

2005

Wasatch Crest Insurance Company, In Liquidation,  
Wasatch Crest Mutual Insurance Company, In  
Liquidation, and D. Kent Michie v. LWP Claims  
Administrators Corp., LWP Claims Solutions, Inc. :  
Brief of Appellee

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 APPELLEES**

Case No. 2005110~~X~~2

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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IN THE SUPREME COURT FOR THE STATE OF UTAH

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|                                      |   |                           |
|--------------------------------------|---|---------------------------|
| WASATCH CREST INSURANCE              | : |                           |
| COMPANY, IN LIQUIDATION,             | : |                           |
| WASATCH CREST MUTUAL                 | : |                           |
| INSURANCE COMPANY, IN                | : | <b>BRIEF OF APPELLEES</b> |
| LIQUIDATION, and D. KENT             | : |                           |
| MICHIE, Liquidator,                  | : |                           |
|                                      | : | Case No. 20051103         |
| Plaintiffs/Appellants,               | : |                           |
|                                      | : | Trial Court No. 030915527 |
| -vs-                                 | : |                           |
|                                      | : |                           |
| LWP CLAIMS ADMINISTRATORS            | : |                           |
| CORP., a California corporation, and | : |                           |
| LWP CLAIMS SOLUTIONS, INC., a        | : |                           |
| California corporation,              | : |                           |
|                                      | : |                           |
| Defendants/Appellees.                | : |                           |

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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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## **JURISDICTION**

This Court has jurisdiction over this appeal under Utah Code Ann.

§ 78-2-2(4)(j).

## **ISSUES PRESENTED FOR REVIEW**

1. Was LWP Claims Solutions, Inc., formerly LWP Claims Administrators Corp. (collectively “LWP”), “an affiliate that controlled” insurers Wasatch Crest Insurance Company (“Insurance”) and Wasatch Crest Mutual Insurance Company (“Mutual”) within the meaning of Utah Code Ann.

§ 31A-27-322?

2. Were payments for claims handling services provided by LWP to Insurance and Mutual “distributions” within the meaning of Utah Code Ann.

§ 31A-27-322?

## **DETERMINATIVE LEGAL PROVISIONS**

Utah Code Ann. § 31A-27-322; Utah Code Ann. § 31A-1-301(5);  
§ 31A-1-301(27)(a) and (b); Utah Code Ann. § 31A-27-320; Utah Code Ann.  
§ 31A-27-321; Utah Code Ann. § 16-10a-102(13); Utah Code Ann. § 31A-5-418.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This case was filed by the Liquidator of two insolvent insurance companies, Insurance and Mutual, in an attempt to recoup from LWP payments made for claims handling and other administrative services contemporaneously rendered

over a two and one-half year period by LWP to the two insurers. The Liquidator did not attempt to recover the funds from LWP under the remedies of Utah Code Ann. §§ 31A-27-320 or -321, which allow for the recovery of fraudulent transfers or preferential payments. Rather, admitting that LWP had actually performed the services for which it had been paid, the Liquidator elected to pursue recoupment under Utah Code Ann. § 31A-27-322, which allows recovery of distributions made to affiliates that controlled an insurer if the distributions were made within the five years preceding liquidation. The trial court granted summary judgment to LWP on two alternative grounds: (1) the Liquidator did not plead or attempt to prove that LWP was an affiliate that controlled Insurance or Mutual and (2) the payments made to LWP were for services rendered and were not distributions within the meaning of the statute. The Liquidator has appealed the grant of summary judgment.

### **Course of the Proceedings and Disposition Below**

An Order for the Liquidation of Insurance and Mutual was entered by the Third District Court on July 31, 2003. (R. 66.) The liquidation proceedings were assigned to and remain pending before the Honorable Timothy Hanson. The Liquidator filed this recoupment case against LWP on June 7, 2004. (R. 841.) The case, originally assigned to another judge, was then consolidated with the Insurance and Mutual liquidation cases before Judge Hanson on the Liquidator's motion. (R. 84085.)

On January 10, 2005, the Liquidator filed a motion for summary judgment, claiming that he was entitled to recoupment of payments for services rendered to Insurance and Mutual by LWP under Utah Code Ann. § 31A-27-322 as a matter of law. (R. 824-1115.) LWP opposed the Liquidator's motion for summary judgment and filed its own motion for summary judgment on the alternative grounds that (1) the Liquidator had not pled, and presented no facts tending to demonstrate that LWP controlled Insurance or Mutual and (2) that Insurance and Mutual made no "distributions" to LWP within the meaning of the applicable statutes. (R. 1930-58.) LWP acknowledged that it was an affiliate of Insurance because it was a sister company owned by a common parent, Wasatch Crest Group ("Group"). LWP also demonstrated that it was not under common ownership with, and therefore was not an affiliate of, Mutual.

At that point, the Liquidator dropped its claim for summary judgment based on the payments by Mutual to LWP, stating that he believed there were disputed factual issues as to whether or not Mutual was an affiliate of LWP. (R. 2285.) The Liquidator also opposed LWP's motion for summary judgment on the Liquidator's claims regarding payments by Insurance and Mutual. (R. 2248.)

After further briefing by LWP, Judge Hanson heard oral argument. (R. 3393.) On June 21, 2005, Judge Hanson issued a detailed Memorandum Decision denying the Liquidator's summary judgment motion and granting LWP's summary judgment motion on the alternative grounds that LWP was not an



affiliate that controlled Insurance and Mutual, as explicitly required by the statute, and that the payments for services performed by LWP were not “distributions.” (R. 2435-39.) A written order was signed by the Court on October 31, 2005, in accordance with Rule 52(a) of the Utah Rules of Civil Procedure. (R. 2970-2981.)<sup>1</sup> The Liquidator filed his Notice of Appeal from the final judgment of Judge Hanson on November 30, 2005.

### **Statement of Facts**

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

2. At all relevant times, Insurance was a wholly-owned subsidiary of Group. (R. 2973.)

3. At all relevant times, Mutual was a mutual insurance company controlled by its policyholders. From 1998 until December 2000, Mutual owned some of the common stock of Group. (R. 1936-37.) On November 27, 2000, the capital of Group was restructured and Mutual relinquished all of its Group shares. (R. 2973.)

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<sup>1</sup> Copies of the Memorandum Decision and Order Granting LWP’s Motion for Summary Judgment are included in the separately bound Addendum to Brief of Appellants at Tabs 10 and 11.

4. Group, the parent corporation of Insurance, purchased substantially all the business operations of LWP Commercial Claims Administrators, Inc. from John and Erica Igoe on November 16, 1999. (R. 2973.) Group formed a new California corporation, LWP Claims Administrators Corp., to take title to the purchased assets. *Id.* The name of the new company was subsequently changed to LWP Claims Solutions, Inc. (R. 2972.) Though they are listed as separate Defendants in this case, they are the same company.

5. By virtue of these transactions, LWP became a sister subsidiary of Insurance. (R. 2973.) LWP never owned any shares of Insurance. (R. 2975.)

6. LWP never owned any shares of Mutual and was not an affiliate of Mutual. (R. 2973, 2975.)

7. LWP was in the business of administering third-party insurance claims for insurance companies. (R. 2036.)

8. In approximately June 2000, LWP began handling workers' compensation claims, adjusting and administrative services for Insurance. (R. 2037, 2973.) These claims handling services were provided pursuant to an oral agreement between LWP and Insurance until a written agreement with identical terms was signed effective January 1, 2001.<sup>2</sup> (R. 2038, 2081-88.)

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<sup>2</sup> The Liquidator continues to assert that LWP entered into an Administrative Services Agreement to provide claims handling services to Insurance in November 1999. (Appellant's Brief at 12; R. 1965.) That

(continued...)

9. In approximately June 2000, LWP and Mutual also entered into an oral claims handling agreement, the terms of which were similar to the arrangements with Insurance. (R. 2038, 2974.) A written agreement was drafted to formalize the written agreement, but the written agreement was never signed by Mutual. LWP continued to provide services to Mutual under the terms of the oral agreement. *Id.*

10. Although the total amount of the payments made by Insurance and Mutual to LWP is in dispute, the parties agree that payments made to LWP by Insurance and Mutual were payments made for claims handling and administrative services actually performed by LWP over a period of years. (R. 2975; Appellant's Brief at 13.) (For purposes of LWP's summary judgment motion, the amount of the payments is immaterial. *Id.*)

11. Shortly after the purchase of LWP's assets by Group, John Igoe became president and chief operating officer of Group and Insurance. (R. 2036,

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<sup>2</sup>(...continued)  
administrative agreement was not a claims handling agreement between LWP and Insurance, but was instead a short-term agreement between LWP Commercial Claims Administrators, Inc. and LWP Claims Administrators Corp. to facilitate the transition of business operations to the new LWP. (R. 2037, 2070.) There was no arrangement between LWP and Insurance until June 2000 when LWP began performing claims handling services for Insurance under an oral agreement. (R. 2037-38.) This issue is not material to the grant of summary judgment, but given that the Liquidator has persistently mischaracterized these facts, LWP wants to correct them. Further, LWP notes that in this and many other regards, Liquidator's cites to the record are to his own arguments made in prior filings rather than to factual materials.

2973.) He was also the CEO of LWP. *Id.* John Igoe, however, was never an officer or director of Mutual. (R. 2037, 2973.)

12. On November 16, 2001, the Chairman of the Board and Chief Executive Officer of Group and Insurance was placed on an indefinite leave of absence, and John Igoe was also named Acting Chairman of the Board and CEO of Group and Insurance. (R. 2039.) The Liquidator, however, candidly acknowledged that he does not “rely on Mr. Igoe’s positions with [LWP], Insurance Co. and Group to establish control and affiliate status.” (R. 2285.)

13. In 2002, LWP was purchased by John Igoe and Judy Adlam, and the name of the company was changed to LWP Claims Solutions, Inc. (R. 2974.) The Liquidator maintains that the sale occurred on the date of closing, May 8, 2002, while LWP asserts that the sale was made effective as of January 1, 2002. Again, for purposes of the grant of summary judgment to LWP, the effective date of the sale is not a material fact. *Id.*

14. The terms for the sale of LWP were independently determined by outside consultants. (R. 2040.) To purchase the stock of LWP, John Igoe and Judy Adlam paid Group \$2 million in cash, assumed liabilities of approximately \$1.8 million and agreed to a contingency payment of \$175,000. (R. 2039.) The Liquidator does not contend, and there is nothing in the record to suggest, that LWP’s stock was sold for less than fair market value. (R. 2974.) Payment of fair market value to Group in 2002 logically included payment for the value of ongoing

claims adjusting and administrative business of LWP, including payments made for services rendered. (R. 2402-03, 2974.)

15. On the date of the closing of the sale, John Igoe and Judy Adlam resigned all positions with Group and Insurance. (R. 2040, 2103, 2974.)

16. Pursuant to the request of the Utah Guaranty Association, LWP has continued to provide claims handling and administrative services for the Insurance and Mutual claims during liquidation on the same terms as it had provided these services to Insurance and Mutual prior to liquidation. (R. 2041, 2403, 2975.)

17. Although there was some overlap of the boards of LWP and Insurance before May 8, 2002, there was never complete identity of the boards. There is neither allegation nor evidence that LWP appointed or otherwise controlled the directors of Insurance or Mutual or was ever in a position to direct payments from Insurance or Mutual to LWP. (R. 2975-76.)

### **SUMMARY OF ARGUMENT**

The Liquidator is attempting to recover payments to LWP by Mutual and Insurance for claims handling and administrative services under Utah Code Ann. § 31A-27-322 as if they were distributions of equity. The Liquidator has never alleged that LWP failed to provide the services for which it received compensation or that the payments to LWP were other than fair compensation for those services. Instead, he simply argues that all payments of any nature made by the insolvent insurers to all affiliates may be recouped as a matter of law under Utah Code Ann.

§ 31A-27-322, including contemporaneous payments for services actually rendered by affiliates to the insurers.

The plain language of Section 322 allows recovery only from affiliates that controlled an insurer at the time of a distribution by an insurer. Its legislative history shows that its purpose was to remedy the problems occurring when a controlling parent is in a position to raid surpluses of cash or other equity from rich insurer subsidiaries. (R. 1951, 2332.) Although LWP was an affiliate of Insurance for certain time periods, the Liquidator has never argued, and presented no evidence, that LWP ever actually controlled Insurance or Mutual or had the power to direct distributions of any surplus from Insurance or Mutual to LWP. (R. 2977.)

The Liquidator asks the Court to presume as a matter of law that one affiliate controls another just because there is some common management. (Appellant's Brief at 24.) The Utah Insurance Code, however, makes it clear that there is no presumption of control stemming from common management. Utah Code Ann. § 31A-27-301(27). "Control" is instead an element requiring affirmative proof under the statute. Thus, the Liquidator's election not to allege or provide evidence of actual control by LWP of the insurers is fatal to his case as a matter of law.

Further, Section 322 authorizes only recoupment of "distributions" to a controlling affiliate. Common usage, the legislative history of Section 322, the Utah Revised Business Corporation Act and other sections of the Utah Insurance

Code all establish that the term “distribution” as used in Section 322 means dividends or other transfers of equity. The Liquidator has never presented any evidence that Insurance or Mutual made any distributions of equity to LWP. To the contrary, the Liquidator and LWP agree that the payments to LWP were for services rendered. (Appellant’s Brief at 13.) As such, the payments are not distributions, and LWP was also entitled to judgment on that alternative ground as a matter of law.

## **ARGUMENT**

### **I. AS A MATTER OF LAW, THE LIQUIDATOR IS NOT ENTITLED TO RECOUP PAYMENTS BY INSURANCE AND MUTUAL TO LWP BECAUSE LWP WAS NEVER AN AFFILIATE THAT CONTROLLED INSURANCE OR MUTUAL, AS EXPRESSLY REQUIRED BY § 31A-27-322.**

The Liquidator seeks recoupment of payments to LWP from Insurance and Mutual under Utah Code Ann. § 31A-27-322(1), which provides:

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. . . .

(Emphasis added.) To recover under this section, the Liquidator must show, among other things, that the distributions were made to an “affiliate that controlled the insurer.” (R. 2976.) The Liquidator argues that he is entitled to recovery of

payments to LWP from Insurance as a matter of law simply because LWP admits that it was an affiliate of Insurance.<sup>3</sup> (Appellant’s Brief at 16.) The Liquidator did not allege in his Complaint or present evidence to the effect that LWP actually controlled Insurance or Mutual (and cannot do so because there is no such evidence.) (R. 2977.) Instead, the Liquidator has contended that a mere showing or admission of affiliate status is sufficient as a matter of law for recoupment. (Appellant’s Brief at 24.) By focusing solely on the status of an affiliate and ignoring the requirement of control, the Liquidator failed to even plead the basic elements of a cause of action against LWP under Section 322. The trial court rejected the Liquidator’s contention, finding that “[w]ithout claim and proof of actual control, the Liquidator is not entitled to recover money from LWP under Section 27-322 as a matter of law.” (R. 2922.) Through this appeal, the Liquidator continues to attempt to rewrite Section 322 by purposefully deleting the express requirement that the affiliate must be one “that controlled the insurer.”

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<sup>3</sup> After recognizing LWP’s argument that it was not an affiliate of Mutual during the relevant time period, the Liquidator withdrew his motion for summary judgment seeking recovery of payments from Mutual to LWP. LWP’s Motion for Summary Judgment still pertained, however: if the Liquidator is not entitled to recover payments made by Insurance notwithstanding its admitted status as an affiliate based on common ownership, he is certainly not entitled to recover payments made by Mutual which was not an affiliate.



A. **Under Utah Code Ann. § 31A-27-322, it is not sufficient to show common ownership or management of the affiliate and the insurer; the plain language of the statute requires that the affiliate be in a position to control the insurer.**

As noted by the Liquidator himself at p. 34 of his Brief, it is a basic principal of statutory construction that “[i]n construing a statute, [w]e 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 Board of Equalization of Wasatch County v. State Tax Comm’n*, 944 P.2d 370, 373 (Utah 1997) (citations omitted). Here, the Legislature required a showing of both affiliate status and that the affiliate “control” the insurer in order to bring the recoupment statute into play. There is nothing confusing or inoperable about the phrase “that controlled the insurer” in Section 322; it describes an element required in addition to the status as an affiliate. As the trial court found, the “Legislature used that language advisedly . . . the word ‘controlled’ would not have been included if affiliate status were all it intended to require.” (R. 2977.)

Control is not assumed by the mere fact of affiliation. The definitional section of the Utah Insurance Code, § 31A-1-301(5), delineates three types of affiliates: one that controls another entity, one that is controlled by another entity, and one that is under common control and management with another entity. The plain language of Section 322 then limits its application to one of the three types of affiliates, i.e., the type of affiliate that controls the insurer.

The Liquidator argues that an entity is presumed to control its affiliates, even if it is not an owner of the affiliate, because control is defined as “the direct or indirect possession of the power to direct or cause the management and policies of a person” (Utah Code Ann. § 31A-1-301(27)(a); Appellant’s Brief at 22). In other words, according to the Liquidator, “‘affiliate’ and ‘control’ [as used in Section 322] are thereby synonymous.” (Appellant’s Brief at 22-23.) Given the Legislature’s definition of affiliate in § 31A-1-301(5), there is no question that an affiliate relationship may involve some sort of relationship of control or common ownership and management; however, only a particular type of control – that of an affiliate over an insurer – gives the Liquidator the right to recoup distributions under Section 322. And, as Section 301(27)(a) makes absolutely clear, “[t]here is no presumption that an individual holding an official position with another person controls that person solely by reason of the position” (emphasis added).<sup>4</sup> Applying that section, the trial court found there is no presumption that LWP controlled Insurance or Mutual based on “mere common ownership or operation.” (R. 2437.)

The limitation of recovery under Section 322 to controlling affiliates makes absolute sense, given that the statute’s purpose is to prevent parent holding companies from raiding the assets of subsidiary insurers. (R. 1951, 2332.) This sort abuse can only occur when the party receiving the distribution is in control of

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<sup>4</sup> Indeed, the Liquidator affirmatively disclaimed any presumption of control based on John Igoe’s positions with these companies. (R. 2285.)

the insurer and therefore is in the position of dictating or requiring a transfer of equity from the insurer to the controlling affiliate. (R. 2077.) LWP was neither a parent company nor a holding company of Insurance or Mutual, and it was never in a position to direct an equity distribution from those entities.

**B. The Liquidator never alleged or attempted to prove actual control of Insurance or Mutual by LWP, thus entitling LWP to judgment as a matter of law.**

The Liquidator has never alleged or presented evidence of actual control of LWP over Insurance or Mutual. (R. 2977.) In the Liquidator's Complaint, for example, he states that "[p]ursuant to Section 31A-27-322 . . . the receiver of [Insurance and Mutual] is permitted to recoup the amount of distributions made to affiliates at any time during the five years preceding the petition for distribution." (R. 1983.) Nowhere in the Complaint does the Liquidator address the requirement for control of the affiliate by the insurer or even recognize that it is a required element of a cause of action under Section 322. Similarly, in the Liquidator's memorandum supporting his motion for summary judgment, he writes ". . . the Liquidator is permitted to recover from any affiliate any distribution made at any time during the five years preceding the petition for liquidation." (R. 1669.) In advancing this draconian argument, the Liquidator ignores the requirement of control. Again, he presented no allegations or facts showing actual control of Insurance and Mutual by LWP. Even after being told by the trial court that the statute requires "claim and proof of actual control," the Liquidator persists in

ignoring the explicit requirement for control of the insurer by the affiliate, claiming that “[w]here the trial court found the facts established that LWP was an affiliate of Insurance, summary judgment should have been entered for Insurance.” (Appellant’s Brief at 24.) There is no such presumption.

The Liquidator complains that the trial court disregarded evidence of common control and management of LWP and Insurance. (Appellant’s Brief at 24-27.) That some of those in management also held positions with related companies is not a material issue in this case. LWP freely acknowledged that it was an affiliate of Insurance for a period of time based on common ownership. It further admitted that there was some overlap in management. Evidence of common management, however, does not prove that one subsidiary controlled or was able to direct distributions by another subsidiary of a common parent.

The Liquidator cites two cases in support of his proposition that common management is indicative of control of one corporation by the other. (Appellant’s Brief at 24.) The first case, *Johnson-Tanner v. First Cash Financial Serv., Inc.*, 239 F. Supp. 2d 34 (D.D.C. 2003), involved the issue of whether a parent corporation so dominated a subsidiary corporation that personal jurisdiction over the parent corporation under a “long-arm” statute was proper based on the acts of the subsidiary. The case is not at all relevant to the issue before the Court here, which is whether a cause of action under Utah Code Ann. § 31A-27-322 requires an allegation and proof that the affiliate corporation controlled the insurer. It is

admitted here, for example, that LWP was not the parent of Insurance; it was at best a sister company owned by a common parent, Group, which is not a party to this action.

The second case, *In re Chicken Antitrust Litigation*, 560 F. Supp. 1006 (N.D. Ga. 1982), also examined the control of a parent over a subsidiary, an entirely different issue than the issue here where the two corporations are sister subsidiaries without ownership of one by the other.

The Liquidator maintains that he “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.” (Appellant’s Brief at 24.) That showing was in fact that some of the same individuals had positions with both entities – there was never a complete identity of management. Either way, the Liquidator did not demonstrate the control over Insurance necessary to establish a cause of action under Section 322. The trial court was correct in finding against the Liquidator as a matter of law.

As for Mutual, it is true that the Liquidator and LWP disagree about whether LWP was an affiliate of Mutual. (Appellant’s Brief at 31.) This dispute, however, does not create an issue of material fact under Section 322 because the Liquidator has never alleged that LWP controlled Mutual. The Liquidator contends that the contradictory affidavits of Orrin Colby (submitted by the Liquidator) and John Igoe (submitted by LWP) create a factual dispute about control of Mutual,

but Mr. Colby merely asserts that LWP, Insurance and Mutual “were managed and controlled by the same Group of persons.” (Appellant’s Brief at 31; R. 2300.) It is true that some individuals had management positions with all three companies, but there were different members as well. They were not the “same group of persons.” The Colby affidavit does not support a finding that LWP controlled Mutual. (R. 2296-2302.)

Further, there are no allegations of common ownership between LWP and Mutual during the relevant time period.<sup>5</sup> Mutual companies are, by definition, owned by their members. Mutual, in turn, did own some of the common stock of Group, the parent of LWP, prior to the time when payments for services were made by Mutual to LWP, but as the result of a capital restructuring of Group in November of 2002, all of Mutual’s stock in Group was relinquished. (R. 2973.) LWP, as a subsidiary of Group, a company independent of Mutual, simply was not in a position to dictate distributions from Mutual to itself. (R. 2975.) Summary judgment in LWP’s favor on the claim for recoupment of payments by Mutual, a nonaffiliate, therefore follows with even greater force than with regard to the recoupment of payments by Insurance, an admitted affiliate.

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<sup>5</sup> Common ownership was the sole basis for LWP’s admission that it was an affiliate of Insurance.

**II. THE PAYMENTS FROM INSURANCE AND MUTUAL TO LWP WERE PAYMENTS FOR SERVICES RENDERED, NOT “DISTRIBUTIONS” UNDER § 31A-27-322 AND, AS A MATTER OF LAW, ARE NOT SUBJECT TO RECOUPMENT.**

Although the trial court’s holding that there was no evidence that LWP controlled either Insurance or Mutual was sufficient for its grant of summary judgment to LWP, the Court also based its holding in LWP’s favor on an independent, alternative ground. (R. 2977-78.) Utah Code Ann. § 31A-27-322 only allows the Liquidator to recover “distributions” made by the controlled insurer. The Liquidator asserted that the term “distribution” includes all payments of any nature from an affiliate to an insurer. LWP contended instead, and the trial court found, that the term “distribution” means dividends or other transfers of a corporation’s equity and does not include payments such as those made by Insurance and Mutual to LWP for claim adjustment services. (R. 2978.)

As the Liquidator correctly noted, the plain language of a statute determines its meaning. (Appellant’s Brief at 33.)<sup>5</sup> That plain language, however, must be interpreted by “consider[ing] the act in its entirety” and “harmoniz[ing] its provisions in accordance with the legislative intent and purpose.” *Gutierrez v. Medley*, 972 P.2d 913, 915 (Utah 1998). Even though the word “distribution” is not defined in the Utah Insurance Code, the Liquidator argues that the term

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<sup>5</sup> The Liquidator’s assertion that the ‘plain language’ of Section 322 governs its interpretation is somewhat at odds with his acknowledgment that the section is not “a model of clarity.” (Appellant’s Brief at 33.)

“distributions” plainly includes any transfer from an affiliate to an insurer and that these transfers are recoverable regardless of whether they were lawful and reasonable. He advances his contention while acknowledging that dividends are a type of transfer which are not recoverable if they are lawful and reasonable. (Appellant’s Brief at 34.) The Liquidator’s construction of this term establishes a conundrum addressed by the trial court. (R. 2979.)

The Liquidator points to no authority for his position on the meaning of the word “distribution” beyond a district court case with no precedential value which, as discussed below, involved an actual raid of a subsidiary’s equity by a controlling parent. *American Western Life Insurance Company in Liquidation v. Leland A. Wolf*, No. 980905251 (Third District Court, Salt Lake County, Utah, filed May 22, 2003). Further, even if “dividends” are a subset of “distributions” as the Liquidator contends, it does not follow that the term “distribution” includes all transfers of money or property of any type whatsoever. Indeed, as the trial court found, the term “distribution” only includes transfers of the equity of an insurer with respect to its ownership. (R. 2979.)

In granting summary judgment for LWP, the trial court looked to the plain meaning of “distribution” as defined in other sections of the Utah Code, as well as its use in other subsections of Section 322 and other parts of the Insurance Code. (R. 2974-2980.) In other words, the trial court did consider the act in its entirety, as required. The court observed that “distribution” is defined in the Utah Revised



Business Corporation Act, for example, as a “direct or indirect transfer or 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). This definition is consistent with the meaning of the term “distribution” in common usage. A distribution is not any transfer of money or property but rather denotes dividing up and passing out of equity.

The trial court further observed that the term “distribution” is used similarly in the Utah Revised Business Corporation Act and the Utah Insurance Code. (R. 2978.) In subsections (4) and (5) of § 31A-27-322, the very statute invoked by the Liquidator for example, the terms “distribution” and “dividend” are used synonymously. Under subsection (4), an affiliate in control of the insurer at the time of a “distribution” is liable for up to the amount of “distributions” received. Section (5) then provides that “[i]f 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 such deficiency. . . .” (Emphasis added.) Thus, the term “distribution” in subsection (4) is used interchangeably with the term “dividend” in subsection (5). These are words describing a distribution (or raid) of the equity of a company by a parent that controls it, not a payment for services rendered.

As recognized by the trial court, the entire statutory scheme for the management of the affairs of insolvent insurance companies found in Chapter 27 of Title 31A (“Insurers Rehabilitation and Liquidation”) is consistent with the statutory construction urged by LWP: Sections 320-322 support the definition of the term “distribution” as transfer of money or property in respect of the equity of an insurer, as opposed to other payments. (R. 2979.) Section 320, for example, authorizes a liquidator to recover fraudulent “transfers” made within one year of the filing for liquidation; Section 321 empowers a liquidator to recover a “preference,” which is defined as “a transfer of any of the money or property of an insurer to or for the benefit of a creditor” if that transfer was made within a certain time period. Sections 320 and 321 clearly allow the liquidator to recover payments for services rendered under certain circumstances.<sup>6</sup> The Legislature’s use of the term “distribution” in Section 322 instead of the words “transfer” or “preference” strongly supports the conclusion that Section 322 was only intended to reach distributions of the equity of an insurer made to an affiliate in control. (R. 2979.)

Other sections of the Utah Insurance Code also support a definition of “distribution” as a transfer based upon ownership, rather than all payments or transfers. Utah Code Ann. § 31A-5-418, for example, refers to “dividends and

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<sup>6</sup> These provisions are analogous to the powers of a trustee in a bankruptcy. They are the remedy the Liquidator should have used if he really believed that the payments made by Mutual and Insurance for services rendered were improper or otherwise preferential to other customers.

other distributions” and states 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 of the Utah Insurance Code concerning registration of insurers states that registration statements shall contain information on “dividends and other distributions” to shareholders. Utah Code Ann. § 31A-16-105(2)(c)(vii). Similarly, another section establishes standards for determining whether a “dividend or distribution” is extraordinary. Utah Code Ann. § 31A-16-106(2)(b), (c), and (d). In all these statutory provisions, “distribution” is clearly limited to transfers of equity made with respect to ownership.

In a strained attempt to craft a new definition for the term “distribution,” the Liquidator complains that the trial court examined the meaning of the term in other Utah Code provisions, such as the Utah Revised Business Corporation Act and other sections of the Utah Insurance Code, rather than exploring the legislative history of Section 322. (Appellant’s Brief at 39.) The trial court, however, properly applied the basic principles of statutory interpretation by examining the plain language of the statute (which included reviewing the definition of “distribution” in other relevant sections of the Utah Code) and analyzing “the act in its entirety.” *In re Gonzalez*, 1 P.3d 1074, 1079 (Utah 2001).

In addition, and contrary to the Liquidator’s argument, the legislative history of Section 322 supports the conclusion of the trial court as to the meaning of “distribution.” Although the Liquidator argues that the comments and draft

code authored by Professor Spencer L. Kimball indicates that the term “distribution” includes all types of transfers, the opposite is true. The Liquidator has acknowledged that § 96-17-6.5 of the 1983 Draft Code was the precursor to § 31A-27-322 of the Code enacted in 1986. That section of the Draft Code provides “(1) Right of receiver to recover dividends paid. If an order for the liquidation . . . of an insurer . . . is entered . . . , the receiver has a right to recover on behalf of the insurer the amount of distributions other than stock dividends. . . .” (Emphasis added.) The terms “dividend” and “distribution” are there used interchangeably.

The Liquidator also makes much of the fact that Professor Kimball expressed concern about possible abuses in the relationship between insurers and parent holding companies. (Appellant’s Brief at 41.) The Liquidator makes a giant leap in logic, however, when he asserts that Professor Kimball’s concern over the holding company system meant the legislature intended to reach all transfers to all affiliates, including sister companies, when it enacted Section 322. There is simply no support in the legislative history for such a proposition. Indeed, the closing paragraph of the Comment to § 96-17-6.5 provides that “[t]here are other potential abuses, beside excessive dividends, in the holding company, development.” The language of the Comment, therefore, evidences the drafter’s intent to limit § 96-17-6.5 to transfers based on ownership.

As mentioned previously, the Liquidator's sole authority for a definition of distribution as any payment of money or property is found in an interlocutory decision of a Utah district court which does not serve as precedent in this case. *American Western Life Insurance Company in Liquidation v. Leland A. Wolf*, *supra*. The Liquidator asserts that the arguments in that case were virtually identical to the arguments presented in this case. He is wrong. The *American Western* case involved circumstances where individuals in actual control of an insurer entered into transactions on less than arms-length terms that resulted in transfers of equity to the controlling persons. In other words, the parent company raided the assets of the controlled subsidiary, a situation which is far different from the situation now before the Court. Further, for the reasons stated in this brief, LWP respectfully submits that the broad definition of the term "distribution" adopted by the Court in the *American Western* case was unwarranted and incorrect.

In summary, the trial court correctly decided that the monies the Liquidator seeks to recover here were not distributions or dividends but instead were payments for services rendered. The Liquidator has made no allegations that the payments for services rendered by LWP to Insurance and Mutual were unfair, excessive or obtained by fraud. Insurance and Mutual got what they paid for. There are no allegations of abuse, manipulation or overreaching by LWP. In fact, significantly, the Utah Guaranty Association has continued to use LWP to administer claims for the liquidation estates under the same terms as the previous

agreements with Insurance and Mutual. What the Liquidator is asking for is a windfall that would put LWP out of business. He is asking that LWP be treated differently from all other entities that provided goods and services to Insurance and Mutual. Neither the statutory scheme which allows for recoupment of distributions to controlling affiliates nor the Liquidator's factual allegations in this case support the extreme result advocated by the Liquidator.

### **CONCLUSION**

Payments to LWP by Insurance were payments by an insurer to a sister subsidiary for services actually rendered. Payments by Mutual to LWP were payments for similar services. They were not distributions of equity. Further, there is neither allegation nor evidence LWP actually controlled Mutual or Insurance. For these reasons, the Liquidator is not entitled to recover the payments under Utah Code Ann. § 31A-27-322. The order of the trial court granting summary judgment to LWP should be affirmed on both bases

Dated this 19th day of July 2006.

CLYDE SNOW SESSIONS & SWENSON

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

EDWIN C. BARNES

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## CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the BRIEF OF APPELLEES were mailed, postage prepaid, on the 19th day of July 2005 to the following:

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