

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,
AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

FILED: _____

DEPUTY CLERK

**ZURICH AMERICAN INSURANCE COMPANY'S
MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND ALTERNATIVE MOTION TO STRIKE AFFIRMATIVE DEFENSES**

MAY IT PLEASE THE COURT:

Zurich American Insurance Company ("Zurich") submits its Opposition to Plaintiff's Motion for Partial Summary Judgment and Alternative Motion To Strike Affirmative Defenses.

Background

Zurich issued an Excess Select Insurance Policy, Policy No. MPL 0116583-01, with a policy period of 06/01/2016 to 06/01/2017 (the "Zurich Policy") to the named insured, Ochsner Clinic Foundation. Zurich's Policy is excess to \$30 million in underlying insurance, and its layer sits above the plaintiff's recent damages representation to this Court of \$27,590,421.28.¹ The plaintiff has sued Zurich via the Direct Action Statute as the purported insurer of the Nominal Defendants, who are alleged to be former directors and officers of LAHC.

Clarification of the issues before the Court regarding Zurich

The plaintiff seeks to *partially* strike six of Zurich's 62 affirmative defenses asserted in its Answer. More specifically, the plaintiff seeks to strike certain defenses that allocate fault in some manner to the Commissioner of Insurance as Regulator and in his capacity as Court Appointed

¹ See the Receiver's Reply Report Regarding the Status of Risk Corridor Payments and Monthly Status Report Regarding *Health Republic* filed on July 31, 2020. Zurich is also excess to and entitled to an additional credit of \$3 million for the Travelers policy that settled as well as a credit for any applicable SIR.

Rehabilitator (collectively the “Commissioner”). Zurich would like to clarify for the Court how the plaintiff’s motion impacts Zurich’s defenses.

FIRST: Zurich raised 62 affirmative defenses in its Answer, and the plaintiff’s motion only addresses six of them in part. More particularly, the plaintiff’s motion only seeks to strike (in part) Zurich’s affirmative defenses numbers 5, 6, 30, 52, 56, and 62, and therefore the motion has no effect with regard to Zurich’s affirmative defenses numbers 1 – 4, 7 – 29, 31 – 51, 53 – 55, and 57 - 61.

SECOND: Zurich notes that it has not asserted any affirmative defenses that specifically raise the fault of the Commissioner by name. Rather, Zurich has generally raised defenses such as comparative fault, failure to mitigate, and equitable defenses as allowed by the LA. C.C.P. without designating any specific parties. Acknowledging this, the plaintiff has moved to strike those six Zurich defenses only “to the extent they include regulator or receiver actions.” As such, in the event the Court were to grant plaintiff’s motion, then its effect would be to partially strike those six defenses only to the extent they addressed actions by the Commissioner. Otherwise any judgment should have no effect on and should reflect Zurich’s right to assert those six defenses with regard to any other party, person, or entity. Further, defense number 62 contains a number of policy defenses as well, none of which are at issue in or relevant to plaintiff’s motion.

Response to Statement of Undisputed Facts

In accordance with the Local Rules, Zurich responds to plaintiff’s List of Undisputed Essential facts as follows:

Undisputed Facts numbers 1 through 6 and 8. Zurich takes no position on whether the plaintiff has accurately recited the affirmative defenses contained in the pleadings by the other parties.

Undisputed Fact number 7: Zurich admits that plaintiff has accurately recited the affirmative defenses nos. 5, 6, 30, 52, 56 and 62 contained in its Answer. Zurich further responds that these affirmative defenses are not specific to the plaintiff and reiterates that plaintiff’s motion only addresses these six defenses “to the extent” they “include regulator or receiver action.” Accordingly, the parts of these defenses that contain policy defenses or defenses regarding any other party, entity, or person are not relevant to plaintiff’s motion.

DISCUSSION

Zurich will now address plaintiff's argument that the fault of the regulator and the fault of the receiver cannot be considered by the trier of fact.²

A. Plaintiff's Immunity Argument Is Irrelevant

The plaintiff spends most of his brief arguing that the Commissioner is immune from liability. Zurich takes no position on this. Zurich has not filed a reconventional demand against the plaintiff, and Zurich is not attempting to impose liability or seeking any recovery from the plaintiff. Louisiana law is absolute that the immunity of a party to liability has no relevance and no effect on whether the party can be allocated a percentage of fault on a verdict form.

Louisiana's comparative fault law, La. Civil Code art 2323, expressly provides that it applies to a party regardless of whether the party has immunity by statute:

A. 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...**(emphasis added).

The Louisiana Supreme Court has similarly held that a party's statutory immunity from liability has no relevance to whether a finder of fact can allocate a percentage of fault to that party. *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). As such, plaintiff's motion fails unless a statute specifically provides that art. 2323 fault cannot be allocated to the plaintiff.

B. The Receiver Is Not Exempt from art. 2323 Fault Allocation

The plaintiff cites only one statute with regard to whether a party can raise a *defense* regarding actions by the regulator or receiver:

² Plaintiff's alternative motion to strike is procedurally improper. Motions to strike are viewed with disfavor and are infrequently granted. A motion to strike is a drastic remedy and is only proper if it can be shown that the allegations being challenged are so unrelated to a plaintiff's claims as to be unworthy of any 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 a cause of action. *Hazelwood Farm Inc., v Liberty Oil and Gas Corp.*, no. 2001-0345 (La. App 3d Cir. 2001), 790 So.2d 93. A motion to strike is a means of cleaning up the pleadings of any redundant, immaterial, impertinent, or scandalous matter, not a means of eliminating causes of action or substantive allegations. *Christophe v. Washington*, 2018-0691, 2017-0512 (La.App. 1 Cir., 2/14/19), 272 So.3d 106.

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

The statute is clear. Any actions “by the insurance regulatory authorities” cannot be used as a defense “to a claim by the receiver.” The statute draws a distinction between the “regulatory authorities” and the “receiver” and does not prohibit an allocation of comparative fault against the receiver, but rather only against the regulator. The plaintiff himself has previously argued that the regulator and the receiver were two separate entities:

Defendants refuse to accept the “legal separate capacity doctrine” which treats the Commissioner as regulator as a separate and distinct legal entity from the Commissioner as receiver. (Plaintiff’s Memorandum in Opposition to Motion to Compel at p. 2).

The statute is clear on its face. Only the regulator is exempt from an allocation of fault. The receiver, who is referenced in that same statute, is not exempt from an allocation of fault on the verdict form. Comparative fault may be allocated against the receiver.³

Conclusion

1. Plaintiff’s Motion has no application to Zurich’s affirmative defenses numbers 1 – 4, 7 – 29, 31 – 51, 53 – 55, and 57 - 61.
2. Plaintiff’s Motion only addresses Zurich’s affirmative defenses numbers 5, 6, 30, 52, 56, and 62, and only to the extent those defenses include regulator or receiver activity. The portions of those six defenses that address other parties, persons, or entities, or which contain policy defenses are not at issue in plaintiff’s motion.
3. La. Civil Code art 2323 applies to all persons regardless of whether a person has immunity by statute.
4. La. Rev. Stat. 22:2043.1(B) only exempts the regulator’s actions from defenses, not the receiver’s actions. Any judgment in favor of plaintiff should only apply to the portions of Zurich’s six affirmative defenses at issue that could include actions by the regulators.

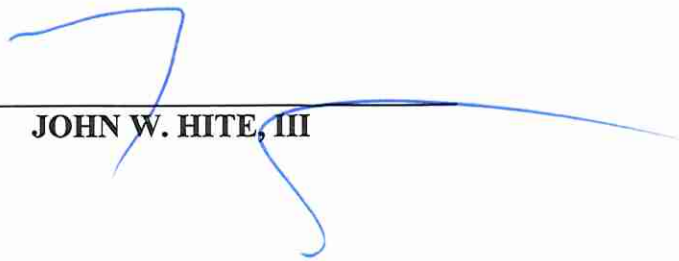
³ In accordance with La. C.C.P. art. 853, Zurich adopts by reference the opposition memoranda of any other defendant with regard to Zurich’s affirmative defenses of comparative fault, failure to mitigate, and equitable defenses, nos. 5, 6, 30, 52, 56 and 62, to the extent applicable and not inconsistent with Zurich’s argument herein and not inconsistent with Zurich’s Answer.

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BY: 
JOHN W. HITE III
ATTORNEYS FOR DEFENDANT,
ZURICH AMERICAN INSURANCE
COMPANY

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 5th day of November, 2020, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by depositing it in the United States mail, properly addressed, via email and/or first class postage prepaid, by hand delivery or by facsimile.



JOHN W. HITE, III