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
	:	19TH JUDICIAL DISTRICT COURT
versus	:	
GROUP RESOURCES INCORPORATED, MILLIMAN, INC., BUCK GLOBAL, LLC. AND IRONSHORE SPECIALTY COMPANY	:	PARISH OF EAST BATON ROUGE
	:	STATE OF LOUISIANA

REPLY MEMORANDUM TO DEFENDANTS' OPPOSITION MEMORANDA REGARDING OFFICER / DIRECTOR / EMPLOYEE / ETC. FAULT DEFENSES OR, IN THE ALTERNATIVE, MOTION TO STRIKE DEFENSES AS A MATTER OF LAW

MAY IT PLEASE THE COURT:

Plaintiff[1] respectfully files this Reply Memorandum to Defendants' Opposition Memoranda regarding the Receiver's "Motion for Partial Summary Judgment Regarding Officer / Director / Employee / etc. Fault Defenses or, in the Alternative, Motion to Strike Defenses as a Matter of Law" ("Motion"), currently set for Zoom hearing before this Honorable Court on Thursday, June 17, 2021. For all of the following reasons, Plaintiff's Motion should be GRANTED insofar as it relates to all of defendants' defenses pleading officer, director, employee, etc. fault ("D&O Fault") of LAHC, as these defenses are prohibited by La. R.S. 22:2043.1(A) and should be stricken as a matter of law.

Although each defendant has filed separate opposition memoranda to Plaintiff's Motion that add up to more than 50 pages of briefing,[2] rather than file multiple, piecemeal reply memoranda, Plaintiff files only this single reply memorandum which attempts to succinctly address all of the arguments advanced by defendants. To the extent possible, Plaintiff has tried to delineate which portions of this reply memorandum address which portions of each defendant's opposition memorandum.

In general, defendants argue that the clear language of La. R.S. 22:2043.1(A) does not apply in this case to bar their defenses of "D&O Fault" because: (1) the Receiver somehow waived

[1] 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 "Receiver").

[2] Buck Opp. Memo (19 pages); Milliman Opp. Memo. (10 pages); and GRI Opp Memo. (13 pages).

§2043.1(A); (2) the Receiver judicially admitted the fault of LAHC's officers, directors, employees, etc.; (3) the application of §2043.1(A) leads to an absurd result; (4) §2043.1(A) does not apply in this proceeding; (5) §2043.1(A) is unconstitutional; (6) §2043.1(A) does not displace La. C.C. art. 2323; and (7) the Receiver's Motion is premature. Each of defendants' unavailing arguments are refuted briefly in turn.

1. The Receiver has not Waived La. R.S. 22:2043.1(A)[3]

La. R.S. 22:2043.1(A), enacted by the Louisiana Legislature in 2012, clearly and unmistakably prohibits defendants from asserting as a "defense" to any "claim by the receiver" the "prior wrongful or negligent actions of any present or former officer, manager, director, trustee, owner, employee, or agent" of LAHC.[4] Given that "Legislation is a solemn expression of legislative will"[5] that trumps custom, equity, and jurisprudence, all of defendants' attempts to circumvent this clear statement of positive law (whether couched as a "waiver" or as a "judicial admission" or an "unconstitutional" violation of due process or as an unfair limitation on discovery, etc.) are futile.

Obviously, nothing in La. R.S. 22:2043.1 provides that, by making allegations against some of the former D&Os of LAHC, the Receiver "waives" the protection afforded to him by this statute. Defendants cite no case which directly supports their erroneous position. For example, *Renfro v. Burlington Northern*, 2006-952 (La. App. 3rd Cir. 12/6/06), 945 So.2d 857, a case relied upon and discussed by defendants in support of their waiver argument, simply holds that a party who discloses otherwise privileged documents, effectively waives that privilege. This is a correct statement of Louisiana law, but it does not support defendants' contention that the Receiver, by previously making allegations of fault against the D&Os has somehow waived his right to invoke §2043.1(A). Indeed, the Receiver is no longer making any allegations of fault against the former D&Os of LAHC in this proceeding.

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[3] See Milliman memo., pp. 3-5; Buck memo., pp. 4-7.

[4] The starting point in the interpretation of any statute is the language of the statute itself. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. La. Civ. Code art. 9; *Red Stick Studio Development, L.L.C. v. State ex rel. Dept. of Economic Development*, 2010-0193, p. 10 (La. 1/19/11), 56 So.3d 181, 187-88; *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007–2371, p. 13 (La.7/1/08), 998 So.2d 16, 27.

[5] La. C.C. arts. 1, 2, 3, & 4.

The clear statement of the Louisiana Legislature found in §2043.1(A) should be recognized and given effect by this Honorable Court, and nothing the Receiver did or did not do has waived his right to benefit from the protections afforded to him by this statutory law.

2. The Alleged Fault of the D&O's of LAHC has Not been Judicially Admitted[6]

Although Buck repeatedly asserts that the Receiver's prior allegations of fault against the D&Os of LAHC constitute "judicial admissions" by the Receiver, this is most assuredly not Louisiana law. None of the cases cited by Buck support its contention. As a matter of law and common sense, the Receiver does not have the power or ability to admit the fault of any defendant he may sue. If defendants are correct (they are not), has the Receiver judicially admitted the fault of GRI, Buck, and Milliman because he has alleged that each of these defendants engaged in grossly negligent conduct that damaged LAHC? While the Receiver wishes he has this power, he most certainly does not.[7]

3. The Application of La. R.S. 22:2043.1(A) in Not Absurd[8]

La. R.S. 22:2043.1(A) embodies the sound public policy of Louisiana: Third party defendants accused of wrongful conduct by a Receiver may not reduce their potential liability by allocating fault to the directors, officers, employees, etc. of the failed insurance company.[9] In an effort to promote and increase the chances of recovery for the receivership estate, this positive law favors the rights of the Receiver and the interests he represents over the rights of third-party defendants in the context of receivership litigation.[10] In effect, §2043.1(A) does not allow defendants whom the Receiver proves engaged in wrongful conduct that caused damages to a failed insurance company to reduce their liability by pointing to any fault attributable to the failed insurance company. In essence, §2043.1(A) forces defendants like GRI, Buck, and Milliman to

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[6] Buck memo., pp. 4-7.

[7] It is worth noting that all of the D&O defendants denied any wrongdoing both in their responsive pleadings filed herein and in the respective settlement agreements entered into with the Receiver. No judicial admission of any fault by the D&Os exists.

[8] Buck memo., pp. 8-12; Milliman memo., pp. 5-6; GRI memo., pp. 11-12.

[9] Stated differently, §2043.1(A) precludes the imputation of fault by LAHC to the Receiver—whether the Receiver only sues the D&Os of LAHC and/or others like GRI, Buck, and Milliman.

[10] The Louisiana Legislature has the authority to realign rights between parties in civil litigation as it deems proper, so long as the law enacted does not deprive a party of a constitutionally protected or vested right. For example, under current Louisiana law, workers cannot sue their employers in tort and victims of medical malpractice may not seek general damages in excess of $500,000. Although Louisiana workers and Louisiana victims of medical malpractice do not like these arguably "unfair" laws, their constitutional rights are not being violated because of them.

defend themselves on the merits of their own conduct. Although GRI, Buck, and Milliman understandably do not like this legislative realignment of rights, there is nothing improper, unconstitutional, or "absurd" about it.

As discussed below, defendants do not enjoy a constitutional right to have the fault of all potentially responsible parties allocated by the finder of fact at trial. While it is true that, absent a more specific and controlling statute like §2043.1(A), La. C.C. art. 2323 provides that the "comparative fault" of all responsible actors will be taken into account and allocated at trial, this does not mean that defendants have a constitutional right to having "comparative fault" principles apply at trial. Indeed, prior to the enactment of Article 2323 several decades ago, Louisiana was not a "comparative fault" state and civil litigants did not enjoy the right to limit their potential liability by pointing the proverbial finger at others. Although one can certainly argue over which policy is better, this debate certainly does not involve any substantive interests protected by our constitution.

4. La. R.S. 22:2043.1(A) Applies Here[11]

According to GRI, La. R.S. 22:2043.1(A) does not apply in this proceeding filed by the Receiver against defendants because this statue somehow only applies to "delinquency proceedings." Putting aside the issue that this suit arises out of and is the result of a "delinquency proceeding" filed by the Louisiana Commissioner of Insurance,[12] the clear language of §2043.1(A) does not restrict its application strictly to "delinquency proceedings"—unlike several of the other statues comprising the "Uniform Insurance Liquidation Law."[13] If the Louisiana Legislature intended to restrict the application of §2043.1(A) strictly to delinquency proceedings, they could have easily said so; they did not.[14]

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[11] GRI memo., pp. 3-4. Neither Milliman nor Buck make this argument.

[12] Consider La. R.S. 22:2009, which mandates that the Commissioner acting through the court-appointed Receiver "take such steps toward removal of the causes and conditions which have made such proceedings necessary as may be expedient." To remove the causes of the receivership includes taking action to recover sufficient funds to pay all creditors. Lawsuits by the Receiver for recovery of assets against persons or entities which caused or contributed to the insurer's insolvency are clearly contemplated by statues and are within the authority of the Receiver to pursue. La. R. S. 22:2043.1 merely clarifies that those not directly involved in operating the failed insurer cannot use as a defense—and are prohibited by law from asserting as a defense to their own independent liability—any claim that anyone affiliated with the insurer pre-receivership (as well as regulators) contributed to the insurer's demise. Furthermore, LAHC's lawsuit here was directly authorized by the Receivership Court as part of the Receiver's obligations imposed by Louisiana receivership law.

[13] *See, e.g.*, La. R.S. 22:2040(A), 22:2041(A), and 22:2042(A), all of which contain the phrase "In a delinquency proceeding" to qualify the application of that subpart. Compare to La. R.S. 22:2043.1 and 22:2045, which do not contain any such qualifying language.

[14] See fn. 4, *supra*.

Furthermore, and perhaps more importantly, restricting §2043.1(A) only to actions brought by the Receiver against LAHC would, in effect, render this statute meaningless. Once an insurance company is placed into receivership and a Receiver is appointed, the Receiver effectively becomes LAHC.[15] §2043.1(A) prohibits the imputation of LAHC's prior fault to the Receiver—regardless of whether the Receiver only sues the D&Os of LAHC or the Receiver sues other third-parties. §2043.1(A) recognizes the separate existence and purpose of the Receiver: to marshal, manage, and recover all assets belonging to the failed insurance company for the benefit of the general public, policyholders, and creditors of the failed insurance company. Just as §2043.1(A) prevents the D&O's from using their own fault as a defense to bar or limit the Receiver's potential recovery, the clear language of §2043.1(A) prevents third-party defendants, like GRI, Buck, and Milliman, from doing the same thing.[16] As a matter of sound public policy, the Louisiana Legislature enacted §2043.1(A) to preclude all parties, including LAHC itself (*i.e.*, its own D&Os, employees, etc.) and third-parties like GRI, Buck, and Milliman, from effectively imputing any prior fault attributable to LAHC to the Receiver in an effort to defeat or in any way limit the Receiver's right of recovery against these allegedly liable parties.

5. Defendants have Not been Deprived of any Vested Due Process Rights[17]

The "due process" argument advanced by defendants is patently deficient, both substantively and procedurally. As discussed above, defendants do not have a constitutional right to have "comparative fault" principles apply at trial. The Louisiana Legislature is free to modify substantive rights of civil litigants prospectively however it reasonably may choose, without violating the constitution. It is only when a substantive modification violates an existing vested right that constitutional concerns may be implicated. *See* La. Civ. Code art. 6; *Segura v. Frank*, 630 So.2d 714 (La. 1994); *Church Mut. Ins. Co. v. Dardar*, 2013-2351 (La. 5/7/14), 145 So.3d 271. Clearly, no rights of any defendant here vested before the enactment of §2043.1(A) in 2012.

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[15] As has been addressed and discussed in several prior briefs in this case, this is not to imply or state that the Receiver stands exactly in the shoes of LAHC; he does not. Once an insurance company fails and is placed into receivership, the court-appointed Receiver assumes not only the responsibility of acting on behalf of the insurance company, but also on behalf of the public at large and the policyholders and creditors of the failed insurance company.

[16] Also, GRI's argument that because it did not "mention any former personnel of LAHC" in its answer, GRI may urge the defense of LAHC to limit the Receiver's recovery, is nonsensical. See GRI memo., p. 5. Because the "present or former officer, manager, director, trustee, owner, employee, or agent" of LAHC is, for all intents and purposes, LAHC itself, GRI's argument is circular at best. Regardless of whether GRI—or any defendant—specifically identifies a specific officer, manager, etc. of LAHC in its answer, §2043.1(A) does not allow it to allege the fault of LAHC as a defense against the claims brought by the Receiver.

[17] See Buck memo., pp. 12-4; Milliman memo., pp. 6-8.

Additionally, the cases cited by defendants are not on-point. For example, *United States v. Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752 (1971) and *State v. Wilson*, 2017-0908 (La. 12/5/18), 2018 WL 6382169, cited by Milliman, are completely inapposite. *Armour & Co.* merely stated, in passing, that a party generally has a right to litigate claims against it that it waives by entering into a consent decree, so the consent decree must be construed strictly only to matters expressly intended by both parties. And *Wilson* involved serious infringement on the rights of a criminal defendant to defend himself and is expressly limited to that completely irrelevant context. Defendants do not cite any case that undermines the right of the Louisiana Legislature to enact La. R.S. 22:2043.1.

Procedurally, because defendants are seeking a declaration that La. R.S. 22:2043.1 is unconstitutional, they are required by applicable Louisiana law to serve the Louisiana Attorney General with a copy of the argument and provide his office an opportunity to be heard. La. Code Civ. Proc. art. 1880. Furthermore, the law requires this type of challenge to be raised in a "pleading," which does not include a memorandum, opposition or brief. *Vallo v. Gayle Oil Co., Inc.*, 94–1238 (La.11/30/94); 646 So.2d 859, 864–65; therefore, the issue of whether §2043.1(A) is unconstitutional is not properly before this Honorable Court on June 17th at the Zoom hearing regarding the Receiver's Motion. Apparently recognizing this deficiency, defendants simultaneously filed a "Motion for Partial Summary Judgment on Unconstitutionality of La. R.S. 22:2043.1(A) as Applied" ("MPSJ"), seeking a ruling regarding this constitutional challenge. As of this filing, we have not been given notice of any hearing date regarding defendants' MPSJ. The Receiver, and presumably the Attorney General's office, will respond to defendants' MPSJ appropriately and timely in advance of any hearing regarding the same.

6. La. R.S. 22:2043.1(A) Controls Here—Not La. C.C. art. 2323[18]

Defendants' argument that La. C.C. art. 2323 precludes the application of La. R.S. 22:2043.1(A) to bar "D&O Fault" defenses is without merit. As discussed in greater detail in the Receiver's original supporting memorandum, Article 2323, which provides, *inter alia*, that the fault of "immune" parties should be considered and allocated by the trier of fact, was last amended in 1996. La. R.S. 22:2043.1(A) was enacted in 2012. Whereas Article 2323 addresses the allocation of fault between parties and non-parties in a general way, §2043.1(A) specifically

[18] See GRI memo., pp. 6-11.

addresses and provides that any allegations regarding "D&O Fault" shall not be allowed as a defense to the receiver's claims. As a matter of hornbook law and statutory construction, "the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character." *LeBreton v. Rabito*, 97-2221, p. 7 (La. 7/8/98), 714 So2d. 1226 (citations omitted). A subsequent statute dealing specifically with a particular subject supersedes and prevails over inconsistent and conflicting provisions in an earlier statute addressing those issues. *Macon v. Costa*, 437 So.2d 806 (La. 1983); *State v. St. Julian*, 221 La. 1018, 61 So.2d 464 (1952). If there is a conflict between two statutes, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *Pumphrey v. City of New Orleans*, 2005-0979 (La. 4/4/06), 925 So.2d 1202; *Killeen v. Jenkins*, 98-2675 (La. 11/5/99), 752 So.2d 146; *Board of Ethics In re Davies*, 2010-1339 (La.App. 1 Cir. 12/22/10), 55 So.3d 918. By enacting §2043.1(A) in 2012 to specifically prevent defendants from using "D&O Fault" as a defense to a receiver's claims, the Louisiana Legislature clearly and deliberately circumscribed the application of Art. 2323 in Receivership cases like the present one.

7. The Receiver's Motion is Not Premature[19]

In cases such as this one, where the law is clear that a party cannot prevail (here, on a "D&O Fault" defense) regardless of what discovery it may do, there is no functional difference between a partial summary judgment under La. Code Civ. Proc. art. 966 or an order striking legally insufficient defenses under La. Code Civ. Proc. art. 964. Under either procedural vehicle, the question is whether the defense being addressed is deficient as a matter of law, and under either standard, the answer here is "yes."

Defendants argue that with regard to a Motion for Partial Summary Judgment, art. 966 requires that "adequate" discovery be completed first. While this is true as a general rule, the Louisiana Supreme Court has instructed that unless the Summary Judgment opponent "shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact." *Simoneaux v. E.I. du Pont de Nemours & Co.*, 483 So.2d 908, 913 (La. 1986). Consistent with that principle, the jurisprudence has recognized that, despite

[19] See Buck memo., pp. 14-18; Milliman memo., pp. 8-9. Defendants also question whether the immediate Motion relates to whether the fault of CGI and/or Beam may be considered and allocated by the finder of fact; because the issue of whether CGI and/or Beam was or was not an "agent" of LAHC for purposes of §2043.1(A) involves a factual determination, the Receiver respectfully suggests that this determination should be deferred and made after discovery has ended and prior to trial. In contrast, because there are no factual issues regarding who is an "officer, manager, director, trustee, owner, [or] employee" of LAHC, there is no need to defer this purely legal determination.

pending discovery requests, summary judgment is not premature when the issue presented is purely a legal one and additional discovery cannot change the result.[20] In cases, like these, it has been observed that additional discovery would be "fruitless" and that there are no material issues of fact that will delay a summary judgment. *SBN V FNBC LLC v. Vista Louisiana, LLC*, 2018-1026, pp 8-9 (La.App. 4 Cir. 3/27/19), 267 So.3d 655, 662. Louisiana law does not provide defendants with a legal defense based upon "D&O Fault" regardless of much discovery defendants may want to undertake.

Indeed, although defense counsel may not recognize or agree with this fact, a relatively early determination that "D&O Fault" cannot be at issue at the trial of this matter will actually benefit all concerned, including defendants, by streamlining discovery, reducing costs, and eliminating unnecessary depositions and expert testimony regarding "D&O Fault."

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[20] *See Whitney Bank v. Garden Gate New Orleans, L.L.C.*, 17-362, pp. 6-7 (La. App. 5 Cir. 12/27/17), 236 So.3d 774, 781 (observing, in a suit on a promissory note, that "defendants have not shown there are any genuine issues of material fact for which discovery is necessary, and thus, defendants have not shown that a probable injustice has occurred" in denying motion to continue); *River Bend Capital, LLC v. Lloyd's of London,* 10-1317, p. 5 (La. App. 4 Cir. 4/13/11), 63 So.3d 1092, 1096 (observing that "[f]urther discovery to verify what Lloyd's meant by 'full and final settlement' is unnecessary where the language is clear and unambiguous as here"); *Hamilton v. Willis*, 09-0370, p. 3 (La. App. 4 Cir. 11/4/09), 24 So.3d 946, 948 (observing that "[a]dditional discovery cannot change the motorsports exclusion, which we find to be clear and unambiguous and not leading to absurd consequences"); *Orleans Par. Sch. Bd. v. Lexington Ins. Co.*, 12-1686, p. 30 (La. App. 4 Cir. 6/5/13), 118 So.3d 1203, 1223 (observing that "[w]hen the words of an insurance contract are clear and explicit and lead to no absurd consequences … additional discovery cannot change the result").

Conclusion and Prayer

For all of the foregoing reasons, the Receiver respectfully requests that his Motion be GRANTED as to "D&O Fault" and that all of defendants' defenses regarding "D&O Fault" be stricken as a matter of law.

Respectfully submitted,

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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 10th day of June, 2021, in Baton Rouge, Louisiana.

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