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 MILLIMAN'S DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION

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 Lack of Subject Matter Jurisdiction (the "Exception") filed by defendant, Milliman, Inc. ("Milliman").

In short, Milliman claims that this Honorable Court lacks subject matter jurisdiction over it because of an arbitration clause found in a contract between LAHC and Milliman. Milliman's Exception should be DENIED because: (1) Milliman ignores the comprehensive and exclusive scope of the Louisiana Insurance Code regarding receivership litigation; (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 arbitrate this dispute would violate the applicable Rehabilitation Order regarding LAHC; (4) Milliman ignores that the Commissioner is not a signatory to the contract that contains the subject arbitration clause; (5) Milliman fails to cite, much less discuss or distinguish, the *Taylor* case decided by the Ohio Supreme Court in 2011, a case which is directly on-point both factually and legally; (6) it is inaccurate to argue, as Milliman 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 Milliman do not arise from the subject engagement letter. Each of these reasons is addressed in turn.

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 Milliman. 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.[1]

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 Milliman. 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.

Milliman provided professional actuarial services to LAHC from approximately August 2011 to March 2014. See Exhibit "A," Amended Petition, ¶13. Milliman's services included preparing the feasibility study for LAHC to use in support of its loan application to CMS and setting LAHC's 2014 premium rates. *Id.* at ¶¶ 74—103. Milliman held itself out as having expertise to provide actuarial services and advice to health insurers like LAHC. *Id.* at ¶129. However, Milliman failed to produce a feasibility study that was accurate and reliable and, further, failed to set premium rates for LAHC that were accurate and reliable. *Id.* at ¶102. Milliman's advice and reports concerning LAHC's funding needs negligently misrepresented the actual funding needs and premium rates. *Id.* at ¶132.

[1] 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.

Milliman now has filed an exception asserting that this Court does not have subject matter jurisdiction over the Commissioner's claims against it based upon an arbitration clause in the Consulting Services Agreement executed by Milliman and LAHC in 2011 (the "Agreement"). The bulk of Milliman's argument is devoted to addressing whether the arbitration clause is one of adhesion. *See* Milliman's Exception memorandum, pp. 6-9. However, the real question here is not whether the contract is adhesionary, but whether the arbitration provision in the LAHC-Milliman agreement is enforceable against the Commissioner.

In its exception, Milliman does not reference the Louisiana Insurance Code. Milliman makes no argument as to why arbitration should be required now that LAHC has been placed in rehabilitation, and none of the cases cited by Milliman involve a factual scenario comparable to the one presented here. Milliman simply relies on general Louisiana law favoring arbitration, without addressing the exclusive scope and nature of the Louisiana Insurance Code provisions governing rehabilitation of insolvent insurers, or the fact that the Commissioner was not a signatory to the LAHC-Milliman agreement.

LAW AND ARGUMENT

I. 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,[2] 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").[3] 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),

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[2] 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."

[3] 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 R.S. 22:1 to 22:3311, into a new format and numbering scheme comprised of 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 brought 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, LAHC was operated as a Health Maintenance Organization ("HMO") and was regulated by the Louisiana Department of Insurance as such. The Health Maintenance Organization Act, La. R.S. 22:241 *et seq.*, which is the statutory scheme for regulating HMOs in Louisiana, includes a more specific venue provision applicable when the Commissioner takes over and liquidates an HMO like LAHC:

> 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).[4] The Commissioner's suit against Milliman arises from the takeover of an HMO because the Commissioner's right of action against Milliman 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.[5] In other words, just as Milliman would be enjoined from filing suit against LAHC in another venue after LAHC was placed into Receivership, Milliman would be enjoined from obtaining an arbitration award against the Commissioner.

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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[4] La. R.S. 22:257 governs the Commissioner's suspension or revocation of a certificate of authority issued to a HMO.
[5] See p. 3 of Exhibit B, Rehabilitation Order; see also, fn. 11, *infra*.

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.[6] 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.

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[6]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).

II. The Commissioner is not bound by the arbitration clause.

A. Milliman skips over the fact that the Commissioner is not a signatory to the arbitration agreement.

In ruling on an exception seeking to compel arbitration, the threshold inquiry the Court must decide is whether the parties agreed to arbitrate their dispute. *Lemoine Co., LLC v. Durr Heavy Constr., LLC*, 2015-1997 (La. App. 1 Cir. 10/31/16), 206 So.3d 244, 246–47, *writ denied sub nom. The Lemoine Co., LLC V. Durr Heavy Constr., LLC*, 2016-2100 (La. 1/13/17). This inquiry is two-fold: first, the court must determine whether there is a valid arbitration agreement; and, second, if so, whether the dispute in question falls within the scope of that agreement. *Id.* (citing *Collins v. Prudential Ins. Co. of America*, 99–1423 (La. 1/19/00), 752 So.2d 825, 831).

In its exception, Milliman summarily argues, "[g]iven that the allegations Plaintiff [the Commissioner] has raised against Milliman arise out of the services Milliman agreed to render to LAHC pursuant to the terms of the Consulting Services Agreement, any and all disputes Plaintiff may have with Milliman are required to be resolved by final and binding arbitration." *See* Milliman's exception, p. 6. However, Milliman's argument improperly reverses this Court's inquiry, addressing the scope of the arbitration clause but skipping over the absence of any agreement by the Commissioner to arbitrate.

Milliman also focuses on the recent Louisiana Supreme Court opinion, *Duhon v. Activelaf, LLC*, 2016-CC-0818 (La. 10/19/2016), ___ So.3d ____; 2016 WL 6123820.[7] *See* Milliman's exception, pp. 7-8. The *Duhon* ruling is based entirely on whether the contract was adhesionary, given the physical characteristics of the arbitration clause in that case and lack of mutuality. *Duhon*, 2016-0818, at *9-11. What was <u>not</u> at issue in *Duhon* was whether the party challenging the arbitration agreement actually signed the underlying contract. *Id.* at 10 ("Thus, although it is undisputed that Mr. Duhon electronically signed the Agreement, purportedly demonstrating an acceptance of its terms, under Louisiana contract law, we find Mr. Duhon did not truly consent to the arbitration provision.").

Duhon is simply not relevant here. The Commissioner has not signed and is not a party to any written agreement with Milliman, much less one containing an arbitration provision. Rather, the agreement at issue is between Milliman and LAHC, which was executed well before the Rehabilitation Order.

[7] This case is not yet final as the defendant has petitioned the United States Supreme Court for certiorari.

Arbitration is a matter of contract, and a party cannot be compelled to submit a dispute to arbitration if he has not agreed to do so. *Chase Bank USA, N.A. v. Leggio*, 43,751 (La. App. 2 Cir. 12/3/08), 999 So.2d 155, 158 (citing *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)); *see also Lemoine*, 206 So.2d at 247. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Horseshoe Entm't v. Lepinski*, 40,753 (La. App. 2 Cir. 3/8/06), 923 So. 2d 929, 934, *writ denied*, 2006-0792 (La. 6/2/06), 929 So.2d 1259 (citing *AT & T Technologies, Inc.*, 475 U.S. 643).[8] Although law and policy both favor arbitration, neither can supply an agreement to arbitrate where there is none. *Johnson v. Blue Haven Pools of Louisiana, Inc.*, 2005-0197 (La. App. 1 Cir. 2/10/06), 928 So.2d 594, 598 (internal citation omitted).

While Milliman correctly notes that Louisiana generally favors arbitration, Milliman fails to address whether the arbitration provision in the Agreement between LAHC and Milliman is enforceable against the Commissioner. 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 an agreement to arbitrate that was previously executed by a now-insolvent insurer. However, the First Circuit has specifically stated that the Commissioner, 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.

Further, in a well-reasoned opinion that is directly on point, both factually and legally, the Ohio Supreme Court concluded that an arbitration agreement executed by an insurer is not subsequently enforceable against an insurance commissioner. *Taylor v. Ernst & Young, LLP*, 958

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[8] The Federal Arbitration Act ("FAA") preempts state law, including the Louisiana Binding Arbitration Law ("LBAL"), in cases involving transactions which affect interstate commerce. However, the McCarran-Ferguson Act commits the regulation of insurance to state law by providing that any state law enacted for the purpose of regulating insurance will trump, or "reverse preempt," any contrary federal law that does not relate specifically to insurance. Regardless, it is not necessary to decide whether interstate commerce is affected by this transaction—and, if so, whether the McCarran-Ferguson Act applies—because under either the FAA or LBAL, the result in this case is unchanged for several reasons.

First, Louisiana courts have repeatedly held that "the [LBAL] is virtually identical to the [FAA]" and often look to federal jurisprudence under the FAA for guidance in construing the LBAL. *See, e.g., Whitlock Family Charitable Remainder Unitrust v. Merrill Lynch, Pierce, Fenner & Smith,* 2008-0560 (La. App. 1 Cir. 9/23/08). The FAA directs courts to place arbitration agreements on equal footing with other contracts, but, like the LBAL, "it 'does not require parties to arbitrate when they have not agreed to do so.'" *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293, 122 S. Ct. 754, 764, 151 L. Ed. 2d 755 (2002) (internal quotations omitted).

In addition, even in cases where the FAA preempts state law, general state contract principles still apply to assess whether agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law. *Aguillard v. Auction Management Corp.*, 04–2804, 04–2857 (La.6/29/05), 908 So.2d 1, 8-9; *Chase Bank USA, N.A.*, 999 So.2d at 158–59; *see also* 9 U.S.C. § 2 (FAA savings clause).

N.E.2d 1203 (Ohio 10/18/11). 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.[9] Like Milliman, 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 liquidation of insurance companies." *Taylor,* 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).[10]

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. *Id.* 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.*

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[9] 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.

[10] 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.*

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.[11] 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 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.[12] 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*.

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[11] 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).

[12] 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.

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.*[13]

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

[13] 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, 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.

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.*[14]

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.[15] 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."[16]

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 <u>not</u> placed in the exact shoes of the insolvent insurer. *LeBlanc*, 554 So.2d at 1381. Further, "[w]hile a party to the instrument may be

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[14] Emphasis added.

[15] 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).

[16] 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)

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").

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.

In this case, as in *Taylor*, the Commissioner is not seeking a declaration of Milliman's obligations under its engagement letter with LAHC. The Commissioner alleges Milliman owed a duty to LAHC to exercise reasonable care and to act in accordance with the professional standards applicable to actuaries and, further, that Milliman breached this duty by: conditioning payment upon a successful result, which may have compromised Milliman's independence as an actuary; performing actuarial work for LAHC, including the feasibility study, three year pro forma reports, and memoranda prepared as part of the 2014 rate filings, that was unreliable, inaccurate, and not the result of careful, professional analysis; failing to set premium rates that were accurate and reliable. Ex. "A", ¶¶75-103.

None of these allegations require the Court to interpret the engagement letter to determine Milliman's obligations to LAHC. Like the superintendent in *Taylor*, the Commissioner's claims arise from his statutory powers and Milliman'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.

CONCLUSION

In conclusion, Milliman's exception overlooks the Commissioner's important role in protecting the public from failed insurance companies like LAHC. It is inaccurate to argue, as Milliman does, that the Commissioner simply stands in the shoes of LAHC and is bound by an arbitration 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 arbitrate the claims against Milliman would violate the law of Louisiana and frustrate the strong public policy of this state. For all of the foregoing reasons, plaintiff respectfully requests that Milliman's Exception of Lack of Subject Matter Jurisdiction be DENIED.

Respectfully submitted,

J. E. Cullens, Jr., T.A., La. Bar #23011
Edward J. Walters, Jr., La. Bar #13214
Darrel J. Papillion, La. Bar #23243
David Abboud Thomas, La. Bar #22701
Jennifer Wise Moroux, La. Bar #31368
WALTERS, PAPILLION, THOMAS, CULLENS, LLC
12345 Perkins Road, Bldg One
Baton Rouge, LA 70810
Phone: (225) 236-3636
Facsimile: (225) 236-3650

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via U.S. Mail, postage prepaid, and via e-mail to all counsel of record as follows:

Thomas McEachin
Schonekas, Evans, McGoey & McEachin, LLC
909 Poydras Street, Suite 1600
New Orleans, Louisiana 70112

Robert J. David, Jr.
Juneau David, APLC
Post Office Drawer 51268
Lafayette, LA 70505

Robert B. Bieck, Jr.
Jones Walker
201 St. Charles Avenue, 49th Floor
New Orleans, LA 70170

Henry D.H. Olinde, Jr.
Olinde & Mercer, LLC
8562 Jefferson Highway, Suite B
Baton Rouge, LA 70809

Harry (Skip) J. Philips, Jr.
Taylor Porter
Post Office Box 2471
Baton Rouge, LA 70821

W. Brett Mason
Stone Pigman
301 Main Street, #1150
Baton Rouge, LA 70825
225-490-5812

Frederic Theodore 'Ted' Le Clercq
Deutsch Kerrigan, LLP
755 Magazine Street
New Orleans, LA 70130

V. Thomas Clark, Jr.
Adams and Reese, LLP
450 Laurel Street
Suite 1900
Baton Rouge, LA 70801

James A. Brown
Liskow & Lewis
One Shell Square
701 Poydras Street, #5000
New Orleans, LA 70139

Matt J. Farley
Krebs Farley
400 Poydras Street, #2500
New Orleans, LA 70130

Baton Rouge, Louisiana this 22nd day of May, 2017.

J. E. Cullens, Jr.