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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. :
Reply Brief

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.

REPLY 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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IN THE SUPREME COURT FOR THE STATE OF UTAH

<p>WASATCH CREST INSURANCE COMPANY, IN LIQUIDATION, WASATCH CREST MUTUAL INSURANCE COMPANY, IN LIQUIDATION, and D. KENT MICHIE, Liquidator,</p> <p>Plaintiffs/Appellants,</p> <p>vs.</p> <p>LWP CLAIMS ADMINISTRATORS, CORP., a California corporation, and LWP CLAIMS SOLUTIONS, INC., a California corporation,</p> <p>Defendants/Appellees.</p>	<p>REPLY BRIEF OF APPELLANTS</p> <p>Case No. 20051102</p> <p>Trial Court No. 030915527</p>
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INTRODUCTION

While LWP is correct that the Liquidator seeks to recoup all payments made to LWP as an affiliate under the Utah Insurance Code § 31A-27-322 (hereafter the “Statute”), it incorrectly argues that the Liquidator somehow conceded no wrongdoing by not pleading that the payments to LWP were other than fair compensation. Quite simply, the applicable statute does not require that the Liquidator plead such allegations and they therefore were intentionally not pled.

In addition to factual inaccuracies, LWP raises new arguments in its opposing brief that must be addressed. First, LWP incorrectly argues that “the Liquidator did not plead or attempt to prove that LWP was an affiliate that controlled Insurance or Mutual.” The Statute does not require factual evidence of actual control. The Liquidator did in fact present evidence of common management and the ability to control-which qualifies as *one* of the *three* ways to demonstrate affiliate status. Regardless, LWP concedes that it was an affiliate and the Trial Court acknowledges LWP’s explicit admission in its Order. (R. 2437).

Second, LWP and the Trial Court misinterpret the statutory requirement of control. The Trial Court required proof of *actual* control. This is in direct contravention to the Statute’s definitional section. As set forth by LWP, the

definitional section, § 31A-1-301(5), delineates three types of affiliates: one that controls, one that is controlled, and one that is under common control and management. The error in LWP's argument is that it then goes on to argue that § 31A-27-322 limits its application to only *one* of the *three* types of affiliates—one that controls. This interpretation would make § 31A-1-301 surplusage, meaningless and in direct opposition to the principles of statutory interpretation. Further, this interpretation completely ignores and disregards the plain language of the definitional section of the Statute. Rather, given the choice of three different types of affiliates to choose from, the Liquidator seeks to recoup payments based on the common/overlapping management option.

Finally, LWP advances an incorrect statutory interpretation of “distributions.” Relying on the Statute's use of “dividend” in section 5, LWP argues that “distribution” and “dividend” are interchangeable. This interpretation is wrong. Rather, section 5 further clarifies section 4 and each section deals with a separate but related situation.

Section 4 deals with joint and several liability for any distribution issued to any person, shareholder or not. Section 5 then further clarifies section 4 explaining, that where a dividend (payments only to shareholders) is given out under section 4, and the person that received the dividend (*i.e.*, a distribution in the form of a dividend) is insolvent, the dividend is still recoverable and joint

and several liability applies for any deficiency. The use of “distribution” and “dividend” in these two sections clearly demonstrate that “distribution” is being used as the broad category, with “dividend” as a sub-set of distribution.

ARGUMENT

I. COMMON OWNERSHIP OR OPERATION IS SUFFICIENT FOR THE COURT TO PRESUME CONTROL.

Violating the basic principles of statutory construction, LWP argues that the Court should ignore the definitions of § 31A-1-301 that apply to § 31A-27-322 and instead limit their application. 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. As agreed to by LWP, the definitional section of the Utah Insurance Code “delineates three types of affiliates,” specifically:

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); Mem. Opp. at 12. 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. This control may be . . . by common management.” UTAH CODE ANN. § 31A-1-301(27)(a) and (a)(ii).

The error in LWP’s argument is that it argues that only one of the above three types of affiliates is included in § 31A-27-322. Mem. Opp. at 12. This interpretation runs counter to the basic principles of statutory construction. In the present case, the three statutory types of affiliates are alternatives stated in the disjunctive (*i.e.*, “or”). Thereby, it is necessary to prove that only one of the provisions is applicable. *See, e.g., Hebertson v. Bank One*, 1999 UT App 342, ¶ 10, 995 P.2d 7 (because the statute utilizes a disjunctive, by its plain language the plaintiff need only satisfy one of the conditions set forth by the statute). That does not mean, however, that only one of the three types of affiliates apply to § 31A-27-322, as LWP argues. To the contrary, because there are three separate types of affiliates, all three are applicable and the Liquidator need only prove that one of the three applies. LWP’s construction would impermissibly render two of the three types of affiliates completely inoperable and mere surplusage. *See Downey State Bank v. Major-Blakeney Corp.*, 578 P.2d 1286, 1288 (Utah 1978) (statute should be read so as to avoid making any provisions

“surplusage and meaningless”); *Ferro v. Utah Dep’t of Commerce*, 828 P.2d 507, 513 (Utah Ct. App. 1992) (rejecting interpretation that would “rewrite the Act and impermissibly render the reciprocity provision a complete nullity”).

Observing the plain language of the Statute and giving effect to each term demonstrates that LWP, along with the Trial Court, misinterpreted the plain language of the Statute, finding that “mere common ownership or operation, . . . is [not] a sufficient basis to presume control.” (R. 2437).

A. The Liquidator Presented Evidence of Common Management and Control.

LWP further misstates that the Liquidator failed to present evidence of control. Mem. Opp. at 14. While the Liquidator is statutorily permitted to recover from any affiliate any distribution made at any time during the five years preceding the petition for liquidation, it was not necessary for the Liquidator to prove or present evidence of actual control; rather it was sufficient to show common ownership or overlapping management to establish affiliate status. UTAH CODE ANN. § 31A-1-301(5) & (27)(a). LWP is an affiliate of Insurance because there was such common management.

As presented in detail in the Brief of Appellants, the Liquidator presented evidence of overlapping management by the overlapping leadership positions of John Igoe and others in LWP and Insurance, the involvement of Mr. Igoe and other management persons in transactions between LWP and Insurance, the

decisions made by the overlapping management team regarding the claims handling services, the common employees, and the corporate relationship/ownership of the companies. *See* Brief at 24-27; (R. 2437, 1944, 2255, 2298-9, 2296, 2300, 2284-2287, 2973, 3393 at 26 and 2399).

The above evidence was 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, and confirm that Mr. Igoe and others operated Group, Insurance, and LWP with one common management, utilized the same employees, and entered into agreements with each other on behalf of one another. (R. 2288). While there is "no presumption that an individual holding an official position with another person controls that person solely by reason of the position," UTAH CODE ANN. § 31A-1-301(27)(b), added to the other above-mentioned instances of common/overlapping management, it is indicative of common control.

LWP's argument that the Liquidator was required to show a "complete identity of management" is also incorrect. Mem. Opp. at 16. The definitional section of the Statute requires common management, not "complete identity of management." UTAH CODE ANN. § 31A-1-301(5) & (27)(a).

LWP itself "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.” Mem. Opp. at 15. The Trial Court also found “[t]here is no question that LWP was an affiliate of” Insurance. (R. 2437). LWP and the Trial Court, however, incorrectly wanted proof that “one subsidiary controlled or was able to direct distributions by another subsidiary of a common parent.” Mem. Opp. at 15; (R. 2977). The plain language of the Statute does not require this. Rather, choosing one of the three types of affiliates available, the Liquidator proved that it was under common control. (R. 2437, 1944, 2255, 2298-9, 2296, 2300, 2284-2287, 2973, 3393 at 26 and 2399; *see also*, Brief at 24-27). The Liquidator was then only required to demonstrate, as it did, the “indirect possession of the power to direct or cause the direction of management and policies” and not actual control. UTAH CODE ANN. § 31A-1-301(27)(a). For this reason, the Trial Court’s interpretation was directly contrary to the Statute.

B. There Were Disputed Material Issues of Fact Regarding the Extent of LWP’s Control of Insurance and Mutual.

Completely disregarding the material issues of fact in dispute regarding the level and duration of control/management of Insurance, LWP incorrectly asserts that there were no disputed material facts with respect to Mutual. Mem. Opp. at 16. This argument is illogical given LWP’s statement that “[a]s for Mutual, it is true that the Liquidator and LWP disagree about whether LWP was

an affiliate of Mutual.” Mem. Opp. at 16. Affiliate status is the very basis of the present suit.

LWP’s statement that “the Liquidator has never alleged that LWP controlled Mutual” is contrary to the evidence presented in the affidavit of Mr. Colby. While LWP correctly states that Mr. Colby testified that Insurance and Mutual “were managed and controlled by substantially the same group of persons,” it incorrectly represents this was the only statement of Mr. Colby. (R. 2300). Rather, Mr. Colby, in his position as Chairman of the Board and Chief Executive Officer of Mutual from 1999 to July of 2003, testified that by nature of the corporate relationship of Group, Insurance, LWP and Mutual, there was affiliate status. (R. 2299 at ¶ 11). Mr. Colby states that Mutual shared employees with Group and Insurance, had common management with LWP and Insurance which included John Igoe, Dennis Larson, Judy Adlam and others. (R. 2297-2300). The overlapping management team—such as John Igoe—was involved in drafting and/or administering services agreement with Mutual and Insurance, and supervised the day-to-day business activities and records for Mutual. (R. 2297-2301). Mr. Colby then directly testified that Mutual had affiliate status. (R. 2300 at ¶ 16).

These allegations directly support the Liquidator’s allegation of affiliate status. A material issue of fact was then created with the affidavits submitted by

LWP wherein Mr. Igoe disclaims affiliate status and specifically disputes Mr. Colby's testimony. (R. 1940, 2037, 2296-2302; 2396-2403). Given the material disputed issues of fact regarding Mutual and Insurance, summary judgment was improper. *See, e.g., Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah Ct. App. 1988) ("One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment."); *Hill v. Grand Central, Inc.*, 477 P.2d 150, 151 (Utah 1970) (explaining summary judgment is not proper when there are genuine issues of material fact). It is for that reason that the Liquidator withdrew its motion for summary judgment with respect to Mutual.

II. "DISTRIBUTION" AND "DIVIDEND" ARE NOT SYNONYMOUS.

LWP's argument that "distribution" is used synonymously with "dividend" because of the use of "dividend" under section 4 of the Statute is unsustainable. Mem. Opp. at 20. Review of section 1 and both sections 4 and 5 is necessary to obtain the full meaning of each and to understand that sections 4 and 5 are consistent with one another—section 5 is merely a further amplification of section 4.

Sections 1, 4 and 5 of § 31A-27-322 state:

- (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).

(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.

UTAH CODE ANN. 31A-27-322(1), (4) & (5).

As demonstrated by the plain language, section 4 is discussing joint and several liability, specifically, where a *distribution* was paid, any person that received the distribution is jointly and severally liable. Because a distribution can be issued to shareholders and/or non-shareholders, this section seeks to recoup any and all distributions, whether shareholder or not. Section 5 then further clarifies section 4, explaining that where a dividend (payments only to shareholders) is given out under section 4, and the person that received the dividend (*i.e.*, a distribution in the form of a dividend) is insolvent, the dividend

is still recoverable and joint and several liability applies for any deficiency. The “distribution” and “dividend” in sections 4 and 5 are not used synonymously as LWP argues, but are dealing with two separate but related situations. The Statute uses “distribution” as the broad category of what can be recovered, and “dividend” as a sub-set thereof.

This interpretation is further consistent with the legislative history. The author of the current Utah Insurance Code, Professor Spencer L. Kimball, was concerned with all “intergroup transactions” and his comments evidence that the Statute was intended to address all potential abuses with affiliates, not just dividends. (R. 2278-9, 2333).

LWP also incorrectly argues that 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” and that the Trial Court abided by the rules of statutory construction. Mem. Opp. at 19.

The Liquidator bases its interpretation on the plain meaning of the words of the Statute, and verified the plain meaning of the words by looking at the legislative intent and purpose of the Statute, as required by Utah law. *Water & Energy Systems Technology, Inc. v. Keil*, 2002 UT 32, ¶ 18, 48 P.3d 888, 894 (Utah 2000); *In re Gonzales*, 2000 UT 28, ¶ 23, 1 P.3d 1074, 1079. It also provided the *American Western Life Ins. Company in Liquidation v. Leland A.*

Wolf case where another judge dealt with the exact issue here. (R. 2342-2358).

While this case is not controlling, it is certainly instructive.

A. The Trial Court Did Not Adhere To the Rules of Statutory Construction.

The Trial Court did not adhere to the rules of statutory construction. LWP itself explains that the “trial court looked to the plain meaning of ‘distribution’ as defined in other sections of the Utah Code” Mem. Opp. at 19.

Reviewing the ruling of the Trial Court also evidences that the Trial Court went beyond the plain meaning of the Statute. (R. 2438, 2974-2980). As explained by the Utah Supreme Court: “When interpreting a legislative enactment, ‘we look first to the plain language of the act to determine its meaning.’” *Keil*, 2002 UT 32, ¶18, 48 P.3d 888, 894 (internal citation omitted). The Trial Court did not first look to the plain language of the Statute to determine the meaning of “distribution” and “dividend” but rather, looked to “other sections of the Utah Code.” Mem. Opp. at 19; R. 2433, 2974-2980). If the Trial Court found the terms ambiguous, it should have looked to the “reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject.” *In re Gonzales*, 2000 UT 28, ¶ 23, 1 P.3d at 1079. Accordingly, rather than solely looking to other definitions of “distribution” and “dividend” within the Utah Code, the Trial Court should have deferred to the legislative history.

Regardless, the other code sections cited by LWP either actually support the Liquidator's interpretation of distribution as the broad category and dividend as a subset or sub-class of distribution or are completely irrelevant to the present analysis. LWP cites § 16-10a-102(13), incorrectly stating that it demonstrates that "distribution is not any transfer of money or property but rather denotes dividing up and passing out of equity." Mem. Opp. at 20. The plain language of § 16-10a-102(13) states that a distribution "means a direct or indirect transfer of *money or other property*" and includes many items, such as dividends, acquisitions of shares or any other forms. UTAH CODE ANN. § 16-10a-102(13) (emphasis added). The plain language of this statute shows that while a dividend is a sub-class of distribution, the reverse is not true, a distribution is not a sub-set of dividend. It also clearly provides that distributions can be more than distributions of equity and specifically include money, property or any other forms.

Similarly, § 31A-5-418, also cited by LWP, explicitly provides that a dividend is a sub-set of distribution. It states that the broad category of distributions can be effectuated but that the sub-set dividend cannot be paid unless certain circumstances are satisfied. UTAH CODE ANN. § 31A-5-418. Sections 31A-16-105(2)(c)(vii) and 31A-16-106(2)(b) use distribution and dividend in the same way—a dividend is a sub-set of distribution.


Finally, LWP's argument that use of the word "transfers" in § 31A-27-320 and "preference" in § 31A-27-321 "strongly supports the conclusion that Section 322 was only intended to reach distributions of equity of an insurer" requires a giant constructional leap. Mem. Opp. at 21. Both those sections are dealing with different situations (*i.e.*, fraudulent transfers and voidable preferences), and evidence nothing other than the legislature's use of different concepts and methods of recovering assets. To somehow equate "preference" and "transfers" as used in other sections with "distribution" is a non-sequitur.

CONCLUSION

The Trial Court, misinterpreting § 31A-27-322 of the Utah Code, incorrectly granted summary judgment to LWP. 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, 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 are dividends that are shown to be fair and reasonable; and (4) that there were material issues of fact that precluded summary judgment as to Mutual.

DATED this 21st day of August, 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

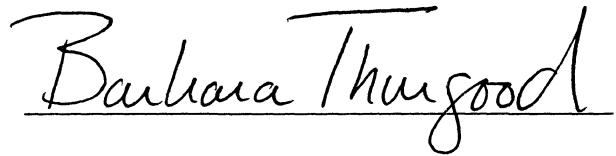
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
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