

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

STATE OF LOUISIANA

NO.: 651,069

SECTION 22

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

VERSUS

TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A.  
OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND  
SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC,  
MILLIMAN, INC., BUCK CONSULTANTS, LLC, AND TRAVELERS CASUALTY AND  
SURETY COMPANY OF AMERICA

FILED: \_\_\_\_\_

\_\_\_\_\_  
DEPUTY CLERK

**DEFENDANT BUCK GLOBAL, LLC’S MEMORANDUM IN SUPPORT  
OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON  
UNCONSTITUTIONALITY OF LA. R.S. 22:2043.1(A) AS APPLIED**

**MAY IT PLEASE THE COURT:**

Defendant Buck Global, LLC (“Buck”), through undersigned counsel, files this Memorandum in Support of its Motion for Partial Summary Judgment on Unconstitutionality of La. R.S. 22:2043.1(A) as Applied. In this case, Plaintiff<sup>1</sup> has both deprived Buck of the right to file contribution claims against the D&O defendants by having released them, *and at the same time* asked the Court to apply La. R.S. 22:2043.1(A) in a manner to prevent Buck from seeking to allocate fault to them at trial. Plaintiff seeks this unconscionable and unconstitutional relief notwithstanding his prior judicial admissions that the D&O defendants directly caused and/or substantially contributed to the insolvency and failure of LAHC – the very same loss that Plaintiff seeks to recover from Buck and the other remaining defendants. Hence, Plaintiff seeks to hold Buck responsible for losses that it did not cause after having deprived it of any remedy against the actors who actually caused or substantially contributed to those losses. That smacks of the star chamber – a plainly absurd, unconscionable and unintended result that deprives Buck of fundamental due process rights.

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<sup>1</sup> James J. Donelon, Louisiana Commissioner of Insurance, as Rehabilitator of Louisiana Health Cooperative, inc. (“LAHC”).

Due process *mandates* that Buck be permitted to fully defend itself against the Commissioner's accusations, including the substantive right to apportion fault to "empty chair" defendants who are responsible for the losses Plaintiff now seeks to recover from Buck. Accordingly, Buck respectfully moves this Court for a summary ruling sustaining Buck's affirmative defenses that the application of La. R.S. 22:2043.1(A) to Buck in this particular context deprives it of its fundamental due process rights, in violation of the United States and Louisiana Constitutions.

## **I. Procedural Background**

This lawsuit arises out of the failure of Louisiana Health Cooperative, Inc. ("LAHC"), a consumer operated and oriented health care plan created under the Patient Protection and Affordable Care Act. LAHC, a Louisiana nonprofit corporation, was formed in 2011 and was licensed to operate as a health maintenance organization in 2013. In September 2015, LAHC was placed into rehabilitation under the control of Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana, as Rehabilitator.

On August 31, 2016, the Commissioner, in his capacity as Rehabilitator of LAHC, filed his original petition for damages, naming as defendants former directors and officers of LAHC, including Terry S. Shilling; George G. Cromer; Warner L. Thomas, IV; William A. Oliver; Charles D. Calvi; and Patrick C. Powers (the "D&O Defendants"); the contract developer of LAHC, Beam Partners, LLC ("Beam"); and contract third-party administrators, CGI Technology and Solutions, Inc. ("CGI") and Group Resources, Inc. ("GRI"). On November 29, 2016, he amended his petition to name two defendants who provided actuarial services to LAHC – Milliman, Inc. ("Milliman") and Buck. Then, on October 25, 2017, Plaintiff filed his second amended and restated petition ("SAP") to restate all of his claims and to add excess insurers of LAHC's directors and officers and related nominal defendants. SAP, **Exhibit A** to Motion filed herewith. Plaintiff made detailed allegations of fault by all named defendants and sought to recover the entire loss to LAHC from all of them, contending that their combined fault caused the insolvency of LAHC. SAP, Ex. A at ¶22.

Earlier this year, Plaintiff settled and released his claims against the D&O defendants and their excess insurers for substantial amounts, as his April 1, 2021 motion for partial summary judgment/to strike admits. Previously, he had settled with and released Beam and

CGI. Then, on April 1, 2021, he filed a *fifth* amended and restated petition, removing all allegations of D&O fault and fault of Beam and CGI, and seeking to hold Buck and the remaining defendants liable for the total insolvency of LAHC – the very same loss that he previously sought against the D&O defendants along with all other defendants. At the same time, he filed a motion for partial summary judgment/to strike asking this Court to apply La. R.S. § 22:2043.1(A) in a manner to strip Buck and the remaining defendants of their substantive rights to allocate fault to the “empty chair” D&O defendants.

In its answer to Plaintiff’s fifth amended and restated petition, Buck asserted affirmatively the unconstitutionality of La. R.S. 22:2043.1(A) if applied to Buck in this case in the manner sought by Plaintiff. Buck Affirmative Defenses and Answer, **Exhibit B** to Motion filed herewith, Twentieth through Twenty-Third Defenses. In accordance with La. Code Civ. Proc. art. 1880, Buck served the Louisiana Attorney General with a copy of that pleading. Buck is also serving the Attorney General with these summary judgment papers.

Plaintiff’s settlement with and release of the D&O defendants, CGI, and Beam triggered Louisiana’s “settlement bar” rule, which insulates settling defendants from contribution claims by non-settling defendants who are cast in judgment to the Plaintiff.<sup>2</sup> See *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1073 (La. 1992). But the “trade off” for the Plaintiff’s deprivation of the non-settling defendant’s contribution rights is that they are permitted to seek to allocate percentages of fault to the “empty chair” settling defendants. *Cole*, 599 So. 2d at 1073, n. 41 (“The reason for imposing this trade-off is that the settling tortfeasor is insulated from liability for contribution, and the contribution rights of the non-settling tortfeasor are thereby rendered unenforceable and lost.”).<sup>3</sup>

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<sup>2</sup> Under Louisiana law, contribution rights vest when the principal defendant has been cast in judgment to the plaintiff. *E.g.*, *Diggs v. Hood*, 772 F.2d 190, 194 (5th Cir. 1985) (Rubin, J., applying Louisiana law) (“Contribution may be demanded only by one who has paid the ‘part or portion’ of an obligation for which another is liable.”).

<sup>3</sup> “[W]here a plaintiff settled with one co-defendant, any recovery against the remaining defendants would be reduced under the virile share principle.” *Vedros v. Pub. Grain Elevator of N.O., Inc.*, 94-0659 (La. App. 4 Cir. 4/13/95), 654 So. 2d 775, 778, writ denied, 95-1205 (La. 6/23/95), 656 So. 2d 1024 (citing *Harvey v. Travelers Insurance Co.*, 163 So.2d 915 (La. App. 3rd Cir.1964)). “Since the settling tortfeasor is insulated from liability for contribution, and the contribution rights of the non-settling tortfeasors are rendered unenforceable, plaintiff’s recovery should be reduced proportionately.” *Id.*; see also *Ducre v. Avondale Indus.*, No. CIV.A. 80-4388, 1993 WL 268432, at \*1 (E.D. La. July 14, 1993). “There is no dispute that the jury must be allowed to consider the fault of the former parties with whom plaintiff has settled.” *Ducre v. Avondale Indus.*, No. CIV.A. 80-4388, 1993 WL 268432, at \*1 (E.D. La. July 14, 1993) (citing *Harvey v. Travelers Insurance Co.*, 163 So.2d 915 (La. App. 3d Cir. 1964)).

Hence, Plaintiff has both deprived Buck of the ability to file contribution claims against the D&O defendants *and* asked the Court to apply La. R.S. 22:2043.1(A) to prevent Buck from seeking to allocate fault to them at trial – notwithstanding Plaintiff’s prior judicial admissions that they directly caused and/or substantially contributed to the insolvency and failure of LAHC. Hence, Plaintiff seeks to hold Buck responsible for losses that it did not cause after having deprived it of any remedy against the individuals who actually caused or substantially contributed to those losses. Plaintiff also seeks to prevent Buck from demonstrating that a key element of his claim – causation – is missing from his case. Because such an application would lead to a plainly absurd, unconscionable, and unintended result that deprives Buck of fundamental due process rights, Buck respectfully requests that this Court enter summary judgment in its favor.

## **II. Essential Legal Elements**

Under Louisiana law, comparative fault apportionment is a substantive right. *See Cole v. Celotex Corp.*, 599 So. 2d 1058, 1064 (La. 1992) (agreeing with Louisiana Third Circuit’s holding that comparative fault apportionment is a substantive right); *Veazey v. Elmwood Plantation Assocs., Ltd.*, 93-2818 (La. 11/30/94), 650 So. 2d 712, 715 (describing Act 431 enacting Louisiana’s comparative fault system as making “substantive changes” to the Civil Code); *Wiley v. City of New Orleans*, 2000-1544 (La. App. 4 Cir. 5/16/01), 809 So. 2d 151, 158, as amended on reh’g (Nov. 30, 2002), writ denied, 2002-0616 (La. 5/10/02), 815 So. 2d 842, and writ denied, 2002-0641 (La. 5/10/02), 815 So. 2d 843 (“[I]t is clear that the substantive right to allocate fault was created in 1979 with the introduction of comparative fault.”).

The total deprivation of Buck’s substantive rights to comparative fault apportionment and any right or remedy against the culpable D&O defendants would work a gross denial of Buck’s substantive and procedural due process rights guaranteed under Amend. XIV § 1 of the United States Constitution and Article 1, § 2 of the Louisiana Constitution.

## **III. Statement of Undisputed Material Facts**

1. Plaintiff originally named as defendants, former LAHC directors and officers, judicially admitting that as a direct and proximate result of their gross negligence, intentional fault, and failures to perform their fiduciary obligations (in *at least* 45 enumerated ways), LAHC was driven into insolvency. SAP, Ex. A to Motion, at ¶¶22, 37-38. The SAP also made

detailed allegations of fault by CGI and Beam also contributing substantially to LAHC's losses and insolvency. SAP, Ex. A at ¶¶ 43-53; 61-80.

2. Earlier this year, Plaintiff settled with the D&O Defendants and their respective insurers for substantial amounts and gave them full releases, as Plaintiff acknowledged in its partial summary judgment memorandum filed on April 1, 2021. Plaintiff had also previously settled with and released CGI and Beam. Plaintiff's fifth amended and restated petition, also filed on April 1, 2021, seeks to recover the full insolvency of LAHC from Buck and the other remaining defendants. Fifth Amended Petition, **Exhibit E** to Motion filed herewith, ¶¶ 19, 135.
3. Also on April 1, 2021, Plaintiff moved for partial summary judgment dismissing Buck's defenses based on fault of former officers, managers, directors, trustees, shareholders, employees, or agents of LAHC, relying entirely on the provisions of La. R.S. § 22:2043.1(A).
4. Buck's Twentieth through Twenty-Third Affirmative Defenses filed in response to Plaintiff's fifth amended and restated petition assert that application of La. R.S. 22:2043.1(A) to Buck in the manner sought by Plaintiff would deprive Buck of its constitutional due process rights. Buck's Answer, **Exhibit C** to Motion filed herewith.

#### **IV. Standard of Proof on Summary Judgment**

A court shall grant a motion for summary judgment "if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3). Summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of actions. La. C.C.P. art. 966(A)(2). Article 966(E) empowers this Court to grant partial summary judgment dispositive of any "defense," including Buck's affirmative defenses asserting that application of La. R.S. 22:2043.1(A) to bar its comparative fault defenses violates its fundamental constitutional due process rights.

Initially, the movant bears the burden of proof. La. C.C.P. art. 966(D)(1). If the movant successfully meets this burden, then the burden shifts to the other party to present factual support adequate to establish that he/she will be able to satisfy the evidentiary burden at trial. *Id.* If the other party fails to meet this burden, there is no genuine issue of material fact, and the movant is

entitled to summary judgment as a matter of law. *Id.*; *Supreme Services and Specialty Co., Inc. v. Sonny Greer, Inc.*, 2006–1827 (La. 5/22/07), 958 So. 2d 634.

Here, there is no genuine issue of material fact. As a matter of law, application of 22:2043.1(A) to Buck in the manner sought by Plaintiff would deprive Buck of its fundamental due process rights.

## **V. Law and Argument**

Application of La. R.S. 22:2043.1(A) here would expose Buck to liability for tens of millions of dollars of loss that it did not cause, with (i) no ability to ask the jury to apportion fault to the parties that actually caused or substantially contributed to those losses and (ii) no independent remedy against the culpable parties for contribution due to Plaintiff’s having deprived Buck of that remedy. Moreover, Plaintiff seeks to prevent Buck from demonstrating that a key element of his claim – causation – is missing from Plaintiff’s case.

The *total* deprivation of Buck’s substantive rights to comparative fault apportionment *and* any right or remedy against the culpable D&O defendants would work a gross denial of Buck’s substantive and procedural due process rights, in violation of Amend. XIV § 1 of the United States Constitution and Article 1, § 2 of the Louisiana Constitution. The Due Process clause of the Fourteenth Amendment declares that no State shall “deprive any person of life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1.<sup>4</sup> It is axiomatic that the Constitution is the supreme law of this state to which all legislative instruments must yield. *Iberville Par. Sch. Bd.*, 248 So. 3d at 306 (citing *La. Fed’n of Teachers*, 13-01230 at p. 22, 118 So. 3d at 1048 (citing *World Trade Ctr. Taxing Dist. v. All Taxpayers, Prop. Owners*, 908 So. 2d 623, 632). When the application of legislation conflicts with a constitutional provision, the legislative instrument must fall. *See Caddo–Shreveport Sales and Use Tax Com’n v. Office of Motor Vehicles Through Dept. of Public Safety and Corrections of the State*, 97–2233, p. 6 (La. 4/14/98), 710 So. 2d 776, 780.

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<sup>4</sup> “The Louisiana Due Process Clause parallels the Federal Due process Clause.” *Nunnery v. City of Bossier*, 822 F. Supp. 2d 620, 630 (W.D. La. 2011) (citing *Giddens v. City of Shreveport*, 901 F. Supp. 1170, 1177 (W.D. La. 1995) (citing *Delta Bank & Trust Co. v. Lassiter*, 383 So.2d 330 (La. 1980)); *see also Progressive Sec. Ins. v. Foster*, 711 So.2d 675, 688 (La. 1998). The minimum amount of due process required by the Louisiana Constitution is the same as the minimum amount required by the United States Constitution. *Nunnery v. City of Bossier*, 822 F. Supp. 2d 620, 630 (W.D. La. 2011).

The application of La. R.S. 22:2043.1(A) to Buck in this case would contravene the Supreme Court’s admonition that the Due Process clause requires that a litigant be provided “an opportunity to present every available defense.” *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). *See also Nat’l Union Fire Ins. Co. of Pittsburgh v. City Savings, F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994); *Placida Prof’l Ctr., LLC v. F.D.I.C.*, 512 F. App’x 938, 949-950 (11th Cir. 2013) (barring defendants’ affirmative defenses against FDIC as receiver “does not comport with due process”). The right to a defense includes the ability to show that a non-party caused the harm alleged. *See Gatlin v. Entergy Corp.*, 04-0034 (La. App. 4 Cir. 5/4/05), 904 So. 2d 31, writ denied 05-1509 (La. 12/16/05), 917 So. 2d 1114 (“[A] defendant has the right to quantify and allocate the fault of all persons causing or contributing to an injured plaintiff’s damages, including the fault of [those who] would be immune.”).

In *Nat’l Union*, the Court held that barring defenses to the receiver’s counterclaims would “result in an unconstitutional deprivation of due process.”

***Property which one stands to lose as a result of a lawsuit is a property interest protected by the Due Process Clause, and the Due Process Clause prevents denying potential litigants use of established adjudicatory procedures, where such an action would be the equivalent of denying them an opportunity to be heard upon their claimed rights. If parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them. Such a serious deprivation of property without due process of law cannot be countenanced in our constitutional system.***

28 F.3d at 394 (3d Cir. 1994); *see also Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 220, 275 P.3d 933, 940 (Nev. 2012).

Due process mandates that Buck be permitted to fully defend itself against Plaintiff’s accusations, including the substantive right to apportion fault to culpable parties when, as here, Plaintiff has deprived it of any remedy against those parties. *Hicks v. Schouest*, 381 So. 2d 977, 978 (La. App. 4 Cir. 1980); *State v. Van Winkle*, 94-0947 (La. 6/30/95), 658 So. 2d 198, 202 (A defendant has a constitutional right to present a defense.); *State v. Walland*, 555 So. 2d 478, 482 (La. App. 4 Cir. 1989) (A defendant’s “right to present a defense is paramount in order to have a fair trial.”).

Plaintiff's April 1, 2021 motion for summary judgment, although referring generically to former "managers" and "agents" of LAHC, does not explicitly seek to bar fault apportionment to CGI and Beam – as those entities were third party contractors of LAHC.<sup>5</sup> La. R.S. § 22:2043.1(A) makes no reference to "contractors." So Buck does not read Plaintiff's papers as applying to those entities – who Plaintiff also previously released. But to the extent, if any, Plaintiff's motion is deemed to apply to those third party contractors, and if the Court reads La. R.S. 22:2043.1(A) as applying to them (which it should not do), application of the statute to prevent Buck from seeking to apportion fault to those "empty chair" defendants is unconstitutional for all of the reasons set forth above – and this Court should so rule.

As further support for its instant Motion for Partial Summary Judgment, Buck respectfully adopts and incorporates herein the arguments set forth in Buck's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, which is filed herewith, and the exhibits filed in support of that memorandum.

## **VI. CONCLUSION**

For the foregoing reasons and those set forth in Buck's opposition memorandum filed and incorporated herewith, Buck respectfully moves this Court to grant summary judgment sustaining Buck's affirmative defenses that the application of La. R.S. § 22:2043.1(A) in this particular context would violate Buck's constitutional rights to substantive and procedural due process.

Respectfully submitted,

/s/ James A. Brown

James A. Brown, T.A. (La. Bar #14101)

Sheri L. Corales (La. Bar #37643)

**LISKOW & 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

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<sup>5</sup> CGI's contract with LAHC expressly disclaims any agency relationship and confirms its status as solely an independent contractor. CGI contract, Ex. E to Buck opposition memorandum, at p. 9. Likewise, Beam's contract with LAHC, although titled as a "Management and Development Agreement," expressly disclaims any affiliation with LAHC and is expressly limited to advice and recommendations, with all decision-making and other actions reserved to LAHC's officers and directors. Beam contract, Ex. F to Buck opposition memorandum, at pp. 6, 11. Plaintiff attached both of these contracts as exhibits to its original Petition filed herein on August 31, 2016, so they are part of the Court record and hence properly considered on the instant partial summary judgment motion, per La. Code Civ. Proc. art. 966.



David R. Godofsky, *pro hac vice* (D.C. Bar # 469602)

**ALSTON & BIRD LLP**

950 F Street NW

Washington, DC 20004

Telephone: (202) 239-3392

Facsimile: (202) 654-4922

David.Godofsky@alston.com

*Attorneys for Buck Global, LLC*

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the above and foregoing has been served upon all counsel of record by e-mail, and upon counsel of record for Plaintiff by the additional means of certified mail, return receipt requested, this 2nd day of June, 2021.

/s/ James A. Brown

**SHERIFF PLEASE SERVE:**

The Honorable Jeff Landry  
Attorney General for the State of Louisiana  
Livingston Building  
1885 N. Third Street  
Baton Rouge, LA 70802