

**COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA**

DOCKET NO. 2021-CA-0703

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

VERSUS

**GROUP RESOURCES INCORPORATED, MILLIMAN, INC.,
BUCK GLOBAL, LLC, AND IRONSHORE SPECIALTY COMPANY,
Defendants**

**MILLIMAN, INC.
Defendant-Appellant.**

CIVIL PROCEEDING

**REPLY BRIEF ON BEHALF OF
DEFENDANT-APPELLANT MILLIMAN, INC.**

**On Appeal from the 19th Judicial District Court, Parish of East Baton Rouge,
State of Louisiana, Its Docket No. 651,069, Section 22, Division F
Honorable Timothy E. Kelley, Presiding**

Respectfully submitted,

PHELPS DUNBAR LLP

HARRY ROSENBERG (Bar # 11465)
Canal Place | 365 Canal Street, Suite 2000
New Orleans, Louisiana 70130-6534
Telephone: 504-566-1311
Facsimile: 504-568-9130
Email: rosenbeh@phelps.com

H. ALSTON JOHNSON (Bar # 7293)
400 Convention Street, Suite 1100
Baton Rouge, LA 70802
Telephone: 225-346-0285
Telecopier: 225-381-9197
Email: johnsona@phelps.com

DENTONS US LLP

REID L. ASHINOFF (*pro hac vice*)

JUSTIN N. KATTAN (*pro hac vice*)

JUSTINE N. MARGOLIS (*pro hac vice*)

CATHARINE LUO (*pro hac vice*)

1221 Avenue of the Americas

New York, NY 10020

Telephone: (212) 768-6700

Facsimile: (212) 768-6800

E-mail: reid.ashinoff@dentons.com

justin.kattan@dentons.com

justine.margolis@dentons.com

catharine.luo@dentons.com

*Counsel for Defendant-Appellant Milliman,
Inc.*

TABLE OF CONTENTS

| | Page |
|--|-------------|
| I. LA. R.S. § 22:2043.1 DOES NOT ALLOW THE LDI TO WITHHOLD DOCUMENTS RESPONSIVE TO MILLIMAN’S SUBPOENA | 2 |
| II. NEITHER LA. R.S. § 22:1983(J) NOR § 22:2045 SHIELDS THE LDI FROM DISCOVERY | 4 |
| III. THE DE NOVO STANDARD OF REVIEW APPLIES HERE, ALTHOUGH THE DISTRICT COURT’S ORDER IS ALSO AN ABUSE OF DISCRETION | 5 |
| CONCLUSION | 6 |

TABLE OF AUTHORITIES

Page(s)

Cases

| | |
|--|---|
| <i>Colonial BancGroup, Inc. v. PricewaterhouseCoopers, LLP</i> , 110 F. Supp. 3d 37 (D.D.C. 2015) | 2 |
| <i>F.D.I.C. v. Berling</i> , No. 14-CV-00137, 2015 WL 3777408 (D. Colo. June 16, 2015) | 2 |
| <i>F.D.I.C. v. Clementz</i> , No. 2:13-CV-00737, 2014 WL 4384064 (W.D. Wash. Sept. 4, 2014) | 2 |
| <i>F.D.I.C. v. Dosland</i> , No. C13-4046, 2014 WL 1347118 (N.D. Iowa Apr. 4, 2014) | 2 |
| <i>Francois v. Norfolk S. Corp.</i> , 812 So. 2d 804 (La. App. 4 Cir., 3/6/02) | 6 |
| <i>La. Health Serv. & Indem. Co. v. Blue Cross & Blue Shield of Miss., Inc.</i> , No. 96-31131, 129 F.3d 609 (5th Cir. 1997) (unpublished)..... | 5 |
| <i>Nelson v. Carroll Cuisine Concepts, LLC</i> , 2018-1079 (La. App. 1 Cir. 11/09/18), 2018 WL 5881710 (unpublished) | 5 |
| <i>Shaw Grp. Inc. v. Zurich Am. Ins. Co.</i> , No. 12-257, 2014 WL 1891543 (M.D. La. May 12, 2014)..... | 4 |
| <i>Suprun v. Louisiana Farm Bureau Mut. Ins. Co.</i> , 2008 WL 4190661 (La. App. 1 Cir., 2008) (unpublished)..... | 5 |

Statutes

| | |
|---|------|
| Louisiana Code of Civil Procedure Article 1422 | 6 |
| Louisiana Revised Statutes | |
| § 22:256 | 4 |
| § 22:1983 | 1, 4 |
| § 22:2043.1 | 1, 2 |
| § 22:2045 | 1, 5 |

MAY IT PLEASE THE COURT:

The LDI's brief, like the Trial Court's Judgment from which Milliman appeals, neither addresses any of Milliman's specific document requests, nor responds to Milliman's arguments showing that its document requests are necessary and proper.¹ The LDI does not, and cannot, dispute that Milliman's requests for, among other things, information concerning other insurers' 2014 rate filings, documents concerning LAHC's financial condition and insolvency, and LDI's communications with the federal government—all of which are relevant to the claims and defenses in this case for the reasons discussed in Milliman's opening brief—in no way bear on the LDI's "actions or inactions," and therefore do not implicate La. R.S. § 2043.1(b). Rather, those categories of information, and several other Milliman requests, will allow Milliman and the factfinder to test the reasonableness of its rates and assumptions (which the Receiver alleges were unreasonable when compared to those submitted by other Louisiana insurers), and/or assess the extent to which the federal government or other outside factors caused LAHC's insolvency and losses. The LDI's generalized assertion that Milliman's requests are not reasonably calculated to lead to evidence that will be admissible at trial, which echoes the Trial Court's erroneous holding, is demonstrably wrong.

The LDI's confidentiality arguments based on La. R.S. § 22:2045 and § 22:1983(J) are also unavailing. The LDI does not dispute that La. R.S. § 22:2045 only applies to documents that are "produced by, obtained by, or disclosed to the commissioner. . . in the course of" a Receivership or Rehabilitation action, and are otherwise privileged." Likewise, La. R.S. § 22:1983(J)—which the LDI did not raise in its objections to the Subpoena, and which was not a basis for the Trial Court's Judgment—only applies to documents "produced by, obtained by, or disclosed to

¹ Capitalized terms not defined herein shall have the meaning ascribed to them in Milliman's opening brief.

the commissioner *in the course of an examination made under this Chapter*” (emphasis added)—i.e., an official financial or market conduct exam. The LDI does not even address the criteria for either statute, much less dispute that the LDI fails to satisfy those criteria here.

Milliman’s unrebutted factual and legal arguments show that the Trial Court erred by upholding the LDI’s wholesale objections to the Subpoena. The Trial Court’s erroneous Judgment should be reversed, and the LDI should be ordered to comply with the Subpoena.

I. LA. R.S. § 22:2043.1 DOES NOT ALLOW THE LDI TO WITHHOLD DOCUMENTS RESPONSIVE TO MILLIMAN’S SUBPOENA

La. R.S. § 22:2043.1 does not bar the discovery that Milliman seeks because: (1) Milliman is not seeking discovery from the LDI to assess the regulator’s “actions or inactions” or “delegate responsibility to a state agency,” which is what the statute is designed to protect, and (2) numerous court have held in analogous situations that regulatory documents are relevant and discoverable in receivership actions even when “regulator fault defenses are disallowed.” *See, e.g., F.D.I.C. v. Dosland*, No. C13-4046, 2014 WL 1347118, at *4 (N.D. Iowa Apr. 4, 2014); *F.D.I.C. v. Berling*, No. 14-CV-00137, 2015 WL 3777408, at *2 (D. Colo. June 16, 2015); *F.D.I.C. v. Clementz*, No. 2:13-CV-00737, 2014 WL 4384064, at *2-3 (W.D. Wash. Sept. 4, 2014); *Colonial BancGroup, Inc. v. PricewaterhouseCoopers, LLP*, 110 F. Supp. 3d 37, 41-42 (D.D.C. 2015). The LDI does not address these cases cited in Milliman’s opening brief, or provide any basis for this Court to disregard their reasoning.

The LDI’s unfounded assertion that all of Milliman’s requests “relate to regulatory action or inaction taken by the LDI” (Appellee Br., p. 4) is contradicted by the myriad reasons Milliman has given for the discovery sought. For example, the Second Amending Petition (the “Second Amending Petition”) specifically alleged that Milliman’s reports relied on improper assumptions concerning levels of

policyholder enrollment, claim coding intensity and provider discounts, particularly as compared to other carriers in Louisiana. (R. Vol. 2 at 264-66, ¶¶ 95-96, 98, 104-105.)² The LDI does not, and cannot, dispute that Milliman is entitled to test these allegations by obtaining information from the LDI on actual versus expected statewide enrollment in Affordable Care Act (“ACA”) compliant plans, to determine whether or to what extent these allegedly “unreasonable” assumptions actually impacted LAHC’s financial condition, or were unreasonable at all. It is similarly undisputed that *only* the LDI has in its files this contemporaneous information, data, and analyses from other insurers who sold ACA-compliant health insurance in Louisiana.

Notably, the Receiver has served discovery requests demanding that Milliman produce extensive rate filing and financial information relating to every non-Louisiana Co-Op for which Milliman performed work. It defies logic that such information for insurers outside of Louisiana could be relevant and discoverable in this case, yet similar information in the LDI’s files is not discoverable.

Milliman is also entitled to documents and information bearing whether or not it was the cause of LAHC’s losses, or whether other parties and non-parties, like the federal government, caused or contributed to LAHC’s losses. Because the LDI monitored LAHC’s financial condition before ultimately recommending that it wind down, the LDI had unique insight into the reasons for LAHC’s losses, including

² Following the Trial Court’s February 25, 2021 Judgment at issue on this appeal, on April 1, 2021, the Receiver filed a Motion for Leave to File Plaintiff’s Fifth Amended Petition for Damages and Request for Jury Trial (the “Fifth Amended Petition”), which the Trial Court granted on April 7, 2021. The allegations concerning Milliman in Plaintiff’s Second Amending Petition are repeated in Plaintiff’s Fifth Amended Petition. *See* Fifth Amending Petition, ¶¶ 58-59, 61, 67-68.

financial reports and consumer complaints that are solely in the LDI's possession. None of that information has been produced.³

II. NEITHER LA. R.S. § 22:1983(J) NOR § 22:2045 SHIELDS THE LDI FROM DISCOVERY

Although the LDI now argues that La. R.S. § 22:1983(J) precludes it from producing documents and information responsive to the Subpoena, the LDI did not object to the Subpoena on that basis, and the Trial Court did not rely on it in denying Milliman's Motion To Compel. Because the LDI did not assert this objection in response to the Subpoena, it is waived. *Shaw Grp. Inc. v. Zurich Am. Ins. Co.*, No. 12-257, 2014 WL 1891543, at *1 n.1 (M.D. La. May 12, 2014) (citing *In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1989)).

Moreover, the LDI's belated reliance on La. R.S. § 22:1983(J) ignores that the statute governs only the confidentiality of documents "produced by, obtained by, or disclosed to the commissioner" in the course of an official financial or market conduct exam.⁴ See also La. R.S. § 22:256. There is no basis to read La. R.S. § 22:1983(J) as protecting all documents of any kind related to the LDI's regulatory work from being subject to subpoena.

The vast majority of documents sought by Milliman's Subpoena are not related to official market or financial examinations. And while Milliman's requests

³ The LDI references a production it made in response to the Receiver's public records request (Appellee Br., p. 1). However, the LDI's public records production consisted of only 60 documents and does not respond to the vast majority of Milliman's requests. For example, the LDI's minimal production contains no documents related to: (1) LAHC's premium rates, (2) LAHC's financial losses (other than a statement for a single quarter), (3) LAHC's enrollment issues, or (4) the decision to place LAHC into rehabilitation.

⁴ The LDI's "Market Conduct" unit "performs examinations and analyses of insurers and producers to assure that policyholders, claimants and beneficiaries are being treated fairly and in line with laws, rules and regulations." LDI, "Market Conduct Information," available at <https://www.ldi.la.gov/industry/financial-regulation/market-conduct> (last accessed Aug. 25, 2021). The LDI's "Financial Examinations Unit performs on-site financial examinations at least once every five years, as required by statute." LDI, "Financial Examinations," available at <https://www.ldi.la.gov/industry/financial-regulation/financial-examinations> (last accessed Aug. 25, 2021).

would include any final LDI examination reports regarding LAHC, the statute makes clear that the content of an examination report is only “private and confidential for a period not to exceed thirty consecutive days” with limited exceptions if a court has stayed the publication of the report (which did not happen here). La. R.S. § 22:1983(I). Moreover, the U.S. Court of Appeals for the Fifth Circuit has held that La. R.S. 22:1983(J) does not shield documents from disclosure. *La. Health Serv. & Indem. Co. v. Blue Cross & Blue Shield of Miss., Inc.*, No. 96-31131, 129 F.3d 609 (5th Cir. 1997) (unpublished) (appeal dismissed as moot due to LDI’s production of documents gathered during examination of defunct insurer).

The LDI’s reliance on La. R.S. § 22:2045 also fails for the reasons discussed in Milliman’s opening brief, which the LDI ignores. La. R.S. § 22:2045 only protects documents that are both (1) produced or received during a receivership action, *and* (2) are otherwise “confidential or privileged pursuant to any other provision of law.” Milliman seeks primarily contemporaneous evidence from before LAHC was placed in receivership, and the LDI indisputably failed to satisfy its burden to identify and assert a privilege that covers any of the requested documents. *Nelson v. Carroll Cuisine Concepts, LLC*, 2018-1079 (La. App. 1 Cir. 11/09/18), 2018 WL 5881710, at *1 (unpublished) (“the party asserting the privilege has the burden of proving that the privilege applies; further, the party asserting the privilege must adequately substantiate the claim and cannot rely on a blanket assertion of privilege.”).

III. THE DE NOVO STANDARD OF REVIEW APPLIES HERE, ALTHOUGH THE DISTRICT COURT’S ORDER IS ALSO AN ABUSE OF DISCRETION

Because the Trial Court’s Judgment cut Milliman off entirely from discovery that can only be obtained from the LDI, and that bears directly on the claims and defenses in this case, the Trial Court “interdict[ed] the fact-finding process,” and its decision is subject to de novo review. *Suprun v. Louisiana Farm Bureau Mut. Ins.*

Co., 2008-0241 (La. App. 1 Cir., 9/12/2008), 2008 WL 4190661, at *2 (unpublished).

That said, the LDI's argument concerning the standard of review does not impact the outcome of this appeal, as the Trial Court plainly abused its discretion in disallowing any discovery of the LDI. As the Fourth Circuit Court of Appeal stated in *Francois v. Norfolk S. Corp.*, 2001-1954 (La. App. 4 Cir., 3/6/02), 812 So. 2d 804, 805, "[a]lthough the trial court has great discretion in discovery matters, that discretion may be abused when the trial judge denies a motion to compel the production of information that meets the requirements of La. C.C.P. art. 1422, especially where, as here, examination of the requested information may be the only means available to the party seeking discovery to defend against claims made by the party from whom discovery is sought." Milliman has demonstrated, and the LDI does not dispute, that the requested information is the "only means available" to test certain of the Receiver's allegations against it. Milliman has also shown that its demands meet the requirements of La. Code Civ. Proc. art. 1422, because the requested information is "reasonably calculated to lead to the discovery of admissible evidence."

CONCLUSION

For all of the foregoing reasons, the Trial Court erred by denying Milliman's Motion to Compel. Milliman respectfully requests that this Court reverse the Trial Court's Judgment denying Milliman's Motion to Compel LDI's compliance with the Subpoena, and remand with an order for the Trial Court to order the LDI to comply with, and produce documents and information responsive to, the Subpoena, and for any other and further relief that this Court deems just and proper.

Respectfully submitted,

/s/ Harry Rosenberg

PHELPS DUNBAR LLP

Harry Rosenberg (Bar # 11465)
Canal Place | 365 Canal Street, Suite 2000
New Orleans, LA 70130-6534
Tel: (504) 566-1311
Fax: (504) 568-9130
E-mail: rosenbeh@phelps.com

H. Alston Johnson (Bar # 7293)
400 Convention Street, Suite 1100
Baton Rouge, LA 70302
Tel: (225) 346-0285
Fax: (225) 381-9197
E-mail: johnsona@phelps.com

DENTONS US LLP

Reid L. Ashinoff (admitted *pro hac vice*)
Justin N. Kattan (admitted *pro hac vice*)
Justine N. Margolis (admitted *pro hac vice*)
Catharine Luo (admitted *pro hac vice*)
1221 Avenue of the Americas
New York, NY 10020
Tel: (212) 768-6700
Fax: (212) 768-6800
E-mail: reid.ashinoff@dentons.com
justin.kattan@dentons.com
justine.margolis@dentons.com
catharine.luo@dentons.com

Counsel for Milliman, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail, postage prepaid, and via-email, to the trial court and all counsel of record as follows:

J. E. Cullens, Jr.
Edward J. Walters, Jr.
Darrel J. Papillion
Andree M. Cullens
S. Layne Lee
WALTERS, PAPILLION, THOMAS, CULLENS,
LLC
12345 Perkins Road, Bldg One
Baton Rouge, LA 70810
Telephone: (225) 236-3636
Facsimile: (225) 236-3650

*Attorneys for Plaintiff James J. Donelon,
Commissioner of Insurance for the State
of Louisiana, In His Capacity as
Rehabilitator of Louisiana Health
Cooperative, Inc.*

W. Brett Mason
Douglas J. Cochran
Michael W. McKay
Justin P. Lemaire
Gary M. Langlois, Jr.
STONE PIGMAN WALTHER WITTMAN LLC
One American Place, Suite 1150
301 Main Street
Baton Rouge, Louisiana 70825
Telephone: (225) 490-5812
Facsimile: (225) 490-5860
bmason@stonepigman.com

*Attorneys for Defendant Group Resources,
Inc.*

James A. Brown
Sheri Corales
LISKOW AND LEWIS
701 Poydras Street, Suite 5000
New Orleans, Louisiana 70139-5099
Telephone: (504) 581-7979
Facsimile: (504) 556-4108
jabrown@Liskow.com
scorales@Liskow.com

*Attorneys for Defendant-Appellant
Buck Global, LLC f/k/a Buck
Consultants, LLC*

Honorable Timothy Kelley
19th Judicial District Court
300 North Boulevard
Baton Rouge, LA 70801
pdennis@19thjdc.org
Trial Court

John Ashley Moore, Esq.
Taylor, Porter, Brooks & Phillips, LLP
450 Laurel Street, 8th Floor
P.O. Box 2471
Baton Rouge, LA 70801
Telephone: (225) 387-3221
Facsimile: (225) 346-8049
Ashley.moore@taylorporter.com

*Attorney for Louisiana Department of
Insurance*

New Orleans, Louisiana this 26th day of August, 2021

/s/ Harry Rosenberg