Court should grant the Liquidator's Motion for Summary Judgment.

DATED this 10th day of January 2005.

HOLLAND & HART LLP

A handwritten signature in black ink, appearing to read "Jennifer L. Lange", is written over a horizontal line.

John P. Harrington

Jennifer L. Lange

*Attorneys for Wasatch Crest Insurance
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Mutual Insurance Company, in Liquidation;
and Merwin U. Stewart*

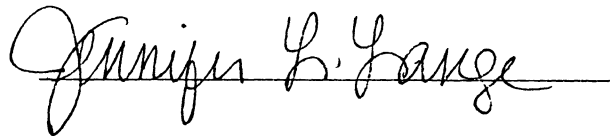
J. Ray Barrios

Liquidation Office General Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **Liquidator's Memorandum in Support of its Motion for Summary Judgment** was sent via U.S. first class mail, postage prepaid on the 10th day of January 2005 to the following:

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A handwritten signature in cursive script, reading "Jennifer L. Lange", written over a horizontal line.

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION, and
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and MERWIN U.
STEWART, Liquidator,

Plaintiffs,

-vs-

LWP CLAIMS ADMINISTRATORS
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO LIQUIDATOR'S
MOTION FOR SUMMARY JUDGMENT

Civil No. 030915527
Judge Hanson

Defendants LWP Claims Administrators Corp. and LWP Claims Solutions, Inc.,
pursuant to Utah R. Civ. P. 56(c) submit this consolidated memorandum of points and
authorities in support of Defendant's Motion for Summary Judgment and in opposition to
the Liquidator's Motion for Summary Judgment.

INTRODUCTION

LWP Claims Solutions, Inc. ("LWPCSI"), formerly LWP Claims Administrators Corp. ("LWPCAC") (collectively referred to as "LWP") acted as a third-party claims administrator for two now-insolvent insurance companies, Wasatch Crest Insurance Company ("WCIC") and Wasatch Crest Mutual Insurance Company ("WCMIC"), and received fair compensation for its services. Now, the Liquidator of the two insolvent Wasatch Crest companies asks the Court to order LWP to return the compensation paid under the authority of the recoupment provisions of Utah Code Ann. § 31A-27-322. That section allows the liquidator of insolvent insurance companies to recover "distributions" if such "distributions" were made to affiliates that had control over the insurer at the time the distributions were made. The legislative history of Section 322, as well as its plain language, establishes that the recoverable payments are excessive distributions made in the form of dividends to the parent of an insurer. The statute does not, and was never intended to, apply to payments made for services rendered to the insurer.

The Liquidator has not even attempted to meet its statutory burden of demonstrating that LWP was ever in control of either WCIC or WCMIC, nor has it demonstrated that LWP ever received any distributions in the nature of dividends from the two insurers. To the contrary, the undisputed evidence is that payments to LWP were contemporaneously made in fair consideration for services provided by LWP to WCIC and WCMIC. The undisputed evidence also shows that, at most, (1) LWP was a

sister subsidiary of WCIC when some of the payments were made to LWP by WCIC, and (2) LWP was not an affiliate of WCMIC when payments were made to LWP by WCMIC. The Liquidator presents no facts demonstrating that LWP was an affiliate that controlled the insurers at the time LWP received payments, and undisputed facts confirm that LWP was not in control of the insurers.

By bringing a complaint for recoupment under § 31A-27-322, and making a summary judgment motion under these undisputed facts, the Liquidator has either misunderstood or grossly misapplied the statute. Its motion must therefore be denied. For the same reasons, LWP is entitled to judgment as a matter of law and this action should be dismissed with prejudice.

LWP'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. WCIC was an insurance company domiciled in the State of Utah. See Memorandum in Support of Liquidator's Motion for Summary Judgment ("Liquidator's Memorandum") at ¶ 1, attached as Exhibit 1. WCIC was placed in liquidation by the Third Judicial District Court in Salt Lake County, Utah on July 31, 2003. *Id.*
2. WCMIC was an insurance company domiciled in the State of Utah. See Liquidator's Memorandum at ¶ 2, Exhibit 1. WCMIC was placed in to liquidation by the Third Judicial District Court in Salt Lake County, Utah on July 31, 2003 *.Id.*
3. LWPCAC was a corporation organized under California law in 1999. In the third quarter of 2002, LWPCAC's name changed to LWPCSI. See Complaint at ¶ 3, attached as Exhibit 2, and Answer at ¶ 4 attached as Exhibit 3.

4. LWPCSI is a California corporation, originally incorporated as LWPCAC. Its name changed to LWPCSI in the third quarter of 2002. See Exhibit 2 at ¶ 4 and Exhibit 3 at ¶ 4.

History of WCIC and WCMIC

5. WCMIC was a mutual insurance company which purchased all of the common stock of First Continental Life and Accident Insurance Company ("FCL") effective April 15, 1994. See Form B, Wasatch Crest Mutual Insurance Co., dated July 15, 1998, at p. 2, Item 1(b), attached as Exhibit 4.

6. Effective January 1, 1997, WCMIC purchased all of the common stock of Transunion Casualty Company ("Transunion"). On January 1, 1998, Transunion purchased Wasatch Fire Insurance Company. Effective March 25, 1998, Transunion was renamed Wasatch Crest Casualty Insurance Company ("WCCIC"). Immediately thereafter, Wasatch Fire Insurance Company merged into WCCIC, with WCCIC as the surviving corporation. See Exhibit 4 at pp. 6-7, Item (1).

7. On June 30, 1998, WCMIC exchanged all of the common stock of FCL and WCCIC for shares of the newly incorporated Wasatch Crest Group ("WCG"). In exchange for the stock of FCL and WCCIC, WCMIC received 1 million Class A common shares of WCG (100% of the Class A shares) and 5.3 million Class C common shares (100% of the Class C shares) of WCG. WCMIC also received 4.4 million shares of Class B-1 common stock, which it sold to investors. An additional 6.4 million shares of Class B-1 common stock and 3.9 million shares of Class B-2 common stock were also

purchased by the investors. After these transactions, WCG Investment Group ("Wasatch Investment"). L.P. owned 5.8 million shares of Class B-1 common stock, Swiss Reinsurance America Corporation ("Swiss Re") owned 3.9 million shares of Class B-2 common stock, and Chase Capital Partners ("Chase") owned 5.0 million shares of Class B-1 common stock. See Wasatch Crest Group, Form B, Insurance Holding Company System Registration Statement, at pp. 14-15, Item 5(1)(e), attached as Exhibit 5.

8. Effective October 31, 1998, WCG purchased all of the common stock of Utah Home Fire Insurance Company and changed the latter company's name to WCIC. *Id.* at p. 14, Item 5(1)(d).

9. Effective December 19, 2000, WCCIC merged into WCIC with WCIC as the survivor. *Id.* at p.15, Item 5(1)(f).

10. Effective December 2000, WCG's capital was restructured pursuant to a Form A Application approved by the Utah Insurance Commissioner by order dated November 27, 2000. As part of the restructuring, WCMIC relinquished its shares in WCG and WCG Investment received 89% of the voting shares of WCG with the remaining 11% of the voting shares held by Swiss Re. *Id.* at p.15, Item 5(1)(e). See Exhibit 6 at ¶ 14; Exhibit 7 at ¶ 14.

**Acquisition of LWP Commercial Claims
Administrators, Inc.'s Assets by WCG.**

11. On November 16, 1999, WCG purchased substantially all of the assets and business operations of LWP Commercial Claims Administrators, Inc."(LWP

Commercial”), a California company which acted as a third party insurance claim administrator and was owned by John and Erica Igoe. See Asset Purchase Agreement, attached as Exhibit 8. At that time, WCG formed a new corporate entity, LWPCAC. The assets purchased from LWP Commercial were transferred to LWPCAC. See Exhibit 2 at ¶15 and Exhibit 3 at ¶15.

The Relationship of LWPCAC to WCIC and WCMIC

12. Shortly after the asset purchase and formation of LWPCAC, John Igoe became President and COO of WCG and its subsidiaries, WCIC and FCL. John Igoe was also CEO of LWPCAC, the third subsidiary of WCG. Igoe, however, was never an officer or director of WCMIC. See Affidavit of John Igoe, attached as Exhibit 6, at ¶ 5 and Affidavit of Dennis Larson, attached as Exhibit 7, at ¶ 5.

13. At the time of the asset purchase, an Administrative Services Agreement, , dated November 16, 1999 (attached as Exhibit 9) was entered into between LWP Commercial, the selling entity owned by John and Erica Igoe, and LWPCAC, the subsidiary formed by WCG to hold the assets transferred by LWP Commercial. WCIC and WCMIC were not parties to the agreement. The agreement provided that LWP Commercial continue to employ its former employees and that LWPCAC would compensate LWP Commercial “on a cost basis” by reimbursing LWP Commercial for all reasonable costs associated therewith. See Exhibit 9 at p.3. The agreement was intended to facilitate the transition of business operations pending the transfer of LWP Commercial’s employees on January 1, 2000. For this reason, the agreement

terminated on December 31, 1999. See Exhibit 9 at p. 4, Exhibit 6 at ¶ 8; Exhibit 7 at ¶ 8.

14. Around June 2000, LWPCAC began providing workers compensation claims handling services to WCIC. Prior to that time, Employees of WCG provided these services. After June 2000, these employees were placed under the direction of LWPCAC. LWPCAC reimbursed WCG for the cost of personnel provided by WCG to LWPCAC. In return for providing claims services, LWPCAC received a percentage of the premiums earned by WCIC and a percentage of the medical cost savings realized by WCIC due to LWPCAC's handling of claims. From June 2000 until January 1, 2001, the claims handling services were provided pursuant to an oral agreement between LWPCAC and WCIC. See Exhibit 6 at ¶ 9; Exhibit 7 at ¶ 9.

15. This oral agreement for claims handling services was formalized in a written agreement between WCIC and LWPCAC which was effective as of January 1, 2001. The terms of the written agreement were the same as the terms of the earlier oral agreement. See, Administrative Agreement, attached as Exhibit 10. The terms of the agreement are standard commercial terms similar to the terms of agreements entered into by LWPCAC with other insurance companies. See Exhibit 6 at ¶ 10; Exhibit 7 at ¶ 10.

16. A similar oral agreement for claims handling services was in effect between WCMIC and LWPCAC. Although a written agreement was drafted to formalize the oral agreement, this agreement was never signed by WCMIC and the two

companies continued to operate under the terms of the oral agreement. See Exhibit 6 at ¶ 11; Exhibit 7 at ¶ 11.

17. On April 28, 1998 WCG entered into a Managing General Agency Agreement with North American Specialty Insurance Company ("NAS"), a wholly owned subsidiary of Swiss Re ("NAS Agreement"). Under the terms of the agreement, WCG was granted the right to underwrite and issue policies on behalf of NAS, subject to certain guidelines and review procedures by NAS. The agreement also provided for WCG to handle all claims arising out of NAS policies written under the agreement. WCIC was not a party to this agreement. See Exhibit 6 at ¶ 12.

18. Beginning June 2000, WCG assigned its responsibilities under the NAS Agreement to LWPCAC. From that time forward, LWPCAC handled claims arising out of the NAS policies for WCG, and received compensation from WCG for these services. WCIC, which was not a party to the NAS Agreement, did not provide compensation to LWPCAC for claims handling services under the NAS Agreement. See Exhibit 6 at ¶ 13.

19. At no time during its relationship with WCG did LWP receive any dividend or other distributions, whether in cash, property or other assets, from WCG, WCIC, FCL or WCMIC other than payments made in the ordinary course of business in accordance with the various service agreements, written and oral, in effect during the period. See Exhibit 6 at ¶ 25; Exhibit 7 at ¶ 17.

20. LWP did not own, direct, or control the business or operations of WCG, WCIC, FCL or WCMIC. Exhibit 6 at ¶ 16.

21. On November 6, 2001, the Chairman of the Board and Chief Executive Officer of WCG, WCIC, and FCL was placed on indefinite leave of absence. At the same time John Igoe was appointed to serve as Acting Chairman of the Board and CEO of the companies pending an internal investigation by special outside counsel of the activities of former officers and directors. See Exhibit 6 at ¶ 15; Exhibit 7 at ¶ 13.

The Sale Of LWPCAC to John Igoe and Judy Adlam

22. On May 8, 2002, John Igoe and Judy Adlam purchased the stock of LWPCAC from WCG for \$2,000,000 in cash, an assumption of liabilities of approximately \$1.8 million and a contingency payment (made in 2003) of \$175,000. See Stock Purchase Agreement and Mandatory Share Redemption Agreement, attached as Exhibit 11. John Igoe did not represent WCG in the negotiations of the transaction, which was made effective as of January 1, 2002. The Board of Directors retained Hales and Company independently to advise them as to the fairness of the transaction. See Exhibit 6 at ¶ 17; Exhibit 7 at ¶ 14.

23. Pursuant to the agreement for purchase of the stock of LWPCAC by Igoe and Adlam, Igoe agreed to resign as an officer and director of all Wasatch Crest companies. See Exhibit 6 at ¶ 18; Exhibit 7 at ¶ 15. Igoe resigned these positions on the day of closing, May 8, 2002. See Resignations of John Igoe, attached as Exhibit 12.

Payments to LWPCAC by Wasatch Crest Companies

24. From June 2000 when LWPCAC first started providing claims handling services for WCIC and WCMIC until January 1, 2002 when the sale of LWPCAC to Igoe and Adlam was effective, LWPCAC received payments of \$5,142,263 under the terms of its agreements with WCIC, WCMIC, and WCG. See Exhibit 6 at ¶ 20.

25. Of the \$5,142,263 received by LWPCAC, \$3,001,503 was paid as compensation for claims handling services provided to WCG in connection with the NAS Agreement. See Exhibit 6 at ¶ 21.

26. Of the \$5,142,263 received by LWPCAC, \$1,328,110 was paid as compensation for claims handling services provided to WCIC under the terms of the oral and written administrative agreements. See Exhibit 6 at ¶ 22.

27. Of the \$5,142,263 received by LWPCAC, \$812,650 was paid as compensation for claims handling services provided to WCMIC under the terms of the oral agreement described. See Exhibit 6 at ¶ 23.

**LWPCSI Continues to Provide Claims Handling Services
After Insolvency of WCIC and WCMIC**

28. After WCIC and WCMIC were placed into liquidation on July 31, 2001, LWPCAC, and subsequently LWPCSI, continued to provide claims handling services to WCIC and WCMIC at the request of the Utah Guaranty Association ("UGA"), in accordance with the terms of the written Administrative Agreement (Exhibit 10) with WCIC and the oral agreement with WCMIC. See Exhibit 6 at ¶ 24; Exhibit 7 at ¶ 16.

RESPONSE TO LIQUIDATOR'S STATEMENT OF MATERIAL FACTS

1. In response to paragraph 1, LWP admits that WCIC was an insurance company domiciled in the State of Utah and was placed in liquidation by the Third Judicial District Court in Salt Lake County, Utah on July 31, 2003.

2. In response to paragraph 2, LWP admits that WCMIC was an insurance company domiciled in the State of Utah and was placed in liquidation by the Third Judicial District Court in Salt Lake County, Utah on July 31, 2003.

3. In response to paragraph 3, LWP admits that Melvin U. Stewart was appointed by the Third Judicial District Court in Salt Lake County, Utah as the liquidator of WCIC and WCMIC on July 31, 2003. The remaining assertions in paragraph 3 are legal conclusions rather than material facts.

4. In response to paragraph 4, LWP admits LWPCAC was a California corporation whose name was changed to LWPCSI.

5. In response to paragraph 5, LWP admits LWPCSI is a California corporation whose name was changed from LWPCAC. LWP further admits that WCG was the parent corporation of WCIC.

LWP disputes that it was sold to *only* John Igoe when, in fact, it was sold effective January 1, 2002, to John Igoe *and* Judy Adlam. See Exhibit 11. LWP also disputes that Igoe was the Chairman of the Board of Directors and Chief Executive Officer of WCIC and WCG. He became Acting Chairman of the Board of Directors and Chief Executive Officer of WCG and WCIC in November of 2001, but resigned from

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those positions and all other positions with Wasatch Crest companies as of May 8, 2002, the date of closing of the sale of LWP by WCG to Igoe and Adlam. See Exhibit 6 at ¶ 17; Exhibit 9 at ¶ 15. LWP admits that in approximately January 2000, Igoe became president of WCG, but he resigned from this position on May 8, 2002. *Id.*

LWP admits (1) Igoe was the Chairman of the Board and Chief Executive Officer of LWP, and (2) WCG was the parent of WCIC from October 1998 until 2002 when Igoe resigned his positions with WCG and WCIC. LWP admits that it was a subsidiary of WCG and a sister subsidiary of WCIC from November 16, 1998 through December 31, 2001, and could therefore be considered an affiliate of WCG and WCIC between those dates. LWP denies that it was an affiliate of WCG and WCIC after January 1, 2002, the effective date of the sale of LWP to Igoe and Adlam. See Exhibit 6 at ¶ 17; Exhibit 7 at ¶ 14. LWP was not an affiliate of WCMIC after November 27, 2000 when WCMIC's interest in WCG, the parent of LWP, was relinquished. Exhibit 5 at p.14, Item 5(1)(e).

**Corporate History of Wasatch Crest Mutual and Wasatch Crest
Insurance Acquisition of FCL**

6. In response to paragraph 6, LWP admits that WCMIC was a mutual insurance company controlled by its shareholders and that WCMIC purchased all of the stock of FCL effective April 15, 1994.

Creation of WCIC and Merger with WCCIC

7. In response to paragraph 7, LWP admits effective October 31, 1998, WCG purchased all of the common stock of Utah Home Fire Insurance Company and changed

the latter company's name to WCIC. LWP also admits, effective December 19, 2000, WCCIC merged into WCIC with WCIC as the survivor.

Corporate History of LWP

8. In regard to Paragraph 8, LWP admits, on November 16, 1999, WCG purchased substantially all of the assets and business operations of LWP Commercial Claims Administrators, Inc. ("LWP Commercial"), a company which acted as a third party insurance claim administrator, from John and Erica Igoe. LWP also admits that WCG formed a new corporate entity, LWPCAC, at that time and the assets purchased from LWP Commercial were transferred to LWPCAC.

LWP further admits that LWPCAC was incorporated in California and changed its name to LWPCSI. LWPCSI has offices in Sacramento, California and Salt Lake City and is a third-party administrator specializing in the administration of worker's compensation insurance and claims.

Affiliate Transactions

9. In regard to Paragraph 9, LWP disputes that (1) LWP entered into an agreement on about November 16, 1999 with WCIC and WCMIC providing for payment of a fixed percentage fee to administer all claims throughout the entire duration of the claims, (2) the fee paid to LWP was a percentage of gross premiums received by WCIC and WCMIC, and (3) LWP was paid a percentage of all medical fee savings generated by LWP. The Administrative Services Agreement, Exhibit 9, dated November 16, 1999 was an agreement between LWP Commercial, the selling entity owned by John and

Erica Igoe, and LWPCAC, the subsidiary formed by WCG to hold the assets transferred by LWP Commercial. WCIC and WCMIC were not parties to the agreement. Moreover, the agreement did not provide for payment of a percentage of premiums or medical cost savings to LWP. It instead provided that LWPCAC would compensate LWP Commercial "on a cost basis" by reimbursing LWP Commercial for all reasonable costs. See Exhibit 11 at p. 3. The agreement was intended to facilitate the transition of business operations pending the transfer of LWP Commercial's employees on January 1, 2000. For this reason, the agreement terminated on December 31, 1999. See Exhibit 6 at ¶ 8.

10. In regard to paragraph 10, LWP disputes that WCIC entered into an Administrative Agreement effective January 1, 2001. In June 2000, LWPCAC began providing workers compensation claims handling services to WCIC pursuant to an oral agreement. Employees of WCG provided these services under the direction of LWPCAC, and LWPCAC reimbursed WCG for the personnel services provided by WCG to LWPCAC. In return for providing these services, LWPCAC received a percentage of the premiums earned by WCIC and a percentage of the medical cost savings realized by WCG due to LWPCAC's handling of claims. See Exhibit 6 at ¶ 9.

This oral agreement was formalized in a written agreement between WCIC and LWPCAC which was effective as of January 1, 2001. The terms of the written agreement were the same as the terms of the earlier oral agreement. See Exhibit 10; Exhibit 6 at ¶ 10; Exhibit 7 at ¶ 10. The terms of the agreement are standard commercial

terms similar to the terms of agreements entered into by LWPCAC with other insurance companies. See Exhibit 6 at ¶ 10.

11. In regard to paragraph 11, LWP admits that it presented a proposed Administrative Agreement to WCMIC, which was to be effective January 1, 2001 and had the same terms as the administrative agreement between LWPCAC and WCIC.

12. In regard to paragraph 12, LWP admits that the written agreement between LWP and WCMIC was never signed by WCMIC and that the two companies continued to operate under the oral agreement. The oral agreement, however, was not entered into in November 1999. The oral agreement was reached in June 2000 when LWP began providing claims handling services to WCMIC. See Exhibit 6 at ¶ 11.

13. In regard to paragraph 13, LWP denies that WCG sold LWP back to John and Erica Igoe sometime in 2002. LWP was, instead, sold to Igoe and Adam effective January 1, 2002. See Exhibit 11. The sale closed on May 8, 2002. *Id.* LWP also disputes that John Igoe continued in his capacity as an officer and director of WCG. At the time the sale was closed, Igoe resigned his positions as an officer and director of WCG and all other Wasatch Crest companies. See Exhibit 12.

14. In regard to paragraph 14, LWP disputes that WCIC paid \$6,144,402.68 to LWP for claims handling services from November 16, 1999 through July 30, 2003, of which amount \$4,955,486.10 was in the form of checks or wire transfers and \$1,188,816.58 was in the form of offsets. From June 30, 2000, when LWP first began providing claims handling services to WCIC, until January 1, 2002, when the sale of LWP

to Igoe and Adlam became effective, WCIC paid \$1,338,110 to LWP for claims handling services. See Exhibit 6 at ¶ 22.

15. In regard to paragraph 15, LWP disputes that WCMIC paid \$534,295.96 to LWP for claims handling services from November 16, 1999 through July 30, 2003, of which amount \$534,265.96 was in the form of checks or wire transfers and \$60,000 was in the form of offsets. From June 30, 2000, when LWP first began providing claims handling services to WCMIC, until January 1, 2002, when the sale of LWP to Igoe and Adlam became effective, WCMIC paid \$812,650 to LWP for claims handling services. See Exhibit 6 at ¶ 23. None of this amount was paid to LWP before November 27, 2000, the date WCMIC relinquished its interest in WCG and ceased to be a part of the WCG group. See Schedule prepared as exhibit to Affidavit of Robert C. Miller, filed as Exhibit M to Liquidator's Motion for Summary Judgment, attached as Exhibit 13.

Standard of Review

Summary judgment is intended to "expedite litigation by avoiding needless trials where no triable issue of fact is disclosed." *Nat'l Am. Life Ins. Co. v. Bayour Country Club*, 403 P.2d 26, 29 (Utah 1965). It is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56 (c). A Court should grant summary judgment when the undisputed facts are such that "there is no reasonable probability that the party moved against could prevail." *Frisbee v. K&K Construction Co.*, 676 P.2d 387, 389 (Utah 1984). Plaintiff has not met that burden, but Defendant LWP has.

ARGUMENT

LWP's cross-motion for summary judgment should be granted and the Liquidator's motion for summary judgment be denied because (1) undisputed material evidence shows that payments to LWP by WCIC and WCMIC were not "distributions" subject to recoupment under Utah Code Ann. 31A-27-322; and (2) LWP was never an affiliate in control of the insurer as required for recoupment of "distributions" under Utah Code Ann. § 31A-27-322. In addition, even if the payments in question could somehow be termed "distributions," the Liquidator is not entitled to summary judgment because there are disputed issues of material fact concerning payments to LWP.

Chapter 27 of the Utah Insurance Code, titled "Insurers Rehabilitation and Liquidation Act," governs the liquidation of Utah Insurance Companies. The Liquidator of WCIC and WCMIC brought its complaint against LWP and its motion for summary judgment under Section 322 of Chapter 27 which gives the receiver of an insurer the right to seek recoupment of "distributions" to affiliates that control the insurer when the distributions are made within the five years before the date of liquidation. As the legislative history of Section 322 clearly demonstrates, the Liquidator, however, either completely misunderstands or has misapplied the provisions of Section 322 by seeking to recoup fair consideration paid for services rendered rather than "distributions", a term which, as used in Section 322, is synonymous with "dividend," from an entity which did not receive dividends and which never controlled the insurers.

1. Utah Code Ann. § 31A-27-322 and its Legislative History

Section 322 specifically provides:

(1) If an order for the liquidation, rehabilitation, or conservation of an insurer authorized to do business in this state is ordered under this chapter, the receiver appointed under the order has a right to recover on behalf of the insurer from *any affiliate that controlled the insurer* the amount of *distributions*, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation, rehabilitation, or conservation. This recovery is subject to the limitations of Subsections (2) through (6).

(2) No *dividend* is recoverable if the recipient shows that, when paid, the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect its solvency.

(Emphasis added.) This section was enacted in 1986 as part of a complete revision of the Utah Insurance Code which began in 1981. For a five year period, the Insurance Law Revision Committee, created by the Utah State Legislature, met to redraft the insurance code.

Records relating to the intent of the drafters are maintained in the Utah State Archives and include a March 25, 1983 draft with extensive drafters' comments.¹ The language of Section 322, first added in this draft, provided "Recoupment from affiliates. A rehabilitator, liquidator, or conservator may recover on behalf of the insurer excessive

¹ The March 1983 draft was identified by drafter Dane Leavitt as one of the documents with the most probative value to the research of legislative history. As Mr. Leavitt noted in his transmittal letter to the Utah State Archives, "To the extent that the resulting provisions were not substantially changed. . . , the drafter's comments [on the above mentioned draft] will be potentially helpful in understanding the drafter's (if not the legislature's) intent." See Series 25134, Insurance Law Revision Committee, Administrative Records, 1981-1985, attached as Exhibit 14.

distributions paid to affiliates, pursuant to section 96-17-6.5."² See, State of Utah Draft Insurance Code, March 25, 1983, § 96-45-55, attached as Exhibit 15. Section 96-17-6.5 provides:

(1) Right of receiver to recover *dividends* paid. If an order for the liquidation, rehabilitation or conservation of an insurer authorized to do business in Utah is entered..., the receiver has a right to recover on behalf of the insurer the amount of *distributions* other than stock dividends paid by the insurer on its capital stock at any time during the five years preceding the petition for liquidation, rehabilitation or conservation, subject to the limitations of subsections (2) to (4).

(2) *Dividend* payments recoverable. No dividend is recoverable if the recipient shows that when paid the *distribution* was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect its solvency.

Id. (Emphasis added.)

The comments to the two draft sections relating to Utah Code Ann. § 31A-27-322 make it clear that the section was added to remedy a potential abuse of insurance company holding systems: "[the section] provides the necessary power to recover distributions to affiliates under a holding company system." Comment to § 96-45-55, Exhibit 15. The recoupment from affiliates provision was intended to remedy the problems occurring when parent companies took large surpluses as dividends from cash-rich insurers and the insurers were later rendered insolvent. This provision allows the liquidator to recoup the excessive dividend to the controlling parent. Comment to § 96-17-6.5. *Id.*

² The August 24, 1984 Draft of the liquidation and rehabilitation section of the Utah Insurance Code, attached as Exhibit 16, shows that Utah Code Ann. § 96-45-55 was renumbered 31A-26-322. The Chapter number was subsequently changed from Chapter 26 to Chapter 27.

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Section 322 as enacted in 1986 makes it even more clear the section's application is limited to situations where dividends are paid to a parent company. In subsection one, the relevant payments to affiliates controlling the insurer are referred to as "distributions." In subsection two, the payments are called "dividends." The drafts of these sections and the comments to the draft demonstrate that the term "distribution" is used interchangeably with the term "dividend." Further, Section 322 as enacted by the legislature allows recoupment from "affiliates that control the insurer," thereby establishing that recoupment is limited to the situation where a parent in a holding company system takes funds from an insurer by dividend. The definition of distribution given elsewhere in the Utah Code supports the conclusion that a distribution does not include payment for services. In the Utah Revised Business Corporation Act, Utah Code Ann. § 16-10a-101 *et seq.*, for example, the term "distribution" is defined as "a direct or indirect transfer of money or other property...in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend, a purchase, redemption, or other acquisition of shares, distribution of indebtedness or otherwise." Utah Code Ann. §16-10a-102(13). LWP received no such dividends or distributions.

2. LWP was never an affiliate that controlled WCIC or WCMIC

The Liquidator argues, incorrectly and without support, that Section 322 recoupment applies to all affiliates of an insurer, when, in fact, it can only apply to affiliates that control the insurer. The point is logical – it is only those with control who can direct dividends. The Liquidator completely ignores the fact that LWP was not in

control of WCIC or WCMIC; instead, the Liquidator asks the Court to assume that recoupment is appropriate merely because at certain times, John Igoe was individually an officer and director of LWP, WCIC, and WCG.

Igoe's position with LWP, WCIC and WCG, however, is alone insufficient to establish that LWP was an affiliate of WCIC or WCMIC. First, Igoe held no management position with WCMIC, much less a position which could result in WCMIC being an affiliate of LWP. Second, the Liquidator fails to establish that Igoe's individual responsibilities with LWP and WCIC actually resulted in WCIC being an affiliate of LWP. Such status may arise where "[a] corporation is an affiliate of another corporation, regardless of ownership, if substantially the same group of natural persons manages the corporations." Utah Code Ann. § 31A-27-301(5). Here, the Liquidator has not even tried to show that "the same group or persons" manages LWP and WCIC, but instead presumes control based on Igoe's individual positions at times with the two corporations. The Insurance Code, however, does not allow such presumptions: "there is no presumption an individual holding an official position with another person controls that person solely by reason of the position." Utah Code Ann. § 31A-1-301(27)(a). (Emphasis added.)

The undisputed facts show that LWP and WCIC were sister subsidiaries of WCG from November 16, 1999 until January 1, 2002 when the sale of LWP by WCG to Igoe and Adlam was effective. As such, LWP and WCIC may have been affiliates prior to the effective date of the sale of LWP, but LWP was never an affiliate that controlled the

insurer, WCIC. Section 322's recoupment provisions, therefore, could not apply to any payments from WCIC to LWP, even if the Liquidator had established that such payments had been dividends rather than payments for services rendered.

The undisputed facts also establish that LWP was not an affiliate of WCMIC during the time period when WCMIC made payments for services to LWP. In November 1999, when LWP Commercial's assets were acquired by LWPCAC, WCMIC owned a portion of the stock of WCG, which in turn owned the stock of LWPCAC. However, effective November 27, 2000, WCMIC relinquished all of its stock in WCG and could not thereafter be considered to be an affiliate of LWP under any interpretation of the term. The schedule submitted as an exhibit to the Affidavit of Robert C. Miller filed in support of the Liquidators Motion for Summary Judgment shows no payments from WCMIC to LWP before December 31, 2000. See Exhibit 13. Further, at no time was LWP ever an affiliate in control of WCMIC.

3. Payments to LWP by WCIC and WCMIC were not distributions

Additional undisputed facts establish that the payments to LWP from WCIC and WCMIC were fair consideration for services contemporaneously rendered to WCIC and WCMIC, not excessive dividends from an insurer to a parent. The services were provided pursuant to administrative agreements standard in the industry. The fairness of this arrangement is further confirmed by the fact that UGA engaged and continues to engage LWP to provide claims handling services to WCIC and WCMIC under terms and conditions similar to those of the contracts in effect prior to the liquidation proceedings.

4. Disputed issues concerning payments

Even if payments to LWP were found to be distributions to an affiliate that controlled the insurer, summary judgment in the Liquidator's favor should not be granted. There is an issue of disputed material fact concerning the source of payments to LWP and the relationship of the companies when the payments were made. The Liquidator contends WCIC paid LWP \$6,144,402.68 and WCMIC paid LWP \$534,295.96 prior to liquidation. LWP disputes this amount, reporting that LWP received a total of \$5,142,263 from Wasatch Crest companies during the time period LWP was owned by WCG. After the sale of LWP to Igoe and Adlam effective January 1, 2002, ownership of LWP was totally different from the ownership of WCIC and WCMIC and after May 8, 2002, Igoe no longer held a position WCIC. LWP could not possibly be considered an affiliate of WCIC or WCMIC after May 8, 2002, and payments after that date could not be subject to recoupment, regardless of the issue of control. In addition, after November 27, 1999, when WCMIC relinquished its stock in WCG, WCMIC no longer had even an indirect interest in LWP and could not be LWP's affiliate.

The Liquidator also misstates, or ignores, the source of payments to LWP. The Affidavits presented by LWP confirm that \$3,001,503 of the amount in question was paid to LWP for services rendered under the NAS Agreement, not as a result of services provided to WCIC or WCMIC. Those amounts also could not be subject to recoupment as payments by the insurer.

5. Payments Do Not Meet Test for Recovery

Even if the payments to LWP by WCIC and WCMIC were termed distributions (which they are not), they would not be recoverable under Utah Code Ann. § 31A-27-322(2) which provides that “...no dividend is recoverable if the recipient shows that when paid the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect its solvency.” Throughout the period from June 2000 until year end 2002, both WCIC and WCMIC met all the solvency requirements of the Utah Department of Insurance as evidenced by their quarterly financial filings as required under the Utah Insurance Code. Subsequent to the acquisition of LWP by Igoe and Adlam both entities were declared insolvent by the Utah Department of Insurance. This action was taken by the Utah Department of Insurance on July 31, 2003 over eighteen months after the effective date of the sale and fifteen months after the closing date of the sale. Therefore, there is no evidence that insurer knew or should reasonably have know that the distributions, if made “...might adversely affect its solvency.” Furthermore, as amply demonstrated, the payments were made for services rendered in accordance with standard commercial terms and were therefore “...lawful and reasonable.” Even if the distributions were deemed to be “dividends” within the meaning of the Insurance Code, they do not meet the test for recovery under Section 322.

CONCLUSION

For the foregoing reasons, LWP's Motion for Summary Judgment should be granted, finding in LWP's favor on the Liquidator's claims and dismissing such claims with prejudice. On the same grounds, the Liquidator's Motion for Summary Judgment should be denied.

Dated this 17th day of February 2005.

CLYDE SNOW SESSIONS & SWENSON

A handwritten signature in black ink, appearing to read 'Edwin C. Barnes', written over a horizontal line.

EDWIN C. BARNES
CHARLES R. BROWN
JENNIFER A. JAMES
Attorneys for Defendants

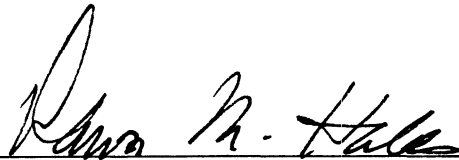
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Memorandum in Support of Cross-Motion for Summary Judgment and Opposition to Liquidator's Motion for Summary Judgment to be mailed, postage prepaid, to the following this 17th day of February 2005:

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Tab 3

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Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION, and
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and MERWIN U.
STEWART, Liquidator,

Plaintiffs,

-vs-

LWP CLAIMS ADMINISTRATORS
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants.

AFFIDAVIT OF JOHN IGOE

Civil No. 030915527
Judge Hanson

STATE OF UTAH }
 :ss
COUNTY OF SALT LAKE }

I, John Igoe, having first been duly sworn, depose and state as follows:

1. I am a resident of the State of California, am over the age of eighteen and
am competent to make this affidavit.

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2. On September 1, 1998, my wife, Erica Igoe, and I purchased the assets of a company providing third-party claims handling and other administrative services from Acordia Corporation. These assets were transferred to a California corporation, LWP Commercial Claims Administrators, Inc. ("LWP Commercial"), owned by my wife and me.

3. On November 16, 1999, substantially all of the assets and business operations of LWP Commercial Claims Administrators, Inc. ("LWP Commercial"), were purchased by Wasatch Crest Group ("WCG"), a Utah corporation. See Asset Purchase Agreement, attached as Exhibit A. At that time, WCG formed a new corporate entity, LWP Claims Administrators Corp. ("LWPCAC") as a wholly owned subsidiary and transferred the assets purchased from LWP Commercial to LWPCAC.

4. As consideration for substantially all the assets of LWP Commercial, my wife and I received \$325,000 in cash and \$700,000 in promissory notes. See Exhibit A at pp. 7-8, Art. 3.1. We were supposed to be issued 800,000 shares of Class B common stock of WCG on the third anniversary of the asset sale, but these shares were never issued. *Id.* at Art. 3.2.

5. Shortly after the asset purchase and formation of LWPCAC, I became President and Chief Operations Officer of WCG and its subsidiaries, Wasatch Crest Insurance Company ("WCIC") and First Continental Life and Accident Insurance Company ("FCL"). I also became CEO of LWPCAC.

A handwritten signature in black ink, appearing to be "Z0310", located in the bottom right corner of the page.

6. I have never been an officer or director of Wasatch Crest Mutual Insurance Company ("WCMIC"), a Utah insurance company which held a significant portion of the shares of WCG from June 30, 1998 until November 27, 2000.

7. I have never controlled WCG, WCMIC, FCL, or WCIC. I have never held any stock of those corporations. I was one of at least five directors of WCG at certain times, but I did not control the board, which was under the control of an investor group. At no time did LWP ever control WCG, WCMIC, FCL or WCIC.

8. To facilitate the transfer of the business operations of LWP Commercial to LWPCAC in November 1999, the former corporation agreed to continue to employ its former employees and supervise their work under the terms of an administrative services agreement from November 16, 1999 through December 31, 1999 when LWP Commercial's employees were to become employees of WCG. See Administrative Services Agreement, effective November 16, 1999, attached as Exhibit B. In return for providing these services, LWPCAC paid LWP Commercial for the costs of rendering the services. *Id.* at p. 3. The Administrative Services Agreement expired on December 31, 1999. *Id.* at p. 4.

9. Around June 2000, LWPCAC began providing workers compensation claims handling services to WCIC. Employees of WCG provided these services under the direction of LWPCAC, and LWPCAC reimbursed WCG for the personnel services provided by WCG to LWPCAC. In return for providing these services, LWPCAC received a percentage of the premiums earned by WCIC and a percentage of the

7027

medical cost savings realized by WCIC due to LWPCAC's handling of claims. From June 2000 until January 1, 2001, the claims handling services were provided pursuant to an oral agreement between LWPCAC and WCIC.

10. This oral agreement was formalized in a written agreement between WCIC and LWPCAC effective as of January 1, 2001. The terms of the written agreement were the same as the terms of the earlier oral agreement. See, Administrative Agreement, attached as Exhibit C. The terms of the agreement are standard commercial terms similar to the terms of agreements entered into by LWPCAC with other insurance companies.

11. A similar oral agreement for claims handling services was in effect between WCMIC and LWPCAC. Although a written agreement was drafted to formalize the oral agreement, this agreement was never signed by WCMIC and the two companies continued to operate under the terms of the oral agreement.

12. On April 1, 1998, prior to formation of LWPCAC, WCG entered into a Managing General Agency Agreement with North American Specialty Insurance Company ("NAS"), a wholly owned subsidiary of Swiss Reinsurance America Corporation ("Swiss Re") (the "NAS Agreement"). Under the terms of the agreement, WCG was granted the right to underwrite and issue policies on behalf of NAS, subject to certain guidelines and review procedures by NAS. The agreement also provided for WCG to handle all claims arising out of NAS policies written under the agreement. WCIC was not a party to this agreement.

13. Beginning June 2000, LWPCAC handled claims arising out of the NAS policies for WCG, and received compensation from WCG for these services. WCIC, which was not a party to the NAS agreement, did not provide compensation to LWPCAC for claims handling services under the NAS agreement.

14. Effective December 2000, WCG's capital was restructured pursuant to a Form A Application approved by the Utah Insurance Commissioner by order dated November 27, 2000. As part of the restructuring, WCMIC relinquished its shares in WCG, and WCG Investment received 89% of the voting shares of WCG, with the remaining 11% of the voting shares held by Swiss Re.

15. On November 6, 2001, the Chairman of the Board and Chief Executive Officer of WCG, WCIC, and FCL was placed on indefinite leave of absence. At the same time I was appointed to serve as Acting Chairman of the Board and CEO of the companies pending an internal investigation by special outside counsel of the activities of former officers and directors. My service in these positions was an accommodation to the investor group which controlled WCG, but did not give me control of WCG, WCIC, or FCL.

16. LWP did not own, direct, or control the business or operations of WCG, WCIC, FCL or WCMIC.

17. On May 8, 2002, Judy Adlam and I purchased the stock of LWPCAC from WCG for \$2,000,000 in cash, assumption of liabilities of approximately \$1.8 million and a contingency payment (made in 2003) of \$175,000. I did not represent WCG in the

negotiations leading up to that transaction, which was made effective as of January 1, 2002. The Board of Directors of WCG retained Hales and Company to advise them as to the fairness of the transaction.

18. Pursuant to the agreement for purchase of the stock of LWPCAC from WCG, I agreed to resign as an officer and director of all Wasatch Crest companies. See Stock Purchase Agreement and Mandatory Share Redemption Agreement, attached as Exhibit D. I resigned those positions as of the day of closing, May 8, 2002. See Resignations, attached as Exhibit E.

19. In the third quarter of 2002, the name of LWPCAC was changed to LWP Claims Solutions, Inc. ("LWPCSI").

20. I have carefully examined the books and records of LWPCAC, including its financial records. The books and records show that, from June 2000, when LWPCAC first started providing claims handling services for WCIC and WCMIC, until January 1, 2002, when the sale of LWPCAC by WCG was effective, LWPCAC received payments of \$5,142,263 for services performed under the terms of its agreements with WCIC, WCMIC, NAS and WCG.

21. Of the \$5,142,263 received by LWPCAC for services, \$3,001,503 was paid as compensation for claims handling services provided to WCG in connection with the NAS agreement described in ¶¶ 12 & 13, above.

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22. Of the \$5,142,263 received by LWPCAC for services, \$1,328,110 was paid as compensation for claims handling services provided to WCIC under the terms of the oral and written administrative agreements described in ¶¶ 9 & 10, above.

23. Of the \$5,142,263 received by LWPCAC for services, \$812,650 was paid as compensation for claims handling services provided to WCMIC under the terms of the oral agreement described in ¶ 11, above.

24. After WCIC and WCMIC were placed into liquidation on July 31, 2003, LWPCSI continued to provide claims handling services to WCIC and WCMIC at the specific request of the Utah Property and Casualty Guaranty Association ("UGA"), in accordance with the terms of the written Administrative Agreement (Exhibit C) with WCIC and the oral agreement with WCMIC.

25. At no time during its relationship with WCG did LWP receive any dividend or other distributions, whether in cash, property or other assets, from WCG, WCIC, FCL or WCMIC other than payments made in the ordinary course of business in accordance with the various service agreements, written and oral, in effect during the period.

Dated this 17th day of February 2005.

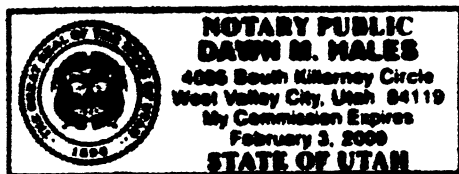


JOHN IGOE

Subscribed and sworn to before me this 17th day of February 2005.



NOTARY PUBLIC



Tab 4

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and D. Kent Michie, Liquidator*

FILED
DISTRICT COURT
05 MAR 24 PM 4:55
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY [Signature]
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION, and
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and D. KENT MICHIE,
Liquidator,

Plaintiffs,

vs.

LWP CLAIMS ADMINISTRATORS,
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants.

**LIQUIDATOR'S MEMORANDUM IN
OPPOSITION TO LWP'S MOTION
FOR SUMMARY JUDGMENT AND
REPLY MEMORANDUM IN
SUPPORT OF LIQUIDATOR'S
MOTION FOR SUMMARY
JUDGMENT**

(Oral Argument Requested)

Case No: 030915527

Judge Timothy R. Hanson

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Plaintiffs Wasatch Crest Insurance Company, in Liquidation (“Insurance Co.”), and Wasatch Crest Mutual Insurance Company (“Mutual”), in Liquidation, and D. Kent Michie, Liquidator (the “Liquidator”), by and through counsel, submit this opposition to Defendants LWP Claims Administrators, Corp. and LWP Claims Solutions, Inc.’s (collectively “LWP”) Motion for Summary Judgment. In addition, the Liquidator submits his Reply Memorandum in Support of Insurance Co. and Mutual’s Motion for Summary Judgment.

I. INTRODUCTION

Defendant LWP advances two arguments in opposition to the Liquidator’s Motion for Summary Judgment and in support of LWP’s own Motion for Summary Judgment: (1) the approximate \$6 million payments made by WCIC and WCMIC to LWP were not “dividends”, and therefore were not subject to the Recoupment from Affiliates statute (Sec. 31A-27-322, Utah Code Ann.); and (2) LWP was never an affiliate in control of WCIC and/or WCMIC. *See* LWP’s Memorandum in Support of Motion for Summary Judgment and Opposition to Liquidator’s Motion for Summary Judgment (“LWP Memo.”) already on file with Court at p. 1. Both arguments are based on misinterpretations of the pertinent statutes and erroneous conclusions based on a faulty and incomplete reading of the legislative history. Affiliate transactions are so susceptible to manipulation and abuse that the Liquidator is statutorily empowered by § 31A-27-322 to recoup those paid monies regardless of any defense asserted by the original recipient/affiliate.

In addition, LWP makes three secondary arguments: (1) the payments were for contemporaneously rendered services; (2) the source of the payments to LWP was not always Insurance Co. and Mutual; and (3) dividends are not recoverable if LWP can show that the dividend was lawful and reasonable, and Insurance Co. and Mutual did not know that the dividends would adversely affect the solvency of Insurance Co. and Mutual. The three secondary arguments are, quite simply, irrelevant and immaterial to whether the Liquidator can recoup distributions made to affiliates by an insurance company.

**II. LIQUIDATOR'S STATEMENT OF UNDISPUTED FACTS WITH
RESPECT TO THE LIQUIDATOR'S MOTION
FOR SUMMARY JUDGMENT**

Pursuant to Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure, “[a] memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party’s facts that is controverted.” LWP failed to follow this procedural rule governing summary judgment motions resulting in confusion as to what facts LWP admits or denies. First, LWP did not restate each of the Liquidator’s facts with which LWP disagrees. Second, LWP included a response to all of the Liquidator’s separately numbered facts, regardless of whether they admitted or denied the fact. Thirdly, in certain instances, it is difficult to determine if LWP is truly disputing a fact asserted by the Liquidator or whether they are making some kind of inconsequential distinction. LWP’s failure to follow the procedural rules has made the Liquidator’s task much more difficult in extrapolating what is disputed. Therefore, the Liquidator sets forth here (1) a verbatim restatement of the Liquidator’s original

undisputed fact; (2) a verbatim restatement of LWP's response; and (3) an attempt to discern whether LWP admitted or denied the Liquidator's statement of fact, and if denied, a response to that denial. Inasmuch as LWP failed to comply with Rule 7 of the Utah Rules of Civil Procedure, the Liquidator's statements are deemed admitted.

Liquidator's Statement of Fact No. 1: Plaintiff Wasatch Crest Insurance Company was an insurance company domiciled in the State of Utah. Wasatch Crest Insurance was placed into liquidation by the Third Judicial District Court, in and for Salt Lake County, State of Utah, on or about July 31, 2003. *See* Complaint at ¶ 1 and Answer at ¶ 1, true and correct copies of which are attached to the Liquidator's Memorandum in Support of its Motion for Summary Judgment ("Liquidator's Memo.") respectively as Exhibits "A" and "B".

LWP's Response: In response to paragraph 1, LWP admits that WCIC was an insurance company domiciled in the State of Utah and was placed in liquidation by the Third Judicial District Court in Salt Lake County, Utah on July 31, 2003.

Liquidator's Reply: LWP admits all statements of fact in the Liquidator's first statement.

Liquidator's Statement of Fact No. 2: Plaintiff Wasatch Crest Mutual Insurance Company was an insurance company domiciled in the State of Utah. Wasatch Crest Mutual was placed into Liquidation by the Third Judicial District Court, in and for Salt Lake County, State of Utah, on or about July 31, 2003. *See* Complaint, Ex. "A" at ¶ 2 and Answer, Ex. "B" at ¶ 2.

LWP's Response: In response to paragraph 2, LWP admits that WCMIC was an insurance company domiciled in the State of Utah and was placed in liquidation by the Third Judicial District Court in Salt Lake County, Utah on July 31, 2003.

Liquidator's Reply: LWP admits all statements of fact in the Liquidator's second statement.

Liquidator's Statement of Fact No. 3: Plaintiff Merwin U. Stewart, Utah Insurance Commissioner, was appointed by the Third Judicial District Court as the liquidator of Insurance Co. and Mutual on July 31, 2003 (the "Liquidator"). The Liquidator has the authority and standing to bring this action pursuant to § 31A-27-310, Utah Code Ann. The Liquidator is vested by operation of law with the title to all the property, contracts, and rights of actions of the insurance company being liquidated, wherever located, as of the date of the filing of the petition for Liquidation. Pursuant to § 31A-27-314, Utah Code Ann., the Liquidator may continue to prosecute and institute in the name of the insurer or in the Liquidator's own name, any suits or other legal proceedings in this state or elsewhere. *See* Liquidation Order, a true and correct copy of which is attached to the Liquidator's Memo. as Exhibit "C".

LWP's Response: In response to paragraph 3, LWP admits that Melvin [sic] U. Stewart was appointed by the Third Judicial District Court in Salt Lake County, Utah as the liquidator of WCIC and WCMIC on July 31, 2003. The remaining assertions in paragraph 3 are legal conclusions rather than material facts.

Liquidator's Reply: LWP admits only certain portions of this statement. The Liquidator asserts that the Utah Insurance Code speaks for itself and that the Liquidator

has the authority and standing to bring this action, that the Liquidator is vested by operation of law with the title to all the property, contracts, and rights of actions of the insurance company being liquidated, and that the Liquidator may prosecute and institute in the name of the insurer or in the Liquidator's own name any suits or other legal proceedings in this state or elsewhere.

Liquidators Statement of Fact No. 4: Defendant LWP Claims Administrators, Corp. was a California corporation. The name "LWP Claims Administrators, Corp" was changed to LWP Claims Solutions, Inc. *See* Complaint, Ex. "A" at ¶ 4 and Answer, Ex. "B" at ¶ 4.

LWP's Response: In response to paragraph 4, LWP admits LWPCAC was a California corporation whose name was changed to LWPCSI.

Liquidator's Reply: LWP admits all statements of fact in the Liquidator's fourth statement.

Liquidator's Statement of Fact No. 5: Defendant LWP Claims Solutions, Inc. is a California corporation. *See* Utah Department of Commerce print out, attached to the Liquidator's Memo. as Exhibit "D". LWP Claims Administrators, Corp. and LWP Claims Solutions, Inc. are collectively referred to as "LWP". Wasatch Crest Group, Inc. was the parent corporation of WCIC. LWP was sold to John A. Igoe, the former Chairman of the Board of Directors and Chief Executive Officer of Insurance Co. and LWP. Mr. Igoe was also the Chairman of the Board, President and Chief Executive Officer of Wasatch Crest Group, Inc., the parent corporation of Insurance Co. and LWP. LWP was an affiliate of Wasatch Crest Group, Inc., Insurance Co., and Mutual. *See*

Complaint, Ex. "A" at ¶ 5; *see also* Wasatch Crest Group, Inc. Form B¹, dated April 16, 2001 at p. 5, a true and correct copy of which is attached to the Liquidator's Memo. as Exhibit "E".

LWP's Response: In response to paragraph 5, LWP admits LWPCSI is a California corporation whose name was changed from LWPCAC. LWP further admits that WCG was the parent corporation of WCIC.

LWP disputes that it was sold to *only* John Igoe when, in fact, it was sold effective January 1, 2002, to John Igoe and Judy Adlam. *See* Exhibit 11 to LWP's Memorandum in Support of its Motion for Summary Judgment. LWP also disputes that Igoe was the Chairman of the Board of Directors and Chief Executive Officer of WCIC and WCG. He became Acting Chairman of the Board of Directors and Chief Executive Officer of WCG and WCIC in November of 2001, but resigned from those positions and all other positions with Wasatch Crest companies as of May 8, 2002, the date of closing of the sale of LWP by WCG to Igoe and Adlam. *See* Ex. 6 at ¶ 17; Ex. 9 at ¶ 15. LWP admits that in approximately January 2000, Igoe became president of WCG, but he resigned from this position on May 8, 2002. *Id.*

LWP admits (1) Igoe was the Chairman of the Board and Chief Executive Officer of LWP, and (2) WCG was the parent of WCIC from October 1998 until 2002 when Igoe resigned his positions with WCG and WCIC. LWP admits that it was a subsidiary

¹ Form B is a standard form used by all state insurance departments. Form B is a sworn statement to the state regulators as to the transactions and interrelationship of the insurance company and its affiliates which must be filed annually or whenever a material transaction or change has occurred. All Form B's referenced in this Memorandum were filed with the Utah Department of Insurance.

of WCG and a sister subsidiary of WCIC from November 16, 1998 through December 31, 2001, and could therefore be considered an affiliate of WCG and WCIC between those dates. LWP denies that it was an affiliate of WCG and WCIC after January 1, 2002, the effective date of the sale of LWP to Igoe and Adlam. *See* Ex. 6 at ¶17; Ex. 7 at ¶14. LWP was not an affiliate of WCMIC after November 27, 2000 when WCMIC's interest in WCG, the parent of LWP, was relinquished. Exhibit 5 at p. 14, Item 5(1)(e).

Liquidator's Reply: LWP admits certain portions of this statement. LWP disputes to whom LWP was sold in 2002, which is completely irrelevant to the issues in this motion. However, the Liquidator does not dispute that LWP was sold to John Igoe and Judy Adlam. The Liquidator does, however dispute the date of the sale. LWP states that the sale was effective as of January 1, 2002. This is simply not true. LWP was sold to John A. Igoe and Judy Adlam on May 8, 2002. *See* Ex. 11 of LWP's Memo. (Stock Purchase Agreement, dated May 8, 2002).² The Liquidator disputes, therefore, LWP's contention that LWP could be considered an affiliate of Group and Insurance Co. from November 16, 1998 through only December 31, 2001. The date on the Stock Purchase Agreement is May 8, 2002. LWP, therefore, was an affiliate from November 16, 1999 through May 8, 2002. The issue of when John Igoe resigned his positions is irrelevant, and the Liquidator contends that the documents speak for themselves. The Liquidator also disputes LWP's assertion that it was not an affiliate of Mutual after

² The LWP Administrative Services Agreement that was executed at the closing of the Stock Purchase Agreement was effective as of May 8, 2002, it was not backdated to January 1, 2002. This agreement, which is attached hereto as Exhibit "B", was between Group and LWP. It outlined LWP's continued involvement with claims administration even though WCG was divesting itself of its interest in LWP as of May 8, 2002.

November 27, 2000. The Liquidator contends that LWP was an affiliate of Mutual until at least the spring of 2002. *See id.* at ¶ 16.

Corporate History of Wasatch Crest Mutual and Wasatch Crest Insurance
Acquisition of FCL

Liquidator's Statement of Fact No. 6: Wasatch Crest Mutual was a mutual insurance company controlled by its policyholders who annually elected a Board of Directors. Effective April 15, 1994, Wasatch Crest Mutual purchased all of the issued and outstanding common stock of First Continental Life & Accident Insurance Company, a Utah domiciled insurance company ("FCL"). *See* Wasatch Crest Mutual Insurance Co. Form B, dated July 15, 1998, a true and correct copy of which is attached to the Liquidator's Memo. as Exhibit "F"; *see also* Form B dated April 16, 2001, Ex. "E".

LWP's Response: In response to paragraph 6, LWP admits that WCMIC was a mutual insurance company controlled by its shareholders and that WCMIC purchased all of the stock of FCL effective April 15, 1994.

Liquidator's Reply: LWP admits all statements of fact in the Liquidator's sixth statement.

Creation of Wasatch Crest Insurance Company
and Merger with Wasatch Crest Casualty

Liquidator's Statement of Fact No. 7: Effective October 31, 1998, Wasatch Crest Group (the parent company of WCIC) purchased all of the issued and outstanding common shares of Utah Home Fire Insurance Company, a Utah domiciled property and casualty company, from Deseret Management Corporation. Wasatch Crest Group

changed the name of Utah Home Fire Insurance to Wasatch Crest Insurance Company. Effective December 19, 2000, Wasatch Crest Casualty Company was merged into Wasatch Crest Insurance with Wasatch Crest Insurance as the surviving company. *See* Form B dated April 16, 2001, Ex. “E” at p. 14.

LWP’s Response: In response to paragraph 7, LWP admits effective October 31, 1998, WCG purchased all of the common stock of Utah Home Fire Insurance Company and changed the latter company’s name to WCIC. LWP also admits, effective December 19, 2000, WCCIC merged into WCIC with WCIC as the survivor.

Liquidator’s Reply: LWP admits all statements of fact in the Liquidator’s seventh statement.

Corporate History of LWP

Liquidator’s Statement of Fact No. 8: On November 16, 1999, Wasatch Crest Group purchased from LWP Commercial Claims Administrators, Inc., substantially all of the assets, real and personal property, and business operations owned by LWP Commercial Claims Administrators, Inc. pursuant to the Asset Purchase Agreement By and Among Wasatch Crest Group, Inc. and LWP Commercial Claims Administrators, Inc., John A. Igoe and Erica L. Igoe, dated November 16, 1999. Wasatch Crest Group’s purchase was an asset purchase, not a purchase of the stock of LWP Commercial Claims Administrators, Inc. LWP Commercial Claims Administrators, Inc. was a third party administrator of insurance claims. Concurrent with the purchase of substantially all of the assets of LWP Commercial Claims Administrators, Inc., Wasatch Crest Group created a new corporate entity, (i.e., LWP Claims Administrators, Corp.) that took

possession and title to all of the purchased assets. LWP Claims Administrators, Corp. was incorporated in the State of California. The name of LWP Claims Administrators, Corp. was subsequently changed to LWP Claims Solutions, Inc. LWP is currently a California corporation with offices in Sacramento, California and Salt Lake City, Utah. LWP is currently a third-party administrator (“TPA”), which specializes in the administration of worker’s compensation insurance and claims associated with ski industry workers. *See* Answer, Ex. “B” at ¶ 15 at; *see also* November 16, 1999, Asset Purchase Agreement attached to the Memo. in Support as Exhibit “G” and November 16, 1999 Administrative Services Agreement between LWP Commercial Claims Administrators, Inc. and LWP Claims Administrators, Corp., a true and correct copy of which is attached to the Liquidator’s Memo. as Exhibit “H”.

LWP’s Response: In regard to paragraph 8, LWP admits, on November 16, 1999, WCG purchased substantially all of the assets and business operations of LWP Commercial Claims Administrators, Inc. (“LWP Commercial”), a company which acted as a third party insurance claim administrator, from John and Erica Igoe. LWP also admits that WCG formed a new corporate entity, LWPCAC, at that time and the assets purchased from LWP Commercial were transferred to LWPCAC.

LWP further admits that LWPCAC was incorporated in California and changed its name to LWPCSI. LWPCSI has offices in Sacramento, California and Salt Lake City and is a third-party administrator specializing in the administration of worker’s compensation insurance claims.

Liquidator's Reply: LWP admits all statements of fact in the Liquidator's eighth statement.

Affiliate Transactions

Liquidator's Statement of Fact No. 9: On or about November 16, 1999, LWP entered into an agreement with WCIC and WCMIC whereby LWP was paid a fixed percentage fee to administer all the claims throughout the entire duration of the claims. The fee paid to LWP was calculated as a percentage of gross written premium received by WCIC or WCMIC. In addition, LWP was paid a percentage of all medical fee savings generated by LWP in the administration of the claims. LWP's agreement with WCIC and WCMIC was not reduced to writing or disclosed to the Utah Department of Insurance. See May 21, 2002 Letter from Orrin T. Colby Jr. to Judy Adlam attached to the Liquidator's Memo. as Exhibit "I".

LWP's Response: In regard to paragraph 9, LWP disputes that (1) LWP entered into an agreement on about November 16, 1999 with WCIC and WCMIC providing for payment of a fixed percentage fee to administer all claims throughout the entire duration of the claims, (2) the fee paid to LWP was a percentage of gross premiums received by WCIC and WCMIC, and (3) LWP was paid a percentage of all medical fee savings generated by LWP. The Administrative Services Agreement, Exhibit 9, dated November 16, 1999 was an agreement between LWP Commercial, the selling entity owned by John and Erica Igoe, and LWPCAC, the subsidiary formed by WCG to hold the assets transferred by LWP Commercial. WCIC and WCMIC were not parties to the agreement. Moreover, the agreement did not provide for payment of a percentage of

premiums or medical cost savings to LWP. It instead provided that LWPCAC would compensate LWP Commercial “on a cost basis” by reimbursing LWP Commercial for all reasonable costs. *See* Exhibit 11 at p. 3. The agreement was intended to facilitate the transition of business operations pending the transfer of LWP Commercial’s employees on January 1, 2000. For this reason, the agreement terminated on December 31, 1999. *See* Ex. 6 at ¶ 8.

Liquidator’s Reply: The Administrative Services Agreement was an agreement between LWP Commercial and LWPCAC. Mutual and Insurance Co. were not parties to the agreement. The agreement speaks for itself, and, therefore, any additional statements set forth by LWP are disputed by the Liquidator to the extent they are not found in the agreement which is attached to LWP’s Memo. as Ex. 11.

Liquidator’s Statement of Fact No. 10: Effective January 1, 2001, WCIC and LWP entered into an Administrative Agreement whereby LWP administered worker’s compensation claims for WCIC on a “life of claim” basis and was paid fees as described in paragraph 19 of the Administrative Agreement. *See* Wasatch Crest Group Form B, dated April 30, 2002 at p. 12, a true and correct copy of which is attached to the Liquidator’s Memo. as Exhibit “J”; *see also* January 2001 Administrative Agreement attached to the Liquidator’s Memo as Exhibit “K”.

LWP’s Response: In regard to paragraph 10, LWP disputes that WCIC entered into an Administrative Agreement effective January 1, 2001. In June 2000, LWPCAC began providing workers compensation claims handling services to WCIC pursuant to an oral agreement. Employees of WCG provided these services under the direction of

LWPCAC and LWPCAC reimbursed WCG for the personnel services provided by WCG to LWPCAC. In return for providing these services, LWPCAC received a percentage of the premiums earned by WCIC and a percentage of the medical cost savings realized by WCG due to LWPCAC's handling of claims. *See* Ex. 6 at ¶ 9.

This oral agreement was formalized in a written agreement between WCIC and LWPCAC which was effective as of January 1, 2001.³ The terms of the written agreement were the same as the terms of the earlier oral argument. *See* Ex. 10; Ex. 6 at ¶ 10; Ex. 7 at ¶ 10. The terms of the agreement are standard commercial terms similar to the terms of agreements entered into by LWPCAC with other insurance companies. *See* Ex. 6 at ¶ 10.

Liquidator's Reply: LWP disputes that Insurance Co. and LWP entered into a formal Administrative Agreement on January 1, 2001. The Liquidator affirmatively alleges that the Wasatch Crest Group Form B statement dated April 30, 2002 which is attached to the Liquidator's Memo. as Ex. J, speaks for itself and that Insurance Co. did enter into a formal Administrative Agreement with LWP on January 1, 2001. Further, the Liquidator contends that LWPCAC began providing services pursuant to an oral agreement at the time of the sale of LWP Commercial to Group, November 16, 1999.

³ In LWP's response to the Liquidator's Statement of Fact No. 9, LWP states that the Administrative Services Agreement terminated on December 31, 1999. In its response to the Liquidator's Statement of Fact No. 10, LWP states that an oral agreement to provide services was entered in June 2000. What happened between January 1, 2000 and June 2000? The Liquidator contends that there was more than just one "oral agreement".

The Agreement speaks for itself and, therefore, any additional statements set forth by LWP are disputed by the Liquidator to the extent they are not found in the Agreement.

Liquidator's Statement of Fact No 11: LWP presented to WCMIC a proposed Administrative Agreement that was to be effective January 1, 2001. The terms of the agreement were identical to the Administrative Agreement entered into between WCIC and LWP as described above in paragraph 15. *See Answer, Ex. "B" at ¶ 18; see also Letter dated May 21, 2002, Ex. "I", both of which are attached to the Liquidator's Memo.*

LWP's Response: In regard to paragraph 11, LWP admits that it presented a proposed Administrative Agreement to WCMIC, which was to be effective January 1, 2001 and had the same terms as the administrative agreement between LWPCAC and WCIC.

Liquidator's Reply: LWP admits all statements of fact in the Liquidator's eleventh statement.

Liquidator's Statement of Fact No. 12: The agreement between LWP and WCMIC was never executed; rather, the arrangement between WCMIC and LWP continued under the terms of the verbal agreement entered into in November 1999, whereby LWP would administer worker's compensation claims for WCMIC on a "life of claim" basis. *See Letter dated May 21, 2002, Ex. "I" to the Liquidator's Memo.*

LWP's Response: In regard to paragraph 12, LWP admits that the written agreement between LWP and WCMIC was never signed by WCMIC and that the two companies continued to operate under the oral agreement. The oral agreement,

however, was not entered into in November 1999. The oral agreement was reached in June 2000 when LWP began providing claims handling services to WCMIC. *See* Ex. 6 to LWP's Memo. at ¶ 11.

Liquidator's Reply: The Liquidator asserts that the oral agreement was reached in November 1999 and that LWP began providing claims handling services to Mutual at that time. *See* Statement of Fact No. 13 of LWP's Memo. which states that "[a]t the time of the asset purchase, an Administrative Services Agreement, dated November 16, 1999 [] was entered into between LWP Commercial . . . and LWPCAC." Although Mutual was not a party to that agreement, the services were billed to and paid by Mutual. *See* Aff. of Robert C. Miller attached to the Liquidator's Memo. as Ex. M at ¶ 19.

Liquidator's Statement of Fact No. 13. Wasatch Crest Group sold LWP back to John Igoe and Erica Igoe sometime in 2002. John Igoe continued in his capacity as an officer and director of Wasatch Crest Group after the sale of LWP to John and Erica Igoe. *See* Term Sheet attached to the Liquidator's Memo. as Exhibit "L".

LWP's Response: In regard to paragraph 13, LWP denies that WCG sold LWP back to John and Erica Igoe sometime in 2002. LWP was, instead, sold to Igoe and Adlam effective January 1, 2002. *See* Ex. 11. The sale closed on May 8, 2002. *Id.* LWP also disputes that John Igoe continued in his capacity as an officer and director of WCG. At the time the sale was closed, Igoe resigned his positions as an officer and director of WCG and all other Wasatch Crest companies. *See* Ex. 12 to LWP's Memo.

Liquidator's Reply: LWP was sold to John A. Igoe and Judy Adlam effective May 8, 2002, not January 1, 2002. *See* Ex. 11 to LWP's Memo. Whether or not John Igoe remained as an officer and director of Group, Insurance Co., and FCL is irrelevant. The Liquidator maintains that the documents speak for themselves.

Liquidator's Statement of Fact No. 14: From November 16, 1999 through July 30, 2003, WCIC paid \$6,144,402.68 to LWP for claims handling services. Of the \$6,144,402.68 total, \$4,955,586.10 was in the form of a check or wire transfers, while \$1,188,816.58 was in the form of offsets. *See* Aff, of Robert C. Miller, attached to the Liquidator's Memo. as Exhibit "M".

LWP's Response: In regard to paragraph 14, LWP disputes that WCIC paid \$6,144,402.68 to LWP for claims handling services from November 16, 1999 through July 30, 2003, of which amount \$4,955,486.10 was in the form of checks or wire transfers and \$1,188,816.58 was in the form of offsets. From June 30, 2000 when LWP first began providing claims handling services to WCIC, until January 1, 2002, when the sale of LWP to Igoe and Adlam became effective, WCIC paid \$1,338,110 to LWP for claims handling services. *See* Ex. 6 to LWP's Memo. at ¶ 22.

Liquidator's Reply: From November 16, 1999 through July 30, 2003, Insurance Co. paid \$6,144,402.68 to LWP for claims handling services, of which \$4,955,586.10 was in the form of a check or wire transfers, while \$1,188,816.58 was in the form of offsets. *See* Affidavit of Robert C. Miller, attached as Ex. M to the Liquidator's Memo. at ¶ 18.

Liquidator's Statement of Fact No. 15: From November 16, 1999 through July 30, 2003, WCMIC paid \$534,265.96 to LWP for claims handling services. Of the \$534,265.96 total, \$474,265.96 was in the form of a check or wire transfers, while \$60,000.00 was in the form of offsets. *See id.*

LWP's Response: In regard to paragraph 15, LWP disputes that WCMIC paid \$534,295.96 to LWP for claims handling services from November 16, 1999 through July 30, 2000, of which amount \$534,265.96 was in the form of checks or wire transfers and \$60,000 was in the form of offsets. From June 30, 2000, when LWP first began providing claims handling services to WCMIC, Until January 1, 2002, when the sale of LWP to Igoe and Adlam became effective, WCMIC paid \$812,650 to LWP for claims handling services. *See* Ex. 6 at ¶ 23. None of this amount was paid to LWP before November 27, 2000, the date WCMIC relinquished its interest in WCG and ceased to be a part of the WCG group. *See* Schedule prepared as exhibit to Affidavit of Robert C. Miller, filed as Exhibit M to Liquidator's Motion for Summary Judgment, attached as Ex. 13 to LWP's Memo.

Liquidator's Reply: From November 16, 1999 through July 30, 2003, Mutual paid \$534,265.96 to LWP for claims handling services, of which \$474,265.96 was in the form of a check or wire transfer, while \$60,000 was in the form of offsets. *See* Aff. of Robert C. Miller attached as Ex. M to the Liquidator's Memo. at ¶ 19.

III. STATEMENT OF DISPUTED FACTS WITH RESPECT TO LWP'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure, the Liquidator asserts that the following statements of material facts made by LWP are disputed.

LWP Statement of Fact No. 7: On June 30, 1998, WCMIC exchanged all of the common stock of FCL and WCCIC for shares of the newly incorporated Wasatch Crest Group. In exchange for the stock of FCL and WCCIC, WCMIC received 1 million Class A common shares of WCG (100% of the Class A shares) and 5.3 million Class C common shares (100% of the Class C shares) of WCG. WCMIC also received 4.4 million shares of Class B-1 common stock, which it sold to investors. An additional 6.4 million shares of Class B-1 common stock and 3.9 million shares of Class B-2 common stock were also purchased by the investors. After these transactions, WCG Investment Group (“Wasatch Investment”) L.P. owned 5.8 million shares of Class B-1 common stock, Swiss Reinsurance America Corporation (“Swiss Re”) owned 3.9 million shares of Class B-2 common stock, and Chase Capital Partners (“Chase”) owned 5.0 million shares of Class B-1 common stock. *See* Wasatch Crest Group, Form B, Insurance Holding Company System Registration Statement at pp. 14-15, a true and correct copy of which is attached to LWP’s Memorandum in Support of its Motion for Summary Judgment as Exhibit 5.

Disputed Facts: After these transactions, Swiss Re owned 5.0 million shares of Class B-1 common stock and Chase owned 3.9 million shares of Class B-2 common stock. This appears to have been a clerical error on LWP’s part. *See id.*

LWP Statement of Fact No. 13: At the time of the asset purchase, an Administrative Services Agreement dated November 16, 1999 (attached as Exhibit 9) was entered into between LWP Commercial, the selling entity owned by John and Erica Igoe, and LWPCAC, the subsidiary formed by WCG to hold the assets transferred by

LWP Commercial. WCIC and WCMIC were not parties to the agreement. The agreement provided that LWP Commercial continue to employ its former employees and that LWPCAC would compensate LWP Commercial “on a cost basis” by reimbursing LWP Commercial for all reasonable costs associated therewith. *See* Exhibit 9 at p. 3. The agreement was intended to facilitate the transition of business operations pending the transfer of LWP Commercial’s employees on January 1, 2000. For this reason, the agreement terminated on December 31, 1999.

Disputed Facts: The Liquidator disputes the last full sentence of Fact No. 13 inasmuch as the Liquidator has no knowledge regarding that fact, it appears to be LWP’s opinion that the agreement was intended to facilitate the transition of business operations, etc., and, therefore, the Liquidator disputes that statement. Further, the Liquidator avers that the agreement speaks for itself.

LWP Statement of Fact No. 15: The oral agreement for claims handling services was formalized in a written agreement between WCIC and LWPCAC which was effective as of January 1, 2001. The terms of the written agreement were the same as the terms of the earlier oral agreement. *See* Administrative Agreement, attached as Exhibit 10. The terms of the agreement are standard commercial terms similar to the terms of agreement entered into by LWPCAC with other insurance companies. *See* Exhibit 6 at ¶ 10; Exhibit 7 at ¶ 10.

Disputed Facts: The Liquidator disputes the last full sentence of this statement inasmuch as there is no evidence to prove that the terms of the agreement are standard commercial terms similar to the terms of agreement entered into by LWPCAC with

other companies. This statement contains LWP's opinion, and the Liquidator, therefore, disputes this statement. Further, the Liquidator avers that the agreement speaks for itself.

LWP Statement of Fact No. 17: On April 28, 1998 WCG entered into a Managing General Agency Agreement with North American Specialty Insurance Company ("NAS"), a wholly owned subsidiary of SwissRe ("NAS Agreement"). Under the terms of the agreement, WCG was granted the right to underwrite and issue policies on behalf of NAS, subject to certain guidelines and review procedures by NAS. The agreement also provided for WCG to handle all claims arising out of NAS policies written under the agreement. WCIC was not a party to this agreement. *See* Exhibit 6 at ¶ 12.

Disputed Facts: LWP did not attach the NAS Agreement to its memorandum and provided no basis for this statement of fact. The NAS Agreement speaks for itself, but without evidence of it, the Liquidator disputes the entire statement of fact.

LWP Statement of Fact No. 18: Beginning June 2000, WCG assigned its responsibilities under the NAS Agreement to LWPCAC. From that time forward, LWPCAC handled claims arising out of the NAS policies for WCG, and received compensation from WCG for these services. WCIC, which was not a party to the NAS Agreement, did not provide compensation to LWPCAC for claims handling services under the NAS Agreement. *See* Exhibit 6 at ¶ 13.

Disputed Fact: Inasmuch as LWP did not attach the NAS Agreement to its memorandum, there is no factual basis for this statement of fact. The Liquidator asserts

that the NAS Agreement speaks for itself, but without evidence of it, the Liquidator disputes the entire statement of fact. The Liquidator specifically disputes that LWPCAC received compensation under the NAS Agreement from Group. LWPCAC billed and received its compensation from Insurance Co. *See* Aff. of Robert C. Miller attached as Ex. M to the Liquidator's Memo. at ¶¶ 16-18.

LWP Statement of Fact No. 19: At no time during its relationship with WCG did LWP receive any dividend or other distributions, whether in cash, property or other assets, from WCG, WCIC, FCL or WCMIC other than payments made in the ordinary course of business in accordance with the various service agreements, written and oral, in effect during the period. *See* Exhibit 6 to LWP's Memorandum at ¶ 25 and Exhibit 7 at ¶ 17.

Disputed Facts: The Liquidator disputes the entire statement of fact. LWP did receive distributions, as that term is interpreted pursuant to Utah Code Ann. § 31A-27-322. Pursuant to that statute, the Liquidator is permitted to recover from any affiliate any distribution made at any time during the five years preceding the petition for liquidation. If a person or entity qualifies as an affiliate (as LWP with respect to Group, Mutual, Insurance Co., and FCL), then any distribution to that affiliate made in the five years prior to the filing of the liquidation petition must be repaid. The \$6,678,668.64 paid by Insurance Co. to LWP for claims handling services is unquestionably a distribution. The fact that the distributions were within the ordinary course of business is irrelevant to whether the distributions are recoverable by the Liquidator.

LWP Statement of Fact No. 20: LWP did not own, direct, or control the business or operations of WCG, WCIC, FCL, or WCMIC. Exhibit 6 to LWP's Memo. at ¶ 16.

Disputed Facts: The Liquidator disputes the entire statement of fact. In its Response to Liquidator's Statement of Material Facts, responding to statement of fact number five, LWP admits that LWP could be considered an affiliate of Group and Insurance Co. from November 1998 through December 31, 2001.⁴ The Liquidator asserts that LWP is an affiliate of Group and Insurance Co. from November 16, 1999 through at least May 8, 2002. The Liquidator agrees that LWP did not own Group, Insurance Co., FCL or Mutual, but that LWP was under common control and management such that it was an affiliate of Insurance Co., Group, Mutual, and FCL as those terms are defined in the Utah Insurance Code. *See* Aff. of Orrin T. Colby Jr. (Ex. A) at ¶¶ 6-18.

Group acquired LWP Commercial in October 1999, and formed a new corporate entity, LWP Claims Administrators Corp. ("LWPCAC"). John Igoe served as CEO of LWPCAC from November 1999 to the present, and served as Chairman of the Board from the point Orrin T. Colby Jr. was relieved of that role. LWPCAC was a wholly owned subsidiary of Group until it was sold to John A. Igoe and Judy K. Adlam on May 8, 2002. *See id.* at ¶ 8.

At all times between 1999 and July 2003, Group was the parent company of Insurance Co., FCL, Casualty (until merged) (collectively the "Companies"), and

⁴ *See* LWP's Memo. at p. xii.

LWPCAC, and John Igoe was the COO and President of Group.⁵ Although Mutual was never a subsidiary of Group, it was an affiliate of Group between 1999 and the spring of 2002. *See id.* at ¶¶ 6 & 11. In his capacity as CEO, COO, and President of Group, and CEO of LWPCAC, Mr. Igoe was directly involved in drafting and/or administering a services agreement whereby LWPCAC provided claims services to the Companies and Mutual. Mr. Igoe, along with Dennis Larson, had direct input into the scope and nature of the services that would be performed by LWPCAC, and how much LWPCAC would be paid for those services. *See id.* at ¶ 12. From the time that LWPCAC was formed until it was sold, LWPCAC was under the common control and management of Group. *Id.* at ¶ 13.

Group management, which included John Igoe as President, CEO, and COO, made management and employee decisions for the Companies, Mutual, and LWPCAC because Group, Insurance Co., Mutual, FCL, Casualty, and LWPCAC were under common management and control from 1999 through July 2003 (with the exclusion of Mutual which ended its relationship with the Wasatch Crest companies in the spring of 2002). *See id.* at ¶ 14. The management, officers, and directors of Group controlled each of the Companies, Mutual, and LWPCAC, by virtue of their management and supervision of the employees, day-to-day business activities, and records keeping. *See id.* at ¶ 15. During the relevant time period, Group, Insurance Co., Mutual, FCL, Casualty, and LWPCAC were affiliates with one another. *See id.* at 16.

⁵ From 1999 to July 2003, John A. Igoe was the Chief Operating Officer and President of Group. Prior to November 2001, John Igoe was named Chairman of the Board and CEO of Group. *See Aff. of Orrin T. Colby Jr. (Ex. A) at ¶ 6.*

LWP Statement of Fact No. 21: On November 6, 2001, the Chairman of the Board and Chief Executive Officer of WCG, WCIC, and FCL was placed on indefinite leave of absence. At the same time John Igoe was appointed to serve as Acting Chairman of the Board and CEO of the companies pending an internal investigation by special outside counsel of the activities of former officers and directors.

Disputed Facts: This statement is completely irrelevant to the issues set forth in either the Liquidator's or LWP's Motions.

LWP Statement of Fact No. 22: On May 8, 2002, John Igoe and Judy Adlam purchased the stock of LWPCAC for \$2,000,000 in cash, an assumption of liabilities of approximately \$1.8 million and a contingency payment (made in 2003) of \$175,000. *See* Stock Purchase Agreement and Mandatory Share Redemption Agreement, attached as Exhibit 11. John Igoe did not represent WCG in the negotiations of the transaction, which was made effective as of January 1, 2002. The Board of Directors retained Hales and Company independently to advise them as to the fairness of the transaction. *See* Exhibit 6 at ¶ 17; Exhibit 7 at ¶ 14.

Disputed Facts: The Liquidator does not dispute or agree with the details of the agreement set forth in this statement of fact, but affirmatively alleges that the Stock Purchase Agreement speaks for itself. The Liquidator contends that the stock purchase sale took place and was effective as of May 8, 2002, not on January 1, 2002. *See* Stock Purchase Agreement attached as Ex. 11 to LWP's Memo. The Liquidator contends that the details of the sale, with the exception of the date, are completely irrelevant to the issues set forth in either LWP's Memo. or the Liquidator's Memo.

LWP Statement of Fact No. 23: Pursuant to the agreement for purchase of the stock of LWPCAC by Igoe and Adlam, Igoe agreed to resign as an officer and director of all Wasatch Crest companies. *See* Exhibit 6 at ¶ 17; Exhibit 7 at ¶ 14.

Disputed Facts: The Liquidator does not dispute or agree with the details of the agreement set forth in this statement of fact, but affirmatively alleges that the Stock Purchase Agreement speaks for itself. With regard to the purported resignation of John Igoe, the Liquidator again affirmatively alleges that the agreement and addendums speak for themselves.

LWP Statement of Fact No. 24: From June 2000 when LWPCAC first started providing claims handling services for Insurance Co. and WCMIC until January 1, 2002, when the sale of LWPCAC to Igoe and Adlam was effective, LWPCAC received payments of \$5,142,263 under the terms of its agreements with WCIC, WCMIC, and WCG. *See* Ex. 6 to LWP's Memo. at ¶ 20.

Disputed Facts: The Liquidator disputes the entire statement of fact. From November 16, 1999 through July 30, 2003, Insurance Co. paid \$6,144,402.68 to LWP for claims handling services. Of the \$6,144,402.68 total, \$4,955,586.10 was in the form of a check or wire transfers, while \$1,188,816.58 was in the form of offsets. *See* Aff. of Robert Miller attached as Ex. M to the Liquidator's Memo. at ¶ 18.

From November 16, 1999 through July 30, 2003, Mutual paid \$534,265.96 to LWP for claims handling services. Of the \$534,265.96 total, \$474,265.96 was in the form of a check or wire transfers, while \$60,000 was in the form of offsets. *See id.* at ¶ 19.

LWP Statement of Fact No. 25: Of the \$5,142,263 received by LWPCAC, \$3,001,503 was paid as compensation for claims handling services provided to WCG in connection with the NAS agreement. *See* Ex. 6 to LWP's Memo. at ¶ 21.

Disputed Facts: The Liquidator provided its proof of payment to LWP in Robert C. Miller's affidavit which was attached as Exhibit M to the Liquidator's Memo. LWP has not substantiated its figures, making it impossible for the Liquidator to verify them, and, therefore, the Liquidator disputes the entire statement of fact. The fact that the claims handling services may have been provided for the benefit of Group does not take away from the fact that Insurance Co. paid LWPCAC. The issue of which affiliate received the benefit is irrelevant.

LWP Statement of Fact No. 26: Of the \$5,142,263 received by LWPCAC, \$1,328,110 was paid as compensation for claims handling services provided to WCIC under the terms of the oral and written administrative agreements. *See* Ex. 6 to LWP's Memo. at ¶ 22.

Disputed Facts: The Liquidator provided its proof of payment to LWP in Robert C. Miller's affidavit which was attached as Exhibit M to the Liquidator's Memo. LWP has not substantiated its figures, making it impossible for the Liquidator to verify them, and, therefore, the Liquidator disputes the entire statement of fact.

LWP Statement of Fact No. 27: Of the \$5,142,263 received by LWPCAC, \$812,650 was paid as compensation for claims handling services provided to WCMIC under the terms of the oral agreement described. *See* Ex. 6 to LWP's Memo. at ¶ 23.

Disputed Facts: The Liquidator provided its proof of payment to LWP in Robert C. Miller's affidavit which was attached as Exhibit M to the Liquidator's Memo. LWP has not substantiated its figures, making it impossible for the Liquidator to verify them, and, therefore, the Liquidator disputes the entire statement of fact.

LWP Statement of Fact No. 28: After WCIC and WCMIC were placed into liquidation on July 31, 2001, LWPCAC, and subsequently LWPCSI, continued to provide claims handling services to WCIC and WCMIC at the request of the Utah Guaranty Association ("UGA"), in accordance with the terms of the written Administrative Agreement (Exhibit 10) with WCIC and the oral agreement with WCMIC. *See* Exhibit 6 at ¶ 24; Exhibit 7 at ¶ 16.

Disputed Facts: The Liquidator disputes that Insurance Co. and Mutual were placed into liquidation on July 31, 2001. Insurance Co. and Mutual were placed into liquidation on 31, 2003. This was most likely a clerical error on LWP's part. The Liquidator does not dispute or agree with the rest of the statement of fact, but contends that this statement of fact is completely irrelevant to the issues set forth in either LWP's Memo. or the Liquidator's Memo.

IV. LEGAL ARGUMENT

The Liquidator has asked this Court to enforce the provisions of Utah Code Ann. §31A-27-322 as written. That is, any distribution to an affiliate made five years before the filing of the liquidation petition must be repaid. The only exception to that edict is stock dividends.

LWP argues that the word “distribution” should be used interchangeably with the term “dividend”. *See* LWP Memo. at p. 4. The reason that LWP wants a “distribution” to be the equivalent of a “dividend” is because the payments to LWP were not based on stock ownership but rather on the value of the alleged services provided by LWP to Companies and Mutual. Therefore, if the money received by LWP was not a dividend, then the Liquidator cannot recoup those monies. To do that, LWP embarks on a convoluted journey to transmogrify the meaning of the word “distribution”.

A. THE LEGISLATIVE HISTORY INDICATES THAT THE STATUTE IS APPLICABLE TO ALL TRANSACTIONS BETWEEN THE COMPANIES, MUTUAL, AND THEIR AFFILIATE LWP, NOT JUST DIVIDENDS.

LWP asserts that the legislative history of § 31A-27-322, Utah Code Ann. supports its theory that the term “distribution” is interchangeable with the term “dividends”. LWP’s assertion is wrong and is based on an incomplete reading of the legislative history LWP cites.

The author of the current Utah Insurance Code was Professor Spencer L. Kimball, a professor at the University of Utah (a copy of his biography published by the S. J. Quinney School of Law at the University of Utah is attached hereto as Exhibit “C”). Professor Kimball was nationally renowned as an insurance law expert. In approximately 1982, Professor Kimball was commissioned by the Utah State Legislature to draft Utah’s version of the Model Insurance Code. In conjunction with an advisory committee, Professor Kimball produced a document entitled “State of Utah Draft Insurance Code” dated March 1983. The original Title 31A, Insurance Code, was

based on Professor Kimball's Draft Insurance Code and was enacted during the 1985 and 1986 legislative sessions. The instant section on the recoupment from affiliates was enacted in 1986.

Attached hereto as Exhibit "D" is a readable copy of the entire Chapter 96-17 entitled "Insurance Holding Company Systems"⁶. In the Prefatory Comment, Professor Kimball states as follows:

There is no room for argument, however, that after formation of a holding company system there must be serious concern with intergroup transactions. They are subject to abuse involving vast sums of money, the improper transfer of which can endanger policyholder and public interest. This chapter carries concern for such transactions a step farther than does the Model Act or previous law. See section 96-17-6.5.

From the very beginning of this section, Professor Kimball was very concerned about transactions by and between an insurance company and its affiliates. Unquestionably, the legislative history indicates an overriding concern with affiliate transactions because they are prone to being abused. The drafters' unqualified apprehension for affiliate transactions should guide and inform the interpretation of the mechanics of the statute.

Virtually all of chapter 96-17 of Professor Kimball's Draft Insurance Code was enacted as Chapter 16 of the current Utah Insurance Code entitled "Insurance Holding Companies" (§§ 31A-16-101, *et seq.*). Section 96-17-6.5 of the Draft Insurance Code

⁶ One of the reasons that LWP may have misconstrued the vital concept that distributions cover more than just dividends is because the copy attached to the LWP pleading had illegible sections and pages. Attached hereto as Exhibit "E" is a copy of the legislative history included in the LWP Memo. as Exhibit 15. On page 14 of Exhibit 15 is the language that unequivocally shows that the word "distribution" was intentionally used to cover abuses over and beyond excessive dividends.

entitled “Liability of Affiliates”, however, was transferred from the chapter on Insurance Holding companies and placed in the section pertaining exclusively to liquidations, i.e., Chapter 27 (§§ 31A-27-101, *et seq.*). Consequently, Section 96-17-6.5 appears in the Utah Insurance Code as § 31A-27-322.

Professor Kimball’s comments on Section 98-17-6.5 are dispositive in ascertaining the intent of the legislature:

There are other potential abuses, beside excessive dividends, in the holding company development. They include all of the devices for “milking” that have been ingeniously exploited in other contexts. They encompass the full range of less than arm’s-length transactions that benefit affiliates at the expense of the insurer. They permit evasions of insurance laws and regulations by a parent holding company through payment to insurance agents and employees, for example, that could not be done by an insurance company alone.

It is hard to envision a clearer or more poignant description of the abuses that the statute was intended to address. Not just dividends, but all payments between affiliates are susceptible to potential abuses. Therefore, it was necessary to use a broader or more inclusive term than the word “dividend” – which “distribution” certainly is. In construing a statute, the court is to give effect to the legislature’s intent in light of the purpose the statute was meant to achieve. *In Re Gonzales*, 1 P.3d 1074, 1079 (Utah 2001). Section 31A-27-322 was enacted to address not only excessive dividends, but also other excessive distribution between an insurance company and its affiliates.

Contrary to LWP's assertion, the legislative history unequivocally supports the Liquidator's position, not LWP's⁷.

B. THE PLAIN LANGUAGE OF SEC. 31A-27-322 (RECOUPMENT FROM AFFILIATES) STATES THAT DISTRIBUTIONS TO AFFILIATES ARE TO BE REPAID AND THE RULES OF STATUTORY CONSTRUCTION REQUIRE THAT THE TERM "DISTRIBUTIONS" BE GIVEN EFFECT.

When interpreting a legislative enactment, the plain language of the act determines its meaning. *Water & Energy Systems Technology, Inc. v. Keil*, 48 P.3d 888, 894 (Utah 2000); *City of Hindale v. Cooke*, 28 P.3d 697 (Utah 2001). The plain language of the statute says that the liquidator may recover "the amount of distributions" made to affiliates. The next phrase creates an exception to that general rule: stock dividends are not recoverable. Therefore, "distribution" is the all-inclusive,

⁷ The Utah appellate courts have no reported cases construing § 31A-27-322, Utah Code Ann. However, the Third Judicial District Court for Salt Lake City, State of Utah (Judge Tyrone E. Medley) has encountered virtually identical arguments asserted by LWP. In the lawsuit captioned *American Western Life Insurance Company in Liquidation et al. v. Leland A. Wolf, et al.* (Case No. 980905251) (the "American Western Lawsuit"), the Defendants responded to the Liquidator's Motion for Summary Judgment that only excessive dividends could be recovered by the Liquidator, not the sales proceeds paid by an insurance company to an affiliate for the purchase of used furniture and computer equipment from the affiliate (a less than arm's-length transaction that resulted in a multi-million dollar windfall to the affiliate). In the Order dated May 22, 2003 (a copy of which is attached hereto as Exhibit "F"), Judge Medley ruled in Paragraphs 19 and 20 as follows:

19. The statute [§ 31A-27-322] provides that the liquidator may recover "the amount of distributions" which is the broad general rule. The next phrase (i.e., "stock dividends are not recoverable") creates an exception to that general rule or a subset of the general class.

20. The word "dividend" as used in this statute creates a special class of distributions which the recipient shareholder could demonstrate as fair and reasonable and therefore not returnable to the liquidation estate. This limitation on recovery only applies to the subset of dividends; it does not apply to the broad general category of "distributions".

general rule, and a subset of that general category is “stock dividends”. The next section of the statute, Sec. 31A-27-322(2), provides that “no dividend” is recoverable by the liquidator if the recipient shows that the dividend was fair and reasonable. In the statute, the Legislature did not use the word “distribution” (the general class), but rather used the word “dividend” (a subset of the general class). The duty of this Court is to “construe a statute on the assumption that each term is used advisedly and that the intent of the Legislature is revealed in the use of the term in the context and structure in which it is placed.” *Ward v. Richfield City*, 716 P.2d 265, 266 (Utah 1984), *quoted in Ferro v. Utah Dept. of Commerce, et al.*, 828 P.2d 507, 514 (Utah 1992). It must be assumed that the Legislature intended to use the word “dividend” when it used it as a special sub-class of distributions which the recipient shareholder could demonstrate as fair and reasonable and therefore not returnable to the liquidation estate. That privilege was not granted to distributions in general, only the specific subset of dividends.

The rules of statutory construction cited above also serve the objective of the statute. If the Legislature meant for Sec. 31A-27-322 to apply only to dividends, then the title and text of the statutory enactment would have used that word. It did not because the Legislature wanted the Liquidator to have the power to recoup all distributions to affiliates, not just dividends.

Dividends are a function of stock ownership. Affiliates are not necessarily shareholders. Therefore, the application of the statute is much broader, rather than strictly limited to recipients of dividends. Recipients of dividends are given an opportunity to prove that the dividend was fair and reasonable. The reason for this is

clear. There may be individual shareholders who are not control persons and who have innocently received dividends. In that case, non-control persons are permitted to prove that the dividend was fair and reasonable. But if the distribution is not a dividend, the statute's plain language dictates that the distribution must be returned to the Liquidator. The strong presumption of the statute (i.e., that the recipient's distribution was a result of overreaching and undue control) dictates that the distribution be returned without regard to the reasonableness of the transaction.

There is also a strong equitable policy that supports the Liquidator's position. The objective of the recoupment statute is to draw back into the liquidation estate monies that will be used to pay policyholders and third party creditors. Rather than affiliates (which are insiders akin to shareholders) keeping the distribution, the monies are equitably distributed to policyholders and creditors. It should also be remembered that the affiliates are not without a remedy or recourse. The affiliates can file a claim against the liquidation estate and share in the proportionate proceeds which may be paid to similarly situated creditors.

In conclusion, there is no need to look at the legislative history because the language of the statute is very straightforward. There is no uncertainty about the Liquidator's power to recover distributions to affiliates. Because affiliate transactions are devoid of the safeguards associated with arm's-length transactions, the Legislature determined that all distributions must be returned, with the only exception being fair and reasonable dividends. LWP's argument that "distributions" are the equivalent of "dividends" fails both on the face of the words used and the legislative history.

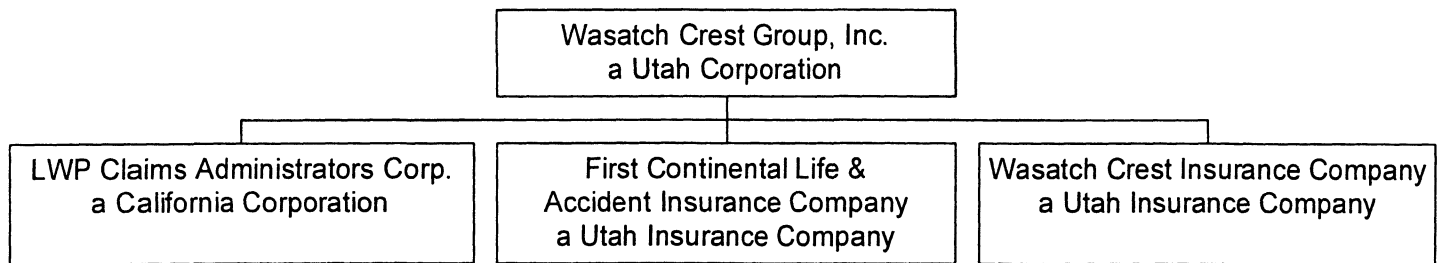
C. BY ITS OWN ADMISSION, AND PURSUANT TO THE UTAH INSURANCE CODE, LWPCAC WAS AN AFFILIATE OF INSURANCE CO.

An affiliate is defined as “any person who controls, is controlled by, or is under common control with, another person. A corporation is an affiliate of another corporation, regardless of ownership, if substantially the same group of natural persons manages the corporations.” Utah Code Ann. § 31A-1-301(5).⁸ The Utah Insurance Code defines “control,” “controlled,” and “under common control” as “the direct or indirect possession of the power to direct or cause the direction of the management and policies. . .” *Id.* at (27)(a). In addition to LWP’s own admission that it was an affiliate with Group and Insurance Co., there is irrefutable evidence that Insurance Co. and LWPCAC were affiliates with one another because “substantially the same group of natural persons managed” the companies. *See* LWP’s Memo. at p. xii (“LWP admits that it was a subsidiary of WCG and a sister subsidiary of WCIC from November 16, 1998 through December 31, 2001, and could therefore be considered an affiliate of WCG and WCIC between those dates”); *see also* Wasatch Group, Inc. Form B, dated April 16, 2001 attached to the Liquidator’s Memo. as Exhibit “E”.⁹ LWPCAC and Insurance Co. were both wholly owned subsidiaries of Group. LWPCAC does not and cannot refute that fact. LWPCAC does not and cannot refute the fact that LWPCAC,

⁸ *See also* the Order dated May 22, 2003 (Ex. F) in the American Western Lawsuit at p. 13, ¶ 14.

⁹ The Liquidator disputes that LWP’s affiliate status with Group and Insurance Co. ended on January 1, 2002 inasmuch as the Stock Purchase Agreement was signed on May 8, 2002, the affiliation, and common control and management extended at least until May 8, 2002, regardless of when the Stock Purchase Agreement allegedly became “effective.”

Insurance Co. and Group were managed by Orrin T. Colby Jr., John A. Igoe, Lewis T. Stevens, Verl R. Topham, Richard A. Veed, and Mark Finkelstein. *See id.* at pp. 4-6; *see also* Aff. of Orrin T. Colby Jr. (Ex. A) at ¶ 18. The following organizational chart was filed with the State of Utah Insurance Department in Group's April 16, 2001 Form B filing as an exhibit. It shows how Group, LWPCAC, FCL, and Insurance Co. were organized, with Group as the parent and LWPCAC as a wholly owned subsidiary of Group.



See Exhibit "A" to Wasatch Crest Form B, dated April 16, 2001, a true and correct copy of which is attached hereto as Exhibit "G".

In his affidavit, John Igoe states that "LWP did not own, direct, or control the business or operations of WCG, WCIC, FCL, or WCMIC." *See* Aff. of John A. Igoe, attached as Ex. 6 to LWP's Memo. at ¶ 16. Interestingly, Mr. Igoe does not aver the reverse of that statement, that Group or Insurance Co. did not own, direct, or control the business or operations of LWP. In fact, Mr. Igoe cannot make that statement because his own admissions and the Form B's on file for Group, irrefutably prove that LWPCAC was a wholly owned subsidiary of Group.

Although the Liquidator is confident that it can prove that Mutual and LWPCAC were affiliates, there is contradictory evidence as to control of Mutual such that for purposes of this Motion, the Liquidator is proceeding with Insurance Co., and leaving the issue of Mutual's affiliation for trial, effectively making the Liquidator's Motion one for partial summary judgment.

LWP makes much of John Igoe's personal involvement or, as it alleges, lack thereof, to suggest that LWPCAC, Insurance Co. and Group were not affiliates. This argument is a red herring. Mr. Igoe's participation in the management of all three companies, while important, is not relevant in the big picture. Further, LWP's reliance on the statement from Utah Code Ann. § 31A-1-301(27)(a) that "there is no presumption an individual holding an official position with another person controls that person solely by reason of the position" is misplaced in this instance because the Liquidator does not rely on Mr. Igoe's positions with LWPCAC, Insurance Co. and Group to establish control and affiliate status. Instead, the Liquidator relies on the irrefutable evidence that LWPCAC, Insurance Co., FCL, Group, and Casualty (until merged) were controlled and managed by the same people. Although interlocking directorates is not enough, on its own, to establish control, "[s]haring officers between the parent and the subsidiary or the presence of 'interlocking directorates' are indicative of common corporate ownership and control." *Johnson-Tanner v. First Cash Financial Serv, Inc.*, 239 F.Supp.2d 34, 39 (D. D.C. 2003.)¹⁰. Pursuant to Utah Code Ann. §

¹⁰ See also *In re Chicken Antitrust Litigation*, 560 F.Supp. 1006, 1009 (N.D.Ga. 1982) where the Court stated that "'shared' officers and directors raise a strong inference of domination by the parent and indicate [] 'common direction and supervision. . .'"

31A-1-301(5), common management is sufficient to establish that LWPCAC, Insurance Co., Group, FCL, and Casualty are affiliates.

Although John Igoe's personal involvement is not relevant to the ultimate issue of the affiliate status of LWPCAC, Insurance Co., FCL, Group, and Casualty, there is telling evidence of the interlocking management and control of these companies by virtue of Mr. Igoe's involvement. John and Erica Igoe were the owners of LWP Commercial Claims Administrators, Inc. ("LWP Commercial") in 1999. *See* Aff. of Orrin T. Colby Jr. (Ex. A) at ¶7. Once he took his place as Chief Operating Officer, President, and a member of the board of directors of Group, John Igoe negotiated the sale of LWP Commercial to Group in 1999—working both sides of the deal.¹¹ After Group acquired LWP Commercial, Group formed a new corporate entity, LWP Claims Administrators, Corp. ("LWPCAC"), with John Igoe as its CEO from November 1999 to the present and, for a time, Chairman of the Board. *See id.* at ¶ 8. LWPCAC was a wholly owned subsidiary of Group until it was sold on May 8, 2002.¹² *Id.* In his capacity as CEO, COO, and President of Group, and as CEO of LWPCAC, John A. Igoe, along with Dennis T. Larson ("CFO"), made crucial management decisions for Group, Mutual, Insurance Co., FCL, and Casualty regarding claims handling services. Mssrs. Igoe and Larson were directly involved in drafting and/or administering a

¹¹ *See* Aff. of John Igoe attached to LWP's Memo. at ¶¶ 3-5. Sometime prior to November 2001, John A. Igoe was named Chairman of the Board and CEO of Group. *See* Aff. of Orrin T. Colby Jr. (Ex. A) at ¶ 8. John Igoe was also the COO and President of Insurance Co., FCL, and Casualty. *Id.*

¹² From the time that LWPCAC was formed and until it was sold, LWPCAC was under the common control and management of Group. *See* Aff. of Orrin T. Colby (Ex. A) at ¶ 13.

services agreement whereby LWPCAC provided claims services to Group, Mutual, Insurance Co., Casualty, and FCL. Mssrs. Igoe and Larson had direct input into the scope and nature of the services that would be performed by LWPCAC, and how much LWPCAC would be paid for those services. *Id.* at ¶ 12.

Additional evidence of interlocking corporate structure and management is that from January 1, 2000 through at least May 8, 2002, Group, FCL, Casualty, LWPCAC, and Insurance Co. had a common employee base, meaning the Companies and LWPCAC shared the same employees and management team. *See* Aff. of Orrin T. Colby Jr. (Ex. A) at ¶ 14.¹³ Group management, which included John A. Igoe (President, COO, and CEO), Orrin T. Colby Jr., Dennis T. Larson, and others, made management and employee decisions for Group, FCL, Insurance Co., Casualty, LWPCAC, and Mutual. *Id.* Further, the management, officers, and directors of Group controlled Mutual, Insurance Co., FCL, Casualty, and LWPCAC by virtue of their management and supervision of the employees, day-to-day business activities, and records keeping. *Id.* at ¶ 15.¹⁴

¹³ From January 1, 2000 through the spring of 2002, Mutual shared employees with Group, FCL, Insurance Co., LWPCAC, and Casualty. *See* Aff. of Orrin T. Colby Jr. (Ex. A) at ¶ 14.

¹⁴ John A. Igoe participated in the management, policymaking, and control of Group, FCL, Insurance Co., Casualty, LWPCAC, and Mutual. In fact, from 1999 through the spring of 2002, Group guided many management decisions of Mutual. For example, the management of reinsurance arrangements and underwriting were performed under the supervision of John A. Igoe. Similarly, Mr. Igoe supervised the administration of claims by means of his affiliated corporation, LWPCAC. In addition, Dennis T. Larson, the Chief Financial Officer, and other employees performing functions for Mutual, reported to Mr. Igoe. *See* Aff. of Orrin T. Colby Jr. (Ex. A) at ¶ 17.

Clearly, from 1999 to at least May 8, 2002, Group, FCL, Insurance Co., Casualty, and LWPCAC were managed and controlled by substantially the same group of persons, that is, John A. Igoe, Dennis T. Larson, Orrin T. Colby, Judy Adlam, Lewis T. Stevens, William J. Worsley, and members of the Board including Richard A. Veed, Mark Finkelstein, and Verl R. Topham. *Id.* at ¶ 18.¹⁵ Therefore, pursuant to Utah Code Ann. § 31A-1-301(4), LWPCAC, Group, Insurance Co., Casualty, and FCL are affiliates inasmuch as “substantially the same group of natural persons manage[d] the corporations.” The Form B filings, Mr. Colby’s affidavit, and LWP’s own admissions in John Igoe’s affidavit and LWP’s Memo., clearly confirm that Mr. Igoe and others managed Group, Insurance Co., Casualty, FCL, and LWPCAC as one company, utilized the same employees, and entered into agreements with each other on behalf of one another.

Once affiliate status is proved, the affiliate has no defenses to assert that will spare the affiliate from disgorging the distributions it received. As an affiliate of Insurance Co., LWPCAC must disgorge all funds it received from Insurance Co. since November 16, 1999. LWP’s attempt to distance itself from Insurance Co. and its assertion that LWP never received payments from Insurance Co., is belied by the fact that LWP billed Insurance Co. for claims handling services, and Insurance Co. paid LWP directly for those services. This evidence is irrefutable. *See* Aff. of Robert C. Miller, attached as Ex. M to the Liquidator’s Memo. at ¶¶ 16-19. LWP, therefore, must

¹⁵ The Liquidator firmly believes that at trial it can prove that Mutual was also managed and controlled by this same group of persons.

pay Insurance Co. at least \$ 5,615,090 which is the amount that Insurance Co. paid to LWPCAC prior to May 8, 2002.

**D. WHETHER THE PAYMENTS TO LWP WERE FAIR
CONSIDERATION FOR CONTEMPORANEOUSLY RENDERED
SERVICES IS IRRELEVANT.**

LWP attempts to interject what appears to be a bankruptcy concept into the discussion of whether § 31A-27-322, Utah Code Ann., permits the Liquidator to recover the payments to an affiliate. This argument is irrelevant and immaterial. LWP asserts that the payments they received from Insurance Co. and Mutual were for services LWP contemporaneously rendered to LWP's affiliates. The instant statute makes absolutely no mention of this alleged exception to the requirement that all payments by an insurance company to an affiliate within five years of the liquidation petition are to be paid back.

As Professor Kimball so ably articulated in his discussion of the Recoupment from Affiliates statute, distributions by insurance companies to affiliates are so suspect that there are virtually no defenses to the repayment requirement. Only if the distributions qualify as dividends can the recipient accept the burden of proving that the dividend was fair and reasonable and the payor (the insurance company) did not know that the payment of the dividend would affect the solvency of the insurance company. Clearly, the distributions to LWP were not predicated on stock ownership and therefore were not dividends. The inescapable conclusion is that the distribution must be paid back, regardless of whether the payments were contemporaneous with the services

rendered by LWP. The Bankruptcy Code concept of payment of fair consideration for contemporaneous services is simply irrelevant and immaterial¹⁶.

E. THE ENTITY FOR WHICH LWP RENDERED THE SERVICES IS IRRELEVANT AND IMMATERIAL TO THE FACT THAT LWP RECEIVED DISTRIBUTIONS FROM INSURANCE CO. AND MUTUAL. FURTHERMORE LWP HAS OFFERED NO SUBSTANTIATED EVIDENCE OF THE AMOUNT OF MONEY LWP CLAIMS IT RECEIVED.

LWP claims that the services it rendered were not for Insurance Co. or Mutual, but rather the services were rendered under the NAS Agreement. That alleged fact is wholly irrelevant and immaterial to the fact that Insurance Co. and Mutual did in fact pay LWP over \$6 million. Insurance Co. and Mutual paid LWP and that is the only operative fact that should concern this Court. It may be difficult for LWP to comprehend that § 31A-27-322, Utah Code Ann. concerns itself with only two operative questions: (1) were distributions made?; and (2) were the distributions made to an affiliate? Anything else is irrelevant.

The quality of the evidence presented by LWP in attempting to refute the Liquidator's position should also be noted. In this instance, LWP fails to attach the agreement pursuant to which the services were rendered. Where is the NAS agreement that supposedly excuses LWP's repayment of the distributions? This is symptomatic of the refutation posed by LWP. LWP claims that only \$5 million was paid by Insurance Co. and Mutual. Where is the accounting for that number? How did LWP come up

¹⁶ In the American Western case decided by Judge Medley, the recipient of the affiliate payments made an argument that they should be allowed to keep that part of the distributions that was not "excessive". After a careful review of the statute and the underlying policy, Judge Medley ruled that all of the distributions must be repaid, regardless of whether there was any fair consideration for the payment. *See* Exhibit F.

with that number? In contrast, the Liquidator has made available to LWP a detailed accounting of the distributions made to LWP that is subject to verification. LWP relies only on the unsubstantiated assertions of John Igoe and Dennis Larson. In a similar fashion, LWP says that the services agreement with Insurance Co. and Mutual “were provided pursuant to administrative agreements standard in the industry” LWP Memo. at p. 6. What agreements are they referring to? Why were similar agreements not attached? In essence, LWP asks the Court to accept unsubstantiated statements that should have been included.

F. THE DISTRIBUTIONS RECEIVED BY LWP WERE NOT DIVIDENDS AND THEREFORE THE TEST FOR THE RECOVERY OF DIVIDENDS IS IRRELEVANT AND IMMATERIAL.

In the final section of the LWP Memo., LWP argues that the monies received by LWP are not recoverable by the Liquidator because the payments were not distributions. Apparently relying on the faulty premise that distributions are the functional equivalent of dividends under § 31A-27-322, Utah Code Ann., LWP says that the payments to LWP do not qualify as recoverable dividends because the insurer (i.e., Insurance Co. and Mutual) did not know that and could not reasonably have known that the distribution might adversely affect its solvency. Again, this is irrelevant and immaterial. The Liquidator has never claimed that the payments were based on stock ownership and therefore were dividends. LWP’s argument constitutes a classic straw man polemic: they argue that the payments are something that they are not, and then proceed to knock down the straw man by showing that its status as a dividend disqualifies it from being recovered.

V. CONCLUSION

Affiliate transactions are so susceptible to manipulation and abuse that the Liquidator is statutorily empowered by Utah Code Ann. § 31A-27-322 to recoup money paid to affiliates within five years of liquidation regardless of any defense asserted by the original recipient/affiliate. The Liquidator has asked this Court to enforce the provisions of Utah Code Ann. § 31A-27-322 as written. That is, any distribution to an affiliate made five years before the filing of the liquidation petition must be repaid. The only exception to this rule is stock dividends. Distributions and dividends are not used interchangeably here. The legislative history indicates that the statute is applicable to all transactions between Group, Insurance Co., FCL, Mutual, and LWPCAC, not just dividends. Therefore, the payments that Insurance Co. made to LWPCAC for claims handling services are included in the term “distributions” and must be disgorged.

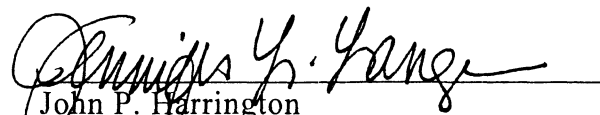
By its own admission, and pursuant to the Utah Insurance Code, LWPCAC was an affiliate of Insurance Co. LWP admits in its rendition of the facts that LWPCAC was an affiliate of Group and Insurance Co. The Utah Insurance Code defines an affiliate as “any person who controls, is controlled by, or is under common control with, another person. A corporation is an affiliate of another corporation, regardless of ownership, if substantially the same group of natural persons manages the corporations.” Utah Code Ann. § 31A-1-301(5). The Liquidator has presented irrefutable evidence in this memorandum that Group, Insurance Co., and LWPCAC were managed by “substantially the same group of natural persons.” LWPCAC is,

therefore, an affiliate of both Group and Insurance Co. As a result, LWPCAC must disgorge at least \$ 5,615,090, which is the amount that Insurance Co. paid to LWPCAC from November 1999 to May 8, 2002 for claims handling services.

Whether the payments to LWPCAC were fair consideration for contemporaneously rendered services is completely irrelevant. There are no defenses to disgorgement by affiliates pursuant to the Utah Insurance Code, simply stated, this is not a bankruptcy. In addition, the entity for which LWPCAC rendered the services is irrelevant and immaterial to the fact that LWPCAC received distributions from Insurance Co. and Mutual. Furthermore, LWP has offered no substantiated evidence of the amount of money LWPCAC claims it received. For these and all other foregoing reasons, the Liquidator respectfully requests that the Court grant its Motion for Summary Judgment and deny LWP's Motion for Summary Judgment, at least with respect to Insurance Co.

DATED this 24th day of March 2005.

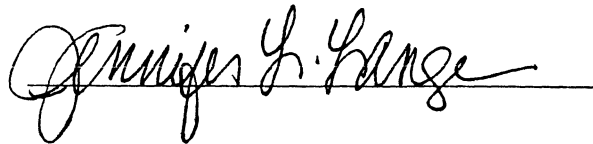
HOLLAND & HART LLP


John P. Harrington
Jennifer L. Lange
Attorneys for the Liquidator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **LIQUIDATOR'S MEMORANDUM IN OPPOSITION TO LWP'S MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF LIQUIDATOR'S MOTION FOR SUMMARY JUDGMENT** was sent via U.S. first class mail, postage prepaid on the 24th day of March 2005 to the following:

Edwin C. Barnes
Charles R. Brown
Jennifer A. James
Clyde Snow Sessions & Swenson
201 South Main, 13th Floor
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "Jennifer A. James", is written over a horizontal line.

Tab 5

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*Attorneys for Plaintiffs Wasatch Crest Insurance Company,
Wasatch Crest Mutual Insurance Company, in Liquidation
and Merwin U. Stewart, Liquidator*

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION, and
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and MERWIN
U. STEWART, Liquidator,

Plaintiffs,

vs.

LWP CLAIMS ADMINISTRATORS,
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants.

**AFFIDAVIT OF
ORRIN T. COLBY JR.**

Case No: 030915527

Judge Timothy R. Hanson

STATE OF UTAH }
 :ss
COUNTY OF SALT LAKE }

I, Orrin T. Colby Jr., having first been duly sworn, depose and state as follows:

1. I am a resident of the State of Utah, am over the age of majority and am competent to make this affidavit.

2. The facts set forth in this affidavit are within my personal knowledge and are true and correct to the best of my knowledge, information, and belief. Most of this information is also contained in the Board of Director's minutes, Annual Meeting minutes, Bylaws, and other relevant documents kept in the ordinary course of business related to the companies discussed below. If called to testify as a witness, I would competently testify as follows:

3. Prior to 1999, and from 1999 through November 6, 2001, I was a director and Chairman or Vice Chairman of the Board of Wasatch Crest Group Inc. ("Group"). During the majority of that time, I was Chief Executive Officer of Group, Wasatch Crest Insurance Company ("Insurance Co."), First Continental Life & Accident Insurance Company ("FCL"), and Wasatch Crest Casualty Insurance Company ("Casualty") (hereinafter collectively referred to as "the Companies"), until Casualty was merged into Insurance Co. in or around December 2000.

4. Prior to 1999, and from 1999 through July 2003, I was the Chairman of the Board and Chief Executive Officer of Wasatch Crest Mutual Insurance Company, ("Mutual").

5. I was removed as Vice Chairman of the Board of Group, Insurance Co., and FCL, in or around November 2001. I did, however, remain as Chairman of the Board and Chief Executive Officer of Mutual until July 2003.

6. From 1999 to July 2003, John A. Igoe was the Chief Operating Officer (“COO”) and President of Group. Prior to November 2001, John A. Igoe was named Chairman of the Board and CEO of Group. In addition, John A. Igoe was a Director of Insurance Co., FCL, and Casualty (until it merged into Insurance Co.).

7. John A. Igoe personally represented to me that he and his wife, Erica Igoe, were the owners of LWP Commercial Claims Administrators, Inc. (“LWP Commerical”) in 1999.

8. In John A. Igoe’s capacity as a member of the board of directors of Group, he negotiated the sale of LWP Commercial to Group. Group acquired LWP Commercial in October 1999, and formed a new corporate entity, LWP Claims Administrators Corp. (“LWPCAC”). John A. Igoe has served as CEO of LWPCAC from November 1999 to the present, and has served as Chairman of the Board from the point I was relieved of that role. LWPCAC was a wholly owned subsidiary of Group until it was sold. It is my understanding the LWPCAC was sold to John A. and Erica Igoe sometime in 2002.

9. At all times relevant hereto, Dennis T. Larson was the Chief Financial Officer (“CFO”) of the Companies, Mutual, and LWPCAC.

10. In my capacity as Chairman and Vice Chairman of the Board and Chief Executive Officer of the Companies and Mutual, I attended board and management meetings during that period with John A. Igoe and Dennis T. Larson, CFO, as well as other members and officers of the Companies, LWPCAC, and Mutual.

11. At all times between 1999 and November 2001, Group was the parent company of Insurance Co., FCL, Casualty (until merged), and LWPCAC. It is my understanding that this is also true from November 2001 to July 2003. Mutual was never a subsidiary of Group, in that it was a mutual company (i.e., Mutual was owned by the policyholders, not by shareholders); however, it was an affiliate of Group between 1999 and the spring of 2002.

12. In his capacity as CEO, COO, and President of Group, and CEO of LWPCAC, John A. Igoe, along with Dennis T. Larson, CFO, was directly involved in drafting and/or administering a services agreement whereby LWPCAC provided claims services to the Companies and Mutual. Mssrs. Igoe and Larson had direct input into the scope and nature of the services that would be performed by LWPCAC, and how much LWPCAC would be paid for those services.

13. From the time that LWPCAC was formed and until it was sold, LWPCAC was under the common control and management of Group.

14. From January 1, 2000 through at least November 2001, the Companies had a common employee base, meaning that LWPCAC, Group, FCL, Insurance Co., and Casualty (until merged), shared the same employees and management team. It is my understanding that this is true through July 2003. From January 1, 2000 through the spring of 2002, Mutual shared employees with the Companies and LWPCAC. Group management, which included John A. Igoe as President, CEO, and COO, made management and employee decisions for Group, FCL, Insurance Co., Casualty (until merged), LWPCAC, and Mutual.

15. I observed that all of the Companies and Mutual were under common management and control during the periods indicated. The management, officers, and directors of Group controlled each of the Companies, LWPCAC and Mutual by virtue of their management and supervision of the employees, day-to-day business activities, and records keeping for each of the Companies, LWPCAC and Mutual, during the periods indicated, subject, where appropriate, to approval of various Boards of Directors.

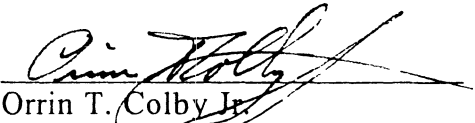
16. During the relevant time period, the Companies, LWPCAC, and Mutual were affiliates with one another.

17. John A. Igoe participated in the management, policymaking, and control of Group, FCL, Insurance Co., Casualty, LWPCAC, and Mutual, pursuant to his position at Group. In fact, from 1999 through the spring of 2002, when Mutual withdrew from its affiliation with Group, Group guided many management decisions of Mutual. For example, the management of reinsurance arrangements and underwriting were performed under the supervision of John A. Igoe. Similarly, the administration of claims was supervised by John A. Igoe by means of his affiliated corporation, LWPCAC. In addition, Dennis T. Larson, the Chief Financial Officer, and other employees performing functions for Mutual reported to John A. Igoe.

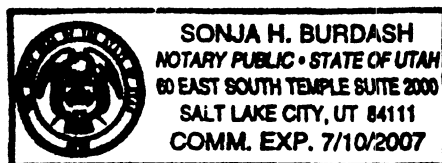
18. During the relevant time period, the Companies, LWPCAC, and Mutual were managed and controlled by substantially the same Group of persons, that is, John A. Igoe, Dennis T. Larson, myself, Judy Adlam, Lewis T. Stevens, William J. Worsley

and members of the Board including Richard A. Veed, Mark Finkelstein, and Verl R. Topham.

DATED this 18th day of March 2005.


Orrin T. Colby Jr.

SUBSCRIBED, ACKNOWLEDGED, AND SWORN TO before me this 18th
day of March 2005.



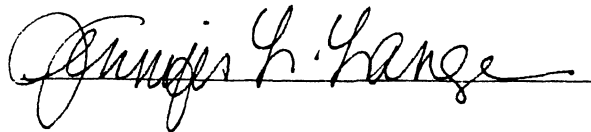

NOTARY PUBLIC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **LIQUIDATOR'S MEMORANDUM IN OPPOSITION TO LWP'S MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF LIQUIDATOR'S MOTION FOR SUMMARY JUDGMENT** was sent via U.S. first class mail, postage prepaid on the 24th day of March 2005 to the following:

Edwin C. Barnes
Charles R. Brown
Jennifer A. James
Clyde Snow Sessions & Swenson
201 South Main, 13th Floor
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "Jennifer A. James", written over a horizontal line.

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Tab 6

CHAPTER 96-17

INSURANCE HOLDING COMPANY SYSTEMS

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Prefatory Comment

There is room for argument about the extent to which insurance regulators should be seriously concerned about the process of acquisition of insurers, i.e., the formation of an insurance holding company system. That question has been resolved here by basically following former law, which was based on the NAIC Model Act.

There is no room for argument, however, that after formation of a holding company system there must be serious concern with intergroup transactions. They are subject to abuse involving vast sums of money, the improper transfer of which can endanger policyholder and public interests. This chapter carries concern for such transactions a step farther than does the Model Act or previous law. See section 96-17-6.5.

The Model Act (the former Utah law) has been criticized as excessively cumbersome and as requiring unnecessary information. In the course of preparing this draft, a number of files were examined where there had been acquisitions under the act. No evidence of excessive burdensomeness was found in the files examined. The transaction is one of great consequence, and it should be expected that the acquiring company would have to spend both time and money making its plans and then making the case for allowing the transaction. Without extensive information, the commissioner would have to give approval in the dark.

The draft gives great flexibility to the commissioner in deciding what information to ask for and what acquisitions to monitor closely.

The existing holding company statutes have been brought into some question by the recent decision of the U.S. Supreme Court in Edgar v. Mite Corp., 102 S.Ct. 2629 (1982) holding the general Illinois corporate takeover statute unconstitutional. An effort has been made in drafting this chapter to avoid the pitfalls exposed by that case. For example, it is no part of the purpose of this chapter to give existing management an advantage in the takeover attempt. Nor does the chapter seek to protect all shareholders but only, or at least primarily, Utah shareholders. In the process others may get some protection too. In these respects, this chapter is consistent with the purposes of the Williams Act, as described in Edgar v. Mite Corp., Id.

2635-40. It is believed that the chapter is not invalid as the Illinois Takeover Act was held to be in that case. It is neither an excessive burden on commerce nor inconsistent with the objectives of the Williams Act.

96-17-1. Scope and purposes.

(1) Scope. (a) Unless specifically exempted under subsection (b), this chapter applies to all entities doing an insurance business (as defined in subsection 96-1-3(24a) in Utah.

(b) (i) The commissioner may exempt any class of insurers from any provisions of this chapter, when he deems the exemption consistent with the purposes of this chapter and in the public interest.

(ii) On request of the person required to supply information or perform an act, the commissioner may exempt that person from any provisions of this chapter when he deems the exception consistent with the purposes of this chapter and in the public interest.

(2) The purposes of this chapter include:

(a) To exercise surveillance over the acquisition of a domestic insurer, to ensure that in the process of making it part of an insurance holding company system the interests of policyholders, Utah shareholders and the public are not harmed.

(b) To provide special protection for the policyholders of a life insurance company that is acquired by another person.

(c) To provide for the regulatory monitoring of those intercorporate relationships and transactions among affiliates within an insurance holding company system that may affect the solidity of insurers.

(d) To control the payment of dividends that might affect the solidity of insurers.

(e) To provide in appropriate cases for recoupment of dividends paid.

Comment

The power to grant exemptions under subsection (1) is a necessary corollary of the broadly stated requirements of this chapter. If the commissioner has unusual powers to acquire information, he should have adequate power to waive the requirements when he does not need the information. The usual procedure for establishing an exemption would be a rule, though an individual insurer or group of insurers could be exempted by an order. The exemption can be terminated in the same way it is created.

Subsection (2) is new. It is useful to have a statement of purposes to help in the interpretation of the chapter.

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96-17-2. Definitions.

In this chapter:

(1) "Security holder" means the holder of any security, including common or preferred stock, debt obligations, and any other instrument convertible into or evidencing the right to acquire any of the foregoing.

(2) "Voting security" includes any security convertible into or evidencing a right to acquire a voting security.

(3) "Person" does not include a securities broker performing only the usual and customary broker's function.

(4) "Insurer" does not include an unauthorized insurer.

Comment

Most terms that need to be defined are defined for other purposes as well. They are in section 96-1-3. These definitions come from former subsections 31-39-1(4), (5), (7) and (8).

96-17-3. Acquisition of control of or merger with domestic insurer.

(1) Filing requirements. (a) No person other than the issuer may in any manner acquire or seek to acquire any voting security of a domestic insurer if, after consummation, the person would, directly or indirectly, or could by exercise of any right, be in control of the insurer, without first filing with the commissioner a statement containing the information required by this section.

(b) No person may enter into an agreement to merge with or otherwise to acquire control of a domestic insurer without first filing with the commissioner a statement containing the information required by this section.

(c) Unless a domestic insurer is acting under authority of another provision of the insurance code or an order of the commissioner, it may not acquire or seek to acquire any of its own voting securities without first filing with the commissioner a statement containing such portion of the information required by this section as the commissioner may request.

(d) The transactions or activities described in subsections (1)(a), (b) or (c) may not be consummated unless approved by the commissioner in the manner prescribed in subsection (5) of this section.

(e) At the time the statement is filed with the commissioner under subsection (1)(a) or (b), the person shall file the statement also with the insurer. The insurer shall send an informative and accurate summary of the statement, or the statement filed under subsection (1)(c) of this section, to

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its shareholders within five business days, with information about how a shareholder may obtain a copy of the full statement at his own expense.

(f) The distribution of the summary under subsection (1)(d) shall be at the expense of the person making the statement. To secure the payment, that person shall file with the commissioner an acceptable bond or deposit in an amount the commissioner determines.

(g) For purposes of this section, a domestic insurer includes any other person controlling a domestic insurer unless that other person is either directly or through its affiliates primarily engaged in business other than the business of insurance.

(2) Content of statement. The statement under subsection (1) of this section shall be made under oath and shall contain the following information:

(a) If any rule or order under section 96-17-2.5 is relied on, the full text of the rule or order.

(b) The name and address of each person by whom or on whose behalf the merger or other acquisition of control is to be effected ("acquiring party"), and

(1) If a natural person, his principal occupation and all offices and positions held during the past five years, and any conviction of crimes other than minor traffic violations during the past ten years;

(11) If not a natural person, the nature of its business operations during the past five years or for such lesser period as it and its predecessors have been in existence; an informative description of the business it and its affiliates intend to do and a list of all its and its affiliates' directors or executive officers and those who perform functions appropriate to such positions.

(111) For each such additional natural person the information required by subsection (2)(b)(1) of this section.

(c) The source, nature and amount of the consideration to be used in effecting the merger or other acquisition of control, a description of any transaction for obtaining such funds, and the identity of persons furnishing the funds. Where the source is a loan made in the lender's ordinary course of business, the identity of the lender may, at the commissioner's discretion, remain confidential on request of the person filing the statement.

(d) Fully audited financial information as to the earnings and financial condition of each acquiring party for the preceding five fiscal years (or for

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such lesser period as an acquiring party and its predecessors have been in existence), and similar unaudited information as of a date not earlier than 90 days prior to the filing of the statement.

(e) Any plans each acquiring party or those who control it may have to liquidate the insurer, to sell its assets or merge or consolidate it with any person, or to make any other material change in its business or corporate structure or management.

(f) The number of shares of any security referred to in subsection (1) which each acquiring party proposes to acquire, and the terms of the acquisition.

(g) The amount of each class of any security referred to in subsection (1) which each acquiring party beneficially owns or of which he has a right to acquire beneficial ownership.

(h) A full description of any arrangements in which any acquiring party is involved with respect to any security referred to in subsection (1) of this section, including the identity of the persons with whom they were entered into.

(i) A description of each purchase by any acquiring party of any security referred to in subsection (1) during the twelve calendar months preceding the filing, including the dates of purchase, names of the purchasers, and the consideration.

(j) A description of any recommendations to purchase any security referred to in subsection (1) made during the twelve calendar months preceding the filing of the statement, by any acquiring party, or by anyone based upon interviews or at the suggestion of any acquiring party.

(k) Copies of all offers and agreements to acquire or exchange any securities referred to in subsection (1) of this section and, if distributed, of soliciting material used.

(l) The terms of any agreement, contract or understanding with any broker-dealer as to solicitation of securities referred to in subsection (1), and the amount of compensation to be paid to such broker-dealers.

(m) Such additional information as the commissioner prescribes by rule as necessary or appropriate for the protection of policyholders and Utah security holders of the insurer and of the public interest.

(3) Supplements to information required. (a) If the person required to file the statement under subsection (1) is a partnership, limited partnership, syndicate or other group, the commissioner may require that the information

called for by subsection (2) be given for each partner, each member of a syndicate or group, and each person who controls a partner or member. If any person required to file is a corporation, the commissioner may require that the information be given for the corporation, each officer and director of the corporation, and each person who is directly or indirectly the beneficial owner of more than ten percent of the outstanding voting securities of the corporation.

(b) If any material change occurs in the facts filed under this section, an amendment setting forth the change, together with copies of all documents and other material relevant to the change, shall be filed with the commissioner and sent to the insurer within two business days after the person learns of the change. The insurer shall send the amendment to its shareholders promptly.

(4) Alternative filing materials. If any transaction under subsection (1) is proposed to be made pursuant to federal law or another state's law requiring the disclosure of similar information, the person required to file may use such documents in making the filing.

(5) Approval by commissioner. The commissioner shall approve any merger or other acquisition of control referred to in subsection (1) unless, after a hearing, he finds that:

(a) After the change of control, the domestic insurer would not satisfy the requirements for the certificate of authority it then has; or

(b) The merger or other acquisition of control would substantially lessen competition or tend to create a monopoly in insurance in Utah; or

(c) The financial condition of any acquiring party might jeopardize the financial stability of the insurer, or prejudice the interest of its policyholders or the interests of any Utah security holders who are unaffiliated with the acquiring party; or

(d) The terms of the transaction are unfair and unreasonable to Utah security holders; or

(e) The plans the acquiring party has to liquidate the insurer, sell its assets or consolidate or merge it with any person, or to make any other material change in its business or corporate structure or management, are unfair and unreasonable to policyholders of the insurer and not in the public interest; or

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(f) The competence, experience and integrity of those persons who would control the insurer are such that it would not be in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control.

(6) Hearing. The hearing required under subsection (5) shall begin within twenty-five days and be closed within thirty-five days after the filing. The commissioner shall give at least fifteen days' notice thereof to the filer and to the insurer. The filer shall give at least seven days notice of the hearing to any persons designated by the commissioner at the time he gives notice to the filer. The insurer shall give notice to its security holders promptly on receipt of the notice. The commissioner shall make a final determination within twenty days after the conclusion of the hearing. Subject to reasonable limitations and restrictions the commissioner imposes to keep the proceedings manageable and to prevent shareholders from using the proceedings to gain leverage in negotiations for the sale of their shares, the filer, the insurer, persons to whom notice of hearing was sent, and any other person whose interests may be affected may on written request be given the right to present evidence, examine and cross-examine witnesses, and offer oral and written arguments and conduct discovery proceedings. All discovery proceedings shall be concluded not later than three days prior to the commencement of the hearing. If the commissioner denies the right to participate in the hearing, he shall state reasons in reasonable detail.

(7) Violations. It is a violation of this section:

- (a) To fail to file any statement required to be filed under it; or
- (b) To attempt to effectuate an acquisition of control of, or merger with, a domestic insurer without the commissioner's approval under this section.

(8) Jurisdiction. The district court for Salt Lake County has jurisdiction over every person not resident, domiciled, or authorized to do business in Utah who files or is obligated to file a statement with the commissioner under this section, and over all actions involving the person arising out of actions under or violations of this section. Each person is deemed to have appointed the commissioner his attorney upon whom may be served all lawful process under sections 96-2-44 and 96-2-45 in any such action.

Comment

This section continues, with considerable editorial and substantive change, former section 31-39-2, which was almost identical with Model Act section 3. The section places a substantial procedural hurdle before persons seeking to acquire control of a domestic insurer. Because the hurdle is one requiring considerable effort to surmount, it gives the Utah commissioner meaningful control over the concentration of business in the state and over the character and financial backing of those who control domestic insurers. The provision is complex but seems sound, especially when coupled with the power in section 96-17-2.5 to waive requirements that in a particular situation serve no purpose justifying their cost.

The recent case of Edgar v. Mite Corp., 102 S. Ct. 2629 (1982) suggests there may be some danger of invalidation of the law on commerce clause grounds (or possibly because of conflict with the Williams Act) if the procedure goes too far in protecting management against takeovers, or non-Utah security holders against imposition, or conflicts with federal procedures that might be applicable. The section has been considerably changed to try to establish a better balance between management and the acquiring persons that will not render the process vulnerable. Suggestions for further improvement are especially welcome.

Subsection (1)(f) provides for the expenses of mailing. They may be very burdensome and not very productive. Should the commissioner be given substantial discretion to give notice by publication to reduce cost?

Subsection (1)(g) is not found in the former Utah act but is in the Model Act. It is inserted here for consideration of the commission. It raises difficult questions, for in some hypothetical (but possible) situations it could compel the disclosure of an almost infinite amount of information. Suppose, for example, that a domestic Utah insurer were controlled by another insurer (a nondomestic one) which in turn was controlled by another and so on for several levels, finally ending up with a major national insurer like Hartford Fire or Travelers. Presumably this provision could be interpreted as requiring the information specified in the section and the involvement in the procedure of all the corporations back to the Hartford Fire in the one case (though not I.T. & T. because it and its affiliates are primarily engaged in other businesses than insurance), and back to Travelers Corporation in the other. The question to be considered here is whether it is useful for the statute to reach so far. If not, what should the limits be?

Under subsection (6), the hearing rules of the department should be followed if they are reasonably suitable. The standing provision in this subsection is very generous and in some conceivable situations the hearing might collapse of its own weight. It could be almost as complicated as the IBM antitrust case of recent notoriety. The version presented here gives the commissioner power to confine the hearing somewhat but there is a question whether the statute should not confine standing much more and also explicitly restrict the rights of interested persons to be involved in the actual proceedings in the hearing.

Subsection (9), dealing with jurisdiction, is shortened by reference to general provisions in the insurance code.

96-17-4. Acquisition of domestic life insurer.

(1) Trust agreement. Before an acquisition or merger of a domestic life insurer is approved by the commissioner, the commissioner shall require the

acquiring person or surviving company to execute a written trust agreement acceptable to the commissioner under which assets approved by the commissioner in an amount equal to the total policyholder liabilities of the insurer in Utah, immediately preceding acquisition or merger, are maintained in trust for the exclusive benefit of those policyholders. No reinsurance agreement covering such liabilities may affect the trust assets without the prior approval of the commissioner.

(2) Other applicable provisions. The trust assets are subject to chapters 96-20 and 96-23.

(3) Deposit provisions. Section 96-2-27.5 does not apply.

Comment

This provision is not in the Model Act but is in former section 31-39-2.5. It was added to the law in 1977. It eliminates a good deal of guessing about whether the acquirer of a life insurer will be able to perform the assumed obligations. Subsection 96-17-4(2) is completely changed, however.

96-17-5. Registration of insurers.

(1) Registration. (a) Except under subsection (1)(b) of this section, every insurer authorized to do business in Utah which is a member of an insurance holding company system as defined in subsection 96-1-3(24b) shall register with the commissioner within fifteen days after it becomes subject to registration unless the commissioner for good cause shown extends the time for registration, and then within the extended time.

(b) Subsection (1)(a) of this section does not apply to a foreign insurer subject to disclosure requirements and standards in the jurisdiction of its domicile which are substantially similar to those contained in this section. The commissioner may require such an insurer to furnish a copy of the registration statement or other information filed with the insurance regulatory authority of the domicile.

(2) Information and form required. The registration statement shall be on a form prescribed by the commissioner, which shall contain current information about:

(a) The capital structure, general financial condition, ownership and management of the insurer and any person controlling the insurer.

(b) The identity, home office address and telephone number of every member of the insurance holding company system.

(c) The following agreements in force, relationships subsisting, and transactions currently outstanding between the insurer and all its affiliates:

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(1) Loans, other investments, or purchases, sales or exchanges of securities of the affiliates by the insurer or of the insurer by its affiliates;

(11) Purchases, sales or exchange of assets;

(111) Transactions not in the ordinary course of business;

(1v) Guarantees or undertakings for the benefit of an affiliate which result in contingent exposure of the insurer's assets to liability, other than insurance contracts entered into in the ordinary course of the insurer's business;

(v) All management and service contracts and all cost-sharing arrangements other than cost allocation arrangements based upon generally accepted accounting principles; and

(vi) Reinsurance agreements covering all or substantially all of one or more lines of insurance of the ceding company.

(d) Classes of reinsurance transactions specified by the commissioner by rule.

(e) Other transactions between registered insurers and any affiliates that may be included from time to time in registration forms adopted or approved by the commissioner.

(3) Materiality. No information need be disclosed on the registration statement if it is not material for the purposes of this section. Unless the commissioner by rule or order provides otherwise, sales, purchases, exchanges, loans or extensions of credit, or investments, involving one-half of 1% or less of an insurer's admitted assets as of the 31st day of December next preceding are not deemed material for purposes of this section.

(4) Amendments to registration statements. Each registered insurer shall keep current the information in its registration statement by reporting on forms provided by the commissioner all material changes or additions within fifteen days after the end of the month in which it learns of each change or addition.

(5) Termination of registration. The commissioner shall terminate the registration of any insurer that demonstrates it is no longer a member of an insurance holding company system.

(6) Consolidated filing. The commissioner may require or allow two or more affiliated insurers to file a consolidated registration statement or consolidated amendment reports.

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(7) Disclaimer. Any person may file with the commissioner a disclaimer of affiliation with any other person, fully disclosing all material relationships and bases for affiliation between the two and the basis for disclaiming affiliation. After the filing of the disclaimer, the duty to register or report under this section arising out of the relationship is in abeyance until the commissioner disallows the disclaimer. The commissioner may disallow the disclaimer only after a hearing under section 96-2-36.

Comment

This section contains most of former section 31-39-3, which was based on Model Act section 4.

Aside from editorial changes, there are a few substantive changes. In subsection (2)(d) reinsurance of classes designated by the commissioner is included as a kind of transaction to be reported. Reinsurance arrangements are easily subject to abuse, especially within a corporate family.

Subsections (7) and (10) of the former statute are omitted as unnecessary.

96-17-6. Standards.

(1) Transactions with affiliates. Material transactions by registered insurers with their affiliates are subject to the following standards:

(a) The terms shall be fair and reasonable.

(b) The books, accounts and records of each party shall be so maintained as to disclose clearly and accurately the precise nature and details of the transactions.

(c) The insurer's capital and surplus following any dividends or distributions to shareholder affiliates shall continue to be adequate for its financial needs. For purposes of this section, in determining whether an insurer's capital and surplus are adequate for its financial needs, section 96-23-11 shall guide the determinations.

(2) Dividends and other distributions. (a) No insurer subject to registration may pay an extraordinary dividend or make any other extraordinary distribution to its shareholders until either thirty days after the commissioner has received notice of the declaration thereof and has not disapproved the payment or the commissioner has approved it.

(b) For purposes of this section, an extraordinary dividend or distribution includes any dividend or distribution of cash or other property, whose fair market value together with that of other dividends or distributions, excluding pro rata distributions of any class of the insurer's own securities, made within the preceding twelve months exceeds the greater of:

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- (i) Ten percent of the insurer's capital and surplus as of the thirty-first day of December next preceding, or
- (ii) If the insurer is a life insurer, the net gain from operations or if the insurer is not a life insurer, the net income on investment and operations combined for the twelve month period ending the thirty-first day of the preceding December.
- (c) Notwithstanding any other provision of law, an insurer may declare an extraordinary dividend or distribution conditioned upon the commissioner's approval. The declaration confers no rights on shareholders until the commissioner has approved the payment or has not disapproved it within the thirty day period under subsection (3)(a) of this section.

Comment

This section continues former section 31-39-4, which was based upon Model Act section 5.

The standards for adequacy of capital and surplus are the same as those for compulsory surplus under section 96-23-11, which is incorporated by reference.

The permissible maximum non-extraordinary dividend for nonlife companies of the net investment income, the standard of former subsection 31-39-4(3), is no longer realistic in a period when very large investment income has to balance out an underwriting loss of large dimensions. Payment of the net investment income in some recent years would (for the whole industry) have amounted to close to 20% of capital and surplus; for some individual insurers it would undoubtedly have amounted to substantially more. Such a dividend would be extraordinary. The maximum has therefore been changed to the net combined income from operations and investment. Even that would be a very large sum in some years, but it would be much less likely to strip insurers of needed capital and surplus for at least it would leave the insurer in approximately the same position (apart from inflation) it occupied in the prior year. That provides no room for growth unless the insurer was overcapitalized, which may sometimes be the case.

96-17-6.5. Liability of affiliates.

(1) Right of receiver to recover dividends paid. If an order for the liquidation, rehabilitation or conservation of an insurer authorized to do business in Utah is entered under chapter 96-45, the receiver has a right to recover on behalf of the insurer the amount of distributions other than stock dividends paid by the insurer on its capital stock at any time during the five years preceding the petition for liquidation, rehabilitation or conservation, subject to the limitations of subsections (2) to (4).

(2) Dividend payments recoverable. No dividend is recoverable if the recipient shows that when paid the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect its solvency.

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(3) Persons liable. (a) Affiliates at time of payment. Any person who was an affiliate of the insurer at the time the distributions were paid is liable up to the amount of distributions received.

(b) Affiliates at time of declaration of distribution. Any person who was an affiliate of the insurer at the time the distributions were declared is liable up to the amount of distributions it would have received if it had been paid.

(c) Joint and several liability. If under subsections (3)(a) and (b) two persons are liable with respect to the same distributions they are jointly and severally liable.

(4) Aggregate limitation. The maximum amount recoverable under this section is the amount needed in excess of all other available assets to pay all claims under the receivership, less for each recipient any amount that recipient has already paid to receivers under similar laws of other states.

(5) Secondary liability. If any person liable under subsection (3) is insolvent, all its affiliates that controlled it at the time the dividend was declared or paid are jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate.

Comment

Under certain circumstances, one purpose of creating an insurance holding company system, especially on the part of a noninsurer which acquired an insurer, was to 'liberate' excess surplus from a cash-rich company. There are undoubtedly some circumstances in which insurers, especially nonlife insurers, are overcapitalized and excess surplus can safely be withdrawn from them. Were it not for the income tax consequences, the excess should be paid out as dividends to shareholders, who could then reinvest as they saw fit. But income tax liability leads to an effort to find a productive outlet for the use of the capital with minimum income tax consequences. Payment to a parent is one route to such reapplication of the capital.

This section seeks to cure any error of judgment or any venality in deciding how much surplus can safely be withdrawn from a subsidiary insurer if the amount withdrawn helps lead to insolvency within a few years. It is modeled after Wisconsin section 617.23. Section 96-45-55 is its necessary correlate. The nature of the problem is illustrated by an incident in early 1969.

After being acquired by a noninsurance holding company, the Great American Insurance Company, then of New York but now of Ohio, which was then and is now authorized to do business in Utah, and which had a surplus of over \$300 million at year-end 1968, voted a dividend of over \$171 million payable to its parent holding company. [At year-end 1980, it had surplus of about \$385 million].

Immediately after declaration of the dividend, the New York insurance department launched an investigation to determine what effect so large a dividend would have on the financial condition of the company and on the

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amounts of insurance it would safely be able to write in the future. The New York Department noted that it did not have authority to disapprove even such a large dividend. Although the dividend may not have endangered the solidity of the particular company at all, the fact that such a payment could be made in the way it was made and without regulatory surveillance even in the domiciliary state raised issues far transcending the individual case and its individual merits. It urgently called for the commissioner to have an opportunity to consider whether the insurer's solidity is endangered. Model legislation was developed by the NAIC and was widely adopted.

There are other potential abuses, beside excessive dividends, in the holding company development. They include all of the devices for "milking" that have been ingeniously exploited in other contexts. They encompass the full range of less than arm's-length transactions that benefit affiliates at the expense of the insurer. They permit evasions of insurance laws and regulations by a parent holding company through payments to insurance agents and employees, for example, that could not be done by an insurance company alone.

The statutory provision proposed here is designed to give the commissioner power to recoup the loss resulting from such abuses in at least some cases.

Comment on Omitted Section

Former section 31-39-5 (based on Model Act section 5) is not continued in this chapter. All the powers it gives the commissioner are already incorporated in sections 96-2-25, 96-2-26 and 96-2-27.

96-17-7. Confidential Treatment.

All information, documents and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made under subsection 96-2-25(1)(b) and all information reported under sections 96-17-3 and 96-17-5 are confidential under subsection 96-2-28(6), are not subject to subpoena and may not be made public by the commissioner or any other person, except to insurance departments of other states, without the prior written consent of the insurer or the particular affiliate to which it pertains except that if the commissioner, after a hearing, determines that the interests of policyholders, Utah shareholders or the public will be served by the publication of the information he may publish all or any part thereof in a manner he deems appropriate.

Comment

This section continues former section 31-39-6, which was based on Model Act section 7.

Comment on Omission

Former section 31-39-7 is omitted as unnecessary.

96-17-9. Remedies.

(1) Voting of securities. No security which is the subject of any agreement or arrangement regarding acquisition or which is acquired or to be acquired in contravention of this chapter or of any rule or order issued hereunder, may be voted or counted for quorum purposes at any shareholders' meeting. Any action of shareholders requiring the affirmative vote of a specified percentage of shares may be taken as though such securities were not issued and outstanding. No action taken at any such meeting is invalidated by the voting of the securities unless the action would materially affect control of the insurer or unless a Utah court has so ordered.

(2) Injunctions. If an insurer or the commissioner has reason to believe that any security of the insurer has been or is about to be acquired in violation of this chapter or of any rule or order issued hereunder, either may apply to the district court for Salt Lake County or for the county in which the insurer has its principal place of business to enjoin the transactions or the voting of any security so acquired, to void any vote of the security already cast, and for such other equitable relief as the nature of the case and the interests of the insurer's policyholders, creditors, Utah shareholders or the public may require.

(3) Sequestration of voting securities. In any case where a person has acquired or is proposing to acquire any voting securities in violation of this chapter or any rule or order issued hereunder, the district court for Salt Lake County or for the county in which the insurer has its principal place of business may, upon the application of the insurer or the commissioner and on such notice as the court deems appropriate, seize or sequester any voting securities of the insurer owned directly or indirectly by such person, and issue such orders as may be appropriate to effectuate the provisions of this chapter.

(4) Situs of ownership. For the purposes of this chapter, the situs of the ownership of the securities of domestic insurers is deemed to be in Utah.

Comment

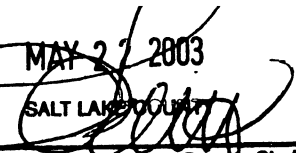
This section continues former subsections 31-39-8(2) and (3), which were based on Model Act section 8. Subsection (1) is omitted as unnecessary.

Comment on Omitted Sections

Former sections 31-39-9, 31-39-10, 31-39-11, 31-39-12 and 31-39-13 are omitted because they have already been dealt with adequately elsewhere in the insurance code.

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Tab 7

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

AMERICAN WESTERN LIFE INSURANCE
COMPANY, IN LIQUIDATION and
MERWIN U. STEWART, LIQUIDATOR

Plaintiffs,

v.

LELAND ARNO WOLF, individually; SALLY
RUETENIK WOLF, individually; LISA A.
WOLFKLAIN, individually; LOGAN A.
WOLF, individually; LELAND A. WOLF
ASSOCIATES, INC., a California corporation;
LOUISE WOLF, a/k/a LOUISE WOLF
HANSEN, individually; KEITH HANSEN,
individually; MATTHEW WOLFKLAIN,
individually; CINDY M. WOLF,
Individually; WESTERN HEALTH
NETWORK, INC., a California corporation;
AWL INSURANCE SERVICES, INC., a
California corporation; AWL FINANCIAL
SERVICES, INC., a California corporation;
HEALTH RELIANCE, INC., a Delaware

**REVISED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
REGARDING LIQUIDATOR'S MOTION
FOR PARTIAL SUMMARY JUDGMENT
AND MOTION TO STRIKE
DEFENDANTS' MEMORANDUM IN
OPPOSITION AND AFFIDAVIT OF
LELAND A. WOLF**

Case No. 980905251 MI

Judge Tyrone E. Medley

corporation; THE WELLNESS HEALTH PLAN PROVIDER GROUP, a Nevada corporation; WOLFPACK INSURANCE SERVICES, INC., a California corporation; WOLF/NET, INC., a California corporation,

Defendants.

LELAND A. WOLF; SALLY RUETENIK WOLF; LOGAN A. WOLF; LOUIS WOLF HANSEN; LELAND A. WOLF ASSOCIATES, INC.; HEALTH RELIANCE, INC.; and THE WELLNESS HEALTH PLAN PROVIDER GROUP, INC.,

Third-Party Plaintiffs,

v.

MICHAEL WHEELER and BRUCE NORIEGA,

Third-Party Defendants.

Plaintiffs American Western Life Insurance Company, In Liquidation and Merwin U. Stewart, the Court-appointed liquidator ("Liquidator") filed the Liquidator's Motion for Partial Summary Judgment on or about August 19, 2002. The following pleadings were filed and considered by the Court in conjunction with the Liquidator's Motion for Partial Summary Judgment:

- a. Liquidator's Memorandum in Support of the Motion for Partial Summary Judgment dated August 16, 2002.
- b. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment dated September 13, 2002.
- c. Affidavit of Leland A. Wolf dated September 11, 2002.

d. Liquidator's Reply Memorandum in Support of Motion for Partial Summary Judgment dated December 16, 2002.

e. Correction to Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment dated December 16, 2002.

f. Defendants' Supplemental Memorandum of Law in Opposition to Motion for Summary Judgment dated January 13, 2003.

g. Liquidator's Supplemental Memorandum in Support of Liquidator's Motion for Partial Summary Judgment dated January 21, 2003.

Upon receipt of Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment dated September 13, 2002 and the Affidavit of Leland A. Wolf dated September 11, 2002, the Liquidator filed his Motion to Strike Defendants' Memorandum in Opposition and Affidavit of Leland A. Wolf dated October 8, 2002. The following pleadings were filed and considered by the Court in conjunction with the Liquidator's Motion to Strike Defendants' Memorandum in Opposition and Affidavit of Leland A. Wolf:

a. Liquidator's Motion to Strike Defendants' Memorandum in Opposition and Affidavit of Leland A. Wolf dated October 8, 2002.

b. Liquidator's Memorandum in Support of Liquidator's Motion to Strike Defendants' Memorandum in Opposition and Affidavit of Leland A. Wolf dated October 8, 2002.

c. Defendants' Memorandum in Opposition to Motion to Strike Affidavit of Leland A. Wolf dated October 18, 2002.

d. Defendants' Statement of Disputed Material Facts dated October 18, 2002.

e. Defendants' Summary of the Deposition Testimony of Bruce Noriega dated October 18, 2002.

f. Defendants' Summary of the Deposition Testimony of Michael Wheeler dated October 18, 2002.

g. Liquidator's Reply Memorandum in Support of Motion to Strike Affidavit of Leland A. Wolf dated December 16, 2002.

h. Liquidator's Reply Memorandum in Support of Objections to Affidavit of Leland A. Wolf dated December 16, 2002.

Oral arguments on the issues raised by the above referenced pleadings were heard by the Court on January 6, 2003. Plaintiffs American Western Life Insurance Company, in Liquidation, and Merwin U. Stewart, in his capacity as the Liquidator appointed by this Court were represented by John P. Harrington and Kristine M. Larsen of Ray, Quinney & Nebeker and J. Ray Barrios, Jr., General Counsel of the Liquidation Office. Defendants Leland A. Wolf, Sally R. Wolf, Lisa A. Wolfklain, Logan A. Wolf, Leland A. Wolf & Associates, Inc., Louise Wolf Keith Hansen, Matthew Wolfklain, Cindy M. Wolf, Western Health Network, Inc, AWL Insurance Services, Inc., AWL Financial Services, Inc., Health Reliance, Inc., The Wellness Health Plan Provider Group, Wolfpack Insurance Services, Inc., and Wolf/Net, Inc. (collectively referred to as the "Wolf Family Defendants") were represented by Edward W. McBride, Jr. Third-party Defendant Michael C. Wheeler was represented by Darren K Nelson of Parr, Waddoups, Brown Gee & Loveless. Third-party Defendant Bruce Noriega was represented by D. Jason Hawkins of Snow Christensen & Martineau. At the conclusion of the hearing on January 6, 2003, the Court requested the supplemental briefs cited above. The decision of the Court was announced in open court on January 29, 2003.

FINDINGS OF FACT

1. American Western Life Insurance Company ("AWLIC") was an insurance company organized under the laws of the State of Utah. On or about November 30, 1985, Leland A. Wolf & Associates, Inc., a California corporation ("LAWA") purchased AWLIC. Through subsequent reorganizations, LAWA's ownership of AWLIC was converted to Class A preferred AWLIC stock. Leland A. Wolf and Sally R. Wolf, as joint tenants with rights of survivorship, own 70.76% of the issued and outstanding common shares of AWLIC. Leland A. Wolf, as an individual, owns 19.88% of the issued and outstanding common shares of AWLIC. The remaining 9.35% of AWLIC shares were gifted in December of 1995 by Leland A. Wolf and Sally R. Wolf to each of their children and their respective spouses. See Form B dated April 21, 1994, Annual Supplement to Insurance Holding Company System Registration Statement filed with the Insurance Department of the State of Utah and personally signed by Leland A. Wolf, an individual and the Ultimate Controlling Person of AWLIC ("Form B").

2. Leland A. Wolf, as an individual, owns 37.2% of LAWA and Sally R. Wolf, wife of Leland A. Wolf, owns 37.2% of LAWA. See Form B, Item 2(b)(1). The remaining shareholders of LAWA are Wolf family members.

3. Leland A. Wolf and Sally R. Wolf have been directors and officers of AWLIC since the purchase of AWLIC by LAWA on November 30, 1985. The first pages of the Annual Statements of AWLIC to the Utah Department of Insurance for the years 1992, 1993, 1994, 1995, and 1996 indicate that Leland A. Wolf and Sally R. Wolf were officers and directors of AWLIC. In addition, the first pages of the Quarterly Statement of AWLIC for the quarter ending March 31, 1997 and June 30, 1997 indicate that Leland A. Wolf and Sally R. Wolf were officers and directors until the entry of the Liquidation Order on August 28, 1997.

Rental Agreement

4. Effective February 1, 1992, AWLIC entered into a Rental Agreement with LAWA wherein AWLIC agreed to rent from LAWA "office furniture, fixtures, equipment, computer components and software systems designed to administer health care plans" (defined in the Rental Agreement as "Equipment") for a monthly rental fee.

5. Pursuant to Exhibit B of the Rental Agreement, AWLIC was obligated to pay a monthly fee of \$55,000 to LAWA. The monthly fee was determined exclusively by Leland A. Wolf. No independent, competitive evaluation of the \$55,000 monthly rental fee was obtained.

6. At the time the Rental Agreement was entered into, a contemporaneous inventory of Equipment being rented by AWLIC was not established nor maintained by either AWLIC or LAWA. Neither AWLIC nor LAWA ever had supporting written documentation or a listing of the precise Equipment that was subject to the Rental Agreement. Without knowing the precise quantity and quality of the Equipment being rented, it is impossible to determine a fair or reasonable monthly rental fee.

7. The Rental Agreement appears to have been approved by the AWLIC Board of Directors as reflected in the Minutes of the Board of Directors dated January 9, 1992. However, the AWLIC Board of Directors never actually met at any time. Mr. Bruce Noriega, President of AWLIC, specifically states that the Board of Directors' meeting of January 9, 1992 never took place. The minutes of the Board of Directors were created to satisfy the requirements of the Utah Department of Insurance ("Utah DOI") and falsely represented that an actual meeting occurred.

8. No notice or report, either oral or written, of the AWLIC Board of Directors' approval of the Rental Agreement was given to the Utah DOI immediately after the AWLIC Board's approval.

9. From September of 1992 to the cessation of the Rental Agreement in April of 1995, AWLIC paid LAWA \$1,174,489.00. The total amount of monthly rental fees is derived from the accounts payable ledgers maintained by AWLIC, copies of which have been made available to the Wolf Family Defendants and their counsel.

Computer Equipment Purchase

10. On or about January 12, 1996, AWLIC purchased from LAWA various pieces of used computer equipment in the total amount of \$277,888.17. A listing of the used computer equipment prepared by AWLIC at the time of the purchase contains a legend explaining the price at which various pieces of used computer equipment were valued for purposes of the sale.

11. Michael Wheeler and his accounting staff were instructed by Leland A. Wolf to designate certain LAWA used computer equipment to be valued at approximately \$300,000.00. Michael Wheeler and his accounting staff subsequently calculated certain valuation formulas (e.g., 1.2 times book value) whereby the value of the used computer equipment would most closely approximate Leland A. Wolf's desired number.

12. At the time of the used computer equipment purchase, no efforts were made to have an appraisal done or to ascertain the fair market value of the used computer equipment.

13. The minutes of the AWLIC Board of Directors dated July 29, 1996 indicated that the used computer equipment purchase from LAWA in the amount of \$277,888.17 was "ratified" after the sale was completed and not prior to the purchase as required by §31A-5-414(1)(a), Utah Code Ann.

14. No notice or report, either oral or written, of the AWLIC Board of Directors' ratification of the used computer equipment purchase was given to the Utah DOI immediately after the AWLIC Board's ratification or any time subsequent.

Used Furniture Purchase

15. In May of 1996, AWLIC purchased from LAWA various pieces of used furniture in the total amount of \$471,000.00. A listing of the used furniture was prepared by AWLIC at the time of the purchase. The used furniture consisted of used Herman Miller modular furniture that had been previously rented by AWLIC from LAWA.

16. AWLIC used a 1986 or 1988 listing of retail prices for Herman Miller furniture to value the used furniture. The value assigned to the used furniture was manipulated until the total value equaled \$471,000.

17. At the time of the used furniture purchase, no efforts were made to have a legitimate appraisal done or to ascertain the fair market value of the used furniture.

18. The minutes of the AWLIC Board of Directors dated June 29, 1996 indicated that the used furniture purchase from LAWA in the amount of \$471,000 was "ratified" after the sale was completed and not prior to the purchase as required by § 31A-5-414 (1)(a), Utah Code Ann.

19. No oral or written report of the AWLIC Board of Directors' ratification of the used furniture purchase was given to the Utah DOI immediately after the AWLIC Board's ratification.

20. To the extent any of the foregoing Findings of Fact should be denominated as a Conclusion of Law, such Finding of Fact shall be considered a Conclusion of Law.

CONCLUSIONS OF LAW

1. The Memorandum in Opposition to the Liquidator's Motion for Partial Summary Judgment filed by the Wolf Family Defendants on September 13, 2002 failed to comply with the requirements of Rule 4-501 of the Utah Rules of Judicial Administration. Specifically, the Wolf Family Defendants' Memorandum in Opposition failed to begin with a section that contained a verbatim restatement of each of the movant's statement of facts as to which the Wolf Family Defendants contended a genuine issue existed followed by a concise statement of material facts which support the Wolf Family Defendants' contentions. As a result, all of the facts recited by the Liquidator in its Memorandum in Support of the Motion for Partial Summary Judgment are deemed admitted and true.

2. The Wolf Family Defendants filed the Affidavit of Leland A. Wolf. The filing of the Affidavit of Leland A. Wolf did not cure or remedy the Wolf Family Defendants' failure to comply with the requirements of Rule 4-501 of the Utah Rules of Judicial Administration. Even if the Affidavit of Leland A. Wolf was to be considered as a statement of the disputed material facts of the Wolf Family Defendants, the Affidavit of Leland A. Wolf contained non-admissible evidence (e.g., hearsay, unsubstantiated conclusions and opinions, irrelevant evidence, etc.). Such non-admissible evidence did not create an issue of disputed material fact. Therefore, even if the failure to comply with Rule 4-501 of the Utah Rules of Judicial Administration was overlooked, the Wolf Family Defendants have failed to marshal admissible evidence that created a question of fact.

3. The Liquidator has the authority and standing to bring this action. Pursuant to Utah Code Ann. § 31A-27-310, the Liquidator is "vested by operation of law with the title to all

of the property, contracts, rights of action . . . of the insurer ordered liquidated, wherever located, as of the date of the filing of the petition for liquidation.”

4. Utah Code Ann. § 31A-27-314 provides that the Liquidator “may continue to prosecute and institute in the name of the insurer or in his own name, any suits and other legal proceedings, in this state or elsewhere.”

5. Before an insurance company enters into a material transaction with a director or a company that the director controls, the insurance company must be certain that it complies with § 31A-5-414, Utah Code Ann., which states as follows:

Transactions in which directors and others are interested.

(1) Any material transaction between an insurance corporation and one or more of its directors or officers, or between an insurance corporation and any other person¹ in which one or more of its directors or officers or any person controlling the corporation has a material interest, is voidable by the corporation unless all the following exist:

(a) At the time the transaction is entered into it is fair to the interests of the corporation.

(b) The transaction has, with full knowledge of its terms and of the interests involved, been approved in advance by the board or by the shareholders.

(c) The transaction has been reported to the commissioner immediately after approval by the board or the shareholders.

(2) A director, whose interest or status makes the transaction subject to this section, may be counted in determining a quorum for a board meeting approving a transaction under Subsection (1)(b), but may not vote. Approval requires the affirmative vote of a majority of those present.

(3) The commissioner may by rule exempt certain types of transactions from the reporting requirement of Subsection (1)(c). The commissioner has standing to bring an action on behalf of an insurer to have a contract in violation of Subsection (1) declared void. Such an action shall be brought in the Third Judicial District Court for Salt Lake County.

Utah Code Ann. § 31A-5-414 (2001).

¹ The definition of “person” is provided by § 31A-1-103(84), Utah Code Ann.: ““Person” includes an individual, partnership, corporation, incorporated or unincorporated association . . .”

6. The statute imposes three requirements on an insurance company before it can enter into a transaction with a director. One, the transaction must be fair to the insurance company at the time the transaction is entered into. Second, the insurance company's Board of Directors (with full knowledge of the terms and the interests involved) must approve the transaction before it is consummated. Third, the transaction must be reported to the insurance commissioner immediately after the board of directors approves it.

7. The requirements of the statute apply to the three transactions at issue which include the rental agreement, the used computer equipment purchase and the used furniture purchase.

8. The rental agreement violated two of the three requirements. First, at the time the transaction was entered into, there is no evidence that the monthly rental payment of \$55,000.00 was fair to the interests AWLIC. Second, the Wolf Family Defendants failed to immediately notify the insurance commissioner of this transaction with directors.

9. The used computer equipment transaction failed to satisfy all three requirements imposed by the statute. There is no evidence that the \$277,888.17 payment from AWLIC to LAWA for used computer equipment was fair to the interests of AWLIC. Second, there is no evidence whatsoever that the purchase was approved by the AWLIC Board of Directors prior to the consummation of the transaction. Finally, there is no evidence that the insurance commissioner was notified of the transaction immediately after the AWLIC Board acted or even after the transaction was ratified.

10. The used furniture purchase did not satisfy any of the three requirements mandated by the statute. There is no evidence that the payment of \$471,000 from AWLIC to LAWA for used furniture was fair to the interests of AWLIC because prior to the transaction,

Defendants never obtained any verifiable evidence such as an appraisal to ascertain the fair market value of the furniture. The transaction was not approved by the AWLIC Board of Directors before the transaction took place. The insurance commissioner was never given notice of the transaction.

11. The Liquidator is entitled to void these transactions with directors and AWLIC is entitled to restitution of the monies paid to LAWA and Sally Wolf.

12. In connection with the transactions with directors and pursuant to § 31-5-414, Utah Code Ann., the Wolf Family Defendants are entitled to a setoff for whatever value, if any, AWLIC received from the rental agreement, the used computer equipment sale and the used furniture sale. The value of the setoff shall be determined at trial and LAWA and Sally Wolf shall have the burden of proving any setoff.

13. Leland A. Wolf, Sally Wolf and LAWA are subject to violated Section 31A-27-322 of the Utah Code Annotated which states as follows:

Recoupment from Affiliates

(1) If an order for the liquidation, rehabilitation, or conservation of an insurer authorized to do business in this state is ordered under this chapter, the receiver appointed under the order has a right to recover on behalf of the insurer from any affiliate that controlled the insurer the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation, rehabilitation, or conservation. This recovery is subject to the limitations of Subsections (2) through (6).

(2) No dividend is recoverable if the recipient shows that, when paid, the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect its solvency.

(3) The maximum amount recoverable under this section is the amount needed, in excess of all other available assets, to pay all claims under the receivership, reduced for each recipient by any amount the recipient has already paid to receivers under similar laws of other states.

(4) Any person who was an affiliate that controlled the insurer at the time the distributions were paid is liable up to the amount of distributions he received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared is liable up to the amount of distributions he would have received if they had been paid immediately. If two or more persons are liable regarding the same distributions, they are jointly and severally liable.

(5) If any person liable under Subsection (4) is insolvent, all affiliates that controlled that person at the time the dividend was declared or paid are jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate.

(6) This section does not enlarge the personal liability of a director under existing law.

(7) An action or proceeding under this section may not be commenced after the earlier of:

(a) two years after the appointment of a rehabilitator under Section 31A-27-303 or a liquidator under Section 31A-27-310; or

(b) the date the rehabilitation is terminated under Subsection 31A-27-306(2) or the liquidator is terminated under Section 31A-27-339.

Utah Code Ann. § 31A-27-322.

14. An affiliate is defined as “any person who controls, is controlled by, or is under common control with, another person. A corporation is an affiliate of another corporation, regardless of ownership, if substantially the same group of natural persons manages the corporations.” Utah Code Ann. § 31A-1-301(4).

15. Leland A. Wolf and Sally Wolf are all affiliates of AWLIC. LAWA is also an affiliate of AWLIC because there is common management and ownership, i.e., Lee and Sally Wolf own and control both AWLIC and LAWA.

16. Pursuant to Utah Code Ann. § 31A-27-322, the Liquidator is entitled to recover from any affiliate any distribution made and received at any time during the five years preceding the petition for liquidation. The petition for liquidation was filed on August 18, 1997. Consequently, any payments made on or after August 18, 1992 to any affiliate are recoverable by

the Liquidator. Under this statute, Leland A. Wolf, Sally Wolf and LAWA are not entitled to any setoff or other mitigating factors or circumstances.

17. “When interpreting statutes, we determine the statute’s meaning by first looking to the statute’s plain language, and give effect to the plain language unless the language is ambiguous.” Wilson v. Supply, Inc. v. Fradan Mfg. Corp., 54 P.3d 1177 (Utah 2002) (quotations omitted). Furthermore, “[i]n construing a statute, [we] must assume that ‘each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.’” County Bd. of Equalization of Wasatch County v. State Tax Comm’n, 944 P.2d 370, 373 (Utah 1997) (quotations omitted). Thus, the “primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.” State v. Burns, 4 P.3d 795 (Utah 2000).

18. The express language of Section 31A-27-322 of the Utah Code Annotated is clear and unambiguous. Therefore, effect must be given to the plain language of the statute.

19. The statute provides that the liquidator may recover “the amount of distributions” which is the broad general rule. The next phrase (i.e., “stock dividends are not recoverable”) creates an exception to that general rule or a subset of the general class.

20. The word “dividend” as used in this statute creates a special class of distributions which the recipient shareholder could demonstrate as fair and reasonable and therefore not returnable to the liquidation estate. This limitation on recovery only applies to the subset of dividends; it does not apply to the broad general category of “distributions”.

21. If the statute was considered ambiguous, which this Court does not find, the legislative history of the statute would be considered. After reviewing the supplemental pleadings filed by the parties, the legislative history indicates that setoffs and the consideration

of other mitigating circumstances would not be allowed. The repayment of distributions to affiliates without setoffs is consistent with the underlying policy of marshalling assets, protecting policyholders, and giving priority to third-party arms-length creditors.

22. To the extent any of the foregoing Conclusions of Law should be denominated as a Finding of Fact, such Conclusion of Law shall be considered a Finding of Fact.

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ORDER

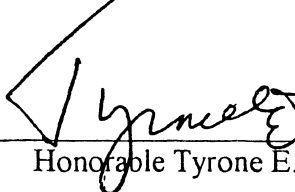
IT IS HEREBY ORDERED, DECREED AND ADJUDGED as follows:

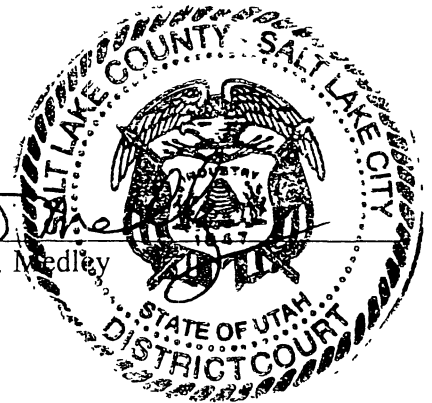
1. The Liquidator's Motion for Partial Summary Judgment is hereby GRANTED for the reasons stated forth above. However, the Court is not entering a judgment at this time due to the fact that evidence of additional affiliate distributions may be introduced at trial which is currently scheduled to commence on May 5, 2003.

2. The Liquidator's Motion to Strike Defendants' Memorandum in Opposition and the Affidavit of Leland A. Wolf is granted for the reasons set forth above.

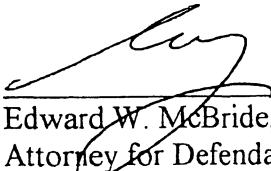
DATED this 22 day of May, 2003.

BY THE COURT


Honorable Tyrone E. Medley



Approved as to form:



Edward W. McBride, Jr.
Attorney for Defendants Wolf Family

Richard A. Van Wagoner
D. Jason Hawkins
Attorneys for Third-Party Defendant
Bruce Noriega

Darren K. Nelson
Attorney for Third-Party Defendant
Michael M. Wheeler

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DATED this _____ day of May, 2003.

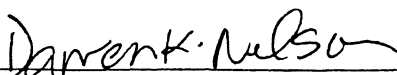
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Honorable Tyrone E. Medley

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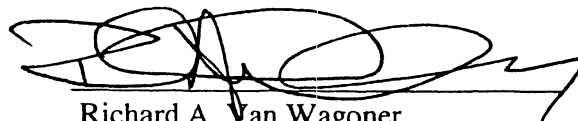
BY THE COURT

Honorable Tyrone E. Medley

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Attorney for Defendants Wolf Family

Darren K. Nelson
Attorney for Third-Party Defendant
Michael M. Wheeler


Richard A. Van Wagoner
D. Jason Hawkins
Attorneys for Third-Party Defendant
Bruce Noriega

Tab 8

Edwin C. Barnes (Bar No. 0217)
Charles R. Brown (Bar No. 0449)
Jennifer A. James (Bar No. 3914)
CLYDE SNOW SESSIONS & SWENSON
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CONF 22 PM 4:13

[Handwritten signature]
SALT LAKE COUNTY
CLERK

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION, and
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and MERWIN U.
STEWART, Liquidator,

Plaintiffs,

-vs-

LWP CLAIMS ADMINISTRATORS
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants.

REPLY MEMORANDUM IN SUPPORT
OF LWP'S MOTION FOR SUMMARY
JUDGMENT

Civil No. 030915527
Judge Hanson

Defendants LWP Claims Administrators Corp. ("LWPCAC") and LWP Claims Solutions, Inc. ("LWPCSI") (collectively "LWP"), submit this memorandum in reply to arguments made by the Liquidator in opposition to LWP's Motion for Summary Judgment. For reasons set forth both herein and in LWP's opening memorandum, LWP's motion should be granted.

[Handwritten signature]

I. INTRODUCTION

The Liquidator brought this action and filed his motion for summary judgment against LWP,¹ claiming that, under Utah Code Ann. § 31A-27-322, he is entitled to recoup from LWP, as a matter of law, payments made for claims handling services performed pursuant to contract.² Although there remain peripheral factual disputes that LWP has addressed in the Supplemental Affidavit of John A. Igoe filed herewith, the issue presented by LWP is not a factual one; rather, it presents the issue of whether the Liquidator's claims must be dismissed as a matter of law because he is not entitled to recoupment from LWP under § 31A-27-322.

The Liquidator flatly states that “[a]ffiliate transactions are so susceptible to manipulation and abuse that the Liquidator is statutorily empowered by § 31A-27-322 to recoup those paid monies **regardless of any defense asserted by the original recipient/affiliate.**” Liquidator's Opposition Memorandum (“Liquidator's Opposition”) at 1, emphasis supplied. The Liquidator here argues that he need not even prove the

¹ The Liquidator originally sought summary judgment on payments from both Wasatch Crest Insurance Co. and Wasatch Crest Mutual Insurance Company. The Liquidator now seeks only partial summary judgment on the claims regarding payments from Wasatch Crest Insurance Co. Liquidator's Opposition Memorandum at 36. He dropped his request for summary judgment regarding payments from Wasatch Crest Mutual Insurance Company because he has not established that LWP and Wasatch Crest Mutual Insurance Company were affiliates during the time that it made payments to LWP. The Liquidator here concedes the basis for LWP's Motion for Summary Judgment as to those claims.

² Notably, the Liquidator makes no allegations whatsoever of abuse, manipulation or overreaching on the part of LWP. He tacitly admits both receipt of the claims handling services from LWP and the reasonableness of the terms of the contracts for those services. (That reasonableness is also demonstrated by the fact that the Utah Guaranty Association continues to utilize LWP to perform the same services on the same terms during the liquidation. Exhibit A, ¶ 18.) In other words, acknowledging that the companies received full value for the payments contemporaneously made to LWP, the Liquidator wants a short-sighted windfall that will put LWP out of business and end its benefit to the Guaranty Association. Neither the statute nor the Liquidator's allegations support that unseemly result.

elements of § 31A-27-322 in order to recoup money from LWP. He is wrong. LWP's motion is based in the clear failure of the Liquidator to allege and establish facts to support the simple elements of his cause action. Indeed, the Liquidator has failed to plead even a *prima facie* case, because (1) the Liquidator has not pled or argued, and cannot demonstrate, that LWP is an "affiliate that controlled the insurer" as expressly required by § 31A-27-322, and (2) the payments received were not "distributions" under § 31A-27-322.

II. ISSUES RELATING TO FACTUAL STATEMENTS

A. LWP properly controverted incorrect factual statements.

In the Liquidator's Opposition at 2-3, he takes issue with the format used by LWP in responding to the factual statements in the Liquidator's summary judgment memorandum. The Liquidator complains about LWP's responses, ignoring the fact that he failed to comply with his requirement under Rule 7(c)(3)(a) that each "statement of fact shall be separately stated and numbered." The Liquidator included multiple, run-on facts in single numbered paragraphs. See, e.g., Liquidator's Facts numbered 5 and 8 (the Liquidator includes at least six different facts in paragraph 8, alone). LWP tailored its response to the Liquidator's statement of facts to minimize the confusion caused by the Liquidator's noncompliance with Rule 7. The Liquidator has shown no confusion or prejudice as a result of LWP's response. To the contrary, the Liquidator demonstrated, by fully responding to LWP's statement of disputed facts, that he understood it.

A further examination of LWP's response to the Liquidator's statement of facts demonstrates that LWP in fact complied with the requirements of Rule 7(c)(3)(B) by

controverting those statements that were incorrect. It responded separately to each of the Liquidator's statements of facts and designated by number the paragraph to which it responded. LWP then stated whether or not the specific fact was admitted or denied. Because the Liquidator included multiple facts in most of its numbered paragraphs, LWP indicated which specific fact within each paragraph was being admitted. Thus, the Liquidator's statements cannot be deemed admitted under Rule 7(c)(3)(A).

B. Undisputed facts.

Perhaps because of the complicated structure of insurance companies and the transactions that give rise to this dispute, the parties have devoted extensive effort to the affidavits and factual statements in their memoranda. Indeed, LWP has filed a Supplemental Affidavit of John A. Igoe to further explain some of those circumstances.

Notwithstanding that effort, the facts relevant to LWP's Motion for Summary Judgment remain undisputed. It remains clear, for example, that LWP was not an affiliate of WCMIC when WCMIC made payments to LWP, and LWP was an affiliate of WCIC only between the asset purchase on November 16, 1999 and the sale of LWP's stock to John Igoe and Judy Adlam on May 8, 2002. Exhibit A, ¶¶ 9,10; Liquidator's Opposition at 10, 16.³ It is equally clear that LWP itself **never** owned, directed or controlled WCG, WCIC, FCL or WCMIC, and the Liquidator candidly admits that he "does not rely on Mr. Igoe's positions with LWPCAC, Insurance Co. and Group to establish control and affiliate status." Liquidator's Opposition at 36. There is no claim

³ Whether that sale was effective as of closing or on the effective date for accounting purposes of January 1 is irrelevant to LWP's motion

that LWP received any dividend or other distribution of equity from WCIC, WCMIC or any affiliated entity.

It is equally clear that LWP received payments for claims services, and that it actually performed the services for which it was paid. That the exact amounts paid remain a matter of dispute is irrelevant to LWP's motion. The fairness of the terms under which LWP performed its adjustment and other claims handling services is further indicated by the fact that LWP continues to perform such services to WCIC and WCMIC on the same terms for the Utah Guaranty Association during the liquidation.

III. ARGUMENT

A. LWP was never an “affiliate that controlled the insurer” as expressly required to invoke § 31A-27-322.

The Liquidator has neither pled nor attempted to prove the basic element of control necessary for him even to state a cause of action against LWP. Utah Code Ann. § 31A-27-322 plainly allows a Liquidator to recover certain distributions made to an affiliate “**that controls an insurer . . .**” The statute was obviously designed to keep parent companies from raiding the capital of subsidiaries they control. However, there is and can be no allegation that LWP controlled either WCIC or WCMIC because it did not. In the instant case, the Liquidator attempts to turn the statutory scenario on its head and claim as controlled distributions not equity distributed to a parent but payments made to a subsidiary for services rendered. He goes to great lengths to demonstrate that LWP was an affiliate of WCIC for a period of time and argues that

some of the same individuals managed WCIC, WCG and LWP at various times.

Liquidator's Opposition at pp. 34-40. His argument doesn't suffice.

LWP does not dispute its affiliate relationship with WCIC as a sister subsidiary for approximately two years. That it may for a time have been a sister affiliate, however, does not come close to proving that LWP was an affiliate "that controlled the insurer." That point is fatal to the Liquidator's claim.

The Liquidator argues that he can ignore the statutory element of control, asserting that: "[o]nce affiliate status is proved, the affiliate has no defenses to assert that will spare the affiliate from disgorging the distributions it received." Liquidator's Opposition at 39. In making this statement, the Liquidator blatantly misstates the law. While affiliate status may be established by proof of common management with another entity under § 31A-1-301(5), the Liquidator is empowered to recover equity distributions under § 31A-27-322 **only** from an "affiliate that controls the insurer." As noted in LWP's opening memorandum, there is no presumption of control under the Utah insurance code.⁴ Rather, control remains a separate element of affirmative proof under the statute that the Liquidator has not attempted to meet.

The Liquidator chooses to ignore the language which limits recoupment to affiliates in control of an insurer for the obvious reason that LWP **never** controlled WCIC or WCMIC.⁵ Nowhere in the Liquidator's summary judgment motion, or in the

⁴ See, Utah Code Ann § 31A-1-301(27).

⁵ There are numerous examples where the Liquidator willfully ignores the controlling language of § 31A-27-322. For example, the Liquidator argues that "LWPCAC is, therefore, an affiliate of both [WCG and WCIC]. As a result, LWPCAC must disgorge at least \$5,615,090." Liquidator's

Liquidator's Opposition does the Liquidator acknowledge that recoupment may only be obtained from a controlling affiliate. In fact, as noted, the Liquidator failed even to allege in his complaint that LWP controlled WCIC or WCMIC. His failure (and inability) to do so dooms his action.

B. Contemporaneous payments made to LWP by the insurers for claims handling services were not "distributions" under § 31A-27-322.

Though there is a disagreement as to the amount paid, the parties agree the funds sought by the Liquidator were paid to LWP by WCIC and WCMIC for claims handling and administrative services rendered to or on behalf of the insurers by LWP. The Liquidator has not alleged that these payments were excessive, unfair or obtained by fraudulent means, but instead baldly asserts, without any precedential support, that any payment of any nature made to an affiliate by an insurer is a "distribution" subject to recovery under § 31A-27-322.

The term "distribution" is not defined in the Utah Insurance Code, and extensive research revealed no reported case discussing the meaning of the term in the context of insurance cases.⁶ The Liquidator's argument about the meaning of the term is

Opposition at 44 The Liquidator also states "[i]t may be difficult for LWP to comprehend that § 31A-27-322 concerns itself with only two operative questions (1) were distributions made?, and (2) were the distributions made to an affiliate? Anything else is irrelevant" Liquidator's Opposition at 39 The Liquidator's illogic ignores the plain language of the statute which restricts its application only to those affiliates that controlled an insurer and so directed the distribution in question

⁶ In the Liquidator's Opposition at 31, n 7, he cites to an interlocutory decision written by the Liquidator's counsel, in the case of *American Western Life Insurance Company in Liquidation, et al v. Leland A Wolf, et al* (Case No 980905251) The Liquidator cites the case for the proposition that "distribution" under § 31A-27-322 includes all transfers of property to an affiliate by an insurer This unpublished district court decision, of course, has no precedential value Moreover, that case apparently involved a situation where individuals in control of an insurer entered into transactions on less than arms-length terms that resulted in payments to those in control, a situation entirely different from the present

contradicted by the common meaning of the word "distribution," the definition of "distribution" in Utah law governing the regulation of corporations, the use of the word in § 31A-27-322, and the way the term is used elsewhere in the Utah Insurance Code, all of which consistently support LWP's position that the term "distribution" means a transfer of money or property in respect of the **equity** of an insurer, such as a dividend, and does not encompass payments made for services.⁷

As noted in LWP's opening memorandum at 4, the Utah Revised Business Corporation Act defines a "distribution" as a "direct or indirect transfer of money or other property. . . in respect of any of [a corporation's] shares. . . in the form of a declaration or payment of a dividend, a purchase, redemption, or other acquisition of shares, distribution of indebtedness or otherwise." Utah Code Ann. § 16-10a-102(13). This and other definitions indicate that a "distribution" is a kind of payment or transfer of money or property which involves dividing, apportioning, or giving out the equity of a company in respect to shares. The definition given in the corporate context makes it clear that a distribution is a transfer based on stock ownership. The statutory

case. In addition, for the reasons stated herein and in LWP's opening memorandum, LWP respectfully submits that the broad interpretation of the term "distribution" in *American Western Life* is incorrect.

⁷ The Liquidator's definition of "distribution" as any payment is contrary to the legislative purpose of Section 322 of remedying potential abuses by insurance holding companies. See LWP's Memorandum at 2-4. Under the Liquidator's construct, an insurer's payments for services fairly rendered by an affiliate in the ordinary course of business within five years of the liquidation filing would be fully recoverable, but dividends of any size would not be recoverable if lawful and made without reason to know that the insurer's solvency was jeopardized. Thus, a parent corporation could cause a subsidiary insurer to issue a \$50 million dividend that would not be recoverable, but a small payment made to an affiliate for services fairly rendered would have to be disgorged.

requirement of affiliate control as a prerequisite for recoupment comports entirely with this concept.

Further, the terms “distribution” and “dividend” are used synonymously in Subsections (4) and (5) of § 31A-27-322. Subsection (4) establishes that a person who is an affiliate in control of an insurer at the time of distributions is liable up to the amount of distributions received. Subsection (5) uses the word “dividend” completely interchangeably with the word “distribution” in Subsection (4): “If any person liable under Subsection (4) is insolvent, all affiliates that controlled that person at the time the dividend was declared or paid are jointly and severally liable for any resulting deficiency. . . .”

The language of other sections of Chapter 27 of Title 31A, titled “Insurers Rehabilitation and Liquidation,” also supports LWP’s position. Section 320, for example, allows a liquidator to recover a “transfer” made within one year prior to the liquidation filing when the transfer is fraudulent. And Section 321 allows the Liquidator to recover a “preference,” which is defined as “a transfer of any of the property of an insurer to or for the benefit of a creditor,” made within a certain time period.⁸ The use of the terms “transfer” and “preference” to describe payments recoverable under those provisions confirms that “distribution,” as used in Section 322, does not mean all payments. Rather, read correctly and in context, Section 322 covers only those

⁸ This provision, not Section 322, is the law that entitles the Liquidator to pursue recovery of payments made for services rendered such as those at issue here

transfers made by an affiliate with respect to the equity of an insurer for the benefit of those in control.

Further, the word “distribution” is used throughout the Utah Insurance Code, Utah Code Ann. § 31A, to refer to transfers based on stock ownership. Under § 31A-5-506, for example, “[n]o policyholder in a nonlife mutual may receive a distribution of shares . . .” of a certain type. Section 31A-5-418 refers to “dividends and other distributions” and provides that “a stock corporation may make distributions” if the “dividend” would not reduce the insurer’s total adjusted capital below a certain level. The section on registration of insurers, § 31A-16-105(2)(c)(vii), states that registration statements shall contain information on “dividends and other distributions” to shareholders, and § 31A-16-106(2)(b), (c) and (d) provide standards for determination of whether a “dividend or distribution” is extraordinary. In all of these contexts, distribution is used to describe transfers made with respect to shares, not all payments or other transfers.

The Liquidator also argues that Professor Spencer L. Kimball’s comments on the 1986 Utah Insurance Code confirm the Liquidator’s definition of “distribution” when, in fact, the draft section and its comments do just the opposite. Liquidator’s Opposition at 29-30. After acknowledging that § 96-17-6.5 of the 1983 Draft Code was the precursor to § 31A-27-322 of the Code enacted in 1986, the Liquidator quotes the closing paragraphs of Professor Kimball’s comment: “There are other potential abuses, beside excessive dividends, in the holding company development.” Professor Kimball’s comment then describes some of those potential abuses. Section 96-17-6.5 of the

Draft Code, however, is limited to distributions based on stock ownership and uses the terms "dividend" and "distribution" interchangeably.⁹

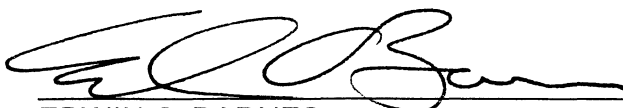
The payments to LWP for claims handling services were simply not "distributions" and are thus not subject to recoupment under § 31A-27-322.

IV. CONCLUSION

For the foregoing reasons, LWP's Motion for Summary Judgment should be granted, finding in LWP's favor on the Liquidator's claims as a matter of law and dismissing the Liquidator's action with prejudice.

Dated this 22nd day of April 2005.

CLYDE SNOW SESSIONS & SWENSON



EDWIN C. BARNES
CHARLES R. BROWN
JENNIFER A. JAMES
Attorneys for Defendants

⁹ The language from Professor Kimball cited by the Liquidator also confirms that the recoupment powers were intended to prevent "abuse," including "improper transfer" of money, and "the full range of less than arm's-length transactions that benefit affiliates at the expense of the insurer." Liquidator's Opposition at 29, 30. None of those circumstances is even alleged in the present case. The Liquidator's action is instead an effort to get something for nothing – to recover monies paid pursuant to contract for services actually rendered for the acknowledged benefit of the insurer. The claims are not fair, nor are they allowed by the statute invoked by the Liquidator.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Memorandum in Support of LWP's Motion for Summary Judgment to be hand-delivered to the following this 22nd day of April 2005:

John P. Harrington
Jennifer L. Lange
Holland & Hart LLP
60 East South Temple, Suite 2000
Salt Lake City, Utah 84111

J. Ray Barrios, Jr.
Liquidation Office General Counsel
215 South State Street, Suite 300
Salt Lake City, Utah 84111

Attorneys for Plaintiffs

A handwritten signature in black ink, appearing to read "J. Ray Barrios, Jr.", is written over a horizontal line.

Tab 9

Edwin C. Barnes (Bar No. 0217)
Charles R. Brown (Bar No. 0449)
Jennifer A. James (Bar No. 3914)
CLYDE SNOW SESSIONS & SWENSON
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Attorneys for Defendants

FILED
DISTRICT COURT
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THIRD DISTRICT
BY Kathy Westwood
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION, and
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and MERWIN U.
STEWART, Liquidator,

Plaintiffs,

-vs-

LWP CLAIMS ADMINISTRATORS
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants.

SUPPLEMENTAL
AFFIDAVIT OF JOHN A. IGOE

Civil No. 030915527
Judge Hanson

STATE OF UTAH }
 : ss
COUNTY OF SALT LAKE }

I, John A. Igoe, having first been duly sworn, depose and state as follows:

1. I have reviewed the Affidavit of Orrin T. Colby, Jr. filed by the Liquidator in support of the Liquidator's motion for summary judgment and in opposition to LWP's motion for summary judgment.

2. Mr. Colby's Affidavit is inaccurate and misleading in a number of respects. While LWP's Motion for Summary Judgment does not depend on these points, I would like to correct them.

3. In paragraph 6, Mr. Colby asserts that I was the Chief Operating Operator and President of Wasatch Crest Group ("WCG") from 1999 to July 2003. As I stated in paragraph 18 of my previous affidavit, I resigned from those positions on May 28, 2002. Further, I was not Chairman of the Board and Chief Executive Officer of WCG prior to November 6, 2001 when I became Acting Chairman of the Board and CEO, after Mr. Colby was removed from those positions.

4. Mr. Colby's statements in paragraph 8 of his affidavit concerning my role in the negotiation of the sale of the assets of LWP Commercial Claims Administrators, Inc. ("LWP Commercial") to WCG are also inaccurate. I negotiated on behalf of LWP Commercial but not WCG. At the time of the negotiations, I was a member of the Board of Directors of WCG, but there were other directors who negotiated the asset purchase on behalf of WCG. After the asset purchase, I was not the CEO of LWP Commercial but instead served in that role for a newly created company, LWP Claims Administrators Corp. ("LWPCAC") to which WCG transferred the assets of LWP

Commercial. In 2002, LWPCAC was sold to Judy Adlam and me, rather than to my wife and me as Mr. Colby incorrectly asserts.

5. In Paragraph 10 of his affidavit, Mr. Colby states that he attended board meetings of Wasatch Crest Mutual Insurance Company ("WCMIC") and that I also attended those meetings as a member and officer. This statement is false. I never served as a member of the Board of Directors of WCMIC or as an officer of that company, and I did not attend its board meetings in that capacity. I did not attend any WCMIC board meeting after November 27, 2000.

6. Paragraph 11 of Mr. Colby's affidavit is also inaccurate. WCG was not the parent company of LWPCAC after January 1, 2002 when the sale of LWPCAC by WCG to Judy Adlam and me became effective. That sale closed on May 28, 2002, effective as of January 1, 2002. Further, WCMIC was not an affiliate of WCG after a November 27, 2000 capital restructuring in which WCMIC relinquished its shares in WCG.

7. Mr. Colby states in paragraph 12 of his affidavit that I was CEO of WCG at the time the administrative services agreements between Wasatch Crest Insurance Company ("WCIC") and LWPCAC and between WCMIC and LWP were entered into. This statement is untrue. The administrative services agreements were orally entered into in approximately June of 2000, and the agreement with WCIC was formalized in a written administrative services agreement with an effective date of January 1, 2001. At that time, Mr. Colby was CEO of WCG. I did not become Acting CEO of WCG until

Mr. Colby was removed as CEO on November 6, 2001, well after these arrangements were made. The administrative services agreements were drafted by Judy Adlam and Charles Wilcox, Executive Vice President of Insurance Operations for WCIC. The agreements were in turn reviewed and approved by the full board of directors of WCG. I was only one of at least five directors of WCG at that time. I did not control the board, which was instead under the control of an investor group.

8. Paragraph 14 of Mr. Colby's affidavit is inaccurate in stating that LWPCAC had the same employees and management team as WCG and WCIC from November 2001 through July 2003 when, in fact, I resigned from all management positions with the Wasatch Crest companies on May 28, 2002, the date of the closing of the sale of LWPCAC. After that date, I was not involved in any way in the management of any Wasatch Crest companies, and Wasatch Crest management was not involved in the management of LWPCAC. Further, I was never an officer and director of WCMIC and never made management decisions for that company. I was not CEO of any Wasatch Crest company (except LWPCAC) prior to November 27, 2001 when I became Acting CEO of WCG and WCIC.

9. Mr. Colby asserts in paragraph 15 of his affidavit that WCG, WCIC, LWPCAC and WCMIC, among other companies, were under the common management and control of the officers and directors of WCG. This broad assertion is inaccurate. WCG was the parent of WCIC at all relevant times but the parent of LWPCAC only from November 16, 1999 until January 1, 2002 when the sale of LWPCAC to Judy

Adlam and me became effective. LWPCAC was not under common the control of WCG after January 1, 2002. Similarly, WCMIC was not under common control with WCG or the other companies after the capital restructuring effective on November 27, 2000.

10. In paragraph 16 of his affidavit, Mr. Colby states that WCG, WCIC and WCMIC and LWPCAC were affiliates during all relevant times. He is mistaken for the reasons given in paragraph 9 above.

11. Paragraph 17 of Mr. Colby's affidavit is false and misleading because I never participated in the management of WCMIC, which was not affiliated with WCG after November 27, 2000. The administration of WCMIC's claims was performed by LWPCAC, but these services were provided pursuant to a contractual arrangement between WCMIC and LWPCAC. I had no supervisory role with WCMIC. And, as noted, I was not involved in the management of WCG or WCIC after May 28, 2002.

12. Paragraph 18 of Mr. Colby's affidavit is similarly misleading. LWPCAC was not managed or controlled by the management and controlling persons of WCG after January 1, 2002.

13. I have also reviewed the Liquidator's Memorandum in Opposition to LWP's Motion for Summary Judgment and Reply Memorandum in Support of Liquidator's Motion for Summary Judgment ("Liquidator's Memorandum"). The Liquidator's memorandum recited the inaccurate statements of Mr. Colby described above and contains additional inaccurate and misleading statements.

14. For example, on page 20 of the memorandum, the Liquidator disputes LWP's assertion that the Managing General Agency Agreement with North American Specialty Insurance Company ("NAS") was between WCG and NAS, arguing instead that the agreement was between WCIC and NAS. The Liquidator also disputes that LWPCAC handled claims arising out of the agreement for WCG, rather than WCIC. The Liquidator argues that LWP should produce the contract to verify its allegations. LWP does not have the original or a copy of the Managing General Agency Agreement, but, on information and belief, asserts that this agreement is in the possession of the Liquidator and that it was not produced because it confirms LWP's assertion that LWP provided claims handling services to WCG, not WCIC, pursuant to the Managing General Agency Agreement between WCG and WCIC. Compensation to LWP for these services was paid out of the WCIC bank account, but these were WCG funds, as WCG at times deposited funds into and withdrew funds out of the WCIC bank accounts. These inter-company transactions were appropriately accounted for in the books and records of WCG and WCIC.

15. On pages 22 -23 of the Liquidator's Memorandum, the Liquidator states that Group was the parent company of LWPCAC "at all times between 1999 and July 2003," a statement inconsistent with the accurate acknowledgment in the preceding paragraph on page 22 that LWPCAC was sold to Judy Adlam and me on May 28, 2002. LWPCAC was not owned by WCG after the effective date of the sale, January 1, 2002, but even if LWPCAC could be considered to have been owned until the date the sale

documents were signed, that is, May 28, 2002, it was not a subsidiary of WCG after May 28, 2002.

16. On page 35 of the Liquidator's Memorandum, the Liquidator comments that I do not aver that WCG or WCIC did not own, direct or control the business or operations of LWPCAC. I agree and have stated that WCG owned LWPCAC and directed the operations of LWPCAC from November 16, 1999 until January 1, 2001 when WCG sold LWPCAC. I have never averred, however, that WCIC controlled or directed LWPCAC at any time. WCIC was a wholly owned subsidiary of WCG, as was LWPCAC. As such, LWPCAC never owned or controlled WCIC, and WCIC never owned or controlled LWPCAC.

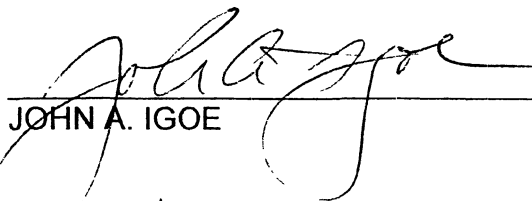
17. When my wife and I sold the assets of our claims administrative business, LWP Commercial, to WCG in November 1999, we received \$500,000 in cash and \$700,000 in promissory notes (only \$333,000 of these notes were paid by WCG). When Judy Adlam and I purchased LWPCAC from WCG in 2002, we paid approximately \$4 million to WCG (up front cash of \$2 million, assumption of approximately \$1.8 million in liabilities and a contingency payment of \$175,000). This purchase price was found to be fair and adequate consideration for the company by the outside appraiser retained by WCG's Board. By paying over \$3 million more to WCG for the business than WCG paid for the business, WCG (the parent of WCIC) was compensated fully and fairly for any increase in the value of LWPCAC which occurred

by virtue of the claims handling agreements with WCIC and WCMIC and LWPCAC's other business operations.


18. LWPCAC (which changed its name to LWP Claims Solutions, Inc. in the third quarter of 2002) continues to provide claims handling services to WCIC and WCMIC during the liquidation period through an agreement with the Utah Guaranty Association which is handling insurance claims for the liquidation estates of WCIC and WCMIC. The services are provided on the same terms as the 2001 agreements between WCIC and LWPCAC and between WCMIC and LWPCAC.

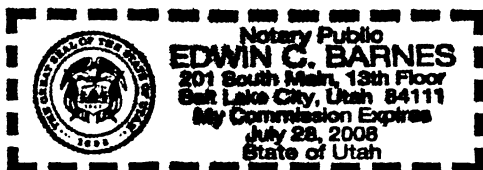
19. Attached as Exhibit A is a schedule showing revenue recorded by LWPCAC from NAS, WCIC, and WCMIC for claims handling and administrative services during 2000 and 2001. The numbers were taken from LWPCAC's general ledger and represent amounts that were audited by WCG's independent auditors (Ernst & Young) as part of their annual review and audited financial report on Wasatch Crest companies.

Dated this 18th day of April 2005.


JOHN A. IGOE

Subscribed and sworn to before me this 18th day of April 2005.


NOTARY PUBLIC



CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing
Supplemental Affidavit of John A. Igoe to be hand-delivered to the following this 22nd
day of April 2005:

John P. Harrington
Jennifer L. Lange
Holland & Hart LLP
60 East South Temple, Suite 2000
Salt Lake City, Utah 84111

J. Ray Barrios, Jr.
Liquidation Office General Counsel
215 South State Street, Suite 300
Salt Lake City, Utah 84111

Attorneys for Plaintiffs



711081

LWP Claims Solutions, Inc
Revenue History

North American Specialty Insurance Company (NAS)
Wasatch Crest Insurance Company (WCIC)*
Wasatch Crest Mutual Insurance Company (WCMIC)

*Includes Wasatch Crest Casualty Insurance Company

		Revenue Source			
		<u>NAS</u>	<u>WCIC</u>	<u>WCMIC</u>	<u>Total</u>
Date Recorded					
Jun	2000	-	53,333	-	53,333
Jul	2000	-	53,333	-	53,333
Aug	2000	-	53,333	-	53,333
Sep	2000	-	53,333	-	53,333
Oct	2000	-	53,333	-	53,333
Nov	2000	-	53,333	-	53,333
Dec	2000	<u>692,368</u>	<u>195,569</u>	<u>420,054</u>	<u>1,307,991</u>
Total	2000	<u>692,368</u>	<u>515,567</u>	<u>420,054</u>	<u>1,627,989</u>
Jan	2001	184,591	89,306	35,212	309,108
Feb	2001	127,892	123,446	69,990	321,328
Mar	2001	48,015	48,007	58,326	154,347
Apr	2001	257,954	77,016	30,827	365,798
May	2001	197,286	80,697	28,659	306,642
Jun	2001	203,090	57,043	26,947	287,081
Jul	2001	219,588	61,240	32,463	313,291
Aug	2001	244,691	56,278	30,287	331,256
Sep	2001	197,449	53,242	23,670	274,361
Oct	2001	244,889	55,500	20,591	320,979
Nov	2001	182,590	55,604	19,543	257,737
Dec	2001	<u>201,099</u>	<u>55,165</u>	<u>16,080</u>	<u>272,343</u>
Total	2001	<u>2,309,135</u>	<u>812,543</u>	<u>392,595</u>	<u>3,514,273</u>
Total		<u>3,001,503</u>	<u>1,328,110</u>	<u>812,650</u>	<u>5,142,263</u>

Tab 10

FILED DISTRICT COURT
FILED DISTRICT COURT
Third Judicial District

JUN 21 2005

JUN 21 2005

By [Signature] SALT LAKE COUNTY
By [Signature] Deputy Clerk
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In Re:	:	MEMORANDUM DECISION
WASATCH CREST MUTUAL INSURANCE	:	CASE NO. 030915527
COMPANY IN LIQUIDATION, and	:	(Consolidated with 030915528)
WASATCH CREST INSURANCE COMPANY :	:	
IN LIQUIDATION,	:	
Respondents.	:	

The above-referenced matter was before the Court on cross-Motions for Summary Judgment. The first Motion for Summary Judgment was filed by LWP Claims Administrators Corporation and LWP Claims Solutions, Inc., seeking Summary Judgment determining that payments made to LWP Claims Administrators and LWP Claims Solutions are not subject to return to the liquidator as liquidator alleges. The liquidator for Wasatch Crest Insurance Company has filed a Motion for Summary Judgment seeking to have this Court determine as a matter of law that the payments made to LWP are in fact subject to return to the liquidator on the basis that the liquidator was an affiliate of Wasatch Crest Insurance Company which controlled the insurer, and that the payment for claims services were a dividend, all referring to Section 31A-27-322 of the Utah Code Ann., 1953 as amended.

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The Court heard argument of counsel, and at the conclusion of argument took the matter under advisement to further review the submissions of the parties and consider the oral arguments offered by counsel in relation thereto.

The Court has had an opportunity to consider all those matters and being fully advised, enters the following Memorandum Decision.

The liquidator for Wasatch Crest Insurance Company is entitled to recover from LWP any amounts that LWP received from Wasatch Crest Insurance Company that constitutes a "dividend" if, at the time the dividend was received, LWP was an affiliate of Wasatch Crest Insurance Company and controlled Wasatch Crest Insurance Company.

The liquidator argues that LWP was an affiliate, and LWP agrees that it was an affiliate. The liquidator asserts that because there were common owners and operators of both Wasatch Crest and LWP, that constitutes sufficient evidence of control so as to meet the statute. Finally, the liquidator argues that the payment for claims services made by Wasatch Crest to LWP do constitute a dividend, and therefore recoverable.

LWP, while admitting that it was an affiliate, denies that it controlled the insurer, and suggests that there is absolutely no evidence in the record that LWP controlled Wasatch Crest, so as to influence the payments made by Wasatch Crest to LWP for insurance

claims services. Further, LWP argues that the payment for services rendered do not constitute a dividend that is recoverable under the statute.

Unfortunately, Section 31A-27-322, of the Utah Code Ann., 1953 as amended, is not a model of clarity, however, the Court is able to determine the intent of the legislature by referring to the plain language of the statute.

There is no question that LWP was an affiliate of Wasatch Crest Insurance Company. The Court is not persuaded, however, that mere common ownership or operation, at least to the extent set forth in this record, is a sufficient basis to presume control. Assuming for the sake of discussion that there were some periods of time in which there were joint owners or joint operators, that fact, in and of itself, is insufficient to raise a question of LWP controlling Wasatch Crest for the purposes of making payments to Wasatch Crest which might be considered a dividend or, for that matter, a distribution.

The Court determines herein that there is no evidence that LWP as an affiliate "controlled the insurer," as required by the statute, which determination ends the inquiry as to whether or not the payments received by LWP for insurance service work are recoverable by the liquidator.

However, the Court deems it advisable at this point in time to proceed forward, and indicate that, even assuming that LWP was an affiliate that controlled the insurer, the statute does not allow recovery of payments for services rendered under Section 31A-27-322, inasmuch as the legislature used, and presumably advisedly so, the term "dividend." A dividend cannot be considered as a payment for services rendered, and therefore assuming that LWP in fact controlled Wasatch Crest Insurance Company for the purposes of making distributions, it did not receive a dividend.

Accordingly, the Court accepts the position of LWP as the correct position as to when affiliates may be required to repay dividends to an insurer, and grants LWP's Motion for Summary Judgment. The Court likewise is therefore required to deny the Motion for Summary Judgment brought by the liquidator on this issue.

Counsel for LWP should prepare an appropriate Order, all in accordance with Rule 52(a) of the Utah Rules of Civil Procedure, setting forth in detail the basis for this Court's decision, and submit that Order for review and signature.

The Court requests a second Order, although it only needs to be in brief form, indicating that the receiver's Motion for Summary

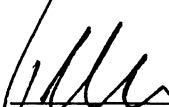
IN RE: WASATCH CREST
MUTUAL INSURANCE CO.

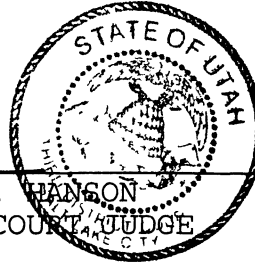
PAGE 5

MEMORANDUM DECISION

Judgment is denied. That Order should likewise be submitted to the Court for review and signature.

Dated this 21 day of June, 2005.


TIMOTHY R. HANSON
DISTRICT COURT JUDGE



IN RE: WASATCH CREST
MUTUAL INSURANCE CO.

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MEMORANDUM DECISION

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 21 day of June, 2005:

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Lennard W. Stillman, Special Deputy Liquidator
Wasatch Crest Mutual Insurance Co.
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Kent Michie
Utah Insurance Commissioner
in his capacity as Liquidator of WCIC
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Salt Lake City, Utah 84114

Allen Muhlestein
Executive Director
Utah Property and Casualty Insurance
P.O. Box 1626
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IN RE: WASATCH CREST
MUTUAL INSURANCE CO.

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MEMORANDUM DECISION

Mailing Certificate - Continued

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7/1/11

Tab 11

FILED DISTRICT COURT
Third Judicial District

Oct 31, 2005

By  SALT LAKE COUNTY

Edwin C. Barnes (Bar No. 0217)
Charles R. Brown (Bar No. 0449)
Jennifer A. James (Bar No. 3914)
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Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WASATCH CREST INSURANCE
COMPANY, IN LIQUIDATION, and
WASATCH CREST MUTUAL
INSURANCE COMPANY, IN
LIQUIDATION, and MERWIN U.
STEWART, Liquidator,

Plaintiffs,

-vs-

LWP CLAIMS ADMINISTRATORS
CORP., a California corporation, and
LWP CLAIMS SOLUTIONS, INC., a
California corporation,

Defendants.

ORDER GRANTING LWP'S
MOTION FOR SUMMARY JUDGMENT

Civil No. 030915527
Judge Hanson

Defendants' Motion for Summary Judgment, filed February 17, 2005, came on for hearing before the Court on Monday, May 16, 2005 at 10:00 a.m. Defendants were represented by Edwin C. Barnes and Jennifer A. James of the law firm of Clyde Snow Sessions & Swenson. Plaintiffs were represented by John P. Harrington and Jennifer L.

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Lange of the law firm of Holland & Hart and by J. Ray Barrios, Jr., Estate General Counsel.

The Court, having reviewed the extensive materials filed by Defendants and Plaintiffs, considered the arguments of counsel, and taken the matter under advisement for further review, issued a Memorandum Decision on June 21, 2005 stating that Defendants' Motion for Summary Judgment would be granted. Now, in accordance with Rule 52(a) of the Utah Rules of Civil Procedure, the Court issues this more detailed statement of the multiple grounds for the Court's decision. Plaintiffs also filed a Motion for Summary Judgment that was argued and submitted at the same time. Based on the reasoning of the Memorandum Decision and this Order, the Court will enter a separate Order denying Plaintiffs' Motion.

The action filed by the Plaintiffs (collectively, the "Liquidator") on June 7, 2004 asserts the right to recoup certain payments made by Wasatch Crest Insurance Company ("Insurance") and Wasatch Crest Mutual Insurance Company ("Mutual") to LWP under the stated authority of Utah Code Ann. § 31A-27-322. The first section of that statute reads as follows:

If an order for the liquidation, rehabilitation, or conservation of an insurer authorized to do business in this state is ordered under this chapter, the receiver appointed under the order has the right to recover on behalf of the insurer from any affiliate that controlled the insurer the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation, rehabilitation, or conservation. This recovery is subject to the limitations of Subsections (2) through (6).

The parties agree that the Liquidator's Complaint, and both parties' Motions for Summary Judgment, turn on this statutory language. In particular, the dispositive issue presented by both motions is whether payments made by Insurance and Mutual to LWP are subject to recoupment under this statute. For the reasons stated herein, the Court has determined as a matter of law that they are not. Accordingly, the Court grants LWP's Motion for Summary Judgment.

UNDISPUTED FACTS

Both Defendants and The Liquidator have provided affidavits referencing numerous documents in support of the positions they advocate. They disagree on some factual points, but those disagreements all involve matters peripheral to the issues presented to the Court by LWP's Motion for Summary Judgment. The affidavits and materials filed with the Court demonstrate that there is no genuine issue as to any fact material to LWP's motion. The principal material facts as to which no genuine issue exists are as follows:

1. Insurance was an insurance company domiciled in the State of Utah, which was placed into liquidation in the Third District Court on or about July 31, 2003.
2. Mutual was an insurance company domiciled in the State of Utah, which was placed in liquidation in the Third District Court on or about July 31, 2003.
3. Defendant LWP Claims Administrators Corp. was a California corporation, the name of which was changed to LWP Claims Solutions, Inc. Though they are listed as separate Defendants in this matter, they are the same company.

4. Wasatch Crest Group purchased substantially all of the assets and business operations of a prior business, LWP Commercial Claims Administrators, Inc., from John and Erica Igoe on November 16, 1999. In connection with that purchase, Wasatch Crest Group formed a new entity, LWP Claims Administrators Corp., to hold the acquired assets. LWP was later sold to John Igoe and Judy Adlam.

5. Shortly after the purchase of the LWP assets, John Igoe became president and chief operating officer of Wasatch Crest Group and two of its subsidiaries, including Insurance. Igoe was never an officer or director of Mutual.

6. LWP was a subsidiary of Wasatch Crest Group and therefore a sister company or affiliate of Insurance from October 1998 until the sale of LWP to Igoe and Adlam in 2002. Mutual was restructured on November 27, 2000 so that it was no longer a subsidiary of Wasatch Crest Group, and LWP was not an affiliate of Mutual at any time after that date. (The Liquidator originally alleged an affiliate status between LWP and Mutual, but later withdrew its summary judgment motion as to the claims of Mutual. The Liquidator does not question the November 27, 2000 reorganization date or that Mutual then relinquished its interest in Wasatch Crest Group. The affiliate relationship of Mutual, however, is immaterial to the disposition of LWP's motion.)

7. LWP began providing workers compensation claims adjusting and administrative services to Insurance in about June 2000. In return for these services, LWP received a percentage of the premiums earned by Insurance and a percentage of the medical cost savings realized by Insurance through the claims administration. LWP's

services were provided first pursuant to an oral agreement, and later pursuant to a written agreement with equivalent terms.

8. A similar oral agreement for claims adjusting and administrative services was reached between Mutual and LWP Commercial. The agreement with Mutual, however, was never executed. All payments made to LWP by Mutual were for claims adjusting and administrative services after the November 27, 2000 date when Mutual relinquished its interest in Wasatch Crest Group.

9. John Igoe and Judy Adlam purchased the stock of LWP from Wasatch Crest Group for the sum of \$2 million in cash, an assumption of liabilities of approximately \$1.8 million, and a contingency payment later made in the amount of \$175,000. The parties disagree as to whether the effective date of the sale was January 1, 2002 or May 8, 2002, but that issue is not material to LWP's motion. The Liquidator does not contend, and there is nothing in the record to indicate, that the terms for the purchase of the LWP stock were other than fair market value. Payment of fair market value to Wasatch Crest Group in 2000 would logically have included payment for the value of ongoing claims adjusting and administrative business as of that date. In any event, the Liquidator does not contradict LWP's assertion that the Wasatch Crest Group board of directors retained Hales & Company to provide independent advice as to the fairness of this transaction.

10. John Igoe and Judy Adlam resigned from their respective positions with all Wasatch Crest companies as of May 8, 2002, the closing date of the transaction.

11. Though the parties differ on the exact amounts paid, it is admitted that LWP received payments from Insurance and Mutual and that all such payments were for claims adjusting and administrative services. The combined payment figures for both entities submitted to the Court by the parties range from \$5,142,263.00 to \$6,678,668.64.

12. It is acknowledged by the parties that all of the payments in question were made for claims adjusting and administrative services performed pursuant to the oral and written agreements.

13. There is no claim or evidence that LWP received any dividend or other distribution of equity from Insurance or Mutual.

14. Since Insurance and Mutual were placed into liquidation, LWP has continued to provide adjusting and administrative services for the claims of Insurance and Mutual at the request of the Utah Guaranty Association, on the same commercial terms previously extended to Mutual and Insurance.

15. While some individuals served simultaneously on the governing boards of both LWP and Insurance prior to May 8, 2002, there was not a complete identity of those boards. Neither was it demonstrated that LWP "controlled" Insurance or Mutual, through their boards of directors or otherwise, to the extent LWP could have required Insurance or Mutual to make payments to LWP.

16. The Liquidator does not contend, and has not offered any evidence to support a contention, that LWP ever owned either Insurance or Mutual. There is no

allegation that LWP appointed or otherwise controlled the directors of Insurance or Group. In particular, the Liquidator concedes that it does not “rely on Mr. Igoe’s positions with LWPCAC, Insurance Company and Group to establish control and affiliate status.” Instead, the Liquidator addressed the control issue by asserting that LWP, Insurance and Mutual were “under common control.”

DISCUSSION

From these facts it is apparent that LWP was an affiliate of Insurance, at least until early 2002. Both parties agree, and the Court finds, that LWP had affiliate status with Insurance. LWP contends that all amounts paid by Mutual to LWP were paid after Mutual had relinquished its interest in Wasatch Crest Group and thus during a period in which LWP was not an affiliate of Mutual. The Liquidator has not acquiesced to this argument of LWP, but withdrew its Motion for Summary Judgment as it relates to Mutual so that the Liquidator’s Motion for Summary Judgment now embraces only the claims advanced on behalf of Insurance. LWP’s Motion for Summary Judgment, by contrast, seeks dismissal of all claims advanced by the Liquidator on behalf of both Insurance and Mutual. In light of the Court’s dispositive ruling on related issues, the question about the affiliate status of Mutual need not be resolved.

The statute in question, Utah Code Ann. § 31A-27-322, may not be a model of clarity, but the Court is able to determine the legislative intent from the plain language of the statute. That statute allows a liquidator to recover only “distributions” made to an affiliate “that controls an insurer.” The Liquidator essentially argues that affiliate status

is the same as control; that is, it is enough that some of the same people served on the various corporate boards or held management positions. That is not a sufficient showing, as there is, under the Utah State Insurance Code, no presumption of control from the fact that an individual or individuals hold a particular position. Utah Code Ann. § 31A-1-301(27)(a).

The Liquidator was granted sweeping powers by § 31A-27-322 for the limited purpose of recovering distributions made to an “affiliate that controlled the insurer.” It appears that the Legislature used that language advisedly and that the word “controlled” would not have been included if affiliate status were all it intended to require. That construction also makes practical sense, as the potential abuses the Liquidator describes as underlying the statute can arise only if the party receiving the distribution is in a position of control sufficient to dictate its payment.

Accordingly, the Liquidator would have to demonstrate that LWP “controlled” Insurance or Mutual to the extent that it could direct them to make payments to LWP in order to prevail herein. There is, in the Complaint and the extensive documents submitted to the court, neither allegation nor evidence that LWP actually “controlled” either Insurance or Mutual. That these entities may have been affiliates does not, in and of itself, suffice. Without claim and proof of actual control, the Liquidator is not entitled to recover money from LWP under Section 31A-27-322 as a matter of law.

While the foregoing determination is sufficient for the Court to grant LWP’s Motion for Summary Judgment and conclude this action in its entirety, the Court deems it

advisable also to address the issue of whether the payments the Liquidator seeks to recover under Section 31A-27-322 were “distributions,” and thus recoverable in the event LWP were shown to have controlled Insurance or Mutual. The Court concludes that the payments to LWP for claims adjusting and administrative services contemporaneously rendered were not such “distributions.”

The Liquidator argues that all payments made to affiliates within five years preceding the Petition for Liquidation are “distributions” subject to recovery under that statute. LWP counters that the term “distributions” means dividends or other distributions of equity, and that it does not include payments for services rendered.

The term “distribution” is not expressly defined in the Utah Insurance Code. It is, however, defined in the Utah Revised Business Corporation Act as a “direct or indirect transfer of money or other property . . . in respect to any of [a corporation’s] shares . . . in the form of a declaration or payment of a dividend, a purchase, redemption, or other acquisition of shares, distribution of indebtedness or otherwise.” Utah Code Ann. § 16-10a-102(13). Under this provision, “distribution” means a payment or transfer of money or property which involves dividing, apportioning, or giving out the equity of a company in respect to shares.

The term “distribution” is used similarly where it appears in the Utah Insurance Code. For instance, the terms “distribution” and “dividend” are used synonymously in subsections (4) and (5) of Section 31A-27-322. There, the word “dividend” in subsection (5) is used interchangeably with the word “distribution” in subsection (4). The Court also

notes that the Liquidator's definition of the term "distribution" would result in the anomalous situation where pure dividends of any size could not be recovered if lawful and made without reason to know that the dividend might adversely affect the company's solvency, but small payments for services fairly rendered in the ordinary course of business would be fully recoverable. The Court can perceive a real potential for abuse in the distribution of a company's equity arising from situations of affiliate control, but that potential for abuse is not present in payments by the company for services actually and fairly rendered.

The Court also notes the contrasting descriptions of payments made in other sections of the Utah Insurance Code where the term "distribution" is not used. For instance, Section 31A-27-320 allows a liquidator to recover "transfers" made within one year prior to the liquidation filing when the transfer is fraudulent. Further, Section 31A-27-321 allows a liquidator to recover a "preference," which is specifically defined as "a transfer of any of the property of an insurer to or for the benefit of a creditor" within a certain time period. The words "transfer" and "preference" are clearly used by the legislature to describe the various payments recoverable under those sections. Their use indicates that the Legislature intended something else by the term "distribution" in Section 31A-27-322. The term does not embrace all payments for services rendered, recovery of which may be available under the limited circumstances described in Sections 31A-27-320 or -321. Rather, the term "distribution" embraces only dividends or other transfers of equity made to a controlling affiliate.

The evidence before the Court confirms that the monies that the Liquidator seeks to recover here were not dividends or other transfers of equity; rather, they were payments made by Insurance and Mutual for services contemporaneously rendered. Notably, the Liquidator has advanced no argument that the payments to LWP were excessive, unfair or obtained by fraudulent means. The Court may also infer that the terms are commercially reasonable from the fact that the Utah Guaranty Association has continued to utilize LWP's services on the same terms to adjust Wasatch Crest claims since the filing of the Petitions for Liquidation. The Court need not rely on that inference, however, because the payments made by Insurance and Mutual to LWP for services rendered are not "distributions" within the meaning of Section 31A-27-322. Since the payments from Insurance and Mutual that the Liquidator seeks to recoup from LWP were not distributions, they are not recoverable under Section 31A-27-322 as a matter of law.

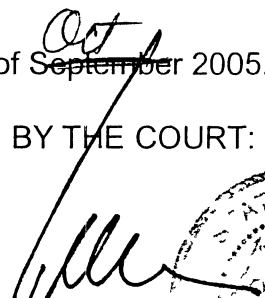
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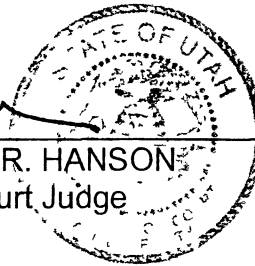
The Court finds that there is no genuine issue as to any fact material to LWP's motion and that LWP is entitled to summary judgment as prayed. In particular, LWP is entitled to judgment dismissing the Liquidator's Complaint and each cause of action therein as a matter of law on the alternative grounds that LWP was not an affiliate "that controlled the insurer" as required for recovery under Section 31A-27-322, and that the payments made to LWP by Insurance and Mutual were not "distributions" within the

meaning of that section. Accordingly, the Liquidator' Complaint is hereby dismissed, with prejudice.

Dated this 31 day of ^{Oct}~~September~~ 2005.

BY THE COURT:


TIMOTHY R. HANSON
District Court Judge



Approved as to form:

John P. Harrington
Holland & Hart, LLP
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Order Granting LWP's Motion for Summary Judgment to be delivered or mailed, postage prepaid, as indicated to the following this 31st day of August 2005:

John P. Harrington
Jennifer L. Lange
Holland & Hart LLP
60 East South Temple, Suite 2000
Salt Lake City, Utah 84111
Hand-delivered

J. Ray Barrios, Jr.
Liquidation Office General Counsel
215 South State Street, Suite 300
Salt Lake City, Utah 84111
Mailed
Attorneys for Plaintiffs

A handwritten signature in black ink, appearing to read "J. Ray Barrios, Jr.", is written over a horizontal line.

Tab 12

C

Supreme Court of Utah.
Cindy GUTIERREZ, Petitioner,
v.
The Honorable Tyrone E. MEDLEY, Respondent.
Melissa Gutierrez, Petitioner,
v.
The Honorable Tyrone E. Medley, Respondent.
State of Utah, Plaintiff and Appellee,
v.
Johnny Augusti Gutierrez, et al., Defendants and
Appellant.
Nos. 970472, 970473 and 970476.

Dec. 29, 1998.

Murder defendant moved to quash subpoenas issued to his wife and daughter on ground that Subpoena Powers Act did not permit issuance of subpoenas to aid State in investigation after criminal charges had been filed. The District Court, Salt Lake Division, Tyrone Medley, J., denied motion to quash. Defendant appealed, and wife and daughter brought original proceeding in which they petitioned for extraordinary relief. The Supreme Court, Russon, J., held, on issue of first impression, that Subpoena Powers Act could not be used after charges had been filed.

Ordered accordingly.

Stewart, J., filed concurring opinion.

West Headnotes

[1] Criminal Law ⚡1134(3)

110k1134(3) Most Cited Cases

The proper interpretation and application of a statute is a question of law which Supreme Court reviews for correctness, affording no deference to the district court's legal conclusion.

[2] Statutes ⚡181(1)

361k181(1) Most Cited Cases

[2] Statutes ⚡184

361k184 Most Cited Cases

In interpreting a statutory act, court is to give effect to the intent of the legislature in light of the purpose the act was meant to achieve.

[3] District and Prosecuting Attorneys ⚡8

131k8 Most Cited Cases

Subpoena Powers Act, under which witnesses may be subpoenaed to aid State in criminal investigation, can be used only prior to the filing of formal criminal charges. U.C.A.1953, 77-22-1, 77-22-2(1)(a), (2)(a).

*913 John D. O'Connell, Jr., Salt Lake City, for Cindy Gutierrez.

Rebecca C. Hyde, Salt Lake City, for Melissa Gutierrez.

Brent M. Johnson, Salt Lake City, for Judge Medley.

Jan Graham, Att'y Gen., Christine Soltis, Asst. Att'y Gen., E. Neal Gunnarson, Barbara J. Byrne, Bel-Ami De Montreux, Salt Lake City, for the State.

James C. Bradshaw, Salt Lake City, for Johnny Gutierrez.

RUSSON, Justice:

Johnny Gutierrez, his wife Cindy Gutierrez, and his daughter Melissa Gutierrez challenge the Third District Court's order denying a motion to quash subpoenas issued to Cindy and Melissa Gutierrez pursuant to Utah Code Ann. § 77-22-2. We reverse and remand.

FACTS

On or about August 5, 1996, Roberto Huerta was shot and killed during a gun battle at the home of

(Cite as: 972 P.2d 913)

defendant Johnny Gutierrez. Both Cindy and Melissa Gutierrez were at the home at the time of the shooting. Both were interviewed briefly at the scene and were told that a homicide detective would contact them later to obtain a statement concerning their observations. When a detective later contacted them, Cindy and Melissa refused to cooperate.

On August 7, 1996, a criminal information was filed against Johnny Gutierrez and several others, [FN1] charging them with murder. *914 Following a preliminary hearing, defendants were bound over to stand trial.

FN1. The other defendants are Lupe Najera, Gilbert Najera, and Steven Najera.

On August 15, 1997, one year after charges had been brought and one week before the scheduled trial, the district court issued an order, pursuant to Utah Code Ann. §§ 77-22-1 to -5 (the "Subpoena Powers Act"), permitting the State to subpoena Cindy and Melissa Gutierrez to provide sworn statements "to aid the State in its pre-trial investigation of the killing of Roberto Huerta." Johnny Gutierrez moved to quash the subpoenas on the ground that the Subpoena Powers Act did not permit such subpoenas after the filing of formal criminal charges. Cindy and Melissa Gutierrez also opposed the subpoenas. On September 18, 1997, the court denied the motion to quash, ruling that the Subpoena Powers Act was not limited to the period of investigation preceding the filing of criminal charges but could be utilized during any period of the State's pretrial investigation of a criminal case. In support of its ruling, the court stated that the language of the Subpoena Powers Act did not specifically limit its use to only the period of investigation preceding the filing of charges. The court further supported its decision by citing to Utah Code Ann. § 77-22b-1, entitled "Immunity granted to witness." That section states in part:

A witness who refuses, or is likely to refuse, on the basis of his privilege against self-incrimination to testify or provide evidence or information in a criminal investigation,

including a grand jury investigation or prosecution of a criminal case, ... may be compelled to testify or provide evidence or information by any of the following, after being granted use immunity...

Utah Code Ann. § 77-22b-1(1)(a) (Supp.1998) (emphasis added). The district court reasoned that because section 77-22b-1 describes a criminal investigation to include a criminal prosecution, it followed that a criminal investigation under the Subpoena Powers Act included that period of investigation during prosecution, and thus the subpoena power could be used after the filing of criminal charges.

Johnny Gutierrez appeals the denial of his motion to quash the subpoenas, and Cindy and Melissa Gutierrez petition for extraordinary relief against the Honorable Tyrone E. Medley, also challenging the denial of the motion. The Gutierrezes argue that the language of the Subpoena Powers Act, its legislative history, and important policy considerations all compel the conclusion that the Act cannot be used after criminal charges have been filed. The Gutierrezes also argue that the subpoenas should be quashed because the State did not request or obtain authorization from the district court to conduct a Subpoena Powers Act investigation, as is required. See Utah Code Ann. § 77-22-2(1) (1995).

The State responds that the Subpoena Powers Act is not limited to the time prior to the filing of charges, but can be used during any period of the State's pretrial investigation. The State also argues that the procedures of the Act were complied with because the district court found that there was good cause for the investigation.

Thus, the principal issue before us is whether the Subpoena Powers Act can be used to subpoena witnesses after formal criminal charges have been filed. Because we hold that the Subpoena Powers Act cannot be used after charges have been filed and we reverse the district court on that ground, we need not consider whether the State complied with the procedures of the Act in this case. [FN2]

(Cite as: 972 P.2d 913)

FN2. The State also argues that defendant Johnny Gutierrez lacks standing to challenge the subpoenas inasmuch as he is not the subject of the subpoena and he has not otherwise put forth evidence that an exception in his case should apply. *See State v. Thompson*, 810 P.2d 415 (Utah 1991); *Society of Prof. Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987). Because the petitions of Cindy and Melissa Gutierrez raise the same issue Johnny Gutierrez raises, i.e., whether the Subpoena Powers Act can be used after charges have been filed, we will consider the merits of the issue without addressing whether, under the facts of this case, Johnny Gutierrez lacks standing.

STANDARD OF REVIEW

[1] The proper interpretation and application of a statute is a question of law which *915 we review for correctness, affording no deference to the district court's legal conclusion. *See Salt Lake Therapy Clinic v. Frederick*, 890 P.2d 1017, 1019 (Utah 1995).

ANALYSIS

Upon a showing of good cause and the approval of the district court, the Subpoena Powers Act permits the attorney general, the county attorney, or the district attorney (the "state's attorneys") to conduct a criminal investigation. Utah Code Ann. § 77-22-2(1)(a). Once such an investigation is approved by the court, the state's attorneys may subpoena witnesses and compel their testimony and the production of physical evidence. *Id.* § 77-22-2(2)(a). The state's attorneys are required to disclose, among other things, that the subpoena is issued in aid of a criminal investigation, the general subject matter of the investigation, that the witness has the privilege to refuse to answer any question that may result in self-incrimination, and that the witness has the right to have counsel present during interrogation. *Id.* § 77-22-2(3) & (4). If the witness is suspected of committing the crime that is under investigation, the state's attorneys must inform the witness of that status, as well as the nature of the charges under consideration against him. *Id.* §

77-22-2(5). Furthermore, upon showing a reasonable likelihood that the public release of the identity of the witness or the substance of the evidence obtained would threaten harm to a person or impede the investigation, the court may order the identity of the witness and the evidence obtained to be kept secret. The court may also order the witness, under appropriate circumstances, not to disclose the substance of his or her testimony to others. *Id.* § 77-22-2(7).

While the Gutierrezes and the State do not dispute that the state's attorneys can conduct an investigation under the Act in which they have the power to subpoena witnesses and compel their testimony, they do dispute when that power may be exercised. The Gutierrezes claim that the subpoena power can be used only prior to the filing of criminal charges. Thus, according to the Gutierrezes, an investigation under the Act is limited to the preindictment investigation. The State, however, draws no distinction between an investigation prior to the filing of charges and an investigation after the filing of charges. Thus, the State claims that when it is authorized to conduct a "criminal investigation" under the Act it may use the subpoena power any time during its pretrial investigation.

[2] Therefore, we need to determine when the subpoena power can be used. In other words, we need to decide when a criminal investigation, for purposes of the Subpoena Powers Act, begins and ends. In interpreting a statutory act, we seek to give effect to the intent of the legislature in light of the purpose the act was meant to achieve. *See Mariemont v. White City Water Improvement Dist.*, 958 P.2d 222, 224 (Utah 1998). In doing so, we look to the plain language of the act and consider the act in its entirety, "harmoniz[ing] its provisions in accordance with the legislative intent and purpose." *Id.* at 225 (citations omitted). If there is ambiguity in the act's plain language, "we then seek guidance from the legislative history and relevant policy considerations." *Id.* at 224-25 (citations omitted).

[3] We conclude that the Subpoena Powers Act is

972 P.2d 913, 359 Utah Adv. Rep. 46

(Cite as: 972 P.2d 913)

ambiguous as to when the subpoena power may be used. On the one hand, the legislature sought to "grant subpoena powers in aid of criminal investigations." Utah Code Ann. § 77-22- 1. As the State points out, this phrase is not specifically limited to the investigation prior to the filing of charges, and it is axiomatic that the State investigates criminal cases both before and after charges have been filed. On the other hand, the Act when read as a whole seems to suggest that a criminal investigation, for purposes of the Act, ends with the filing of criminal charges. For example, the Act states in part that (1) it is necessary "to provide a method of keeping information gained from investigations secret both to protect the innocent and to prevent criminal suspects from having access to information *prior to prosecution*," *id* § 77- 22-1 (emphasis added); (2) if the state's attorneys have evidence that the particular witness "has committed a crime that is under investigation, *916 [they] shall inform that witness in person prior to interrogation of that witness's *target status* and of the nature of the *charges under consideration* against him," *id* § 77-22-2(5) (emphasis added); and (3) "[t]he subpoena need not disclose the names of *possible defendants*," *id* § 77-22- 2(6)(a) (emphasis added).

The use of language such as "prior to prosecution," "target status," "charges under consideration," and "possible defendants," implies that the Act is to be used prior to formal charges. In our prior cases, we have taken this view, although we have never directly ruled on the issue. See *Parsons v Barnes*, 871 P.2d 516, 519 n. 3 (Utah 1994) (emphasizing that "[a] county prosecutor proceeds under section 77-22-2 *prior* to commencing prosecution of a defendant or defendants"); *In re Criminal Investigation*, 754 P.2d 633, 652 (Utah 1988) (stating that the Act is intended to "enable the state's attorneys to gather sufficient evidence with which to initiate formal adjudicative criminal proceedings"). But see *id* at 666 (Stewart, Assoc.C.J., dissenting) (stating that "the Act allows prosecutors to engage in criminal discovery even after a formal charge has been filed"). Having found the Act ambiguous as to when the state's attorneys may use the subpoena power, we look to

the legislative history to infer the legislative intent.

The Subpoena Powers Act was sponsored by Representative M. Byron Fisher in 1971 and was enacted that same year. See Utah Code Ann. §§ 77-45-19 to -21 (1971). The Act was then recodified in 1980 as Utah Code Ann. §§ 77-22-1 to -3. In 1988, this court addressed the constitutionality of the Act. See *In re Criminal Investigation*, 754 P.2d 633 (Utah 1988). In that case, the Act was upheld as constitutional, but only after this court interpreted the Act as "incorporating a number of substantive and procedural safeguards." *Id* at 636 In 1989, the legislature amended the Act to specifically include those safeguards.

During debate of the proposed Act in the House of Representatives in 1971, Representative Fisher stated:

The purpose of the bill is to permit the investigation of criminal activities and suspect crimes by [the state's attorneys] by ... allowing them to subpoena witnesses and to bring people before them *for the purpose of obtaining information for the filing of criminal complaint*. This action would take place prior to the filing of complaints and would not necessarily come about in the filing of a criminal complaint or culminate in that activity

Floor Debate, Statement of Rep. M. Byron Fisher, 39th Utah Leg., Gen. Sess. (Feb. 17, 1971) (emphasis added). Later that same day, Representative Fisher also stated, "With the subpoena power, [the state's attorneys] could obtain ... evidence and if it showed what is believed is occurring, *then the action could be brought and a complaint filed*" *Id* (emphasis added). On reintroducing the bill the next day to continue the debate, Representative Fisher stated that the proposed Act "is the subpoena powers granting to the [state's attorneys] an opportunity to obtain evidence by investigation *without the filing of criminal complaints should be filed*" Floor Debate, Statement of Rep. M. Byron Fisher, 39th Utah Leg., Gen. Sess. (Feb. 18, 1971) (emphasis added). As this history makes clear, the subpoena power was

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intended to be used prior to the filing of criminal charges.

This conclusion is further supported by the legislature's amendments in 1989. Those amendments constituted a significant overhauling of the Act, which incorporated the substantive and procedural safeguards read into the Act in *In re Criminal Investigation*. In that case, this court also rejected the claims that the Act violated a defendant's constitutional rights to present evidence and cross-examine witnesses. In doing so, this court relied heavily on its view that investigations under the Act are "preliminary investigative proceedings" which "only lead[] to the filing of criminal charges." *In re Criminal Investigation*, 754 P.2d at 652. Thus, at the time of the 1989 amendments, the legislature knew that this court viewed the use of the subpoena power as occurring only prior to the filing of formal charges. Because the legislature did not amend the Act to specifically state that the subpoena power could be *917 used after the filing of charges, we conclude that this court's view that it could not be so used is consistent with legislative intent. See *Christensen v. Industrial Comm'n*, 642 P.2d 755, 756-57 (Utah 1982) ("A well-established canon of statutory construction provides that where a legislature amends a portion of a statute but leaves other portions unamended ... the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent."). [FN3]

FN3. Furthermore, we note that had the legislature clearly stated that the Act applied after the filing of charges without adding other substantive provisions permitting a defendant to present evidence, confront the witness, and engage in reciprocal discovery, the Act might have then been of questionable constitutional validity. See *In re Criminal Investigation*, 754 P.2d at 650-52; *id.* at 666 (Stewart, Assoc.C.J., dissenting); *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973).

CONCLUSION

In view of the foregoing, we hold that the Subpoena Powers Act can be used by the State only prior to the filing of formal criminal charges. We therefore grant the petitions of Cindy and Melissa Gutierrez for extraordinary relief and order the district court to quash the subpoenas.

Chief Justice HOWE, Associate Chief Justice DURHAM, and Justice ZIMMERMAN concur in Justice RUSSON's opinion.

STEWART, Justice, concurring:

I concur with the majority in holding that the Subpoena Powers Act does not permit prosecutors to take discovery depositions after the filing of an information. I submit that a contrary construction of the Act would raise significant due process issues.

Furthermore, given the many recent revelations of oppressive prosecutorial abuses by various federal special prosecutors under the federal Independent Counsel Act, [FN1] which vests special prosecutors with broad inquisitorial powers directed at the person, I again reiterate the objections I stated with respect to the Utah Act and this Court's opinion in *In re Criminal Investigation*, 754 P.2d 633, 659-66 (Utah 1988) (Stewart, Assoc.C.J., dissenting). That opinion sustained the constitutionality of the Act with respect to its preinformation ex parte inquisitorial procedures. I pointed out in that dissent the vast potential, if not temptation, for prosecutors-- whether well-meaning, unduly zealous, or partisan--to crush personal liberties and rights of privacy. I repeat what I stated in my dissent in *In re Criminal Investigation*:

FN1. Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-99.

I believe the Subpoena Powers Act (the "Act") is unconstitutional on its face. The United States Supreme Court has observed, in language which I believe is applicable to this Act, "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without

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any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice is unknown to our constitution and laws; and such an inquisition would be destructive to the rights of the citizen, and an intolerable tyranny." *Jones v. S.E.C.*, 298 U.S. 1, 27, 56 S.Ct. 654, 662, 80 L.Ed. 1015 (1935) (quoting *In re Pacific Ry. Comm'n*, 32 F. 241 (C.C.Cal.1887)). This language applies in essential respects to the powers the Legislature has sought to confer on county prosecutors and the Attorney General. The Subpoena Powers Act vastly extends the compulsory inquisitorial power of state and county prosecutors over both citizens and government officials. Anglo-American history is fraught with examples of abuses of similar powers by government officials.

754 P.2d at 659-60.

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Tab 13

C

Supreme Court of Utah.
Claudia HILL, by and through her Guardian ad
Litem, Mary Hill Fogel, Plaintiff
and Appellant,
v.
GRAND CENTRAL, INC., a Utah corporation,
Defendant and Respondent.
No. 12082.

Nov. 25, 1970.

Complaint for libel. The Second District Court, Weber County, John F. Wahlquist, J., entered a judgment dismissing the complaint and the plaintiff appealed. The Supreme Court, Ellett, J., held that where trial judge overruled motion of defendant to dismiss complaint, he had performed the full measure of his duties, and he acted improperly when he entered order reciting that upon failure of plaintiff to produce evidence to support allegations of actual malice within 30 days defendant would be granted a summary judgment and then entered a summary judgment.

Judgment of dismissal reversed with directions.

Henriod, J., concurred in result.

West Headnotes

[1] Judgment ⚡183

228k183 Most Cited Cases

When motion to dismiss is accompanied by affidavits it may be treated as a motion for summary judgment, but court should not on its own initiative try to convert a motion for dismissal into one for summary judgment, as court has no more right to ask plaintiff how he will establish his claim than he has to require defendant to state what his defense will be. Rules of Civil Procedure, rule 12(b) (6).

[2] Pretrial Procedure ⚡306.1

307Ak306.1 Most Cited Cases

(Formerly 307Ak306, 127k79 Discovery)

Where answers to interrogatories are to be used to establish fact, the answers can be used only as admissions against party making them.

[3] Pleading ⚡360

302k360 Most Cited Cases

(Formerly 302k360(16))

[3] Pretrial Procedure ⚡691

307Ak691 Most Cited Cases

Where trial judge overruled motion of defendant to dismiss libel complaint, he had performed the full measure of his duties, and he acted improperly when he entered order reciting that upon failure of plaintiff to produce evidence to support allegations of actual malice within 30 days defendant would be granted a summary judgment and then entered a summary judgment. Rules of Civil Procedure, rule 12(b) (6).

****150 *122** Pete N. Vlahos, Ogden, for plaintiff-appellant.

Rex J. Hanson, Leonard H. Russon, Salt Lake City, for defendant-respondent.

****151** ELLETT, Justice:

The appellant appeals from the granting of a summary judgment against her in her action for libel.

After she filed her complaint wherein she alleged malice on the part of the defendant, the defendant without answering moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6), U.R.C.P.

The order of the court was unique:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That defendant's motion to dismiss plaintiff's

25 Utah 2d 121, 477 P.2d 150

(Cite as: 25 Utah 2d 121, 477 P.2d 150)

complaint be denied.

2. That plaintiff be granted 30 days from the date of this hearing to produce evidence to support her allegations of actual malice.

3. That upon failure of the plaintiff to produce evidence to support her allegations of actual malice, within 30 days, defendant will be granted a summary judgment upon defendant's motion for the same.

*123 Thereafter the defendant moved for summary judgment. Interrogatories were propounded by the plaintiff and answered by the defendant and an affidavit was filed by plaintiff's attorney. Based upon the pleadings, the affidavit of plaintiff's counsel and defendant's answers to interrogatories the court granted the motion for summary judgment.

We think at a pretrial conference, after the issues are stated by way of pleadings on both sides, it is proper for the court to make inquiry as to what evidence will support a contention and to eliminate those issues which cannot be supported by competent proof. However, we do not think it is proper for a court to require a plaintiff to state what proof he will produce on an issue which has not even been raised.

[1] True it is that when a motion to dismiss is accompanied by affidavits it may be treated as a motion for summary judgment, yet the court should not on his own initiative try to convert a motion for dismissal into one for summary judgment. He has no more right to ask the plaintiff how he will establish his claim than he has to require the defendant to state what its defense will be. It would have been highly improper for the court, on the motion to dismiss, to have given the defendant 30 days to present proof as to the truth of the alleged statement or as to the lack of malice.

The answers to the interrogatories in this case were apparently taken as being true since the summary judgment was based upon them, at least in part.

Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. If

there be any such disputed issues of fact, they cannot be resolved by summary judgment even when the parties properly bring the motion before the court.

[2] In any case where answers to interrogatories are to be used to establish a fact, they can only be used as admissions against the party making them. They are objectionable when offered by the party making them because they are self-serving and not subject to cross-examination.

[3] The trial judge performed the full measure of his duty when he overruled the defendant's motion to dismiss for failure to state a claim. He was in error in dismissing the complaint as he did.

The judgment of dismissal is reversed with directions to reinstate the complaint and to proceed with the case pursuant to the Rules of Civil Procedure.

Costs are awarded to the appellant.

CROCKETT, C.J., and CALLISTER and TUCKETT, JJ., concur.

HENRIOD, J., concurs in the result.

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END OF DOCUMENT

Tab 14

H

United States District Court, N.D. Georgia, Atlanta
Division.
In re CHICKEN ANTITRUST LITIGATION.
Civ. A. No. C-74-2454-A.

March 22, 1982.

Subsidiaries of a defendant in chicken antitrust litigation filed a motion for clarification, asking the court to rule that they were entitled to recover as members of settlement classes, and asking the court to rule that they had opted out of the class settlement in the event court found them not entitled to class membership because of affiliation with or ownership by their parent. The District Court, O'Kelley, J., held that three subsidiaries of a defendant were not entitled to participate in the settlement fund, since they were not sufficiently independent of their parent to warrant participation; they "shared" officers and directors, raising a strong inference of parental domination, and they were completely owned by their parent.

Order in accordance with opinion.

West Headnotes

[1] Corporations 101 ↪1.6(1)**101 Corporations****101I Incorporation and Organization**

101k1.6 Particular Occasions for
Determining Corporate Entity

101k1.6(1) k. In General. Most Cited
Cases

Three subsidiaries of a defendant in chicken antitrust litigation were not entitled to participate in settlement fund, since they were not sufficiently independent of their parent to warrant participation; they "shared" officers and directors, raising a strong inference of parental domination, and they were completely owned by their parent.

[2] Evidence 157 ↪91**157 Evidence****157III Burden of Proof**

157k91 k. Party Asserting or Denying
Existence of Facts. Most Cited Cases
Generally, burden of proof of disputed facts rests on party affirming the existence of the facts and claiming rights and benefits from their existence.

[3] Corporations 101 ↪1.5(3)**101 Corporations****101I Incorporation and Organization**

101k1.5 Separate Corporations, Disregarding
Separate Entities

101k1.5(3) k. Parent and Subsidiary
Corporations. Most Cited Cases
While full ownership alone would be insufficient to show that a subsidiary was not independent of its parent, it is a factor highly indicative of control by the parent.

[4] Corporations 101 ↪1.5(3)**101 Corporations****101I Incorporation and Organization**

101k1.5 Separate Corporations, Disregarding
Separate Entities

101k1.5(3) k. Parent and Subsidiary
Corporations. Most Cited Cases
"Shared" officers and directors raise a strong
inference of domination of subsidiary by its parent
and indicate "common direction and supervision."

***1006 ORDER**

O'KELLEY, District Judge.

Presently pending before the court are two motions by KFC ^{FN1} and a stipulation filed by KFC and the Settlement Administration Committee modifying the two previous motions. KFC is a putative class claimant in the settlement fund established in this

protracted antitrust litigation. In KFC's first motion, KFC moved for clarification, asking the court to rule that KFC was entitled to recover as a member of two settlement classes, Class III(b) and Class IV, made up respectively of (1) restaurants and fast food franchisees, and (2) wholesale distributors. In the same motion, KFC asked the court to rule that KFC had opted out of the class settlement in the event the court should find that KFC was not entitled to class membership because of affiliation with or ownership by a defendant. The second motion by KFC was a 60(b) motion, filed after final judgments were entered on March 19, 1980 setting up the settlement *1007 classes. Final judgments were entered before the court had ruled on the KFC motion for clarification. KFC subsequently filed the 60(b) motion for relief from the final judgments, apparently having read the judgments to deny class membership to KFC.

FN1. "KFC," as used in the two motions, is a collective term referring to KFC Corporation and its wholly owned subsidiary, KFC National Management Company.

On June 11, 1981, this court entered an order addressing the motion for clarification and the 60(b) motion. In that order, the court concluded that the 60(b) motion was premature since its resolution would depend upon a ruling on KFC's class status. The court accordingly declined to rule on the 60(b) motion. The court declared, "KFC unquestionably is not a member of Settlement Class III(b)." The court went on to say, however, that the court would defer ruling on whether KFC had effectively opted out until such time as the parties had fully briefed the issue.

KFC and the Settlement Administration Committee have recently filed a stipulation addressing the status of KFC. The stipulation narrows the issues presented by the two KFC motions to the question whether KFC Corporation and two of its subsidiaries may participate in the settlement as members of Classes III(b) and IV. In the stipulation the parties agree that KFC Corporation (KFC) is a wholly owned subsidiary of defendant

Heublein, Inc., that KFC National Management Company (Management) is a wholly-owned subsidiary of KFC, and that Commonwealth Food Services, Inc. (CFI), now dissolved, was a wholly owned subsidiary of Management. The parties agree for the purposes of the motions that KFC, Management, and CFI filed timely proofs of claim to participate as members of Classes III(b) and IV, and have elected not to opt out of the settlement. KFC and Management seek to participate in the settlement fund as purchasers of broilers sold to consumers through Kentucky Fried Chicken stores owned and operated by KFC and Management.^{FN2} CFI sets forth a claim to participate as a wholesale distributor,^{FN3} stating that during the relevant period,^{FN4} CFI purchased to resell at wholesale approximately 6,638,590.23 pounds of broilers from processors other than defendant Heublein, Inc. Finally, the parties agree that certain documents which were attached to the response of the settlement committee to KFC's 60(b) motion pertaining to the corporate relationships among the three claimants are accurate. The court will treat this stipulation as a modification of the motion to clarify. The court will therefore grant the motion to clarify and will determine the eligibility of the claimants to participate.

FN2. Class III is comprised of hotel, motel, restaurant, fast-food franchisee, and institutional feeder claimants.

FN3. Class IV is made up of wholesale distributors.

FN4. The relevant period was January 1, 1970 through October 31, 1977.

[1] In the final judgments entered March 19, 1980, this court restricted the right of any defendants or defendant affiliates to recover. The restriction stated:

(1) all named party defendants, their affiliates, and subsidiaries, to the extent that they are not legally independent and autonomous from their parent-defendant or affiliate-defendant, shall be excluded from participating as claimants under any of the settlement classes herein;

(2) all legally independent and autonomous subsidiaries and/or affiliates of all named defendants herein not expressly excluded from settlement Classes I-IV may participate as either direct purchaser claimants under settlement Class V or as wholesaler-distributor claimants under settlement Class IV as appropriate whether or not they are controlled or owned in whole or in part by their parent-defendant or affiliate-defendant,

(3) no legally independent and autonomous subsidiaries and/or affiliates of all named defendants herein who are permitted to participate as claimants in these settlements under part (2) *supra* shall be permitted to recover for purchases from their parent-defendant or affiliate-defendant

Accordingly, only defendant-affiliates or defendant-subsidiaries that can show that *1008 their corporation is "legally autonomous and independent" of the defendant parent/affiliate may participate as claimants. This restriction was imposed to preserve the settlement fund for truly adverse entities who were harmed by the alleged wrongdoing by defendants and to prevent reduction of the settlement fund by defendants through their subsidiaries and affiliates in violation of obvious intent of the settlement agreement. Since all three claimants here are subsidiaries of defendant, Heublein, Inc., the court is now called upon, for the first time, to define its "independent and autonomous" standard.

In the court's view, factors discussed in cases considering whether to disregard the corporate fiction are also relevant to the question whether a subsidiary is sufficiently independent of its parent to warrant permitting the subsidiary to participate in a settlement fund partially contributed by its parent. In *Markow v Alcock*, 356 F.2d 194 (5th Cir. 1966), in discussing whether to disregard the corporate fiction, the court listed these factors:

(1) are the formal legal requirements observed, (2) is the "subsidiary" adequately financed or does the "parent" furnish the capitalization, (3) by whom are the salaries and expenses paid, (4) do the directors of the "subsidiary" act in the independent and primary interest of the "parent," (5) are the two operations so integrated through the commingling of funds, interactivities and common direction and

supervision that they should be considered as one enterprise, and (6) generally, is one corporation so organized and controlled and its business conducted in such a manner as to make it merely an agency, instrumentality, adjunct or alter ego of the other?

Markow v Alcock, 356 F.2d 197-98 (citations omitted). See also *Andrew Martin Marine Corp v Stork-Werkspoor Diesel*, 480 F.Supp. 1270 (E.D. La. 1979) (applying the *Markow* factors) and *Johnson v Warnaco, Inc.*, 426 F.Supp. 44 (S.D. Miss. 1976) (applying similar factors derived from *Fish v East*, 114 F.2d 177 (10th Cir. 1940)). In *Luckett v Bethlehem Steel Corp.*, 618 F.2d 1373 (10th Cir. 1980), the court cited the following factors in deciding whether to disregard the corporate status of a subsidiary: (1) the parent owns all the stock, (2) both have common directors and officers, (3) the parent finances the subsidiary, (4) the parent causes the subsidiary's incorporation, (5) the subsidiary has grossly inadequate capital, (6) the parent pays salaries or expenses of the subsidiary, (7) the subsidiary has no business except with its parent or subsidiary corporation or no assets except those transferred by its parent or subsidiary, (8) directors and officers do not act independently in the interests of the subsidiary, (9) formal legal requirements of the subsidiary such as keeping corporate minutes are not observed, (10) distinctions between the parent and the subsidiary and subsidiary and its subsidiary are disregarded or confused, (11) subsidiaries do not have full boards of directors.

618 F.2d at 1378, n. 4

[2] While many of the factors outlined in these cases are also probative on the question of independence and autonomy of a subsidiary from its parent, the court will require a considerably lesser showing for its "independent and autonomous" standard than is required when disregard of the corporate entity is sought. The court strongly feels that only truly adverse entities should be permitted to participate in the settlement fund. Otherwise, the settlement fund could be dissipated in violation of the obvious intent of the settling plaintiffs, and future antitrust settlements would be discouraged. Furthermore, in the view of the court, the burden of

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(Cite as: 560 F.Supp. 1006)

proof on the “legally independent and autonomous” standard belongs upon the subsidiary corporation seeking to recover as a claimant. Generally, the burden of proof of disputed facts rests on the party affirming the existence of the facts and claiming rights and benefits from their existence. *Marcum v. United States*, 452 F.2d 36 (5th Cir.1971). In this case, the subsidiaries seeking to recover as claimants are in the better position to present to the *1009 court facts showing their independence from defendant Heublein, Inc., and they are the parties seeking to participate in the settlement fund partially set up by their parent corporation. Therefore, the court finds that the burden rests properly on the subsidiaries to show their independence from the parent.

In the June 11, 1981 order, the court declared without discussion that KFC was not a member of settlement Class III(b). That order dealt with “KFC” in the aggregate, which was comprised of KFC and Management. The order did not address KFC’s claim to membership in Class IV, nor were the claims of CFI discussed in that order.^{FN5} The court is not inclined, however, to alter its previous ruling excluding KFC and Management from participation in Class III(b). Furthermore, since the court finds that KFC, Management and CFI have failed to show that they are legally independent and autonomous of parent/defendant Heublein, Inc., none may recover as claimant members of either Class III(b) or Class IV.

FN5. CFI’s claims were not raised in the initial motion by KFC.

[3][4] The parties stated in their stipulation that the documents labeled Exhibits D through I and attached to the Settlement Administration Committee’s brief in opposition to the 60(b) motion were authentic. The court has studied these documents and finds that they reveal that the relationship among Heublein, Inc., KFC, and Management was not sufficiently autonomous and independent to permit these subsidiaries to recover as claimants. The stipulation shows that each subsidiary was “wholly owned.” KFC had been publicly owned until it was acquired by Heublein in

1971. After the acquisition, Heublein owned all of the KFC stock. While full ownership alone would be insufficient to show that the subsidiaries were not independent, it is a factor highly indicative of control by the parent. *See Luckett v. Bethlehem Steel Corp.*, *supra*. Furthermore, the exhibits reveal that several officers and directors of defendant Heublein, Inc., were also officers and directors of KFC, Management, and other subsidiaries of Management. These “shared” officers and directors raise a strong inference of domination by the parent and indicate the “common direction and supervision” cited as a relevant factor in *Markow v. Alcock*, *supra*. The shared directors and complete ownership alone would convince the court that for purposes of claiming a portion of a settlement fund partially contributed by defendant Heublein, Inc., KFC and Management are too entangled with Heublein to permit their participation. The court need not rest its decision on these factors alone, however. The documents filed by the Committee show that Barry Rowles and Mike Miles, officers and directors of KFC and Management, reported to Hicks Waldron, president of Heublein. This indicates control and supervision of KFC by Heublein, Inc. Exhibit D shows that in answer to a question concerning frequency of meetings of the boards of directors and whether minutes were maintained, the KFC legal department supplied this response: “Meetings of the boards of KFC and Management seldom, if ever, were held. Necessary action was taken by consent resolution.” This failure to hold board meetings indicates a disregard of the formality of the corporate entity, a factor mentioned in both *Markow v. Alcock*, *supra*, and *Luckett v. Bethlehem Steel Corp.*, *supra* and, further, that the boards were not actual functioning bodies. Another document also demonstrates an intermingling of authority. A memorandum dated July 9, 1979, from David M. Stigler, Assistant General Counsel for Heublein, Inc., to Michael J. McGraw, Vice-President/General Counsel for KFC, clearly shows cooperation between the legal departments of KFC and Heublein in directing their franchisees to prepare claims in this litigation. While the court is hesitant to read too much into a single memorandum, the conclusion that an identity of interest existed is inescapable. In short, several items of information

supplied to the court show that free interchange of information between Heublein and KFC occurred. *1010 The court can only conclude, in the absence of any evidence which would demonstrate independence, and in the face of several items indicating control by Heublein, that neither KFC nor Management are independent or autonomous of Heublein, Inc., for purposes of participating in the claimant universe.^{FN6}

FN6. The court expresses no opinion whether the corporate status of the subsidiaries should be disregarded, and is only deciding that the subsidiaries are so closely related to a defendant in this action that they are barred from recovering as plaintiffs. The court would presume that a greater showing of inter-relation and intermingling than was made for this purpose would be required to cause disregard of the corporate entity for other purposes.

Where CFI is concerned, there is more of a close question since the court has been supplied with only scant information about its status. CFI is a wholly owned subsidiary, however, and its kinship to Heublein, Inc., derives from two other wholly owned subsidiaries whose status the court has found non-autonomous. Therefore, in view of the failure of CFI to come forward with evidence to show its legal independence and autonomy from Heublein, the court will find CFI barred as a claimant as well.

In summary, the court previously ruled that the 60(b) motion was premature. By the terms of this order and the stipulation filed by the parties, it is now moot and will therefore be denied. The KFC motion for clarification as modified by the stipulation is granted. The court holds that neither KFC, Management nor CFI are entitled to participate in the Settlement Fund.

D.C.Ga., 1982.

In re Chicken Antitrust Litigation

560 F.Supp. 1006

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Tab 15

P

Briefs and Other Related Documents

Supreme Court of Utah.
In re Marriage of Juanita GONZALEZ and Martin
Briceno.
Juanita Gonzalez aka Juanita L. Briceno, Petitioner
and Appellant.
Metropolitan Property & Casualty Insurance
Company, Intervenor and Appellee.
No. 970521.

Jan. 28, 2000.
Rehearing Denied May 31, 2000.

Insured's alleged common law wife filed petition for adjudication of marriage to insured, who had set fire to her home, and insurer was permitted to intervene upon petitioner's stipulation. The Third District Court, Salt Lake Department, Tyrone E. Medley, J., granting summary judgment in favor of insurer on statute of limitations grounds, and denied petitioner's motions to dismiss insurer's complaint in intervention and to amend her complaint. Petitioner appealed. The Supreme Court, Durham, A.C.J., held that proceeding for adjudication of marriage was required to be commenced, but not completed, within one year of termination of relationship between alleged common law wife and insured.

Affirmed in part, but reversed and remanded.

Zimmerman, J., filed a concurring opinion.

Russon, J., filed a dissenting opinion, in which Howe, C.J., joined.

West Headnotes

[1] **Appeal and Error** ⚡893(1)
30k893(1) Most Cited Cases

De novo standard of review applies when intervention as of right is before the Supreme Court on appeal. Rules Civ.Proc., Rule 24(a).

[2] **Statutes** ⚡181(1)
361k181(1) Most Cited Cases

[2] **Statutes** ⚡184
361k184 Most Cited Cases
In construing a statute, the Supreme Court's aim is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve.

[3] **Statutes** ⚡181(1)
361k181(1) Most Cited Cases

[3] **Statutes** ⚡184
361k184 Most Cited Cases

[3] **Statutes** ⚡206
361k206 Most Cited Cases
When doubt or uncertainty exists as to the meaning or application of an act's provisions, an analysis of the act in its entirety should be undertaken and its provisions harmonized in accordance with the legislative intent and purpose.

[4] **Statutes** ⚡183
361k183 Most Cited Cases

[4] **Statutes** ⚡206
361k206 Most Cited Cases

[4] **Statutes** ⚡208
361k208 Most Cited Cases
In construing a statute, courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject.

[5] **Constitutional Law** ⚡48(1)
92k48(1) Most Cited Cases

1 P.3d 1074, 387 Utah Adv. Rep. 89, 2000 UT 28

(Cite as: 1 P.3d 1074, 2000 UT 28)

[5] Statutes ⚡ **181(1)**

361k181(1) Most Cited Cases

Courts have a duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities.

[6] Limitation of Actions ⚡ **61**

241k61 Most Cited Cases

Proceeding for adjudication of marriage was required to be commenced, but not completed, within one year of termination of relationship between alleged common law wife and husband. U.C.A.1953, 30-1-4.5(2).

[7] Limitation of Actions ⚡ **61**

241k61 Most Cited Cases

Statute of limitations applicable to petitions for adjudication of marriage requires that an action for adjudication must be filed within a year of the termination of the relationship. U.C.A.1953, 30-1-4.5(2).

[8] Stipulations ⚡ **18(2)**

363k18(2) Most Cited Cases

Insurer's intervention, pursuant to parties' stipulation, was properly allowed in action commenced by insured's alleged common law wife seeking adjudication of marriage to insured, who had set fire to her home; insurer's interest in action was not so speculative so as to preclude alleged wife from agreeing to have insurer's challenges adjudicated in determination proceeding.

***1074** Concurring opinion of Zimmerman, J., with Chief Justice and one Justice concurring.

***1075** Tamara J. Hauge, Salt Lake City, for Gonzalez.

Robert L. Stevens, Salt Lake City, for Metropolitan.

SUMMARY

DURHAM, Associate Chief Justice:

****1** Petitioner Juanita L. Gonzalez appeals a decision of the district court granting summary

judgment in favor of intervenor Metropolitan Property & Casualty Insurance Company ("Metropolitan") and denying her motions to dismiss Metropolitan's complaint in intervention and to amend her complaint. This is an action based on Ms. Gonzalez's petition for adjudication of marriage, brought pursuant to Utah Code Ann. § 30-1-4.5 (Supp.1998), regarding her relationship with Martin Briceno. [FN1] Metropolitan moved to intervene. Ms. Gonzalez contested the intervention but ultimately stipulated to it. Metropolitan moved for summary judgment on the ground that Ms. Gonzalez failed to complete the adjudication of her petition within the statutory time period. This appeal followed. We reverse and remand for further proceedings, but note the following divergence in the justices' separate opinions concerning the issues: (1) as to the interpretation of Utah Code Ann. § 30-1-4.5 (Supp.1988) ("ONE-YEAR LIMITATION"), this opinion reflects a majority view, being concurred in by Justices Stewart and Zimmerman; (2) as to the propriety of the trial court's refusal to dismiss Metropolitan as an intervenor below ("INTERVENTION"), Justice Zimmerman concurs in that portion of Justice Russon's opinion, joined by Chief Justice Howe, but only to the extent it holds that intervention pursuant to the stipulation was properly permitted.

FN1. The 1998 version of the statute is exactly the same as the statute originally passed in 1987.

BACKGROUND

****2** According to the petition for adjudication of marriage (the "petition"), Ms. Gonzalez and Mr. Briceno began living together in September, 1983. On October 21, 1995, Briceno set fire to Gonzalez's home. Ms. Gonzalez alleges that her relationship with Briceno "terminated" on that day. At the time, Briceno had insurance through Metropolitan. If Gonzalez was Briceno's spouse at the time of the fire, she would have a claim under the Metropolitan policy. Presumably, premiums were calculated on this basis.

****3** On February 5, 1996, Metropolitan filed a

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motion to intervene pursuant to rule 24(a) of the Utah Rules of Civil Procedure. Metropolitan asserted that Briceno had no reason to contest the recognition of the alleged marriage and that Metropolitan's interest was therefore not represented in the action. In its memorandum in support of the motion, Metropolitan stated that it moved to intervene because Gonzalez had filed the petition "to establish her insurance claim against Metropolitan." Gonzalez opposed the motion, arguing that Metropolitan had failed to attach a memorandum of points and authorities or appropriate affidavits, as required under rule 4-501 of the Utah Code of Judicial Administration. Gonzalez answered the intervenor's complaint on March 11, 1996. On March 12, 1996, the parties filed a Stipulation for Leave to Allow Metropolitan to Intervene. An order granting Metropolitan leave to intervene was filed on March 12, 1996.

****4** Metropolitan formally denied Ms. Gonzalez's insurance claim on June 4, 1996. On August 7, 1996, the trial court set a date of January 7, 1997, for trial of Ms. Gonzalez's petition, depending on the court's availability. On October 4, 1996, Metropolitan moved for summary judgment. Its motion was based upon "the fact that Ms. Gonzalez did *not* have a uniform reputation as the wife of Martin Briceno," as required under section 30-1-4.5 of the Utah Code. No affidavits were attached. That motion was denied.

****5** A minute entry of January 6, 1997, noted that the trial date, scheduled for the following day, had been stricken. The trial was continued because of a criminal trial that took precedence on the court's calendar. On March 18, 1997, the court ordered a new scheduling conference for April 8, 1997. Trial was reset for August 5, 1997. Gonzalez never requested an accelerated trial.

***1076 **6** On April 10, 1997, Metropolitan filed a "Motion for Summary Judgment based upon Failure to Comply with Statutory Time Limits," in which it claimed that Ms. Gonzalez's petition should be dismissed because she failed to obtain a judgment concerning her alleged marriage within one year of its termination, as required under Utah Code Ann. §

30-1-4.5. Metropolitan contended that the statutory time period ran from the date the relationship terminated, allegedly October 21, 1995, and that the statute of limitations was not tolled by filing the action. Metropolitan did not contend, and has not argued here, that the statute of limitations expired prior to Ms. Gonzalez's commencement of this proceeding.

****7** In an affidavit in support of her memorandum in opposition, Gonzalez admitted that on October 21, 1995, she considered her relationship with Briceno "permanently terminated." She also indicated, however, that "[s]ince that time, I have re-established a relationship with Martin." Gonzalez filed a second motion to amend her petition to allege the re-establishment of the relationship on April 23, 1997.

****8** On May 8, 1997, Gonzalez moved to dismiss Metropolitan's complaint as intervenor. She asserted that she had stipulated to Metropolitan's intervention based on its alleged suggestion that a decision on her marital status would dispose of all coverage questions in Briceno's insurance policy. She then argued that Metropolitan was not a proper party under rule 24(a) because it had in fact already denied Gonzalez's insurance claim based on lack of coverage. She asserted that Metropolitan's intervention would prejudice the rights and social status of herself and her three children, whose father is Briceno, inasmuch as denial of her petition would prevent all of them from "assuming[] legal rights, responsibilities and social status due them under the circumstances of their joint relationships."

****9** In Metropolitan's memorandum in opposition, it argued that its interest in Ms. Gonzalez's status remained, despite its unequivocal denial of coverage to her.

****10** After arguments on all the motions, Gonzalez's motion to amend was denied, as was her motion to dismiss the intervenor's complaint. The court granted Metropolitan's motion for summary judgment based on Gonzalez's failure to comply with the statutory time limit.

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****11** In its findings of fact, conclusions of law, and order denying petitioner's motion to dismiss the complaint in intervention, the court concluded that Gonzalez had "presented no valid legal basis for her withdrawal of [the] Stipulation," thus allowing the complaint in intervention to stand. The court also ruled that Metropolitan "falls squarely within rule 24(a)(2) of the Utah Rules of Civil Procedure regarding intervention." In its findings of fact and conclusions of law regarding intervenor's motion for summary judgment, the court held that the statutory limitation period expired on October 21, 1996, which date occurred after the commencement of the action. This date was also prior to the initial trial date set by the court.

****12** In its conclusions of law, the trial court determined that the "petitioner is not and never has been married to Martin Briceno in any solemnized or unsolemnized relationship."

****13** Petitioner raises three issues on appeal. First, she argues that it was error for the trial court to grant Metropolitan's motion for summary judgment dismissing the petition on the ground that the petition was not adjudicated within one year of the termination of the relationship. Second, Ms. Gonzalez contends that the trial court erred in refusing to grant her motion to dismiss Metropolitan's complaint in intervention. Finally, Ms. Gonzalez argues that the trial court should not have denied her motion to amend the petition to allege a continuing relationship with Briceno.

****14** As noted in ¶ 1, this opinion (Durham, J), joined by Justice Stewart and Justice Zimmerman, determines the result regarding the statute of limitations issue. As to the intervention issue, Justice Zimmerman concurs in that portion of Justice Russon's opinion, joined by Chief Justice Howe, but only to the extent it holds that intervention pursuant to the stipulation was properly permitted.

***1077 STANDARD OF REVIEW**

****15** A trial court's grant of summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to a

judgment as a matter of law. See Utah R. Civ. P. 56(c), see also *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989). When deciding whether the trial court correctly found that there was no genuine issue of material fact, this court reviews the facts and inferences to be drawn therefrom in the light most favorable to the losing party. See *id.* Additionally, because summary judgment is granted as a matter of law, we give the trial court's legal conclusions no deference and review their decision for correctness. See *White v. Gary L. Deseelhorst NP Ski Corp.*, 879 P.2d 1371, 1374 (Utah 1994).

[1] ****16** This court has not heretofore identified the standard it employs when reviewing a motion to intervene as of right under Utah Rule of Civil Procedure 24(a). See *Lima v. Chambers*, 657 P.2d 279 (Utah 1982) (reversing trial court's denial of intervention but not stating standard of review for that reversal). We now adopt a de novo standard of review when intervention as of right is before us on appeal. [FN2]

FN2 The majority of federal appeals courts follow a de novo standard of review when intervention as of right is involved. See *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996) (intervention as of right reviewed de novo), *Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 90 (10th Cir. 1993) (same), *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992) (same), *United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 412 (5th Cir. 1991), *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989) (same), *Walters v. City of Atlanta*, 803 F.2d 1135, 1151 n.16 (11th Cir. 1986) (reviewing denial of motion to intervene as of right "for error"), *Cook v. Boorstin*, 763 F.2d 1462, 1468 (D.C. Cir. 1985) (holding application for intervention as of right seems to pose only question of law, but "we would ordinarily give substantial weight to a trial court's findings" regarding whether intervention comports with efficiency and due

process). *But see In re Sierra Club*, 945 F.2d 776, 779 (4th Cir.1991) (utilizing abuse of discretion standard).

While several other circuits appear to be adopting an abuse of discretion standard, they make distinctions between intervention as of right and permissive intervention. The standard seems to inhabit an area somewhere between de novo review and abuse of discretion when intervention as of right is involved. *See International Paper Co. v. Town of Jay*, 887 F.2d 338, 345 (1st Cir.1989); *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir.), *cert. denied*, 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 990-91 (2d Cir.1984).

ONE-YEAR LIMITATION

****17** In 1987, the Utah Legislature enacted a statute that recognized the possibility of establishing an unsolemnized marriage. *See* Utah Code Ann. § 30-1-4.5 (Supp.1998). [FN3] Subsection two of the statute states, in pertinent part, "The *determination or establishment* of a marriage under this section must occur during the relationship described in subsection (1), or *within one year following the termination of that relationship*." *Id.* § 30-1-4.5(2) (emphasis added).

FN3. The statute sets forth the following criteria that must be met in establishing the existence of an unsolemnized marriage:

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who: a) are capable of giving consent; b) are legally capable of entering into a solemnized marriage under the provisions of this chapter; c) have co-habited; d) mutually assume marital rights, duties, and obligations; and, e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife. Utah Code Ann. § 30-1-4.5 (1998).

****18** The trial court found that "[m]ore than one year has passed since the termination of the relationship between Martin Briceno and the petitioner," and that Ms. Gonzalez had therefore not met the requirement that determination of the marriage occur within one year of the relationship's termination. The trial court appeared to assume that the statute required completion of the proceeding, not merely its commencement, within the one-year period. Furthermore, it put the burden of assuring a resolution of the petition on Ms. Gonzalez, stating: "This court is just confident that if a request for expedited disposition had been [sic] in this matter, between January and early October of 1996, we could have brought this matter to a resolution." Finally, ***1078** at the same hearing, the trial court did not permit Gonzalez a second amendment to her petition to allege a resumption of her relationship with Briceno, which she contended would show a continuous relationship from the time they first began living together in 1983.

STATUTORY INTERPRETATION

****19** The process of statutory interpretation is often a difficult one, as courts try to apply the terms of a statute to an unanticipated situation. As Judge Richard Posner has pointed out:

Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process. The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted ... and not that the legislators failed to agree on just what they wanted to accomplish in the statute ... but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.... Matters are not decided until they have to be.

Richard A. Posner, *Statutory Interpretation--in the Classroom and in the Courtroom*, 50 U. Chi. L.Rev. 800, 811 (1983).

****20** Our own legislature seems to have had the same point in mind when it included a severability clause for chapter 246, in which the statutory marriage provision is found, stating that "if any provision of Chapter 246, or the application of any

provision to any person or circumstance, is held invalid, the remainder of the chapter is to be given effect without the invalid provision or application." 1987 Utah Laws ch. 246, § 5. Thus, the legislature has acknowledged that unforeseen issues in the application of statutes such as the one involving statutory marriage might arise.

****21** The facts of this case would appear to have been far from the legislature's contemplation when the statute recognizing unsolemnized marriages was enacted. [FN4] So far as the limited legislative history shows, the apparent aim was to give Utah's Office of Recovery Services an avenue to prevent the exclusion of an alleged "common law" spouse's income when an application for government benefits was made, thus preventing welfare fraud. *See* Floor Debate, remarks of Norman Angus, Director of State Social Services Admin., 47th Utah Leg., Gen. Sess. (Feb. 17, 1987) (Sen. Recording No. 75). [FN5] Utah has no doctrine of common law marriage, and thus a statutory creation was necessary. The subsection of the statute concerning the amount of time allotted for adjudication of a petition after the relationship's termination was added in an amendment and was apparently designed to protect the *parties* to a putative marriage from fraud or mistake due to long delays in adjudication. The only substantive comment on the amendment appears to be the following:

FN4. While the form of unsolemnized marriage recognized by Utah was created only relatively recently by statute, its roots are long and deep, lying in the common law concept of "common law" marriage. There appears to be no meaningful distinction between Utah's statutory scheme and the concept of common law marriage.

FN5. For a fuller discussion of the legislative history of section 30-1-4.5, see *Recent Developments in Utah Law--Legislative Enactments-- Family Law*, 1988 Utah L.Rev. 273.

This amendment ... brings in a time focus, the other protection that Senator Reese put in the bill yesterday provides that that determination of common law marriage must occur by a court or administrative agency during the relationship or within one year after its [sic] been terminated. I think that gives the protection of having a marriage declared twenty years after the relationship when the parties had no intention of a marriage. I think it would still give protection to the Office of Recovery Services

Floor Debate, remarks of Sen. Lyle Hillyard, 47th Utah Leg., Gen. Sess. (Feb. 19, 1987) (Sen. CD No. 81B).

****22** Senator Hillyard's remarks suggest that the legislature was concerned with situations in which the couple never intended to ***1079** be married but where, years later, most likely at the time that one of them dies, some party is trying to prove the existence of such a marriage.

[2][3][4][5] ****23** In construing a statute, our aim is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve. *See Craftsman Builder's Supply v. Butler Mfg.*, 1999 Utah 18, ¶ 25, 974 P.2d 1194, 1201. When doubt or uncertainty exists as to the meaning or application of an act's provisions, an analysis of the act in its entirety should be undertaken and its provisions harmonized in accordance with the legislative intent and purpose. *See id.* at 1202. "One of the cardinal principles of statutory construction is that the courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject." *Mountain States Tel. & Tel. Co. v. Payne*, 782 P.2d 464, 466 (Utah 1989) (citation omitted). Further, we have "a duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities." *State v. Bell*, 785 P.2d 390, 397 (Utah 1989).

1. Statute of Limitations

[6] ****24** Conventional statutes of limitation run until the date on which an action is commenced.

The question raised in this action is whether the somewhat unusual language of section 30-1-4.5 was intended to create a novel phenomenon—a statute of limitations not tolled by the filing of an action, so that an action filed in a timely manner could still fail the limitation period due to delays in discovery or a court's crowded docket. The legislature should not be deemed to have created such a potentially unfair rule without clear and convincing language evidencing its intent to do so; the ambiguities created in this statute appear to be the result of nothing more than inartful drafting. It is clear that the legislative purpose of preventing welfare fraud, which gave rise to the time limitation, has nothing to do with Ms. Gonzalez's attempts to establish a statutory marriage to Mr. Briceno, and that strict construction of the subsection regarding the completion of an adjudication of the relationship no later than a year after it allegedly terminated does not further the underlying purpose of the statute. We are not persuaded that the legislature meant to place the burden of crowded court dockets, and other matters completely out of a petitioner's control, solely on the petitioner. In fact, as noted above, in this case the trial was delayed at the beginning of 1997 because a criminal trial took precedence at the last moment.

[7] ****25** A more reasonable interpretation of the legislature's intent, which would not upset the underlying purpose of the statute, is that the statute is simply an ordinary statute of limitations which, like all statutes of limitations, requires that an action for adjudication must be *commenced* within a year of the termination of the relationship. This would still protect parties who never meant to be statutorily married from adjudications many years after their relationship has ended, but without placing an undue burden on petitioners who cannot control every circumstance in the judicial arena. In fact, even if the insurer had not intervened in this uncontested action (a point addressed more fully below), given the court's initially scheduled trial date, the petition would not have been decided within the one-year time-frame. It seems unlikely that the legislature intended to create such a trap for the unwary, leading to the dismissal of timely filed, uncontested lawsuits.

****26** State and federal speedy trial acts provide some useful guidance in this area, inasmuch as they also contain requirements that cases be resolved within specific time-frames. Section 77-1-6(1)(h) of the Utah Code, for example, requires that a trial begin within thirty days after arraignment if the accused is not posting bail, as long as the court's other business presents no obstacle to this. See Utah Code Ann. § 77-1-6(1)(h) (1990). Even in the criminal trial context, however, where the defendant's Sixth Amendment rights are implicated, the United States Supreme Court has declined to establish "rigid time requirements" to determine whether a defendant's right to a speedy trial was violated. See **1080State v. Hoyt*, 806 P.2d 204, 208 (Utah Ct. App. 1991) (citing *Barker v. Wingo*, 407 U.S. 514, 521, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). The Court in *Barker* outlined a four-part test to assess any violation, including "[1] length of the delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant." *Barker*, 407 U.S. at 530, 92 S.Ct. 2182. Thus, even when a party has a constitutional right to a speedy trial, delay will be excused where it is not prejudicial. Were the intervenor in this case entitled to such concern, which of course it is not, the "delay" here would not rise to the level of being overly lengthy or prejudicial. Indeed, Metropolitan could not demonstrate any prejudice in this case. Moreover, as Ms. Gonzalez has pointed out, without the insurer's intervention any delays would have been unlikely, except to the extent that they were caused by the court's own docket.

2 Constitutional Considerations

****27** Were we to accept intervenor's claim that the legislature meant to create an entirely new type of statute of limitations, the statutory time limitation would be subject to constitutional challenge. For example, in *White v. State Farm Mut. Auto. Ins. Co.*, 907 F.Supp. 1012 (E.D. Tex. 1995), the court had to apply a similar Texas statute. The case involved a woman suing her auto insurer under the uninsured motorist clause of her policy, regarding the death of her alleged common law husband. The Texas statute stated " 'A proceeding in which a marriage

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is to be proved under this section must be *commenced* not later than one year after the date on which the relationship ended....' " *Id.* at 1017 (quoting Tex. Fam.Code Ann. § 1.91(b) (West Supp.1989) (emphasis added)). [FN6]

FN6. The court in *White* noted that although the 1989 version of the Texas statute had been recently amended, the earlier version of the statute specifically instructed that the 1995 amendment not be retroactively applied. *See White*, 907 F.Supp. at 1017 n. 2 (citing Tex. Fam.Code Ann. § 1.91(b) (West Supp.1996) (Act of May 29, 1995, 74th Leg., R.S., ch. 891, § 1)). The 1995 amendment extended the statute of limitations to two years, and by the terms of the amendment, even that time period is not absolute. *See Shepherd v. Ledford*, 926 S.W.2d 405, 409 n. 1 (Tex.App.1996).

****28** The court in *White* held the Texas one-year statutory limitation period unconstitutional under the United States Constitution on equal protection grounds. The court found that the statute made a distinction between "ceremoniously married persons" and "informally or common-law married persons," and that the one-year period to commence an action must be reasonably related to a legitimate governmental interest. *See White*, 907 F.Supp. at 1017-18. Finding that the interest in requiring proof of the existence of a common law marriage in a timely fashion was to insure that Texas courts did not have to rely on stale evidence in divorce and probate proceedings, the court reasoned that while the interest was legitimate, the statutory scheme was not rationally related to the goals. *See id.* at 1018.

****29** Noting the severity of the bar to commencing an action to prove a common law marriage within just one-year of the relationship's termination, the *White* court was particularly concerned about the community property rights that would be extinguished and the legitimacy of the two children of the marriage that would be unresolved. *See id.* The court relied on a United States Supreme Court case that held a similar Texas statute regarding a

one-year period to prove the legitimacy of a child violated equal protection because the time period was too short in light of the important rights involved. *See id.*; *Mills v. Habluetzel*, 456 U.S. 91, 100, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982). [FN7] *But *1081 see Shepherd*, 926 S.W.2d at 405-09 (applying, without mentioning *White*, the Texas statute involved in *White* according to its terms).

FN7. The constitutionality of the one-year statutory limitation period is not before us on this appeal, since Ms. Gonzalez concededly filed her petition within one-year of the termination of her relationship. Metropolitan argues that the case of *Bunch v. Englehorn*, 906 P.2d 918 (Utah Ct.App.1995), is dispositive here and stands for the proposition that a petition for adjudication of marriage must be brought and decided within a year of the relationship's termination. Intervenor misconstrues this case. In *Bunch*, a divorce action was filed ten months after the parties separated. *Id.* at 919. The trial court dismissed the complaint on the ground that no statutory marriage had been established and it therefore lacked subject matter jurisdiction over the action. *Id.* On appeal, the court of appeals explicitly refused to consider constitutional arguments raised by the appellant, stating that these arguments were not sufficiently articulated below. *Id.* at 921. Finding section 30-1- 4.5 to be unambiguous regarding the time limitation, it affirmed the trial court. *Id.* We agree with Ms. Gonzalez that her case is clearly distinguishable inasmuch as it involves a petition to establish a marriage, not to obtain a divorce. We believe that today we begin to clarify some of the issues left unresolved by the court in *Bunch*. However, since the constitutionality of a one-year statute of limitations is not before us, we express no opinion on the issue.

****30** In light of the considerations discussed

above, we construe the statute of limitations in question to avoid potential unconstitutionality, and conclude that section 30-1-4.5 requires only the filing of a petition for adjudication of marriage within one year after the termination of the relationship. Our decision rests on our analysis of the legislature's intent, and therefore, we do not reach the constitutional arguments raised by Ms. Gonzalez. See *Sutherland on Statutory Construction* § 45.11, at 49 (rev. 5th ed.1992). Further, in light of our ruling, we do not reach the issue of whether the trial court erred in denying Ms. Gonzalez's motion to amend her second petition. Should Ms. Gonzalez still wish to amend after remand, she should renew her motion, and we presume the court will give her motion due consideration in light of this opinion. Typically, motions to amend are liberally granted. See *Timm v. Dewsnap*, 851 P.2d 1178, 1183 (Utah 1993).

INTERVENTION

****31** Next, we turn to Ms. Gonzalez's contention that it was error for the trial court to deny her motion to dismiss Metropolitan's complaint in intervention. Gonzalez initially challenged Metropolitan's motion to intervene, but later reversed course and stipulated to the intervention.

****32** Stipulations between the parties are usually honored by the courts. See *First of Denver Mortgage Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521, 527 (Utah 1979). Nevertheless, the courts may ignore such agreements "when points of law requiring judicial determination are involved." *Id.* No consideration was undertaken by the trial court of Metropolitan's standing to intervene in Ms. Gonzalez's petition to adjudicate marriage; nevertheless, the question of the legitimacy of Metropolitan's presence in this lawsuit implicates significant public policy concerns that should be addressed on appeal.

****33** Pursuant to Utah Rule of Civil Procedure 24(a), an applicant must be allowed to intervene if four requirements are satisfied: (1) the application is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the

disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties.

****34** Spouses are ordinarily the only appropriate parties to divorce litigation. See Frank D. Wagner, Annotation, *Divorce-Third Parties' Claims*, 63 A.L.R.3d 373, 378 (1975). An exception to this is generally made, however, for third-party claims that concern the "actual or equitable ownership of real property, or to some other asserted interest such as an encumbrance upon real property, or the ownership of personal property." *Id.* (footnotes omitted). This case, which concerns a petition for adjudication of marriage, is analogous to cases where a third party attempts to intervene in a divorce action. The threshold question here, for both the requirements of rule 24(a) and intervention in a marriage context, is whether Metropolitan has an interest relating to a property or transaction which is the subject of the action.

****35** Metropolitan never alleged any "interest" in any property or transaction relating to the subject matter of the petition. In its complaint in intervention, prior to the stipulation, Metropolitan stated as its basis for intervention that it "believes that this petition is filed as an attempt to defraud an insurance company by falsely attempting to establish a marriage where none existed." ***1082** This is clearly not an acceptable reason for intervening as of right in a proceeding to establish the existence of a marriage. Laudable as attempting to prevent fraud is, it does not approach the type of property interest that is typically contemplated by courts considering this issue in the context of an intervenor's application in a divorce proceeding.

****36** Looking to the treatment of this issue in other jurisdictions, we find that while most allow intervention in divorce proceedings, such intervention is granted only after the intervenor meets a heavy burden. Analyzing an identical intervention rule in West Virginia, the court found that "[a] third party seeking intervention in a divorce proceeding for the purpose of protecting a

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property interest assumes the burden of demonstrating an interest which will outweigh the substantial privacy interests of the divorcing parties." *Boyle v. Boyle*, 194 W.Va. 124, 459 S.E.2d 401, 404 (1995). In *Boyle*, the court denied intervention to a third party claiming a right to buy stock obtained by the wife as part of the divorce settlement. See *id.* at 405. Embracing the rationale of the *Boyle* court, another court recently allowed the second wife to intervene in a proceeding brought by the first wife, challenging the validity of her divorce settlement. See *Cohen v. Cohen*, 748 So.2d 91 (Miss.1999). There, the court stressed (at least seven times in one form or another) the "rare fact driven" nature of this case and that it is a significant departure from the normal rule. See *id.* at 92-94. At the outset of its discussion in *Cohen*, the court made it clear that under its intervention rule, identical to our own, "an economic interest alone in the litigation is insufficient to allow intervention." *Id.* at 93. (citations omitted).

****37** Other jurisdictions have adopted a similar rationale. For instance, in *In re Marriage of Perkinson*, 147 Ill.App.3d 692, 101 Ill.Dec. 137, 498 N.E.2d 319 (1986), an order of dissolution of marriage was entered shortly before the former husband drowned while working on his employer's tugboat. The employer, however, potentially liable for the drowning death of the man, was not permitted to intervene in an action seeking to set aside the order of dissolution. See *id.* 101 Ill.Dec. 137, 498 N.E.2d at 324. The court reasoned that though the former wife might bring a wrongful death action against the employer if the dissolution order was set aside, the employer's current interest in any future action that she might bring was at most "speculative, hypothetical, and incidental." *Id.*

****38** Likewise, in *Fisher v. Fisher*, 546 N.W.2d 354, 358 (N.D.1996), the court found that the children of divorcing parents did not have a right to intervene in their divorce proceedings regarding the appointment of a receiver for their closely held company, even if such appointment might affect the value of the children's shares in the company. The court's analysis begins by stating that "[a] 'direct'

interest is one that is not 'remote' or 'contingent.' " *Id.* at 356 (citing 3B James W. Moore, *Moore's Federal Practice* ¶ 24.07[2], at 24-54 (2d ed.1995)). It continues, "[a] 'legally protectible' interest is one that 'the substantive law recognizes as belonging to or being owned by the applicant.' " *Id.* (quoting *New Orleans Pub. Serv. v. United Gas Pipe Line*, 732 F.2d 452, 464 (5th Cir.), cert. denied, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984) (emphasis in original)). Finally, the court states that "[a] party who qualifies as a 'real party in interest' under rule 17(a), F.R. Civ. P., is a party with a 'legally protectible' interest." *Id.* (citing 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1543, at 339 (2d ed. 1990)) ("[T]he real party in interest requirement ... must be satisfied for purposes of asserting ... a claim by an intervenor."). Since the court found that the valuation of minority shares in a close corporation was a speculative undertaking, it held that the children did not have an interest in their parents' property that was "direct, substantial, and legally protectible." *Id.* at 356. [FN8]

FN8. See also *Arnold v. Arnold*, 214 Neb. 39, 332 N.W.2d 672, 674 (1983) (denying intervention to parents of one of the divorcing parties on grounds that they attempted to introduce into dissolution proceeding a number of legal actions involving themselves and divorcing parties that had nothing to do with division of marital assets); *Nielson v. Thompson*, 982 P.2d 709, 712 (Wyo.1999) (denying intervention to creditor where divorcing husband had no "possessory or marketable interest" in his spouse's property, making payment of his debt to creditor unavailable from such source).

***1083 **39** The claims of the parties who attempted to intervene in these actions are entirely analogous to those of the insurer in the present action. The privacy interests of a couple in determining their status and property rights without the interference of outside parties are clearly paramount. Certainly, Metropolitan's "interest" in this action is no greater than the employer in

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Perkinson, who was likely to be sued if the order of dissolution was set aside.

****40** Many of the cases denying intervention also find that it would be possible for the intervenor to bring a separate action to enforce any alleged rights, thereby avoiding their inappropriate insinuation into the private affairs of a married couple. *See Ex parte Kirkley*, 418 So.2d 118, 121 (Ala.1982) (former wife could not intervene in former husband's subsequent divorce proceeding to obtain any money owed her under their divorce decree, but rather could file contempt suit); *Fisher*, 546 N.W.2d at 358; *Boyle*, 459 S.E.2d at 405. [FN9]

FN9. Metropolitan would be able to contest its obligation in an action on the insurance contract, which is not before us on this appeal.

****41** Metropolitan has failed to show any interest in this action that requires its intrusion into an otherwise private matter between two persons regarding the nature of their relationship. In fact, as petitioner argues, Metropolitan denied Ms. Gonzalez's insurance claim during the pendency of the proceedings below, making it clear that it could proceed without the court's adjudication of this matter. Accordingly, adopting the rationale of the court in *Boyle*, I would hold that the trial court erred in permitting Metropolitan to intervene, and that it should have granted Ms. Gonzalez's motion to dismiss. As noted earlier, this view is joined only by Justice Stewart, and a majority of the court affirms on this question.

PROCEDURE ON REMAND

****42** Having found that section 30-1-4.5 requires only that an action to determine or establish a marriage be commenced within a year of the termination of the relationship, we reverse the trial court's grant of summary judgment in favor of Metropolitan on the issue of the statute of limitations.

****43** On remand, should Gonzalez choose to proceed with the petition for adjudication of marriage, the trial court should apply a

preponderance of the evidence standard of proof to the establishment of a marriage under the statute. *See Hansen v. Hansen*, 958 P.2d 931, 935-36 (Utah Ct.App.1998). While no single factor is determinative in the trial court's analysis, and while "numerous factors should be considered," evidence proving each of the five statutory elements is essential. *See Whyte v. Blair*, 885 P.2d 791, 793 (Utah 1994). The parties must make a showing of capacity to marry, capacity to give consent, assumption of marital rights and duties, cohabitation, and a holding out as, and acquiring a uniform and general reputation as, husband and wife. *See Utah Code Ann. § 30-1-4.5(1)(a)-(e)* (1998). One commentator has noted "the success of the common law marriage doctrine, and especially of the requirement of 'holding out,' in distinguishing between cases in which the parties' intent was marriage and those in which they cohabited without any such intent." Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 1996 Or. L.Rev. 709, 749 (1996). At trial, the court will have to determine whether Ms. Gonzalez meets this standard. The dispute regarding the existence of a "uniform" reputation is a material fact in this case and to the extent that the trial court's grant of summary judgment was based on that ground, it may not stand.

****44** Although not discussed by any party to this appeal, we note a point that may assist in the disposition of the case on remand. On March 26, 1999, after the entry of summary judgment in this case, Gonzalez filed an action in federal district court against Metropolitan, alleging various contractual and tortious causes of action related to its insurance policy. It is not clear from ***1084** the complaint in that case whether the claim therein relies on the case of *Proctor v. Insurance Co. of N. Am.*, 714 P.2d 1156 (Utah 1986), but it appears that this case is highly instructive. In *Proctor*, two claimants disputed the disbursement of the proceeds of two insurance policies. *See id.* at 1157. The policies did not name a beneficiary by name, but they both insured the "member and spouse." *Id.* At the time the policies were purchased, the insured was married to his second wife. His divorce,

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however, from his first wife was not finalized until nine months after his ceremony of marriage to his second wife. Thus, the second marriage was illegal. *See id.* at 1158.

****45** In response to the first wife's contention that her minor daughter was the rightful claimant under the policy, the court held that the principles of contract and insurance governed in this instance, and since the second wife was clearly the intended beneficiary, she should receive the proceeds of the policy. *See id.* The court in *Proctor* noted, among other things, that the insured was required to pay additional premiums for coverage for his "spouse." *See id.* at 1159. *Proctor* was not cited by either party in the case before us, but we note that it has a direct bearing on Metropolitan's obligation to Gonzalez under its policy, and further that, while a successful adjudication of marriage in state court would presumably determine her federal court claims, it would also not be a *sine qua non* for such a determination. *Proctor* appears to stand for the proposition that in some circumstances one who is not legally married may nevertheless be a "spouse" for purposes of coverage in an insurance policy, depending on the language of the policy and the intent of the parties. *See id.* at 1158-59.

CONCLUSION

****46** The judgment of the trial court is affirmed in part, but reversed on the statute of limitations issue, and the matter is remanded for further proceedings consistent with this opinion.

****47** Justice STEWART concurs in Associate Chief Justice DURHAM's opinion.

ZIMMERMAN, Justice, concurring:

****48** I concur in that portion of the opinion of Associate Chief Justice Durham that holds that a proceeding for the determination of marriage must be commenced within a year, but not completed. That is a more reasonable interpretation of the statute, and it seemingly protects the state's interest in avoiding fraud.

[8] ****49** I concur in that portion of Justice

Russon's opinion to the extent it holds that intervention pursuant to the stipulation was properly permitted. Justice Durham looks to cases from other jurisdictions concerning interventions in divorce proceedings for guidance, and then applies those rules and policies to a proceeding to determine a marriage, labeling the situations "analogous." She would hold that a party in Metropolitan's situation cannot be permitted to intervene, even on stipulation, because it would violate public policy. I cannot accept the easy public policy analogy Justice Durham draws between determination of marriage actions under the Utah statute and actions brought to end an existing legal marriage, particularly where the proceeding to determine a marriage appears to have been commenced solely to give Gonzalez legal entitlement to claim under the insurance policy and to sue Metropolitan. In such a situation, I would hold that the company's interest is not so speculative that Gonzalez cannot be permitted to agree to have the company's challenges adjudicated in the determination proceeding. It may have been tactically unwise for Gonzalez to have stipulated to the intervention in that context, but she did so. I see no overriding public policy against permitting that stipulation to be made effective.

****50** Unlike Justice Russon, however, I would not address the broader question of when third parties may properly be permitted to intervene in adjudications concerning a marriage over the objections of a party to the actual or putative marriage in question. Therefore, I do not join in that portion of Justice Russon's opinion.

RUSSON, Justice, dissenting:

****51** I dissent from Justice Durham's lead opinion. I would affirm all of the trial court's rulings.

***1085 **52** First, the trial court did not err in dismissing Gonzalez's petition for failure to meet the jurisdictional time limitation set forth in Utah Code Ann. § 30-1-4.5. Justice Durham's opinion does not even attempt to read the statute on the basis of its plain language, but instead simply

rewrites its provisions by attributing motives to the legislature. Although the requirement relating to conclusion, rather than commencement, of legal proceedings is unusual and could potentially raise constitutional concerns in certain hypothetical scenarios, this case is not one of them. Gonzalez had thirteen years in which to commence a petition for adjudication and failed to do so. Moreover, after filing her petition, she made no attempt to obtain an adjudication within the time limit. The trial court specifically found that an accelerated schedule could have been arranged if Gonzalez had sought one. This is not a case where petitioner was prevented from meeting the statutory deadline by events wholly beyond her control. Rather, it is evident from the record that Gonzalez simply failed to recognize the nature of the time limitation and falsely assumed it functioned as a traditional statute of limitations that had been satisfied at the time the petition was filed. It is not the constitutional duty of this court to rescue parties from their inability to read the plain language of a statute. I would affirm the court's decision in view of the particular facts of this case.

****53** Second, as recognized by Justice Zimmerman's opinion, the trial court correctly denied Gonzalez's motion to dismiss Metropolitan's complaint. Although Justice Durham undertakes an analysis of the standard of review relating to contested motions to intervene as of right, she fails to correctly reference the standard of review for the only question properly brought to us on appeal: the court's refusal to set aside the stipulation for intervention. She thus attempts to establish a new standard of review for a question not properly brought before us on appeal. This purported establishment of a new standard of review has not been joined by a majority of this court.

****54** Justice Durham implicitly relies on our statement in *First of Denver Mortgage Investors v. C.N. Zundel & Associates*, 600 P.2d 521, 527 (Utah 1979), that a "court" is not bound by stipulations between parties "when points of law requiring judicial determination are involved." [FN1] Durham Op. ¶ 32. However, this statement in *First of Denver* (whatever it means) clearly does not

empower us to review de novo a trial court's decision to set aside a stipulation as to matters of law. Rather, *First of Denver* recognizes that the trial court--not the Supreme Court--is entrusted with the discretion whether to honor such a stipulation between parties. Indeed, as we further stated in that case, whether a stipulation involves issues of fact or law, "[p]arties are bound by their stipulations unless relieved therefrom by the [trial] court, which has the power to set aside a stipulation entered into inadvertently or for justifiable cause." *Id.*; see also 73 Am.Jur.2d *Stipulations* § 13, at 548 (1974) ("It is generally recognized that it is within the discretion of the court to set aside a stipulation of the parties relating to the conduct of a pending cause."). As a result, a stipulation not set aside below will be reversed on appeal only if the trial court abused its discretion. The well-established abuse of discretion standard of review requires us to "presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." *Goddard v. Hickman*, 685 P.2d 530, 534-35 (Utah 1984). [FN2]

FN1. I must confess that the scope and import of this statement, as quoted in isolation by Justice Durham, utterly escapes me. So far as I am aware, all disputed cases brought before courts involve "points of law requiring judicial determination." Hence, a literal reading of this passage would require all courts everywhere to disregard all stipulations for the sake of rendering a full-blown independent determination of the legal soundness of the parties' choices.

FN2. In this regard, Justice Durham states that the trial court failed to consider whether Metropolitan had standing to intervene in this action. Durham Op. ¶ 32. But Gonzalez did not appeal any alleged failure of the trial court to enter specific findings that Metropolitan had standing to intervene at the time it approved the stipulation, nor is there any indication that the trial court was obligated to do so. Rather, Gonzalez appeals the

later denial of her motion to dismiss Metropolitan's complaint in intervention. With respect to that motion, the court received extensive briefing on Gonzalez's motion, heard oral argument, and entered findings of fact and rulings of law that specifically treated Metropolitan's standing to intervene. There is no basis in those careful and correct findings for us to attribute an abuse of discretion.

***1086 **55** Employing the correct standard of review, I would uphold the trial court's ruling denying Gonzalez's petition to dismiss Metropolitan's complaint. In this case, the trial court carefully reviewed the particular facts and circumstances before it and rendered a reasoned opinion refusing to set aside the stipulation. It found there was a sound legal basis for Metropolitan's intervention and that Gonzalez had failed to meet her burden of showing why the stipulation should be set aside. [FN3]

FN3. Gonzalez's primary argument in her motion was that she had been misled by Metropolitan's counsel into believing there were no other potential bases in the insurance contract for denying her claims. The trial court correctly found that Metropolitan had reserved its right to deny coverage under other provisions of the contract and had notified Gonzalez that it reserved the right to do so from the outset.

****56** Finally, I would hold that Metropolitan has a right to intervene in this action. Contrary to Justice Durham's assertion, this case is not "analogous to cases where a third party attempts to intervene in a divorce action." Durham Op. ¶ 34. In a divorce action, the status of the marriage relationship (and the attendant legal and personal interests that attach to that relationship) have already been established. Because divorce constitutes such a fundamental alteration in the lives of a husband and a wife, the law justifiably presumes that a divorce will be sought for legitimate personal reasons. Intervention in divorce cases is typically sought by creditors who claim that their interests are

implicated by the disposition of the spouses' financial assets. Such interventions are disfavored because they present a substantial risk of confusing the central issues relating to the parties' already-established private relationship. Moreover, the likelihood that parties to a marriage will seek a divorce for the sole or primary purpose of defrauding or damaging a creditor is small. [FN4] Hence, courts properly impose more stringent standards when entertaining applications for intervention in divorce cases.

FN4. It was suggested at oral argument that annulments might present a closer analogy and could be affected by our decision here. Whether or not annulment is an adequate analogy, it does not alter the fundamental policies governing intervention in the particular circumstances of this case. To the extent there is a properly supported allegation that parties to a relationship are attempting to alter their legal status, *where that status (and the attendant privacy rights it entails) is in doubt*, and they are attempting the alteration for the sole or primary purpose of deceit or fraud (and the other criteria of rule 24 are met), a right of intervention should be granted. Moreover, to the extent we find it necessary to craft particular rules to meet new circumstances, we may do so when the proper case arises.

****57** The reasons for denying intervention in most divorce cases manifestly do not apply to the facts of this particular case. In this case, Metropolitan specifically alleged a fraudulent basis for the marriage petition. In its complaint in intervention, Metropolitan asserts that "Juanita Gonzalez's sole purpose in filing this petition is to attempt to create a relationship of husband and wife between herself and Martin Briceno for the sole purpose of obtaining insurance coverage under a policy issued by Metropolitan to Martin Briceno." In other words, Metropolitan contends that Gonzalez and Briceno had not actually met the criteria of the unsolemnized marriage statute at the time of the fire and that they did not actually believe they met the

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criteria. If this contention is proven correct, Gonzalez's attempt to retroactively establish a legal status for the sole purpose of obtaining insurance benefits would constitute fraud and manipulation of a state statute. I submit that where there is a good faith assertion that a petition to validate an unsolemnized marriage is filed for fraudulent purposes, the principles governing permissive intervention and the statutory policies underlying the marriage statute grant a right of intervention. A party clearly has a right of intervention in an action that was brought for the sole purpose of defrauding that party. [FN5]

FN5. It is no answer to state, as does Justice Durham, Durham Op. *supra* note 9, that Metropolitan may litigate its concerns in the context of a separate contract action on the insurance policy. Metropolitan obviously cannot litigate, in the context of a separate contract dispute, a decision regarding marital status that has been established and recognized by another court of competent jurisdiction.

***1087 **58** Given the fact that Metropolitan is alleging a fraudulent basis for the petition, and because the retroactive establishment of an unsolemnized marriage does not proceed from the same presumptions of the established legal status inherent in any divorce action, no special heightened burden applies to Metropolitan's application for intervention. Consequently, the issues regarding the right of intervention are governed by the traditional standards of Utah Rule of Civil Procedure 24(a).

****59** According to that rule, the four traditional requirements for intervention are met. First, there is no dispute that the application was timely; second, Metropolitan has a clear interest in avoiding the payment of fraudulent insurance claims; third, Gonzalez's petition may impair that interest if Metropolitan does not have the opportunity to demonstrate that the petition has been brought for fraudulent purposes; and fourth, no party other than Metropolitan has a clear interest or opportunity to present evidence demonstrating

that Gonzalez's petition is fraudulent.

****60** The trial court correctly dismissed Gonzalez's petition for failure to meet the time limitation in Utah Code Ann. § 30-1-4.5; it did not abuse its discretion in denying Gonzalez's request to ignore her stipulation; and it correctly refused to dismiss Metropolitan's complaint in intervention. I would affirm the trial court on all grounds.

****61** Finally, I write to express my disapproval of Justice Durham's apparent attempt to give legal advice to one of the parties. She states in her section titled "Procedure on Remand" that "[a]lthough not discussed by any party to this appeal, we note a point that may assist in the disposition of the case on remand." Durham Op. ¶ 44. However, the issue she thereafter discusses has nothing to do with any disputed legal question this court believes is likely to occur on remand to *the district court*. See *State v. James*, 819 P.2d 781, 795 (Utah 1991). Rather, she provides an advisory opinion that is apparently exclusively related to collateral and factually distinct proceedings in *federal court*. She does so under the apparent presumption that petitioner's counsel has failed to locate relevant, perhaps even dispositive, authority relating to petitioner's federal claim. This court has no business giving such advice to parties represented by counsel. Nor can we provide such advice to a federal court when no questions have been properly certified from that court. See Utah Code Ann. § 78-2-2(1) (1996).

****62** Chief Justice HOWE concurs in Justice RUSSON's dissenting opinion.

****63** Justice STEWART acted on this opinion prior to his retirement.

Briefs and Other Related Documents (Back to top)

- 1999 WL 33919958 (Appellate Brief) Appellant's Reply Brief (Apr. 22, 1999) Original Image of this Document (PDF)

Tab 16

C

Briefs and Other Related Documents

United States District Court, District of Columbia.

Monique JOHNSON-TANNER, Plaintiff,

v.

FIRST CASH FINANCIAL SERVICES, INC., and

Famous Pawn, Inc. Defendants.

No. CIV.A.01-718 PLF.

Jan. 2, 2003.

African-American former employee brought § 1981 racial discrimination action against both employer's parent corporation and its subsidiary, seeking injunctive relief and monetary damages. Employer moved to dismiss for lack of personal jurisdiction, improper venue, and failure to state a claim. The District Court, Paul L. Friedman, J., held that: (1) District Court could exercise personal jurisdiction over parent corporation; (2) venue was proper; and (3) allegations stated claim for § 1981 employment discrimination.

Motions denied.

West Headnotes

[1] Federal Courts 170B ¶1037

170B Federal Courts

170BXI Courts of District of Columbia

170BXI(A) In General; District Court

170Bk1035 Jurisdiction of District Court

170Bk1037 k. Persons Subject. Most

Cited Cases

District of Columbia's long-arm provision allows for personal jurisdiction to the fullest extent permissible under the Due Process Clause. U.S.C.A. Const.Amend. 14; D.C. Official Code, 2001 Ed. § 13-423(a)(1).

[2] Constitutional Law 92 ¶305(5)

92 Constitutional Law

92XII Due Process of Law

92k304 Civil Remedies and Proceedings

92k305 Actions

92k305(4) Jurisdiction and Venue

92k305(5) k. Nonresidents in

General. Most Cited Cases

Due Process, in the context of personal jurisdiction, is satisfied where a defendant has minimum contacts with the forum jurisdiction such that the exercise of personal jurisdiction will not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ¶305(5)

92 Constitutional Law

92XII Due Process of Law

92k304 Civil Remedies and Proceedings

92k305 Actions

92k305(4) Jurisdiction and Venue

92k305(5) k. Nonresidents in

General. Most Cited Cases

Minimum contacts, for the purpose of personal jurisdiction under the Due Process Clause, are established where a defendant purposefully avails itself of the privilege of conducting activities within the forum jurisdiction such that the defendant should reasonably anticipate being haled into court there. U.S.C.A. Const.Amend. 14.

[4] Federal Courts 170B ¶96

170B Federal Courts

170BII Venue

170BII(A) In General

170Bk96 k. Affidavits and Other

Evidence. Most Cited Cases

The plaintiff bears the burden of proving a prima facie case of personal jurisdiction by alleging specific acts linking a defendant with the forum. U.S.C.A. Const.Amend. 14.

[5] Federal Courts 170B ¶96

170B Federal Courts

170BII Venue

170BII(A) In General

170Bk96 k. Affidavits and Other Evidence. Most Cited Cases

In deciding whether a basis for personal jurisdiction exists, factual discrepancies in the record must be resolved in the plaintiff's favor.

[6] Federal Courts 170B ¶82

170B Federal Courts

170BII Venue

170BII(A) In General

170Bk77 Corporations, Actions by or Against

170Bk82 k. Agent Within District; Parent and Subsidiary. Most Cited Cases

Ordinarily, a defendant corporation's contacts with a forum may not be attributed to affiliated corporations, for the purpose of establishing personal jurisdiction over affiliated corporations.

[7] Federal Courts 170B ¶82

170B Federal Courts

170BII Venue

170BII(A) In General

170Bk77 Corporations, Actions by or Against

170Bk82 k. Agent Within District; Parent and Subsidiary. Most Cited Cases

When the corporation contesting jurisdiction is found to be nothing more than the alter ego of an affiliated corporation over which the district court does have jurisdiction, the affiliated corporation's jurisdictional contacts may be extended to reach the other corporate entity.

[8] Federal Courts 170B ¶97

170B Federal Courts

170BII Venue

170BII(A) In General

170Bk97 k. Determination of Venue Questions. Most Cited Cases

Whether one corporation is the alter ego of another, for purposes of establishing personal jurisdiction over one when the district court has jurisdiction

over the other, is a question of law to be decided by the district court. U.S.C.A. Const.Amend. 14.

[9] Federal Courts 170B ¶82

170B Federal Courts

170BII Venue

170BII(A) In General

170Bk77 Corporations, Actions by or Against

170Bk82 k. Agent Within District; Parent and Subsidiary. Most Cited Cases

Ultimately, in determining whether personal jurisdiction exists over parent corporation in forum court when it exists over subsidiary corporation, the question is whether the parent corporation so dominated the subsidiary corporation as to negate its separate personality, making the exercise of jurisdiction over the absent parent fair and equitable. U.S.C.A. Const.Amend. 14.

[10] Federal Courts 170B ¶82

170B Federal Courts

170BII Venue

170BII(A) In General

170Bk77 Corporations, Actions by or Against

170Bk82 k. Agent Within District; Parent and Subsidiary. Most Cited Cases

To determine whether a parent corporation is a separate corporate entity distinct from its subsidiary, over which district court has personal jurisdiction, or merely the alter ego of the subsidiary, for purposes of deciding existence of personal jurisdiction over parent corporation, the district court must evaluate: (1) whether there is such a unity of interest and ownership that the separate corporate personalities of parent corporation and subsidiary effectively no longer exist, and (2) whether an inequitable result would follow if the district court treats subsidiary's allegedly wrongful acts as those of subsidiary alone and not also those of parent corporation. U.S.C.A. Const.Amend. 14.

[11] Corporations 101 ¶1.6(9)

101 Corporations

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101I Incorporation and Organization
 101k1.6 Particular Occasions for
 Determining Corporate Entity
 101k1.6(9) k. Remedies and Procedure;
 Parties. Most Cited Cases
 Unity of interest between parent corporation and
 subsidiary is established, for purposes of
 determining if subsidiary is alter ego of parent
 corporation, in analyzing existence of personal
 jurisdiction over parent corporation when it exists
 over subsidiary, if parent corporation had active and
 substantial control over subsidiary at the time of the
 alleged wrongful acts that form basis of lawsuit, but
 this control does not have to amount to actual
 day-to-day control or supervision. U.S.C.A.
 Const.Amend. 14.

[12] Corporations 101 ⇐1.6(9)

101 Corporations
 101I Incorporation and Organization
 101k1.6 Particular Occasions for
 Determining Corporate Entity
 101k1.6(9) k. Remedies and Procedure;
 Parties. Most Cited Cases
 Among the factors the district court is to consider in
 determining if subsidiary is alter ego of parent
 corporation, in analyzing existence of personal
 jurisdiction over parent corporation when it exists
 over subsidiary, are whether there was a failure to
 maintain separate corporate minutes or records, a
 failure to maintain corporate formalities, a
 commingling of funds or other assets, a diversion of
 one corporation's funds to the other's uses, the use
 of the same office or business location, and a joint
 accounting and payroll system, whether the
 subsidiary is operated as a mere division of the
 parent or exclusively in the interest of the parent,
 and whether there is a transfer of personnel back
 and forth between the parent corporation and its
 subsidiary. U.S.C.A. Const.Amend. 14.

[13] Federal Courts 170B ⇐82

170B Federal Courts
 170BII Venue
 170BII(A) In General
 170Bk77 Corporations, Actions by or
 Against

170Bk82 k. Agent Within District;
 Parent and Subsidiary. Most Cited Cases
 Existence of unity of interest and ownership blurred
 any distinction between employer's parent
 corporation and subsidiary, so that District Court
 could exercise personal jurisdiction over parent
 corporation, in employee's racial discrimination
 action against both parent corporation and
 subsidiary, when District Court had personal
 jurisdiction over subsidiary; parent and subsidiary
 shared at least three key common officers and
 directors, none of the shared officers and directors
 maintained separate phone or facsimile line for their
 dual roles, one executive employee was transferred
 from parent to subsidiary, employee of parent made
 hiring and firing decisions for subsidiary, parent
 headquarters maintained nearly all records for
 subsidiary employee, and parent and subsidiary
 maintained joint payroll and accounting systems.
 U.S.C.A. Const.Amend. 14.

[14] Federal Courts 170B ⇐1041

170B Federal Courts
 170BXI Courts of District of Columbia
 170BXI(A) In General; District Court
 170Bk1040 Procedure in District Court
 170Bk1041 k. Venue and Change of
 Venue. Most Cited Cases
 Venue in District of Columbia was proper, in
 employee's racial discrimination action against both
 employer's parent corporation and its subsidiary,
 where parent corporation was subject to personal
 jurisdiction under District of Columbia's long-arm
 statute by virtue of its inextricable links to and
 control over subsidiary, which operated businesses
 in the District of Columbia. 28 U.S.C.A. §
 1391(b)(1); D.C. Official Code, 2001 Ed. §
 13-423(a)(1).

[15] Federal Civil Procedure 170A ⇐673

170A Federal Civil Procedure
 170AVII Pleadings and Motions
 170AVII(B) Complaint
 170AVII(B)1 In General
 170Ak673 k. Claim for Relief in
 General. Most Cited Cases
 Under the notice pleading requirement, a plaintiff's

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complaint need only contain a short and plain statement of the claim and the grounds on which it is based, and need not plead law or match facts with each element of a legal theory. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[16] Civil Rights 78 ⇨ 1395(8)

78 Civil Rights

78III Federal Remedies in General

78k1392 Pleading

78k1395 Particular Causes of Action

78k1395(8) k. Employment Practices.

Most Cited Cases

(Formerly 78k235(3))

Civil Rights 78 ⇨ 1532

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1532 k. Pleading. Most Cited Cases

(Formerly 78k375)

While plaintiff ultimately has the burden of proving a prima facie case in an employment discrimination case, plaintiff is not required to set forth the elements of a prima facie case at the initial pleading stage. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A

[17] Civil Rights 78 ⇨ 1395(8)

78 Civil Rights

78III Federal Remedies in General

78k1392 Pleading

78k1395 Particular Causes of Action

78k1395(8) k. Employment Practices.

Most Cited Cases

(Formerly 78k235(3))

Allegation by African-American female former employee that employer's refusal to transfer her on the basis of her race constituted a violation of her rights under § 1981 and caused her to be constructively discharged properly put defendants on notice as to nature and basis of her claims and thus adequately stated claim under § 1981 for employment discrimination. 42 U.S.C.A. § 1981; Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

*36 Michael G. Kane, Meredith S. Francis, Cashdan, Golden & Kane, P.L.L.C., Washington, DC, for plaintiff.

Joseph Yenouskas, Douglas P. Lobel, Morgan, Lewis & Bockius, McLean, VA, for defendants.

OPINION AND ORDER

PAUL L. FRIEDMAN, District Judge.

This action was filed under 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, seeking injunctive relief and monetary damages for allegedly unlawful employment discrimination based on race. Plaintiff alleges that First Cash Financial Services, Inc. and its wholly owned subsidiary, Famous Pawn, Inc., refused to laterally transfer the plaintiff, allegedly causing her constructive discharge. This matter comes before the Court on defendants' motions to dismiss for lack of personal jurisdiction, improper venue and failure to state a claim.^{FN1} For the reasons that follow,*37 this Court denies defendants' motions to dismiss.

FN1. First Cash's motion to dismiss includes defenses under Rules 12(b)(2), 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure. Famous Pawn's motion to dismiss does not raise the Rule 12(b)(2) lack of personal jurisdiction defense. Given the similar nature of the defendants' separately filed motions for dismissal, the Court will address both motions together.

I. BACKGROUND

From June 1997 to September 1998, plaintiff Monique Johnson-Tanner, a resident of the District of Columbia and an African American female, was employed as a salesperson by First Cash and/or by Famous Pawn. Plaintiff was originally hired to work at a pawn shop in Georgetown in the District of Columbia but, after several transfers, she ended up working at a Silver Spring, Maryland pawn shop. After being twice denied a transfer back to the Georgetown store, allegedly because of her race, plaintiff filed her Amended Complaint on May 8, 2001.

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First Cash is a Delaware Corporation with its principal place of business in Arlington, Texas. Famous Pawn is a Maryland Corporation that operates pawn shops in Maryland, Virginia and the District of Columbia. First Cash previously was the subject of a similar employment discrimination suit, the testimony from which plaintiff relies on heavily in the instant case.^{FN2}

FN2 See *Williams v First Cash, Inc*, Civ Action 98-3567 (D C Superior Court 1998)

II PERSONAL JURISDICTION

[1][2][3][4][5] District of Columbia law controls the extent to which the Court may exercise personal jurisdiction over a nonresident defendant. See *Crane v Carr*, 814 F 2d 758, 762 (D C Cir 1987). D C Code Section 13-423(a)(1) provides that the Court “may exercise personal jurisdiction over a person, who acts directly or as an agent, as to a claim for relief arising from the person’s transacting any business in the District of Columbia.” This long-arm provision allows for jurisdiction to the fullest extent permissible under the Due Process Clause of the United States Constitution. See *Crane v New York Zoological Soc’y*, 894 F 2d 454, 455 (D C Cir 1990). Due Process is satisfied where a defendant has “minimum contacts” with the District of Columbia such that the exercise of personal jurisdiction will not offend “traditional notions of fair play and substantial justice.” *International Shoe Co v Washington*, 326 U S 310, 316, 66 S Ct 154, 90 L Ed 95 (1945). Such minimum contacts are established where a defendant “purposefully avails” itself of the privilege of conducting activities within the forum jurisdiction such that the defendant “should reasonably anticipate being haled into court” there. *Hanson v Denckla*, 357 U S 235, 253, 78 S Ct 1228, 2 L Ed 2d 1283 (1958). See *World-Wide Volkswagen Corp v Woodson*, 444 U S 286, 297, 100 S Ct 559, 62 L Ed 2d 490 (1980). The plaintiff bears the burden of proving a *prima facie* case of personal jurisdiction by alleging specific acts linking a defendant with the forum. See *Crane v New York Zoological Soc’y*, 894 F 2d at 456,

United States v Philip Morris, Inc, 116 F Supp 2d 116, 121 (D D C 2000). In deciding whether a basis for personal jurisdiction exists, factual discrepancies in the record must be resolved in the plaintiff’s favor. See *United States v Philip Morris, Inc*, 116 F Supp 2d at 121.

In an effort to establish that First Cash transacts business in the District of Columbia and possesses the necessary minimum contacts, plaintiff lists numerous facts indicating that Famous Pawn is “not its own business, but that of the parent corporation [First Cash].” Plaintiff’s Opposition at 6 (“Pl Opp”). In opposition, First Cash argues that it and Famous Pawn are in fact separate companies maintaining all corporate formalities. First Cash further states that it owns no property in the District of Columbia, is not licensed to do *38 business in the District and transacts no business in the District. This Court finds no genuinely separate identity between First Cash and Famous Pawn, and the Court therefore has personal jurisdiction over First Cash (not just over Famous Pawn).

A Alter Ego Analysis

[6][7][8] Ordinarily, a defendant corporation’s contacts with a forum may not be attributed to affiliated corporations. See *El-Fadl v Central Bank of Jordan*, 75 F 3d 668, 675-76 (D C Cir 1996), *Shapiro, Lifschitz & Schram, P C v Hazard*, 90 F Supp 2d 15, 22 (D D C 2000), *Material Supply Int’l, Inc v Sunmatch Indus Co*, 62 F Supp 2d 13, 19 (D D C 1999). An exception exists, however, when the party contesting jurisdiction is found to be nothing more than the alter ego of an affiliated corporation over which the court does have jurisdiction, in that case the affiliated corporation’s jurisdictional contacts may be extended to reach the other corporate entity. See *El-Fadl v Central Bank of Jordan*, 75 F 3d at 676 (“if parent and subsidiary ‘are not really separate entities,’ or one acts as an agent of the other, the local subsidiary’s contacts can be imputed to the foreign parent”), *Material Supply Int’l, Inc v Sunmatch Indus Co*, 62 F Supp 2d at 20 (same, where parent corporation so dominates subsidiary as “to negate its separate personality”) “

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In such cases, the foreign parent will be found to be transacting business in the forum state through the activities of its subsidiary” *Color Sys, Inc v Meteor Photo Reprographic Sys, Inc*, 1987 WL 11085, *4 (D D C 1987) Whether one corporation is the alter ego of another is a question of law to be decided by the court *See Shapiro, Lifschutz & Schram, P C v Hazard*, 90 F Supp 2d at 22, *Material Supply Int'l, Inc v Sunmatch Indus Co*, 62 F Supp 2d at 19-20

[9][10] The defendants concede that the Court has personal jurisdiction over Famous Pawn which admittedly operates pawn shops in the District of Columbia The question is whether the Court also has personal jurisdiction over First Cash as the alter ego of Famous Pawn To determine whether Famous Pawn is a separate corporate entity distinct from First Cash or merely the alter ego of First Cash, the Court must evaluate (1) whether there is such a unity of interest and ownership that the separate personalities of First Cash and Famous Pawn effectively no longer exist, and (2) whether an inequitable result would follow if the Court treats Famous Pawn's allegedly wrongful acts as those of Famous Pawn alone and not also those of First Cash *See Shapiro, Lifschutz & Schram, P C v Hazard*, 90 F Supp 2d at 23, *Material Supply Int'l, Inc v Sunmatch Indus Co*, 62 F Supp 2d at 20 Ultimately, the question is whether the parent corporation “so dominated the [subsidiary] corporation as to negate its separate personality,” making the exercise of jurisdiction over the absent parent fair and equitable *Material Supply Int'l, Inc v Sunmatch Indus Co*, 62 F Supp 2d at 20 (quoting *Hart v Department of Agriculture*, 112 F 3d 1228, 1231 (D C Cir 1997))

1 Unity of Interest and Ownership

[11][12][13] Unity of interest is established if First Cash had active and substantial control of Famous Pawn at the time of the alleged racial discrimination, *see Shapiro, Lifschutz & Schram, P C v Hazard*, 90 F Supp 2d at 23, but this control does not have to amount to actual day-to-day control or supervision *See Material Supply Int'l, Inc v Sunmatch Indus Co*, 62 F Supp 2d at 20

Among the factors the Court is to consider in making this determination are whether there was a failure to maintain separate corporate minutes or *39 records, a failure to maintain corporate formalities, a commingling of funds or other assets, a diversion of one corporation's funds to the other's uses, the use of the same office or business location, and/or a joint accounting and payroll system *Id* It is also relevant whether the subsidiary is operated as a mere division of the parent and/or whether the subsidiary is operated exclusively in the interest of the parent *See id* The transfer of personnel back and forth between the parent corporation and its subsidiary or affiliate is another relevant factor *See Color Sys, Inc v Meteor Photo Reprographic Sys, Inc*, 1987 WL 11085 at *5 In this case, a number of these factors lead the Court to conclude that there is sufficient unity of interest and ownership to blur any distinction between the two companies' respective personalities and to permit the Court reasonably to exercise personal jurisdiction over First Cash Financial Services

First, First Cash and Famous Pawn share at least three key common officers and directors Rick Powell, Alan Barron and Rick Wessel *See* Pl Opp, Exhibit 22, First Cash Responses to Plaintiff's Interrogatories at 6, 8 ^{FN3} Rick Powell is both Chairman/CEO of First Cash and a Director of Famous Pawn Alan Barron serves as the Chief Operating Officer of First Cash and as the President of Famous Pawn Rick Wessel handles the duties of Chief Financial Officer for both First Cash and Famous Pawn, he also fills the roles of Director, Secretary and Treasurer of First Cash Sharing officers between the parent and the subsidiary or the presence of “interlocking directorates” are indicative of common corporate ownership and control *See Color Sys, Inc v Meteor Photo Reprographic Sys, Inc*, 1987 WL 11085 at *5, 6 (finding alter ego test satisfied in part where parent and subsidiary shared two of three members of board of directors and where one co-manager of parent was also president of subsidiary), *Shapiro, Lifschutz & Schram, P C v Hazard*, 90 F Supp 2d at 26 (suggesting operational nexus where two seemingly separate construction-related companies shared the sole employee of one of the companies), *Material Supply Int'l, Inc v Sunmatch Indus Co*,

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62 F.Supp.2d at 22 (strong evidence of control where president of parent makes all final business and financial decisions regarding subsidiary).

FN3. Unless otherwise noted, all exhibits cited herein are Exhibits to Plaintiff's Opposition to Defendants' Motion to Dismiss.

Second, according to Rick Wessel, none of the common executives/directors maintains separate phone or fax lines for their respective dual roles. See Exhibit 19, September 21, 2001 Deposition of Rick Wessel at 127-28 ("Wessel Dep"). This is another indicator that there is a unity of interest and operations. See *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 90 F.Supp.2d at 26 n. 11 (undifferentiated use of office equipment such as phones, faxes, copiers and computers by dual employees is relevant factor in assessing nature of corporate ownership and control).

Third, the joint executives/directors listed above ordered the transfer of at least one employee, Chris Lee, from First Cash in Texas to the Washington, D.C. metropolitan region to serve as First Cash or Famous Pawn's Regional Vice President, with responsibility for overseeing District of Columbia stores. See Wessel Dep. at 24; Exhibit 9, 2001 Deposition of Chris Lee at 32. The only stores in the District of Columbia, it should be noted, were Famous Pawn shops.^{FN4} As First Cash's Regional *40 Vice President, Lee had responsibility for store operations in Washington, D.C., which included the responsibility to terminate employees from District of Columbia—that is, Famous Pawn-stores. See Exhibit 8, 1998 Deposition of Chris Lee at 16-17. One of the employees whom Lee terminated was Cynthia Williams, who worked in a pawn shop located in Georgetown. *Id.*

FN4. Lee, who testified that he was employed by First Cash during his 1998 deposition in *Williams v. First Cash, Inc.*, now states that he erroneously labeled himself a First Cash employee when in fact he worked for Famous Pawn. See First

Cash's Reply in Support of its Motion to Dismiss for Lack of Personal Jurisdiction at 12-13 ("First Cash's Reply"). If this is true, this only provides further evidence that at least one employee was transferred between the parent and the subsidiary.

Another employee, Karie McBride, testified that she was hired as First Cash's Regional Human Resource Director by Scott Williamson, a First Cash Senior Vice President who subsequently served as McBride's supervisor. In this position, McBride had hiring authority, which she exercised during visits to District of Columbia stores. See Exhibit 11, 1998 McBride Deposition at 7-8, 13 ("McBride Dep. I"); Exhibit 34, McBride Trial Testimony at 3. This statement was made during McBride's deposition in *Williams v. First Cash, Inc.* During McBride's deposition three years later in the instant case, Ms. McBride claimed to have mistakenly identified herself as a First Cash employee during her *Williams* deposition, and testified that she-like Chris Lee—was in fact a Famous Pawn employee. See First Cash's Reply at 13. If McBride was actually a Famous Pawn employee, hired and supervised by a First Cash employee, this only further demonstrates First Cash's exercise of management control and authority over Famous Pawn employees.

Since the primary focus of the alter ego analysis is to ascertain whether the parent corporation "so dominated the [subsidiary] corporation as to negate its separate personality," see *Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 62 F.Supp.2d at 20, First Cash's control of Famous Pawn supervisory employees and its high degree of oversight and management activity—including the hiring and firing of First Pawn employees—is an extremely relevant factor, independent of the actual sharing of officers. See *Color Sys., Inc. v. Meteor Photo Reprographic Sys., Inc.*, 1987 WL 11085 at *5 (transfer of personnel between parent and subsidiary is factor for consideration); cf. *Richard v. Bell Atlantic Corp., Inc.*, 976 F.Supp. 40, 44, 47-48 (D.D.C.1997) (common management of human resources functions probative of whether parent controls employment decisions of subsidiaries; evidence of "consultative

involvement' with respect to decisions concerning hiring, promotion, evaluation, work assignments, training, and discharge" of subsidiary's employees also relevant factor).

Fourth, according to Ms. McBride, First Cash headquarters in Arlington, Texas inputs, stores and maintains nearly all records concerning Famous Pawn employees, including those employed in the District of Columbia. *See* McBride Dep. I at 16-17; *see also* Wessel Dep. at 66-67, 87. These personnel files include employment applications, performance reviews, background checks, separation (termination) forms-all of which are supplied by First Cash directly-and information on employee demographics. *See* Exhibit 12, 2001 McBride Deposition at 135, 156-57, 161-62 ("McBride Dep. II"). Ms. McBride forwarded some of the human resources materials to First Cash in Texas for processing and storage and regularly contacted the First Cash employee in charge of payroll, Phyllis Christian, in order to gain access to the information contained in the *41 personnel files.

See id. at 158, 180-81; McBride Dep. I at 16-17. In addition, the First Cash job application telephone hotline and the employment page on the First Cash website-both advertised at the Georgetown Famous Pawn shop-put prospective employees in touch with John Hamilton, the First Cash human resources recruiter. *See* Exhibit 43, Affidavit of Michael Marra ¶¶ 3-5.

Fifth, First Cash and Famous Pawn also maintain joint payroll and accounting systems. *See* Wessel Dep. at 90-91, 110. Employees at First Cash's Texas headquarters provide "accounting [services], payroll processing, accounts payable processing [and] financial statement generation" for Famous Pawn's District of Columbia stores. *Id.* at 110. In fact, Famous Pawn pay stubs bear the name of First Cash along with its Texas address. *See, e.g.,* Exhibit 31 (Monique Tanner Pay Stub). First Cash also supplies Famous Pawn with income tax services, including processing "of Famous Pawn's property taxes, ... sales tax payments and state income tax filings." *Id.* Health benefits, 401(k) account administration, worker's compensation insurance, an integrated computer network, computer support and e-mail services also are

provided by First Cash to Famous Pawn and First Cash's other subsidiaries. *See* Wessel Dep at 44, 47-48, 68, 91, 112.

Although First Cash asserts that these services are provided through contract, there is no evidence that First Cash bills Famous Pawn directly for these services. It appears that First Cash merely calculates an amount owed by Famous Pawn based upon Famous Pawn's revenues vis-à-vis the total revenues from the First Cash family of companies and then simply deducts that amount from Famous Pawn accounts-another indicator of a unity of interest, ownership and control. *See Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 90 F.Supp.2d at 24 (unity of financial transactions and no written documentation showing separate corporate identities when monetary exchanges are at issue important factors); *cf. MCI Communications Corp. v. American Tel. & Tel. Co.*, 1983 WL 1881, **10, 12-13 (D.D.C.1983) (common employee insurance and stock benefit plans are factors for consideration in analysis of transacting business venue provision).

Based on all of these factors, the Court concludes that First Cash exercised a sufficient degree of control over Famous Pawn and there was a sufficiently clear unity of interest and ownership that the two companies cannot be treated as separate and distinct corporate identities. This Court therefore may exercise personal jurisdiction over First Cash as well as Famous Pawn.

2. Inequitable Result

This Court finds that it would create an injustice to permit First Cash to escape the consequences of its substantial connection to Famous Pawn's employment practices and procedures in the District of Columbia. It is evident from the record that there is a unity of interest between the two entities. First Cash has sufficient ownership and control over all aspects of Famous Pawn's business to establish that First Cash is transacting business in the District of Columbia, and thus to satisfy the minimum contacts requirement for personal jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. at 316, 66 S.Ct. 154. There is nothing unfair or

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inequitable in treating the wrongful acts of Famous Pawn (if proven) as those of First Cash as well. *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 90 F.Supp.2d at 26.

*42 III. VENUE

[14] Defendants also argue that venue is improper in this district. Under 28 U.S.C. § 1391(b)(1), this district is an appropriate venue if both First Cash and Famous Pawn reside here. As corporations, defendants are “deemed to reside in any judicial district in which [they are] subject to personal jurisdiction at the time the action is commenced.” 28 U.S.C. § 1391(c). Famous Pawn has never contested personal jurisdiction because it operates pawn shops in the District of Columbia. As discussed above, the Court finds that First Cash is subject to personal jurisdiction under the D.C. long-arm statute by virtue of its inextricable links to and control over Famous Pawn. Thus, venue is proper in this district under 28 U.S.C. § 1391(b)(1).

IV. FAILURE TO STATE A CLAIM

Plaintiff brings her claim under 42 U.S.C. § 1981, which prohibits racial discrimination in the “making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. § 1981(b). Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants argue that plaintiff has failed to state a claim because she has not alleged an adverse employment action in her complaint, an essential element of a *prima facie* case of employment discrimination. *See, e.g., Brown v. Brody*, 199 F.3d 446, 452 (D.C.Cir.1999).

[15][16] Defendants' argument is of no avail. This Court need not determine at this stage whether the denial of plaintiff's lateral transfer constitutes an adverse action. More to the point, plaintiff is not required to allege an adverse action in her complaint. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, plaintiff's complaint need only contain a short and plain statement of the claim

and the grounds on which it is based, and need not plead law or match facts with each element of a legal theory. Therefore, a complaint may be dismissed for failure to state claim only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.” *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C.Cir.2000) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Furthermore, in deciding a motion to dismiss, the Court must accept plaintiff's allegations as true and draw all reasonable inferences in plaintiff's favor. *Glymph v. District of Columbia*, 180 F.Supp.2d 111, 114 (D.D.C.2001). While plaintiff ultimately has the burden of proving a *prima facie* case in an employment discrimination case, she “is not required to set forth the elements of a *prima facie* case at the initial pleading stage.” *Glymph v. District of Columbia*, 180 F.Supp.2d at 114; *see Sparrow v. United Air Lines, Inc.*, 216 F.3d at 1114 (“[n]one of this, however, has to be accomplished in the complaint itself.”).

[17] Furthermore, Count I of plaintiff's First Amended Complaint expressly states: “First Cash/Famous Pawn's refusal to transfer Ms. Johnson-Tanner on the basis of her race constituted a violation of her rights under 42 U.S.C. Section 1981 and caused her to be constructively discharged.” First Amended Complaint ¶ 20 (“Comp.”). This statement clearly puts defendants on notice of the nature and basis of plaintiff's claim. *See Sparrow v. United Air Lines, Inc.*, 216 F.3d at 1115. Plaintiff identifies herself as a member of a minority class, effectively asserts that she requested and was denied a transfer, and cites three separate statements that implicate race as a deciding factor in denying*43 the transfer. *See* Compl. ¶¶ 3, 10, 12, 13, 15-16. Taking these allegations as true, it is apparent that plaintiff's complaint properly puts defendants on notice as to the nature and basis of plaintiff's claims and thus adequately states a claim. *See Glymph v. District of Columbia*, 180 F.Supp.2d at 114. Accordingly, it is hereby

ORDERED that defendants' motions to dismiss for lack of personal jurisdiction, improper venue and failure to state a claim are DENIED; and it is

FURTHER ORDERED that counsel for all parties shall appear for a status conference on January 29, 2003 at 9:30 a.m.

SO ORDERED.

D.D.C.,2003.

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Briefs and Other Related Documents (Back to top)

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END OF DOCUMENT

Tab 17

C

Court of Appeals of Utah.
LUCKY SEVEN RODEO CORPORATION, a
Utah corporation, Plaintiff and Appellant,
v.
Pat CLARK, Defendant and Respondent.
No. 880079-CA.

June 9, 1988.

On appeal from summary judgment by the District Court, Washington County, terminating easement in property, the Court of Appeals, Billings, J., held that: (1) language of stipulated court order granting easement did not clearly and unambiguously require that dike and reservoir be preserved and area used for irrigation purposes, and (2) removal of portion of dike and reservoir did not conclusively result in abandonment of easement, particularly in light of ten-year nonuse provision delineated for termination thereof.

Reversed and remanded.

West Headnotes

[1] Appeal and Error ¶863
30k863 Most Cited Cases

[1] Appeal and Error ¶934(1)
30k934(1) Most Cited Cases
In reviewing summary judgment, Court of Appeals applies analytical standard required of trial court and liberally construing facts and viewing evidence in light most favorable to party opposing motion.

[2] Appeal and Error ¶863
30k863 Most Cited Cases
Because summary judgment is granted as matter of law rather than fact, Court of Appeals is free to reappraise trial court's legal conclusion.

[3] Appeal and Error ¶934(1)

30k934(1) Most Cited Cases

[3] Appeal and Error ¶1024.4
30k1024.4 Most Cited Cases
After reviewing facts in light most favorable to appellant, if Court of Appeals concludes there is dispute as to material issue of fact it must reverse trial court's summary judgment and remand for trial on that issue.

[4] Judgment ¶185(6)
228k185(6) Most Cited Cases

[4] Judgment ¶186
228k186 Most Cited Cases
It is inappropriate for courts to weigh disputed material facts in ruling on summary judgment, and it matters not that evidence on one side may appear to be strong or even compelling; one sworn statement under oath is all that is needed to dispute averments on other side of controversy and create issue of fact, precluding entry of summary judgment.

[5] Judgment ¶181(15.1)
228k181(15.1) Most Cited Cases
(Formerly 228k181(15))
Genuine issue of material fact, as to whether stipulated court order granting easement required that dike and reservoir be preserved and area used for irrigation purposes, precluded summary judgment terminating easement after portion of dike was removed and ground was leveled in preparation for planting.

[6] Judgment ¶91
228k91 Most Cited Cases
Ambiguous stipulated judgment is subject to construction according to rules that apply to all written contracts.

[7] Judgment ¶181(8)
228k181(8) Most Cited Cases
If stipulated judgment is ambiguous and there are

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disputed issues of fact as to what parties intended, summary judgment is inappropriate.

[8] Contracts ⚡256

95k256 Most Cited Cases

"Abandonment" of contract means intentional relinquishment of one's rights therein, and in order to nullify such rights there must be clear and unequivocal showing of such abandonment.

[9] Contracts ⚡256

95k256 Most Cited Cases

When there is dispute as to whether "abandonment of contract" has occurred, it is usually question of fact to be determined from all facts and circumstances of particular case, including expressions of intent and other actions of parties.

[10] Waters and Water Courses ⚡165

405k165 Most Cited Cases

Removal of portion of dike and reservoir did not conclusively result in abandonment of easement, particularly in light of ten-year nonuse provision delineated for termination of easement.

*751 Timothy B. Anderson (argued), Dale R. Chamberlain, Jones, Waldo, Holbrook & McDonough, St. George, for plaintiff and appellant.

Phillip L. Foremaster, St. George, for defendant and respondent.

Before BENCH, JACKSON and BILLINGS, JJ.

OPINION

BILLINGS, Judge:

Appellant Lucky Seven Rodeo Corporation ("Lucky") appeals from a summary judgment which terminated Lucky's easement in property owned by respondent Pat Clark. Lucky contends that the trial court erred in granting summary judgment, arguing that the court misconstrued the unambiguous order establishing the easement or that the order granting the easement was ambiguous, and, thus, summary judgment was inappropriate. We reverse and remand.

In March of 1981, Lucky filed suit against Pat Clark to quiet title to a parcel of land, hereinafter referred to as the reservoir and dike area, bordering their respective properties. On the third day of trial, the parties negotiated a settlement. The stipulation was reduced to writing and signed by the parties and their counsel. An order and judgment incorporating the stipulation was signed by the judge on February 13, 1984.

The stipulation and order granted title to the reservoir and dike area to Pat Clark and Tex Gates, and granted an easement to Lucky. The easement relevant to this action is contained in the following paragraphs, with our emphasis added:

3. Plaintiff Lucky Seven Rodeo Corporation and its successors and assigns (hereinafter "Plaintiff") shall have an exclusive and perpetual easement *to use, maintain and operate the reservoir and dyke are[a]* which are described in paragraph 2 above for irrigation, stock watering, *corralling of animals and agricultural purposes*, together with the obligation that plaintiff shall maintain the fences enclosing the area hereinabove described.

* * *

6. In the event the reservoir and Dyke [sic] area described in paragraph 2 above were to fall into *non-use for a period of Ten (10) consecutive years, the easement granted in paragraph 3 above would expire automatically without notice.*

In 1985, Lucky removed from the easement a portion of a dike located on the property, and began to level the ground in preparation for planting. Pat Clark, the fee owner, filed this action to terminate Lucky's easement in the property, alleging Lucky's removal of the reservoir and dike destroyed the need for the easement, and indicated Lucky's intent to abandon it. Clark further alleged that Lucky had failed to maintain the fences on the property and had in fact destroyed the fences, contrary to the agreement of the parties, and the consequent court order.

It is undisputed that Lucky removed the dike, but there is disagreement as to whether Lucky removed fences that were part of the easement agreement, or

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other fences with no relevance to the easement. Lucky filed an affidavit of its president, Russel Walter, stating that he understood the easement agreement to grant alternative uses of the property and that Lucky had elected to use the property for agricultural purposes as provided for in the agreement. Lucky denied any intent to abandon the easement, and believed that its removal of the dike and reservoir was consistent with the language of the easement and the intent of the parties in allowing use of the property for agricultural purposes.

The court granted Clark's motion for summary judgment and terminated Lucky's easement. The court indicated that there was ambiguity in the agreement, but stated that it had "a clear memory in this case" and, in making its decision, had relied upon its recollection of the previous trial. In making his ruling, the judge stated:

*752 It is my direct impression that the purpose of the lawsuit with respect to the area was for a reservoir and dike. That's my view. I believe that the purpose of the settlement, the purpose of the order and judgment of the Court, the purpose of resolving all of the law suit, was to maintain a reservoir and dike use. That's not done. Motion granted.

Lucky appeals the court's entry of summary judgment, claiming that the court erroneously relied on its own pre-stipulation recollection of the facts and claims the stipulation and court order clearly grant an easement for the use of the property for agricultural purposes. Lucky further claims that, if the language is ambiguous, the court erred in granting Clark's motion for summary judgment because there was a clear factual dispute as to the intent of the parties and Lucky's intent to abandon the easement.

STANDARD OF REVIEW

[1][2][3][4] In reviewing a summary judgment, we apply the analytical standard required of the trial court. *Oberhansly v. Sprouse*, 751 P.2d 1155, 1156 (Utah Cr.App.1988). We liberally construe the facts and view the evidence in a light most favorable to the party opposing the motion. *Id.*

Moreover, because a summary judgment is granted as a matter of law rather than fact, we are free to reappraise the trial court's legal conclusion. *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987); *Oberhansly*, 751 P.2d at 1156; *K.O. v. Denison*, 748 P.2d 588, 590 (Utah Ct.App.1988). After reviewing the facts in the light most favorable to appellant, if we conclude there is a dispute as to a material issue of fact, we must reverse the trial court's determination and remand for trial on that issue. *Atlas*, 737 P.2d at 229; *Denison*, 748 P.2d at 590. It is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment. *Spor v. Crested Butte Silver Mining, Inc.*, 740 P.2d 1304, 1308 (Utah 1987); *W.M. Barnes Co. v. Sohio Natural Resources Co.*, 627 P.2d 56, 59 (Utah 1981); *Oberhansly*, 751 P.2d at 1156. It matters not that the evidence on one side may appear to be strong or even compelling. *Spor*, 740 P.2d at 1308; *Oberhansly*, 751 P.2d at 1156. One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment. *W.M. Barnes*, 627 P.2d at 59; *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975).

ORDER GRANTING EASEMENT

[5] After an independent review, in a light most favorable to Lucky, we cannot conclude, as a matter of law, that the language of the stipulated court order granting the easement clearly and unambiguously requires that the dike and reservoir be preserved and the area used for irrigation purposes. The determinative paragraphs of the stipulation and order are paragraphs 3 and 6 which provide with our emphasis:

3. Plaintiff Lucky Seven Rodeo Corporation and its successors and assigns (hereinafter "Plaintiff") shall have an exclusive and perpetual easement to use, maintain and operate the reservoir and dyke are[a] which are described in paragraph 2 above for irrigation, stock watering, corralling of animals and agricultural purposes, together with the obligation that plaintiff shall maintain the fences enclosing the area hereinabove described.

* * *

(Cite as: 755 P.2d 750)

6. In the event the reservoir and Dyke [sic] area described in paragraph 2 above were to fall into non-use for a period of Ten (10) consecutive years, the easement granted in paragraph 3 above would expire automatically without notice.

The stipulation and order create an easement to use, maintain and operate the reservoir and dike area for irrigation, stock watering, corralling of animals and agricultural purposes. The language creates an easement which terminates only if the property falls into non-use, for a period of 10 consecutive years. For the trial court's entry of summary judgment to be correct, this court must read the stipulation as unambiguously providing that *all uses* of the *753 easement must continue or the easement is terminated or that the failure of Lucky to maintain the reservoir and dike located on the land terminated the easement. We agree with the trial court that this order is ambiguous. It is ambiguous as to what is meant by "maintain" and whether the uses of the easement are alternative. This is further confused by the language that, in any event, any non-use must continue for 10 years before the easement expires.

AMBIGUITY OF SETTLEMENT ORDER

[6][7] An ambiguous judgment is subject to construction according to the rules that apply to all written contracts. *Park City Utah Corp. v. Ensign Co.*, 586 P.2d 446, 450 (Utah 1978). If the judgment is ambiguous, and if there are disputed issues of fact as to what the parties intended, summary judgment is inappropriate. *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983); *Amjacs Interwest Inc. v. Design Assoc.*, 635 P.2d 53, 55 (Utah 1981). [FN1] Extrinsic evidence as to the intent of the parties must be received and considered in an effort to glean what the parties actually agreed to. *Wilburn v. Interstate Elec.*, 748 P.2d 582, 585 (Utah Ct.App.1988).

FN1. The trial judge seemed to rely on his independent recollection of the pre-settlement hearing to interpret the ambiguity in the settlement order. This is clearly inappropriate. See *Carr v. Bradshaw Chevrolet Co.*, 23 Utah 2d 415,

464 P.2d 580, 581 (1970).

In the instant case, the facts as to what the parties intended are vigorously disputed. There was competent evidence before the court that the parties intended alternative uses for the dike and reservoir area and that the reservoir was not required to be preserved. Lucky's president filed a sworn affidavit stating that he understood the stipulated order to provide alternative uses for the property and that the water pipe line installed eliminated the need for a reservoir. Clark filed a conflicting affidavit stating the removal of the dike and reservoir destroyed the intended purpose of the easement. Thus, summary judgment is inappropriate and the trial court must hold an evidentiary hearing to determine the scope and purpose of the easement.

ABANDONMENT

[8][9] The trial court determined that Lucky abandoned the easement by its removal of the dike and reservoir. Abandonment means the intentional relinquishment of one's rights in the contract; and in order to nullify such rights, there must be a clear and unequivocal showing of such abandonment. *Timpanogos Highlands, Inc. v. Harper*, 544 P.2d 481, 484 (Utah 1975). When there is dispute as to whether abandonment has occurred, it is usually a question of fact to be determined from all the facts and circumstances of the particular case, including the expressions of intent and other actions of the parties. *Id.*; *Thermo-Kinetic Corp. v. Allen*, 16 Ariz.App. 341, 493 P.2d 508, 512 (1972).

[10] Based on the record before us, we cannot say what the intended purpose of the easement was, and thus cannot find, as a matter of law, that Lucky's removal of the dike and reservoir resulted in an abandonment of the easement, particularly in light of the 10 year non-use provision delineated for termination of the easement.

We reverse the judgment of the trial court and remand for a hearing in conformance with our opinion.

BENCH and JACKSON, JJ., concur.

Tab 18

H

Briefs and Other Related Documents

Supreme Court of Utah.
UINTAH BASIN MEDICAL CENTER, Plaintiff
and Appellee,
v.
Leo W. HARDY, M.D., Defendant and Appellant.
No. 20000501.

Aug. 30, 2002.

Doctor brought action against county hospital after hospital's board of trustees voided contract under which doctor was to provide pathological services to hospital. The District Court, Eighth District, Duchesne County, John R. Anderson, J., granted hospital's motion for summary judgment. Doctor appealed. The Supreme Court, Durrant, Associate C.J., held that: (1) contract involved a proprietary function and therefore was enforceable against successor boards of trustees if of a reasonable duration; (2) issue of whether contract was of a reasonable duration required remand; and (3) term of length could not be read into contract.

Remanded with instructions.

Russon, J., concurred in part and dissented in part with opinion in which Howe, J., concurred.

West Headnotes

[1] Appeal and Error ⚡863

30k863 Most Cited Cases

In deciding whether the trial court correctly granted summary judgment as a matter of law, the Supreme Court gives no deference to the trial court's view of the law; it is reviewed for correctness.

[2] Municipal Corporations ⚡232

268k232 Most Cited Cases

Government contracts that extend beyond the term of the governing body that originally entered into the contract represent a public policy concern, as such contracts, if enforced, potentially allow a former governing body to perpetuate its policies beyond its term and thereby limit a successor governing body's ability to respond to the public's changing needs.

[3] Municipal Corporations ⚡232

268k232 Most Cited Cases

Under the governmental/proprietary test to determine whether a government contract should be enforced against a successor governing body, a contract is (1) unenforceable against successor governing bodies if it involves a governmental power or function, but (2) enforceable against successor governing bodies if it involves a proprietary power or function and is of a reasonable duration.

[4] Municipal Corporations ⚡232

268k232 Most Cited Cases

Supreme Court declined to repudiate the governmental/proprietary test, used to determine whether a government contract should be enforced against a successor government body.

[5] Counties ⚡114

104k114 Most Cited Cases

Contract for pathology services between doctor and county hospital involved a proprietary function and therefore was enforceable against successor boards of trustees if it was of a reasonable duration; services provided were not indispensable to the proper functioning of government, and doctor merely recommended policies related to hospital's pathology laboratory, while the board of trustees retained ultimate decision making authority.

[6] Appeal and Error ⚡172(1)

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30k172(1) Most Cited Cases

Doctor failed to raise argument in trial court that the county hospital's successor board of trustees was precluded from terminating his personal services contract with hospital because the board earlier ratified it, and thus Supreme Court declined to hear argument on appeal.

[7] Appeal and Error ⚡1178(1)

30k1178(1) Most Cited Cases

Issue of whether contract between doctor and county hospital for doctor to provide pathological services was of a reasonable duration at the time they entered into the contract, and thus whether contract was an enforceable proprietary contract under the governmental/proprietary test, required remand.

[8] Municipal Corporations ⚡232

268k232 Most Cited Cases

Whether a contract's duration is reasonable for purposes of governmental/proprietary test to determine whether a government contract is binding on successor governing bodies depends on the circumstances of each case.

[9] Municipal Corporations ⚡232

268k232 Most Cited Cases

Depending on the circumstances, a lengthy or indefinite contractual duration is not necessarily an unreasonable duration under the governmental/proprietary test for a public contract to exist.

[10] Counties ⚡126

104k126 Most Cited Cases

Term of length could not be read into personal services contract between doctor and county hospital; contract did not specify a duration, contract provided for termination for "just cause," parties agreed in their appellate briefs that the contract was of indefinite length, and term was not necessary to determine prospective damages for breach of the contract.

[11] Contracts ⚡9(3)

95k9(3) Most Cited Cases

Parties have the right to enter into indefinite length

contracts terminable for cause.

[12] Labor and Employment ⚡47

231Hk47 Most Cited Cases

(Formerly 255k7 Master and Servant)

[12] Reformation of Instruments ⚡16

328k16 Most Cited Cases

When a contract for employment or personal services does not recite a fixed term, the law does not call for the judicial reformation of the contract to impose a term, especially when neither party disputes the contract was of indefinite duration.

*1166 Blaine J. Bernard, Eric G. Maxfield, Christine T. Greenwood, E. Blaine Rawson, Salt Lake City, for plaintiff.

John P. Harrington, Joni J. Jones, Melissa H. Bailey, Salt Lake City, for defendant.

INTRODUCTION

DURRANT, Associate Chief Justice:

****1** This appeal concerns the voidability of certain government contracts. Specifically, we consider the question of when a contract entered into by a predecessor governing body is voidable by a successor governing body. Throughout the country, substantial case law has developed to distinguish between those government contracts that may be voided and those that may not be voided by a successor governing body. Various common law tests have been articulated, all designed to balance the tension between the right of a successor governing body to implement its own policies and not be bound by those of a former body, and the interest in providing some certainty to parties who contract with governing bodies. Utah courts have relied on the governmental/proprietary test, a test under which contracts involving proprietary functions and having reasonable durations are enforceable against successor governing bodies.

****2** In this case, the district court granted summary judgment to a county hospital on the theory that the particular contract at issue, a contract for the provision of pathological services to

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the hospital by a doctor, was voidable by the hospital's governing body--its board of trustees. The district court held that the contract had been entered into by a predecessor board and thus was voidable by successor boards.

****3** Because we conclude that the contract for pathological services involves a proprietary function, we remand with instructions that the district court determine whether the contract's duration was reasonable.

BACKGROUND

****4** The following facts are undisputed. On November 29, 1994, Dr. Leo Hardy entered into a contract with Uintah Basin Medical ***1167** Center ("UBMC"), a hospital owned by Duchesne County and operated by a board of trustees. Under the terms of the contract, Dr. Hardy received \$400 per month for providing UBMC pathological services on a part-time basis and serving as the director of its pathology laboratory. The contract did not recite a termination date, but provided that either party could terminate the contract for "just cause" following ninety days' notice.

****5** Although Dr. Hardy performed his contractual obligations satisfactorily and received no complaints from UBMC or its medical staff, on July 18, 1996, the UBMC board of trustees voted to give Dr. Hardy ninety days' notice and invite another doctor to join its medical staff as a pathologist and emergency room physician. When Dr. Hardy's termination became effective, UBMC sought a declaratory judgment that it had "just cause" to terminate the contract. Dr. Hardy counterclaimed, contending that UBMC materially breached the contract by terminating him because UBMC did not have "just cause." The district court initially denied the parties' respective motions for summary judgment, ruling that the jury would decide whether UBMC had "just cause."

****6** Following this ruling, the district court accepted supplemental briefing from the parties on an issue UBMC had raised for the first time in its answer to Dr. Hardy's counterclaim: whether the contract violated common law rules against

government contracts that bind successor governing bodies. After hearing from the parties, the court granted UBMC summary judgment on the ground that the contract was voidable even without "just cause" simply because it could not bind successor Boards." In reaching this conclusion, the district court explained, "Due to the rapid advance of science, medicine [sic] changes and needs of patients there should be no reason for such an agreement to continue into the future or be binding on successor [b]oards where the governing [b]oard is a governmental entity." Dr. Hardy appeals. Section 78-2-2(3)(j) of the Utah Code gives us appellate jurisdiction over this case. Utah Code Ann. § 78-2-2(3)(j) (Supp. 2001).

ANALYSIS

I STANDARD OF REVIEW

[1] ****7** "In deciding whether the trial court correctly granted [summary] judgment as a matter of law, 'we give no deference to the trial court's view of the law, we review it for correctness.' " *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs.*, 2001 UT 54, ¶ 9, 28 P 3d 669 (quoting *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P 2d 1382, 1385 (Utah 1989)).

II RATIONALE BEHIND COMMON LAW RESTRICTIONS ON GOVERNMENT CONTRACTS THAT BIND SUCCESSOR GOVERNING BODIES

****8** Before addressing Dr. Hardy's specific claims on appeal, we briefly discuss the rationale behind the common law rules regarding contracts that bind successor governing bodies.

[2] ****9** Government contracts raise public policy concerns beyond those involved with private contracts. See, e.g., *Mitchell v. Chester Hous. Auth.*, 389 Pa. 314, 132 A 2d 873, 876 (1957). One such concern involves contracts that extend beyond the term of the governing body that originally entered into the contract. Such contracts, if enforced, potentially allow a former governing body to perpetuate its policies beyond its term and thereby limit a successor governing body's ability to respond to the public's changing needs. See generally *Figuly v. City of Douglas*, 853 F Supp

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381, 384 (D.Wyo.1994).

****10** While such concerns militate against enforcing a predecessor governing body's contracts against its successors, the common law also recognizes a countervailing concern: that permitting successor governing bodies to indiscriminately terminate government contracts may make private parties hesitant to contract with government entities, thereby reducing the viability of contracts as a means of solving public problems. *See Plant Food Co. v. City of Charlotte*, 214 N.C. 518, 199 S.E. 712, 714 (1938).

[3][4] ****11** A desire to accommodate these competing concerns animates the various common law tests for determining whether a ***1168** contract should be enforced against a successor governing body. The test on which Utah courts rely is known as the governmental/proprietary test. *See Bair v. Layton City Corp.*, 6 Utah 2d 138, 147-48, 307 P.2d 895, 902 (1957); *see also Salt Lake City v. State*, 22 Utah 2d 37, 42, 448 P.2d 350, 354 (1968) (holding that contract for providing water to state capitol grounds was enforceable under the governmental/proprietary test). [FN1] Under the governmental/proprietary test, a contract is (1) unenforceable against successor governing bodies if it involves a governmental power or function, but (2) enforceable against successor governing bodies if it involves a proprietary power or function and is of a reasonable duration. *Bair*, 6 Utah 2d at 147-48, 307 P.2d at 902.

FN1. Citing various criticisms of the governmental/proprietary test, both parties urge us to repudiate it in favor of other common law tests. However, because the parties have failed to show that any of their suggested tests is clearly better than the governmental/proprietary test, we decline to repudiate it at this time. *See State v. Menzies*, 889 P.2d 393, 398 (Utah 1994) (noting that because of stare decisis, "[t]hose asking us to overturn prior precedent have a substantial burden of persuasion").

****12** Having set forth the governmental/proprietary test, we next apply it to Dr. Hardy's contract to determine whether the contract may be validly enforced against successor hospital boards of trustees.

III. WHETHER DR. HARDY'S CONTRACT IS ENFORCEABLE AGAINST SUCCESSOR BOARDS OF TRUSTEES

[5][6] ***13** Dr. Hardy maintains the district court erred in concluding that his contract was voidable because it bound successor boards. [FN2] Relying on the governmental/proprietary test, Dr. Hardy argues that his contract for pathological services involves a proprietary function and therefore was enforceable against successor boards provided it is of a reasonable duration. We agree.

FN2. Dr. Hardy also argues that the rationale behind the common law rules does not apply (1) to appointed, staggered boards like the UBMC board of trustees, or (2) until a majority of the nine voting members of the board are replaced. These arguments are without merit. First, the rationale behind the common law rules applies to appointed, staggered governing bodies because preexisting contracts may also unduly inhibit these bodies in the performance of their public duties. *See Mitchell*, 132 A.2d at 877-78; *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876, 882 (App.1995). Second, there is inadequate support in the law for the contention that a majority turnover in the UBMC board is required before the board can challenge the contract. *See Mariano & Assocs., P.C. v. Bd. of County Comm'rs*, 737 P.2d 323, 331 (Wyo.1987) (concluding that precedent did not support argument that turnover in board was required before it could challenge validity of contract).

In addition, Dr. Hardy argues that the successor UBMC board was precluded from terminating his contract because the board earlier ratified it. Since this issue

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was not raised below, we decline to address it. *See Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996).

A. Dr. Hardy's Contract Was Proprietary in Nature

****14** The factors on which courts have relied to distinguish between governmental and proprietary contracts strongly support the conclusion that Dr. Hardy's contract for pathological services involves a proprietary function. First, UBMC has not demonstrated that the services Dr. Hardy provides under the contract are "indispensable to the proper functioning of government." *County Council v. SHL Systemhouse Corp.*, 60 F.Supp.2d 456, 465 (E.D.Pa.1999). To the contrary, consistent with the view that Dr. Hardy's contract did not involve functions essential to governance, Duchesne County conveyed the hospital to a non-profit organization on July 3, 2000.

****15** Moreover, under the terms of the contract, Dr. Hardy merely recommended, but did not have authority to set, policies related to UBMC's pathology laboratory. The board's retention of this policymaking discretion weighs heavily in favor of deeming the contract proprietary. *See Rhode Island Student Loan Auth. v. NELS, Inc.*, 550 A.2d 624, 627 (R.I.1988) (concluding contract was proprietary because contracting party "could neither exercise discretion nor set policy in performance of its duties").

****16** Accordingly, we conclude that Dr. Hardy's contract involves a proprietary function.

***1169 B. Whether Dr. Hardy's Contract Was of Reasonable Duration Depends on the Scope of the Contract's "Just Cause" Provision**
[7][8][9] ****17** Under the governmental/proprietary test, Dr. Hardy's proprietary contract is enforceable if its duration was reasonable at the time the parties executed the contract. *Bair*, 6 Utah 2d at 148, 307 P.2d at 902. Whether a contract's duration is "reasonable" depends on the circumstances of each case. *See, e.g., id.*, 6 Utah 2d at 143, 148, 307 P.2d at 899, 903 (holding that a fifty-year sewage treatment contract

was valid because its lengthy duration allowed city to obtain treatment facilities without undue delay and expense, and also facilitated long-term planning). Depending on the circumstances, a lengthy or indefinite contractual duration is not necessarily unreasonable. *See id.*; *see also Salt Lake City*, 22 Utah 2d at 42, 448 P.2d at 354 (validating contract that required city to provide free water to land as long as the land served as the state capitol grounds, noting that city derives continuing economic benefit from capitol's presence).

****18** As the record has been inadequately developed on the issue of the reasonableness of the contract's duration, we remand to permit the district court to allow further development of the record and to then make this determination. On remand, as a preliminary matter, the district court should interpret the intended scope of the contract's "just cause" provision, [FN3] since the reasonableness of the contract's duration depends in large part on the amount of discretion this provision gives to successor boards. For example, if the "just cause" provision gives successor boards broad discretion to terminate Dr. Hardy (e.g., to improve patient care, for fiscal considerations), the contract is more likely to be of a reasonable duration than if the "just cause" provision permitted termination only for deficient job performance. In evaluating whether the duration is reasonable, the district court may also find it useful to compare Dr. Hardy's contract to the agreements UBMC typically enters into with medical professionals. For example, UBMC's bylaws concerning its medical staff suggest that UBMC routinely enters into agreements under which the only practical durational limit is a liberally-construed "just cause" provision. [FN4] The extent to which the durational limitations in Dr. Hardy's contract conform to UBMC's usual practices in similar situations may factor into the district court's reasonableness assessment.

FN3. *See Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 64, 44 P.3d 663 (noting that determination of scope of contractual "clause is a question of law for determination by the district court because

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it is a matter of contract interpretation").

FN4. Under UBMC's bylaws, although appointments to the medical staff are ostensibly limited to two years, staff members are reappointed unless there is "just cause." Under the bylaws, "just cause" appears to have a broad scope: for instance, the board may terminate a member of the medical staff for any reason "reasonably related to the delivery of quality patient care."

****19** If the district court determines that the contract's duration is reasonable, the contract is enforceable. The court should then determine whether the UBMC board had "just cause" to terminate Dr. Hardy. On the other hand, if the district court determines that the contract's duration is unreasonable, the court should not enforce the contract.

[10][11] ****20** The dissent maintains that a term should be implied into Dr. Hardy's contract. In support of its argument, the dissent relies on canons of construction that have been developed to aid courts in discerning the parties' intent when a contract fails to specify a duration. We reject the dissent's position for several reasons. First, and most importantly, neither party has argued in their briefs in favor of implying a term. To the contrary, both parties maintain that the contract should be evaluated as an indefinite-length contract whose duration is limited only by the "just cause" provision. [FN5] In effect, ***1170** then, the parties have implicitly stipulated that the contract has an indefinite term. [FN6] Implying a term would therefore result in a contract that is contrary to the intent of either party and violate the preeminent goal of contractual interpretation (i.e., to give effect to the intent of the parties). *Buehner Block Co v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988). Accordingly, because the parties agree that the contract should be treated as an indefinite-length contract, there is no need to rely on canons of construction for resolving ambiguities over whether the parties intended the contract be of indefinite duration. [FN7]

FN5. Dr. Hardy asserts the following in his appellate brief:

To entice excellent physicians to move to and remain in rural areas, hospitals often add perks to the contracts, including "just cause" termination provisions, or even "lifetime" contracts... Given the necessities of the situation, such contracts are of reasonable duration. Thus, [Dr. Hardy's contract] passes the second part of the *Bair* test....

Appellant's Br. at 21.

Despite disagreeing with Dr. Hardy on the ultimate conclusion of whether an indefinite-length contract with a "just cause" provision is of reasonable duration, UBMC clearly agrees that the contract was of indefinite duration:

The potentially perpetual duration of Dr. Hardy's contract with UBMC was limited only by the "just cause" provision.... [Dr. Hardy's] contract bound Duchesne County indefinitely....

Appellee's Br. at 28-29.

FN6. The dissent acknowledges that parties may enter into an indefinite-length contract.

FN7. The dissent acknowledges that "both parties contend that the contract should be evaluated as an indefinite-length contract limited only by just cause," yet nonetheless argues for the imposition of a fixed duration. The dissent has cited no cases, nor are we aware of any, in which we rejected parties' mutual concessions that are in harmony and clearly expressed. Given that the goal in interpreting contracts is to give effect to the intent of the parties, we should be particularly reluctant to reject the parties' stipulations or concessions in this case.

The clear import of the parties' concessions is that the parties intended the contract to be of indefinite duration. The imposition of a fixed duration is therefore incompatible with the parties' concessions.

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Moreover, the law in Utah and numerous other jurisdictions recognizes the right of parties to enter into indefinite length contracts terminable for cause. *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1000-01 & n. 9 (Utah 1991); e.g., *Shah v. Am. Synthetic Rubber Corp.*, 655 S.W.2d 489, 491-92 (Ky.1983). In short, the imposition of a term would contradict the parties' stated intent, disregard their legal arguments, and impede their freedom to contract. This we decline to do.

Significantly, the dissent also acknowledges that the parties have not argued in their appellate briefs that a term should be implied into the contract. In the absence of adequate briefing, it would be ill-advised for the court to raise this issue sua sponte, especially if the dissent is correct in asserting that this issue presents a question of first impression. *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 59, 56P.3d 524, 2002 WL 1610562 ("On myriad occasions, we have held that we will not address issues inadequately briefed.").

[12] **21 Second, conspicuously absent from the dissent's analysis is any citation to Utah precedent that supports its position. Contrary to the dissent's position, when a contract for employment or personal services does not recite a fixed term, the law in Utah does not call for the judicial reformation of the contract to impose a term, especially where, as here, neither party disputes the contract was of indefinite duration. Indeed, in a case in which we traced the historical development of the law associated with employment contracts, we specifically noted that courts long ago repudiated a common law rule under which a term was implied when an employment contract did not specify a duration. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1040-41 (Utah 1989). [FN8] In its place, courts in Utah and elsewhere adopted the at-will employment rule, under which employment contracts that did not specify a duration were generally presumed to be terminable at will. *Id.* at 1041. In time, Utah recognized an exception under

which an employee could rebut the at-will presumption associated with indefinite-length contracts by showing the parties intended the contract be terminable for cause. *Johnson*, 818 P.2d at 1000-01 & n. 9; see also *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 54 (Utah 1991). Significantly, nothing in *Johnson*, *Brehany*, or *Berube* suggests that a court should sua sponte impose a term on an indefinite-length employment contract that provides for termination for cause.

FN8. Although *Berube* was a plurality opinion, a majority of the court concurred in the portion of the opinion that traced the historical development of the common law of employment contracts.

**22 Applying Utah precedent to Dr. Hardy's contract confirms our view that a term should not be read into the contract. First, because Dr. Hardy's contract does not specify a duration, under Utah law we initially presume it is of indefinite duration but terminable at will. *Berube*, 771 P.2d at 1040-41. We do not apply the long-since rejected rule *1171 that previously required the implication of a term. *Id.* Second, we consider whether any of the exceptions to the at-will rule applies. In this regard, we note that the parties expressly provided the contract was terminable for "just cause." We further note that the parties agree in their appellate briefs that the contract is of indefinite length and terminable only for "just cause." Accordingly, we conclude that the at-will presumption has been rebutted and Dr. Hardy's indefinite-length contract is terminable for "just cause." *Johnson*, 818 P.2d at 1000-01 & n. 9; see also *Brehany*, 812 P.2d at 54. [FN9]

FN9. The cases cited by the dissent are (1) from other jurisdictions and therefore not binding and (2) are either distinguishable from, or inapposite to, the present case. In reaching its conclusion, the dissent relies heavily on cases not involving employment contracts. This reliance is tenuous given the fact that courts have developed a unique set of rules for employment and personal service

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contracts. See generally *Berube*, 771 P.2d at 1040-41; *Consol. Theatres, Inc. v. Theatrical Stage Employees Union, Local 16*, 69 Cal.2d 713, 73 Cal.Rptr. 213, 447 P.2d 325, 335 & n. 12 (1968) (noting that due to special policy considerations associated with employment contracts, such contracts are exempt from rule applicable to other contracts under which courts imply a term when a contract is silent as to duration).

For example, the dissent cites *Mid-Southern Toyota, Ltd. v. Bug's Imports, Inc.*, 453 S.W.2d 544, 549 (Ky.1970) in support of its position. That case did not involve an employment contract, however, and, moreover, when faced with an employment contract, the relevant jurisdiction (Kentucky) relies on rules of interpretation specifically tailored to employment contracts. *Shah v. Am. Synthetic Rubber Corp.*, 655 S.W.2d 489, 491-92 (Ky.1983) (confirming parties' right to enter into contracts under which person is employed for an indefinite period of time and may be terminated only for cause). Accordingly, the more pertinent case from the cited jurisdiction is consistent with the view that when an employment contract is silent as to duration, courts generally do not imply a fixed term of years. See *id.* Instead, as in *Johnson*, Kentucky courts presume such a contract is terminable at will unless the parties clearly express another criterion for termination (e.g., for cause). *Id.*

The cases cited by the dissent that involve employment contracts provide little support for its conclusion that a term must be imposed on Dr. Hardy's contract. For example, when faced with an indefinite-length employment contract, the court in *Paisley v. Lucas* did not impose a term but rather applied rules of construction specific to employment contracts. 346 Mo. 827, 143 S.W.2d 262, 271 (1940).

****23** Finally, we disagree with the dissent's contention that the imposition of a term is justified as a means of easing the calculation of prospective damages. [FN10] The dissent itself concedes that parties can contract for an indefinite term. In making this concession, the dissent implicitly acknowledges that, to give effect to the parties' intent, courts inevitably and routinely need to determine damages associated with a breach of an indefinite employment contract. In making such determinations, courts have relied on various factors in addressing the kinds of concerns raised by the dissent:

FN10. The dissent asks the following:

[If hospital breached the contract], how would Dr. Hardy's damages be calculated? Would Dr. Hardy be entitled to all of his loss of earnings under the indefinite contract? [W]ould he be entitled to compensation ... to the date of his death? To the date of his retirement? To the date of his inability to perform his job responsibilities . . . ?

While a district court has considerable experience in calculating future earnings, some basis must appear in the record for such an award. Some of the factors which district courts have employed to alleviate the speculative nature of future damage awards include an employee's duty to mitigate, "the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employee's work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards."

Shore v. Fed. Express Corp., 777 F.2d 1155, 1160 (6th Cir.1985) (quoting *Koyen v. Consol. Edison Co.*, 560 F.Supp. 1161, 1168-69 (S.D.N.Y.1983)). "It is not difficult to determine the ... factors that are pertinent on prospective damage awards." *Koyen*, 560 F.Supp. at 1168-69. Regardless, while the determination of damages presents challenges, so would the determination of a "reasonable" duration, especially when both parties on appeal appear resistant to the imposition of a term.

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CONCLUSION

****24** We conclude that Dr. Hardy's contract for pathological services is a proprietary ***1172** contract, and thus is enforceable against successor UBMC boards of trustees if it is of a reasonable duration. Accordingly, we remand to the district court to permit it to determine whether the contract's duration is reasonable.

****25** Remanded.

****26** Chief Justice DURHAM and Judge BENCH concur in Justice DURRANT's opinion.

RUSSON, Justice, concurring in part and dissenting in part.

****27** I concur with the majority opinion that the contract in question is proprietary in nature and could therefore bind the successor trustees of the hospital. However, I differ with the analysis of the opinion as to how the trial court is to determine the reasonableness of the duration of the contract on remand.

****28** Well-settled canons of contract construction and interpretation dictate that the trial court, when faced with a contract of employment that is silent as to its duration, and thus indefinite in length, but expressly terminable only for just cause, should determine by implication a reasonable term of duration under the circumstances and then imply that reasonable term into the contract as a matter of law. Once the trial court determines a reasonable term and implies it into the contract as a matter of law, the trial court then should evaluate the implied duration of the contract to determine if the duration of the contract was reasonable for purposes of deciding whether the successor trustees of the hospital are bound by the contract.

****29** The employment contract between Uintah Basin Medical Center and Dr. Hardy did not include a specific term of duration and therefore was of indefinite duration or perpetual in nature. It did, however, expressly indicate that the contract could be terminated only for just cause. *Corbin on Contracts* provides guidance on how to treat such a

contract and indicates what legal effect such a contract is to be given when it states:

When parties make a *contract of employment without specifying the length of service*, but indicate that it is *not terminable at will*, the legal effect is that the *parties are bound for a "reasonable time."* This is based upon "implication" [i.e., the implication of a reasonable term of duration].

Catherine M.A. McCauliff, 8 *Corbin on Contracts* § 34.11, at 262 (revised ed.1999) (emphasis added); see also *Consol. Theatres, Inc. v. Theatrical Stage Employees Union Local 16*, 69 Cal.2d 713, 73 Cal.Rptr. 213, 447 P.2d 325, 335 (1968) (en banc); *Ansbacher-Siegle Corp. v. Miller Chem. Co.*, 137 Neb. 142, 288 N.W. 538, 541 (1939); *Tavel v. Olsson*, 91 Nev. 359, 535 P.2d 1287, 1288 (1975); *Smith v. Knutson*, 76 N.D. 375, 36 N.W.2d 323, 328 (1949), *overruled on other grounds by Neibauer v. Well*, 319 N.W.2d 143 (N.D.1982); *Hall v. Hall*, 158 Tex. 95, 308 S.W.2d 12, 15 (1957) ("Now it is doubtless true that, in contracts of the general type of the instant one [an employment contract for services], a term of reasonable duration may be implied, with the result that they are not void for lack of an essential provision and are not terminable at will."); *Edwards v. Morrison-Knudsen Co.*, 61 Wash.2d 593, 379 P.2d 735, 738 (1963); 27 Am.Jur.2d *Employment Relationship* § 38 (1996) (citing *Shah v. Am. Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky.1983)). [FN1] ***1173** This is precisely the situation presented in the instant case.

FN1. The majority opinion criticizes this dissent for its citation to applicable, persuasive authority from the highest courts of our kindred states and dismisses that authority as nonbinding. Where this court has not addressed a particular question of law and where authoritative precedent from our own jurisdiction is absent, this court has not been reluctant to seek out the experience, reasoning, and counsel of the decisions of other high courts as persuasive guidance in our deliberations.

The majority opinion also criticizes the

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dissent for its citation to certain cases involving contracts other than for the provision of employment or personal services. However, all of the cases cited in this paragraph involve contracts for employment or personal services.

This dissent does cite to other nonemployment contract cases later in ¶ 32 for the additional proposition that courts generally will imply a term of duration into indefinite-length contracts. The majority opinion maintains that those nonemployment cases are inapposite and that this dissent's reliance on them is tenuous because the courts have developed "a unique set of rules for employment and personal services contracts." To the extent that the cases mentioned by the majority opinion as recognizing special and different rules for employment contracts actually refer to special rules or policy considerations for employment contracts, they do so only in reference to the adoption of the general "at-will" employment doctrine and its exceptions. Those cases do not recognize special and different rules with respect to the propriety of implying a reasonable term into an employment contract that is silent as to its duration but outside of the "at-will" employment doctrine because of the explicit inclusion of an express "just cause" provision, such as the contract at issue here. In this regard, the majority opinion misreads *Berube v Fashion Centre, Ltd.*, 771 P 2d 1033 (Utah 1989), *Consolidated Theatres, Inc. v Shah*, and *Paisley v Lucas*, 346 Mo 827, 143 S W 2d 262 (1940). The cases cited herein otherwise stand for the proposition for which they are cited and support the implication of duration for a reasonable period.

****30** The determination of what constitutes a "reasonable time" of duration of the indefinite-length employment contract that is not terminable at will is either "(1) the time that seems

reasonable in the light of the circumstances existing when the contract was made [or] (2) the time that seems reasonable in light of the circumstances as they occur during the course of performance." McCauliff, 8 *Corbin on Contracts* § 34 11, at 262. The reasonableness of an implied duration term is a question of fact and is determined in reference to the circumstances surrounding the transaction, the situation of the parties, and the subject matter of the contract. See *William B Tanner Co v Sparta Tomah-Broad Co*, 716 F 2d 1155, 1159-60 (7th Cir 1983), *Metal Assocs, Inc v E Side Metal Spinning & Stamping Corp*, 165 F 2d 163, 165 (2d Cir 1947), *Consol Theatres, Inc*, 73 Cal Rptr 213, 447 P 2d at 335, *Brown Loan & Abstract Co v Willis*, 150 Ga 122, 102 S E 814, 815 (1920), *Ansbacher-Siegle Corp*, 288 NW at 541, *Tavel*, 535 P 2d at 1288, *Borough of W Caldwell v Borough of Caldwell*, 26 N J 9, 138 A 2d 402, 412 (1958), *Hall*, 308 S W 2d at 16-17, 17B C J S *Contracts* § 440 (1999), Margaret N Kniffin, 5 *Corbin on Contracts* § 24 29 (revised ed 1998).

****31** *Corbin on Contracts* ' suggested treatment of contracts of this nature is based upon and supported by well-settled principles and rules of contract construction and interpretation. In the instant case, the employment contract was silent as to its duration and therefore indefinite or perpetual. Contracts of perpetual duration are generally disfavored by the law. See *Paisley v Lucas*, 346 Mo 827, 143 S W 2d 262, 270 (1940) ("The courts are prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation" (quotation omitted)), see also *Borough of W Caldwell*, 138 A 2d at 412, *Farley v Salow*, 67 Wis 2d 393, 227 N W 2d 76, 82 (1975). Interpretations which avoid construing a contract to have an indefinite duration are preferable. See *Borough of W Caldwell* 138 A 2d at 412-13, *Farley*, 227 N W 2d at 82, *Kovachik v Am Auto Ass'n*, 5 Wis 2d 188, 92 N W 2d 254, 256 (1958). Because the law disfavors contracts of perpetual performance or duration, courts will interpret a contract as being of indefinite duration only where the parties to the contract have clearly and unambiguously indicated their intentions to create a contract of indefinite

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duration through the use of express and positive language to that effect in the contract [FN2] See *1174 *William B Tanner Co*, 716 F2d at 1159 ("Courts are reluctant to interpret contracts providing for some perpetual or unlimited contractual right unless the contract clearly states that that is the intention of the parties"), *Mid-Southern Toyota, Ltd v Bug's Imps, Inc*, 453 S W 2d 544, 549 (Ky 1970) ("The general rule is that a construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract"), *Paisley*, 143 S W 2d at 271 ("A contract [for employment] for life will be upheld only where the intention, that the contract's duration is for life, is clearly expressed in unequivocal terms"), *Borough of W Caldwell*, 138 A 2d at 412-13 ("[A] construction affirming a [contractual performance] right in perpetuity is to be avoided unless given in clear and peremptory terms," and "[i]t is not often that a promise will properly be interpreted as calling for perpetual performance" (internal quotations omitted)), 17B C J S *Contracts* § 439 (1999) ("[A] construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract [and] a contract which purports to run in perpetuity must be adamantly clear that that is the parties' intent, in order to be enforceable") Likewise, employment contracts that do not explicitly express the parties' intentions that the contract be for lifetime or permanent employment have been held to be unenforceable or merely terminable at the will of either party See *Chastain v Kelly-Springfield Tire Co*, 733 F2d 1479, 1482, 1484 (11th Cir 1984), *Littell v Evening Star Newspaper Co*, 120 F2d 36, 37 (D C Cir 1941), 30 C J S *Employer-Employee Relationship* § 23 (1992)

FN2 The majority opinion notes that the parties have not argued in their appellate briefs that a term should be implied into the contract and that both parties contend that the contract should be evaluated as an indefinite-length contract limited only by the just cause provision This incorrectly elevates the parties' arguments in the briefs to the level of an agreement between the

parties on this point and treats it as a stipulation Nothing in the record or the briefs indicates that the parties have stipulated in the manner the majority opinion claims The parties do not deny that they did not include an explicit provision in the contract expressing their intentions purposely to create an indefinite-length contract If the parties to a contract intend to create an indefinite-length contract, they *must* express their intentions to do so through clear, unambiguous, and unequivocal language *in the contract* The parties' questionable "concession" in this regard in their briefs on appeal obviously fails to meet this standard and is contrary to the rule of law stated in the cited authority Both *Johnson* and *Shah* may recognize the rights of parties to enter into indefinite-length contracts, but they do not dispute or contradict the requirement that the parties do so using explicit language in their contract

In any event, under normal circumstances, we will treat particular facts or issues as stipulated to by the parties only where such a stipulation is clear and expressed Rarely, if ever, do we find a stipulation of this nature by implication The notion of an implied stipulation is contrary to the very nature of a stipulation as a clear, definite, and certain agreement by the parties as to the truth or validity of a particular fact

Finally, the majority opinion also admonishes the dissent that "[i]n the absence of adequate briefing, it would be ill-advised for the court to raise [the issue of implying a reasonable term] sua sponte, especially [where] this issue presents a question of first impression" This, however, ignores our settled position that this court has inherent authority to consider arguments and issues that the parties have not raised or recognized if it is necessary to a proper decision and to avoid bad law See *Kaiserman Assocs, Inc v*

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Francis Town, 977 P.2d 462, 464 (Utah 1998) ("[A]n overlooked or abandoned argument should not compel an erroneous result [and][w]e should not be forced to ignore the law just because the parties have not raised or pursued obvious arguments."). Simply because the parties did not recognize the issue on appeal or because they are in supposed agreement in their argumentative position, erroneous as it may be, on appeal, we will not ignore a genuine legal issue or acquiesce in the parties' error and apply incorrect legal principles.

****32** Where a contract is of indefinite or perpetual duration because of the lack of an explicit term, the law will imply into the contract a term that is reasonable under the circumstances. See *McCauliff*, 8 *Corbin on Contracts* § 34.11, at 262; see also *Metal Assocs., Inc.*, 165 F.2d at 165; *Consol. Theatres, Inc.*, 73 Cal.Rptr. 213, 447 P.2d at 335; *Brown Loan & Abstract Co.*, 102 S.E. at 815; *Anne Arundel County v. Crofton Corp.*, 286 Md. 666, 410 A.2d 228, 232 (1980); *Ansbacher-Siegle Corp.*, 288 N.W. at 541; *Tavel*, 535 P.2d at 1288; *Borough of W. Caldwell*, 138 A.2d at 412-13; *Erskine v. Chevrolet Motors Co.*, 185 N.C. 479, 117 S.E. 706, 713-14 (1923); *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502, 505 (1897); *Hall*, 308 S.W.2d at 15; *Farley*, 227 N.W.2d at 82; 17A *Am.Jur.2d Contracts* § 546 (1991); 27 *Am.Jur.2d Employment Relationship* § 38 (1996) (citing *Shah*, 655 S.W.2d 489); 17B *C.J.S. Contracts* § 421 (1999); *Kniffin*, 5 *Corbin on Contracts* § 24.29.

****33** The majority opinion criticizes this dissent for its lack of citation to Utah precedent in support of determining and implying a reasonable term of duration into the contract. This is empty criticism given that this case presents an issue of first impression in this jurisdiction.

****34** The majority opinion incorrectly relies on *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033 (Utah 1989), *Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991), and *Johnson v. Morton Thiokol,*

Inc., 818 P.2d 997 (Utah 1991), as binding Utah authority that purportedly rejects the dissent's approach in this case. While the majority is correct in noting "that nothing in *Johnson*, *Brehany*, or *Berube* suggests that a court should sua sponte impose a term on an indefinite-length employment contract that provides for termination for cause," nothing in those decisions ***1175** would prohibit the implication of a reasonable term into the contract either. Those cases simply do not go as far as articulating a governing rule applicable to the case at hand and are focused on a separate and discrete issue not present in the instant case.

****35** Specifically, the majority opinion's assertion that in *Berube* we noted (and purportedly endorsed) the notion that "courts long ago repudiated a common law rule under which a term was implied when an employment contract did not specify a duration" is not entirely correct and overstates *Berube*. The central issue in *Berube* was whether the termination-related provisions of an employer's employee handbook could be implied into the employment contract as implied-in-fact contract terms between the employer and employee such that the original indefinite-length employment contract would escape application of the "at-will" employment doctrine that provides an indefinite-length employment contract is terminable by either party for good cause, cause, or no cause at all.

****36** In the "historical development" portion of Justice Durham's plurality opinion in *Berube*, to which the majority opinion in this case cites, Justice Durham merely traced the historical development and adoption of the "at-will" employment doctrine in the United States.

****37** In any event, that section of *Berube* does not stand for the proposition offered by the majority opinion. The historical review section of the *Berube* plurality opinion simply described the nineteenth century English common law rule stating that English courts, when faced with employment contracts of indefinite duration, would imply an arbitrary one-year term into the contract. *Berube*, 771 P.2d at 1040-41; see also *McCauliff*, 8 *Corbin*

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on *Contracts* § 34.11, at 257. *Berube* 's historical review merely noted that American courts rejected the arbitrary one-year term implied by English courts in favor of the "at-will" employment doctrine. *Berube*, 771 P.2d at 1040- 41. *Berube* simply acknowledged the historical rejection of the implication of a term of duration in an "at-will" employment contract. *See id.* It does not, as the majority opinion claims, reject the notion that a reasonable term could or should be implied into an employment contract that is by its own terms outside the "at-will" employment doctrine because of a just cause provision such that the parties are bound for a "reasonable time." *See McCauliff*, 8 *Corbin on Contracts* § 34.11, at 262. In fact, Justice Durham's opinion in *Berube* notes that the rejection of the English common law implied one-year term and the adoption of the "at-will" employment doctrine in the United States was "adopted by many jurisdictions without careful or thorough examination." *Berube*, 771 P.2d at 1040. Thus, the most *Berube* can be cited for in this regard is the proposition that American courts uncritically rejected the arbitrary one-year implied term rule used by the English courts, but not the apparently unconsidered, yet supportable, notion that a reasonable term could or should be implied into an indefinite-length employment contract that by its own terms is not terminable at will. *See McCauliff*, 8 *Corbin on Contracts* § 34.11, at 262. Therefore, the majority opinion's statement in applying purportedly controlling Utah precedent to this case that "[w]e do not apply the long-since rejected rule that previously required the implication of a term" is based on a misinterpretation of *Berube* 's historical review. Regardless, this portion of the plurality *Berube* opinion, despite being joined by a majority of the court, was at best dicta in that it was historical exposition. *Berube* and its progeny simply do not prohibit the implication of a reasonable term into the contract at hand and are not binding precedent that govern whether a term of duration should be implied into the contract at issue.

****38** Finally, *Johnson* and *Brehany* likewise do not govern the present case or bar the imposition of an implied reasonable term of duration into the

contract. *Brehany* and *Johnson*, like *Berube*, were employee handbook or implied-in-fact contract term cases but go no further than *Berube* in their holdings and no more state an on-point or governing rule applicable in this case than does *Berube*.

****39** *Berube*, *Brehany*, and *Johnson* all involved indefinite-length employment contracts and claims of wrongful termination. ***1176** However, these cases merely explore and set rules for determining whether a plaintiff employee's claim for wrongful termination can escape the general "at-will" employment doctrine. In other words, in those cases, this court was asked to determine whether an implied-in-fact term existed which would remove the contract from the general "at-will" employment doctrine under which a plaintiff employee could not sustain a wrongful termination action. If such an implied-in-fact term was found to exist, for example where an employer's employee handbook specified exclusive reasons for termination of its employees, then those provisions of the employment handbook were treated as implied-in-fact contract terms, removing the employment contract from the "at-will" employment doctrine rules and preventing the employer from terminating the contract for any or no cause.

****40** The case at hand involves an indefinite-length contract which contained an express "just cause" provision. Because that provision was expressed, the analysis and rules in *Berube*, *Brehany*, and *Johnson* are not applicable; we already know that the express "just cause" provision takes us out of the general "at-will" employment doctrine rule. The issue here is how the trial court is to determine whether the duration of the contract is reasonable and how it is to arrive at such a reasonable duration. This is a question not previously addressed to this court and to which *Berube*, *Brehany*, and *Johnson* are not instructive. The legal propositions and rules of contract construction and interpretation presented in this dissent are more appropriate for use by the trial court in adjudicating this controversy on remand.

****41** Once the trial court determines the

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reasonable term under the circumstances and that term is implied by law into the contract, the contract will necessarily be enforceable against the succeeding board under the second prong of the *Bair* test articulated in the majority opinion because (1) the activity contracted for is proprietary and (2) the term or duration that was implied into the contract is de facto reasonable under the circumstances.

****42** Having determined the reasonable duration of the contract, and therefore its enforceability, the trial court must then determine if the hospital breached the contract when it terminated Dr. Hardy. It could terminate him before the expiration of the implied term only for "just cause." If the trial court determines that the hospital had just cause to terminate the contract with Dr. Hardy, the hospital did not breach the contract and Dr. Hardy is not entitled to damages. If the trial court determines that the hospital did not have just cause to terminate the contract with Dr. Hardy, then the hospital breached the contract and Dr. Hardy is entitled to damages calculated consistent with the reasonable employment duration term implied into the contract. See *Bad Wound v Lakota Cmty. Homes, Inc.*, 1999 SD 165, ¶ 11, 603 N.W.2d 723, 726.

****43** Under the majority opinion's analysis, Dr. Hardy's damages, assuming the hospital is liable to Dr. Hardy for terminating him without just cause, would be speculative, at best, and undeterminable, at worst, absent a finite term of duration in the contract. See *Benham v. World Airways, Inc.*, 432 F.2d 359, 360, 361-62 (9th Cir.1970); *Sterling Drug, Inc v. Oxford*, 294 Ark. 239, 743 S.W.2d 380, 386-87 (1988). It is for this reason that the law disfavors contracts of perpetual duration and why, when faced with contracts of indefinite duration, courts will imply a reasonable term of duration. If on remand the perpetual contract is held to be enforceable and the trial court determines that the hospital did not have just cause to terminate the contract, how would Dr. Hardy's damages be calculated? Would Dr. Hardy be entitled to all of his loss of earnings under the indefinite contract? In other words, would he be entitled to compensation under the contract from the date of

termination to the date of his death? To the date of his retirement? To the date of his inability to perform his job responsibilities, whenever that might be? Determining a reasonable term for the contract under the circumstances and implying it into the contract would avoid the possibility of speculative or undeterminable damages.

***1177 **44** The majority opinion disagrees that imposition of a definite term is justified and argues that the trial court would face similar "challenges" in determining a reasonable term of duration under the circumstances as it would in determining Dr. Hardy's speculative damages. The approach advocated in this dissent would focus the trial court's attention and efforts on the discrete task of discerning a reasonable term for the contract under the circumstances, thus centering the inquiry on the parties' intentions, the nature of the parties' relationship, and the overall circumstances surrounding the formation of the contract at issue. See McCauliff, 8 *Corbin on Contracts* § 34.11, at 262. The majority opinion's suggestion for determining Dr. Hardy's potential damages would take the trial court's attention away from the contract itself and the context in which it was formulated and focus on myriad distant and less related factors, all of which remain at least to some extent speculative in nature. I would not send the trial court into the majority opinion's briar patch of thorny factors. In this case, [FN3] it would be far less complicated and less speculative for the trial court to determine Dr. Hardy's potential damages in relation to an implied reasonable term.

FN3. The majority opinion also argues that under the dissent's analysis courts will "inevitably and routinely need to determine damages associated with a breach of an indefinite employment contract." This is incorrect. The vast majority of cases involving issues of termination under indefinite-length employment contracts will be governed by the "at-will" employment doctrine. In those instances, the issue of damages would not arise because the employment relationship would be terminable by either party for

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any reason. The problematic issue of damages arises only in the very rare and unique case, such as the one at hand, where an expressed or implied "just cause" term is a part of the indefinite duration contract, thus removing the case from the application of the usual "at-will" employment doctrine rule.

****45** I would remand to the trial court but with instructions consistent with this concurring opinion.

****46** Justice HOWE concurs in Justice RUSSON's concurring and dissenting opinion.

Briefs and Other Related Documents (Back to top)

- 2000 WL 34475351 (Appellate Brief) Brief of Appellant, Leo W Hardy, M D (Dec. 08, 2000)Original Image of this Document with Appendix (PDF)

END OF DOCUMENT

Tab 19

H**Briefs and Other Related Documents**

Supreme Court of Utah.
 WATER & ENERGY SYSTEMS
 TECHNOLOGY, INC., Plaintiff, Appellee, and
 Cross-
 Appellant,
 v.
 Steven L. KEIL and Brody Chemical Company,
 Inc., Defendants, Appellants, and
 Cross-Appellees.
 No. 20000468.

March 19, 2002.
 Rehearing Denied May 3, 2002.

Company alleged misappropriation of trade secrets by its former water treatment chemical salesman and sought preliminary injunction to enjoin employee and his new employer from disclosing trade secrets. The Second District Court, Farmington Department, Rodney S. Page, J., granted the preliminary injunction. Salesman's petition for interlocutory appeal was granted. The Supreme Court, 974 P.2d 821, reversed. On remand, the District Court, Rodney S. Page, J., entered jury verdict in company's favor on both its intentional interference with business relations and misappropriation of trade secrets claims, awarding it \$188,675 for damages in lost profits and unearned salary and benefits that had been paid to the salesman. Salesman and his new employer appealed, and the company cross-appealed. The Supreme Court, Russon, Associate C.J., held that: (1) salesman failed to meet his burden of marshaling all the evidence supporting jury's verdict, and thus, evidence would be assumed to have adequately supported finding that the company's price lists were misappropriated, and (2) the company was not limited to award of damages

based on the unjust enrichment for the misappropriation.

Affirmed.

West Headnotes**[1] Appeal and Error ¶930(1)**

30k930(1) Most Cited Cases

On appeal from a jury verdict, the Supreme Court will view the evidence and all reasonable inferences drawn therefrom in the light most favorable to that verdict.

[2] Appeal and Error ¶1079

30k1079 Most Cited Cases

Water treatment chemical salesman's argument that jury's finding that his former employer's price lists were confidential was not supported by the evidence, because the salesman committed them to memory and his new employer could have obtained the prices by other means, as well as salesman's contention that the his actions could not have injured the employer, because its customer contracts were not adhesive or exclusive, were not adequately briefed and, therefore, would not be addressed on appeal before the Supreme Court.

[3] Appeal and Error ¶757(3)

30k757(3) Most Cited Cases

[3] Appeal and Error ¶937(1)

30k937(1) Most Cited Cases

Former water treatment chemical salesman failed to marshal all the evidence supporting jury's verdict, and thus, evidence would be assumed to have adequately supported finding that his former employer's price lists were misappropriated by him, where the salesman's supposed marshaling only constituted a reargument of the factual case presented below, in which evidence was construed in light most favorable to the salesman rather than his employer; although the salesman maintained he

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(Cite as: 48 P.3d 888, 2002 UT 32)

"took no documents with him that set forth pricing" when he departed from his employer, and that pricing was not the "key" issue affecting employer's loss of business, president of the employer testified that the salesman never returned pricing sheets for a number of its clients that were in salesman's possession, and evidence was introduced at trial deeming pricing as "important."

[4] Appeal and Error ¶893(1)
30k893(1) Most Cited Cases

[4] Appeal and Error ¶930(1)
30k930(1) Most Cited Cases

[4] Appeal and Error ¶1001(1)
30k1001(1) Most Cited Cases

When an appellant contends that the evidence presented at trial is insufficient to support a jury's factual findings, the Supreme Court does not weigh the evidence de novo; rather, the Supreme Court will follow one standard of review, and will reverse only if, taking the evidence in the light most favorable to the prevailing party, the appellant demonstrates that the findings lack substantial evidentiary support, after the appellant has marshalled all the evidence supporting the verdict and then showed that such evidence cannot support the verdict.

[5] Appeal and Error ¶937(1)
30k937(1) Most Cited Cases

When the appealing party does not meet its burden of marshaling all the evidence supporting the verdict, the Supreme Court will assume that the evidence adequately supported the findings, and the complaining party's assertion of insufficiency must therefore fail.

[6] Damages ¶40(1)
115k40(1) Most Cited Cases

Former employer was not limited to award for damages based on the unjust enrichment of its former water treatment chemical salesman and his new employer from misappropriation of the former employer's pricing lists, but could recover its lost profits caused by defendants' conduct. U.C.A.1953, 13-24-4(1).

[7] Statutes ¶188

361k188 Most Cited Cases

When interpreting a legislative enactment, the Supreme Court looks first to the plain language of the act to determine its meaning.

[8] Appeal and Error ¶1079
30k1079 Most Cited Cases

Former employer's argument that it was entitled to double damages and attorney fees due to its former water treatment chemical salesman's malicious and willful misuse of the employer's trade secrets, and to additional damages derived from the employee's interference with one of its business accounts, was inadequately briefed and, thus, would not be addressed by the Supreme Court on appeal; employer did not offer even a single statutory citation, judicial decision, or procedural rule nor refer to even one location in the record to show that evidence existed in support of its claim. Rules App.Proc., Rule 24(a)(9).

[9] Appeal and Error ¶756
30k756 Most Cited Cases

[9] Appeal and Error ¶761
30k761 Most Cited Cases

The Supreme Court will not become simply a depository in which the appealing party may dump the burden of argument and research. Rules App.Proc., Rule 24.

*890 Joseph C. Rust, Salt Lake City, for plaintiff.

John T. Caine, Ogden, for Keil.

Thomas R. Blonquist, Salt Lake City, for Brody Chemical.

RUSSON, Associate Chief Justice.

****1** Steven L. Keil and Brody Chemical Company appeal from a trial court judgment awarding Water & Energy Systems Technology, Inc., \$188,675 in damages for its claims of (1) intentional interference with existing and prospective business relations and (2) misappropriation of trade secrets pursuant to the Uniform Trade Secrets Act, Utah Code Ann. §§ 13-24-1 to - 9 (1999). We affirm.

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(Cite as: 48 P.3d 888, 2002 UT 32)

BACKGROUND

[1] * *2 "On appeal from a jury verdict, we view the evidence and all reasonable inferences drawn therefrom in the light most favorable to that verdict." *Pratt v. Prodata, Inc.*, 885 P.2d 786, 787 (Utah 1994); see also *Kilpatrick v. Wiley, Rein & Fielding*, 2001 UT 107, ¶ 2, 37 P.3d 1130.

**3 Steven Keil ("Keil") began working for Water & Energy Systems Technology, Inc. ("WEST"), as a water treatment chemical sales representative in 1986. During his tenure at WEST, Keil spent the majority of his time managing and servicing certain of the company's industrial sales accounts, including those for Alliant Techsystems ("Alliant"), Cargill Flour Milling ("Cargill"), Magnesium Corporation of America ("MagCorp"), and Utah State University ("USU"). As part of his duties related to these accounts, Keil had access to the formulae WEST used to create its chemicals, as well as to WEST's confidential, customer-specific pricing lists for those chemicals. [FN1]

FN1. WEST attempted to ensure the confidentiality of its customer-specific price lists in a number of ways. The company provided prices to its sales representatives only on a "need to know basis." Likewise, WEST instructed its sales personnel to always inform customers that any pricing information they received was confidential. Finally, all written disclosures of WEST prices to the company's customers was accompanied by language that read in substance, "This material is proprietary and confidential. We honor your commitment to maintain it as such."

**4 Subsequently, in September 1997, representatives of Brody Chemical Company ("BCC") approached Keil about the possibility of his leaving WEST to work for BCC. Keil initially declined this invitation, deciding instead to stay with WEST. After further discussions, however, Keil agreed in late 1997 to begin selling for BCC water treatment chemicals similar to those he was marketing for WEST.

**5 In preparation for his departure from WEST, Keil began meeting with various employees of BCC, including the company's owner, Jon Liddiard. The purpose of these meetings was to ensure that BCC carried an inventory of treatment chemicals comparable to those marketed by WEST, and to establish a pricing scheme for the chemicals that would be "competitive" with WEST's pricing. Accordingly, the discussions at Keil's meetings with BCC centered around the necessary "[f]ormulations" for the chemicals, how and "where to obtain [the] raw materials" required by the formulae, and possible "pricing" for the ultimate products. Specifically, BCC and Keil worked to create products that would be "equivalent" to WEST's but that would be sold for "ten percent less" than the confidential prices charged by WEST to each respective customer.

**6 Following these preparatory meetings, on February 18, 1998, Keil drafted on BCC stationery six substantively identical letters to the various clients he had been servicing for WEST, including Alliant, Cargill, MagCorp, and USU. In the letters, Keil explained that he had begun working for BCC and that because of this change in employment, he could now offer "essentially the same" chemicals he had provided before but at "substantially lower" prices. In support of this contention, Keil's letters to Alliant, Cargill, and USU each included a table that juxtaposed the proposed prices of BCC's *891 treatment chemicals with the prices of WEST's "corresponding" chemicals. The prices listed for BCC's chemicals represented approximately a ten percent discount from WEST's prices.

**7 Shortly thereafter, on March 2, 1998, Keil voluntarily terminated his employment with WEST. The next day, Keil began delivering the letters he had written to the clients he serviced while at WEST. Within two weeks of the delivery of these letters, Alliant, Cargill, and MagCorp all ceased ordering water treatment chemicals from WEST despite the fact that WEST had serviced each company continuously for the previous four years and WEST "had every expectation" of maintaining those relationships. Moreover, two of these companies, Alliant and Cargill, immediately began

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purchasing their water treatment chemicals from BCC. Similarly, MagCorp reported to WEST that it was terminating their relationship based in part on "problems with [its service] representative," Keil.

****8** On March 9, 1998, WEST sued BCC and Keil (collectively, "defendants") in the Second District Court for Davis County, alleging among other things that Keil had intentionally interfered with WEST's "existing and future business relationships for improper purposes," and had misappropriated WEST's confidential prices by sharing them with BCC in violation of the Uniform Trade Secrets Act, Utah Code Ann. §§ 13-24-1 to -9 (1999). On March 26, 1998, the district court granted WEST a preliminary injunction against BCC and Keil, which we reversed on interlocutory appeal in *Water & Energy Systems Technology, Inc. v. Keil*, 1999 UT 16, 974 P.2d 821 ("Keil I").

****9** Following our decision in *Keil I*, defendants moved for summary judgment, asserting in part that Keil had not misappropriated WEST's price lists as a matter of law. The district court, however, denied the motion on this issue in an order dated September 1, 1999. The court reasoned:

There is sufficient evidence from which the trier of fact could conclude that the ... price lists of [WEST] were confidential.... [Therefore,] [t]here remains a question of fact as to the misappropriation of [WEST]'s price lists and as to whether [WEST]'s price lists were used by [BCC and Keil] in establishing [BCC]'s prices.

Accordingly, the case proceeded to trial.

****10** At trial, defendants again urged the district court to enter judgment in their favor, moving for a directed verdict at the conclusion of WEST's case in chief on a number of grounds, including (1) that insufficient evidence had been introduced to establish WEST's claim for misappropriation of its price lists, (2) that insufficient evidence had been introduced to substantiate WEST's claim for intentional interference with its business relations for improper purposes, and (3) that WEST had failed to prove Keil's actions caused the company damages in regard to its contractual relationship with USU. Concluding that the jury could

reasonably find in WEST's favor on the issue of misappropriation if it "chose to believe everything ... presented by way of [WEST]'s case"--and that a jury finding of misappropriation would satisfy the challenged "improper purpose" element of WEST's intentional interference with business relations claim--the district court denied defendants' motion on these two issues but granted the motion on WEST's claim for damages related to its USU account. The court stated, "[On] the element of damage having to do with USU[,] the Court finds that there is insufficient evidence to go to the jury ... and therefore will allow [WEST to proceed] only [on] those issues relative to the claim from Alliant, from MagCorp, [and] from Cargill."

****11** At the conclusion of trial, the jury rendered a verdict in WEST's favor on both its intentional interference with business relations and misappropriation of trade secrets claims, awarding the company \$188,675 of damages in lost profits and unearned salary and benefits that had been paid to Keil. Specifically, the jury found that WEST's price lists were confidential; that Keil had misappropriated WEST's price lists; that Keil intentionally interfered with WEST's business relationships with Alliant, Cargill, and MagCorp; that Keil's actions damaged WEST; and that Keil engaged in these actions as an agent of BCC.

***892 **12** Subsequently, on March 10, 2000, defendants moved for a new trial and for judgment notwithstanding the verdict, contending among other things that insufficient evidence had been introduced at trial to establish WEST's claim for misappropriation of its trade secrets, and that an incorrect standard for calculating damages had been used in the case. WEST responded, and on May 31, 2000, the trial court denied defendants' motions. Finding that sufficient evidence had been introduced at trial to prove Keil had disclosed WEST's respective price lists for Alliant, Cargill, and MagCorp in an effort to transfer that business to BCC, the court ruled that the "damages awarded by the jury were fair and reasonable." Defendants now appeal the judgment of the trial court.

ANALYSIS

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[2] ****13** On appeal, BCC and Keil raise two arguments: (1) that the trial court erred by failing to direct or set aside the jury verdict because, as defendants allege, WEST presented "insufficient evidence to support the jury's verdict" for its claim of misappropriation of trade secrets; and (2) that the trial court erred by refusing to set aside the damages awarded to WEST as an improper assessment of damages under the Uniform Trade Secrets Act. [FN2] In addition, WEST cross-appeals, claiming that the trial court inappropriately disallowed the company from seeking additional damages beyond those ultimately awarded by the jury. We address each issue in turn.

FN2. Apparently, defendants also argue that the jury's finding concerning the confidentiality of WEST's price lists was not supported by the evidence because Keil committed them to memory and because BCC could have obtained the prices by asking WEST's customers what they paid for their chemicals. Likewise, defendants contend that Keil's actions in this case could not have injured WEST because WEST's contracts with Alliant, Cargill, and MagCorp "were not adhesion or exclusive contracts and [the companies] were free to purchase other products and services at any time." These arguments, however, fail for at least three reasons. First, defendants have not adequately briefed these contentions, and we therefore will not address them. *E.g.*, *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988); Utah R.App. P. 24(a)(9); *see also infra* ¶¶ 20-21. In addition, defendants do not even attempt to meet their marshaling burden on these arguments, and thus, we assume that the record supports the jury's findings in favor of WEST on these issues. *E.g.*, *State v. Hopkins*, 1999 UT 98, ¶ 16, 989 P.2d 1065; *Young v. Young*, 1999 UT 38, ¶ 30, 979 P.2d 338. Finally, even a cursory review of the record reveals that ample evidence was presented at trial for the jury to find that WEST's price lists were confidential and

expected their employees to keep them as such, that water treatment chemical prices are treated as confidential and proprietary within the industry as a general practice, and that WEST reasonably expected to continue its relationships with Alliant, Cargill, and MagCorp despite the nonexclusive nature of their contracts.

I. INSUFFICIENCY OF THE EVIDENCE

[3] ****14** BCC and Keil first contend that the trial court erred by denying their motions for directed verdict and for judgment notwithstanding the verdict because WEST failed to present sufficient evidence to establish a misappropriation of WEST's price lists. Specifically, defendants argue that the evidence presented at trial "did not purponderate [sic]" the jury's finding of either (1) Keil's disclosure of WEST's price lists or (2) "a nexus between the any [sic] activity of Keil [and] damage to WEST."

[4][5] ****15** When an appellant contends that the evidence presented at trial is insufficient to support a jury's factual findings, "we do not weigh the evidence de novo." *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989). Rather, we follow one standard of review: We reverse only if, taking the evidence in the light most favorable to the prevailing party, the appellant demonstrates that the findings lack substantial evidentiary support. *Id.*; *see also Scudder v. Kennecott Copper Corp.*, 886 P.2d 48, 52 (Utah 1994); *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992); *Gustaveson v. Gregg*, 655 P.2d 693, 695 (Utah 1982). Specifically, this standard obligates the appealing party to marshal all the evidence supporting the verdict and then show that such evidence "cannot support the verdict." *Hansen v. Stewart*, 761 P.2d 14, 18 (Utah 1988); *see also, e.g., Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶¶ 33-36, 31 P.3d 557; *Seale v. Gowans*, 923 P.2d 1361, 1363 (Utah 1996); ***893** *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991). Indeed, we employ this standard in light of our general deference toward the jury's role as fact-finder and our repeated recognition of trial courts' "advantaged position to evaluate the

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evidence and determine the facts." *Utah Med Prods, Inc v Searcy*, 958 P 2d 228, 232 (Utah 1998), *see also, e.g., Willey v Willey*, 951 P 2d 226, 230 (Utah 1997) Accordingly, when the appealing party does not meet its marshaling burden, we "assume that the evidence adequately supported the finding[s]," and the complaining party's assertion of insufficiency must therefore fail *Young v Young*, 1999 UT 38, ¶ 30, 979 P 2d 338, *see also, e.g., State v Hopkins*, 1999 UT 98, ¶ 16, 989 P 2d 1065, *Searcy*, 958 P 2d at 233, *Interwest Constr v Palmer*, 923 P 2d 1350, 1360 (Utah 1996), *Hall v Process Instruments & Control, Inc*, 890 P 2d 1024, 1028 (Utah 1995), *Saunders v Sharp*, 806 P 2d 198, 199 (Utah 1991)

****16** In this case, defendants' brief contains a lengthy section purporting to marshal the evidence in favor of the jury verdict. However, although BCC and Keil do cite some evidence that supports the jury's findings, even a cursory review of the trial record reveals that defendants "frequently omit[] crucial and incriminating evidence" that weighs in favor of the jury's verdict *Alta Indus Ltd v Hurst*, 846 P 2d 1282, 1287 (Utah 1993). For example, defendants admit that Keil repeatedly met with employees of BCC prior to his departure from WEST, but they fail to address what occurred at those meetings that BCC and Keil openly discussed prices in a joint effort to develop a plan to offer chemicals equivalent to WEST's at a ten percent discount from that company's prices. Similarly, defendants assert that when he departed from WEST, Keil "took no documents with him that set forth pricing," even though WEST's president specifically testified at trial that Keil never returned pricing sheets for a number of WEST's clients, including Alliant and MagCorp, that were in his possession when he left WEST. Further, defendants maintain that pricing was not the "key" issue affecting WEST's loss of business as a result of Keil's actions, despite the fact that evidence was introduced at trial deeming pricing "important", that Alliant, Cargill, and MagCorp all ceased purchasing chemicals from WEST following BCC's offers to provide equivalent chemicals at a ten percent discount, and that following such offers Alliant and Cargill immediately began purchasing

their water treatment chemicals from BCC. Indeed, defendants' supposed marshaling of the evidence in reality only constitutes a reargument of the factual case they presented below, with the evidence construed in a light most favorable to BCC and Keil rather than to WEST. *See In re Estate of Bartell*, 776 P 2d at 886. By its very nature, such a tactic does not carry defendants' "heavy" marshaling burden, and we consequently will not disturb the jury's findings rendered in favor of WEST. *Alta Indus*, 846 P 2d at 1286, *see also Young*, 1999 UT 38 at ¶ 30, 979 P 2d 338, *Searcy*, 958 P 2d at 232, *In re Estate of Bartell*, 776 P 2d at 886, *Scharf v BMG Corp*, 700 P 2d 1068, 1069-70 (Utah 1985) [FN3]

FN3 We further note that, under other conditions, the jury's finding in favor of WEST on the company's claim for intentional interference with business relations would constitute independent grounds for affirmance. *See Crookston v Fire Ins Exch*, 817 P 2d 789, 797-98 (Utah 1991). However because the trial court explicitly hinged the viability of this claim on WEST's misappropriation claim, we address defendants' insufficiency of the evidence argument on appeal regardless.

II MEASURE OF DAMAGES

[6] ****17** Defendants' second argument on appeal is that the trial court erred by refusing to set aside the damages awarded to WEST. Specifically, defendants argue that rather than allowing WEST to recover its lost profits caused by Keil's disclosure of its price lists, the trial court should have limited WEST's damages to the "benefit" BCC and Keil received as a result of misappropriation. We disagree.

[7] ****18** Section 13-24-4 of the Utah Code governs the amount of damages that may be awarded for the misappropriation of a trade secret. This provision states that damages available under the Act

***894** can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into

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account in computing actual loss. Utah Code Ann. § 13-24-4(1) (1999). When interpreting a legislative enactment, "we look first to the plain language of the act to determine its meaning." *City of Hildale v. Cooke*, 2001 UT 56, ¶ 36, 28 P.3d 697; see also, e.g., *State ex rel. Div. of Forestry, Fire & State Lands v. Tooele County*, 2002 UT 8, ¶ 10, 44 P.3d 680; *Associated Gen. Contractors v. Bd. Oil, Gas & Mining*, 2001 UT 112, ¶ 27, 38 P.3d 291; *Hall v. Utah State Dep't of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958; *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984). In this case, the plain language of section 13-24-4 is entirely antithetical to the position advanced by BCC and Keil. Rather than restricting damages in misappropriation cases to the windfall obtained by the defendant, section 13-24-4 unambiguously states that such damages "can include *both* the actual loss caused by misappropriation *and* the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." Utah Code Ann. § 13-24-4(1) (emphasis added). Indeed, this language specifically contemplates--in two separate places--that a successful plaintiff in a misappropriation case may obtain the losses it suffers due to the disclosure of its trade secret. See *id.* Accordingly, we reject defendants' argument that damages for the misappropriation of a trade secret must be restricted to the unjust enrichment such disclosure renders, and thus, hold that the trial court did not err in this case by allowing WEST to recover its lost profits caused by BCC and Keil. See *id.*

III. ADDITIONAL DAMAGE CLAIMS

[8] **19 Finally, WEST contends on cross-appeal that the trial court erred by disallowing the company from seeking additional damages beyond those ultimately awarded by the jury. Specifically, WEST asserts that it is "entitled[d]" to "double damages and attorney[] fees" for Keil's "malicious and willful ... misuse of WEST's trade secrets," and to "additional damages [derived from] Keil's interference with WEST's USU account." In making this assertion, however, WEST fails to adequately set forth an argument as required by rule 24(a)(9) of the Utah Rules of Appellate Procedure.

**20 This court has repeatedly held that appealing parties must " 'clearly define[]' " the issues presented on appeal " 'with pertinent authority cited.' " *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) (quoting *Williamson v. Opsahl*, 92 Ill.App.3d 1087, 48 Ill.Dec. 510, 416 N.E.2d 783, 784 (1981)). Likewise, Utah Rule of Appellate Procedure 24 unequivocally requires, "[Appellant's brief] shall contain the contentions and reasons of the appellant with respect to the issues presented, including ... citations to the authorities, statutes, and parts of the record relied on." Utah R.App. P. 24(a)(9). Consequently, "[i]t is well established that a reviewing court will not address arguments that are not adequately briefed." *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998); see also, e.g., *Ellis v. Swensen*, 2000 UT 101, ¶ 17, 16 P.3d 1233; *Coleman v. Stevens*, 2000 UT 98, ¶ 7, 17 P.3d 1122.

[9] **21 In this case, WEST has entirely failed to adequately brief its assertion that it is "entitled" to additional damages. WEST does not offer even a single statutory citation, judicial decision, or procedural rule in support of its claim for further damages. See, e.g., *Associated Gen. Contractors v. Bd. Oil, Gas, & Mining*, 2001 UT 112, ¶ 37, 38 P.3d 291; *State v. Bisner*, 2001 UT 99, n. 5, 37 P.3d 1073; *Featherstone v. Schaerrer*, 2001 UT 86, n. 11, 34 P.3d 194. Indeed, WEST baldly asserts it is "clear from trial court testimony" that the company is due additional damages, but WEST fails to refer us to even one location in the record where such evidence exists. Moreover, WEST utterly neglects to discuss, let alone construe or apply, the Uniform Trade Secrets Act's provisions on damages and attorney fees--statutory language that would certainly be determinative, if not dispositive, of whether WEST qualifies for the damages it seeks. See Utah Code Ann. §§ 13-24-4 to -5. Such an approach is neither adequate under the Utah Rules of Appellate Procedure nor acceptable. Accordingly, because WEST has *895 not sufficiently presented its claim for additional damages, we will not address the argument. E.g., *Ellis*, 2000 UT 101 at ¶ 17, 16 P.3d 1233; *Coleman*, 2000 UT 98 at ¶ 7, 17 P.3d 1122; *Thomas*, 961 P.2d at 304. As we have all too often

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[FN4] had occasion to explain, this court will not become " 'simply a depository in which the appealing party may dump the burden of argument and research.' " *Bishop*, 753 P.2d at 450 (quoting *Opsahl*, 48 Ill.Dec. 510, 416 N.E.2d at 784). We once again refuse to accept that role.

FN4. See *Associated Gen. Contractors*, 2001 UT 112 at ¶ 37 & n. 8, 38 P.3d 291 (listing twenty-three cases in which a party inadequately briefed an argument); *MacKay v. Hardy*, 973 P.2d 941, 948 n. 9 (Utah 1998) (giving examples of the "disconcertingly legion" number of inadequately briefed cases); see also *Tanner v. Carter*, 2001 UT 18, ¶ 42, 20 P.3d 332; *Coleman*, 2000 UT 98 at ¶ 7, 17 P.3d 1122.

CONCLUSION

****22** In view of the foregoing, we conclude that the trial court did not err by (1) refusing to set aside the jury's verdict based on defendants' claims of insufficiency of the evidence and inappropriately assessed damages or by (2) disallowing WEST from seeking additional damages beyond those awarded by the jury. Accordingly, we affirm the judgment of the trial court as entered below.

****23** Chief Justice HOWE, Justice DURHAM, Justice DURRANT, and Justice WILKINS concur in Associate Chief Justice RUSSON'S opinion.

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Briefs and Other Related Documents (Back to top)

- 2001 WL 34728387 (Appellate Brief) Appellants' Reply Brief (Feb. 23, 2001)Original Image of this Document (PDF)
- 2001 WL 34728388 (Appellate Brief) Appellee/Cross-Appellant Brief (Jan. 22, 2001)Original Image of this Document with Appendix (PDF)

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Tab 20

H

Supreme Court of Utah.
Boyd A. WARD, Plaintiff and Appellant,
v.

RICHFIELD CITY, a municipal corporation, et al.,
Defendants and Respondents.
No. 18431.

Aug. 16, 1984.
Rehearing Denied April 16, 1986.

Terminated city chief of police brought action seeking to be reinstated and recover damages. The Sixth District Court, Sevier County, Don V. Tibbs, J., granted city's motion to dismiss for lack of jurisdiction, and chief appealed. The Supreme Court, Howe, J., held that statute which deals with appointment of chief of police in third-class cities does not make removal of chief of police in such cities free from all judicial oversight, in light of statutes dealing with removal of chief of police from first and second class cities, which expressly make such removal free from judicial review, and thus, trial court had jurisdiction to review action of city council of third class city in firing chief of police.

Order set aside and case remanded with directions.

West Headnotes

[1] Municipal Corporations ⚡182

268k182 Most Cited Cases

U.C.A.1953, 10-3-909 to 10-3-911, which respectively, require cities of first and second class to create police departments, vest board of commissioners with authority to prescribe administration of police department and to appoint head of department, and provide that chief of police department may be removed by board of commissioners without hearing or review by courts, by their references to authority of board of

commissioners over police department, are limited to first and second class cities, in which board of commissioners exist; such statutes do not apply to police departments in third-class cities.

[2] Statutes ⚡212.6

361k212.6 Most Cited Cases

Statute is construed on assumption that each term is used advisedly and that intent of legislature is revealed in use of term in context and structure in which it is placed.

[3] Municipal Corporations ⚡182

268k182 Most Cited Cases

U.C.A.1953, 10-3-918, which deals with appointment of chief of police in third-class cities, does not make removal of chief of police in such cities free from judicial oversight, in light of statutes dealing with removal of chief of police from first and second class cities, which expressly make such removal unreviewable, and thus, trial court had jurisdiction to review action of city council of third class city in firing chief of police. U.C.A.1953, 10-3-911.

*265 George E. Brown, Jr., Midvale, for plaintiff and appellant.

Ken Chamberlain, Richfield, for defendants and respondents.

HOWE, Justice:

Plaintiff Boyd A. Ward appeals from an order granting defendant Richfield City's motion to dismiss his complaint for lack of jurisdiction.

On April 2, 1981, Ward was terminated as chief of police of the city of Richfield, a third-class city, when the city council went into a closed meeting to consider "other business." According to a stipulation made by counsel for both sides, that action was entered in the minutes after the closed session concluded. On June 7, 1981, Ward brought

(Cite as: 716 P.2d 265)

this action to be reinstated and to recover damages alleging that the closed meeting of the council had violated U.C.A., 1953, § 52-4-1, et seq., commonly known as the Open and Public Meetings Act. He also obtained a temporary restraining order against Richfield City, restraining it from taking any further action on the termination until the legality of its action could be decided by the district court. Nevertheless, on June 8 the council in an open meeting ratified its action of April 2. At a *266 hearing for a preliminary injunction, Richfield City made a motion to dismiss plaintiff's complaint for lack of jurisdiction. The court determined that pursuant to U.C.A., 1953, § 10-3-911, it had no jurisdiction to review the act of the city council in firing the chief of police and granted the motion. That order is the sole issue before us for review.

Section 10-3-911 provides in pertinent part:

The chief of the police or fire department of the cities may at any time be removed, without a trial, hearing or opportunity to be heard, by the *board of commissioners* whenever in its opinion the good of the service will be served thereby. Its action in removing the chief of either department shall be final and conclusive and shall not be received or called in question before any court. [Emphasis added.]

Section 10-3-911 is preceded by § 10-3-909 mandating cities of the first and second class to create police departments and by § 10-3-910 vesting the *board of commissioners* with authority to prescribe the administration of the police departments by ordinance and to appoint the head of that department. Under § 10-1-104(2)(a), the governing body for cities of the first and second class is a city commission composed of a mayor and four or two commissioners, § 10-3-103 and 104. Under § 10-1-104(2)(b), the governing body for cities of the third class is the city council composed of a mayor and five councilmen, § 10-3-105.

[1][2][3] It is readily apparent that §§ 10-3-909, 910 and 911 with their references to the authority of the board of commissioners over police departments unmistakably refer to and are limited to first and second-class cities where boards of commissioners exist. These sections were not

intended by the Legislature to apply to police departments in third-class cities such as Richfield. Police departments in third-class cities and towns are dealt with separately in § 10-3-918, which provided at the time this case arose:

In cities of the third class and in towns, the governing body may appoint a chief of police or marshal who shall exercise and perform such duties as may be prescribed by the governing body. The chief of police or marshal shall be under the direction, control and supervision of the mayor. The chief of police or marshal may, with the consent of the mayor, appoint assistants to the chief of police or marshal.

Conspicuously absent from this statute is the provision contained in § 10-3-911 making the removal of a chief of police free from all judicial oversight. "It probably is not wholly inaccurate to suppose that ordinarily when people say one thing they do not mean something else." 2A C. Sands, Sutherland Statutory Construction, § 47.01, as cited in *Hansen v. Wilkinson*, Utah, 658 P.2d 1216 (1983). We construe a statute on the assumption that each term is used advisedly and that the intent of the Legislature is revealed in the use of the term in the context and structure in which it is placed.

Richfield City relies on several cases to bolster its argument that stare decisis supports a finding of no jurisdiction. It also cites us to § 10-1-110 which directs that statutes such as § 10-3-911 which were enacted in 1977 as part of the "Utah Municipal Code" should be construed as the continuation of prior statutes so long as the provisions are the same or substantially the same. In *Taylor v. Gunderson*, 107 Utah 437, 154 P.2d 653 (1944) we held that a town marshal of a third-class city could be removed without cause. However, the statute then in force (U.C.A., 1943, § 15-6-32) was repealed by the enactment of the 1977 Municipal Code and § 10-3-911 is in no wise substantially the same. In *Skeen v. Browning*, 32 Utah 164, 89 P. 642 (1907) the statutes specifically made actions of the mayor and city council in removing heads of police and fire departments final and nonreviewable. Sec. 8, p. 46, Act 1899. In *State v. Stavar*, Utah, 578 P.2d 847 (1978) we did not reach the issue presented in

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the instant case. None of these cases is helpful here.

*267 The order dismissing plaintiff's complaint for lack of jurisdiction was in error and is set aside. The case is remanded to the trial court with directions to allow plaintiff to proceed on the merits of his case. Costs are awarded to appellant.

HALL, C.J., and STEWART and DURHAM, JJ., concur.

ZIMMERMAN, J., does not participate herein.

ON PETITION FOR REHEARING

Richfield City has petitioned for rehearing pointing out that the court's opinion did not cite nor rely upon *Jolley v. Lindon City*, Utah, 684 P.2d 47 (1984). We acknowledge our oversight. That case, too, involved the firing of the chief of police in a third class city. However, the contention there made by the appellant chief of police was that U.C.A., 1953, § 10-3-911 could not apply to him because he was discharged for investigating a city councilman in his official duties. The contention was not there made, as in the instant case, that section 10-3-911 does not in any instance apply to chiefs of police in third class cities. In a per curiam opinion, we held that since section 10-3-911 contained no exceptions, it was inconsequential why the chief was dismissed. We also found lacking merit the appellant's contention that the city council had not formally dismissed him. Again, no contention was made that the city council lacked that statutory power.

After careful consideration of the appellant's petition for rehearing, we deny it and overrule *Jolley v. Lindon City*, *supra*, insofar as our decision in that case conflicts with our opinion in the instant case. Furthermore, we have carefully examined Chapter 3 of Title 10 and have found that in each instance when the term "Board of Commissioners" is used, it refers only to the governing body of cities of the first and second class. We can find no instance in which that term was used to refer to the governing body of cities generally, including a city council in a third class city. In Chapter 3, the term

"governing body" is consistently used (over seventy-five times) when reference is made to cities generally, that is, of all three classes.

The petition for rehearing is denied.

ZIMMERMAN, J., did not participate herein.

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