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	PARISH OF EAST BATON ROUGE
GROUP RESOURCES INCORPORATED, MILLIMAN, INC., BUCK GLOBAL LLC. AND IRONSHORE SPECIALTY COMPANY	STATE OF LOUISIANA

MILLIMAN, INC.'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE APPLICATION OF LOUISIANA LAW OR, IN THE ALTERNATIVE, MOTION IN LIMINE REGARDING CHOICE-OF-LAW ISSUES

NOW INTO COURT, through undersigned counsel, comes defendant Milliman, Inc. ("Milliman" or "Defendant") to oppose the Receiver's *Motion for Partial Summary Judgment Regarding the Application of Louisiana Law or, in the Alternative, Motion in Limine Regarding Choice-of-Law Issues* filed on May 28, 2021 (the "Motion").

The sole question that is briefed and before the Court is whether the Receiver has shown that there is no genuine issue of material fact concerning whether Louisiana law governs the construction of the limitation of liability clause in Milliman's Consulting Services Agreement ("CSA").[1] La. Code Civ. Proc. Art. 966(D). The Receiver has not met his burden. Recasting the Motion as a Motion in Limine does not relieve the Receiver of his burden to show there are no material facts in dispute. The Receiver's premature Motion should be denied.

Summary judgment may be granted only if "[a]fter an ***opportunity for adequate discovery*** . . . 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. Code Civ. Proc. Art. 966(A)(3) (emphasis added). An issue is genuine if reasonable persons could disagree or reach more than one conclusion from the ***evidence*** presented. *Bass v. Disa Glob. Sols., Inc.*, 2019-1145 (La. App. 1 Cir. 6/12/20), 305 So. 3d 903, 906-07, reh'g denied (July 17, 2020), writ denied, 2020-01025 (La. 11/4/20), 303 So. 3d 651. The Louisiana Supreme Court

[1] Neither the enforceability of the CSA's limitation of liability, nor any issues with respect to the merits of the Receiver's claims against Milliman are before the Court in this Motion. Milliman reserves all rights and arguments with respect to those issues.

has likewise held that a motion in limine is premature prior to discovery of the facts. *See Strickland v. Cmty. Health Sys., Inc.*, 2006-1784 (La. 10/13/06), 939 So. 2d 353.

The Receiver's Motion flies in the face of these well-settled standards. Far from "adequate discovery," there has been no discovery at all on the underlying facts regarding the choice-of-law question at issue in the Motion. The Receiver concedes a proper choice-of-law analysis includes a fact-intensive analysis of, among other things, the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties. Yet, his Motion does not, and cannot, offer ***evidence*** on any of these factors because there has been no discovery directed to these issues. Instead, the Receiver's Motion assumes its conclusion that Louisiana is the "lex causae" of this dispute based on unsupported legal assertions, which have not been adequately tested through discovery. Apart from reciting Milliman's affirmative defenses, the only "undisputed material fact" the Receiver identifies is not a fact at all, but a disputed conclusion of law that "Louisiana's connection and relationship to the parties and this dispute predominate." (*See* Mot. at 3, "List of Undisputed Material Facts").

Accordingly, the Receiver's Motion should be denied.

MATERIAL DISPUTED FACTS

The Receiver's purported material facts are not material facts and cannot support summary judgment. To the extent "fact" number three is construed as a material fact (it is not), Milliman disputes it. Discovery in this matter is in its initial stages. The Receiver just completed his multi-million document production in June, which Defendants are still reviewing. There have been no depositions, and there has been no discovery directed to the underlying facts at issue in the Motion, including, but not limited to, place of contract formation, negotiation, or performance. Such material facts are in dispute. The nature and depth of the disputed facts will become more evident and developed once Milliman has the opportunity to engage in discovery, particularly depositions, which has not yet occurred as La. Code Civ. Proc. Art. 966 contemplates.

In his Petition, the Receiver alleges that "[i]n or around August 2011, Milliman was engaged by [Terry] Shilling on behalf of Beam Partners and/or LAHC, to provide 'actuarial support' . . ." through the execution of an engagement letter[2] addressed to and signed by Mr. Shilling as "Owner/Partner" of Beam Partners on behalf of LAHC. (Fifth Am. Pet. at ¶ 40). The engagement letter, signed on behalf of Milliman by Courtney White, was addressed from Milliman's Georgia address to Terry Shilling / Beam Partners' Georgia address. (Ex. 1 at 1). On the same day Mr. Shilling signed the engagement letter, he also signed the CSA. (Mot. at Ex. 3). Courtney White signed the CSA on behalf of Milliman. (Mot. at Ex. 3).

Milliman is a foreign corporation domiciled in Washington which also operates offices in New York. (Fifth Am. Pet. at ¶ 11(a); Mot. at 7). Discovery in this matter is likely to show that Mr. Shilling, Beam Partners, and Courtney White were all domiciled in Georgia when the CSA was executed and that the CSA was executed in Georgia. Discovery will also show that Rachel Killian, the Milliman actuary primarily responsible for the actuarial services provided to LAHC, was (and still is) domiciled in Georgia during the relevant time that she performed her work for LAHC. Equally important, she performed her work for LAHC in Georgia.

Pursuant to the CSA, the parties agreed that: "Milliman . . . shall not be liable to [LAHC], under any theory of law including negligence, tort, breach of contract or otherwise, for any damages in excess of three times the professional fees paid to Milliman with respect to the work in question or $3,000,000, whichever is less." Mot. at Ex. 3, ¶ 3. The parties further agreed: "The construction, interpretation, and enforcement of this Agreement shall be governed by the substantive contract law of the State of New York without regard to its conflict of laws provisions. In the event any provision of this agreement is unenforceable as a matter of law, the remaining provisions will stay in full force and effect." *Id*. at ¶ 5.

Discovery is likely to show that the CSA was negotiated and agreed to in an arms-length transaction in which two sophisticated parties agreed that New York law would apply to construe the CSA.

Finally, although the Receiver asserts, without support, that Louisiana policyholders and providers have a significant interest in this action, evidence obtained and being sought from the

[2] A copy of the engagement letter is attached hereto as Exhibit 1.

Receiver is likely to show that the vast majority, if not substantially all, of allegedly injured Louisiana policyholders and providers have already been made whole.

ARGUMENT

I. Summary Judgment Should Be Denied on the Choice-Of-Law Question Because There Are Material Facts in Dispute.

On a motion for summary judgment, the movant bears the burden to show that no genuine issue of material fact exists. *See Istre v. Meche*, 2005-2508 (La. 6/16/06), 931 So. 2d 361, 364; *see also* La. Code Civ. Proc. Art. 966(D). In determining whether an issue is genuine, the trial court "cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence." *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512 (La. 7/5/94), 639 So. 2d 730, 751. Rather, "factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor." *Willis v. Medders*, 2000-2507 (La. 12/8/00), 775 So. 2d 1049, 1050. "If the supporting documents presented by the mover are not sufficient to resolve all material fact issues, ***summary judgment must be denied***." *Geo Consultants Int'l v. Professional Roofing & Constr., Inc.*, 95-1016, p. 3 (La. App. 5 Cir. 3/26/96); 672 So. 2d 1002, 1004-05 (citing *Durrosseau v. Century 21 Flavin Realty Inc.*, 594 So. 2d 1036, 1038 (La. App. 3d Cir. 1992)) (emphasis added); *see also Dimattia v. Jackson Nat. Life Ins. Co.*, 2004-1936 (La. App. 1 Cir. 9/23/05), 923 So. 2d 126, 129.

The Receiver fails to meet his burden to show that there is no genuine issue of material fact that Louisiana law should govern. The one "undisputed fact" the Receiver identifies that is not a recital of Milliman's affirmative defenses states that "Louisiana's connection and relationship to the parties and this dispute predominate over New York's interest in this dispute." (Mot. at 4). This conclusory statement, with no supporting evidence, is disputed for the following reasons.

First, the Receiver's Motion improperly restricts his *lex causae* analysis to just two states: New York, the state law that the parties agreed to contractually, and Louisiana, the state law the Receiver hopes will give him an advantage in this lawsuit. However, the law is clear that the *lex causae* must be determined by a factual analysis of the strength and pertinence of the relevant

policies of "*all* involved states." *See* La. Civ. Code Art. 3515. Here, the involved states include, at a minimum, Louisiana and New York, but also Georgia where the contract was executed and where most of Milliman's work on behalf of LAHC was performed, and Washington where Milliman is domiciled.

Second, the Receiver falls far short of his burden to establish there are no facts in dispute with respect the choice-of-law factors outlined in La. Civ. Code Art. 3537. Rather, the Motion confirms the Receiver himself is unsure of these facts. For example, the Receiver asserts (with no facts in support) that the CSA was negotiated and formed "at least in part if not exclusively, in Louisiana." (Mot. at 7). Even assuming this statement was true, the difference between a contract negotiation/formation being "in part" versus "exclusively" in a state would have a material impact on what state is ultimately determined to be the *lex causae*. *See Premium Hosp., L.L.C. v. Astra Cap. Funding*, No. CIV.A. 12-0779, 2013 WL 3791495, at *9 (E.D. La. July 19, 2013) ("The Louisiana Supreme Court has recognized that states have a substantial interest in the application of its laws to contracts formed within their state") (citing *Champagne v. Ward*, 2003–3211 (La.1/19/05); 893 So.2d 773); *Dickerson v. Progressive Exp. Ins. Co.*, No. CIV.A. 07-8153, 2009 WL 117006, at *5 (E.D. La. Jan. 14, 2009) (ruling that Louisiana law does not apply because even though plaintiff was domicile in Louisiana, courts cannot just look at plaintiff's place of domicile and the location of the object of the contract but must also consider where the contract was formed and negotiated). Moreover, discovery is likely to show this assertion is untrue and that the CSA was negotiated and formed in Georgia, where Terry Schilling, Beam Partners, and Courtney White were located, not in Louisiana. Similarly, the Receiver does not provide any facts with respect to where the contract was performed, as Art. 3537 requires. Although the Receiver asserts the work done by Milliman "related primarily, if not exclusively" to setting Louisiana premium rates (Mot. at 7), discovery is likely to show that work was done primarily by Milliman in Georgia, and supported by work of other Milliman personnel in states other than Louisiana.

Third, the Receiver's strawman argument comparing New York versus Louisiana's interest in this post-receivership proceeding is not the relevant analysis. In Louisiana, a choice-of-law provision is presumed valid. *See* La. Civ. Code art. 3540. Articles 3537 and 3515 require

courts evaluate the strength and pertinence of the relevant policies that allow sophisticated parties such as those at issue here to choose the law applicable to their transaction. This analysis should not impair fundamental policies of contract law such as: (1) the orderly planning of transactions, (2) promoting multistate commercial intercourse, (3) the policies and needs of the interstate and international systems, and (4) upholding the justified expectations of parties. *Id.*

The expectation of the two sophisticated parties to the CSA, operating in interstate commerce, was that New York law would govern the construction of their contract. Louisiana has recognized that the interest of the forum state in applying its local law does not override the parties' expectation that a uniform law will apply. *See, e.g.*, *Murden v. Acands, Inc.*, 2005-0319 (La. App. 4 Cir. 12/14/05), 921 So. 2d 165, 172, writ denied, 2006-0129 (La. 4/17/06), 926 So. 2d 526 (ruling that Belgian law should govern when parties intended that the insurance contract be interpreted pursuant to Belgian law because "[a] contrary conclusion could subject this policy to 50 different interpretations based on the state in which a plaintiff files suit, thereby destroying any predictability or uniformity of application."). Likewise, uniformity in choice-of-law provisions is commonplace and essential for companies like Milliman that operate nationwide so that their contracts are not subjected to fifty different state interpretations. Subjecting Milliman to a different state law than the one it contracted for will have a chilling effect on out-of-state service providers' willingness to enter into contracts in Louisiana because they cannot rely on the terms of their agreements. Louisiana's interest is best served by not allowing sophisticated entities to back out of terms of their contracts whenever they deem it convenient, which defeats the purpose of entering into a binding contract in the first place.

Robinson v. Robinson, 1999-3097 (La. 1/17/01), 778 So.2d 1105, on which the Receiver relies, is therefore inapposite not only because it is a divorce proceeding, but also because the ruling was intended to protect "disadvantaged spouses" in Louisiana. Rather, this case is more akin to *In re Plaisance,* 619 B.R. 148, 160 (Bankr. W.D. La. 2020), in which the court held that a Delaware choice-of-law provision and broad restrictive covenants in a contract did not violate the public policy of Louisiana when agreed to in a contract that was negotiated at arm's length, for valuable consideration, and without any allegation of coercion or adhesion. As the court stated, the parties were "free to choose not only the terms of their agreement but the law

applicable to it." *Id.* Here, discovery is likely to show that unlike the spouse in *Robinson* and like the sophisticated entity in *Plaisance*, LAHC/Beam Partners was anything but disadvantaged. It was a sophisticated party that negotiated the CSA at arms-length and agreed it would be governed by New York law. Moreover, LAHC/Beam Partners was in a position to determine what was in the interest of its policyholders and providers[3] when it entered into the CSA and agreed that New York law would apply. At a minimum, discovery is needed to determine why and how New York law was selected before a choice-of-law determination can be made.

Finally, the Receiver dismisses out of hand Washington state as an involved state even though Article 3537 specifically states that a party's place of domicile should be considered in a *lex causae* analysis. There is a genuine issue of material fact if reasonable persons could disagree or reach more than one conclusion from the evidence (once it is discovered and) presented. *Larson v. XYZ Ins. Co.*, 2016-0745 (La. 5/3/17), 226 So. 3d 412, 416. This standard is easily met here. The Receiver has not presented any ***evidence*** that Louisiana law applies. His legal conclusions and assumptions are insufficient to overcome the disputed facts Milliman has raised with respect to whether New York, Georgia, or Washington state law should govern this dispute. On a motion for summary judgment, all factual inferences and doubts must be construed in favor of the non-moving party—*i.e.*, Milliman. *See Willis*, 775 So. 2d at 1050.

Many courts have denied summary judgment upon finding a genuine issue of material fact as to the choice of applicable law. *See, e.g., Wright v. Gotte*, 2008-174 (La. App. 3 Cir. 12/10/08), 1 So. 3d 700, 705, writ denied, 2009-0060 (La. 3/6/09), 3 So. 3d 489 (reversing the trial court's grant of summary judgment since a genuine issue of material fact, *i.e.* the insured's state of domicile, exists as to the choice-of-law issue); *In re EDC Contractor Ins. Litig.*, 2005-1064 (La. App. 3 Cir. 5/24/06), 931 So. 2d 462, 467, writ denied, 2006-1612 (La. 9/29/06), 937 So. 2d 871 (concluding that summary judgment as to whether Texas or Louisiana law applied to

[3] The Receiver's documents indicate that the estate received sufficient funds through its settlement of its claims against the federal government to pay nearly all Louisiana provider claims. (*See* "Notice of Receipt of Risk Corridor Funds from the United States and Revised LAHC Forms for Payment of LAHC Settling Provider Claims"). Accordingly, the concerns of unidentified Louisiana providers who are no longer creditors of the estate is not a relevant consideration for overriding the clear expectation of the parties to the CSA who explicitly agreed to a New York choice-of-law provision. Milliman is currently seeking further discovery from the Receiver on this precise issue.

a particular insurance contract was premature because discovery was still needed on issues surrounding the negotiation and issuance of the policies); *Ark-La-Tex Timber Co. v. Georgia Cas. & Sur. Co.*, 516 So. 2d 1217, 1222 (La. App. 2d Cir. 1987) (reversing trial court's grant of summary judgment upon finding that "the question of choice of law regarding the duty to defend and the attendant interpretation of the insurance policy presents a genuine issue of material fact and prevents a determination that plaintiff is entitled to partial summary judgment as a matter of law"). Because there are genuine issues of material facts here, this Court should likewise deny the Receiver's Motion.

II. Motion in Limine Regarding Choice-Of-Law Issues in the Alternative Should Be Denied Because It Is Improper and/or Premature.

Motions in limine are not specifically authorized in Louisiana but can be used to exclude evidence that is irrelevant or prejudicial prior to trial. *State v. Taylor*, 502 So. 2d 534, 536 n.3 (La. 1986), on reh'g, 502 So. 2d 537 (La. 1987); *See, e.g.*, *Furlough v. Union Pacific R.R. Co.*, 766 So. 2d 751, 757 (La. Ct. App. 2d Cir. 2000), writ denied, 781 So. 2d 556 (La. 2001) ("Motions in limine provide both plaintiffs and defendants with a vehicle to have evidentiary issues decided prior to trial."). The party against whom a motion in limine is made is allowed to rebut it by showing why the evidence is potentially probative. Here, however, the Receiver does not identify any such evidence that he seeks to exclude anywhere in his Motion. He seeks only a ruling on choice-of-law.

Accordingly, recasting a summary judgment motion as a motion in limine is not an end run around the Receiver's burden to show there are no material facts in dispute, nor does it disprove that this Motion is premature because of such disputed facts. *See, e.g., Plaquemines Par. Gov't v. State*, 2001-1027 (La. App. 4 Cir. 4/10/02), 826 So. 2d 14, 21, writ denied, 2002-1304 (La. 9/13/02), 824 So. 2d 1170 (confirming the district court's ruling denying the State's motion in limine because there was a genuine factual issue as to causation); *Trafficware Grp., Inc. v. Sun Indus., L.L.C.*, No. CV 15-106-SDD-EWD, 2017 WL 1050579, at *3 (M.D. La. Mar. 20, 2017), aff'd, 749 F. App'x 247 (5th Cir. 2018) (denying motion in limine because it turned on a factual dispute that must be resolved by the trier of fact); *JH Kaspar Oil Co. v. Newton &*

Assocs., LLC, No. CIV.A. 07-3723, 2008 WL 819094, at *2 (E.D. La. Mar. 25, 2008) (denying alternative motion in limine due to disputed issues of fact).

The Louisiana Supreme Court has denied motions in limine prior to any discovery as premature. *See Strickland*, 939 So. 2d 353 ("Plaintiffs' motion in limine is premature, as it was filed prior to defendant's answer and prior to any discovery."); *see also Kelly v. Patel*, No. 1:20-CV 01291, 2021 WL 2460560, at *2 (W.D. La. June 16, 2021) (finding the motion in limine premature when it was filed before deadlines for discovery were established).

The cases Receiver cited in support of the motion in limine do not support his demand for early limine ruling now on disputed issues, before any meaningful discovery has been completed, and well over a year before a trial is even set. *See, e.g.*, *Furlough*, 766 So. 2d at 757 (motion in limine that was filed one day before commencement of trial); *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So. 3d 507 (motion in limine filed one month prior to trial). *Gunter v. Plauche, 428 So. 2d 1094* (La. Ct. App.), writ granted, 434 So. 2d 1099 (La. 1983), rev'd, 439 So. 2d 437 (La. 1983) does not even involve a motion in limine.

Nor is it "important this legal determination be made sooner rather than later" as the Receiver erroneously asserts because this ruling will have no practical impact on the course of this litigation. This case will move forward regardless of the ruling on this Motion, as will discovery into whether the Receiver can plead or prove gross negligence. Thus, this case is nothing like *Russell v. Lake Sherwood Acres, Inc.*, 388 So. 2d 822 (La. Ct. App. lst Cir. 1980), cited by the Receiver, in which the court elected to hold an early evidentiary hearing on the merits of a motion in limine related to the applicable prescriptive period because "disposing of the exception in limine might save all involved an unnecessary trial on the merits and is in the best interest of justice." *Id.* at 823. No such efficiency will be gained here.

In fact, if the Receiver cannot prove gross negligence, a decision on this choice-of-law motion will have no impact on this case.[4] Having the Court decide this complex choice-of-law question now for a claim that might never present itself is premature, hypothetical, a waste of the

[4] Milliman disputes the Receiver's allegations that its work for LAHC was "grossly negligent," under any governing standard. That inherently factual question is not before the Court at this time. Milliman reserves all arguments with respect to the merits of the Receiver's claims, including that the Receiver failed to properly plead gross negligence, and that any such claim is untimely.

parties and Court's time and resources, and contrary to long-standing precedent. "It is well settled that courts will not render advisory opinions as to abstract, hypothetical, or moot controversies, and that cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely." *Coffee Bay Invs., L.L.C. v. W.O.G.C. Co*., 2003-0406 (La. App. 1 Cir. 4/2/04), 878 So. 2d 665, 673, writ denied, 2004-1084 (La. 6/25/04), 876 So. 2d 838) (reversing summary judgment ruling on alter ego liability because a decision on that issue would be an advisory opinion having no practical effect if plaintiff could not first prove the merits of its underlying claims); *see also Sawyers v. Naomi Heights Nursing Home & Rehab. Ctr., LLC*, 2019-331 (La. App. 3 Cir. 8/21/19), 279 So. 3d 404, 409, writ denied sub nom. *Sawyers v. Naomi Heights Nursing Home & Rehab. Ctr. LLC*, 2019-01501 (La.11/12/19), 282 So. 3d 228 (affirming trial court's denial of the Relators' motion in limine as premature because it was based on "hypothetical scenarios"). The Motion should be denied.

CONCLUSION

Because the Receiver has not provided sufficient evidence to resolve all material facts, nor has he described or presented what factual evidence he asks to be struck from the case at this early stage, Milliman respectfully requests that the Receiver's Motion be denied in its entirety.

Respectfully submitted,

/s/ Harry Rosenberg
PHELPS DUNBAR LLP
HARRY ROSENBERG (Bar #11465)
Canal Place 365 Canal Street, Suite 2000
New Orleans, Louisiana 70130-6534
Telephone: (504) 556-1311
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 (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 copy of the above and foregoing *Milliman, Inc.'s Opposition to Motion for Partial Summary Judgment Regarding the Application of Louisiana Law or, in the Alternative, Motion in Limine Regarding Choice-of Law Issues* has been served upon all counsel of record via facsimile, e-mail and/or by placing same in the U.S. Mail, postage pre-paid and properly addressed.

Near Orleans, Louisiana, this 5th day of August 2021.

/s/ Harry Rosenberg