

19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO.: 651,069

SECTION 22

JAMES J. DONELON, COMMISSIONER OF INSURANCE
FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF
LOUISIANA HEALTH COOPERATIVE, INC.

VERSUS

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,
MILLIMAN, INC., BUCK CONSULTANTS, LLC, AND TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA

FILED: _____

DEPUTY CLERK

**RSUI'S OPPOSITION TO 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**

RSUI Indemnity Company ("RSUI"), Defendant, submits this Opposition to the 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, filed by 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") which is set for hearing on November 20, 2020. For the reasons set forth more fully below, RSUI respectfully requests that the Court deny Plaintiff's Motion for Partial Summary Judgment or alternative Motion to Strike.

OVERVIEW

In Plaintiffs' Motion, Plaintiff asks the Court to dismiss or strike certain defense raised by the numerous defendants, including RSUI, an alleged excess insurer of Ochsner Clinic Foundation that allegedly provides certain insurance coverage to certain "D&O Defendants" of the Louisiana Health Cooperative, Inc. ("LAHC"). Specifically, Plaintiff asks this Court to issue an order that neither the Commissioner nor the Receiver be listed on the jury verdict form for an allocation of fault. As to RSUI, Plaintiff seeks to dismiss or strike the following defenses raised

in its Answer “to the extent they include regulator or receiver fault or actions” (Plaintiff does not seek any ruling or relief regarding any of RSUI’s other defenses pled in this matter):

NINTH DEFENSE

Plaintiff’s claims are barred, or alternatively reduced, by the doctrine of avoidable consequences.

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.

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.

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.

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.

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.

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.

**RESPONSE TO PLAINTIFF’S LIST OF UNDISPUTED MATERIAL FACTS AND
RSUI’S LIST OF MATERIAL FACTS GENUINELY DISPUTED**

Pursuant to Rule 9.10 of the Rules for Louisiana District Courts, RSUI responds to Plaintiff’s List of Undisputed Material Facts as follows:

Response to Undisputed Fact Number 4:¹ In identifying RSUI, Plaintiff states in parenthesis that RSUI is an “excess insurer for the D&O Defendants.” Plaintiff’s Motion does not seek any ruling regarding any alleged insurance coverage provided by RSUI nor does Plaintiff’s Motion offer any proof of any alleged insurance coverage provided by RSUI. Nevertheless, out of an abundance of caution, RSUI specifically denies that it is an insurer of the “D&O Defendants” and further denies that it provides any coverage for Plaintiff’s claim(s). Further responding, Plaintiff’s Undisputed Fact Number 4 is simply a recitation of certain defenses raised by RSUI in its Answer which RSUI admits that it raised as set forth therein.

RSUI submits the following list of fact which are genuinely disputed:

The facts supporting RSUI’s Affirmative Defenses 9, 11, 13, 14, 15, 17 and 18 set forth above (RSUI notes that discovery is in its infancy and facts supporting its defenses will be further developed during discovery).

ARGUMENT

La. Civ. Code. Art. 2323A provides the following:

In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

This aforementioned article sets forth Louisiana’s comparative fault regime which requires the fault of all parties and non-parties to be allocated regardless of their insolvency, ability to pay or immunity. See also *Floyd Keith v United States Guaranty & Fidelity Co.*, No. 96-CC-2075, 694 So.2d 180 (LA. 1997) (quantification of fault includes all parties causing or contributing to the loss regardless of any statutory immunity). RSUI’s defenses at issue are entirely consistent with Louisiana comparative fault regime.

Furthermore, the Louisiana authority relied on Plaintiff to support his contentions provides the following:

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

¹ Aside from Plaintiff’s Undisputed Fact Number 4, Plaintiff’s other Undisputed Facts are not directed at RSUI and require no response from RSUI.

C. 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. 22:2043.1. Contrary to Plaintiff's contentions, La. R.S. 22:2043.1(B) states only that "action or inaction by the insurance regulatory authorities" may not be used as a defense. La. R.S. 22:2043.1(B) only applies to "insurance regulatory authorities" and does not apply to the receiver. The fact that "insurance regulatory authorities" does not include the receiver is made crystal clear by La. R.S. 22:2013.1(C) which draws a distinction between the regulator and the receiver. Moreover, even if the receiver is immune from liability as Plaintiff contends, the fault of immune parties must still be allocated pursuant to La. Civ. Code. Art. 2323A, and Plaintiff cites to no authority that provides otherwise.

Finally, Plaintiff's Motion seeks to dismiss or strike² the foregoing defenses "to the extent they include regulator or receiver fault or actions." As is readily apparent from the defenses set forth above, these defenses are not limited to "regulator fault" or "receiver fault" but include the fault of other parties and non-parties who may be responsible for LAHC's alleged failure. Thus, even if the Court accepts Plaintiff's contentions, which are denied as set forth above, it is improper to dismiss or strike the foregoing defenses in their entirety as they are not limited to "regulator fault" or "receiver fault".

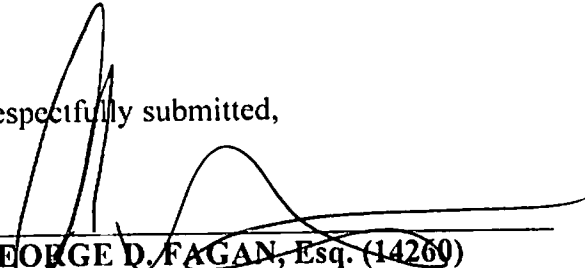
RSUI hereby adopts by reference herein the oppositions to Plaintiff's Motion for Partial Summary Judgment or Alternative Motion to Strike filed by other defendants to the extent those oppositions are consistent with RSUI's positions and defenses in this matter.

CONCLUSION

For the foregoing reasons, RSUI respectfully requests that the Court deny Plaintiff's Motion for Partial Summary Judgment or alternative Motion to Strike.

² Plaintiff's Motion to Strike is improper. "Motions to strike are disfavored and are infrequently granted. It is disfavored because striking a portion of a pleading is a drastic remedy, and because it is often sought by the movant simply as a dilatory tactic. A motion to strike is only proper if it can be shown that the allegations being challenged are so unrelated to plaintiff's claim as to be unworthy of consideration and that their presence in the pleading would be prejudicial to the moving party. 'A motion to strike is not an authorized or proper way to procure the dismissal of a complaint or cause of action.' A court must deny a motion to strike if there is any question of fact or law." *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 2001-0345 (La. App. 3 Cir. 6/20/01), 790 So. 2d 93, 98, writ denied sub nom. *Hazelwood Farms, Inc. v. Liberty Oil & Gas Corp.*, 2001-2115 (La. 7/26/01), 794 So. 2d 834 (internal citations omitted).

Respectfully submitted,



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*Attorneys for Defendant,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading has been delivered to all counsel of record, either by depositing a copy of same in the United States mail, first class postage prepaid, by hand delivery, by facsimile transmission, or by electronic mail, this November 5, 2020, at their last known address of record.