

30919-08000

J. ROBERT WOOLEY

**STATE
FILED**

DOCKET NO. 499, 737 DIV. D

VERSUS

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

THOMAS S. LUCKSINGER, ET AL

STATE OF LOUISIANA

**OPPOSITION TO DILATORY AND DECLINATORY EXCEPTIONS
OF EXECUTIVE LIABILITY UNDERWRITERS**

MAY IT PLEASE THE COURT:

Executive Liability Underwriters ("ELU") has filed Dilatory and Declinatory Exceptions claiming that ELU lacks the procedural capacity to be sued and therefore, there was insufficiency of citation and service with respect to ELU. As set forth in the reasons below, ELU entered into a joint venture with or acted as the agent of Greenwich Insurance Company ("Greenwich"), also made a defendant herein. A party to a joint venture is treated according to the rules of partnership and a judicial entity does exist. As an agent ELU is a juridical person that can sue and be sued. Consequently, ELU does have procedural capacity and citation and service upon it is sufficient.

FACTS

Robert Wooley, as Insurance Commissioner of the State of Louisiana in his capacity as Liquidator of AmCare Health Plains of Louisiana, Inc, a wholly owned subsidiary of AmCareCo, Inc. filed suit against several defendants including ELU and alleged that ELU was doing business with Greenwich. (Petition, Exhibit "A"). The Commissioner also alleged that ELU acted on behalf of the insurers in implementing policies of insurance to the HMO, AmCareCo and AmCare Management. (Petition, Exhibit "A" at ¶ 15). ELU now claims that it simply lacks procedural capacity to be sued.

LAW AND ARGUMENT

I. Agency of ELU

ELU claims that it is a U.S. Division of a corporation, XL Specialty Insurance Company and not itself a corporation, partnership, unincorporated association or limited liability corporation. ELU relies upon *Wilridge v. Capitol Manufacturing Co.*, 97-574 (La. App. 3 Cir. 12/17/97), 704 So.2d 966 in which the court estopped Capitol Manufacturing Company, a

Division of Harsco Corporation from claiming it lacked procedural capacity or that there was insufficiency of service of citation since Capitol Manufacturing Company had been sued and initiated suit on a number of occasions. Since Capitol Manufacturing held itself out as an entity with capacity to be sued, then the court permitted the plaintiff to sue.

ELU claims that it has not held itself out to be sued and therefore has no procedural capacity. However, a review of the policy clearly indicates that ELU holds itself out to be either a party to a joint venture or the agent of Greenwich. The policy clearly states on Page 1 the following:

Item 7. Notices required to be given to the Insurer must be addressed to:

Executive Liability Underwriters
One Constitution Plaza, 16th Floor
Hartford, CT 06103
Toll Free Telephone 877-953-2636

(Policy at p. 1, Exhibit "B").

This is a totally separate office than that listed for Greenwich which is "70 Seaview Avenue, Stamford, CT 06902." (Policy at p. 1, Exhibit "B"). Furthermore, the policy directs policyholders on the page entitled "Important Notice" to contact ELU for "information (including information regarding claims) or to make a complaint." (Policy at p. 3, Exhibit "B"). On the page entitled "Management Liability and Company Reimbursement Insurance Coverage Form" the language states as follows:

In consideration of the payment of the premium, and in reliance on all statements made and information furnished to **Executive Liability Underwriters, the Underwriting Manager for the Insurer** identified in the Declarations...the Insurer, the Insured Persons and the Company agree as follows:...

(Policy at p. 1 of 11, Exhibit "B").

Clearly, ELU has held itself out as the agent of Greenwich which has a separate address, is the person to contact for information, information regarding claims, or to make a complaint, and is listed as the Underwriting Manager for the Insurer.

In *Hoskins v. Plaquemines Parish Government*, 1998-1825 (La. App. 4 Cir. 8/4/99), 743 So.2d 736, the plaintiff claimed that HCC lacked procedural capacity to sue on behalf of Prudential. The court found that HCC as the representative or mandatary of Prudential was permitted by law to bring suit on behalf of its named principal. La.Code Civ. Proc. art. 694 provides that "[a]n agent has the procedural capacity to sue to enforce a right of his principal,

when specially authorized to do so." Therefore, an agent does have the procedural capacity to sue and act as a juridical person. Consequently, an agent has the procedural capacity to be sued.

In *Fleming v. American Automobile Association, Inc.*, 1999-1638 (La. App. 4 Cir. 6/21/00), 764 So.2d 274), a plaintiff bought a travel policy. The administrator of the policy was Trip Mate Insurance Agency. Monumental Life Insurance Company acted in its capacity as the underwriter. Group Voyagers sold the policy. MEDEX Assistance Corporation was the hands on provider for medical services. All shared the \$59.00 premium. The terms of the policy included that the plaintiff was to receive reimbursement within the limits of the policy for \$10,000 in medical assistance, \$15,000 for medical evacuation and \$10,000 for trip cancellation. MEDEX, failed to honor the terms of the contract given their faulty deployment of the plaintiff's medical evacuation. The contract conditions were not fulfilled causing the breach of duty on the part of the defendants.

The defendants claimed they could not be solidarily liable to the plaintiff. The trial court collectively referred to the defendants as one because they shared in the premium. The court noted that defendants, at one point or another, acted as insurance agents or brokers or underwriters or providers of services soliciting applications for policies of insurance, aiding and placing risks or effecting insurance and deriving substantial compensation and commissions from the premium. The court found that this joint enterprise of the defendants renders them liable for the acts or omissions that caused Ms. Fleming's significant damages. The court determined that despite much finger pointing among defendants, the evidence clearly showed that, for a fee, they all assumed the responsibility of honoring the contract/Travel Insurance Policy toward the ultimate goal of selling the entire travel package to the plaintiff. It was difficult for the court to determine what role each individual defendant played in the entrepreneurial scheme. "All were intricately involved in marketing, soliciting the policy, selling, arranging for the underwriting, drafting, and administering the insurance policies, collecting the premiums, and providing the benefits to the plaintiff. They are all clearly under the purview of La. R.S. 22:1212 and fall into the definition of "insurer"". *Fleming*, 764 So.2d at 280.

In the present case, ELU clearly acted as the agent for or helped in the administering of the policy since all complaints, information, or notices required to be sent to the insurer were to be addressed to ELU. ELU at the very least was administering the policy and as such, acted as

an agent for Greenwich. Consequently, ELU is a juridical person and does have procedural capacity. Furthermore, the only case relied upon by ELU is one in which the holding was that the defendant did have procedural capacity. ELU cites no cases with holdings in its favor.

II. Joint Venture

Despite the claims of ELU that it is not a juridical person capable of being sued, ELU and Greenwich formed a joint venture and as such, ELU does have procedural capacity. The early case of *Ault & Wiborg Co. of Canada v. Carson Carbon Co.*, 181 La. 681, 160 So. 298, 300 (La.1935) defined joint venture as follows:

"The legal relation of joint adventure now widely recognized in judicial decisions results from the undertaking by two or more persons to combine their property or labor in the conduct of a particular line of trade or general business, for joint profits, creating the status of a partnership, although the facts do not show a formal partnership. While a joint adventure is not identical with a partnership, it is analogous to a partnership and is controlled largely by the principles or rules applicable to partnerships."

The jurisprudence has established that the essential elements of a joint venture are generally the same as those of partnership, i.e., two or more parties combining their property, labor, skill, etc. in the conduct of a venture for joint profit, with each having some right of control. *Walker v. Simmons*, 155 So.2d 234 (La.App. 3rd Cir.1963). Therefore, in general, joint ventures are governed by the law of partnership. *Marine Services, Inc. v. A-1 Industries*, 355 So.2d 625 (La.App. 4th Cir.1978).

LSA-C.C. art. 2801 defines partnership as follows:

"A partnership is a juridical person, distinct from its partners, created by a contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit...."

A joint venture and a partnership have the same requisites which are as follows:

- (1) A contract between two or more persons;
- (2) A juridical entity or person is established;
- (3) Contribution by all parties of either efforts or resources;
- (4) The contribution must be in determinate proportions;
- (5) There must be joint effort;
- (6) There must be a mutual risk vis-a-vis losses;
- (7) There must be a sharing of profits.

Cajun-Electric Power Cooperative, Inc. v. McNamara, 452 So.2d 212 (La. App. 1st Cir. 1984).

The court in *Cajun* noted that both *Cajun* and *GSU* agreed to combine their resources in a 70% and 30% ratio, to collaborate, and to share the risk of loss and the hope of gain. The court found a joint venture arrangement **even though the parties contractually provided that the association would not be a joint venture.**

The existence or nonexistence of a joint venture is a question of fact, although what constitutes a joint venture is a question of law. *Grand Isle Campsites, Inc. v. Cheek*, 262 La. 5, 262 So.2d 350 (La.1972). *Cajun* recognized that there are no hard and fast legal rules fixing the requisites for a joint adventure and that each case must be decided on its facts. *Cajun*, 452 So.2d at 216.

The court also noted that the legal relationship of parties is not conclusively controlled by the terms which the parties use to designate their relationship, especially with regard to third parties. Courts look to the totality of evidence and not just the written agreement between the parties to determine whether a joint venture was entered into. *Cajun*, 452 So.2d at 216 (citing *Guilbeau v. Liberty Mutual Insurance Company*, 324 So.2d 571 (La.App. 1st Cir.1975)).

When two or more parties enter into an agreement which the law defines as a partnership or joint venture, it becomes a juridical entity, and liability of the parties is determined by the law relating to partnership, even if the parties had not thought of such consequences or even sought to avoid certain consequences of the relationship. *Peterson v. BE & K Inc. of Alabama*, 94- 0005 (La.App. 1st Cir.3/3/95), 652 So.2d 617.

Kelly v. Boh Bros. Construction Co., Inc. 96-1051 (La.App. 5 Cir. 4/9/97) 694 So.2d 463, 468.

In *Kelly*, *supra* at 468 the Fifth Circuit stated:

The essential elements of a joint venture are generally the same as those of partnership, i.e. two or more parties combining their property, labor, skill, etc., in the conduct of the venture for joint profit or benefit, with each having some right of control, and thus, joint ventures are generally governed by the law of partnership. *Cajun Elec. Power Co-op., Inc. v. McNamara*, 452 So.2d 212 (La.App. 1st Cir.1984).

Gabriel v. Hobbs, 2001-0538 (La. App. 4 Cir. 12/19/01), 804 So.2d 853 also added that a joint venture is for pecuniary gain. In *Kelly* the court found that Orleans Levee Board and the Orleans Sewerage and Water Board had created a joint venture. In deciding that there was no need to apportion fault the court cited La C.C. art. 2817 which provides:

A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership.

The Orleans Levee Board and the Orleans Sewerage and Water Board as joint venturers were jointly and solidarily liable to plaintiffs. Therefore, under La. C.C. art. 2817, each party is liable for their virile share or equal portions. Thus, there was no need for the trial court to further apportion fault between those two defendants. Furthermore, upon finding that the Orleans Levee Board and the Orleans Sewerage and Water Board combined their resources in the conduct of the venture for joint profit or benefit, with each having some control, that defendants were engaged in a joint venture, there was no reason to apportion liability in any manner other than equally.

Many Louisiana court of appeal cases have imposed partnership-derived liability on defendants who have held themselves out to third parties as partners without any discussion of the usual partnership requirement that they share profits and losses. For instance, in *American Furnace Co. v. Great Southern Air Conditioning Co.*, 16 So. 2d 140 (La. App. 2d Cir. 1943) the Second Circuit held that even where an alleged partner was not actually a partner because he did nothing more than provide operating capital to the alleged partnership, he was estopped from denying the existence of a partnership in an action on a contract because he had prepared and furnished a financial statement in which he was listed as a partner and on which the plaintiff had relied. *Id.* at 143-44. In *Homer Electric Shop v. J.D. Waldrip & Son*, 139 So. 539 (La. App. 2d Cir. 1932) the court of appeal held that even if no partnership actually existed between a father and his son, where they had held themselves out to the public as partners, the father was estopped from denying the existence of a partnership in an action by a seller on a contract of sale. *Id.* at 541. In *Carlisle v. Kimbrough*, 134 So. 773 (La. App. 2d Cir. 1931) the court of appeal affirmed judgment against a partnership and an individual in his capacity as a partner because the individual had been held out as, and had represented to the plaintiff that he was, a partner, and, therefore, despite evidence to the contrary, the individual was held to be a partner. *Id.* at 774-75. In *Triangle Machine Co. v. Dutton & Adams*, 127 So. 54 (La. App. 2d Cir. 1930) the court held that even where "the evidence clearly show(ed) that there was no (actual) partnership," an alleged partner was estopped from denying the existence of a partnership in an action on a contract, because the alleged partner had held himself out as a partner by receiving and paying bills billed to the alleged partnership. *Triangle Machine*, 127 So. at 55-56. The court in *Chadick Hayes Provision Co. v. Pine Grove Grocery Co.*, 121 So. 348 (La. App. 2d Cir. 1929) held that a purported partner was estopped from denying his partnership status because he had held himself out to the community as a partner and the plaintiffs had relied on those representations, and, therefore, whether he was actually a partner was irrelevant. *Id.* at 348-49. In *City of Houma v. Municipal & Industrial Pipe Service*, 884 F.2d 886 (5th Cir. 1989) the Court of Appeals for the Fifth Circuit, applying Louisiana law, held that a group of entities that contracted with the City of Houma in the purported capacity of a "joint venture" was estopped from denying such joint venture status where the group had held itself out to the city as a joint venture, without engaging in any analysis of the sharing of profits or losses. See *City of Houma*, 884 F.2d at 890.

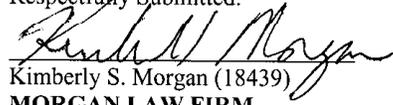
In the present case, ELU should be estopped from claiming it is not part of a joint venture with Greenwich when in fact the policy directs that all notices which are to be sent the Insurer (Greenwich) be sent to ELU. (Policy at p. 1, Exhibit "B"). Certainly, it is understandable how a third party could believe that ELU is acting on behalf or in concert with Greenwich when there is no address to correspond with ELU but there is one to send all notices for Greenwich to ELU. (Policy at p. 1, Exhibit "B"). Furthermore, the policy directs all complaints for the policy to be made through ELU. (Policy at p. 3, Exhibit "B"). The insuring language is in consideration of information provided to ELU. (Policy at p. 1 of 11, Exhibit "B"). When one considers that this entire case is about defendants not sufficiently funding an HMO and the mismanagement of funds for an HMO here in Louisiana, it is evident that ELU should be estopped from claiming that it is not a juridical person and lacks capacity to be sued. ELU claims that since it is called a division of XL Speciality Insurance Company it is not a judicial entity. However, the legal relationship of parties will not be conclusively controlled by the terms which the parties use to designate their relationship, especially with regard to third parties. Courts look to the totality of evidence and not just the written agreement between the parties to determine whether a joint venture was entered into. *Cajun*, 452 So.2d at 216 (citing *Guilbeau v. Liberty Mutual Insurance Company*, 324 So.2d 571 (La.App. 1st Cir.1975)).

CONCLUSION

ELU should be estopped to deny that a joint venture existed between Greenwich and itself. ELU held itself out to third parties as acting in concert with or on behalf of Greenwich. The laws of partnership apply and ELU is a juridical person which can be sued. Alternatively, if ELU acted as agent on behalf of Greenwich then ELU can also be sued, and as such is a judicial entity. Considering that ELU does have procedural capacity to be sued, the dilatory exception of insufficiency of citation and service is without merit.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on all known opposing counsels of record by either hand-delivering, faxing or mailing a copy of same via First Class United States Mail, postage prepaid and properly addressed, this 18 day of September, 2003, in Baton Rouge, Louisiana.

Kimberly S. Morgan

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