

JAMES J. DONELON, COMMISSIONER	:	SUIT NO.: 651,069 SECTION: 22 OF
INSURANCE FOR THE STATE OF	:	
LOUISIANA, IN HIS CAPACITY AS	:	
REHABILITATOR OF LOUISIANA	:	
HEALTH COOPERATIVE, INC.	:	
versus	:	19 <sup>TH</sup> JUDICIAL DISTRICT COURT
	:	
TERRY S. SHILLING, GEORGE G.	:	
CROMER, WARNER L. THOMAS, IV,	:	
WILLIAM A. OLIVER, CHARLES D.	:	
CALVI, PATRICK C. POWERS, CGI	:	PARISH OF EAST BATON ROUGE
TECHNOLOGIES AND SOLUTIONS,	:	
INC., GROUP RESOURCES	:	
INCORPORATED, BEAM PARTNERS,	:	
LLC, AND TRAVELERS CASUALTY	:	
AND SURETY COMPANY OF	:	
AMERICA	:	STATE OF LOUISIANA

**ORDER**

A hearing, conducted via Zoom, at 10:00 a.m. on November 20, 2020, was held to consider 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”). Participating in this Zoom hearing were:

J. Cullens and Andrée Cullens for Plaintiff, the Receiver LAHC (“Plaintiff” or “Receiver”)

Michael McKay for Defendant, Group Resources, Inc. (“GRI”)

James Brown, Sheri Corales, and David Godofsky for Defendant, Buck Global, LLC (“Buck”)

Harry Rosenberg, Justin Kattan, and Justine Margolis for Defendant, Milliman, Inc. (“Milliman”)

Rob Bieck for the Nominal Defendants, Warner Thomas, *et al.*

Michael Balascio for Defendant, Allied World Specialty Insurance Company

Adam Whitworth for Defendant, RSUI Indemnity Company

Nicole Babb for Defendant, Atlantic Specialty Insurance Company

Simone Almon, Jena W. Smith for Defendant, Evanston Insurance Company

John Hite for Defendant, Zurich Insurance Company

Considering the briefs filed by the parties, all exhibits attached to the pleadings which were admitted into evidence and not specifically excluded by this Order, and memoranda filed by the parties and filed into the record, applicable law, and the argument of counsel:

**IT IS HEREBY ORDERED** that Exhibit B, the Affidavit of David R. Godofsky, attached to the Opposition Memorandum filed by Buck and offered into evidence at the hearing, is held to be inadmissible evidence and was not considered by this Court in ruling upon Plaintiff's Motion;

**IT IS FURTHER ORDERED** that, as requested by Plaintiff, Plaintiff is hereby allowed to withdraw its motion to the extent that it prayed for the dismissal or striking of "Receiver Fault" defenses pleading conduct of the Receiver and/or Commissioner in his capacity as Rehabilitator; Plaintiff's withdrawal of this portion of its motion is without prejudice to Plaintiff's right to seek such relief at a later time.

**IT IS FURTHER ORDERED** that Plaintiff's Motion For Partial Summary Judgment, to the extent directed to "Regulator Fault" Defenses, is **GRANTED**; specifically, the Court finds that La. R.S. 22:2043.1(B) does not allow defendants to plead the defense of "Regulator Fault" and there are no genuine issues of material fact bearing upon the application of La. R.S. 22:2043.1(B), which provides that "no action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver."

**IT IS FURTHER ORDERED** that Plaintiff's Motion to Strike, to the extent directed to "Regulator Fault," is **GRANTED**, as, pursuant to La. R.S. 22:2043.1(B), defenses pleading actions or inactions of insurance regulatory authorities are insufficient as a matter of law and should be stricken pursuant to La. C. C. P. art. 964.

**IT IS THEREFORE ORDERED** that:

a. The following Defendants' affirmative defenses be wholly stricken from their answers:

1. **MILLIMAN'S 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.
2. **MILLIMAN'S 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.
3. **MILLIMAN'S TENTH DEFENSE:** Plaintiff's claims are barred by the filed rate doctrine.
4. **BUCK'S 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.

b. some of the following defenses be modified as follows to exclude, and all of the following defenses be qualified to be inapplicable to, the acts of the Louisiana Department of Insurance or the Commissioner of Insurance in their capacity as regulator, and as modified, these affirmative defenses shall read as follows:

1. MILLIMAN'S 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 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.
2. MILLIMAN'S 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 Receiver, LAHC, the federal government, third parties, other defendant(s) and/or each such person or entity's respective employees or agents.
3. BUCK'S 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 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.
4. BUCK'S SIXTH DEFENSE: Plaintiff's damages, if any, were caused by regulatory misconduct and negligence of the Receiver, and their employees and agents.
5. BUCK'S EIGHTH DEFENSE: Plaintiff has failed to mitigate the damages that were incurred, if any. Furthermore, the Receiver, and their employees, agents, and contractors, committed acts of negligence and misconduct in the conservation, rehabilitation, and liquidation of LAHC, and other acts and omissions that may be discovered and presented at trial.
6. BUCK'S ELEVENTH DEFENSE: Plaintiff's damages, if any, were not caused by Buck.
7. GRI'S 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.
8. GRI'S FOURTH AFFIRMATIVE DEFENSE: The claims asserted are barred by laches, waiver, unclean hands, ratification, and any applicable period of prescription.
9. GRI'S 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.
10. RSUI'S NINTH DEFENSE: Plaintiff's claims are barred, or alternatively reduced, by the doctrine of avoidable consequences.
11. RSUI'S 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.

12. RSUI'S 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.
13. RSUI'S 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.
14. RSUI'S 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.
15. RSUI'S 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.
16. EVANSTON'S 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.
17. EVANSTON'S FOURTH AFFIRMATIVE DEFENSE: Plaintiff's claims are barred, in whole or in part, by the doctrine of intervening and/or superseding cause.
18. EVANSTON'S 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.
19. EVANSTON'S 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.
20. EVANSTON'S 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.
21. ATLANTIC SPECIALTY'S 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.
22. ATLANTIC SPECIALTY'S Thirty-Fourth Defense: Plaintiff's claims may be barred or limited by its own comparative fault.
23. ATLANTIC SPECIALTY'S 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.
24. ATLANTIC SPECIALTY'S 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.
25. ATLANTIC SPECIALTY'S Forty-Ninth Defense: Atlantic Specialty pleads superseding and/or intervening causes as a defense and a bar to recovery.
26. ATLANTIC SPECIALTY'S 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.
27. ATLANTIC SPECIALTY'S 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.

28. ATLANTIC SPECIALTY'S 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.
29. ZURICH'S FIFTH DEFENSE: In the alternative, Zurich pleads the affirmative defense of comparative fault, assumption of the risk, and/or contributory negligence.
30. ZURICH'S 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.
31. ZURICH'S 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.
32. ZURICH'S 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.
33. ZURICH'S 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.
34. ZURICH'S 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.
35. ALLIED WORLD'S 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.
36. ALLIED WORLD'S 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.

37. ALLIED WORLD'S 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.

**IT IS FURTHER ORDERED** that Defendants, with the exception of the Nominal Defendants, shall bear the costs associated with Plaintiff's Motion.

**SO ORDERED** this \_\_\_\_ day of \_\_\_\_\_, 202\_\_, at Baton Rouge, Louisiana.

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**HONORABLE JUDGE TIMOTHY KELLEY**

*Donelon v. Shilling, et al.*, No. 651,069  
Sec. 22, 19<sup>th</sup> JDC of Louisiana

Respectfully submitted,



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**RULE 9.5(b) CERTIFICATE**

I hereby certify that I first circulated a proposed ORDER to counsel for all parties by email on November 24, 2020, and that after numerous edits and revisions suggested by defense counsel were made, all counsel agreed to the form of this proposed ORDER prior to filing this date.

Certified this 29<sup>th</sup> day of December, 2020.



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J. E. Cullens, Jr.

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been furnished via e-mail to all counsel of record as follows, this 29<sup>th</sup> day of December, 2020, in Baton Rouge, Louisiana.

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