

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
	:	
	:	19 <sup>TH</sup> JUDICIAL DISTRICT COURT
	:	
versus	:	PARISH OF EAST BATON ROUGE
	:	
CGI TECHNOLOGIES AND SOLUTIONS, INC., <i>ET AL.</i>	:	STATE OF LOUISIANA

**REPLY MEMORANDUM**  
**TO MILLIMAN’S OPPOSITION MEMORANDUM TO**  
**MOTION FOR PARTIAL SUMMARY JUDGMENT**  
**REGARDING THE APPLICATION OF LOUISIANA LAW OR,**  
**IN THE ALTERNATIVE,**  
**MOTION IN LIMINE REGARDING CHOICE-OF-LAW ISSUES**

MAY IT PLEASE THE COURT:

Plaintiff<sup>1</sup> files this brief Reply Memorandum to Milliman’s Opposition to his “Motion for Partial Summary Judgment Regarding the Application of Louisiana Law or, in the Alternative, Motion in Limine Regarding Choice-of-Law Issues” (the “Motion”) which is set for Zoom Hearing on Friday, August 20, 2021. For the following reasons and those set for in his original Memorandum in support, the Receiver respectfully suggests that the immediate Motion is neither “premature” nor “improper” as Millman argues, and that Louisiana law should apply to determine whether the limitation-of-liability clauses found in Milliman’s contract with LAHC should be enforceable.

**A. BUCK AND GRI HAVE BOTH SETTLED WITH THE RECEIVER**

Significantly, on August 6, 2021, the Receiver reached separate settlement agreements with both Buck and GRI / Ironshore that will resolve all claims between these parties. Undersigned counsel and counsel for Buck, GRI, and Ironshore (GRI’s insurer) are actively working on the separate, formal settlement agreements now, and hope to be in a position to seek Court approval of these settlement agreements in the near future. In light of these settlements, neither Buck nor GRI/Ironshore have any remaining interest in the immediate Motion and it is the Receiver’s understanding and expectation that counsel for Buck and GRI/Ironshore will not participate in the August 20, 2021, hearing regarding this Motion. The Receiver therefore respectfully suggests that this Honorable Court should not consider the opposition memorandum filed herein by Buck.<sup>2</sup>

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<sup>1</sup> James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Court Appointed Rehabilitator of Louisiana Health Cooperative, Inc., through his duly Court appointed Receiver, Billy Bostick (“Plaintiff” or the “Receiver”).

<sup>2</sup> This is especially true insofar as Buck raises certain factual issues that are relevant only to Buck and not Milliman—namely that Buck is headquartered in New York and did some work regarding LAHC in New York. Milliman has no meaningful connection to New York.

The only remaining defendant in this proceeding is Milliman. Therefore, the Receiver will only address, and this Honorable Court need only consider, the arguments found in Milliman's opposition memorandum to the immediate Motion.

**B. THAT LOUISIANA LAW IS THE *LEX CAUSEA* CANNOT BE GENUINELY CONTESTED**

For summary judgment purposes, and as acknowledged by Milliman in its opposition memo, a "genuine issue" is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. La. C.C.P. art. 966; *Hines v. Garrett*, 2004-C-0806 (La. 6/25/04); 876 So.2d 764; *Jones v. Estate of Santiago*, 2003-CC-1424 (La. 4/14/04); 870 So.2d 1002; *Collins v. Franciscan Missionaries*, 2019-CA-0577 (La. App. 1<sup>st</sup> Cir. 2/21/20); 298 So.3d 191.

Here, although Milliman tries to delay this critical choice-of-law determination to a later date after "sufficient discovery" has occurred, none of the facts asserted by Milliman in its opposition are contested. That Milliman is based in Washington is not contested. That part of LAHC's contract with Milliman was negotiated in Georgia is not contested. That Milliman has two (2) satellite offices in New York is not contested. That LAHC and Milliman chose New York law in their contract is not at issue. Indeed, the Receiver stated and acknowledged these uncontested facts in his original memorandum in support; see p. 7. These facts, however, are not determinative of the immediate choice-of-law issue: they are only facts that inform the balancing analysis mandated by Articles 3515, 3537, & 3540—a purely legal determination. And, of course, additional discovery regarding these uncontested facts will not alter the choice-of-law issue at hand.

Similarly, and as set forth in detail in the Receiver's original memorandum in support, none of the relevant facts that factor into the choice-of-law analysis can be seriously disputed. That LAHC sold its policies primarily, if not exclusively, to Louisiana residents is a material fact that is not genuinely contested. That the medical providers who relied upon and cared for LAHC policyholder were primarily, if not exclusively, located in Louisiana, is another material fact that cannot be seriously contested. That LAHC was regulated by the Louisiana Department of Insurance cannot be argued. That LAHC's entire business was conducted in Louisiana is another material fact that Milliman does not contest. That LAHC contracted with Milliman to perform professional actuarial work for the start-up health insurance company in Louisiana is uncontested. That Milliman created the feasibility study that allowed LAHC to secure a \$12 million start-up

loan and a \$52 million solvency loan from the federal government is uncontested. That Milliman also set the premium rates charged by LAHC in 2014 is also not genuinely contested.

Milliman's feeble suggestion that Washington or Georgia law may somehow be the *lex causea* in this case may and should be dismissed out of hand. And Milliman does not seriously advance an argument that New York law should apply in the absence of LAHC and Milliman's contractual provision that selects it. Simply stated—and despite Milliman's protestations to the contrary—there is no “genuine issue” regarding the fact that Louisiana law is the *lex causae* in this case. The relative strength and pertinence of Louisiana's connection to and interest in this insurance dispute is overwhelming in comparison to New York's practically non-existent interest—much less that of Washington or Georgia's interest.<sup>3</sup>

In other words, any reasonable person can only arrive at one conclusion: that Louisiana law is the *lex causea* here. As such, the Receivers' Motion should be GRANTED.

**C. ALTERNATIVELY, MOTION IN LIMINE CONSIDERATION IS APPROPRIATE AND NOT PREMATURE**

Even if Your Honor concludes that some material fact remains genuinely contested that prevents summary judgment at this point, Your Honor has vast discretion to make a pre-trial determination of what law shall apply pursuant La. C.E. Articles 201 & 202.<sup>4</sup> While it may be appropriate in certain cases to defer this choice-of-law determination to the eve of trial, a determination of this important issue—before the parties engage in additional discovery and incur considerable additional expenses—is appropriate here and now.

If New York law is applied to determine whether Milliman's limitation-of-liability clauses are enforceable against the Receiver, then, in all likelihood, even upon a showing that Milliman's conduct was grossly negligent, the Receiver's recovery against Milliman may be limited to \$3 million at most. If, however, Louisiana law is applied to make this determination, then the Receiver's potential recovery against Milliman is unlimited upon a showing of gross negligence. As a matter of common sense and pragmatism, knowing up front whether the Receiver's potential recovery is either \$3 million or \$30 million is a critical piece of information that will necessarily inform how the parties proceed. This is undoubtedly true for both Milliman and LAHC. Given

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<sup>3</sup> There can be no genuine dispute that Louisiana, “in light of its relationship to the parties and the dispute and its policies rendered pertinent by that relationship, would bear the most serious legal, social, economic, and other consequences if its law were not applied to that issue.” Revision Comment (b) to Art. 3515.

<sup>4</sup> See also, American Bar Association Civil Trial Practice Standard 18 (1998): “In advance of trial, counsel should seek, and the court should provide, judicial resolution of significant evidentiary and legal issues that are susceptible of pretrial adjudication and are likely to have an impact of consequence on the trial.”

that both parties are about to spend hundreds of thousands of dollars (if not millions when you consider attorneys' fees), it is reasonable and important for both parties to know the potential recovery / exposure in this case. It makes no sense to spend more—or a considerable portion of—your potential recovery / exposure before you know what that potential recovery / exposure may be. And, of course, an early determination of this key legal issue may promote an extrajudicial determination of this dispute—sooner rather than later.

**D. MILLIMAN DOES NOT ADDRESS THE ACTUAL CONFLICT BETWEEN NEW YORK AND LOUISIANA LAW IN ITS OPPOSITION**

Milliman does not address or attempt to refute the Receiver's argument that an actual conflict exists between New York and Louisiana; therefore, upon a ruling that Louisiana law is the *lex causea* in this case (whether via summary judgment and/or through a motion in limine), La. C.C. art. 2004 and Louisiana's view of "gross negligence" should apply at the trial of this matter to determine if Milliman's limitation-of-liability clauses are enforceable.

**E. CONCLUSION**

For all of the foregoing reasons, Plaintiff respectfully prays that this Honorable Court issue an ORDER stating that Louisiana law shall apply to determine whether any limitation-of-liability clauses found in LAHC's contract with Milliman are enforceable.

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 13<sup>th</sup> day of August, 2021, in Baton Rouge, Louisiana.

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