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

PLAINTIFF'S OPPOSITION TO DEFENDANT BEAM PARTNERS' EXCEPTION OF PREMATURITY OR, ALTERNATIVELY, MOTION TO STAY PROCEEDINGS

MAY IT PLEASE THE COURT:

Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"), through his duly appointed Receiver, Billy Bostick ("Plaintiff" or the "Commissioner"), through undersigned counsel, respectfully files this opposition memorandum to the Exception of Prematurity or, Alternatively, Motion to Stay Proceedings (the "Exception") filed by defendant, Beam Partners, LLC ("Beam Partners").

In short, Beam Partners claims that this Honorable Court lacks subject matter jurisdiction over it because of an arbitration clause found in a contract between LAHC and Beam Partners. Beam Partners' Exception should be DENIED because: (1) Beam Partners erroneously minimizes the comprehensive and exclusive scope of the Louisiana Insurance Code regarding receivership litigation; (2) Louisiana law mandates that the Nineteenth Judicial District Court has "exclusive jurisdiction" over the Commissioner's takeover of a failed HMO like LAHC; (3) forcing the Commissioner to arbitrate this dispute would violate the applicable Rehabilitation Order regarding LAHC; (4) Beam Partners ignores that the Commissioner is not a signatory to the contract that contains the subject arbitration clause; (5) Beam Partners fails to cite, much less discuss or distinguish, the *Taylor* case decided by the Ohio Supreme Court in 2011, a case which is directly on-point both factually and legally; (6) it is inaccurate to argue, as Beam Partners does, that the Commissioner simply stands in the shoes of a failed insurance company like LAHC; Louisiana law affords the Commissioner broad powers to protect the interests of the public, the policy

holders, and the failed company's creditors—not just LAHC; and (7) the Commissioner's claims against Beam Partners do not arise from the subject engagement letter. Each of these reasons is addressed in turn.[1]

OVERVIEW

This lawsuit arises out of the creation and failure of LAHC, a Consumer Operated and Oriented Plan ("CO-OP") program established by the Patient Protection and Affordable Care Act ("ACA"), as a result of the gross negligence of numerous individuals and entities, including Beam Partners. Incorporated in 2011, LAHC eventually applied for and received loans from the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS") totaling more than $65 million. Pursuant to the ACA, these loans were to be awarded only to entities that demonstrated a high probability of becoming financially viable. All CO-OP loans must be repaid with interest. LAHC's Start-up Loan must be repaid no later than five (5) years from disbursement; and LAHC's Solvency Loan must be repaid no later than fifteen (15) years from disbursement.[2]

As succinctly summarized and plead by the Commissioner in his First Supplemental, Amending and Restated Petition for Damages ("Amended Petition"), LAHC failed miserably due to the gross negligence of the Defendants, including Beam Partners. By July 2015, only eighteen months after it started issuing policies, LAHC decided to stop doing business. Because of Defendants' gross negligence, as of December 31, 2015, LAHC had lost more than $82 million. The LDOI placed LAHC in rehabilitation in September 2015, and a Receiver, Billy Bostick, was appointed by this Court to take control of the failed Louisiana CO-OP.

Beam Partners developed and managed LAHC from 2011, prior to LAHC's incorporation, through approximately mid-2014. See Exhibit "A," Amended Petition, ¶12. LAHC and Beam Partners entered into a Management and Development Agreement (the "Agreement"), whereby Beam Partners was to perform certain management, administrative, and developmental services for LAHC. ¶57. From approximately September 2012 through May 2014, LAHC paid more than $3.7 million in the form of consulting fees, performance fees, and expenses to Beam Partners. *Id.* at ¶56. During this timeframe, many of the individuals involved with Beam Partners were

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[1] Please note that, given the similarities of the legal arguments raised by defendants in their exceptions, a substantial part of plaintiff's opposition memorandum to Beam Partners' exception is substantially identical to plaintiff's opposition memorandum to Milliman's exception; specifically, pp. 3 to 6 (through 2nd full paragraph) and pp. 7 (from 3rd full paragraph) to 12 (until Sec. 2).

[2] According to the 2012 Loan Agreement with LAHC, the Louisiana CO-OP was awarded a Start-up Loan of $12,426,560, and a Solvency Loan of $52,614,100.

simultaneously involved with LAHC. *Id.* at ¶55. For example, when Terry Shilling signed the Agreement on behalf of Beam Partners, he was both the Interim CEO of LAHC and a member and owner of Beam Partners. *Id.* at ¶57.

Unfortunately, Beam Partners was not qualified to render the services that LAHC needed to be successful. Ex. "A", ¶54. Beam Partners' numerous failures to perform its obligations to LAHC constitute gross negligence, if not a conscious disregard for the best interests of LAHC, its members, providers, and creditors. See generally Ex. "A", ¶¶59—73. For example, Beam Partners failed to: retain qualified third party contractors for LAHC, including co-defendants CGI and GRI; develop a network of providers; recruit and train LAHC directors; disclose conflicts of interest to any regulatory authority; provide adequately trained personnel with sufficient knowledge to process and pay health insurance claims. *Id.* Beam Partners breached its duty to LAHC perform its obligations in a reasonable, competent, and professional manner. *Id.* at ¶¶68, 70.

In its exception, Beam Partners seeks to compel arbitration of the Commissioner's claims based upon the arbitration provision in the Agreement between LAHC and Beam Partners. However, this provision is not enforceable against the Commissioner, a nonsignatory to the Agreement charged with protecting not only LAHC, but also its policyholders, members, creditors, and the public.

LAW AND ARGUMENT

I. As rehabilitator, the Commissioner is vested with broad, exclusive powers and duties for the benefit of policyholders, creditors, and the public.

First, as an evidentiary matter, plaintiff objects to Exhibit B attached to Beam Partners' exception, the "Affidavit of Terry S. Shilling," as it is in a form that is not allowed or contemplated by the Louisiana Code of Civil Procedure or the Louisiana Code of Evidence. Although affidavits may be used to support or oppose a motion for summary judgment, they may not be used to support an exception of prematurity and/or a motion to stay proceedings if objected to by the opposing party. Plaintiff hereby formally objects to this improper affidavit and moves to strike the same; Your Honor should not consider or rely upon this affidavit in any way. Furthermore, plaintiff has not been afforded an opportunity to cross examine Mr. Shilling, a named defendant, regarding the veracity of his statements; therefore, for this additional reason, plaintiff respectfully suggests and requests that Exhibit B to Beam Partners' exception not be admitted into evidence at the May 30th hearing of this matter.

A. The Rehabilitation, Liquidation, Conservation Act: Louisiana's comprehensive and exclusive statutory scheme governing insurance insolvency.

The Louisiana Insurance Code, LA. R.S. 22:2, provides that insurance is a business "affected with the public interest," and this section, pursuant to the authority of La. Const. art. IV, § 11,[3] creates and provides for a Commissioner of Insurance charged with the duty of administering the Insurance Code of this state. LA. R.S. 22:2. As part of the statutory scheme which governs the Commissioner's duties, the legislature has enacted specific provisions for the administration of insurance insolvencies, as set forth in La. R.S. 22:2001 *et seq.* of the Louisiana Insurance Code, entitled "Rehabilitation, Liquidation, Conservation" (hereafter referred to as the "RLC Act").[4] This statutory scheme for the rehabilitation and/or 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, 941–42 (citing *LeBlanc v. Bernard,* 554 So.2d 1378, 1383 (La.App. 1st Cir.1989), *writ denied,* 559 So.2d 1357 (La.1990)) (emphasis added).

Given the significance of the RLC Act and its impact on the outcome of this case, a brief overview of the Act is warranted. Under the RLC Act, if a domestic insurer is potentially insolvent and "the interests of creditors, policyholders, or the public will probably be endangered by delay," the court shall issue, without a hearing, an order directing the Commissioner to take control of the insurer and prohibit it from disposing of property or transacting business without the Commissioner's concurrence. La. R.S. 22:2036.

Following a hearing and with the court's permission, the RLC Act grants the Commissioner the power to rehabilitate or liquidate a domestic insurer in various circumstances, such as when the insurer: has obligations or claims exceeding its assets, cannot pay its contracts in full, or is otherwise found by the Commissioner to be insolvent; or is found to be in such condition that its further transaction of business would be hazardous to its policyholders, its creditors, or the public. La. R.S. 22:2005(1), (5).

The Commissioner "shall immediately proceed to conduct the business of the insurer and take such steps towards removal of the causes and conditions which have made such proceedings

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[3] La. Const. Ann. art. IV, § 11 provides: "There shall be a Department of Insurance, headed by the commissioner of insurance. The department shall exercise such functions and the commissioner shall have powers and perform duties authorized by this constitution or provided by law."

[4] Acts 2008, No. 415, § 1 amended and reenacted Title 22 of the Louisiana Revised Statutes of 1950, the Louisiana Insurance Code, and directed the Louisiana State Law Institute to redesignate the provisions of Title 22, formerly comprised of La. R.S. 22:1 to 22:3311, into a new format and numbering scheme comprised of La. R.S. 22:1 to 22:2371, without changing the substance of the provisions.

necessary as may be expedient." La. R.S. 22:2009(A). Revised Statute 22:2009 contains a nonexclusive list of the powers given to the Commissioner to accomplish these tasks. Among other things, he may "enter into such agreements or contracts as necessary to carry out the full or partial plan for rehabilitation or the order to liquidate and to affirm or disavow any contracts to which the insurer is a party." LA. R.S. 22:2009(E)(4).

By law, once the court enters an order finding that sufficient cause exists for rehabilitation or liquidation, the Commissioner takes possession of the property, business, and affairs of the insurer. La. R.S. 22:2008(A). At that point, the Commissioner is vested by operation of law with the title to all property, contracts, and rights of action of the insurer. *Id.* As rehabilitator, the Commissioner is the proper party to sue to enforce any right of a domestic insurer in rehabilitation. La. C.C.P. art. 693.

B. The Nineteenth Judicial District Court has exclusive jurisdiction.

Regarding venue, the RLC Act provides, in pertinent part: "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." La. R.S. 22:2004.

Beam Partners argues, "there is no statutory requirement that any suits filed by the Healthcare CO-OP against a non-insurer must be adjudicated in state court in contravention of an arbitration agreement between the parties." *See* Beam Partners' Exception memorandum, p. 8. However, this argument misses the mark in several respects. As discussed in detail in Section II below, the "Healthcare CO-OP", or LAHC, is not the plaintiff in this suit—the Commissioner is. Further, LAHC was operated as a Health Maintenance Organization ("HMO") and was regulated by the Louisiana Department of Insurance as such. The Health Maintenance Organization Act, La. R.S. 22:241 *et seq.*, which is the statutory scheme for regulating HMOs in Louisiana, includes a more specific venue provision applicable when the Commissioner takes over and liquidates an HMO like LAHC:

> F. The commissioner is specifically empowered to take over and liquidate the affairs of any health maintenance organization experiencing financial difficulty at such time as he deems it necessary by applying to the Nineteenth Judicial District Court for permission to take over and fix the conditions thereof. **The Nineteenth Judicial District Court shall have exclusive jurisdiction over any suit arising from such takeover and liquidation.** The commissioner shall be authorized to issue appropriate regulations to implement an orderly procedure to wind up the affairs of any financially troubled health maintenance organization.

La. R.S. 22:257(F) (emphasis added).[5] The Commissioner's suit against Beam Partners arises from the takeover of an HMO because the Commissioner's right of action against Beam Partners arises from LAHC's rehabilitation proceedings. The fact that Beam Partners is a "non-insurer" has no bearing on the HMO venue provision. Thus, the Nineteenth JDC has exclusive jurisdiction under the applicable venue statutes.

To facilitate jurisdiction in one venue, LA. R.S. 22:2006 also allows for the court to issue injunctions or other such orders to prevent any person or entity from obtaining judgments against an insurer or its property and assets while in the possession and control of the Commissioner.[6] In other words, just as Beam Partners would be enjoined from filing suit against LAHC in another venue after LAHC was placed into Receivership, Beam Partners would be enjoined from obtaining an arbitration award against the Commissioner.

C. LAHC's Rehabilitation Order is consistent with the RLC Act and in furtherance of its purposes.

The hearing regarding LAHC's rehabilitation was held on September 21, 2015, before Judge Donald Johnson of the 19th Judicial District Court, and resulted in a Permanent Order of Rehabilitation and Injunctive Relief (the "Rehabilitation Order"). Ex. "B". The Rehabilitation Order is consistent with the Commissioner's duties under the RLC Act, which includes the protection of policyholders, creditors, and claimants, as well as the public. *See, e.g., LeBlanc*, 554 So.2d at 1381, 1383-84 (describing the special statutory scheme governing liquidation and rehabilitation of insurance companies as "comprehensive and exclusive" in scope and, further, finding "[t]he scheme represents the legislative will in balancing the interests of policyholders, creditors, and claimants").

Specifically, the rehabilitation Court found the requirements for LAHC's rehabilitation had been met, and "that the interests of creditors, policyholders, members, subscribers, enrollees, and the public will probably be endangered by delay." Ex. "B", p. 1. As such, LAHC was placed into rehabilitation under the direction and control of the Commissioner. *Id.* The Rehabilitation Order provides that the Commissioner is "permanently vested by operation of law with the title to all property, business, affairs, accounts...and other assets of LAHC, and is ordered to direct the rehabilitation of LAHC." *Id.* at p 2. The Commissioner was directed to take possession and control of the property, business, affairs, and other assets of LAHC, including all real property and the

[5] La. R.S. 22:257 governs the Commissioner's suspension or revocation of a certificate of authority issued to a HMO.
[6] See p.3 of Exhibit B, Rehabilitation Order; see also, fn. 11, *infra.*

premises occupied by LAHC for its business, and to "conduct all of the business and affairs of LAHC, or so much thereof as he may deem appropriate, manage the affairs of LAHC, and to rehabilitate same, until further order of this Court." *Id.*

Pursuant to the Rehabilitation Order, the Commissioner "is entitled to permit such further operation of LAHC as he may deem necessary to be in the best interests of the policyholders, subscribers, members, and enrollees, and creditors of LAHC and the orderly rehabilitation of LAHC." Ex. "B", p. 3.[7] He has "the right to enforce or cancel, for the benefit of the policyholders, subscribers, members, enrollees of LAHC, and LAHC, contract performance by any party who had contracted with LAHC." *Id.* at p. 3.

The Rehabilitation Order also authorizes the Commissioner to, among other things, "[c]ommence and maintain all legal actions necessary, wherever necessary, for the proper administration of this rehabilitation proceeding." Ex. "B", p. 4. In contrast, the Order permanently enjoins all persons and entities from obtaining preferences, judgments, attachments or other like liens or the making of any levy against LAHC, its property and assets while in the Commissioner's possession and control. *Id.* at p. 3.

II. The Commissioner is not bound by the arbitration clause.

A. No valid agreement to arbitrate exists between Beam Partners and the Commissioner. The Commissioner is not a signatory to the agreement between LAHC and Beam Partners, and LAHC and the Commissioner are not interchangeable parties.

In ruling on an exception seeking to compel arbitration, the threshold inquiry the Court must decide is whether the parties agreed to arbitrate their dispute. *Lemoine Co., LLC v. Durr Heavy Constr., LLC*, 2015-1997 (La. App. 1 Cir. 10/31/16), 206 So.3d 244, 246–47, *writ denied sub nom. The Lemoine Co., LLC v. Durr Heavy Constr., LLC*, 2016-2100 (La. 1/13/17). This inquiry is two-fold: first, the court must determine whether there is a valid arbitration agreement; and, second, if so, whether the dispute in question falls within the scope of that agreement. *Id.* (citing *Collins v. Prudential Ins. Co. of America*, 99–1423 (La. 1/19/00), 752 So.2d 825, 831).

Beam Partners correctly identifies this two-part test in its exception, but its argument improperly confuses the parties to the Agreement with the parties to this litigation. For example,

[7]If the Commissioner finds further rehabilitation efforts would be futile and result in loss to the creditors, policyholders, stockholders or any other persons interested, he may file for an order directing the liquidation of the insurer. La. R.S. 22:2009(C). Likewise, if the Commissioner finds the causes and conditions which made the rehabilitation proceeding necessary have been removed, he may petition for an order terminating the Commissioner's conduct of the insurer's business and for a full discharge or all liability and responsibility of the Commissioner. La. R.S. 22:2009(D).

Beam Partners argues that "there is a valid contract between the parties which serves as the basis for the claims against Beam" and "[i]t is unequivocal that the parties signed the Contract and agreed to its terms." *See* Beam Partners' exception memorandum, p. 5. But the parties to the Agreement (i.e., LAHC and Beam Partners) are not the same parties to this litigation (the Commissioner and Beam Partners).

Later in its memorandum, Beam Partners refers to "the Healthcare CO-OP" (LAHC) as the party asserting allegations in the Amended Petition. *See* Beam Partners' exception memorandum, p. 7. Beam Partners also argues "the Healthcare CO-OP will not be able to [show its claims fall outside the arbitration clause] because but for the obligations created in the Contract, the Healthcare CO-OP would have no basis to assert any claims against Beam." *Id.* at p. 8. Yet again, Beam Partners is confusing the parties to the lawsuit with the parties to the lawsuit—LAHC is not asserting any claims against Beam, the Commissioner is.

The Commissioner has not signed and is not a party to any written agreement with Beam Partners, much less one containing an arbitration provision. LAHC and the Commissioner are not interchangeable, despite Beam Partners' efforts to treat them as such.

Arbitration is a matter of contract, and a party cannot be compelled to submit a dispute to arbitration if he has not agreed to do so. *Chase Bank USA, N.A. v. Leggio*, 43,751 (La. App. 2 Cir. 12/3/08), 999 So.2d 155, 158 (citing *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)); *see also Lemoine*, 206 So.2d at 247. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Horseshoe Entm't v. Lepinski*, 40,753 (La. App. 2 Cir. 3/8/06), 923 So. 2d 929, 934, *writ denied*, 2006-0792 (La. 6/2/06), 929 So.2d 1259 (citing *AT & T Technologies, Inc.*, 475 U.S. 643).[8] Although law and

[8] The Federal Arbitration Act ("FAA") preempts state law, including the Louisiana Binding Arbitration Law ("LBAL"), in cases involving transactions which affect interstate commerce. However, the McCarran-Ferguson Act commits the regulation of insurance to state law by providing that any state law enacted for the purpose of regulating insurance will trump, or "reverse preempt," any contrary federal law that does not relate specifically to insurance. Regardless, it is not necessary to decide whether interstate commerce is affected by this transaction—and, if so, whether the McCarran-Ferguson Act applies—because under either the FAA or LBAL, the result in this case is unchanged for several reasons.

First, Louisiana courts have repeatedly held that "the [LBAL] is virtually identical to the [FAA]" and often look to federal jurisprudence under the FAA for guidance in construing the LBAL. *See, e.g., Whitlock Family Charitable Remainder Unitrust v. Merrill Lynch, Pierce, Fenner & Smith,* 2008-0560 (La. App. 1 Cir. 9/23/08). The FAA directs courts to place arbitration agreements on equal footing with other contracts, but, like the LBAL, "it 'does not require parties to arbitrate when they have not agreed to do so.'" *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293, 122 S. Ct. 754, 764, 151 L. Ed. 2d 755 (2002) (internal quotations omitted).

In addition, even in cases where the FAA preempts state law, general state contract principles still apply to assess whether agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law. *Aguillard v. Auction Management Corp.*, 04–2804, 04–2857 (La.6/29/05), 908 So.2d 1, 8-9; *Chase Bank USA, N.A.*, 999 So.2d at 158–59; *see also* 9 U.S.C. § 2 (FAA savings clause).

policy both favor arbitration, neither can supply an agreement to arbitrate where there is none. *Johnson v. Blue Haven Pools of Louisiana, Inc.*, 2005-0197 (La. App. 1 Cir. 2/10/06), 928 So.2d 594, 598 (internal citation omitted).

Beam Partners simply concludes that the arbitration clause is enforceable against the Commissioner because, as Rehabilitator, he is vested with the title to all property and contracts of LAHC. *See* Beam Partners' Exception memorandum, pp. 6-7 (citing La. R.S. 22:2008(A)). But this does not mean the Commissioner somehow becomes the signatory to a contract that pre-dates the Rehabilitation Order. Since the Commissioner is a nonsignatory, neither the general policy in favor of arbitration, nor the scope of the specific arbitration provision in the LAHC-Beam Agreement, come into play.

A review of Louisiana jurisprudence indicates that neither the Louisiana Supreme Court nor the appellate courts have addressed the precise question before this Honorable Court, i.e., whether the Commissioner is bound by an agreement to arbitrate that was previously executed by a now-insolvent insurer. However, the First Circuit has specifically stated that the Commissioner, in his capacity as rehabilitator, does not simply "stand in the shoes" of the insurer, but that his responsibilities include protection of the general public and the policyholders and creditors as well as the insurer itself. *LeBlanc*, 554 So.2d at 1381.

Further, in a well-reasoned opinion that is directly on point, both factually and legally, the Ohio Supreme Court rejected similar arguments by a defendant and concluded that an arbitration agreement executed by an insurer is not subsequently enforceable against an insurance commissioner. *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203 (Ohio 10/18/11). In *Taylor*, Ernst & Young ("E&Y") provided auditing services to American Chambers Life Insurance Company ("ACLIC") pursuant to an engagement letter signed by E&Y and ACLIC that contained an arbitration clause. Subsequently, ACLIC was placed in rehabilitation and, ultimately, a liquidation order was entered. The superintendent of insurance, in her capacity as liquidator, sued E&Y in state court asserting malpractice claims.[9] Like Beam, E&Y responded to the liquidator's suit by moving to compel arbitration based on the clause in the engagement letter. The trial court denied the motion, and both the appellate court and the Ohio Supreme Court affirmed. *Id.* at 1207, 1218.

[9] Generally, the superintendent alleged that E&Y negligently failed to conduct its audit of ACLIC's Annual Statement, thus breaching the duties owed and allowing ACLIC's financial condition to go undetected and, consequently, allowing it to continue transacting business, causing harm to ACLIC, its policyholders and creditors, and the public.

In its analysis, the Ohio Supreme Court first addressed its state's Insurers Supervision, Rehabilitation, and Liquidation Act ("Ohio Act"). Comparable to the Louisiana RLC Act discussed above, the *Taylor* court noted the Ohio Act "confer[s] upon the Superintendent and a trial court broad discretionary and equitable powers relating to the supervision, rehabilitation and liquidation of insurance companies." 958 N.E.2d at 1207-08 (internal citations omitted). Further, the Ohio Act empowers the superintendent of insurance "to protect the rights of insureds, policyholders, creditors, and the public generally." *Id.* at 1208 (internal citations omitted).[10]

Regarding venue, the *Taylor* court noted that the general rule is that all liquidation actions be brought in Franklin county, and that the liquidation court has jurisdiction over preference claims. *Id.* at 1209 (internal citations omitted). However, the liquidator has authority to select a forum other than the liquidation court to: collect debts of the insolvent insurer in other jurisdictions; prosecute and commence suits and other legal proceedings in Ohio or elsewhere; or put the question of a security's value to arbitration. *Id.* (internal citations omitted). In contrast, creditors are limited to filing suit in the liquidation court only. *Id.* (internal citations omitted). Consequently, the *Taylor* court determined that, "when allowed, forum selection belongs to the liquidator and the liquidator alone." *Id.*

In Louisiana, the default rule is that actions brought by the Commissioner as rehabilitator or liquidator be brought in the Nineteenth Judicial District Court, and suits arising from the takeover and liquidation of any HMO, such as LAHC, are expressly restricted to the Nineteenth Judicial District Court. La. R.S. 22:2004(A); 22:257(F). Actions pertaining to voidable preferences and liens are also determined by the Nineteenth Judicial District Court. La. R.S. 22:2023(G). In addition, Louisiana law empowers the court, upon entering an order of rehabilitation, to issue injunctions and other such orders as may be necessary to prevent interference with the rehabilitation proceedings or the Commissioner's possession and control of the assets, business and affairs of the insolvent insurer, and to prevent the obtaining of preferences or judgments against the insurer or its assets while in the possession and control of the Commissioner. LA. R.S.

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[10] Like the analogous Louisiana Act, the Ohio Act "grants the superintendent three levels of oversight of the insurance industry apart from her usual regulatory powers." *Taylor*, 958 N.E.2d at 1208. As delineated by the *Taylor* court:

> First, [Ohio] R.C. 3903.09 confers on the superintendent power to identify and supervise a potentially troubled insurer by requiring it to get her permission before engaging in certain business transactions, such as disposing of assets or investing funds. Second, R.C. 3903.12 grants the superintendent the power, with the court's permission, to attempt to rehabilitate an insurer in such a poor financial condition that its further transaction of business would be financially hazardous to its policyholders, creditors, or the public. Third, R.C. 3903.16(A) and 3903.17 grant the superintendent the power, with the court's permission, to liquidate an insurer if, for example, it is insolvent.
> *Id.*

22:2006.[11] Like the Ohio superintendent, the Commissioner is authorized by the Rehabilitation Order to "[c]ommence and maintain all legal actions necessary, wherever necessary, for the proper administration of this rehabilitation proceeding." Ex. "B", p. 4. In other words, Louisiana is like Ohio—to the extent forum selection is allowed, it is to be exercised exclusively by the Commissioner.

Next, the *Taylor* court addressed the Ohio Arbitration Act ("OAA"), which, like the Louisiana Arbitration Act, generally tracks the FAA and expresses Ohio's strong public policy favoring arbitration. *Taylor*, 958 N.E.2d at 1209-1210. As is the case under Louisiana and federal law, the Ohio policy favoring arbitration does not eliminate the question of whether the parties actually agreed to arbitrate. *Id.* at 1210.

Against this legal backdrop, the Ohio Supreme Court held the superintendent's claims were not subject to arbitration based on the agreement previously entered into by the insurer. *Id.* at 1217. The *Taylor* court's decision centered on two primary findings: 1) the superintendent does not stand in the insolvent insurer's shoes; and 2) the superintendent's claims do not arise from the engagement letter between E&Y and ACLIC.[12] Each of these is discussed in turn in the following subsections, and applied to the Commissioner's claims against the defendants in his capacity as Rehabilitator. As discussed below, Louisiana law supports the same result reached in *Taylor*.

1. The Commissioner does not stand precisely in the shoes of the insolvent insurer because he acts as an officer of the state.

In *Taylor*, the Ohio Supreme Court concluded the characteristics of the superintendent's public-protection role confirm that she does not stand in the shoes as a mere successor in interest of the insolvent insurer. *Taylor,* 958 N.E.2d at 1210-11. To claim she is a mere successor in interest ignored "the fact that the superintendent did not bring this suit on behalf of ACLIC and its shareholders but, rather, in her capacity as liquidator of ACLIC for the protection of 'the rights of insureds, policyholders, creditors, and the public generally.'" *Id.* at 1213 (internal citations omitted). Noting the case presented a "garden-variety attempt to enforce an arbitration clause

[11] The Rehabilitation Order specifically referenced La. R.S. 22:2006 in ordering a permanent injunction consistent with the statute's terms. (Ex. "B", p. 3). Moreover, the Rehabilitation Order permanently enjoins any and all individuals and entities from instituting any suits, proceedings, and seizures against LAHC (or the Commissioner and his related affiliates or representatives) to prevent any preference, judgment, seizure, levy, attachment or lien. (*Id.* at pp. 7-8). Similarly, the Rehabilitation Order expressly stays all suits, proceedings, and seizures against LAHC and/or its members/enrollees/subscribers, for the same reasons. (*Id.* at p. 8).

[12] Given its holding, the court found E&Y's argument that the liquidator could not disavow part of a contract was moot. Likewise, the Court did not reach the liquidator's argument that an irreconcilable conflict exists between the Ohio Liquidation Act and the Ohio Arbitration Act. *Taylor*, 958 N.E.2d at 1217.

against a nonsignatory," the *Taylor* court found the superintendent was not bound to arbitration agreements entered into by the insolvent insurer. *Id.*[13]

Similarly, Louisiana courts have held that the Commissioner, as rehabilitator or liquidator, "owes an overriding duty to the people of the State of Louisiana" and "does not stand precisely in the shoes of" an insolvent insurer. *LeBlanc v. Bernard*, 554 So.2d at 1381 (finding Commissioner was third-party entitled to protection of public records doctrine). See also *Republic of Texas Savings Association v. First Republic Life Insurance Co.*, 417 So.2d 1251, 1254 (La.App. 1st Cir.), *writ denied*, 422 So.2d 161 (La.1982), finding that the rehabilitator's powers and responsibilities, which include protecting the interests of the policyholders, creditors and the insurer, indicate "rehabilitator does not stand precisely in the shoes of [the insurer]."

The Louisiana Supreme Court has recognized that, "[a]s liquidator or rehabilitator of an insurance company the Insurance Commissioner acts as an officer of the state to protect the interests of the public, the policy holders, the creditors, and the insurer." *Green v. Louisiana Underwriters Ins. Co.*, 571 So.2d 610, 615 (La. 1990) (citing *State v. Preferred Accident Ins. Co. of New York*, 238 La. 372, 115 So.2d 384 (1959); and *LeBlanc*, 554 So.2d 1378)). The Commissioner's title to property in this capacity is in the nature of a fiduciary holding those assets for the benefit of parties in varied legal relationship to the insurer. *LeBlanc v. Bernard*, 554 So.2d at 1382 (citing Couch, *2A Couch Cyclopedia of Insurance* § 22:45 (Anderson 2d ed. 1984)). "His duties as liquidator or receiver are part of his duties as Insurance Commissioner charged with the administration of the Insurance Code of the state, which regulates a business affected with the public interest, as set forth in the statute." *Preferred Acc. Ins. Co. of N. Y.*, 115 So.2d at 386.

In *LeBlanc*, 554 So.2d at 1382, the First Circuit emphasis the Commissioner's duties to the public as follows:

> The trial court placed defendant [Commissioner] in the exact shoes of First Republic [the insolvent insurer]. He erred here as a matter of law. **The Commissioner of Insurance as rehabilitator or liquidator owes an overriding duty to the people of the State of Louisiana.** The *raison d'etre* of his office is because the insurance industry is "affected with the public interest." LSA-R.S. 22:2.

[13] The Ohio court noted that its holding was in accord with the United States Supreme Court's jurisprudence on arbitration, specifically *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295–96, 122 S. Ct. 754, 765, 151 L. Ed. 2d 755 (2002) (Equal Employment Opportunity Commission not bound by arbitration agreement between employer and employee and may seek victim-specific judicial relief, even if employee is not party to the enforcement action). In *Taylor*, the court found it significant that the liquidator, like the EEOC has exclusive choice of forum (when there is a choice); similarly enjoys the sole discretion to pursue or forgo claims, which is independent of the shareholders' desires and subject instead to judicial approval; and the ordinary statutes of limitations do not apply in the liquidation context to the liquidator or to the estate's creditors. 958 N.E.2d at 1211-12 (internal citations omitted). The *Taylor* court further found that, "[t]he fact that any judgments in favor of the liquidator accrue to the benefit of insureds, policyholders, and creditors means that the liquidator's unique role is one of public protection, and one that is even more so than the EEOC's." *Id.* at 1212. Likewise, these factors further support the public-protection role of Louisiana's Commissioner.

> Any duties imposed upon that office, therefore, must be performed with the public interest foremost in mind. **The Commissioner's responsibilities as rehabilitator or liquidator include, additionally, protection of the policyholders, creditors, and the insurer itself.** *Republic of Texas Savings Association v. First Republic Life Insurance Co.,* 417 So.2d 1251, 1254 (La.App. 1st Cir.), *writ denied,* 422 So.2d 161 (La.1982). This court has previously held that defendant, **as rehabilitator, "does not stand precisely in the shoes of First Republic."** *Id.*[14]

Insurance companies operate in a highly regulated environment very different from that of other companies. When an insurance company is placed into rehabilitation, the company is subjected to a comprehensive statutory scheme designed to protect the public as well as the policyholders and other creditors of the insurer.[15] Under the RLC Act, the Commissioner, as rehabilitator, is not the equivalent of the company, nor is he the mere successor to the company. Rather, the Commissioner "is the manifestation of the state's police power and is asserting the sovereign authority and interest of the state in seizing the delinquent insurer and dealing with its assets and liabilities to protect the interests of the innocent policyholders and other creditors of the insurer."[16]

As discussed above, the Commissioner as rehabilitator is vested with title to "all property, contracts and rights of action of the insurer as of the date of the order directing rehabilitation or liquidation." La. R.S. 22:2008(A). Management ceases to conduct the business of the insurer upon the order of rehabilitation, and the Commissioner proceeds in management's place. *See* LA. R.S. 22:2009(A). In so doing, however, the commissioner is not placed in the exact shoes of the insolvent insurer. *LeBlanc*, 554 So.2d at 1381. Further, "[w]hile a party to the instrument may be estopped from asserting defenses based on previous misrepresentations, this restriction does not extend to the rehabilitator." *Republic of Texas Savings Association,* 417 So.2d at 1254 (rejecting the argument that the rehabilitator should be estopped from asserting certain defenses because those defenses would allow the now-insolvent insurer to "benefit from its own misrepresentations").

2. The Commissioner's claims do not arise from the Agreement.

As a nonsignatory, the *Taylor* court found the applicable test to be not whether the superintendent's claims "relate to" the subject matter of the engagement letter, but whether her claims "arise from" the contract containing the arbitration clause. *Taylor*, 958 N.E.2d 1203, 1213.

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[14] Emphasis added.

[15] Louisiana's statutory scheme specifically designed for insurance insolvency takes precedence over general law to the extent that the general law is inconsistent with the provisions or purpose of the comprehensive, statutory scheme. *Bernard v. Fireside Commercial Life Ins. Co.*, 633 So.2d 177, 185–86 (La. App. 1st Cir. 1993), *writ denied sub nom. Bernard v. Fireside Commercial Life Ins. Co.*, 634 So.2d 839 (La. 1994) (citing *Green*, 571 So.2d at 615-616; *Crist v. Benton Casing Service*, 572 So.2d 99, 102 (La.App. 1st Cir.1990), *writ denied*, 573 So.2d 1143 (1991).

[16] Karl L. Rubinstein, *The Legal Standing of an Insurance Insolvency Receiver: When the Shoe Doesn't Fit*, 10 Conn. Ins. L.J. 309, 312 (2004)

Applying this test, the Ohio Supreme Court in *Taylor* concluded that the malpractice claim against E&Y did not arise from E&Y's engagement letter with ACLIC for two related reasons. First, the malpractice claim plainly did not seek a declaration of a signatory's rights and obligations under the engagement letter. *Id.* at 1214. Second, the malpractice claim arose independently of the engagement letter because it arises from the powers given to the liquidator by the Ohio legislature together with the allegedly false or misleading audit report E&Y filed with the Ohio Department of Insurance, which was not conducted in accordance with generally accepted auditing standards. *Id.*

In this case, as in *Taylor*, the Commissioner is not seeking a declaration of Beam Partners' obligations under the Agreement with LAHC. The *Taylor* court makes this distinction clear by distinguishing a prior Ohio Supreme Court case in which nonsignatories to an agreement containing an arbitration clause filed a declaratory judgment action based on the underlying agreement. *See Gerig v. Kahn,* 769 N.E.2d 381, 384, wherein the plaintiffs, parents and their child born with birth defects, brought a medical malpractice action against the delivering physician and the hospital. After the hospital's insurer became insolvent while plaintiffs' malpractice action was pending, the plaintiffs filed a declaratory judgment action seeking a declaration that the affiliation agreement between the physician and the hospital required the hospital to insure the physician through its self-insurance plan up to $4 million against the plaintiffs' claim. The Ohio Insurance Guaranty Association ("OIGA") filed a cross-claim for declaratory judgment against the hospital, seeking essentially the same declaration, and the physician filed a counterclaim for declaratory judgment also asking the court to declare that the hospital had a contractual duty to allocate $4 million in self-insurance for his indemnification. In response, the hospital moved to compel arbitration. *Gerig*, 769 N.E.2d at 384.

Noting that equitable estoppel applied, the Ohio Supreme Court in *Gerig* held the hospital could enforce the affiliation agreement's arbitration provision against the plaintiffs and OIGA. *Gerig*, 769 N.E.2d 381, 385. The *Gerig* court found the plaintiffs and OIGA "do not have a direct dispute with a signatory regarding their rights under the agreement. Rather, the [plaintiff] and OIGA have an interest in [the physician]'s dispute with [the hospital] regarding [the physician]'s rights under the agreement." *Id.*

Here, the dispute is between Beam Partners and the Commissioner, on behalf of LAHC's creditors, which arises from the powers given to the Commissioner by the legislature. While

equitable estoppel might have applied to LAHC, the doctrines of estoppel and equitable relief do not apply when the party is the Commissioner, in his position as rehabilitator. *Republic of Texas Sav. Ass'n*, 417 So.2d at 1253-54.[17]

Further, the mere fact that the circumstances arose in the context of a contractual relationship does not make the cause of action contractual. *Kroger Co. v. L.G. Barcus & Sons, Inc.*, 44,200 (La. App. 2 Cir. 6/17/09), 13 So.3d 1232, 1235, *writ denied*, 2009-2002 (La. 11/20/09), 25 So.3d 800. As the Louisiana Supreme Court has recognized, "when a party has been damaged by the conduct of another arising out of a contractual relationship, the former may have two remedies, a suit in contract, or an action in tort, and that he may elect to recover his damages in either of the two actions." *Fed. Ins. Co. v. Ins. Co. of N. Am.*, 262 La. 509, 512, 263 So. 2d 871, 872 (1972).

Courts frequently apply the distinction between nonfeasance and misfeasance to determine whether an action sounds in tort or contract. *Ames v. Ohle*, 2011-1540 (La. App. 4 Cir. 5/23/12), 97 So. 3d 386, 393, *decision clarified on reh'g* (July 11, 2012), *writ denied*, 2012-1832 (La. 11/9/12), 100 So.3d 837 (discussing *Roger v. Dufrene*, 613 So.2d 947 (La.1993)). Specifically, nonfeasance of the performance of an obligation is considered a breach of contract claim, and misfeasance in the performance of a contract is considered a tort. *Id.* The *Rogers* court explained this distinction: "The nature of certain professions is such that the fact of employment does not imply a promise of success, but an agreement to employ ordinary skill and care in the exercise of the particular profession."[18] 613 So.2d at 949.

In the Amended Petition, the Commissioner alleges that, instead of declining a job outside of its capabilities, Beam Partners wrongly orchestrated LAHC from its inception. See, e.g., Ex. "A", ¶54. The Commissioner further alleges that Beam Partners selected unqualified TPAs and made the grossly negligent decision to terminate the Verity contract. *Id.* at ¶¶61-64. Beam Partners took certain actions—the wrong ones.

Finally, it bears repeating that the Commissioner has the authority and power to act for the protection of policyholders, creditors, and claimants, as well as the public. *LeBlanc*, 554 So.2d at 1381. The Commissioner is not seeking a declaration of contractual rights. Consistent with his

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[17] Estoppel generally cannot be invoked against a governmental agency to prevent it from discharging its statutory duties. Karl L. Rubinstein, *The Legal Standing of an Insurance Insolvency Receiver: When the Shoe Doesn't Fit*, 10 Conn. Ins. L.J. 309, 325 (2004) (internal quotations omitted). .

[18] Although *Rogers* specifically addressed certain professions (insurance agent, lawyer, doctor, accountant), this reasoning has been applied and extended to other cases. *See, e.g., Ames*, 97 So.3d 386 (bank/financial advisor).

statutory powers, the Commissioner has alleged that Beam Partners' breached its obligations to LAHC—and, thus by extension, to LAHC's policyholders and creditors—in a grossly negligent manner. Any assertion that the Commissioner is a mere successor in interest who is bringing breach-of-contract claims on behalf of LAHC ignores the fact that the Commissioner did not bring this suit on behalf of LAHC and its members but, rather, in his capacity as rehabilitator of LAHC, for the protection of the rights of members, policyholders, claimants, creditors, and the public generally. *Taylor*, 958 N.E.2d 1203, 1213.

CONCLUSION

In conclusion, Beam Partners' exception misconstrues the Commissioner's important role in protecting the public from failed insurance companies like LAHC. It is inaccurate to argue, as Beam Partners does, that the Commissioner simply stands in the shoes of LAHC and is bound by an arbitration clause in a related contract that the Commissioner never signed. Louisiana law affords the Commissioner broad powers to regulate, control, and administer failed insurance companies like LAHC, which includes the power to litigate all such claims in a single venue: this Honorable Court, the Nineteenth Judicial District Court of East Baton Rouge, Louisiana. To force the Commissioner to arbitrate the claims against Beam Partners would violate the law of Louisiana and frustrate the strong public policy of this state. For all of the foregoing reasons, plaintiff respectfully requests that Beam Partners' Exception of Prematurity or Alternative Motion to Stay Proceedings be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Baton Rouge, Louisiana this 22nd day of May, 2017.

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