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COURT OF APPEALS
STATE OF NEW YORK

COLUMBIA MEMORIAL HOSPITAL,
Appellant,

-against-

HINDS,

Respondent.

NO. 36

20 Eagle Street
Albany, New York
April 20, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 36, Columbia
2 Memorial Hospital v. Hinds.

3 Counsel?

4 MR. ZWERLING: Good afternoon, Your Honor. My
5 name is Andrew Zwerling of Garfunkel Wild, P.C. I am
6 appearing on behalf of the appellant Columbia Memorial
7 Hospital. And with the court's permission, I would like to
8 reserve two minutes for rebuttal time.

9 CHIEF JUDGE DIFIORE: You may have two minutes,
10 sir.

11 MR. ZWERLING: Thank you, Your Honor.

12 Although analysis of Insurance Law 7307 results
13 in the conclusion that where an employer paid the premium
14 it is entitled to receive the MLMIC conversion fund, as all
15 four appellate divisions have held and as the Department of
16 Financial Services, DFS, essentially concluded, the
17 determination of which party's entitled to the MLMIC monies
18 rests on equitable claims of unjust enrichments.

19 Specifically, we submit that the issue of which
20 party is entitled to the MLMIC monies should be decided on
21 the basis of which party has demonstrated attributes of
22 ownership and on the basis of facts demonstrating the
23 expectations of the parties with respect to ownership of
24 the policy. But we - - -

25 JUDGE GARCIA: Counsel - - - Counsel? Right



1 here.

2 The Insurance Law is a very complicated thing and
3 there's a very specific provision here which governed
4 during the relevant time period. So we could do what you
5 want to do and say, you know, look at these cases and look
6 at what they thought and look at the equities and look - -
7 - or we could say there's a very specific and - - - to get
8 to the unjust enrichment here, we have to say the statute
9 goes one way, but we're going to go the other way.

10 So we say the statute says this, but we're going
11 to find that you can litigate unjust enrichment claims
12 based on the fact that two parties entered into an
13 agreement with a governing Insurance Law statute on a claim
14 that we should look underneath that and see what the
15 equities are in a particular case. Why would we ever do
16 that, particularly in the insurance field?

17 MR. ZWERLING: Understood, Your Honor. And our
18 position is regardless of how the court falls with regard
19 to the statutory analysis, the hospital's equitable claims
20 survive, for a number of reasons. Number one DFS, the
21 agency that is charged with interpreting the Insurance Law
22 in no way found that the entitlement to the MLMIC monies
23 was solely dependent upon the Insurance Law and, in fact,
24 did the opposite; created this dispute resolution process,
25 where it directed - - - not directed, but stated that the



1 resolution of the claim should depend upon the facts and
2 circumstances surrounding the relationship of the parties
3 as determined by applicable law and as determined by a
4 court or an arbitrator. And so - - -

5 JUDGE GARCIA: But again, as the appellate
6 divisions, I think, have found, at least three of them,
7 that applies to a very specific situation, arguably, where
8 there was a potential assignment of rights. And so in that
9 case, there's provisions for these contingencies. But in a
10 standard case where the hospital, let's say, is paying, the
11 doctor's the holder of the policy, why would we look
12 beneath the Insurance Law for the answer?

13 MR. ZWERLING: Well, I'll answer both questions,
14 which are tied together, Your Honor. First of all, with
15 respect to the assignment of rights factor that the Third
16 Department found so important. In fact, DFS explicitly
17 rejected such a bright line test. I mean, that's the
18 agency that's charged with the responsibility of defining
19 and interpreting the Insurance Law. DFS explicitly
20 rejected a bright line test that says you either resign the
21 rights or not. And in fact, said that even in instances
22 where the policy administrator has not been specifically
23 designated by the policyholder to receive those - - - those
24 monies that the policy administrator still has rights to
25 contest and - - - and - - - and - - - and challenge that it



1 has legal - - - a legal ownership right to those monies.

2 Likewise, MLMIC in the MLMIC conversion plan
3 objection procedure. Again, said it explicitly that it
4 doesn't depend upon an assignment; that you can still
5 challenge legal title, you know, regardless of that fact.
6 And -- and it's only logical that DFS and MLMIC would not
7 have created this dispute resolution process if resolution
8 of this issue was just as easy as saying you're either the
9 nominal policyholder unless you resign. It wouldn't have
10 done that. Again, just based upon logic.

11 So to answer the question with regard to
12 assignment, you know - - - you know, I'll now move on to
13 the can we ignore the Insurance Law. You're not ignoring
14 the Insurance Law. At the end of the day, even this court
15 has held that legal title does not preclude equitable
16 considerations. With regard to 7307, the language of the
17 statute that Your Honor is pointing to, nothing in that
18 statute precludes the equitable claims from being
19 considered by the court. In fact, the statute - - -

20 JUDGE TROUTMAN: But what does that - - -

21 MR. ZWERLING: I'm sorry, Your Honor.

22 JUDGE TROUTMAN: What does that section refer to?

23 MR. ZWERLING: That statute merely says which
24 party is entitled to receive the monies. And - - -

25 JUDGE TROUTMAN: And who does it say?



1 MR. ZWERLING: Excuse me, Your Honor?

2 JUDGE TROUTMAN: And whom does it identify?

3 MR. ZWERLING: It identifies such policyholder
4 who has timely paid the premiums.

5 But with regard to the language, jurisprudence
6 going back over a hundred years draws a distinction between
7 the word receive and keep and retain. And even to that
8 point, DFS in - - - in - - - in its order and decision even
9 expressly stated, and I quote, that the release of the
10 escrow, the receipt of the monies by the nominal
11 policyholder "shall have no substantive effect on the
12 party's position with respect to who is entitled to the
13 payment under the relevant law. And notably, all four
14 appellate divisions likewise - - - and I know the court's
15 not bound by the appellate divisions, but all four of the
16 appellate divisions, although they reach different
17 conclusions, went on to consider the equitable claims and
18 didn't feel that there was some firm, rigid prohibition
19 against considering those equitable claims, which only
20 makes sense because to Your Honor's point, the statute
21 doesn't talk about assignment of rights, which means that
22 the statute itself, the plain language of the statute does
23 not preclude this court's consideration of variables
24 outside of the statute that should be considered in an
25 unjust enrichment or - - - or equitable claim. So I'm not



1 sure if that answers Your Honor's question, but - - -

2 JUDGE GARCIA: It does. Thank you.

3 MR. ZWERLING: Okay. And so most importantly,
4 what we feel is that as the First Department correctly
5 found in Shaffer - - - you know, Shaffer's been - - -

6 JUDGE RIVERA: Oh, Counsel, if I can interrupt
7 you. I'm on the screen.

8 MR. ZWERLING: Sorry.

9 JUDGE RIVERA: Hello. Good afternoon. So if I'm
10 understanding your argument, so please correct me if I'm
11 wrong here, your argument really turns on this position
12 that you all paid the premiums; that's what you base your
13 ownership argument on, your equities argument on. Am I
14 wrong about that?

15 MR. ZWERLING: Well, it's - - - it's incomplete,
16 Your Honor, respectfully.

17 JUDGE RIVERA: Okay.

18 MR. ZWERLING: It's not just on who paid the
19 premiums. Essentially, what we're arguing is that if you
20 have a - - - and I'm not meaning disrespect by looking at
21 Judge Rivera - - - if you create a ledger or a balance
22 sheet and on one - - - one side you have attributes of
23 ownership demonstrated by the nominal policyholder and then
24 on the other side, you have attributes of ownership
25 demonstrated by, in this case, the hospitals or the



1 employer in the other cases, in this column, all the doctor
2 has is his or her names on the policy because it had to go
3 on the policy; that's not by virtue of any agreement
4 between the parties. But in this case, respondent had no
5 other nexus to the policy that demonstrated attributes of
6 ownership. You know, didn't pick the policy and so on.

7 On the other side of the ledger, the hospital
8 selected the policy. And that's important. In fact, Dr.
9 Hinds, the respondent, gave up that right to select the
10 policy explicitly in his employment agreement. And that's
11 what owners do. They decide what house to buy. They
12 decide what car to buy. Here - - -

13 JUDGE TROUTMAN: But wasn't there a contractual
14 relationship that said you provide this insurance coverage?

15 MR. ZWERLING: Your Honor, absolutely not. And
16 I'll elaborate and be more precise. That consideration
17 claim has been bandied about in a bunch of decisions.
18 Well, the employer, that was part of the consideration, in
19 exchange for the physician services.

20 First of all, in this particular case, Dr. Hinds'
21 contract made it explicit that it was not part of his
22 compensation; that the payment of premiums was an expense
23 to the hospital. And with regard to consider - - -

24 JUDGE TROUTMAN: Is his the one - - -

25 MR. ZWERLING: With regard to consider - - - no



1 one was promised a MLMIC policy.

2 JUDGE TROUTMAN: Counselor, is his the one that
3 if he got a bonus that was taken into account?

4 MR. ZWERLING: If is the quality - - - is -- is
5 the - - - the qualifying word here, Your Honor. We are
6 here by virtue of a decision on a pre-answer motion to
7 dismiss in which the court made this leap based upon an
8 affidavit that was wrongfully considered and based upon Dr.
9 Hinds' statement that he was under the impression that he
10 effectively met those productivity thresholds, which meant
11 he may have paid some of the premiums. But the allegations
12 in the complaint, which was presumed to be true, showed
13 that the hospital - - - or alleged that the hospital solely
14 paid those particular premiums.

15 JUDGE RIVERA: Okay. But Counsel, the - - -
16 Counsel, if I - - - I'm back on the screen. Yeah, all
17 right.

18 So Counsel, but the insurance protects the
19 doctor, correct?

20 MR. ZWERLING: Yes.

21 JUDGE RIVERA: And I know it protects you,
22 vicarious liability, correct?

23 MR. ZWERLING: Well, the hospital would have it -
24 - -

25 JUDGE RIVERA: Well, but no. Because your



1 argument seems to be that somehow, there's no benefit at
2 all to the doctor. And the whole point of the insurance is
3 to insure, based on the doctor's conduct, correct?

4 MR. ZWERLING: No, Your Honor. And I guess to -
5 - -

6 JUDGE RIVERA: Right.

7 MR. ZWERLING: - - - to merge the two questions
8 from Judge Troutman and yours is that the only
9 consideration promised to the respondent in this case was
10 base salary, benefits, and a malpractice - - -

11 JUDGE RIVERA: Well, no. But Counsel - - -

12 MR. ZWERLING: - - - (indiscernible).

13 JUDGE RIVERA: Counsel? Counsel, could the
14 doctor have worked for you without the insurance?

15 MR. ZWERLING: No. No doctor, by law, could
16 practice without --

17 JUDGE RIVERA: Right. So you could not - - - you
18 could not benefit from his labor without the insurance.

19 MR. ZWERLING: But where the distinction, the
20 critical distinction lies, Your Honor, is that the
21 respondent - - - and it's likely true. I can only say
22 likely true in all these other cases is that nobody was
23 promised a MLMIC policy. No one was promised a policy that
24 bore fruit. No one was promised a policy that would pay
25 dividends or have conversion funds. So that stands outside



1 of the consideration.

2 This doctor in this case, and maybe in all these
3 other cases, received exactly everything that he or she was
4 promised to receive, in exchange - - -

5 JUDGE RIVERA: Who - - - who had to - - - who had
6 to agree under the plan to sign off on the - - - the
7 mutualization? Who had to do that? Was it your - - - your
8 client?

9 MR. ZWERLING: I - - - I honestly don't know the
10 answer to that question, Your Honor, as far as who the
11 specific - - -

12 JUDGE RIVERA: Well, somebody had to find - - -
13 sign some form.

14 MR. ZWERLING: I - - - I do not know the answer
15 to that particular fact, Your Honor.

16 But again, we believe that the - - -

17 JUDGE RIVERA: Well, isn't the doctor the member?
18 Isn't the one - - - the doctor the one who had to - - - Dr.
19 Hinds, isn't he the one who had to sign off?

20 MR. ZWERLING: He's the nominal policyholder,
21 Your Honor, so - - -

22 JUDGE RIVERA: Didn't he have to sign off?

23 MR. ZWERLING: I do not know the answer to that
24 question, Your Honor. But again, it's a question of
25 weighing which - - - who acted like the owner with regard



1 to this particular policy. His name was on the policy;
2 that is it. He had demonstrated no other attributes of
3 ownership. He received - - -

4 JUDGE WILSON: Well, wait. Well, hold on.
5 Wouldn't you say that voting for or against the transaction
6 is an attribute of ownership?

7 MR. ZWERLING: Well, there's nothing in the
8 record to indicate whether the respondent in this case
9 voted one way or the other or voted at all.

10 JUDGE WILSON: Well, no. I - - - yeah, but then
11 there's nothing to indicate, generally speaking, who the
12 people were who voted for the transaction?

13 MR. ZWERLING: Well, it may be a requirement of
14 law, but the issue in this particular case, as we see it -
15 - -

16 JUDGE WILSON: No. I'm just wondering if you put
17 - - - if - - - if - - - assume hypothetically, let's say -
18 - -

19 MR. ZWERLING: Yes, Your Honor.

20 JUDGE WILSON: - - - that the policyholders were
21 the ones who had to vote. Wouldn't you put that on the
22 ledger that you were talking about on the policyholder's
23 side?

24 MR. ZWERLING: Well - - -

25 JUDGE WILSON: I'm not saying it's dispositive,



1 but wouldn't that be a factor?

2 MR. ZWERLING: It - - - it - - - it could be a
3 factor, Your Honor. Again, it's a requirement of law that
4 that be the case. But again, as between the parties
5 themselves, as far as their expectations as to who the
6 owner was with regard to this policy - - -

7 JUDGE WILSON: Well, there's sort of a factual
8 finding from the Appellate Division, I think, in two of the
9 cases, Second and Third Departments, that there were no
10 expectations; that this was, in their words, a windfall.

11 MR. ZWERLING: I'm - - - I'm not defining
12 expectations. Look. No party in any of these cases
13 though, oh, one day, there's going to be this
14 demutualization and all this money's going to fall from the
15 sky. Nobody anticipated that. And we're - - - we're not -
16 - - we're not arguing that when I use the word
17 "expectations" that that's the case. When I say
18 "expectations", it's just how the - - - the two parties, in
19 this case respondent and - - -

20 JUDGE RIVERA: So if no one - - - Counsel, if no
21 one expected that, then why is it - - - why - - - why - - -
22 why would the policyholder be unjustly enriched? Nobody
23 expected it, so what - how does it fall to your benefit?

24 MR. ZWERLING: Actually, I think --

25 JUDGE RIVERA: Why - - - why - - - why should



1 your client get it?

2 MR. ZWERLING: As we posit, Your Honor - - -

3 JUDGE RIVERA: Um-hum.

4 MR. ZWERLING: - - - the hospital in - - - in
5 this case and likely in these other cases, acted as though
6 it was the owner, took on the obligations of ownership and
7 selected the policy and received dividends, which is an
8 attribute for --

9 JUDGE RIVERA: Yes, but - - - I know, but your -
10 - - but your whole position, as you explained to me when I
11 asked, when I said does it all turn on premiums, you said
12 no, no. It's much more than that. But if none of the
13 things that - - - that you referred to are grounded in the
14 expectation of this future money, then where's the unjust
15 enrichment if they get it instead of you?

16 MR. ZWERLING: But - - - but at least a couple of
17 those factors are grounded on at - - - with respect to the
18 ownership component, Your Honor. For example, dividends.
19 The hospital received dividends. Why did the hospital get
20 to keep the dividends? Because it was treated and - - -
21 treated by the respondent as the owner and acted like the
22 owner; that's what I meant by the expectations of the
23 parties or the - - - the - - - the position with the
24 parties with - - - with - - - concerning the parties, as to
25 who the owner was.



1 Dividends - - - the payment of dividends is not a
2 clerical function, as respondent claims.

3 JUDGE RIVERA: And why did - - - why did your
4 client get the dividends?

5 MR. ZWERLING: Because, as we're asserting here,
6 is that it was not expressly understood because that would
7 say that the parties knew that this conversion was going to
8 come down the path. But it was understood as between the
9 parties that this would --

10 JUDGE RIVERA: I'm sorry, did Hinds sign it - - -
11 did they sign it over to you?

12 MR. ZWERLING: The - - - the dividends came to
13 the hospital - - -

14 JUDGE RIVERA: Okay.

15 MR. ZWERLING: - - - and the hospital used those
16 monies, which should - - - they - - - they should not have
17 kept. It should have gone to the respondent if he was the
18 owner or thought he was the owner. It should have been
19 give me those monies. But that's not how it played out,
20 which is - - -

21 JUDGE RIVERA: Then what did you apply the
22 dividends to?

23 MR. ZWERLING: To future premiums.

24 JUDGE RIVERA: Okay. And what you - - -

25 CHIEF JUDGE DIFIORE: Thank you, Counsel. Thank



1 you, Counsel.

2 Counsel?

3 MR. NADEL: Hi. My name is Seth Nadel, Weiss
4 Zarett Brofman Sonnenklar & Levy, P.C., and I represent
5 defendant-respondent Marcel Hinds.

6 Now, I - - - I know we talked a lot about the
7 equity argument, but just briefly - - -

8 JUDGE RIVERA: Well, Counsel, I'm sorry to
9 interrupt you. Before you go further - - - I'm on the
10 screen - - - did the - - - did the policyholder - - - did
11 Hinds sign off on the demutualization?

12 MR. NADEL: I don't know, standing here today,
13 whether he did. I do know that Insurance Law 7307 charges
14 approval of the demutualization plan with the
15 policyholders. As to Dr. Hinds himself - - - I mean, I
16 know that the policyholders in general approved the plan.
17 I don't know - - - I know it had the option to do so
18 through proxy. Whether he himself cast the vote, voted
19 through proxy, didn't vote at all, I really don't know.

20 JUDGE RIVERA: Did the hospital vote?

21 MR. NADEL: I mean, I can't conclusively say that
22 either, but I can say that under the Insurance Law, the
23 hospital had no right to vote and - - -

24 JUDGE RIVERA: Okay. Thank you.

25 MR. NADEL: No problem.



1 Okay. So just initially, there's really no
2 credible arguments to be made under the Insurance Law that
3 the demutualization proceeds belong to any party other than
4 the policyholder, or as the Insurance Law puts it in
5 7307(e)(3), the person who had a policy of insurance in the
6 applicable period.

7 The - - - the section of the statute that's
8 cherry-picked by the hospital to - - - stating premiums
9 timely paid by the policyholder, as the second and Third
10 Departments correctly pointed out, doesn't pertain to who
11 the policyholder is, but how the premiums are calculated.
12 So there's really just no merit to that argument.

13 And more generally, from a review of Insurance
14 Law 7307, it's very clear that the overarching concern of
15 the statute is defining and protecting the rights of the
16 policyholder. The policyholder is mentioned numerous times
17 in this statute, and apparently the legislature felt it was
18 so important to protect those rights that they didn't just
19 set forth a roadmap for demutualization and tell the
20 insurer to go forth and demutualize, they actually created
21 an entire regulatory process, whereby DFS had to examine
22 the proposed demutualization plan, hold public hearings,
23 accept public comments, and - - -

24 JUDGE RIVERA: Counsel, under the law, could the
25 pol - - - could the employer be a policyholder?



1 MR. NADEL: No, Your Honor. And I - - - I was
2 actually getting to that.

3 JUDGE RIVERA: Okay.

4 MR. NADEL: Because that argument is really
5 premised on a fundamental misunderstanding of the
6 authorities that govern the demutualization. In the - - -
7 in the technical sense, the language of Insurance Law 7307
8 doesn't control the demutualization. It merely sets forth
9 the basic parameters for the plan of conversion, which in
10 this case, is the controlling and governing authority which
11 governs MLMIC's demutualization.

12 And to the extent that one might identify any
13 ambiguity in the Insurance Law, such as the hospital is
14 attempting to, it's completely resolved in the terms of the
15 plan. The plan is very clear who is entitled to the cash
16 consideration, eligible policyholders or their designees.
17 And - - - and as - - - as to your question, Your Honor,
18 could the hospital be the policyholder, the answer is no
19 because the plan handily defines who the policyholder is
20 and its default - - -

21 JUDGE RIVERA: What about your adversary's
22 argument regarding the dispute resolution framework DFS set
23 up?

24 MR. NADEL: Okay. And - - - yeah, so the
25 argument is basically, you know, if this - - - if this



1 dispute was so simple, you know, why have an objection
2 procedure at all. And the answer to that, at least as
3 determined by MLMIC and approved by DFS is that they knew
4 these disputes would happen and they wanted to have a
5 reasonable framework for resolution which wouldn't hold up
6 the demutualization, but I - - -

7 JUDGE WILSON: But I guess - - - I guess the
8 question, though, is why we can't read that provision to
9 allow for something other than just formal assignments.
10 That is, why can't we read that procedure to allow for an
11 equitable kind of arguments being made?

12 MR. NADEL: Well, I - - - I was - - - I was going
13 to get to the equitable argument, but really, the reason we
14 can't read the procedure that way is because that would not
15 be in accord with the Insurance Law. The plan of
16 conversion had to conform to the parameters of the
17 Insurance Law, one of which being that the policyholders
18 and mutual owners of MLMIC were the ones entitled to the
19 money. So the - - - the plan wasn't free and - - - wasn't
20 free to just dispense with this requirement, this core
21 requirement of the Insurance Law that the actual owners of
22 the company are the ones who get paid for their membership
23 interest, nor was DFS empowered to basically rewrite the
24 Insurance Law. Their only job here was making sure that
25 the plan complied with the law, and they did. And the law



1 - - - and - - - and like I said, the plan is abundantly
2 clear that this is vested in the policy rules. They're the
3 ones that be - - - that are being paid for their - - - for
4 their interest.

5 So - - - so beyond that, you know, really a lot
6 of this falls on this equitable argument. And -- and
7 Counsel made the point that, you know, of all the four
8 appellate division decisions, I don't think any of them, at
9 least in the strictly ver - - - literal sense said that an
10 equitable cause of action was disclosed.

11 But really, I mean, it's an - - - I don't think
12 it's necess - - - it was necessary for the courts to state
13 the extremely basic proposition that a court is not
14 empowered to completely disregard the terms of the
15 governing law in favor of reaching a result that, you know,
16 the hospital in this case, or even the court, deems is
17 equitable. You know, again, I think that's a very basic
18 proposition and, you know, to - - - and to argue otherwise
19 is basically to render the law meaningless and to say that,
20 you know, we - - - we don't have to follow the law in any
21 given situation, you know, where we think that the - - -
22 the result is unfair.

23 And really, the question isn't whether - - - and
24 it's very clear that the hospital feels that it's unfair
25 that Dr. Hinds received the money, but the operative



1 inquiry isn't whether it's fair. The operative inquiry is
2 whether they've correctly stated a cause of action for
3 unjust enrichment, and in this case they haven't.

4 And you know, unfortunately in my limited time, I
5 can't just recite the decision, particularly the Second
6 Department in Maple Medical, but I mean, their analysis was
7 - - - was spot on. You know, this - - - this wasn't money
8 gratuitously paid by the hospital out of altruism. This
9 was part of the consideration in arms' length contractual
10 agreements. An agreement whereby the hospital promised to
11 pay a salary and benefits, including malpractice insurance.

12 JUDGE GARCIA: Would it be different if it - - -
13 sorry. Would it be different if it wasn't - - - what if,
14 like, your parents are paying your policy and they just
15 want to do it to be nice to you?

16 MR. NADEL: Well, as - - - as much as I love my
17 parents, I don't think they would have any better claim
18 than the hospital does.

19 JUDGE GARCIA: A hypothetical. What would
20 happen?

21 MR. NADEL: Well, I mean, it would - - - it - - -
22 yeah, it would - - - assuming all other things were
23 constant in the situation, it would depend on whether there
24 was any promise or - - -

25 JUDGE GARCIA: But why is that different - - -



1 MR. NADEL: -- that meets the expectation.

2 JUDGE GARCIA: I guess I'm not understanding - -
3 - and I know this isn't your point, but I'm personally not
4 understanding what any formal compensation has to do with
5 anything if you read the Insurance Law as - - - on its
6 face, which says the policyholder. Who cares why you're
7 the policyholder. You're the policyholder.

8 MR. NADEL: Yeah, I mean - - - well, it - - - you
9 know, it's not so much - - - it's not so much the terms of
10 the Insurance Law. As I - - - as I said, the Insurance Law
11 and the plan are clear that the policyholder is entitled to
12 the money. It's - - - it's the question of whether the
13 hospital can state an equitable cause of action for unjust
14 enrichment, which necessarily requires that it - - - that
15 Dr. Hinds be unjustly enriched at the hospital's expense.
16 The fact that they paid --

17 JUDGE TROUTMAN: So are you saying that you don't
18 - - - over here. You don't - - - are you saying that you
19 don't stop at the definition in the Insurance Law? You - -
20 - you go ahead, go with equity, even though it says
21 policyholder?

22 MR. NADEL: No. No, Your Honor. I think the
23 definitions in the Insurance Law and the plan are utterly
24 dispositive of the hospital's claims.

25 JUDGE GARCIA: And in that case, it wouldn't



1 matter if it's compensation or not, right?

2 MR. NADEL: Well, no. Because there might be a
3 theoretical state of facts in which the hospital could be
4 entitled to the money. And this goes - - - this goes to
5 Counsel's point. You know, what - - - again, what was the
6 point of the objection procedure if it was this simple?

7 And for the record, DFS in no way stated or
8 concluded that the analysis was not this simple or that we
9 needed to undergo some fanciful examination of the facts
10 and circumstances to figure out - - - to figure out who the
11 rightful recipient was. DFS actually stated in their
12 decision "Insurance Law 7307(e)(3) explicitly defines those
13 policyholders entitled to consideration". I don't know how
14 much more clear they could have been. They - - -

15 JUDGE CANNATARO: But Counsel, it is - - - I'm
16 sorry; over here. It is kind of hard to imagine what the
17 equitable considerations could be if it's as simple as just
18 reading the statute. If it - - - if it's - - - if it's
19 looking at the statute and determining who the policyholder
20 is in the way that you say it is, there is no set of
21 equitable considerations that I can think of that would
22 entitle - - - entitle the facility to a recovery.

23 MR. NADEL: No. I - - - I agree with that
24 wholeheartedly. There are no equitable considerations.

25 JUDGE CANNATARO: So that gets back to that - - -



1 that rhetorical question we were asked. What's the point
2 of the arbitral forum that was set up by DFS? Was it just
3 to tell the parties this is what the statute says, now go
4 home?

5 MR. NADEL: No. Because in - - - you know,
6 there's no way that DFS or MLMIC could account for every
7 set of circumstances in which - - - or every individual
8 relationship between the parties. Maybe the part - - - the
9 hospital didn't hear, but maybe the parties did include in
10 their agreement a provision stating that the employer would
11 be entitled to demutualization proceeds, should any arise.
12 Maybe there was more general lang - - - maybe there could
13 be more - - -

14 JUDGE RIVERA: So if - - - if I'm understanding
15 your response, Counsel, what - - - what you're suggesting
16 is that framework is set up for rare instances where there
17 might be a dispute as to whether or not there is an
18 effective designee and whether or not that designee is the
19 employer, or whether or not there is some other arrangement
20 that is recognized by law that is external to the policy
21 that would allow for a claim. Right.

22 Right now, as I understood your adversary, and I
23 asked him a couple of times, really, all of his arguments
24 are grounded on the policy and the relationship around the
25 policy. But you're suggesting maybe there would be some



1 other arrangement that would give claim to the employer to
2 that cash and that's what DFS was thinking about. Am I
3 understanding you right?

4 MR. NADEL: Yes, Your Honor. And I maintain that
5 that's the only set of circumstances in which an employer
6 who is not a policyholder could have any entitlement to the
7 money, irrespective whether they - - -

8 JUDGE RIVERA: So - - - so your argument is - - -
9 yeah, your argument is that the framework is set up for
10 fact specific, case-by-case determinations, as opposed to
11 what I understood your adversary arguing for, a bright line
12 rule.

13 MR. NADEL: I - - - I'm sorry, Your Honor. I
14 think - - - I think we're on - - - I think I was actually
15 arguing the opposite. There is a bright line. The bright
16 line rule is who is the policyholder and what - - -

17 JUDGE RIVERA: No, no, no, no, no. What I'm
18 saying, their bright line rule is the one that they're
19 seeking for, which is if the employer paid the premiums and
20 is otherwise - - - as an indicia of ownership, it's their
21 money, regardless of whether or not someone else is the
22 policyholder?

23 MR. NADEL: Well, I - - - I wouldn't call that a
24 bright line rule, Your Honor. I'm sure that's the result
25 that they would like - - -



1 JUDGE RIVERA: Sure.

2 MR. NADEL: - - - but they're arguing that you
3 need to take a general look at the facts and circumstances
4 of each case. And frankly, the Insurance Law doesn't
5 provide for that, the plan doesn't provide for that, and
6 you know, these equitable considerations don't provide for
7 that, either.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 MR. NADEL: Thank you.

10 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

11 MR. ZWERLING: Yes, Your Honor. Thank you.

12 Just want to address two particular points. The
13 - - - the notion that somehow 7307 is clear and that the
14 language in 7307 that the equitable share is to be
15 determined by the premiums paid such policyholder was
16 merely some formula to assess how much the policyholder is
17 to receive. If that was true - - - and this is why the
18 statute is not so clear. If that was true, then in
19 instances where the policyholder did not pay the premiums,
20 which is true of the respondent in this case, then the
21 policyholder, if policyholder is so rigidly and narrowly
22 defined, would receive no monies; an absurd outcome that
23 undermines the viability of that interpretation unless this
24 court rewrites the statute and adds language that such
25 policyholder shall receive it if the money is paid by such



1 policyholder or some other third party.

2 But the legislature didn't write that statute in
3 that manner. And as this court has held, courts don't have
4 authority to rewrite statutes. So the notion that
5 Insurance Law 7307 somehow creates this firm foundation for
6 a viable argument on the part of respondent runs into a
7 brick wall, as opposed to the hop - - - the hospital's
8 interpretation of the statute, which merely takes you to a
9 place where, well, since - - - how do you define
10 policyholder under the statute? Because policyholder is
11 not defined in 7307. But the court has the authority to
12 look for other sources to see how that term is defined.
13 And in the statute, 7303, they have the word person and
14 policyholder.

15 JUDGE RIVERA: So should we - - - should we give
16 some deference to DFS and DFS's conclusion that the fact
17 that someone pays the premiums doesn't make them a
18 policyholder?

19 MR. ZWERLING: No. The - - - DFS did not say
20 that, Your Honor. In fact, the one sentence that they rely
21 upon is immediately preceded by another sentence by DFS,
22 where they refer to a commentator who said that whoever
23 paid the pro - - - the premiums is automatically entitled
24 to the monies. And DFS said no. It's not necessarily so.
25 The court should look at the facts and circumstances



1 surrounding the relationship of the parties. That's why
2 DFS - - - it's not clear DFS said 7307. DFS did not rely
3 at all on 7307, nor did the plan rely on 7307.

4 Because again - - - and we - - - we sent out
5 papers. I know the court has read the papers thoroughly.
6 But even the plan, the conversion plan, says the opposite
7 of what they're arguing and - - - and makes it clear that
8 the Insurance Law, the plain language, if you accept their
9 interpretation, takes you to a place where the court would
10 have to rewrite the statute. And that's why, going beyond
11 the statute, aside from the other authority, which allows
12 the court to do so and to take into account consi - - -
13 equitable considerations - - - and this court held in
14 Simmons, legal title does not preclude equitable
15 considerations; that's the same framework here.

16 CHIEF JUDGE DIFIORE: Thank you, Counsel.

17 MR. ZWERLING: Thank you, everybody.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Colin Richilano, certify that the foregoing transcript of proceedings in the Court of Appeals of Columbia Memorial Hospital v. Hinds, No. 36, Schoch v. Lake Champlain OB-GYN, No. 37, and Maple Medical v. Scott, et al., Nos. 38-43, and was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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