JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.	:	SUIT NO.: 651,069 SECTION: 22
versus	:	19TH JUDICIAL DISTRICT COURT
TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA	:	PARISH OF EAST BATON ROUGE
	:	STATE OF LOUISIANA

PLAINTIFF'S OPPOSITION TO DEFENDANT BUCK'S DECLINATORY EXCEPTION OF IMPROPER VENUE

MAY IT PLEASE THE COURT:

Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"), through his duly appointed Receiver, Billy Bostick ("Plaintiff" or the "Commissioner"), through undersigned counsel, respectfully files this opposition memorandum to the Declinatory Exception of Improper Venue (the "Exception") filed by defendant, Buck Consultants, LLC ("Buck").

In short, Buck claims that venue in this Honorable Court is improper because of a forum selection clause found in an engagement letter between LAHC and Buck. Buck's Exception should be DENIED because: (1) it is the strong public policy of Louisiana, given the comprehensive and exclusive scope of the Louisiana Insurance Code regarding receivership litigation, not to enforce the subject forum selection clause; (2) Louisiana law mandates that the Nineteenth Judicial District Court has "exclusive jurisdiction" over the Commissioner's takeover of a failed HMO like LAHC; (3) forcing the Commissioner to go to New York to litigate this dispute would violate the applicable Rehabilitation Order regarding LAHC; (4) Buck ignores that the Commissioner is not a signatory to the contract that contains the subject forum selection clause; (5) Buck cites and relies upon Pennsylvania insurance law even though it is not comparable or analogous to Louisiana law regarding venue of receivership proceedings; (6) Buck fails to cite, much less discuss or distinguish, the compelling *Taylor* case decided by the Ohio Supreme Court

in 2011; (6) it is inaccurate to argue, as Buck does, that the Commissioner simply stands in the shoes of a failed insurance company like LAHC; Louisiana law affords the Commissioner broad powers to protect the interests of the public, the policy holders, and the failed company's creditors—not just LAHC; and (7) the Commissioner's claims against Buck do not arise from the subject engagement letter. Each of these reasons is addressed in turn.[1]

OVERVIEW

This lawsuit arises out of the creation and failure of LAHC, a Consumer Operated and Oriented Plan ("CO-OP") program established by the Patient Protection and Affordable Care Act ("ACA"), as a result of the gross negligence of numerous individuals and entities, including Buck. Incorporated in 2011, LAHC eventually applied for and received loans from the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS") totaling more than $65 million. Pursuant to the ACA, these loans were to be awarded only to entities that demonstrated a high probability of becoming financially viable. All CO-OP loans must be repaid with interest. LAHC's Start-up Loan must be repaid no later than five (5) years from disbursement; and LAHC's Solvency Loan must be repaid no later than fifteen (15) years from disbursement.[2]

As succinctly summarized and plead by the Commissioner in his First Supplemental, Amending and Restated Petition for Damages ("Amended Petition"), LAHC failed miserably due to the gross negligence of the Defendants, including Buck. By July 2015, only eighteen months after it started issuing policies, LAHC decided to stop doing business. Because of Defendants' gross negligence, as of December 31, 2015, LAHC had lost more than $82 million. The LDOI placed LAHC in rehabilitation in September 2015, and a Receiver, Billy Bostick, was appointed by this Court to take control of the failed Louisiana CO-OP.

Buck provided professional actuarial services to LAHC from approximately March 2014 through July 2015. See Exhibit "A," Amended Petition, ¶13. Buck's services included setting LAHC's 2015 premium rates, assisting LAHC with state rate filing with LDI, and preparing an opinion used by LAHC to support its period ACA reporting requirements to the federal government. *Id.* at ¶¶ 104—127. Buck held itself out as having expertise to provide actuarial

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1 Please note that, given the similarities of the legal arguments raised by defendants in their exceptions, a substantial part of plaintiff's opposition memorandum to Buck's exception is substantially identical to plaintiff's opposition memorandum to Milliman's exception; specifically, pp. 3 to 6 (through 1st full paragraph) and pp. 7 (from last full paragraph) to 12.

2 According to the 2012 Loan Agreement with LAHC, the Louisiana CO-OP was awarded a Start-up Loan of $12,426,560, and a Solvency Loan of $52,614,100.

services and advice to health insurers like LAHC. *Id.* at ¶104. However, Buck failed to set premium rates for LAHC that were accurate and reliable. *Id.* at ¶109-126. Further, Buck's Statement of Actuarial Opinion, issued only three months before LAHC closed its doors and vouching for LAHC's economic health and continuing viability, was clearly inaccurate and unreliable. *Id.* at ¶106.

LAW AND ARGUMENT

I. The subject forum selection clause violates the strong public policy of Louisiana and is therefore unenforceable.

First, as an evidentiary matter, plaintiff objects to Exhibit A attached to Buck's exception, the "Affidavit of Harvey Sobel," as it is in a form that is not allowed or contemplated by the Louisiana Code of Civil Procedure or the Louisiana Code of Evidence. Although affidavits may be used to support or oppose a motion for summary judgment, they may not be used to support an exception of improper venue if objected to by the opposing party. Plaintiff hereby formally objects to this improper affidavit and moves to strike the same; Your Honor should not consider or rely upon this affidavit in any way. Furthermore, many of the factual matters attested to by Mr. Sobel are irrelevant to the present dispute: whether the subject forum selection clause should be enforced or not as a matter of law. This is not an exception of forum *non conveniens*. Buck voluntarily chose to do business with LAHC, a Louisiana HMO, and should not complain now because "Buck and its key employees and witnesses are located in or near New York." The subject engagement letter has been submitted for consideration; Your Honor simply does not—and should not—consider or rely upon any of the factual statements made by Mr. Sobel in Exhibit A. Lastly, plaintiff has not been afforded an opportunity to cross examine Mr. Sobel regarding the veracity of his statements; therefore, for this additional reason, plaintiff respectfully suggests and requests that Exhibit A to Buck's exception not be admitted into evidence at the May 30th hearing of this matter.

Buck has filed an exception of improper venue based upon forum selection clause in the engagement letter agreement executed by Buck and LAHC in 2014 (the "Agreement"). Buck argues the parties "logically selected the New York forum because Buck's official headquarters is in New York, and Buck's key witnesses in this matter are located either in New York or in the immediately adjacent New Jersey." *See* Buck's Exception memorandum, p. 2. However, this argument ignores the fact that Buck knowingly executed an agreement with a Louisiana insurance company, which by virtue of its business is highly regulated and subject to takeover by an officer

of the state. Further, while forum selection clauses may be "generally enforceable," Buck acknowledges that an exception exists when enforcement would contravene a strong public policy of the forum in which suit is brought. Here, Buck seeks to enforce the forum selection clause against the Commissioner, a nonsignatory to the Agreement charged with protecting not only LAHC, but also its policyholders, members, creditors, and the public. It is hard to imagine a better example of an exception to enforcement based on strong public policy than the present case.

As discussed below in greater detail, it is the strong public policy of Louisiana to allow the Louisiana Commissioner of Insurance to regulate and, in the case of insolvency, place a failed HMO like LAHC into receivership. According to this strong public policy and applicable Louisiana law, this Honorable Court, the Nineteenth Judicial District Court of East Baton Rouge, Louisiana, is mandated as the exclusive venue for all litigation brought by the Commissioner regarding LAHC. If Buck's forum selection clause were enforced, clearly Louisiana's strong public policy of mandating that such disputes be decided by this Louisiana Court would be violated.

II. As rehabilitator, the Commissioner is vested with broad, exclusive powers and duties for the benefit of policyholders, creditors, and the public.

A. The Rehabilitation, Liquidation, Conservation Act: Louisiana's comprehensive and exclusive statutory scheme governing insurance insolvency.

The Louisiana Insurance Code, La. R.S. 22:2, provides that insurance is a business "affected with the public interest," and this section, pursuant to the authority of La. Const. art. IV, § 11,[3] creates and provides for a Commissioner of Insurance charged with the duty of administering the Insurance Code of this state. La. R.S. 22:2. As part of the statutory scheme which governs the Commissioner's duties, the legislature has enacted specific provisions for the administration of insurance insolvencies, as set forth in La. R.S. 22:2001 *et seq.* of the Louisiana Insurance Code, entitled "Rehabilitation, Liquidation, Conservation" (hereafter referred to as the "RLC Act").[4] This statutory scheme for the rehabilitation and/or liquidation of insurers is **comprehensive and exclusive** in scope. *Brown v. Associated Ins. Consultants, Inc.*, 97-1396 (La. App. 1 Cir. 6/29/98),

[3] La. Const. Ann. art. IV, § 11 provides: "There shall be a Department of Insurance, headed by the commissioner of insurance. The department shall exercise such functions and the commissioner shall have powers and perform duties authorized by this constitution or provided by law."

[4] Acts 2008, No. 415, § 1 amended and reenacted Title 22 of the Louisiana Revised Statutes of 1950, the Louisiana Insurance Code, and directed the Louisiana State Law Institute to redesignate the provisions of Title 22, formerly comprised of La. R.S. 22:1 to 22:3311, into a new format and numbering scheme comprised of La. R.S. 22:1 to 22:2371, without changing the substance of the provisions.

714 So. 2d 939, 941–42 (citing *LeBlanc v. Bernard,* 554 So.2d 1378, 1383 (La.App. 1st Cir.1989), *writ denied,* 559 So.2d 1357 (La.1990)) (emphasis added).

Given the significance of the RLC Act and its impact on the outcome of this case, a brief overview of the Act is warranted. Under the RLC Act, if a domestic insurer is potentially insolvent and "the interests of creditors, policyholders, or the public will probably be endangered by delay," the court shall issue, without a hearing, an order directing the Commissioner to take control of the insurer and prohibit it from disposing of property or transacting business without the Commissioner's concurrence. La. R.S. 22:2036.

Following a hearing and with the court's permission, the RLC Act grants the Commissioner the power to rehabilitate or liquidate a domestic insurer in various circumstances, such as when the insurer: has obligations or claims exceeding its assets, cannot pay its contracts in full, or is otherwise found by the Commissioner to be insolvent; or is found to be in such condition that its further transaction of business would be hazardous to its policyholders, its creditors, or the public. La. R.S. 22:2005(1), (5).

The Commissioner "shall immediately proceed to conduct the business of the insurer and take such steps towards removal of the causes and conditions which have made such proceedings necessary as may be expedient." La. R.S. 22:2009(A). Revised Statute 22:2009 contains a nonexclusive list of the powers given to the Commissioner to accomplish these tasks. Among other things, he may "enter into such agreements or contracts as necessary to carry out the full or partial plan for rehabilitation or the order to liquidate and to affirm or disavow any contracts to which the insurer is a party." La. R.S. 22:2009(E)(4).

By law, once the court enters an order finding that sufficient cause exists for rehabilitation or liquidation, the Commissioner takes possession of the property, business, and affairs of the insurer. La. R.S. 22:2008(A). At that point, the Commissioner is vested by operation of law with the title to all property, contracts, and rights of action of the insurer. *Id.* As rehabilitator, the Commissioner is the proper party to sue to enforce any right of a domestic insurer in rehabilitation. La. C.C.P. art. 693.

B. The Nineteenth Judicial District Court has exclusive jurisdiction.

Regarding venue, the RLC Act provides, in pertinent part: "An action under this Chapter brought by the commissioner of insurance, in that capacity, or as conservator, rehabilitator, or

liquidator may be brou[5]ght in the Nineteenth Judicial District Court for the parish of East Baton Rouge or any court where venue is proper under any other provision of law." La. R.S. 22:2004. Further, the Health Maintenance Organization Act, La. R.S. 22:241 *et seq.*, which is the statutory scheme for regulating HMOs, includes a more specific venue provision applicable when the Commissioner takes over and liquidates an HMO:

> F. The commissioner is specifically empowered to take over and liquidate the affairs of any health maintenance organization experiencing financial difficulty at such time as he deems it necessary by applying to the Nineteenth Judicial District Court for permission to take over and fix the conditions thereof. **The Nineteenth Judicial District Court shall have exclusive jurisdiction over any suit arising from such takeover and liquidation.** The commissioner shall be authorized to issue appropriate regulations to implement an orderly procedure to wind up the affairs of any financially troubled health maintenance organization.

La. R.S. 22:257(F) (emphasis added).[6] The Commissioner's suit against Buck arises from the takeover of an HMO because the Commissioner's right of action against Buck arises from LAHC's rehabilitation proceedings. Thus, the Nineteenth JDC has exclusive jurisdiction under the applicable venue statutes.

To facilitate jurisdiction in one venue, La. R.S. 22:2006 also allows for the court to issue injunctions or other such orders to prevent any person or entity from obtaining judgments against an insurer or its property and assets while in the possession and control of the Commissioner. In other words, just as Buck would be enjoined from filing suit against LAHC in a New York venue after LAHC was placed into Receivership, Buck would be enjoined from obtaining a judgment against the Commissioner in New York state or federal courts.

C. LAHC's Rehabilitation Order is consistent with the RLC Act and in furtherance of its purposes.

The hearing regarding LAHC's rehabilitation was held on September 21, 2015, before Judge Donald Johnson of the 19th Judicial District Court, and resulted in a Permanent Order of Rehabilitation and Injunctive Relief (the "Rehabilitation Order"). Ex. "B". The Rehabilitation Order is consistent with the Commissioner's duties under the RLC Act, which includes the protection of policyholders, creditors, and claimants, as well as the public. *See, e.g., LeBlanc*, 554 So.2d at 1381, 1383-84 (describing the special statutory scheme governing liquidation and rehabilitation of insurance companies as "comprehensive and exclusive" in scope and, further,

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[5] See p. 3 of Exhibit B, Rehabilitation Order; see also, fn. 12, *infra.*

[6] La. R.S. 22:257 governs the Commissioner's suspension or revocation of a certificate of authority issued to a HMO.

finding "[t]he scheme represents the legislative will in balancing the interests of policyholders, creditors, and claimants").

Specifically, the rehabilitation Court found the requirements for LAHC's rehabilitation had been met, and "that the interests of creditors, policyholders, members, subscribers, enrollees, and the public will probably be endangered by delay." Ex. "B", p. 1. As such, LAHC was placed into rehabilitation under the direction and control of the Commissioner. *Id.* The Rehabilitation Order provides that the Commissioner is "permanently vested by operation of law with the title to all property, business, affairs, accounts...and other assets of LAHC, and is ordered to direct the rehabilitation of LAHC." *Id.* at p 2. The Commissioner was directed to take possession and control of the property, business, affairs, and other assets of LAHC, including all real property and the premises occupied by LAHC for its business, and to "conduct all of the business and affairs of LAHC, or so much thereof as he may deem appropriate, manage the affairs of LAHC, and to rehabilitate same, until further order of this Court." *Id.*

Pursuant to the Rehabilitation Order, the Commissioner "is entitled to permit such further operation of LAHC as he may deem necessary to be in the best interests of the policyholders, subscribers, members, and enrollees, and creditors of LAHC and the orderly rehabilitation of LAHC." Ex. "B", p. 3.[7] He has "the right to enforce or cancel, for the benefit of the policyholders, subscribers, members, enrollees of LAHC, and LAHC, contract performance by any party who had contracted with LAHC." *Id.* at p. 3.

The Rehabilitation Order also authorizes the Commissioner to, among other things, "[c]ommence and maintain all legal actions necessary, wherever necessary, for the proper administration of this rehabilitation proceeding." Ex. "B", p. 4. In contrast, the Order permanently enjoins all persons and entities from obtaining preferences, judgments, attachments or other like liens or the making of any levy against LAHC, its property and assets while in the Commissioner's possession and control. *Id.* at p. 3.

[7]If the Commissioner finds further rehabilitation efforts would be futile and result in loss to the creditors, policyholders, stockholders or any other persons interested, he may file for an order directing the liquidation of the insurer. La. R.S. 22:2009(C). Likewise, if the Commissioner finds the causes and conditions which made the rehabilitation proceeding necessary have been removed, he may petition for an order terminating the Commissioner's conduct of the insurer's business and for a full discharge or all liability and responsibility of the Commissioner. La. R.S. 22:2009(D).

III. The Commissioner is not bound by the forum selection clause.

A. No valid forum selection clause exists between Buck and the Commissioner. The Commissioner is not a signatory to the agreement between LAHC and Buck, and enforcement of the clause against the Commissioner would violate strong public policy.

Buck argues the forum selection clause in the Buck-LAHC Agreement is enforceable against the Commissioner because, as Rehabilitator, he is vested with the title to all property and contracts of LAHC. *See* Buck's Exception memorandum, pp. 6-7 (citing La. R.S. 22:2008(A)). Contrary to Buck's assertions, however, the cases cited by Buck to support this argument are not relevant or controlling. In fact, one of the cases cited was subsequently reversed on appeal.[8] *See Crist v. Sharp Elec., Inc.*, 876 F.2d 379, 381 (5th Cir. 1989), which reversed Judge Sear's ruling in *Crist v. Drake Concrete Co. of Belle Chase*, No. 87-5808, 1988 WL 104831 (E.D. La. Sept. 29, 1988) (Drake's appeal was consolidated with a similar appeal filed by Sharp). The issue in *Crist* was whether Louisiana insurance insolvency law or general contract law applied to determine whether former insureds may refuse to pay earned premiums on the basis that an insolvent insurance company placed in receivership breached the insurance contract by failing to defend and honor claims after the date of the declaration of insolvency. 876 F.2d at 380. On appeal, the federal Fifth Circuit reviewed Louisiana's "interlocking web of statutes" governing insolvency of insurers and concluded that the insolvency statutes, rather than general contract principles were controlling:

> The courts of Louisiana "have repeatedly stated that when two statutes are in conflict, the statute that is more specifically directed to the matter at issue must prevail as an exception to the statute that is more general." *Smith v. Cajun Insulation, Inc.*, 392 So.2d 398, 402 (La. 1980) (citations omitted). It follows with equal, if not stronger, force that a specific statute or framework of statutes that provides for the rights and liabilities of myriad parties competing over limited funds in special circumstances prevails over a more general doctrine developed in case law that governs the rights of a limited number of parties in ordinary circumstances. In short, the statutes cited by Christ must provide the law of this case because they are specifically directed toward the situation of the insolvent insurer, whereas the general contract law cited by Sharp and Drake does not address our specific situation.

Id. at 382.[9] A review of Louisiana jurisprudence indicates that neither the Louisiana Supreme Court nor the appellate courts have addressed the precise question before this Honorable Court, i.e., whether the Commissioner is bound by a forum selection clause previously executed by a now-insolvent insurer. However, the First Circuit has specifically stated that the Commissioner,

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[8] The two additional Louisiana cases cited by Buck do not involve contracts and are wholly inapplicable to the facts of this case.

[9] This case was followed by the Louisiana First Circuit in *Crist v. Benton Casing Serv.*, 572 So.2d 99, 99 (La. App. 1st Cir. 1990), writ denied, 573 So. 2d 1143 (La. 1991) ("We hold that the receiver of the insolvent insurer is entitled to collect premiums earned prior to the date of insolvency from an insured, and reverse the action of the trial court in ruling otherwise.")

in his capacity as rehabilitator, does not simply "stand in the shoes" of the insurer, but that his responsibilities include protection of the general public and the policyholders and creditors as well as the insurer itself. *LeBlanc*, 554 So.2d at 1381. Likewise, the First Circuit has held that, "[w]hile a party to the instrument may be estopped from asserting defenses based on previous misrepresentations, this restriction does not extend to the rehabilitator." *Republic of Texas Savings Association,* 417 So.2d at 1254 (rejecting the argument that the rehabilitator should be estopped from asserting certain defenses because those defenses would allow the now-insolvent insurer to "benefit from its own misrepresentations").

Looking outside of Louisiana, the Ohio Supreme Court concluded that an arbitration agreement executed by an insurer is not subsequently enforceable against an insurance commissioner, noting the commissioner's role in protecting the public interest means he or she does not stand precisely in the shoes of the insurer. *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203 (Ohio 10/18/11). An arbitration agreement is a "kind of forum-selection clause." *Stadtlander v. Ryan's Family Steakhouses, Inc.*, App. 2 Cir.2001, 794 So.2d 881, 34,384 (La.App. 2 Cir. 4/4/01*), writ denied* 794 So.2d 790, 2001-1327 (La. 6/22/01) (quoting *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974)). As such, and given the *Taylor* court's in-depth analysis of the issues underlying venue in suits like these, the ruling is instructive.

In *Taylor*, Ernst & Young ("E&Y") provided auditing services to American Chambers Life Insurance Company ("ACLIC") pursuant to an engagement letter signed by E&Y and ACLIC that contained an arbitration clause. Subsequently, ACLIC was placed in rehabilitation and, ultimately, a liquidation order was entered. The superintendent of insurance, in her capacity as liquidator, sued E&Y in state court asserting malpractice claims.[10] E&Y responded to the liquidator's suit by moving to compel arbitration based on the clause in the engagement letter. The trial court denied the motion, and both the appellate court and the Ohio Supreme Court affirmed. *Id.* at 1207, 1218.

In its analysis, the Ohio Supreme Court first addressed its state's Insurers Supervision, Rehabilitation, and Liquidation Act ("Ohio Act"). Comparable to the Louisiana RLC Act discussed above, the *Taylor* court noted the Ohio Act "confer[s] upon the Superintendent and a trial court broad discretionary and equitable powers relating to the supervision, rehabilitation and

[10] Generally, the superintendent alleged that E&Y negligently failed to conduct its audit of ACLIC's Annual Statement, thus breaching the duties owed and allowing ACLIC's financial condition to go undetected and, consequently, allowing it to continue transacting business, causing harm to ACLIC, its policyholders and creditors, and the public.

liquidation of insurance companies." 958 N.E.2d at 1207-08 (internal citations omitted). Further, the Ohio Act empowers the superintendent of insurance "to protect the rights of insureds, policyholders, creditors, and the public generally." *Id.* at 1208 (internal citations omitted).[11]

Regarding venue, the *Taylor* court noted that the general rule is that all liquidation actions be brought in Franklin county, and that the liquidation court has jurisdiction over preference claims. 958 N.E.2d at 1209 (internal citations omitted). However, the liquidator has authority to select a forum other than the liquidation court to: collect debts of the insolvent insurer in other jurisdictions; prosecute and commence suits and other legal proceedings in Ohio or elsewhere; or put the question of a security's value to arbitration. *Id.* (internal citations omitted). In contrast, creditors are limited to filing suit in the liquidation court only. *Id.* (internal citations omitted). Consequently, the *Taylor* court determined that, "when allowed, forum selection belongs to the liquidator and the liquidator alone." *Id.*

In Louisiana, the default rule is that actions brought by the Commissioner as rehabilitator or liquidator be brought in the Nineteenth Judicial District Court, and suits arising from the takeover and liquidation of any HMO, such as LAHC, are expressly restricted to the Nineteenth Judicial District Court. La. R.S. 22:2004(A); 22:257(F). Actions pertaining to voidable preferences and liens are also determined by the Nineteenth Judicial District Court. La. R.S. 22:2023(G). In addition, Louisiana law empowers the court, upon entering an order of rehabilitation, to issue injunctions and other such orders as may be necessary to prevent interference with the rehabilitation proceedings or the Commissioner's possession and control of the assets, business and affairs of the insolvent insurer, and to prevent the obtaining of preferences or judgments against the insurer or its assets while in the possession and control of the Commissioner. La. R.S. 22:2006.[12] Like the Ohio superintendent, the Commissioner is authorized by the Rehabilitation Order to "[c]ommence and maintain all legal actions necessary, wherever necessary, for the proper

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[11] Like the analogous Louisiana Act, the Ohio Act "grants the superintendent three levels of oversight of the insurance industry apart from her usual regulatory powers." *Taylor*, 958 N.E.2d at 1208. As delineated by the *Taylor* court:

> First, [Ohio] R.C. 3903.09 confers on the superintendent power to identify and supervise a potentially troubled insurer by requiring it to get her permission before engaging in certain business transactions, such as disposing of assets or investing funds. Second, R.C. 3903.12 grants the superintendent the power, with the court's permission, to attempt to rehabilitate an insurer in such a poor financial condition that its further transaction of business would be financially hazardous to its policyholders, creditors, or the public. Third, R.C. 3903.16(A) and 3903.17 grant the superintendent the power, with the court's permission, to liquidate an insurer if, for example, it is insolvent.
> *Id.*

[12] The Rehabilitation Order specifically referenced La. R.S. 22:2006 in ordering a permanent injunction consistent with the statute's terms. (Ex. "B", p. 3). Moreover, the Rehabilitation Order permanently enjoins any and all individuals and entities from instituting any suits, proceedings, and seizures against LAHC (or the Commissioner and his related affiliates or representatives) to prevent any preference, judgment, seizure, levy, attachment or lien. (*Id.* at pp. 7-8). Similarly, the Rehabilitation Order expressly stays all suits, proceedings, and seizures against LAHC and/or its members/enrollees/subscribers, for the same reasons. (*Id.* at p. 8).

administration of this rehabilitation proceeding." Ex. "B", p. 4. In other words, Louisiana is like Ohio—to the extent forum selection is allowed, it is to be exercised exclusively by the Commissioner.

Next, the *Taylor* court addressed the Ohio Arbitration Act ("OAA"), which, like the Louisiana Arbitration Act, generally tracks the FAA and expresses Ohio's strong public policy favoring arbitration. *Taylor*, 958 N.E.2d at 1209-1210. As is the case under Louisiana and federal law, the Ohio policy favoring arbitration does not eliminate the question of whether the parties actually agreed to arbitrate. *Id.* at 1210.

Against this legal backdrop, the Ohio Supreme Court held the superintendent's claims were not subject to arbitration based on the agreement previously entered into by the insurer. *Id.* at 1217. The *Taylor* court's decision centered on two primary findings: 1) the superintendent does not stand in the insolvent insurer's shoes; and 2) the superintendent's claims do not arise from the engagement letter between E&Y and ACLIC.[13] Each of these is discussed in turn in the following subsections and applied to the Commissioner's claims against the defendants in his capacity as Rehabilitator. As discussed below, Louisiana law supports the same result reached in *Taylor*.

B. The Commissioner does not stand precisely in the shoes of the insolvent insurer because he acts as an officer of the state.

In *Taylor*, the Ohio Supreme Court concluded the characteristics of the superintendent's public-protection role confirm that she does not stand in the shoes as a mere successor in interest of the insolvent insurer. *Taylor,* 958 N.E.2d at 1210-11. To claim she is a mere successor in interest ignored "the fact that the superintendent did not bring this suit on behalf of ACLIC and its shareholders but, rather, in her capacity as liquidator of ACLIC for the protection of 'the rights of insureds, policyholders, creditors, and the public generally.'" *Id.* at 1213 (internal citations omitted). Noting the case presented a "garden-variety attempt to enforce an arbitration clause against a nonsignatory," the *Taylor* court found the superintendent was not bound to arbitration agreements entered into by the insolvent insurer. *Id.*[14]

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[13] Given its holding, the court found E&Y's argument that the liquidator could not disavow part of a contract was moot. Likewise, the Court did not reach the liquidator's argument that an irreconcilable conflict exists between the Ohio Liquidation Act and the Ohio Arbitration Act. *Taylor*, 958 N.E.2d at 1217.

[14] The Ohio court noted that its holding was in accord with the United States Supreme Court's jurisprudence on arbitration, specifically *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295–96, 122 S. Ct. 754, 765, 151 L. Ed. 2d 755 (2002) (Equal Employment Opportunity Commission not bound by arbitration agreement between employer and employee and may seek victim-specific judicial relief, even if employee is not party to the enforcement action). In *Taylor*, the court found it significant that the liquidator, like the EEOC has exclusive choice of forum (when there is a choice); similarly enjoys the sole discretion to pursue or forgo claims, which is independent of the shareholders' desires and subject instead to judicial approval; and the ordinary statutes of limitations do not apply in the liquidation context to the liquidator or to the estate's creditors. 958 N.E.2d at 1211-12 (internal citations omitted). The *Taylor* court further found that, "[t]he fact that any judgments in favor of the liquidator accrue to the benefit of insureds,

Similarly, Louisiana courts have held that the Commissioner, as rehabilitator or liquidator, "owes an overriding duty to the people of the State of Louisiana" and "does not stand precisely in the shoes of" an insolvent insurer. *LeBlanc v. Bernard*, 554 So.2d at 1381 (finding Commissioner was third-party entitled to protection of public records doctrine). See also *Republic of Texas Savings Association v. First Republic Life Insurance Co.*, 417 So.2d 1251, 1254 (La.App. 1st Cir.), *writ denied,* 422 So.2d 161 (La.1982), finding that the rehabilitator's powers and responsibilities, which include protecting the interests of the policyholders, creditors and the insurer, indicate "rehabilitator does not stand precisely in the shoes of [the insurer]."

The Louisiana Supreme Court has recognized that, "[a]s liquidator or rehabilitator of an insurance company the Insurance Commissioner acts as an officer of the state to protect the interests of the public, the policy holders, the creditors, and the insurer." *Green v. Louisiana Underwriters Ins. Co.*, 571 So.2d 610, 615 (La. 1990) (citing *State v. Preferred Accident Ins. Co. of New York,* 238 La. 372, 115 So.2d 384 (1959); and *LeBlanc,* 554 So.2d 1378)). The Commissioner's title to property in this capacity is in the nature of a fiduciary holding those assets for the benefit of parties in varied legal relationship to the insurer. *LeBlanc v. Bernard,* 554 So.2d at 1382 (citing Couch, *2A Couch Cyclopedia of Insurance* § 22:45 (Anderson 2d ed. 1984)). "His duties as liquidator or receiver are part of his duties as Insurance Commissioner charged with the administration of the Insurance Code of the state, which regulates a business affected with the public interest, as set forth in the statute." *Preferred Acc. Ins. Co. of N. Y.*, 115 So.2d at 386.

In *LeBlanc*, 554 So.2d at 1382, the First Circuit emphasis the Commissioner's duties to the public as follows:

> The trial court placed defendant [Commissioner] in the exact shoes of First Republic [the insolvent insurer]. He erred here as a matter of law. **The Commissioner of Insurance as rehabilitator or liquidator owes an overriding duty to the people of the State of Louisiana.** The *raison d'etre* of his office is because the insurance industry is "affected with the public interest." LSA-R.S. 22:2. Any duties imposed upon that office, therefore, must be performed with the public interest foremost in mind. **The Commissioner's responsibilities as rehabilitator or liquidator include, additionally, protection of the policyholders, creditors, and the insurer itself.** *Republic of Texas Savings Association v. First Republic Life Insurance Co.,* 417 So.2d 1251, 1254 (La.App. 1st Cir.), *writ denied,* 422 So.2d 161 (La.1982). This court has previously held that defendant, **as rehabilitator, "does not stand precisely in the shoes of First Republic."** *Id.*[15]

policyholders, and creditors means that the liquidator's unique role is one of public protection, and one that is even more so than the EEOC's." *Id.* at 1212. Likewise, these factors further support the public-protection role of Louisiana's Commissioner.

[15] Emphasis added.

Insurance companies operate in a highly regulated environment very different from that of other companies. When an insurance company is placed into rehabilitation, the company is subjected to a comprehensive statutory scheme designed to protect the public as well as the policyholders and other creditors of the insurer.[16] Under the RLC Act, the Commissioner, as rehabilitator, is not the equivalent of the company, nor is he the mere successor to the company. Rather, the Commissioner "is the manifestation of the state's police power and is asserting the sovereign authority and interest of the state in seizing the delinquent insurer and dealing with its assets and liabilities to protect the interests of the innocent policyholders and other creditors of the insurer."[17]

As discussed above, the Commissioner as rehabilitator is vested with title to "all property, contracts and rights of action of the insurer as of the date of the order directing rehabilitation or liquidation." La. R.S. 22:2008(A). Management ceases to conduct the business of the insurer upon the order of rehabilitation, and the Commissioner proceeds in management's place. *See* La. R.S. 22:2009(A). In so doing, however, the commissioner is not placed in the exact shoes of the insolvent insurer. *LeBlanc*, 554 So.2d at 1381. Again, "[w]hile a party to the instrument may be estopped from asserting defenses based on previous misrepresentations, this restriction does not extend to the rehabilitator." *Republic of Texas Savings Association,* 417 So.2d at 1254.

C. The Commissioner's claims do not arise from the engagement letter.

As a nonsignatory, the *Taylor* court found the applicable test to be not whether the superintendent's claims "relate to" the subject matter of the engagement letter, but whether her claims "arise from" the contract containing the arbitration clause. *Taylor*, 958 N.E.2d 1203, 1213. Applying this test, the Ohio Supreme Court in *Taylor* concluded that the malpractice claim against E&Y did not arise from E&Y's engagement letter with ACLIC for two related reasons. First, the malpractice claim plainly did not seek a declaration of a signatory's rights and obligations under the engagement letter. Second, the malpractice claim arose independently of the engagement letter because it arises from the powers given to the liquidator by the Ohio legislature together with the allegedly false or misleading audit report E&Y filed with the Ohio Department of Insurance, which was not conducted in accordance with generally accepted auditing standards.

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[16] Louisiana's statutory scheme specifically designed for insurance insolvency takes precedence over general law to the extent that the general law is inconsistent with the provisions or purpose of the comprehensive, statutory scheme. *Bernard v. Fireside Commercial Life Ins. Co.*, 633 So.2d 177, 185–86 (La. App. 1st Cir. 11/24/1993), *writ denied sub nom. Bernard v. Fireside Commercial Life Ins. Co.*, 634 So.2d 839 (La. 1994) (citing *Green*, 571 So.2d at 615-616; *Crist v. Benton Casing Service*, 572 So.2d 99, 102 (La.App. 1st Cir.1990), *writ denied*, 573 So.2d 1143 (1991).

[17] Karl L. Rubinstein, *The Legal Standing of an Insurance Insolvency Receiver: When the Shoe Doesn't Fit*, 10 Conn. Ins. L.J. 309, 312 (2004)

In this case, as in *Taylor*, the Commissioner is not seeking a declaration of Buck's obligations under its engagement letter with LAHC. The Commissioner alleges Buck owed a duty to LAHC to exercise reasonable care and to act in accordance with the professional standards applicable to actuaries and, further, that Buck breached this duty by performing actuarial work for LAHC was unreliable, inaccurate, and not the result of careful, professional analysis, and by failing to set premium rates that were accurate and reliable.

None of these allegations require the Court to interpret the engagement letter to determine Buck's obligations to LAHC. Like the superintendent in *Taylor*, the Commissioner's claims arise from his statutory powers and Buck's failure to perform its services for LAHC in accordance with applicable professional standards—standards it was independently required to observe, irrespective of any written engagement letter. For all of these reasons, the Commissioner's malpractice claim does not arise from the engagement letter and, therefore, the Commissioner is not bound by the arbitration provision.

Buck's exception does not address the *Taylor* case, which is both factually analogous to the present case and applies the law of a state (Ohio) that substantively mirrors that of Louisiana, as set forth above. Instead, Buck cites to Pennsylvania federal district court cases. See Exception memorandum, p. 9, wherein Buck cites to *Koken v. Cologne Reinsurance (Barbados), Ltd.*, 34 F. Supp. 2d 240, 246 (MD. Pa. 1999), and *Koken v. Lederman*, 00-755, 2002 WL 32348318, at *1 (E.D. Pa. July 31, 2002) and describes both as "applying Pennsylvania law and finding that the Liquidator 'is bound by the insurer's contractual agreements.'"[18] Buck argues that Pennsylvania jurisprudence is "highly persuasive" because it is a "reciprocal state." See Exception memorandum, p. 8. However, "reciprocal state" is a defined term for purposes of the Uniform Insurers Liquidation Law ("ULIL"), R.S. 22:2038—2044, which governs interstate insolvencies and is not relevant to the question presented in Buck's exception. Regardless, Ohio and Louisiana also have been deemed "reciprocal states" under the ULIL. *Miner v. Punch*, 838 F.2d 1407, 1409-10 (5th Cir. 1988).

Further, and perhaps more significantly, Pennsylvania courts have expressly distinguished that state's insurance insolvency law from other states that have "a comprehensive and exclusive statutory mechanism for resolving all disputes in the context of an insurance company receivership." See *Foster v. Philadelphia Mfrs.*, 140 Pa. Cmwlth. 186, 190, 592 A.2d 131, 133

[18] Only the former case involved a forum selection clause (in the form of an arbitration provision).

(1991) (using this basis to distinguish cases decided under the New York statute in which the contractual right to arbitration has been denied in insurance insolvency proceedings). The court in *Foster* also noted that the Pennsylvania court-approved rehabilitation plan in that case specifically contemplated that the parties would submit to arbitration. While Louisiana and Pennsylvania may be "reciprocal states" for purposes of the ULIL, Louisiana law differs from Pennsylvania's—and follows Ohio's—in several key respects: Louisiana's RLC Act has been held to be comprehensive and exclusive in scope; jurisdiction is exclusively in the 19th JDC; and the Rehabilitation Order does not allow for arbitration. Thus, the Pennsylvania federal district cases are not persuasive authority on this issue.

CONCLUSION

In conclusion, Buck's exception overlooks the Commissioner's important role in protecting the public from failed insurance companies like LAHC. It is inaccurate to argue, as Buck does, that the Commissioner simply stands in the shoes of LAHC and is bound by a forum selection clause in a related contract that the Commissioner never signed. Louisiana law affords the Commissioner broad powers to regulate, control, and administer failed insurance companies like LAHC, which includes the power to litigate all such claims in a single venue: this Honorable Court, the Nineteenth Judicial District Court of East Baton Rouge, Louisiana. To force the Commissioner to litigate the claims against Buck in New York would violate the law of Louisiana and frustrate the strong public policy of this state. For all of the foregoing reasons, plaintiff respectfully request that Buck's Exception of Improper Venue be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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