

2005

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

Utah Court of Appeals

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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.

**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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## **JURISDICTION**

This is an appeal from the grant of summary judgment of the Trial Court, (i.e., the Honorable Timothy R. Hanson of the Third Judicial District Court, Salt Lake County (the “Trial Court”)), in the matter of *Wasatch Crest Insurance Company, in Liquidation, and Wasatch Crest Mutual Insurance Company, In Liquidation and Merwin U. Stewart, Liquidator v. LWP Claims Administrators Corp., and LWP Claims Solutions, Inc.*, Case No. 030915527. This Court has jurisdiction to hear this appeal pursuant to UTAH CODE ANN. § 78-2-2(4)(j).

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW**

#### **Statement of the Issues:**

- I. DID THE TRIAL COURT ERR WHEN IT HELD THAT, EVEN THOUGH LWP WAS AN AFFILIATE UNDER UTAH CODE ANN. § 31A-27-322, LWP WAS NOT AN AFFILIATE IN CONTROL OF INSURANCE BECAUSE MERE COMMON OWNERSHIP OR OPERATION IS NOT SUFFICIENT FOR THE COURT TO PRESUME CONTROL.
  - A. Did the Trial Court Ignore the Evidence of Common Control/Management?
  - B. Did the Trial Court Err in Extending its Ruling to Both Mutual and Insurance Where There Were Disputed Material Issues of Fact Regarding the Extent of LWP’s Control of Insurance and Mutual?
    1. *Were There Material Issues of Fact in Dispute Regarding Mr. Igoe’s and Others Level and Duration of Control/Management of Insurance Such That Summary Judgment Should Have Been Denied to LWP?*
    2. *Were There Material Issues of Fact that Precluded Summary Judgment on LWP’s Control of Mutual?*

- II. DID THE TRIAL COURT ERR IN FINDING THAT THE WORDS “DISTRIBUTION” AND “DIVIDEND” ARE SYNONYMOUS AND THEREBY INCORRECTLY HELD THAT THE STATUTE DOES NOT ALLOW RECOVERY OF PAYMENTS FOR SERVICES RENDERED?
- A. **Did the Trial Court’s Ruling that Distributions and Dividends are Synonymous Offend the Objective and Policy of the Statute?**
- B. **Did the Trial Court Disregard the Legislative History of the Statute that Indicates that the Statute is Applicable to All Transactions, Not Just Dividends?**

Standard of Review:

The Trial Court’s “interpretation and application of a statute is a question of law” and is reviewed for correctness, “affording no deference to the district court’s legal conclusion.” *Gutierrez v. Medley*, 972 P.2d 913, 914-15 (Utah 1998).

In the case of a summary judgment case, the Trial Court’s application of law to the undisputed facts is reviewed for correctness. *See Uintah Basin Med. Ctr. v. Hardy*, 2002 UT 92, ¶ 7, 54 P.3d 1165, 1167 (Utah 2002) (stating that “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.”) (citations omitted).

**DETERMINATIVE LAW**

1. **UTAH CODE ANN. § 31A-27-322:**

**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 liquidation is terminated under Section 31A-27-339.

**2. UTAH CODE ANN. § 31A-1-301(5):**

“Affiliate” means 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.

**3. UTAH CODE ANN. § 31A-1-301(27)(a)&(b):**

(a) “Control,” “Controlling,” “controlled,” or “under common control” means the direct or indirect possession of the power to direct or cause the direction of the management and policies of a person. This control may be:

- (i) by contract;
- (ii) by common management;
- (iii) through the ownership of voting securities; or
- (iv) by a means other than those described in Subsections 27(a)(i) through (iii).

(b) There is no presumption that an individual holding an official position with another person controls that person solely by reason of the position.

**4. Addendum:**

- a) Memorandum in Support of Liquidator’s Motion for Summary Judgment (without exhibits).
- b) Memorandum In Support of Motion for Summary Judgment and Opposition to Liquidator’s Motion for Summary Judgment (without exhibits).
- c) Liquidator’s Memorandum in Opposition to LWP’s Motion for Summary Judgment and Reply Memorandum In Support of Liquidator’s Motion for Summary Judgment (without exhibits).
- d) Reply Memorandum In Support of LWP’s Motion for Summary Judgment (without exhibits).
- e) Affidavit of John Igoe (without exhibits).
- f) Affidavit of Orrin T. Colby, Jr.

- g) Supplemental Affidavit of John A. Igoe.
- h) June 21, 2005 Memorandum Decision.
- i) October 31, 2005 Order Granting LWP's Motion for Summary Judgment.
- j) The legislative history UTAH CODE ANN. § 31A-27-322.
- k) Revised Findings of Fact and Conclusions of Law and Order of Judge Tyrone E. Medley dated May 22, 2003 in the lawsuit captioned *American Western Life Insurance Company in Liquidation, et al. v. Leland A. Wolf, et al* (Case No. 98090521).
- l) The case of *Hill v. Grand Central, Inc.*, 477 P.2d 150, 151 (Utah 1970).
- m) The case of *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah Ct. App. 1988).
- n) The case of *In Re Gonzalez*, 2000 UT 28, 1 P.3d 1074 (Utah 2001).
- o) The case of *Water & Energy Systems Technology, Inc. v. Keil*, 2002 UT 32, ¶18, 48 P.3d 888, 894 (Utah 2000).
- p) The case of *Ward v. Richfield City*, 716 P.2d 265, 266 (Utah 1984).
- q) The case of *In re Chicken Antitrust Litigation*, 560 F. Supp 1006, 1009 (N.D. Ga. 1982).
- r) The case of *Gutierrez v. Medley*, 972 P.2d 913, 914-15 (Utah 1998)
- s) The case of *Uintah Basin Med. Ctr. v. Hardy*, 2002 UT 92, ¶7, 54 P.3d 1165, 1167 (Utah 2002).
- t) The case of *Johnson-Tanner v. First Cash Financial Serv., Inc.*, 239 F. Supp. 2d 34, 39 ( D.D.C. 2003).

## **STATEMENT OF THE CASE**

### **Nature of the Case, Course of Proceeding and Disposition Below**

Wasatch Crest Insurance Company (“Insurance”), in liquidation, and Wasatch Crest Mutual Insurance Company (“Mutual”), in liquidation, (Insurance and Mutual are collectively referred to hereinafter as “Wasatch Crest”), by and through Merwin Stewart,<sup>1</sup> the Utah Insurance Commissioner, in his capacity as the court-appointed liquidator (the “Liquidator”), brought suit against LWP Claims Administrators Corp. and LWP Claims Solutions, Inc. (collectively, “LWP”) seeking recoupment of distributions arising out of certain affiliate transactions and an accounting of monies paid by Insurance and Mutual to LWP for claims handling services. (R. 841-50). The basis of the suit was that the Liquidator was statutorily empowered pursuant to UTAH CODE ANN. § 31A-27-322 (hereinafter “Affiliate Transaction Statute” or “Statute”) to recover from any affiliate any distribution made at any time during the five years preceding the petition for liquidation. (R. 848-49 ). The Liquidator presented evidence that LWP, Mutual and Insurance were affiliates of one another, and therefore sought recoupment of any distribution made to LWP from November 1999 (the date LWP became an affiliate), to July 31, 2003 (the date the Petition for Liquidation was filed). (R. 848-49).

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<sup>1</sup> Subsequent to the entry of the Liquidation Order dated July 23, 2003, Mr. Kent Michie has succeeded Mr. Merwin Stewart as the Utah Insurance Commissioner and as Liquidator of Insurance and Mutual.

After the present case was reassigned to Judge Hanson, the Liquidator moved for summary judgment, arguing that: (1) LWP was an affiliate of Insurance and Mutual because of the common/overlapping management, control and common ownership; and (2) Insurance and Mutual were entitled to recoup any distribution made to this affiliate LWP at any time during the five years preceding the Petition for Liquidation. (R. 834-37). The Liquidator later withdrew its arguments as to Mutual only, acknowledging that there were issues of material fact that precluded summary judgment for Mutual. (R. 2285).

In response to the Liquidator's Motion for Summary Judgment, LWP filed a Memorandum in Support of Motion for Summary Judgment and Opposition to Liquidator's Motion for Summary Judgment ("LWP's Motion"). (R. 1933-58). In LWP's Motion, it argued that the payments made by Insurance and Mutual to LWP were not "distributions" subject to recoupment under the Affiliate Transaction Statute. (R. 1945-52). LWP argued that there was no distinction between the words "distribution" and "dividend" in the Statute because these words were synonymous and interchangeable. (R. 1949). LWP also argued that the definition of distribution and dividend did not include payments for services but only for equity payments based on stock ownership, and as a result, the monies paid to LWP were fair consideration for services rendered and not subject to recoupment. (R. 1949-52, 2391-94). LWP, while conceding that it and Insurance were

affiliates, argued that “affiliate” and “control” were different and there was no such control. (R. 1952-54, 2388-90).

Thereafter, the Trial Court heard oral argument and took the matter under advisement. (R. 2436). On June 21, 2005, the Trial Court entered its Memorandum Decision denying Wasatch Crest’s Motion for Summary Judgment and granting LWP’s Motion. (R. 2435-41). In its Memorandum Decision, the Trial Court held that “[t]here is no question that LWP was an affiliate of [Insurance]”. (R. 2437). The Trial Court, however, held that an affiliate was distinct from an affiliate in control and there was no control by LWP, explaining, “[t]he 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.” (R. 2437). The Trial Court weighed the time periods where there were joint owners or operators of LWP and Insurance and found that insufficient to prove control. (R. 2437).

Even though the Trial Court acknowledged its holding on control could end the inquiry, the Trial Court went on to issue a ruling on the meaning of distribution and dividend. (R. 2437-39). The Trial Court held that “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 . . . .” (R. 2438).

In issuing this ruling, the Trial Court was persuaded by LWP's argument that the words "dividend" and "distribution" had the same meaning and encompassed only payments based on stock ownership. (R. 2438).

LWP thereafter submitted its proposed order and the Liquidator on behalf of Wasatch Crest objected to LWP's Order Granting LWP's Motion for Summary Judgment arguing that the Order went beyond the Trial Court's Memorandum Decision. (R. 2460-73, 2510-18). On October 31, 2005, the Trial Court issued a Minute Entry overruling Wasatch Crest's objections. (R. 2963-65).

On November 30, 2005, the Liquidator on behalf of Wasatch Crest filed its Notice of Appeal from the final judgment of Judge Hanson entered on October 31, 2005. (R. 3011-12).

### **Statement of Facts**

#### **LIQUIDATION**

Insurance and Mutual were insurance companies domiciled in the State of Utah, and placed into liquidation by the Third Judicial District Court, in and for Salt Lake County, State of Utah, on or about July 31, 2003. (R. 2972).

#### **CREATION OF LWP**

Wasatch Crest Group, Inc. ("Group"), the parent corporation of Insurance, purchased substantially all of the assets and business operations of LWP Commercial Claims Administrators, Inc. ("LWP Commercial") from John and Erica Igoe on November 16, 1999. (R. 2258, 2973). LWP Commercial was in the

business of administering insurance claims on behalf of insurance companies, i.e., a third party administration. (R. 2258). In its capacity as a third-party administrator, LWP specializes in the administration of workers' compensation insurance and claims associated with ski industry workers. (R. 2259).

Concurrent with that purchase, Group created a new corporate entity, LWP Claims Administrators Corp. ("LWP") which took possession and title to all of the purchased assets. (R. 2258-9). Thereafter, the name of LWP was subsequently changed to LWP Claims Solutions, Inc. (R. 2259). Though LWP Commercial and LWP Claims Solutions are listed as separate defendants in this matter, they are the same company and referred to as "LWP." (R. 2972). LWP is currently a California corporation with offices in Sacramento, California and Salt Lake City, Utah. (R. 2259). LWP was thereafter repurchased by John Igoe and Judy Adlam. (R. 2254-5). The date of closing the sale was May 8, 2002. (R. 2254-5). LWP and the Liquidator on behalf of Wasatch Crest dispute the *effective* date of the closing. (R. 2254-5). The Liquidator maintains the closing agreement demonstrates the closing was executed on May 8, 2002 using balances as of January 1, 2002. (R. 2256). LWP concedes the closing was May 8, 2002 but insists it was effective January 1, 2002. (R. 2256).



### **COMMON CONTROL AND MANAGEMENT OF GROUP, LWP AND INSURANCE**

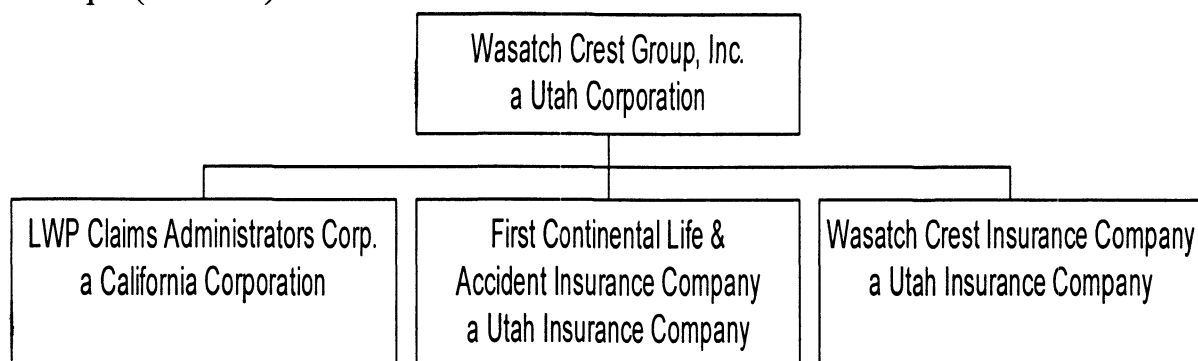
By LWP's own admissions and as the Trial Court found, "[t]here is no question that LWP was an affiliate of [Insurance]." (R. 2437).

When Group purchased LWP Commercial on November 16, 1999, Mr. Igoe and his wife owned LWP Commercial. (R. 2258, 2973). There is no dispute that shortly after the purchase of LWP Commercial, John Igoe became Acting Chairman of the Board, President, Chief Operating Officer ("COO"), and Chief Executive Officer ("CEO") of Group and Insurance. (R. 2254-5, 2973). It is also undisputed that Mr. Igoe was Chairman of the Board and CEO of LWP. (R. 1944, 2255).

In addition to Mr. Igoe's overlapping management, during the same time, Dennis Larson, who was involved in drafting and/or administering a services agreement whereby LWP provided claims services to Mutual and Insurance, was also Chief Financial Officer of LWP. (R. 2298-9). Other common management of LWP, Group and Insurance included Orrin T. Colby and Judy Adlam. (R. 2296, 2300).

The Trial Court held that LWP was an affiliate of Group and therefore an affiliate of "Insurance from October 1998 until the sale of LWP to Igoe and Adlam in 2002." (R. 2973). 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. (R. 2284). It shows how Group, Insurance and others, were organized, with Group as the parent and LWP and Insurance as a wholly owned subsidiary of Group. (R. 2284).



#### **AFFILIATE TRANSACTIONS AND RECOUPMENT OF DISTRIBUTIONS**

On or about November 16, 1999, LWP Commercial, the selling entity owned by John and Erica Igoe, and LWP (the subsidiary formed by Group to hold the assets transferred by LWP Commercial), entered into an Administrative Services Agreement. (R. 2260). During this time, Group was the parent of LWP. (R. 2973). The agreement provided that LWP was to be paid a fixed percentage fee to administer all the claims throughout the entire duration of the claims. (R. 2260).

Effective January 1, 2001, Insurance and LWP entered into an Administrative Agreement whereby LWP administered workers' compensation claims for Insurance on a "life of claim basis". (R. 2262). Prior to 2001, LWP was providing workers' compensation claims handling services to Insurance pursuant to an oral agreement. (R. 2261). LWP and the Liquidator, however, dispute some

of the specifics of each of the above agreements. (R. 2260, 2973-2974). While there is a dispute as to the oral agreement, there is no dispute, however, that the written service agreements were entered into. (R. 2260-61, 2975).

Thereafter, LWP presented to Mutual a proposed Administrative Agreement that was to be effective January 1, 2001. (R. 2263). The terms of the agreement were identical to the Administrative Agreement entered into between LWP and Insurance. (R. 2263). This agreement, however, was never executed; rather the arrangement between Mutual and LWP continued under the terms of the verbal agreement entered into in November 1999, whereby LWP would administer workers' compensation claims for Mutual on a "life of basis" claim. (R. 2263-4). LWP asserts the verbal agreement was reached in June of 2000. (R. 2264, 2974).

Though the parties differ on the exact amounts paid, it is admitted that LWP received payments from Insurance and that such payments were for claims handling and administrative services. (R. 2975). The Liquidator proffered evidence that from November 16, 1999 through July 30, 2003, Insurance paid \$6,144,402.68 to LWP for claims handling services, of which \$4,955,586.10 was in the form of check or wire transfers, while \$1,188,816.58 was in the form of offsets. (R. 2265). The Liquidator also proffered evidence that during the same time period, Mutual paid \$534,265.96 to LWP for claims handling services. (R. 2266) While these facts indicate the magnitude of the amounts at issue, the

specific dollar amount was irrelevant to the Trial Court's ultimate decision to grant LWP's Motion for Summary Judgment (R. 2471).

### **SUMMARY OF ARGUMENT**

The Trial Court erred in its construction of section 31A-27-322 of the Utah Code and the application of the Statute to the evidence presented for three reasons. First, the Trial Court misinterpreted the meaning of "any affiliate that controlled the insurer." The second is the Trial Court's misapplication of the facts to the definition it gave to "affiliate that controlled the insurer." The third error was the Trial Court's definition of "distribution" and "dividend" and the misapplication of that interpretation to what is subject to recoupment. Rather than observe the plain meaning of the Affiliate Transaction Statute, the Trial Court incorrectly found that there was a distinction between "affiliate" and "control" and found that LWP was not an affiliate that controlled Mutual or Insurance. The Trial Court further incorrectly held that "distribution" and "dividend" were synonymous with one another and the definition of distribution only applies to equity payments and not payments for services rendered.

The applicable Statute at issue, UTAH CODE ANN. § 31A-27-322, states in pertinent part:

- (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.

UTAH CODE ANN. § 31A-27-322(1)-(2). 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 corporation.

UTAH CODE ANN. § 31A-1-301(5).<sup>2</sup> The Statute 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 of a person” which can be shown by common management. UTAH CODE ANN. § 31A-1-301(27)(a)(ii) (emphasis added).

Based on the plain language of this Statute and the authority provided therein, the Liquidator seeks recoupment of all distributions paid to LWP during the five years prior to the filing of the liquidation petition because LWP was an

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<sup>2</sup> Section 31A-1-301 was amended in 2001, however none of the amendments affect the sections at issue in the present matter.

affiliate of Insurance. Contrary to the Trial Court's ruling, the plain language of the Statute dictates that once affiliate status is proven, Insurance is entitled to such relief.

To support its contention that LWP was an affiliate, the Liquidator provided evidence of common management including, *inter-alia*, that John Igoe, the owner and former Chairman and COO of LWP, served in overlapping positions with Group, LWP and Insurance. In addition to Mr. Igoe's overlapping positions, the Liquidator also offered other evidence of common management such as LWP and Insurance were managed by the same core group of people: John A. Igoe, Orrin T. Colby, Jr., Dennis T. Larson and July Adlam.

In Mr. Igoe's and the other overlapping managers' positions, they were able to negotiate deals between LWP and Insurance, made management decisions for LWP and Insurance regarding claims handling services, had input into the scope and nature of the services that would be performed by LWP for Insurance, and the compensation to be paid for those services. Furthermore, Insurance and LWP had a common employee base. The shared management team supervised employees' day-to-day business activities and records keeping. In addition to the common and overlapping management, there was common ownership. LWP and Insurance were both wholly owned subsidiaries of Group.

The Trial Court, however, disregarded this evidence and misinterpreted the Statute. Rather than observe the plain language of the Affiliate Transaction Statute, the Trial Court held that being an affiliate does not equate to control but rather determined that the obligation to pay back distributions to affiliates required a two step analysis. In the Trial Court's view, the Liquidator was required to prove that LWP was an affiliate and then that LWP actually exercised control over Insurance thereby resulting in the payments. In essence, it was necessary to prove affiliate control and then control that the Trial Court held should be exercised in a particular manner-namely directing that payments be made.

The Trial Court then went on to hold that even though there may have been periods of time in which there were joint owners and operators, that fact was not sufficient to raise an issue of fact as to control. The Trial Court's ruling disregarded the evidence of common and overlapping management, in addition to the evidence on joint owners and managers. Regardless, at the very least the Trial Court incorrectly ruled for LWP where there were disputed material issues of fact that precluded summary judgment as to the extent of control or affiliate status.

The Trial Court further misinterpreted the definitions of "distribution" and "dividend" as set forth in the Statute. The Statute's plain language evidences two separate categories are used to describe what is subject to recoupment: the general category is "distribution" and then the subset is "dividend." Established Utah law

mandates that each word is used advisedly and that the intent of each word is revealed in the context and structure in which it is placed. Starting with that basic premise, it must be assumed that the Utah Legislature chose the words “distribution” and then “dividend” and in doing so, intended, from the context and structure, that they have differing meanings, namely, distribution being the general category with dividend being the subset, or category. This plain reading interpretation is further consistent with the objectives and policy of the Statute—to reach all distributions and not just those issued to shareholders.

The definition of “affiliate” and “control” found in the Statute promotes a very specific policy objective in the regulation of insurance companies and their relationship with affiliates, namely, to control the mutuality of interest that flows between affiliates and insurance companies. As stated in the legislative history pertaining to affiliate transactions, transactions between insurance companies and their affiliates are extraordinarily vulnerable to abuses because of the mutuality of interest, or as specifically stated in the legislative history, the concern with “intergroup transactions.”<sup>3</sup> Without the fairness derived from the robust negotiations between the *independent* needs of a service purchaser and the capacity of a service provider, an affiliate transaction can easily become a negotiation with

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<sup>3</sup> Professor Spencer Kimball was the principal author and editor of the current edition of the Utah Insurance Code. *See infra* Part II.B. Professor Kimball wrote the legislative history of the Utah Insurance Code, a copy of which is attached hereto in the Addendum.



one's self. When the interests of the seller and buyer converge as a result of common ownership and/or overlapping management, a mutuality of control exists between the affiliated entities whereby reciprocal benefits/burdens and control/be controlled are exchanged. Control can flow back and forth between the affiliate members as deemed appropriate by common management. As a result of the commingled interests of affiliates and the insurance company, the Statute's definition of affiliate includes not only the exercise of control by the affiliate but also the potential for the affiliate being controlled. Because the affiliate and insurance company are beholden to a common goal achieved by common management, the definition of affiliate and control include both dominant (exercise of control) and subservient (potential to be controlled) roles.

The Utah Department of Insurance (the "UDOI") is responsible for the regulation of insurance companies such as Insurance and Mutual, but the UDOI's oversight does not include non-insurance companies such as LWP. When the affairs of the insurance company become so intertwined with a non-regulated entity like LWP through affiliate transactions, the regulatory purview of the UDOI must be expanded to include the affiliate transactions. Part of the UDOI's legislative mandate is to protect the interests of policyholders, and if the financial resources of the insurance company (which are the source of payment of the risk transferred from the policyholders to the insurance company) are being expended

for the benefit of an affiliate, then oversight of those transactions by the regulator is mandatory. It is for that reason that every insurance company must report its transactions with any affiliate in the Form B filed with the UDOI and to obtain approval of the UDOI prior to entering into any such contracts— something Insurance did not do. Without such disclosures it is difficult, if not impossible, for the UDOI to track the interests of the insurance company *vis a vis* the affiliate transaction. In this case, the amount of money passing between Insurance and LWP is quite substantial (*i.e.*, \$6 million).

Because affiliate transactions are susceptible to overreaching on the part of the insurance company or the affiliate (or both), the Utah Legislature was concerned that undue control or influence might take place between the insurance company and its affiliate, particularly if the insurance company has reached the point of liquidation. It is precisely because of the potential for abuse of control in the affiliate relationship that the Liquidator can merely prove the “indirect possession of the power to direct or cause the direction of the management and policies” before it is entitled to recoupment. UTAH CODE ANN. § 31A-1-301(27)(a).

This policy also promotes fairness because like other creditors, after recoupment an affiliate can get in line to make a claim against the liquidation estate. It would be unfair to allow an affiliate, one with mutuality/unity of interest

with the insurance company, to obtain an advantageous contract with the insurance company, retain the proceeds of that advantageous contract and then force other third-party creditors to pursue liquidation claims. Recoupment of affiliate transactions draws back into the liquidation estate all monies that can then be divided among creditors with the same priority claims. Without recoupment, an affiliate is given preferential treatment over other third party claimants.

Finally, to the extent the Trial Court found any ambiguity in the Statute, it should have looked to the legislative history of the Statute, as opposed to other definitions in the Utah Code for the context of the present definitions.

Based on the above misinterpretations and misapplication of the evidence, the Trial Court incorrectly granted summary judgment in LWP's favor.

### **ARGUMENT**

#### **I. THE TRIAL COURT ERRED WHEN IT HELD THAT, EVEN THOUGH LWP WAS AN AFFILIATE UNDER UTAH CODE ANN. § 31A-27-322, LWP WAS NOT AN AFFILIATE IN CONTROL OF INSURANCE BECAUSE MERE COMMON OWNERSHIP OR OPERATION IS NOT SUFFICIENT FOR THE COURT TO PRESUME CONTROL.**

While the Trial Court correctly held that the evidence established that LWP was an affiliate of Insurance, it incorrectly held that LWP was not an affiliate in control of Insurance. Rather than observe the plain language of the Statute, which states that any distribution to an affiliate made five years before the filing of the liquidation petition must be repaid, the Trial Court misinterpreted the plain

language of the Statute, instead finding that “mere common ownership or *operation*, . . . is [not] a sufficient basis to presume control.” (R. 2437) (emphasis added).

The controlling Statute, UTAH CODE ANN. § 31A-27-322 states in pertinent part 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 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).

UTAH CODE ANN. § 31A-27-322. 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 corporation.” UTAH CODE ANN. § 31A-1-301(5). The Statute goes on to define “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 of a person” which can be established by common management. UTAH CODE ANN. § 31A-1-301(27)(a)(ii) .

By LWP's own admission, and as the Trial Court found, LWP was an affiliate of Insurance. (R. 2973). Yet, the Trial Court went on to find that "[t]he 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." (R. 2437). In issuing its ruling on the meaning of "affiliate" and "control," the Trial Court claimed that it was interpreting the plain language of the Statute. (R. 2976).

The Trial Court's interpretation, however, is directly contrary to the plain language of the Statute. The Trial Court essentially held that an affiliate has two meanings, one where control is presumed and one where control must be demonstrated in a manner other than as set forth in the Statute. (R. 2437). The plain language of the Statute does not allow for such a split. Rather, the Statute clearly defines an affiliate as an entity that is controlled by or under common control with another—"affiliate" and "control" are thereby synonymous with one another. UTAH CODE ANN. § 31A-1-301(5). Moreover, the Statute's plain language does not mandate that control actually be exercised in the manner held by the Trial Court, but rather, there be only either (1) direct power to cause the direction of management or (2) "indirect *possession* of the power to direct or cause the direction . . . ." UTAH CODE ANN. 31A-1-301(27)(a).

The Trial Court's finding that while there may have been common operation or ownership and thereby affiliate status, but not control, is contrary to the plain language of the Statute. The Liquidator offered evidence that showed LWP and Insurance were affiliates and that they were managed by the same individuals, thus the Liquidator showed that LWP and Insurance were controlled by the same group. Where the Trial Court found the facts established that LWP was an affiliate of Insurance, summary judgment should have been entered for Insurance.

**A. The Trial Court Ignored the Evidence of Common Control/Management.**

Regardless of the admission and finding of affiliate status, the Liquidator presented irrefutable evidence that Insurance and LWP were affiliates of one another because "substantially the same group of natural persons manag[ed] the companies" and that the overlapping management actually exercised the control. As the Statute makes clear, common or overlapping management is sufficient to establish affiliate status/control. UTAH CODE ANN. § 31A-1-301(5). LWP is an affiliate of Insurance because there was such common management.

Common management is reflected in the overlap of John Igoe's involvement in Group, LWP and Insurance. *See, e.g., Johnson-Tanner v. First Cash Financial Serv., Inc.*, 239 F. Supp. 2d 34, 39 ( D.D.C. 2003) ("Sharing officers between the parent and the subsidiary or the presence of 'interlocking directorates' are indicative of common corporate ownership and control."); *In re Chicken Antitrust*

*Litigation*, 560 F. Supp. 1006, 1009 (N.D.Ga. 1982) (explaining, “‘shared’ officers and directors raise a strong inference of domination by the parent and indicate [] ‘common direction and supervision . . . .’”). LWP itself admitted, at least from November 6, 2001 to January of 2002, there was “interlocking control” based on Mr. Igoe’s overlapping positions. (R. 3393 at 26). While LWP and the Liquidator disputed the duration and specific involvement of Mr. Igoe, there is no dispute that John Igoe, the former owner of LWP Commercial, served concurrently as the President and COO of Group and Insurance, and was also the CEO and Chairman of the Board of Group and Insurance. (R. 2255, 2973). He was also Chairman of the Board and CEO of LWP. (R. 1944, 2255). In these leadership positions, it is not disputed that Mr. Igoe was involved in transactions between LWP and Insurance and had input, along with others, into the scope and nature of the services that would be performed by LWP, and how much LWP would be paid for those services. (R. 2287). Mr. Igoe also made crucial management decisions for Group and Insurance regarding claims handling services. (R. 2286). While Mr. Igoe’s overlapping positions within Group, Insurance and LWP is not afforded any presumption of control, UTAH CODE ANN. § 31A-1-301(27)(b), his involvement and actual exercise of power in the management, is indicative of the common management.

Furthermore, Mr. Dennis Larson, who represented Insurance in their principal financial dealings with LWP, was at the same time CFO of LWP. (R. 2298-9).

Additional undisputed evidence of interlocking corporate structure and management is that from January 1, 2000 through at least May 8, 2002, Group, LWP and Insurance had a common employee base, meaning they shared the same employees and management team. (R. 2287, 2399). Group management, which included John A. Igoe, Orrin T. Colby, Jr., Dennis T. Larson, and others, also made management and employee decisions for Group, LWP and Insurance. (R. 2287). Further, the management, officers, and directors of Group controlled Insurance and LWP by virtue of their management and supervision of the employees day-to-day business activities, and record keeping. (R. 2287).

Finally, the corporate relationship/ownership of the companies is further evidence indicative of control. Group was the parent of Insurance and LWP until 2002. (R. 1944, 2256). While this is not in and of itself determinative of common management, combined with the above facts of common management of Group, Insurance and LWP, it further demonstrates affiliate status.

The above evidence, submitted to the Trial Court in the Form B filings, Mr. Colby's affidavit, LWP's own admissions in John Igoe's affidavit and LWP's Motion for Summary Judgment, confirm that Mr. Igoe and others managed Group,



Insurance, and LWP as one company, utilized the same employees, and entered into agreements with each other on behalf of one another. (R. 2288). The Trial Court, however, incorrectly disregarded this evidence of affiliate status, thus control.

**B. The Trial Court Erred in Extending its Ruling to Both Mutual and Insurance Where There Were Disputed Material Issues of Fact Regarding the Extent of LWP's Control of Insurance and Mutual.**

Summary judgment is not proper when there are genuine issues of material fact. *Hill v. Grand Central, Inc.*, 477 P.2d 150, 151 (Utah 1970). Summary judgment is also not a vehicle to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. *Id.* The Trial Court ignored this mandate and incorrectly applied its ruling to both Insurance and Mutual even though there were disputed material facts as to the degree of LWP's control of Insurance and Mutual.

***1. There Were Material Issues of Fact In Dispute Regarding Mr. Igoe's and Others Level and Duration of Control/Management of Insurance Such That Summary Judgment Should Have Been Denied to LWP.***

While the parties do not dispute the general fact that there was common and overlapping management as set forth above, there were at least material issues of fact on the level of common management such that summary judgment should have been denied to LWP.

In issuing its ruling, the Trial Court explained that common ownership or operation did not prove control. (R. 2437). To support its ruling, the Trial Court explained that even assuming there were some periods of time in which there were joint owners or operations, that fact did not raise a question of fact on control. (R. 2437). Rather, to prove control the court wanted evidence that “LWP ‘controlled’ Insurance or Mutual to the extent that it could direct them to make payments to LWP in order to prevail herein.” (R. 2977).

As explained above, control or affiliate status can be demonstrated, where “substantially the same group of natural persons manages the corporation.” UTAH CODE ANN. § 31A-1-301(5) & 27(a)(ii). In issuing its ruling, the Trial Court misapplied the affiliate test. The Statute says nothing as specific as the Trial Court required—that the Liquidator prove that LWP could direct that payments be made. (R. 2977). While this might be considered as one of the factors used to prove control, it is certainly not the sole factor. The Trial Court’s misapplication of the facts could stem from its misunderstanding of the Statute’s requirement of control.

Specifically, the Trial Court misapplied the facts because it failed to observe the material issues of fact on control, and thereby affiliate status, of Insurance by LWP. For example, LWP and the Liquidator disputed Mr. Igoe’s and Dennis Larson’s, the CFO, level of involvement and control of LWP, Insurance and Group. The Liquidator maintained that in Mr. Igoe’s capacity as CEO, COO and

President of Group and Insurance and CEO of LWP and Mr. Larson's position as CFO, they were directly involved in drafting and/or administering a services agreement whereby LWP provided claims services to Group and Insurance. (R. 2298). The Liquidator further maintained that Messrs. Igoe and Larson had direct input into the scope and nature of the services that would be performed by LWP, and how much LWP would be paid. (R. 2299). LWP, however, disputed this evidence, instead arguing that Mr. Igoe was not the CEO of Group at the time the administrative services agreement was entered into. (R. 2398). LWP also disputed that Mr. Igoe had direct involvement in the negotiation of that agreement, instead arguing it was drafted, reviewed and approved by other board members. (R. 2399).

LWP also disputed the duration of any overlapping management, arguing it only went through January 1, 2002, the date it claims the purchase of LWP was effective. (R. 2399). The Liquidator argues the overlapping management extended to the closing date of May 8, 2002 and is supported by Mr. Igoe's resignation to Group of his various Board and management positions being effective May 8, 2002. (R. 2256). Further, no effective date is recited in the agreement evidencing the purchase of LWP. (R. 2283).

Finally, most curious was the Trial Court's ruling on the duration of affiliate status. The Trial Court held that LWP was an affiliate of Group and therefore an affiliate of "Insurance from October 1998 until the sale of LWP to Igoe and Adlam

in 2002.” (R. 2973). This holding, however, while in the Liquidator’s favor, is based on contradictory evidence. The Liquidator argued that there was affiliate status from November 16, 1999 through May 8, 2002 while LWP argued there was affiliate status from November 16, 1998 through December 31, 2001. (R. 1944, 2256). Again, while such evidence was to the Liquidator’s benefit, it does demonstrate the factual disputes on which the Trial Court based its ruling.

These facts were dispositive to affiliate and thereby control because they demonstrated the level and common/overlapping management. Because LWP and the Liquidator had material factual disputes as to the duration and level of involvement going to affiliate/control status, summary judgment should have been denied to both LWP and the Liquidator.

***2. There Were Material Issues of Fact that Precluded Summary Judgment on LWP’s Control of Mutual.***

Although the Liquidator was confident that it could prove that Mutual and LWP were affiliates, the Liquidator acknowledged in its Reply Memorandum in Support of its Motion for Summary Judgment, that there was contradictory evidence (i.e., disputed material facts) as to control of Mutual. (R. 2285). The basis for this concession was that LWP, in its Motion for Summary Judgment, asserted that neither John Igoe nor LWP ever controlled Mutual. (R. 1940, 2037). The Liquidator provided sworn affidavit testimony of Orrin T. Colby, Jr. refuting that claim, to which LWP responded with a supplemental affidavit of John Igoe.

(R. 2296-2302; 2396-2403). The competing affidavits of Orrin Colby and John Igoe evidence the factual dispute regarding whether or not LWP, John Igoe, and others controlled Mutual.

The Utah Court of Appeals has held that “[o]ne 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.” *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah Ct. App. 1988). The sworn statements of Mr. Colby and Mr. Igoe created an issue of fact that should have precluded summary judgment as to Mutual. The fact that LWP brought its own Motion for Summary Judgment as to both Mutual and Insurance is not dispositive. No matter how compelling the evidence, where there are disputed issues of material facts, summary judgment must be denied. *Id.*

The Court’s Memorandum Decision analyzed control but incorrectly did so with respect to Mutual. The holding of the Trial Court on Mutual’s affiliate status, like its ruling on Insurance, was based on contradictory evidence and thereby went well beyond the mandate that summary judgment is not proper when there are genuine issues of material fact.

**II. THE TRIAL COURT ERRED IN FINDING THAT THE WORDS “DISTRIBUTION” AND “DIVIDEND” ARE SYNONYMOUS AND THEREBY INCORRECTLY HELD THAT THE STATUTE DOES NOT ALLOW RECOVERY OF PAYMENTS FOR SERVICES RENDERED.**

Once affiliate status is proven, the Liquidator is statutorily empowered to recover from any affiliate any *distribution* made at any time during the five years preceding the petition for liquidation. UTAH CODE ANN. § 31A-27-322.

Specifically, the broad language of the Statute applies to all distributions, except the subset of distributions, dividends, which are not recoverable where the recipient shows that the dividend was fair and reasonable. UTAH CODE ANN. § 31A-27-322(2). This section essentially subordinates the claims of affiliates, or “insiders” to the claims of other creditors or policyholders against the remaining assets of the liquidation estate. While at first blush it may seem inequitable or even harsh, the policy reason behind this authority is sound—protection against the abuses of affiliates. The Trial Court misinterpreted this Statute section, instead finding that the words “distribution” and “dividend,” are interchangeable and synonymous with one another. (R. 2438, 2978, 2980). Based on that misinterpretation, the Trial Court went on to find that because the payments to LWP were for services rendered, they were not dividends or other transfers of equity and thereby not recoverable. (R. 2438, 2980).

It is axiomatic that in interpreting a statute, the plain language of the act determines its meaning. *Water & Energy Systems Technology, Inc. v. Keil*, 2002 UT 32, ¶18, 48 P.3d 888, 894 (Utah 2000). The plain language of the Statute reveals that “distribution” and “dividend” are not synonymous with one another. Rather, the Utah legislature used two words in describing what is and what is not recoverable: “distribution”—the more inclusive, general category and then “dividend”—the subset of distribution. UTAH CODE ANN. § 31A-27-322(1)-(2).

The exact language of the Statute states in pertinent part:

(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.

UTAH CODE ANN. § 31A-27-322(1)-(2).

Though not a complete model of clarity, a simple reading reveals two separate categories are used to describe two types of recoupments; the general

category “distribution,” being completely recoverable once affiliate status is shown, regardless of whether it was lawful and reasonable and the subset “dividend,” is only exempt from recovery where they are proven to be lawful and reasonable. These words must be interpreted “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). Therefore, 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.

This interpretation is consistent with the types of recoupments that are recoverable. Distribution, as the general category, includes monetary and non-monetary payments. (R. 3393 at 19). For example, a distribution includes dividends, along with other assets, furniture and computer software, etc. (R. 3393 at 20). LWP itself concedes that “distributions isn’t strictly limited to dividend.” (R. 3393 at 30). The disconnect in LWP’s concession is that it goes on to argue, and the Trial Court accepted, that while a distribution encompasses more than just money, it is limited to “giving out the equity of a company in respect to shares.” (R. 2391).



While there are no reported cases construing section 31A-27-322 of the Utah Code, the Third Judicial District Court for Salt Lake City, State of Utah (Judge Tyrone E. Medley) has encountered virtually identical arguments asserted by LWP. (R. 2280). In the lawsuit captioned *American Western Life Insurance Company in Liquidation v. Leland A. Wolf*, (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). (R. 2280). In the Order dated May 22, 2003, 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.”

(R. 2280).

Based on the plain language of the Statute, the Trial Court should have entered summary judgment in the Liquidator's favor, ruling that the words "distribution" and "dividend" are not synonymous; rather, distribution is the general category with dividend being a subset. Further based on the plain language, the Trial Court should have ruled that the only "distribution" subject to the lawful and reasonable test was "dividend." The Trial Court should therefore have found that once affiliate status was proven, the Liquidator was entitled to all distributions, except those dividends that were proven to be lawful and reasonable.

**A. The Trial Court's Ruling That Distributions and Dividends are Synonymous Offends the Objective and Policy of the Statute.**

Respecting the plain meaning of the Statute and observing that "distribution" and "dividend" are not synonymous also serves the objective of the Statute. Dividends, a payment of capital to shareholders at the time of payment, is a type of distribution. There are many other types of distributions, including the payment by one affiliate to another for services rendered (R. 2281, 3393 at 11). Affiliates are not necessarily shareholders. (R. 2281). The application of the Statute is meant to reach beyond just shareholders and recipients of dividends. (R. 2281). Recipients of dividends are therefore given an opportunity to prove that the dividend was fair and reasonable. (R. 2281). The reason for this is clear. There may be individual shareholders who are not control persons and who have innocently received dividends. (R. 2282). In that case, non-control persons are permitted to prove that

the dividend was fair and reasonable – the Statute provides a clear test to determine if the dividend was appropriate. (R. 2282). But if the distribution is not a dividend, the Statute’s plain language dictates that the distribution must be returned to the Liquidator. (R. 2282). 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 Affiliate Transaction 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 controlling shareholders). (R. 2283). This policy is sensible given that distributions are not subject to reporting. (R. 3393 at 16). Before a dividend is issued it has to be pre-approved by the insurance department. (R. 3393 at 16). To avoid the reporting of dividends, the simple solution is to issue a distribution. (R. 3393 at 16). To be able to reach the unreported distributions, the Statute mandates that all distributions must be returned, except the subset of dividends where it can be shown that it was fair and reasonable.

As part of the basis for its ruling, LWP’s counsel argued and the Trial Court found that the above position advanced by the Liquidator,

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.

(R. 2979). Though not interpreted as a benefit nor relevant to the present situation, there could be the situation that the distribution was smaller than the dividend, however, if the dividend is not shown to be fair and reasonable, then it too would be subject to return. UTAH CODE ANN. § 31A-27-322(2). Regardless of the hypothetical situations that may arise, the plain language of the Statute must guide its interpretation, irrespective of any preconceived inequities. Furthermore, this concern is not relevant. The plain language of the Statute does not mandate that the above concern of LWP's be taken into consideration. Rather, once affiliate status is proven, all distributions, regardless of the size must be returned.

LWP, along with the Trial Court, was incorrectly persuaded by a perceived inequity of the Statute as opposed to adhering to the Statute's plain language. LWP argued that the plain language interpretation provided by the Liquidator allowed it to "get something for nothing." (R. 3393 at 28). The Trial Court itself admitted it was having difficulty with the concept that "distribution" might include monies paid for services rendered—that it needed more specific language that included recoupment for reasonable or unreasonable services. (R. 3393 at 19). While the inherent unfairness asserted by LWP is not a concept that is addressed in

the plain language of the Statute, 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. (R. 2281).

**B. The Trial Court Disregarded the Legislative History of the Statute that Indicates that the Statute is Applicable To All Transactions, Not Just Dividends.**

In its Memorandum Decision, the Trial Court held that the plain language of the Statute would guide its interpretation, even while conceding the Statute was not a model of clarity. (R. 2438). Then in the Order Granting LWP's Motion for Summary Judgment, rather than only relying on the plain language of the Statute, as so held in the Memorandum Decision, the Trial Court looked to other definitions of "dividend" and "distribution" as a context for its interpretation of "distribution" and "dividend" in the present Statute. (R. 2978-80). While there is no definition of "distribution" and "dividend" in the section at issue, 31A-27-322, LWP and the court should have been guided by the plain language of the Statute, or find the language ambiguous and then look to the legislative history. *In re Gonzalez*, 2000 UT 28, ¶ 23, 1 P.3d 1074, 1079 (Utah 2001) ("When doubt or uncertainty exists as to the meaning or application of an act's provision, an analysis of the act in its entirety should be undertaken and its provision harmonized in accordance with the legislative intent and purpose.") Accordingly, rather than

solely look to other definitions of “distribution” and “dividend” within the Utah Code, the Trial Court should have deferred to the legislative history.

While LWP asserted that the legislative history of section 31A-27-322 supported its bald assertion that the terms “distribution” and “dividend” are synonymous, review of the history evidences the contrary. (R. 2277-78).

The author of the current Utah Insurance Code, Professor Spencer L. Kimball, commissioned by the Utah State Legislature to draft Utah’s version of the Model Insurance Code, produced a document entitled “State of Utah Draft Insurance Code” (“Draft”) dated March 1983. (R. 2277). The original Title 31A, Insurance Code, was based on Professor Kimball’s Draft Insurance Code. (R. 2278).

Professor Kimball, in the Prefatory Comment of the Draft Insurance Code, 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.

(R. 2278). As evidenced in the Prefatory Comment, from the very beginning, Professor Kimball was concerned about transactions by and between an insurance company and its affiliates. (R. 2278).

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." (R. 2278). Section 96-17-6.5 of the Draft Insurance Code entitled "Liability of Affiliates," 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.

(R. 2279). This succinct statement evidences that the Statute was intended to address all potential abuses with affiliates, not just dividends.

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 Gonzalez*, 2000 UT 28, ¶ 23, 1 P.3d at 1079. Section 31A-27-322 was enacted to address not only excessive dividends, but also other excessive distributions between an insurance company and its affiliates.

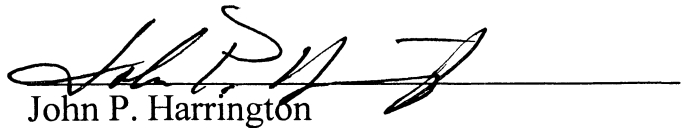
Contrary to LWP's assertion, the legislative history unequivocally supports the Liquidator's position, not LWP's position.

### CONCLUSION

The Trial Court, misinterpreting section 31A-27-322 of the Utah Code, incorrectly granted summary judgment to LWP. The Liquidator on behalf of Wasatch Crest respectfully asks the Utah Supreme Court to reverse the Trial Court's granting of summary judgment in LWP's favor and find as follows: (1) consistent with the evidence presented to the Trial Court, the Liquidator on behalf of Wasatch Crest asks that this Court find that LWP was an affiliate of Insurance and thereby in control of Insurance; (2) as an affiliate of Insurance, Insurance is entitled to recoupment of any distribution which includes monies paid for services rendered; (3) the only distributions Insurance is not entitled to recoup are dividends that are shown to be fair and reasonable; or (4) that there were material issues of fact that precluded summary judgment as to Mutual and Insurance.

DATED this 16<sup>th</sup> day of June, 2006.

HOLLAND & HART LLP

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

John P. Harrington

Cecilia M. Romero

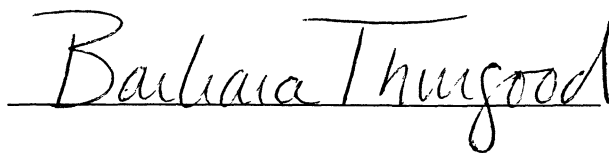
*Attorneys for the Liquidator*



**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that two (2) true and correct copies of the BRIEF OF APPELLANTS and ADDENDUM TO BRIEF OF APPELLANTS were hand delivered on the 16<sup>th</sup> day of June, 2006 to the following:

Edwin C. Barnes  
Charles R. Brown  
Jennifer A. James  
CLYDE SNOW SESSIONS & SWENSON  
201 South Main Street, 13th Floor  
Salt Lake City, UT 84111

Handwritten signature of Barbara Thurgood in cursive script, written over a horizontal line.

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