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

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING "REGULATOR FAULT" OR "RECEIVER FAULT" DEFENSES OR, IN THE ALTERNATIVE, MOTION TO STRIKE DEFENSES PRECLUDED AS A MATTER OF LAW

MAY IT PLEASE THE COURT:

James J. Donelon, Commissioner of Insurance for the State of Louisiana ("Commissioner"), in his capacity as Court Appointed Rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"), through his duly Court appointed Receiver, Billy Bostick ("Plaintiff" or the "Receiver"), files this Memorandum in support of this "Motion for Partial Summary Judgment Regarding "Regulator Fault" or "Receiver Fault" Defenses or, in the Alternative, Motion to Strike Defenses Precluded as a Matter of Law." The defenses identified below should be dismissed, or in the alternative stricken, because the purported actions or inactions of the Commissioner as Regulator and in his capacity as Court Appointed Rehabilitator, through his designee Billy Bostick herein, identified below are not valid defenses to the claims asserted as a matter of law.

Background

This case arises out of the failure of Louisiana Health Cooperative, Inc. ("LAHC"), a Consumer Operated and Oriented Plan ("CO-OP") created under the Patient Protection and Affordable Care Act of 2010 ("ACA"). LAHC sold policies to the public for less than two years, from 2014 to the summer of 2015, before being placed in receivership. Plaintiff Billy Bostick was appointed by the Receivership Court as the LAHC Receiver in September 2015 to take over and thereafter to wind down LAHC's affairs.

After several settlements, the non-nominal defendants that remain in this action are Milliman, Inc. ("Milliman") and Buck Consultants, LLC n/k/a Buck Global, LLC ("Buck"), the actuaries that set LAHC's premium rates for 2014-2015; Group Resources Incorporated ("GRI"), the third-party administrator who handled and processed claims and enrollments for LAHC in 2015; and various excess insurers for former directors and officers of LAHC. Neither the Louisiana Department of Insurance and/or the Louisiana Commissioner of Insurance (collectively, the "Regulator") are parties to this action.

Each of the remaining defendants has alleged that the Commissioner as regulator and the Receiver were negligent or otherwise at fault in defense to the above-captioned suit. These alleged actions or inactions by the Commissioner or the Receiver do not constitute valid defenses to the action and should be dismissed or stricken.

List of Essential Legal Elements and Statement of Undisputed Material Facts

As required by Local Rule 9.14(2)(D), the following is a list of essential legal elements necessary to render summary judgment:

1. " No action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver." La. R.S. 22:2043.1(B).

2. "There shall be no liability on the part of, and no cause of action of any nature shall arise against, the department or its employees, or the commissioner or his designee in his capacity as receiver, liquidator, rehabilitator or conservator, or otherwise, or any special deputy, the receiver's assistants or contractors, or the attorney general's office for any action taken by them in performance of their powers and duties under this Code." La. R.S. 22:2043(C).

As required by Local Rule 9.14(2)(D), the following is a list of essential of undisputed material facts:

1. In its Answer, see Exhibit A, Milliman alleged the following affirmative defenses, among others:

a. FIFTH DEFENSE: Plaintiff's damages, if any, were caused or contributed to by the negligence, wrongdoing, regulatory misconduct, want of care and fault or comparative fault of the Louisiana Department of Insurance, the Commissioner of Insurance (the "Commissioner"), Billy Bostick as the Receiver (the "Receiver"), and/or LAHC, and/or each of their respective employees, agents, attorneys, and/or contractors, and/or other parties for whom Milliman is not responsible and over whom Milliman had no control.

b. SIXTH DEFENSE: Plaintiff's claims are barred in whole or in part, by its own actions, omissions, and/or negligence.

c. SEVENTH DEFENSE: Plaintiff's claims are barred by the doctrines of estoppel, waiver, ratification, and acquiescence in that the Commissioner and his employees and agents and/or the Louisiana Department of Insurance reviewed the activities now complained of, and gave explicit or implicit approval of those activities. Milliman relied to its detriment upon those actions of the Commissioner and his employees and agents and/or the Louisiana Department of Insurance.

d. EIGHTH DEFENSE: Plaintiff has failed to mitigate the damages that were incurred, if any.

e. NINTH DEFENSE: The Commissioner, his employees, his agents, and/or the Louisiana Department of Insurance had knowledge of and approved the activities forming the basis of the present claims.

f. TENTH DEFENSE: Plaintiff's claims are barred by the filed rate doctrine.

g. ELEVENTH DEFENSE: Plaintiff's claims are barred by unclean hands.

h. THIRTEENTH DEFENSE: Plaintiff's damages, if any, were not caused by Milliman, but were the proximate result, either in whole or in part, of the actions or omissions of persons or entities other than Milliman, including but not limited to, the Louisiana Department of Insurance, the Commissioner, the Receiver, LAHC, the federal government, third parties, other defendant(s) and/or each such person or entity's respective employees or agents.

2. In its Answer, see Exhibit B, Buck alleged the following affirmative defenses, among others:

a. FIFTH DEFENSE: Plaintiff's damages, if any, were caused or contributed to by the negligence, wrongdoing, want of care and fault or comparative fault of the Commissioner of Insurance (the "Commissioner") and/or Billy Bostick, as the Receiver (the "Receiver"), and their employees, agents, attorneys, and contractors, of LAHC and its officers, directors, employees, agents, and contractors, and of third parties for whom Buck is not responsible and over whom Buck had no control.

b. SIXTH DEFENSE: Plaintiff's damages, if any, were caused by regulatory misconduct and negligence of the Commissioner, the Receiver, and their employees and agents.

c. SEVENTH DEFENSE: Plaintiff's claims are barred by the doctrines of estoppel, waiver, ratification, and acquiescence in that the Commissioner and his employees and agents

reviewed the activities now complained of, and gave explicit or implicit approval of those activities. Buck relied to its detriment upon those actions of the Commissioner and his employees and agents.

d. EIGHTH DEFENSE: Plaintiff has failed to mitigate the damages that were incurred, if any. The Commissioner had knowledge of and approved the activities forming the basis of the present claims, and he failed to prevent those activities. Furthermore, the Commissioner and the Receiver, and their employees, agents, and contractors, committed acts of negligence and misconduct in the supervision and regulation of LAHC, negligence and misconduct in the conservation, rehabilitation, and liquidation of LAHC, and other acts and omissions that may be discovered and presented at trial.

e. ELEVENTH DEFENSE: Plaintiff's damages, if any, were not caused by Buck.

3. In its Answer, see Exhibit C, GRI alleged the following affirmative defenses, among others:

a. THIRD AFFIRMATIVE DEFENSE: Plaintiff is estopped from making the claims asserted due to its own actions and inactions and course and pattern of conduct over many years.

b. FOURTH AFFIRMATIVE DEFENSE: The claims asserted are barred by laches, waiver, unclean hands, ratification, and any applicable period of prescription.

c. NINTH AFFIRMATIVE DEFENSE: GRI avers that the Plaintiff has not suffered compensable damage as a result of any alleged wrongdoing on the part of GRI or any of their agents or representatives. If Plaintiff suffered any damage, as alleged, such damage was caused in whole or in part by the action or inaction of persons or entities (whether parties or non-parties) for whom GRI is not responsible.

4. In its Answer, see Exhibit D, RSUI (excess insurer for the D&O Defendants) alleged the following affirmative defenses, among others:

a. NINTH DEFENSE: Plaintiff's claims are barred, or alternatively reduced, by the doctrine of avoidable consequences.

b. ELEVENTH DEFENSE: RSUI alternatively avers upon information and belief that the claims, damages and other relief requested or set forth in the Second Amended Petition arose from the negligence, fault and/or want of due care on the part of parties other than any insured under the RSUI Policies, and/or other natural and juridical persons and/or other circumstances, that bar or alternatively reduce any right of recovery against RSUI.

c. THIRTEENTH DEFENSE: Upon information and belief, any damage(s), losses or other relief described in the Second Amended Complaint, if any, were caused by parties or non-parties for whose actions, conduct, fault, negligence or omissions RSUI is not responsible or liable.

d. FOURTEENTH DEFENSE: Alternatively, any party who suffered any damages as alleged in the Second Amended Complaint failed to take reasonable or appropriate conduct in order to mitigate damages, if any.

e. FIFTEENTH DEFENSE: Plaintiff's claims against RSUI are barred, in whole or in part, by the principles of acquiescence, consent, amendment, modification, merger, estoppel, waiver, legal justification, license, excuse and/or privilege, transaction and compromise, payment, set off, failure or lack of consideration, and by its own particular acts and omissions.

f. A SEVENTEENTH DEFENSE: RSUI hereby adopts and incorporates, as if set forth herein, any and all defenses asserted or to be asserted by Allied World in response to the Second Amended Complaint.

g. EIGHTEENTH DEFENSE: RSUI hereby adopts and incorporates, as if set forth herein, any and all defenses asserted or to be asserted by Evanston in response to the Second Amended Complaint.

5. In its Answer, see Exhibit E, Evanston (excess insurer for the D&O Defendants) alleged the following affirmative defenses, among others:

a. SECOND AFFIRMATIVE DEFENSE: Plaintiff's injuries and damages were caused by his own fault and/or negligence, which should reduce or bar recovery under any policy issued by Evanston, the entitlement to which is expressly denied.

b. THIRD AFFIRMATIVE DEFENSE: Plaintiff's injuries and damages were caused by the fault and/or negligence of a third party for whom Evanston is not responsible, and that fault and/or negligence should reduce or bar recovery under any policy issued by Evanston, the entitlement to which is expressly denied.

c. FOURTH AFFIRMATIVE DEFENSE: Plaintiff's claims are barred, in whole or in part, by the doctrine of intervening and/or superseding cause.

d. TWENTIETH AFFIRMATIVE DEFENSE: The claims against Evanston are barred, in whole or in part, and/or should be proportionately reduced to the extent plaintiff and/or any other party failed to mitigate, minimize, and/or reduce damages and to the-extent to any of the damages claimed by plaintiff are or were pre-existing.

e. FORTY-EIGHTH AFFIRMATIVE DEFENSE: Evanston adopts and incorporates any defenses that have been or may be asserted by any of the D&O Defendants that have been or may be asserted as if fully set forth herein.

f. FORTY-NINTH AFFIRMATIVE DEFENSE: Evanston adopts and incorporates any defenses that have been or may be asserted by any of the Insurer Defendants that have been or may be asserted as if fully set forth herein.

g. FIFTY-FIRST AFFIRMATIVE DEFENSE: Evanston pleads and incorporates herein by reference, as though copied in extenso, any and all defenses, affirmative or otherwise, pled by any other defendant in this matter that are not inconsistent with Evanston's position and/or affirmative defenses as described in this pleading.

6. In its Answer, see Exhibit F, Atlantic Specialty (excess insurer for the D&O Defendants) alleged the following affirmative defenses, among others:

a. Thirty-Third Defense: Neither Atlantic Specialty nor its alleged insureds' conduct was the cause in fact or proximate cause of any injury alleged by Plaintiff. Plaintiff's recovery is barred, in whole or in part, to the extent there are numerous intervening and superseding causes of the injuries/damages allegedly sustained by Plaintiff.

b. Thirty-Fourth Defense: Plaintiff's claims may be barred or limited by its own comparative fault.

c. Thirty-Fifth Defense: Plaintiff's claims are barred to the extent he failed to mitigate his damages.

d. Thirty-Sixth Defense: Plaintiff's alleged injuries and damages, if any, were caused by the negligence or fault of other parties, for which Atlantic Specialty and its alleged insureds are not liable.

e. Forty-Eighth Defense: Plaintiff's claims against Atlantic Specialty are barred, in whole or in part, to the extent that the damages alleged were caused by the contributory or comparative fault of other parties besides Atlantic Specialty's alleged insureds.

f. Forty-Ninth Defense: Atlantic Specialty pleads superseding and/or intervening causes as a defense and a bar to recovery.

g. Fiftieth Defense: Plaintiff's claims against Atlantic Specialty are barred, in whole or in part, to the extent that the damages alleged were caused by conditions over which neither Atlantic Specialty nor its alleged insureds has control.

h. Fifty-First Defense: Atlantic Specialty avers that, in accordance with La. C.C. art. 2323, the percentage of fault of all persons causing or contributing to the damages must be determined, and that the amount of damages recoverable, if any, must be reduced in proportion to the percentage of fault attributable to other parties, including Plaintiff, parties that are insolvent, and parties that are not named as defendants.

i. Sixty-Third Defense: Atlantic Specialty adopts and incorporates any defenses that have been or may be asserted by any of the D&O Defendants, Allied World Specialty Insurance Company (f/k/a Darwin National Assurance Company), RSUI Indemnity Company, Evanston Insurance, and Zurich American Insurance Company as if fully set forth herein.

7. In its Answer, see Exhibit G, Zurich (excess insurer for the D&O Defendants) alleged the following affirmative defenses, among others:

a. FIFTH DEFENSE: In the alternative, Zurich pleads the affirmative defense of comparative fault, assumption of the risk, and/or contributory negligence.

b. SIXTH DEFENSE: Plaintiff's claims against Zurich are barred, in whole or in part, to the extent the incidents giving rise to this lawsuit were caused by a party or parties over whom Zurich had no responsibility or legal liability.

c. THIRTIETH DEFENSE: Zurich specifically and affirmatively pleads as an affirmative defense and adopts by reference as if incorporated herein all affirmative defenses set forth by the insurer defendant who issued the Followed Policy (including but not limited to express adoption of Affirmative Defenses nos. 1 through 35 contained in Allied World Specialty Insurance Company's Answer, Exceptions, and Affirmative Defenses To Second Supplemental, Amending and Restated Petition for Damages dated Dec. 18, 2017), and the Other Underlying Insurance, including all affirmative defenses set forth by Allied World Specialty Insurance Company a/k/a Darwin National Assurance Company; Atlantic Specialty Insurance Company; Evanston Insurance Company; and RSUI Indemnity Company including all successors to those entities.

d. FIFTY-SECOND DEFENSE: This action along with any relief sought by plaintiff may be barred, in whole or in part, on the basis of the doctrine of equitable estoppel, judicial estoppel, waiver, laches, and/or unclean hands.

e. FIFTY-SIXTH DEFENSE: Plaintiff's claims are barred, in whole or in part, to the extent that any liability of any policy at issue should be reduced to the extent that any insured or plaintiff has failed to mitigate, minimize, avoid or otherwise abate any damages already sustained.

f. SIXTY-FIRST DEFENSE: To the extent not inconsistent with the affirmative defenses set forth above, in the alternative, Zurich adopts by reference the affirmative defenses of all other insurer defendants, and to the extent appropriate, all nominal defendants.

g. SIXTY-SECOND DEFENSE: Zurich adopts by reference as if incorporated herein the defenses and exceptions set forth in the Answer of Allied World National Assurance Company including: the exception of no right of action under the Direct Action Statute because: 1) at the time Zurich was joined to this lawsuit, the nominal defendants were parties without any potential liability and therefore plaintiff has no right of action under the Direct Action Statute; 2) All of the policies at issue are indemnity policies not liability policies; 3) Because Ochsner has not and will not pay a Loss on behalf of the nominal defendants who have no personal liability, the indemnity coverage in the policies is not triggered; and 4) any applicable policies only cover "Loss" which expressly does not include "amounts which an insured is not legally obligated to pay."

Zurich furthermore adopts by reference as if incorporated herein the defenses and exceptions set forth in the Answer of Allied World National Assurance Company including: the exception of no cause of action under the Direct Action Statute because: 1) the Petition fails to allege facts sufficient to possibly trigger coverage under any policy at issue; 2) the indemnity coverage provided by the policies at issue is not subject to the Direct Action Statute; 3) any applicable policies only cover "Loss" which expressly does not include ' amounts which an insured is not legally obligated to pay."; and 4) Because Ochsner has not and will not pay a Loss on behalf of the nominal defendants who have no personal liability, the indemnity coverage in the policies is not triggered.

8. In its Answer, see Exhibit 8, Allied World (excess insurer for the D&O Defendants) alleged the following affirmative defenses, among others:

a. Thirtieth Affirmative Defense: Neither Allied World nor its alleged insureds' conduct was the cause in fact or proximate cause of any injury alleged by Plaintiff. Plaintiff's recovery is barred, in whole or in part, to the extent there are numerous intervening and superseding causes of the injuries/damages allegedly sustained by Plaintiff.

b. Thirty-First Affirmative Defense: Plaintiff's claims may be barred or limited by its own comparative fault.

c. Thirty-Second Affirmative Defense: Plaintiff's claims are barred to the extent he failed to mitigate his damages.

d. Thirty-Third Affirmative Defense: Plaintiff's alleged injuries and damages, if any, were caused by the negligence or fault of other parties, for which Allied World and its alleged insureds are not liable.

e. Thirty-Fifth Affirmative Defense: Allied World adopts and incorporates any defenses that have been or may be asserted by any of the D&O Defendants, as if fully set forth herein.

Standard of Proof on Motions for Summary Judgment and to Strike

A motion for summary judgment is used to avoid a full-scale trial when there is no genuine issue of material fact. *Georgia-Pacific Consumer Operations, LLC v. City of Baton Rouge*, 2017-1553 (La. App. 1 Cir. 7/18/18), 255 So.3d 16, 21, *writ denied*, 2018-1397 (La. 12/3/18), 257 So.3d 194. A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). The Receiver alleges that there is no fact which supports any of the defenses challenged here. Indeed, the Receiver suggest that as a matter of law these defenses are so clearly prohibited that they could be stricken regardless of the facts alleged.

"The court on motion of a party or on its own motion may at any time and after a hearing order stricken from any pleading any insufficient demand or defense or any redundant, immaterial, impertinent, or scandalous matter." La. C.C.P. art. 964. Because the source of Article 964 is Federal Rule of Civil Procedure 12(f), courts look to federal jurisprudence to assist in analyzing Article 964. *Cole v. Cole*, 2018-0523 (La. App. 1 Cir. 9/21/18), 264 So.3d 537, 544. A defense "that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted." *Fed. Ins. Co. v. Edenbaum, No.* CIV. JKS 12-410, 2012 WL 2803739, at *1–2 (D. Md. July 9, 2012) citing *Waste Mgmt. Holdings v. Gilmore,* 252 F.3d 316, 347 (4th Cir.2001).

Both a Motion for Partial Summary Judgment and a Motion to Strike raise only legal issues as neither consider any disputed fact. The facts of the answers are not disputed for purposes of these Motions only. Moreover, this Honorable Court can take judicial notice that Exhibits A – H have been filed in the above-captioned matter and Exhibit I has been filed in the Receivership Court. La. C.E. art. 201(B) and (D). Since no factual dispute is raised, the Receiver requests that this Honorable Court dismiss or strike the defenses identified *infra*.

Neither the alleged fault of the Louisiana Commissioner of Insurance and any employee of the Louisiana Department of Insurance, acting as regulator of LAHC (or otherwise), nor the acts of the Receiver can serve as a defense and be allocated on the jury verdict form.

The defendants blame their own gross negligence on the Commissioner of Insurance in his capacity as regulator, through the acts of the Louisiana Department of Insurance, and in his capacity as Rehabilitator, acting through his designee, the Receiver herein. Unfortunately for defendants, in the Louisiana Rehabilitation, Liquidation, Conservation Act ("RLCA"), La. R.S. 22:2001, *et seq*., the Louisiana Legislature comprehensively set forth the Commissioner's rights and obligations relative to insolvent insurers, which does not include any duty upon which fault can be allocated. Expressly recognized in the RLCA is the principle that Commissioner of Insurance acts in different and separate capacities: regulator and rehabilitator.

For example, La. R.S. 22:2004(A), a venue provision, governs where the Commissioner may bring an action. This statute includes a recognition that regardless of the separate capacities in which the Commissioner may bring a lawsuit, suit is proper in the same forum. "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." Id. The Louisiana Legislature founded this dual capacity on the understanding that "[i]nsurance is an industry affected with the public interest and it is the purpose of this Code to regulate that industry in all its phases." La. R.S. 22:2(A)(1). One phase includes rehabilitation or liquidation of insolvent insurers.[1] These policies support precluding defenses based upon regulator or Receiver fault. When faced with the issue presented here—whether actions of the Insurance Commissioner prior to the order of rehabilitation of an insurance company can be asserted as a defense in an action by the Receiver—the Pennsylvania Commonwealth Court, in the case discussed below, relied upon the same statutory policies and scheme to answer "No" to this question.

In *Foster v. Monsour Med. Found.*, 667 A.2d 18, 20 (Pa. Commw. 1995), the Insurance Commissioner of Pennsylvania, acting in the capacity as liquidator, sued multiple defendants asserting tort and fraud claims. In response the defendants raised the affirmative defenses of failure to mitigate damages, contributory negligence, comparative negligence, assumption of the risk,

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[1] The Louisiana Supreme Court recognized in this case that any distinction between liquidation and rehabilitation "is immaterial when considering the overall statutory scheme, as both are legal devices used by the Commissioner to manage insolvent insurers." Thus, the phase in which this case is presented is the management of insolvent insurers. *Donelon v. Shilling*, 2019-00514 * 10 (La. 4/27/20); __So.3d __.

estoppel and waiver on the grounds that "at all relevant times, the Insurance Commissioner and the Insurance Department had been aware of Keystone's manner of operation, and by their supervision thereof, had ratified the acts undertaken by Keystone." *Foster*, 667 A.2d at 19. The *Foster* court dismissed these defenses on two grounds. First, the claims "were not premised on any rights asserted by the Insurance Department or the Insurance Commissioner...." *Id.* Instead, these claims were raised by the Liquidator, who was acting in his capacity as a representative of the creditors, members, policyholder or shareholder of the insurer. *Id.* Thus, pre-liquidation conduct of the Commissioner could only be used to defeat the rights of the insurance company, its creditors, policyholders or shareholder if the law would otherwise allow these defenses, which it did not. *Id.* at 20. The second ground was that to allow the assertion of defenses against the Liquidator based upon regulatory negligence would encumber the purpose of the Pennsylvania insurance act.

Like the RLCA, the purpose of the Pennsylvania insurance act is to protect the policyholders, creditors and the public. *Id.* at 21. Consequently, the *Foster* court concluded that "the Statutory Liquidator's power to recover damages against the officers and directors and to recoup the assets of the liquidated insurer should not be encumbered by this Court's examination of the correctness of the Liquidator's actions during the liquidation or the Insurance Commissioner's regulatory actions." *Id.* Thus, affirmative defenses based upon regulator or liquidator fault were dismissed.

Like the *Foster* court, other courts have held over and over again that actions taken by insurance regulator cannot be the basis of a defense against a receiver or liquidator to lessen a party's own liability. *See, e.g., Corcoran v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 532 N.Y.S.2d 376, 143 A.D.2d 309 (N.Y. App. Div. 1988); *In re Blackburn*, 209 B.R. 4 (Bankr. M.D. Fla. 1997); *Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App.3d 350, 855 N.E.2d 128 (Ohio App. 2006); *Clark v. Milam*, 891 F. Supp. 268 (S.D. W.Va. 1995); *Dinallo v. DiNapoli*, 9 N.Y.3d 94, 877 N.E.2d 643, 846 N.Y.S.2d 593 (N.Y. 2007); *Foster v. Rockwood Holding Corp.*, 632 A.2d 335 (Pa. Cmwlth. 1993); *State of North Carolina v. Alexander & Alexander Services, Inc.*, 711 F.Supp. 257 (E.D. N.C. 1989); *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976); *Williams v. Continental Stock Transfer and Trust Company,* 1 F.Supp.2d 836 (N.D. Ill. 1998); *Muhl v. Ambassador Group, Inc.*, 673 N.Y.S.2d 310, 251 A.D.2d 130 (N.Y. App. Div. 1989); *Meyers v. Moody*, 693 F.2d 1196, 1210 n.11 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 287 (1983); *Kreidler v.*

Pixler, 2009 WL 529590 at *3 (W.D. Wash 3/2/2009); *Kueckelhan v. Federal Old Line Ins. Co.*, 74 Wash.2d 304, 315, 444 P.2d 667 (Wash. 1968) There are dozens if not hundreds of cases that so hold.

In *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So.3d 507, 606, the Louisiana Supreme Court squarely addressed the question of whether regulator's actions could be the basis of a defense in claims made by the Receiver of a failed insurance company. Said the Court:

> Finally, we hold the district court did not err in failing to instruct the jury as to regulator fault. "An insurance company may not delegate responsibility for valuation of its assets to a state agency, and the mere fact that an insurance commissioner accepts a company's asset valuation does not immunize the company from liability arising from that valuation." *Meyers v. Moody*, 693 F.2d 1196, 1210 n. 11 (5th Cir.1982), *cert. denied*, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983). As shown by the record in this case, the state insurance regulators must rely on the honesty and integrity of the financial statements filed with them. By accepting these filings, the regulators do not displace the insurance company's fiduciaries or controlling parties or owners by performing their statutory role. Health Net's argument in this regard seeks to hold the "police" liable because they did not sooner catch the "robber" or prevent the robbery in the first place. As argued by the Receivers on appeal, "how the regulators performed their respective jobs—whether well or poorly—does not in any way lessen" Health Net's responsibility for its role in the conspiracy and in its subsequent tortious actions.

(footnotes omitted).

Indeed, it is hornbook law that:

> The receiver or liquidator is subject to those defenses, and only those defenses, that would have been good against the company it represents. Under the "separate capacities doctrine," the actions of an insurance commissioner, while in a regulatory capacity and prior to the order of liquidation, cannot be asserted as affirmative defenses in an action commenced by the commissioner in the capacity of the liquidator of an insurer. Likewise, by reason of an insurance superintendent's different capacities as regulator and liquidator, defendants sued by the superintendent in a capacity as liquidator to recover payments made by the insolvent insurer cannot assert counterclaims against the superintendent as a regulator for the alleged failure to prevent the liquidation from occurring.

44 C.J.S. Insurance § 252 (June 2020 Update) (footnotes omitted).

In other words, the insurance regulator owes no duty to LAHC, its consultants, or its agents to ensure that the actions taken by LAHC, its consultants, or agents were non-negligent. Without a duty, there can be no "fault."

"In order to recover, plaintiff must establish a duty on the part of the defendant. Duty is a question of law and the inquiry is whether the plaintiff has any law—statutory, jurisprudential, or arising from general principles of fault—to support his claim." *Burdis v. Lafourche Par. Police Jury*, 618 So. 2d 971, 975 (La.App. 1 Cir. 1993), *writ denied*, 620 So. 2d 843 (La. 1993) citing *Faucheaux v. Terrebonne Consolidated Government, et al.*, 615 So.2d 289, 292 (La.1993). *See also, Otillio v. Louisiana Entergy, Inc.*, 02-718 (La. App. 5 Cir. 12/11/02), 836 So.2d 293 (a six-

year old child was not capable of fault, and therefore, his alleged negligence is not apportioned under art. 2323). Without a duty, there cannot be a breach of duty, and therefore, no "fault" to be apportioned. *Mobil Exploration & Producing U.S. Inc. v. Certain Underwriters Subscribing to Cover Note 95-3317(A)*, 2001-2219, (La. App. 1 Cir. 11/20/02), 837 So.2d 11, 40-41. To apportion fault to either a party or non-party, particularly one against which the plaintiff has made no allegations, the defendant must prove a breach of a duty by that person. *See, e.g., Bradbury v. Thomas*, 1998-1678 pp. 19-20 (La. App. 1 Cir. 9/24/99), 757 So.2d 666, 680. As shown by *Wooley*, the Insurance Commissioner as regulator owes no duty to an insurer upon which the defendants here can apportion fault. Like the insurance regulator, the Receiver also has no duty to catch or mitigate damages caused by tortious act or breaches of contractual duties owed by these defendants.

As noted by the Louisiana Supreme Court in April of this year,

> the statutory scheme for rehabilitation and liquidation of insurers is comprehensive and exclusive in scope. *Brown v. Associated Ins. Consultants, Inc.*, 97-1396 (La. App. 1 Cir. 6/29/98), 714 So. 2d 939, 942. It balances the interests of policyholders, creditors, and claimants. *LeBlanc v. Bernard*, 554 So. 2d at 1383–84. It was enacted to regulate insurance "in the public interest." La. R.S. 22:2(A)(1).

Donelon v. Shilling, 2019-00514 ** 10-11 (La. 4/27/20); __So.3d__. Plainly, as did the *Foster* court, the Louisiana Legislature understood that as part of this scheme that not just regulator fault, but also receiver fault, should not be a defense to a liquidator or rehabilitator's claims. La. R.S. 22:2043.1(B), enacted by the Louisiana Legislature in 2012, provides as follows:

> No action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver.

And if that were not clear enough, La. R.S. 22:2043.1(C) provides as follows:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, the department or its employees, or the commissioner or his designee in his capacity as receiver, liquidator, rehabilitator or conservator, or otherwise, or any special deputy, the receiver's assistants or contractors, or the attorney general's office for any action taken by them in performance of their powers and duties under this Code.

(emphasis added).

This is an expression of positive law which supercedes any contrary jurisprudence before 2012. La. C.C. art. 3.[2] Similarly, equitable remedies are only available in the absence of legislation

[2] "Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation."

and custom. La. C.C. art. 4. Thus, all of the following categories of defenses alleged by defendants must be dismissed or stricken:

a. Comparative Fault,[3]

b. Failure to Mitigate,[4]

c. Equitable Defenses of estoppel, waiver, unclean hands, ratification, and laches, [5]

d. And any adoption of these defenses in another party's pleading.[6]

The Receivership Court, recognizing that the Receiver and the Rehabilitator's acts could not be used in defense of any claims they brought, included in his order:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there shall be no liability on the part of, and that no cause of action of any nature shall exist against the Commissioner in his capacity as Commissioner or Rehabilitator and/or regulator of LAHC, the Receiver and/or the Attorney General of the State of Louisiana in his capacity as attorney for the Commissioner as Commissioner and/or regulator of LAHC, and/or their assistants, representatives, agents employees, or attorneys, for any action taken by them when acting in accordance with the orders of this Court and/or in performance of their power and duties as Rehabilitator, Receiver Commissioner and/or regulatory of LAHC.

See Attached Exhibit I, Permanent Order of Rehabilitation, pp. 8-9.

Defendants may assert that La. Civ. Code arts. 2323 and 2324 give them the right to use the Receiver's fault as a defense. It is true that these articles generally give a defendant the right to attribute comparative fault upon a showing that the person in question has a degree of "fault." Since the Louisiana Commissioner of Insurance, the Department of Insurance, and the Receiver

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[3] Milliman's Fifth, Tenth, and Thirteenth Defenses; Buck's Fifth, Sixth, Eighth and Eleventh (to the extent that this includes regulator or receiver actions) Defenses; GRI's Third and Ninth (to the extent that this includes regulator or receiver actions) Defenses; RSUI's Eleventh (to the extent that this includes regulator or receiver actions),Thirteenth (to the extent that this includes regulator or receiver actions) and Fifteenth (to the extent that this includes regulator or receiver actions) Defenses; Evanston's Second, Third and Fourth (to the extent that any include regulator or receiver actions) Defenses; Atlantic Specialty's Thirty-Third (to the extent that this includes regulator or receiver actions), Thirty-Fourth, Thirty-Sixth (to the extent that this includes regulator or receiver actions), Forty-Eighth (to the extent that this includes regulator or receiver actions), Forty-Ninth (to the extent that this includes regulator or receiver actions); and Fifty-First (to the extent that either includes regulator or receiver actions); Zurich's Fifth and Sixth (to the extent that this includes regulator or receiver actions) Defenses; and Allied World's Thirteenth (to the extent that this includes regulator or receiver actions), Thirty-Second, and Thirty-Third (to the extent that this includes regulator or receiver actions) Defenses.

[4] Milliman's Eighth Defenses; Buck's Eighth Defense; GRI's Third Defense (to the extent that this includes regulator or receiver actions); RSUI's Ninth and Fourteenth Defenses; Evanston's Twentieth Defense; Atlantic Specialty's Thirty-Fifth Defense; Zurich's Fifty-Sixth Defense; and Allied World's Thirty-Second Defense.

[5]Milliman's Seventh, Ninth, and Eleventh Defenses; Buck's Seventh Defense; GRI's Fourth Defense; RSUI's Fifteenth Defense; and Zurich's Fifty-Second Defense (to the extent that this includes regulator or receiver actions)

[6]RSUI's Seventeenth and Eighteenth Defenses; Evanston's Forty-Eighth, Forty-Ninth and Fifty-First Defenses (to the extent that this includes regulator or receiver actions); Atlantic Specialty's Sixty-Third Defense (to the extent that this includes regulator or receiver actions); Zurich's Thirtieth and Sixty-First Defenses; and Allied World's Thirty-Fifth Defense.

have no liability to any defendant, any alleged actions or inactions by Louisiana Commissioner of Insurance, the Department of Insurance, and the Receiver are no ground for, are irrelevant to, and support no basis for fault underpinning or supporting any of the above defenses raised by the defendants. More importantly, there is a more specific statute that controls in this instance—La. R.S. 22:2043.

Indeed, La. R.S. 22:2043.1 is specific to and part of the RLCA statutory scheme as it relates to insolvent insurers, thus it takes precedence over the more general comparative fault articles La. C.C. arts. 2323 and 2324. See, *Bernard v. Fireside Commercial Life Ins. Co.,* 633 So. 2d 177, 185 (La. App. 1 Cir. 1993), ("Louisiana has enacted a statutory scheme specifically designed for insurance insolvency, which takes precedence over general law to the extent that the general law is inconsistent with the provisions or purpose of the comprehensive, statutory scheme.") Accordingly, these defenses should be stricken or dismissed.

Conclusion

Positive law prohibits any liability from being imposed on the Commissioner or the Receiver in connection with any duties performed under the RLCA. This suit is brought under the authority of the RLCA. Therefore, no liability, or fault, can be assigned to either the Commissioner or Receiver, regardless of the capacity in which they act, as a defense to this suit. Accordingly, the Receiver seeks dismissal or to strike the following defenses:

a. Comparative Fault/Contributory Negligence: Milliman's Fifth, Sixth, Tenth, and Thirteenth Defenses; Buck's Fifth, Sixth, Eighth and Eleventh (to the extent that this includes regulator or receiver actions) Defenses; GRI's Third and Ninth (to the extent that this includes regulator or receiver actions) Defenses; RSUI's Eleventh (to the extent that this includes regulator or receiver actions), Thirteenth (to the extent that this includes regulator or receiver actions) and Fifteenth (to the extent that this includes regulator or receiver actions) Defenses; Evanston's Second, Third and Fourth (to the extent that this includes regulator or receiver actions) Defenses; Atlantic Specialty's Thirty-Third (to the extent that this includes regulator or receiver actions), Thirty-Fourth, Thirty-Sixth (to the extent that this includes regulator or receiver actions), Forty-Eighth (to the extent that this includes regulator or receiver actions), Forty-Ninth (to the extent that this includes regulator or receiver actions); and Fifty-First (to the extent that this includes regulator or receiver actions); Zurich's Fifth and Sixth (to the extent that this includes regulator or receiver actions) Defenses; Allied World's Thirteenth (to the extent that this includes

regulator or receiver actions), Thirty-Second, and Thirty-Third (to the extent that this includes regulator or receiver actions) Defenses;

b. Failure to Mitigate Damages: Milliman's Eighth Defenses; Buck's Eighth Defense; GRI's Third Defense (to the extent that this includes regulator or receiver actions); RSUI's Ninth and Fourteenth Defenses; Evanston's Twentieth Defense; Atlantic Specialty's Thirty-Fifth Defense; Zurich's Fifty-Sixth Defense; Allied World's Thirty-Second Defense;

c. Equitable Defenses: Milliman's Seventh, Ninth, and Eleventh Defenses; Buck's Seventh Defense; GRI's Fourth Defense; RSUI's Fifteenth Defense; Zurich's Fifty-Second Defense (to the extent that this includes regulator or receiver actions); and

d. Adoption of other party defenses to the extent they include regulator or Receiver fault: RSUI's Seventeenth and Eighteenth Defenses; Evanston's Forty-Eighth, Forty-Ninth and Fifty-First Defenses; Atlantic Specialty's Sixty-Third Defense; Zurich's Thirtieth and Sixty-First Defenses; and Allied World's Thirty-Fifth Defense.

Further, the Receiver seeks a judgment that neither the Commissioner nor the Receiver, nor any of their representatives, be listed on the jury verdict form for allocation of fault.

Because positive law so clearly, plainly, and forcefully prohibits the objectionable defenses, the Receiver suggest that it is well-within this Honorable Court's discretion to dismiss these defenses on a Motion to Strike. In an abundance of caution, however, the Receiver has presented these Motions in the alternative, as a Motion for Partial Summary Judgment or a Motion to Strike, so that this Honorable Court has either mechanism available to review and determine the issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via e-mail and U.S. Mail to all counsel of record as follows, this 17th day of SEPTEMBER, 2020, in Baton Rouge, Louisiana.

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