JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.	**SUIT NO. 651069, SEC. 22**
V.	**19TH JUDICIAL DISTRICT COURT**
TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS IV, WILLIAM OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC. BUCK CONSULTANTS, LLC AND TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA	**STATE OF LOUISIANA**
FILED	DEPUTY CLERK

EVANSTON INSURANCE COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING "REGULATOR FAULT" OR "RECIEVER FAULT" DEFENSES OR IN THE ALTERNATIVE, MOTION TO STRIKE DEFENSES PRECLUDED AS A MATTER OF LAW

NOW INTO COURT, through undersigned counsel, comes Defendant, Evanston Insurance Company ("Evanston"), who respectfully submits that Plaintiff's "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" ("Motion to Strike") should be denied. In support of this Opposition, Evanston submits that Plaintiff fails to show why this Honorable Court must strike Evanston's Affirmative Defenses in a summary proceeding rather than allow the completion of discovery and further development of the litigation before assessing the validity of such Affirmative Defenses. Furthermore, as shown below, none of the authority relied on by Plaintiff dictates that this Honorable Court should strike Evanston's defenses.

I. BACKGROUND

Evanston filed an Answer and Affirmative Defenses responding to Plaintiff's Second Supplemental, Amending and Restated Petition for Damages on January 3, 2018. Included in the Answer were the following Affirmative Defenses:

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.

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.

FOURTH AFFIRMATIVE DEFENSE

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

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.

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.

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.

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.

Plaintiff now seeks to strike these Affirmative Defenses based on the assertion that the Insurance Commissioner should not be allocated fault and/or be held liable in connection with this matter. For the reasons described herein, Plaintiff's allegations must fail and the motion should be denied as a matter of law.

II. RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff's Statement of Undisputed Material Facts is a recitation of certain Affirmative Defenses asserted by the various Defendants, including Evanston. Evanston does not dispute these facts to the extent that they correctly state the Affirmative Defenses as identified and listed.

III. LAW AND ARGUMENT

Plaintiff fails to provide any support under Louisiana law that requires this Honorable Court to grant his motion. Plaintiff first cites *Foster v. Monsour Med. Found.*, 667 A.2d 18 (Pa. Commw. 1995), a Pennsylvania state court opinion, to support the proposition that Evanston's Affirmative Defenses should be stricken.[1] As a Pennsylvania case, this authority has no binding effect on this Honorable Court and should not dictate a result in this instance.[2] *FIA Card Servs., N.A. v. Weaver*, 10-1372 (La. 3/15/11); 62 So. 3d 709, 714. The same is true for the various citations from other non-binding jurisdictions.[3] None of these cases cited by Plaintiff provide support for Plaintiff's assertions and therefore Plaintiff's motion should be denied.

Plaintiff next relies on *Wooley v. Lucksinger*, 09-0571 (La. 4/1/11); 61 So. 3d 507.[4] This Louisiana Supreme Court case applies Texas law rather than Louisiana law to determine whether the lower court acted properly in excluding certain defenses from jury instructions at trial. The question presented to the court was whether the trial judge had abused discretion under Texas law in its submission of jury charges. *Id.* at 605. The court held that the trial court had not erred in failing to include an Affirmative Defense as to regulator fault. *Id.* at 606. The court found that it was within the trial court's discretion not to do so and referenced the Texas statutory law in support of this decision. *Id.*

This interpretation of Texas statutory and procedural law by the Louisiana Supreme Court does not support Plaintiff's position that Evanston's Affirmative Defenses should be stricken in this summary fashion at such an early state in the litigation. The *Wooley* case is distinguishable from the instant situation. That is because the *Wooley* court applies Texas law rather than Louisiana law. Moreover, the court does not hold that a Defendant's Affirmative Defense should be stricken prior to discovery and prior to trial on the merits. The *Wooley* case merely holds that the trial judge had discretion to omit certain Affirmative Defenses from jury charges. Indeed, the case exemplifies the fact that the Affirmative Defenses in the underlying litigation were preserved until the trial. Like the *Wooley* case, here, Evanston's Affirmative Defenses should be preserved and could be handled by this Honorable Court prior to or at trial. Based on this, Plaintiff's motion should be denied.

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[1] *See* Plaintiff's Motion to Strike at p.11.
[2] *Id.*
[3] *Id.* at p. 12.
[4] *See* Plaintiff's Motion to Strike at p. 13.

Plaintiff also alleges that his position is supported by so-called "hornbook" law in 44 C.J.S. Insurance § 252 (2020).[5] The source cited by Plaintiff, however, does not include Louisiana law, but rather is a block quote from a general article omitting footnotes. Looking to the actual article cited, each of the statements in the block quote is supported by various citations to cases from the 7th circuit,[6] from New York,[7] from Pennsylvania,[8] and from Ohio.[9] Again, this article provides no binding authority to support Plaintiff's position. Moreover, it does not provide support for the position that it is proper procedurally to strike Affirmative Defenses during the early stages of litigation. Therefore, Plaintiff's motion should be denied.

Additionally, Plaintiff's reliance on Louisiana statutes related to the Insurance Commissioner's liability does not support Plaintiff's assertion that the proper procedural way to address these Affirmative Defenses is through a motion to strike or motion for partial summary judgment when discovery is ongoing and when these issues could be addressed at trial. Indeed, Plaintiff does not provide this Honorable Court with any support for that position. Plaintiff cites to La. Rev. Stat. 22:2043.1(B) and La. Rev. Stat. 22:2043.1(C) to support his position that Evanston's Affirmative Defenses must be stricken. However, these statutory provisions do not support that argument. La. Rev. Stat. 22:2043.1(B) provides that "[n]o action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver." In other words, the statute applies only to the actions or inactions of the Insurance Commissioner as regulator, not the Insurance Commissioner as receiver. This statute does not dictate that defenses may not be asserted against the receiver. Moreover, the fact that these statutes may limit the liability of the Insurance Commissioner in certain circumstances does not mean that there can be no allocation of fault attributed to the Insurance Commissioner. Plaintiff appears to conflate the concepts of liability and fault in a way that mischaracterizes the impact of these statutes under Louisiana law. These provisions do not support the argument that Evanston's Affirmative Defenses must be stricken at this stage of litigation. Based on this, Plaintiff has not met his burden of proof and Plaintiff's motion should be denied as a matter of law.

Finally, while it is Evanston's position that Plaintiff's motion should be denied and the

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[5] *See id.*
[6] *Keehn v. Excess Ins. Co. of America*, 129 F.2d 503 (C.C.A. 7th Cir. 1942).
[7] *Corocan v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 143 A.D.2d 309, 532 N.Y.S.2d 376 (1st Dep't 1988).
[8] *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 39 A.L.R. 6th 717 (Pa. Commw. Ct. 2006).
[9] *Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App. 3d 350, 2006-Ohio-2739, 855 N.E.2d 128 (10th Dist. Franklin County 2006).

above described Affirmative Defenses should stand, in the event that this Honorable Court grants Plaintiff's motion, it should be limited solely to those Affirmative Defenses listed above. Evanston intends to rely on all other Affirmative Defenses described in its responsive pleadings. Moreover, Evanston hereby reserves its right to adopt those arguments raised by other Defendants in Opposition to Plaintiff's Motion to Strike to the extent that those Defenses are not inconsistent with Evanston's position in this litigation.

IV. CONCLUSION

As shown here, Plaintiff fails to show why Evanston's above-listed Affirmative Defenses should be summarily stricken at this stage of the litigation. Plaintiff's reliance on authority from other jurisdictions has no binding on this Honorable Court and should not dictate a result. Moreover, Plaintiff provides no support in Louisiana statutory or jurisprudential law for his positions. Based on this, Evanston respectfully asks that this Honorable Court deny Plaintiff's motion.

Respectfully Submitted:

DEGAN, BLANCHARD & NASH

SIDNEY W. DEGAN, III (#4804)
SIMONE M. ALMON (#30611)
JENA W. SMITH (#25255)
400 Poydras St., Suite 2600
New Orleans, LA 70130
Telephone: 504-529-3333
Facsimile: 504-529-3337
sdegan@degan.com
salmon@degan.com
jsmith@degan.com
Attorneys for Defendant,
Evanston Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all parties of record by electronic mail or by placing same in the United States Mail, properly addressed and postage pre-paid on this 5th day of November, 2020.

SIMONE M. ALMON