BEFORE THE IOWA SUPREME COURT

No. 18-0335

DOUG OMMEN, in his capacity as Liquidator of CoOportunity Health, and DAN WATKINS, in his capacity as Special Deputy Liquidator of CoOportunity Health,

Plaintiffs-Appellees,

v.

STEPHEN RINGLEE, DAVID LYONS, and CLIFFORD GOLD,

Defendants,

and

MILLIMAN, INC., KIMBERLEY HIEMENZ, and MICHAEL STURM,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
HON. JEANIE K. VAUDT

APPELLANTS' REPLY BRIEF

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SUMMARY OF REPLY

The Liquidators do not, and cannot, challenge the two central tenets of Milliman's appeal. First, under the Supremacy Clause of the U.S. Constitution, state statutes or "policies" that preclude arbitration are preempted by the Federal Arbitration Act (the "FAA"). *See Roth v. Evangelical Lutheran Good Samaritan Soc.*, 886 N.W.2d 601, 611-12 (Iowa 2016) ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."), quoting *Preston v. Ferrer*, 552 U.S. 346, 359 (2008). The District Court's—and the Liquidators'—reliance on the Iowa Liquidation Act, and the "policies" that underlie it, to trump Milliman's rights under the FAA, is therefore reversible error.

Second, following the FAA preemption mandate, federal appellate authority ***unanimously*** holds that where, as here, a liquidator brings common law damages claims against third parties who performed pre-insolvency services for an insurer pursuant to a contract that includes an arbitration clause, arbitration of such claims neither implicates nor interferes with the state's regulation of the "business of insurance." *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161–62 (3d Cir. 2000); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1382 (9th Cir. 1997); *Bennett v. Liberty Nat. Fire*

Ins. Co., 968 F.2d 969, 970 (9th Cir. 1992); *Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959 (3d Cir. 1993); *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004); *see also Beam Partners, LLC v. Atkins*, No. 3:17-CV-004-GFVT, 2018 WL 4344456 (E.D. Ky. Sept. 11, 2018).

The Liquidators cite no on-point, contrary federal authority. All of the federal cases on which the Liquidators rely involve either (1) claims brought ***against*** a liquidator, or (2) claims brought by a liquidator to claw back estate assets. These sorts of claims are the grist of the insolvency court's mill, and are inapposite to this case.

The correctness of Milliman's FAA preemption argument was reaffirmed on October 23, 2018, when the U.S. District Court for the Eastern District of Kentucky granted Milliman's petition to compel arbitration of the tort and contract claims brought by the liquidator of Kentucky's insolvent health care cooperative ("KYHC"). *Milliman, Inc. v. Roof*, No 3:18-CV-00012, 2018 WL 5268614 (E.D. Ky. Oct. 23, 2018). The Kentucky federal court's ruling, along with the Nevada state court Order discussed in Milliman's opening brief, means that the only two courts to consider FAA preemption in the context of an insurance liquidator's common law claims

seeking damages arising out of Milliman's work for ACA co-ops have rightly compelled arbitration.[1]

Unable to refute this controlling authority, the Liquidators contend that this Court need not consider Milliman's federal rights because the Agreement's arbitration provision is purportedly "unenforceable" under state law. However, the Liquidators do not raise any traditional state law contract defenses, as permitted by the FAA. Rather, they interpret the Iowa Liquidation Act to preclude an Iowa liquidator from arbitrating an insurer's pre-insolvency claims. Their position contravenes both U.S. and Iowa Supreme Court precedent holding that the FAA "displace[s]" any interpretation of state law that "prohibits outright the arbitration of a particular type of claim." *Roth*, 886 N.W.2d at 612, citing *AT&T Mobility v. Concepcion*, 563 U.S. 333, 341 (2011).

The Liquidators' other arguments are meritless. The Liquidators' contention that they never signed the Agreement ignores that insurance liquidators are ***never*** signatories to an insurer's pre-insolvency agreements

[1] In the only other state where these claims are pending, the Louisiana state trial court that denied Milliman's motion to compel arbitration failed to engage in ***any*** federal preemption or reverse pre-emption analysis. That error was a primary basis for Milliman's writ for an expedited interlocutory appeal. The Louisiana First Circuit Court of Appeal both granted Milliman's writ, and stayed further trial court proceedings against Milliman pending its arbitration ruling. The writ is *sub judice*.

with third parties, yet the cases on which Milliman relies all hold liquidators to pre-insolvency arbitration agreements they never signed.

The Liquidators also strain to differentiate this case by arguing that they have not brought contract claims (thus they are not "enforcing the Agreement"), and that their pleading purports to bring claims "on behalf of" CoOportunity's "creditors and policyholders." Artful pleading, however, cannot vitiate Milliman's federal rights. The core of FAA jurisprudence is that if "the ***underlying factual allegations***" of the plaintiff's tort claims "simply touch matters covered by the arbitration provision," those claims must be arbitrated. *See, e.g.*, *Leonard v. Delaware N. Cos. Sport Serv., Inc.*, 861 F.3d 727, 730 (8th Cir. 2017) (emphasis added). Thus, a plaintiff cannot avoid arbitration by couching claims in tort rather than contract when its claims challenge the work a third party performed pursuant to a contract containing an arbitration clause. *OHI (IOWA), Inc. v. USA Healthcare-Iowa, LLC*, 780 N.W.2d 248, 2010 WL 447112, at *4 (Iowa Ct. App. 2010), citing *Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993).

Similarly, purporting to bring claims "on behalf of" CoOportunity's creditors or policyholders does not forestall arbitration. The Liquidators plead in their Petition, and they concede in their brief, that (1) they are the

legal successors to CoOportunity, (2) these claims are made "on behalf of the company" and "seek to recover damages ***for the financial loss to CoOportunity***," (App. 10, ¶ 21; Appellee Br., p. 48) (emphasis added), and (3) any recovery will inure to the general benefit of the insolvent estate. Such claims are indisputably arbitrable.

While the Liquidators argue that these claims are ***also*** brought on behalf of CoOportunity's policyholders and creditors, that does not forestall arbitration. First, the controlling standard of arbitrability turns not on *who* is bringing the claims, but on whether the underlying allegations of wrongdoing so much as "touch on" the work done pursuant to an agreement with the insolvent insurer. Second, the Liquidation Order requires the Liquidators to pursue actions "***in any necessary forum*** for CoOportunity, or ***for the benefit of CoOportunity's policyholders, creditors and shareholders***, including in the courts and tribunals, agencies or ***arbitration panels*** of this state and other states." (App. 227, ¶ 16) (emphasis added).

The centerpiece of the Liquidators' defense is their "disavowal" of their arbitration obligation. They argue (1) because the state Liquidation Act confers on them a "special, statutory protection role" to protect policyholders, shareholders, creditors and taxpayers (Appellee Br., p. 20), and (2) because the state legislature has allegedly decreed the Liquidation

Act in its entirety to constitute the "business of insurance," they can invoke their statutory disavowal power to avoid arbitration.

Neither a state statute, nor a pronouncement of state policy, can nullify an arbitration agreement, unless the specific provision and the practice involved constitutes or interferes with the "business of insurance" under the McCarran-Ferguson Act. What constitutes the "business of insurance" is solely a question of ***federal law***, therefore the state's classification of what falls within the "business of insurance" does not control. *First Nat'l Bank of E. Ark v. Taylor*, 907 F.2d 775, 780 n.8 (8th Cir. 1990). Moreover, the relevant questions under McCarran-Ferguson are whether the ***specific provision at issue*** within a state statute, not the statute as a whole, focuses on the insurer/policyholder relationship, and whether the liquidator's ***specific practice*** (this lawsuit) implicates the business of insurance. *S.E.C. v. Nat'l Secs., Inc.*, 393 U.S. 453, 459-60 (1969). Regardless of whether the Liquidation Act as a whole was intended by the state legislature to regulate the business of insurance, the ***disavowal provision*** does not regulate the "business of insurance" because the Liquidators' use of it here does not bear upon the insurer-policyholder relationship. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 128, 131-

32 (1982). Therefore, invocation of the state disavowal statute by the Liquidators is preempted by the FAA.

Additionally, this Court has held that disavowal is intended to prevent the ongoing performance of existing contracts, so as to avoid draining estate assets. That is not the case here. The Liquidators admittedly disavowed the Agreement solely to gain a litigation advantage. Performance of the Agreement by both CoOportunity and Milliman started in late 2011, and ceased by November 2014. There are no outstanding performance obligations under the Agreement, save for its dispute resolution mechanisms, including the arbitration clause at issue in this appeal.

Finally, Milliman did not "waive" its FAA preemption argument by failing to raise it in the District Court. We highlight herein the relevant arguments from Milliman's motion below that refute the Liquidators' baseless contention.

ARGUMENT

I. THE FAA MANDATES ARBITRATION OF PLAINTIFFS' CLAIMS AND PREEMPTS CONTRARY STATE LAW

A. The Recent Kentucky Federal Court Decision in *Milliman, Inc. v. Roof* Reaffirms Milliman's Arbitration Rights

The Eastern District of Kentucky's recent *Milliman* decision is the latest on-point federal authority holding that a liquidator must arbitrate

common law damages claims relating to or arising out of a third party's pre-insolvency contract work for an insolvent insurer.

As here, the Kentucky liquidator seeks common law damages from Milliman for the allegedly negligent work Milliman performed for KYHC pursuant to a contract. The Kentucky agreement includes an arbitration provision that is substantively identical to the one at issue here, yet the liquidator refused to arbitrate. Relying on the Kentucky Supreme Court's decision in *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010)—on which the Liquidators here also heavily rely—the Kentucky liquidator argued that the Kentucky liquidation law (the "IRLL") confers the state court with "exclusive jurisdiction" over all claims brought by the liquidator and reverse preempts Milliman's FAA right to arbitration.

Reiterating its holding and rationale in *Beam Partners, LLC*, discussed in Milliman's opening brief (Appellant Br., pp. 26-27, 52-53), the Kentucky federal court refused to follow *Ernst & Young,* and rejected the liquidator's contention that the IRLL's "exclusive jurisdiction" provision reverse preempts the FAA. Briefly, and most relevant to this appeal, the court in *Milliman* held that:

> - "[W]hen a state law conflicts with a federal law, such as the apparent conflict here between the [IRLL] and the preference for arbitration expressed by the FAA, the federal law preempts the state law, rendering the state law without effect." 2018 WL 5268614, at *7;

- There is no basis for the IRLL to reverse preempt the FAA under the McCarran-Ferguson Act. "This litigation involves a contract dispute between a business and its [actuaries], not an insurance contract. Simply because the business is an insurance company and has become insolvent is not relevant to the regulation of the business of insurance." *Id*. at *8 (citation omitted); and

- Compelling the liquidator to arbitrate its common law tort and contract claims against Milliman does not "invalidate, impair or supersede" the IRLL because "[a]rbitration does not deprive the Liquidator of any substantive rights, only altering the forum in which the liquidator may pursue those rights." *Id*. at *9.

Milliman dovetails precisely with the unanimous federal appellate authority holding that "[a]n ordinary [common law damages] suit against a tortfeaser by an insolvent insurance company" neither implicates nor impairs the "business of insurance" under McCarran-Ferguson, and therefore such claims are arbitrable. *See, e.g.*, *AmSouth*, 386 F.3d at 783; *Bennett*, 968 F.2d at 972 ("Application of the FAA" to liquidator's common law damages claims against a third party "does not impair the liquidator's substantive remedy under Montana law. Instead it simply requires the liquidator to seek relief through arbitration. The liquidator has presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer."); *Grode*, 8 F.3d at 959 ("Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests.").

Milliman is also on all fours with the Nevada state court's decision granting Milliman's motion to compel arbitration in an identical case. (*See* Appellant Br., p. 34, n.3.) As set forth below, the Liquidators' attempts to differentiate this case from the Nevada and Kentucky actions are baseless. All three actions involve the same core factual allegations, challenge the same Milliman work, and seek monetary damages to be paid to the insolvent insurer's estate.

B. The Iowa Liquidation Act Does Not Supersede the FAA and Preclude Enforcement of the Agreement's Arbitration Clause

The Liquidators argue that this Court can ignore the controlling federal authority because the Agreement's arbitration clause is purportedly "unenforceable" under state law. The Liquidators' position is without merit.

The U.S. Supreme Court has made clear that FAA preemption is a federal question, and even when applying state law principles of contract interpretation, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989).

Moreover, the Liquidators mischaracterize their position, and the District Court's holding, as based on state law contract defenses. The Liquidators did not assert, and the District Court did not base its decision on,

any traditional "grounds… for the revocation of any contract." *See* FAA, 9 U.S.C. § 2. Rather, the District Court relied exclusively on certain provisions of the Iowa Liquidation Act—including the Act's disavowal provision, the provision allowing the Liquidators to pursue claims "on behalf of" creditors and policyholders, and the District Court's general (erroneous) view that the Iowa Act imbues the Liquidators with broader powers than other states' liquidation statutes do—to establish a purported Iowa state law "policy" that trumps the FAA's arbitration mandate. (App. 263-264.) That rationale does not reflect the application of any traditional "contract defenses," but rather an erroneous determination that the Liquidation Act wholesale exempts insurance liquidators from arbitrating pre-insolvency claims.

Federal courts, and this Court, have repeatedly rejected this sort of effort to elevate state statutes above the FAA. *See, e.g.*, *Roth*, 886 N.W.2d at 612 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."), *quoting Concepcion*, 563 U.S. at 341; *Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816, 819 (Iowa 2002) (holding that the FAA "preempts the Iowa [arbitration] act" where a contract "evidenc[es] a transaction involving commerce"); *Southland Corp. v. Keating*, 465 U.S. 1,

10 (1984) (holding that, in enacting the FAA, "Congress declared a national policy favoring arbitration and ***withdrew the power of the states*** to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration") (emphasis added).

Plaintiffs urge this Court to follow the Ohio Supreme Court's split decision in *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203 (Ohio 2011), on which Plaintiffs have modeled every aspect of their Petition and their legal positions. *Taylor* is wrongly decided, however, as the majority decision ignored the governing federal law, failed to conduct the requisite FAA preemption/McCarran-Ferguson Act analyses, and is distinguishable for all of the reasons set forth in Milliman's opening brief. (Appellant Br., pp. 57-59.)

In all events, none of the Liquidators' purported "state law" defenses to the enforceability of the Agreement have any merit.

1. It is Immaterial That Plaintiffs Are Non-Signatories to the Agreement

The Liquidators' lead contention is that they cannot be bound to an arbitration agreement they did not sign.[2] That argument flies in the face of

[2] The Liquidators' Petition repeatedly concedes that the Agreement is "between CoOportunity and Milliman." (*See, e.g.*, App. 14, ¶ 45; 18-19, ¶ 66.) While Plaintiffs' Appellee Brief references that the Agreement was signed by one of CoOportunity's founders a few days before the company

the uniform federal caselaw holding that insurance liquidators—none of whom signed the pertinent arbitration agreements entered into years before they were appointed—must arbitrate where, as here, their common law damages claims are based on a third-party's pre-insolvency work performed pursuant to an agreement containing a valid arbitration clause.[3] The Liquidators also ignore that ***this Court***, in *Roth*, held that a non-signatory is bound to an arbitration provision where, as here, that non-signatory's claims either belonged originally to a signor of the agreement, or are derivative of such claims. 886 N.W.2d at 608.

The Liquidators also do not dispute controlling federal law which states that, in order to exclude post-insolvency claims from arbitration, the Agreement itself must reflect a clear and unambiguous intent to do so. *AT&T Techs., Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 650 (1986); *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 577 (6th Cir. 2003) ("Where the arbitration clause is broad, ***only an express provision excluding a specific dispute***, or the ***most forceful***

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was legally formed, a company that accepts the benefits of a pre-formation contract, and adopts and performs the contract as its own, is bound by its obligations. *Kridelbaugh v. Aldrehn Theatres Co.*, 191 N.W. 803, 804-05 (Iowa 1923).

[3] Even the *Taylor* majority opinion acknowledges that a non-signatory liquidator is bound to an insurer's arbitration agreement if the liquidator's claims arise under the agreement at issue. 958 N.E.2d at 1213.

evidence of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators.") (emphasis added, internal quotation marks and citations omitted). The Agreement reflects no such intent.

The Liquidators' reliance on *Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727 (Iowa 2014), and *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), is inapposite. Neither case involves an insurance liquidator or common law damages claims relating to work performed under contract. Those cases involved enforcement claims brought by government agencies, which claims could not have been brought by the affected employees. By contrast, the Liquidators' claims are in fact being brought "on behalf of the [insolvent] company." (App. 10, ¶ 21.)

2. The Liquidators Cannot Avoid Arbitration by Artful Pleading

i. The Liquidators' Claims Arise Out of and relate to the Work Milliman Performed Pursuant to the Agreement

The Liquidators do not, and cannot, contest that their claims are arbitrable so long as the underlying allegations "simply touch matters covered by the arbitration provision." *Leonard*, 861 F.3d at 730; *3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008) (same), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985) ("[I]nsofar as the allegations underlying the statutory claims

touch matters covered by the enumerated articles [of the arbitration provision], the Court of Appeals properly resolved any doubts in favor of arbitrability."); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) (same); *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 871 (10th Cir. 1999) (same); *Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 384 (11th Cir. 1996) (same).

That standard, which applies regardless of whether Plaintiffs assert claims directly for CoOportunity or "on behalf of" CoOportunity's creditors and policyholders, is easily satisfied here. The Liquidators make no effort to refute the discussion in Milliman's opening brief (Appellant Br., pp. 19-22) demonstrating that their claims wholly relate to, and attack the work Milliman performed pursuant to, the Agreement, and to the alleged "tainted" Agreement itself.

The fact that the Liquidators did not expressly plead a breach of contract cause of action is also irrelevant to Milliman's right to arbitration. *OHI (IOWA), Inc.*, 2010 WL 447112, at *4 ("[A] party may not avoid a contractual arbitration clause merely by casting its complaint in tort."), citing *Sweet Dreams Unlimited, Inc.*, 1 F.3d at 643 (holding that tort claims based on work performed "pursuant to the Agreement" and which had their "genesis in the Agreement" were arbitrable). "Focusing on the facts rather

than on a choice of legal labels prevents a creative and artful pleader from drafting around an otherwise-applicable arbitration clause." *Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1198 (10th Cir. 2009), citing *Combined Energies v. CCI, Inc.*, 514 F.3d 168, 172 (1st Cir.2008) ("[The plaintiff] cannot avoid arbitration by dint of artful pleading alone."); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 164 (4th Cir.2004) (same). Here, "focusing on the facts," rather than the ***labels*** the Liquidators attached to their causes of action, makes clear that the Liquidators' entire case rests on challenging the work Milliman did pursuant to the Agreement, but for which Agreement there would have been no work done.

While the Liquidators try to obfuscate it, the nature of their action is identical to the Kentucky and Nevada liquidators' cases against Milliman. The central allegations in all three lawsuits are that Milliman prepared feasibility studies and other reports that were "intentionally, willfully, and/or negligently prepared using unrealistic assumption sets with respect to loss ratios, claim morbidity assumptions, and risk adjustment transfer payments." (App. 356, ¶ 117; Nevada Complaint, ¶ 90; App. 27, ¶ 100.) All three actions contend that these reports were prepared for and relied on by state and federal insurance regulators. (App. 362, ¶ 144 ("Milliman's advice,

guidance, and/or reports to KYHC and/or Kentucky Department of Insurance and/or CMS concerning KYHC's funding needs intentionally, willfully, and/or negligently represented false information… regarding the funding needs and premium rates of KYHC."); Nevada Complaint, ¶ 81 ("Milliman intentionally or negligently failed to adequately explain to NHC or to its regulators the inherent risks and uncertainty in the underlying rate development . . . ."); App. 51, ¶ 162.) And all three actions allege that Milliman's work was tainted by a conflict of interest that was created by the terms of the governing engagement agreements. (App. 358, ¶ 125; Nevada Complaint, ¶ 91; App. 17-18, ¶ 62.)

ii. Plaintiffs' Petition Asserts Claims that Belonged to CoOportunity and to the Liquidator as CoOportunity's Legal Successor

The Liquidators reaffirm their concession that the Petition "assert[s] the allegations and claims herein ***on behalf of the company***," and "seek[s] to ***recover damages for the financial loss to CoOportunity***, and that the recovery will go to the [CoOportunity] estate...." (App. 242 (emphasis added); App. 10, ¶ 21 (emphasis added); Appellee Br., p. 48.) The Petition clearly asserts pre-insolvency claims that belonged to CoOportunity.

The Liquidators' contention that they can evade arbitration so long as any recovery will benefit the estate generally is wrong. That argument

ignores the U.S. Supreme Court's holding in *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491 (1993), that while "every preference accorded to the creditors of an insolvent insurer ultimately may redound to the benefit of policyholders, [the Court] reject[s] the notion that such indirect effects are sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act." 508 U.S. 491, 508–09 (1993), citing *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205, 217 (1979).

The Liquidators' argument also contravenes the Third Circuit's similar holding in *Suter v. Munich Am. Reins. Co.*:

> It is true, as the Liquidator stresses, that if the District Court or an arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act.

223 F.3d at 161; *see also Milliman,* 2018 WL 5268614, at *9.

The Liquidators disregard *Fabe* and *Suter*. Instead, they rely on a West Virginia state court case, and on intermediate appellate decisions from California, Connecticut and New Jersey. (Appellee Br., pp. 41-42.) Each of those decisions stands for the unremarkable proposition that a liquidator is entitled to bring claims on behalf of an insolvent insurer's creditors and policyholders. ***None*** of these cases concern a motion to enforce a contractual arbitration provision, or arbitration at all. ***None*** of these cases

refute the well-settled principle that a liquidator must arbitrate if the factual allegations underlying its claims "simply touch on matters covered by the arbitration provision." *Leonard*, 861 F.3d at 730. And ***none*** of these cases address the express terms of the Liquidation Order, which authorizes the Liquidators to arbitrate even if they are bringing claims "on behalf of" CoOportunity's creditors or policyholders. (App. 227, ¶ 16) (claims brought "for the benefit of CoOportunity's policyholders, creditors, and shareholders," must be brought "in any necessary forum," including "arbitration panels").

3. The Liquidators Cannot Disavow the Arbitration Agreement Solely To Evade Arbitration

The Liquidators concede that a plaintiff cannot rely on state law to "single out" an arbitration provision for "suspect treatment." (Appellee Br., p. 57, citing *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996)). Yet that is exactly how the Liquidators have attempted to use their statutory disavowal power. They admit that they are targeting the Agreement's arbitration provision precisely ***because, and only if,*** the court finds that their claims arise under and relate to the Agreement, thus requiring arbitration. (App. 15, ¶ 46.)

The Liquidators cannot dispute that the disavowal power is intended to relieve the receiver from the "***performance*** of the contracts of the original

owner made before his appointment" for the "protection and conservation" of estate property. *Maxwell v. Missouri Valley Ice & Cold Storage Co.*, 164 N.W. 329, 331 (Iowa 1917) (emphasis added); *see also State v. Associated Packing Co.*, 192 N.W. 267 (Iowa 1923). For that reason, this Court has limited receivers' disavowal power to executory contracts. 164 N.W. at 332. Moreover, these claims do not involve "estate" property. The Agreement was fully performed for three years, which performance and payments ended by November 2014. There can be no risk to estate assets because there are no future obligations for the estate to pay for.[4]

In light of this controlling Iowa precedent, the Liquidators' reliance on Ohio and Nebraska intermediate state court decisions in *Covington v. Lucia*, 784 N.E.2d 186 (Ohio Ct. App. 2003), *Benjamin v. Pipoly*, 800 N.E.2d 50 (Ohio Ct. App. 2003) and *State ex rel. Wagner v. Kay*, 722 N.W.2d 348 (Neb. Ct. App. 2006), which do not address, much less hold, that the disavowal power applies to non-executory contracts, is inapposite.

[4] The Liquidators' hyperbole regarding the need to disavow the "improvident" Agreement to "protect the public" from its "heavily one-sided terms" is of no moment. (Appellee Br., p. 39.) Fee arrangements, arbitration provisions and limitations on liability are standard provisions in commercial contracts that are regularly upheld under Iowa law. Regardless, the only question below and before this Court is whether or not the Liquidators' claims must be arbitrated. The merits of any other aspects of the Agreement are not before this Court, have not been briefed or moved upon below, and will be decided upon by whichever tribunal hears this case.

Nor does the ***federal*** FDIC statute address the Liquidators' improper use of the disavowal power to evade arbitration in a manner that contravenes federal and Iowa law regarding the primacy of the FAA over contrary ***state*** law. As discussed below, the Liquidators' attempted use of the Iowa disavowal statute here does not implicate or interfere with the regulation of the "business of insurance" as defined by federal law. Therefore, the Liquidators' purported exercise of the state disavowal statute cannot reverse preempt Milliman's rights under the FAA. Instead, the FAA preempts the Liquidators' use of that statute to evade Milliman's arbitration rights.

II. THE IOWA LIQUIDATION ACT DOES NOT REVERSE-PREEMPT THE FAA

In arguing that the Iowa Liquidation Act reverse-preempts the FAA, the Liquidators argue the broad, protectionist "policies" and powers the Iowa Legislature intended to foster through the Liquidation Act. They ignore, however, that what constitutes regulation of the "business of insurance" under the McCarran-Ferguson Act "is a federal question," and that "courts should ***narrowly*** construe the McCarran-Ferguson Act" to focus on the insurance company policyholder relationship. *S.E.C. v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 69 (1959); *Riverview Health Inst., LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 513 (6th Cir. 2010); *First Nat'l Bank of E. Ark.*, 907 F.2d at 780 n.8 (state law is not controlling on "whether an activity

falls within the 'business of insurance'" under the McCarran-Ferguson Act). A state's "classification does not control in deciding whether an activity is the 'business of insurance' under the McCarran-Ferguson Act." *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 13 (1st Cir. 1992).

A. The Liquidators' Claims Against Milliman Do Not Constitute the "Business of Insurance"

Whether or not the Iowa Liquidation Act ***generally*** was enacted for the purpose of regulating the business of insurance, as the Liquidators contend, is not the relevant inquiry under McCarran-Ferguson. The correct analysis is ***not*** whether a broad statute "as a whole" purports to regulate the business of insurance, but rather whether the individual provision applied to the practice at issue does so. *See e.g.*, *Milliman*, 2018 WL 5268614, at *8 ("Analyzing the IRLL as a whole in this situation presents an opportunity for state legislatures to bypass the Supremacy Clause and federal law simply by including an unrelated provision into an act that generally regulates insurance."). For that reason, federal courts have rejected the notion that forum selection provisions within a liquidation act regulate the "business of insurance." *Id.*; *see also AmSouth* 386 F.3d at 781, citing *Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 838-40 (6th Cir. 1996) (holding that even where a litigation generally is "integral to" the performance of an insurance

contract—and thus implicates the business of insurance—"the choice of forum [is] not").

The provisions or "policies" in the Iowa Liquidation Act on which the Liquidators, and the District Court, rely to vitiate Milliman's arbitration rights do not regulate the "business of insurance" under the criteria the U.S. Supreme Court has articulated—*i.e.*, (1) "whether the practice has the effect of transferring or spreading a policyholder's risk", (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured", and (3) "whether the practice is limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129. "[C]ourts should ***narrowly*** construe the McCarran-Ferguson Act" to focus on "the relationship between the insurance company and the policyholder." *Riverview Health Inst. LLC*, 601 F.3d at 513 (emphasis added); *National Secs., Inc.*, 393 U.S. at 459-60. The disavowal statute, which can be utilized against any of the insolvent insurer's executory contracts—*e.g.*, employment agreements, leases, office supply provider agreements, consulting agreements, etc.—has nothing to do with spreading policyholder risk, is not remotely integral to the policyholder relationship, and is of course not "limited to entities within the insurance industry." The same is true for the state "practice" of consolidating in a single court litigations related to insurer insolvencies.

Similarly, focusing on the specific "practice" at issue here, a liquidator's exercise of its statutory authority to bring an action pursuant to its "public protection role" does not implicate the business of insurance, where its claims are common law damages claims against third parties. *See, e.g.*, *AmSouth*, 386 F.3d at 783 (stating that McCarran-Ferguson "business of insurance" analysis must be "defined with respect to the particular cause of action" at issue); *Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 967 (8th Cir. 2008 (in conducting reverse-preemption analysis, "our focus must be on the precise federal claims asserted"). As the court held in *Milliman* and *Beam Partners*: "there is no transfer or spreading of insurance policy risk, and this has no direct effect on the relationship between KYHC and its insured policy holders…. This litigation involves a contract dispute between a business and its [former actuaries], not an insurance contract…. Simply because the business is an insurance company and has become insolvent is not relevant to the regulation of the business of insurance." *Milliman*, 2018 WL 5268614, at *8; *Beam Partners*, 2018 WL 4344456 at *9; *see also Grode*, 8 F.3d at 959-60 (holding no reverse preemption because liquidator's "contract [or] tort action" against third party has "nothing to do with [the State's] regulation of insurance"); *Suter*, 223 F.3d at 161 (same); *Quackenbush*, 121 F.3d at 1382; *Bennett*, 968 F.2d at 972; App. 508 ("[A]rbitrating Plaintiff's

damages claims against Milliman will not interfere with, invalidate, impair or supersede this state's statutory liquidation scheme… or the State's regulation of insurance."). Plaintiffs have no credible basis to distinguish the controlling federal precedent on which Milliman relies.

Plaintiffs argue that certain of the liquidators in Milliman's cases were seeking to "enforce the very contract containing the arbitration clause." (Appellee Br. p. 66.) Plaintiffs' claims here undeniably arise from and relate to, and much more than "touch upon" Milliman's work performed pursuant to the Agreement. Moreover, none of the courts' McCarran-Ferguson analyses turned on whether or not the liquidator was seeking to "enforce" the contract, or bringing breach of contract as opposed to tort claims. Rather, the courts assessed whether the liquidators' common law claims implicated estate assets, or threatened insurer-policyholder rights, and the fact that arbitration of these kinds of claims would not disrupt the orderly liquidation process.

The Liquidators also urge this Court to follow inapposite cases in which a policyholder or a third party sued the liquidator, claiming some right to a portion of the insolvent insurer's estate. Claims to the insolvent estate's assets are clearly part of the core delinquency proceeding, and of course courts have held that arbitrating such claims would threaten the orderly

liquidation of the insolvent insurer's estate.[5] There is no such danger here. As in *Amsouth, Suter, Quackenbush, Bennett, Beam, Milliman* and the other caselaw on which Milliman relies, Plaintiffs' claims against Milliman neither invoke nor threaten the insurer/policyholder relationship, nor is Milliman stating a claim to some portion of CoOportunity's estate. Enforcing the Agreement's arbitration clause therefore will not "disrupt the orderly liquidation of" CoOportunity, or otherwise "impair" Iowa's insolvency scheme. *See, e.g., Quackenbush*, 121 F.3d at 1381.

Underscoring the weakness of their position, the Liquidators most heavily rely, not on any federal precedent, but on the Kentucky Supreme Court's decision in *Ernst & Young, LLP v. Clark*, (Appellee Br., pp. 63-64).

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[5] *See, e.g., Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1278 (10th Cir. 1998) (creditor action ***against liquidator*** to establish creditor's ownership interest in real property held by debtor's estate); *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998) (reinsurer action ***against liquidator*** to establish whether certain settlement proceeds were part of the insolvent estate); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 44 (2d Cir. 1995) (holding that cedent's setoff claims ***against an insolvent reinsurer's estate*** were not arbitrable "[s]ince reinsurance is a practice which falls within the 'business of insurance,'" and holding that "reinsurance is not merely 'an integral part of the policy relationship between the insurer and insured,' it *is* the policy relationship between the two parties") (italics in original); *Gerling-Konzern Globale Rueckversicherungs-Ag v. Selcke*, No. 93-C-4439, 1993 WL 443404 (N.D. Ill. Oct. 29, 1993) (reinsurer action seeking to recover $10 million ***from insolvent estate***); *Corcoran v. Universal Reins. Corp.*, 713 F. Supp. 77, 81-82 (S.D.N.Y. 1989) (holding that reinsurer's setoff and recoupment defenses would draw money out of the estate).

The court in *Beam Partners* and *Milliman* thoroughly distinguished and rejected *Ernst & Young*'s McCarran-Ferguson analysis, stating that "[t]he Kentucky Supreme Court did not provide a robust analysis, merely assuming that because the clause in the FAA was inconsistent with KRS §§ 304.33-010(5)–(6), then the FAA would supersede the IRLL." *Milliman*, 2018 WL 5268614, at *9. This Court should reject the Liquidators' invitation to follow the Kentucky state court's flawed analysis.

B. Arbitration of the Liquidators' Common Law Damages Claims Will Not Interfere with the "Business of Insurance"

The Liquidators ***concede*** that there is no "direct conflict" between the FAA and either: the Iowa Liquidation Act, which authorizes Plaintiffs to "prosecute [and] institute… suits and ***other legal proceedings***," Iowa Code § 507C.21.1(l) (emphasis added); or the Liquidation Order entered pursuant to the Act, which allows Plaintiffs to sue in "***any necessary forum***" including "the ***arbitration panels*** of this state and other states." (App. 227, ¶ 16 (emphasis added).) Instead, the Liquidators contend that enforcing the Agreement's arbitration provision would "frustrate the policy behind the Liquidation Act." (Appellee Br., p. 68.)

The Liquidators' attempt to expand McCarran-Ferguson reverse preemption to protect purported state "policies" violates the U.S. Supreme Court's directive that a court cannot rely on "policy considerations" to

vitiate an otherwise valid arbitration agreement. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) ("[C]ourts [should] enforce the bargain of the parties to arbitrate, and not substitute [their] own views of economy and efficiency."); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir. 2001) (holding that when "determining whether a dispute is properly arbitrable… our authority does not extend to the consideration of public-policy advantages or disadvantages resulting from the enforcement of the agreement").

Furthermore, the Liquidators present no evidence that enforcing the arbitration clause here will disrupt the orderly liquidation of CoOportunity. Neither the confidential nature of arbitration nor the AAA's discovery rules would "interfere" with the Liquidation Act, as the Liquidators contend. The Liquidators' so-called right to "investigate and prosecute these claims in a transparent, public forum" (Appellee Br., p. 69) is made up from whole cloth—the Liquidation Act says nothing about the Liquidator having a right to try its claims publicly. To the contrary, the Liquidation Order expressly ***countenances*** claims before "arbitration panels," which are confidential and where appropriate discovery is determined by the arbitrators. Moreover, this Court has rejected the notion that the Liquidators have unfettered discovery powers under the Liquidation Act. *See Hager v. Carriers Ins. Co.*, 440

N.W.2d 386, 389 (Iowa 1989). While the Liquidators clearly perceive a litigation advantage in trying this case in court, with expansive discovery, that is not a legally sufficient basis to thwart Milliman's federal arbitration rights.

III. MILLIMAN DID NOT WAIVE ITS FAA PREEMPTION ARGUMENT

The Liquidators' assertion that Milliman "did not really raise" FAA preemption below, and therefore the issue is waived, is demonstrably false.

Relying on much the same precedent cited in Milliman's Appellant's Brief, Milliman's moving papers below expressly argued, *inter alia*, that:

- The FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." (App. 67);
- "If a state law conflicts with the FAA, the FAA controls." (*Id.*);
- "[T]he FAA would preempt the law of *any* state – New York, Iowa, or any other – that attempted to limit the parties' access to arbitration." (*Id.*);
- "Any conclusion to the contrary [i.e., that arbitration is not required here] would fly in the face of the 'liberal federal policy favoring arbitration agreements.'" (App. 73);
- "[T]he United States Supreme Court recently affirmed yet again the FAA's breadth, holding that a Kentucky rule requiring a 'clear statement' of the waiver of the right to jury trial impermissibly disfavored arbitration agreements and thus was preempted by the FAA." (*Id.*);

- "[T]he standard for reverse preemption is not satisfied where, as here, the action is a 'simple contract or tort action[],' and has 'nothing to do with [the State's] regulation of insurance.'" (App. 215.)

Milliman repeated this argument at the hearing on its motion. (App. 292 ("Agreements like that are subject to the Federal Arbitration Act ... This is federal law, and it preempts inconsistent state law.")).

Additionally, the District Court's ruling was based, in part, on its determination that the Iowa Liquidation Act *reverse*-preempted the FAA under the McCarran-Ferguson Act. (*See* App. 264.) Of course, "reverse" preemption only becomes an issue if federal and state law conflict and the former would otherwise preempt the latter. Error is preserved where, as here, an issue is "necessarily" subsumed within a district court's ruling. *See State v. Childs*, 898 N.W.2d 177, 181 (Iowa 2017).

CONCLUSION

For these reasons, Defendants-Appellants respectfully request that the judgment of the District Court be reversed, that Plaintiffs be compelled to arbitrate their claims against Milliman, and that Milliman's motion to dismiss the First Amended Petition be granted.

REQUEST FOR ORAL ARGUMENT

As set forth in the routing statement in Milliman's opening brief (Appellant Br., p. 13), Milliman submits that oral argument is appropriate given the substantial Constitutional questions raised by this appeal.

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PROOF OF SERVICE

I hereby certify that on the December 3, 2018, I electronically filed the foregoing Reply Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the below listed attorneys. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,679, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in Times New Roman 14 pt.

Dated: December 3, 2018

/s/ Stephen R. Eckley