IN THE SUPREME COURT OF IOWA

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,

vs.

MILLIMAN, INC., KIMBERLEY HIEMENZ,

and MICHAEL STURM, et al.,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
CASE NO. LACL 138070
THE HONORABLE JEANIE VAUDT

APPELLEES' FINAL BRIEF

Kevin J. Driscoll AT0002245
John David Hilmes AT0003523
FINLEY LAW FIRM P.C.
699 Walnut Street, Suite 1700
Des Moines, IA 50309
Telephone: (515) 288-0145
Fax: (515) 288-2724
kdriscoll@finleylaw.com
jhilmes@finleylaw.com

ATTORNEYS FOR PLAINTIFFS-APPELLEES

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 5

STATEMENT OF ISSUES PRESENTED FOR REVIEW 12

I. The District Court Properly Ruled That the Statutory Liquidators of an Insolvent Insurer Are Not Required To Arbitrate Based on a Pre-Insolvency Contract That the Liquidators Never Signed or Invoked and Which They Have Wholly Disavowed. 12

II. Preemption Does Not Eviscerate the Liquidators' State Law Defenses to Milliman's Attempt to Enforce the Agreement.....15

ROUTING STATEMENT.....18

STATEMENT OF THE CASE.....19

STATEMENT OF THE FACTS 20

I. CoOportunity became a federally funded CO-OP based upon Milliman's guidance and actuarial projections, and is now in Liquidation.....20

II. The Liquidators have a special public protection role and brought this suit pursuant to their statutory mandate to protect policyholders.....21

III. Milliman moved to dismiss the lawsuit under an arbitration clause in an Agreement signed by one of the Founders.....23

IV. The District Court denied Milliman's Motion. 24

ARGUMENT 27

I. The District Court Properly Ruled That the Statutory Liquidators of an Insolvent Insurer Are Not Required To Arbitrate Based on a Pre-Insolvency Contract That the Liquidators Never Signed or Invoked and Which They Have Wholly Disavowed. 29

A. Statement of Preservation of Issue for Appellate Review and Scope and Standard of Review. 29

B. The Liquidators Should Not Be Required to Arbitrate Because Arbitration is Fundamentally a Matter of Contract; A Party Cannot be Required to Submit to Arbitration Any Dispute Which the Party Has Not Agreed So to Submit. 30

C. The Liquidators Are Not Bound Because They Have Exercised Their Statutory Authority to Disavow the Agreement in its Entirety for the Benefit and Protection of the Estate, Policyholders, and Creditors. 32

1. The Liquidators' Authority to Disavow is Not Limited to Executory Contracts. 35

D. The Liquidators Are Not Bound as Mere Successors to CoOportunity Because They Have a Special, Statutory Public Protection Role and Assert Claims on Behalf of the Policyholders, Creditors, and the Public. 41

E. The Liquidators' Claims Do Not Arise From the Agreement Between CoOportunity and Milliman; Rather, They Independently Arise From Milliman's Misconduct and The Liquidators' Public Protection Role. 53

II. Preemption Does Not Eviscerate the Liquidators' State Law Defenses to Milliman's Attempt to Enforce the Agreement.....57

A. Statement of Preservation of Issue for Appellate Review and Scope and Standard of Review. 57

B. Federal Law Does Not Preempt the Liquidators' Defenses to the Contract. 58

C. The Iowa Liquidation Act Reverse Preempts the FAA by Operation of the McCarran-Ferguson Act.....61

1. The Liquidation Act was enacted for the purpose of regulating the business of insurance. 62

2. Requiring the Liquidators to pursue these claims in a confidential arbitration would impair the operation of the Liquidation Act and protection of policyholders. 69

CONCLUSION 72

REQUEST FOR ORAL ARGUMENT 73

CERTIFICATE OF COMPLIANCE 74

CERTIFICATE OF SERVICE 74

TABLE OF AUTHORITIES

Page

Cases

Allied-Bruce Terminix Companies v. Dobson,
513 U.S. 265 (1995) 12, 33

AmSouth Bank v. Dale,
386 F.3d 763 (6th Cir. 2004) 16, 69

Amwest Surety Ins. Co. v. Wagner,
245 F. Supp. 2d 1038 (D. Neb. 2002) 16, 67

Applied Energetics Inc. v. NewOak Capital Mkts, LLC,
645 F.3d 522 (2d Cir. 2011) 14, 56

Arthur Andersen LLP v. Carlisle,
556 U.S. 624 (2009) 12, 24, 25, 31

Arthur Andersen v. Superior Court,
67 Cal. App. 4th 1481 (Cal. Ct. App. 1998) 14, 48, 49

AT&T Techs., Inc. v. Commc'ns Workers of Am.,
475 U.S. 643 (1986) 12, 15, 24, 30

Beam Partners, LLC v. Atkins,
No. 3:17-cv-004-GFVT,
2018 WL 4344456 (E.D. Ky. Sept. 11, 2018) 16, 67

Benjamin v. Pipoly,
800 N.E.2d 50 (Ohio Ct. App. 2003) 12, 17, 33, 37, 38, 71

Bennett v. Liberty Nt'l Fire Ins. Co.,
968 F.2d 969 (9th Cir. 1992) 13, 16, 34, 52, 69

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 15, 59

Bullis v. Bear, Stearns & Co.,
553 N.W.2d 599 (Iowa 1996) 12, 31

Burris v. FDIC,
No. 09-C-302, 2011 WL 833270
(E.D. Wis. Mar. 3, 2011) 13, 39

Corcoran v. Universal Reinsurance Corp.,
713 F. Supp. 77 (S.D.N.Y. 1989) 16, 67

Cordial v. Ernst & Young,
483 S.E.2d. 248 (W. Va. 1996) 14, 44, 49

Costle v. Fremont Indemn. Co.,
839 F. Supp. 265 (D. Vt. 1993) 13, 16, 34, 35, 52, 68, 69

Covington v. Lucia,
784 N.E.2d 186 (Ohio Ct. App. 2003) 13, 17, 37, 71

Dasher v. RBC Bank (USA),
745 F.3d 1111 (11th Cir. 2014) 14, 56

Davister Corp. v. United Republic Life Ins. Co.,
152 F.3d 1277 (10th Cir. 1998) 15, 16, 63, 70

Doctor's Assocs. v. Casarotto,
517 U.S. 681 (1996) 15, 59

Donelon v. Shilling,
19th Judicial District Court,
Parish of East Baton Rouge, LA
Case No. 651069 (appeal pending) 14, 47

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 12, 14, 30, 31, 46, 47

Ernst & Young, LLP v. Clark,
323 S.W.3d 682 (Ky. 2010) 16, 17, 65, 66, 68, 72

FDIC v. Johnson,
No. 12-CV-00209, 2012 WL 5818259
(D. Nev. Nov. 15, 2012) 13, 39

Florida Department of Financial Svs. v. General Reinsurance Corp.,
Case No. 4:08CV443-WS, 2009 WL 10673255
(N.D. Fla. Feb. 2, 2009) 16, 67

Gerling-Konzern Globale Rueckversicherungs-Ag v. Selcke,
No. 93-C-4439, 1993 WL 443404 (N.D. Ill. Oct. 29, 1993) 16, 67

Goldman, Sachs & Co. v. City of Reno,
747 F.3d 733 (9th Cir. 2014) 14, 56

Griswold v. Coventry First LLC,
762 F.3d 264 (3d Cir. 2014) 14, 55

Hager v. Doubletree,
440 N.W.2d 603 (Iowa 1989) 17, 70, 71

Hennessy v. FDIC,
58 F.3d 908 (3d Cir. 1995) 13, 39

Humana, Inc. v. Forsyth,
525 U.S. 299 (1999) 16, 70

In re Integrity Ins. Co.,
573 A.2d 928 (N.J. Super. Ct. App. Div. 1990) 14, 50

In re Liquidation of CoOportunity Health, Inc.,
Case No. EQCE077579 21

Jacks v. CMH Homes, Inc.,
856 F.3d 1301 (10th Cir. 2017) 14, 55, 56

Javitch v. First Union Securities, Inc.,
315 F.3d 619 (6th Cir. 2003) 14, 53

Kessner v. One Beacon Ins. Co.,
No.: 4:09cv3003, 2009 WL 1408973 (D. Neb. 2009) 16, 67

Lloyd v. Drake University,
686 N.W.2d 225 (Iowa 2004) 12, 29

Maxwell v. Missouri Valley Ice & Cold Storage Co.,
164 N.W. 329 (Iowa 1917) 13, 40

McRaith v. BDO Seidman, LLP,
909 N.E.2d 310 (Ill. App. Ct. 2009) 14, 49

Milliman, Inc. et al. v. Roof,
No. 3:18-cv-00012, 2018 WL 526814
(D. Ky. Oct. 23, 2018) 16, 67, 68

Molina v. Evangelical Lutheran Good Samaritan Soc.,
995 F. Supp. 2d 944 (S. D. Iowa 2014) 12, 31

Munich Am. Reins. Co. v. Crawford,
141 F.3d 585 (5th Cir. 1998) 15, 62, 64

Murff v. Professional Medical Ins. Co.,
97 F.3d 289 (8th Cir. 1996) 15, 64

National Credit Union Admin. Bd. v. Goldman, Sachs & Co.,
Case No.: 13-civ-6721, 2014 WL 297518
(S.D.N.Y. Jan 28, 2014) 12, 33

Nickel v. Evangelical Lutheran Good Samaritan Society,
No. 4:17-cv-00126-SMR-HCA, 2017 WL 5633300
(S.D. Iowa June 27, 2017) 12, 31

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 15, 59

PRS Ins. Group, Inc. v. Credit General Ins. Co.,
294 B.R. 609 (D. Del. 2003) 16, 67

Quackenbush v. Allstate Ins. Co.,
121 F.3d 1372 (9th Cir. 1997) 16, 69

Reider v. Arthur Andersen, LLP,
784 A.2d 464 (Conn. Super. Ct. 2001) 13, 44, 50

Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n,
843 N.W.2d 727 (Iowa 2014) 12, 14, 30, 46, 47

Roth v. Evangelical Lutheran Good Samaritan Society,
886 N.W.2d 601 (Iowa 2016) 15, 59, 60, 61

Saunders v. Farmers Ins. Exch.,
537 F.3d 961 (8th Cir. 2008) 16, 70

Standard Sec. Life Ins. Co. of New York v. West,
267 F.3d 821 (8th Cir. 2001) 15, 62

State ex rel. Hager v. Carriers Ins. Co.,
440 N.W.2d 386 (Iowa 1989) 17, 71

State ex rel. Wagner v. Kay,
722 N.W.2d 348 (Neb. Ct. App. 2006) 13, 38

State v. Associated Packing Co.,
192 N.W. 267 (Iowa 1923) 13, 40

State v. Beach,
630 N.W.2d 598 (Iowa 2001) 13, 36

State v. Iowa Dist. Court for Johnson County,
730 N.W.2d 677 (Iowa 2007) 13, 36

Stephens v. American Int'l Ins. Co.,
66 F.3d 41 (2nd Cir. 1995) 15, 63, 64

Suter v. Munich Reinsurance Co.,
223 F.3d 150 (3d Cir. 2000) 14, 16, 52, 69

Taylor v. Ernst & Young, LLP,
958 N.E.2d 1203 (Ohio 2011) 14, 25, 45, 46, 53, 54, 55, 56

United States Department of Treasury v. Fabe,
508 U.S. 491 (1993) 15, 62, 63

Walling v. Iowa Mut. Liab. Ins. Co.,
292 N.W. 157 (Iowa 1940) 17, 70

Washburn v. Corcoran,
643 F. Supp. 554 (S.D.N.Y. 1986) 15, 63

Wesley Retirement Svs., Inc. v. Hansen Lind Meyer, Inc.,
594 N.W.2d 22 (1999) 12, 15, 29, 57, 58

Statutory Authorities

11 U.S.C. § 365 ..... 13, 39

12 U.S.C. § 1821(e)(1)(A) 13, 38

15 U.S.C. § 1011-1012 ..... 15, 27, 61, 62

9 U.S.C. § 2 ..... 12, 32

Iowa Code § 507C 12, 13, 15, 17, 18, 21, 24, 25, 26, 32, 35, 36, 37, 42, 65, 70, 71

Iowa Code § 524.103 ..... 13, 35

Iowa Code § 554.13208 ..... 13, 35

Iowa Code § 554.13505 ..... 13, 35

Iowa Code § 679A.1 ..... 12, 32

Iowa Code § 428A.2 ..... 13, 35

Ky. St. 304.33-240(12) 67

Nev. St. §§ 696B.010-696B.570 ..... 14, 52

R.C. 3903.21(A)(11) 33

Rules and Regulations

Iowa Ct. R. 16.317(1)(a) 74

Iowa R. App. P. 6.1101 18

Iowa R. App. P. 6.903 ..... 15, 58, 74

Iowa R. App. P. 6.904 36

Additional Authorities

AAA Commercial Arbitration Rules & Mediation Procedures 17, 71, 72

https://www.adr.org/sites/default/files/Commercial%20Rules.pdf. 72

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The District Court Properly Ruled That the Statutory Liquidators of an Insolvent Insurer Are Not Required To Arbitrate Based on a Pre-Insolvency Contract That the Liquidators Never Signed or Invoked and Which They Have Wholly Disavowed.

Wesley Retirement Svs., Inc. v. Hansen Lind Meyer, Inc., 594 N.W.2d 22 (1999)

Lloyd v. Drake University, 686 N.W.2d 225 (Iowa 2004)

AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986)

Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n, 843 N.W.2d 727 (Iowa 2014)

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002)

Nickel v. Evangelical Lutheran Good Samaritan Society, No. 4:17-cv-00126-SMR-HCA, 2017 WL 5633300 (S.D. Iowa June 27, 2017)

Molina v. Evangelical Lutheran Good Samaritan Soc., 995 F. Supp. 2d 944 (S. D. Iowa 2014)

Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009)

Bullis v. Bear, Stearns & Co., 553 N.W.2d 599 (Iowa 1996)

9 U.S.C. § 2

Iowa Code § 679A.1

Iowa Code § 507C.21

Benjamin v. Pipoly, 800 N.E.2d 50 (Ohio Ct. App. 2003)

National Credit Union Admin. Bd. v. Goldman, Sachs & Co., Case No.: 13-civ-6721, 2014 WL 297518 (S.D.N.Y. Jan 28, 2014)

Allied-Bruce Terminix Companies v. Dobson, 513 U.S. 265 (1995)

Bennett v. Liberty Nt'l Fire Ins. Co., 968 F.2d 969 (9th Cir. 1992)

Costle v. Fremont Indemn. Co., 839 F. Supp. 265 (D. Vt. 1993)

Iowa Code § 428A.2

Iowa Code § 524.103

Iowa Code § 554.13208

Iowa Code § 554.13505

State v. Iowa Dist. Court for Johnson County, 730 N.W.2d 677 (Iowa 2007)

State v. Beach, 630 N.W.2d 598 (Iowa 2001)

Iowa Code § 507C.1

Covington v. Lucia, 784 N.E.2d 186 (Ohio Ct. App. 2003)

State ex rel. Wagner v. Kay, 722 N.W.2d 348 (Neb. Ct. App. 2006)

12 U.S.C. § 1821(e)(1)(A)

Hennessy v. FDIC, 58 F.3d 908 (3d Cir. 1995)

FDIC v. Johnson, No. 12-CV-00209, 2012 WL 5818259 (D. Nev. Nov. 15, 2012)

Burris v. FDIC, No. 09-C-302, 2011 WL 833270 (E.D. Wis. Mar. 3, 2011)

11 U.S.C. § 365

Maxwell v. Missouri Valley Ice & Cold Storage Co., 164 N.W. 329 (Iowa 1917)

State v. Associated Packing Co., 192 N.W. 267 (Iowa 1923)

Reider v. Arthur Andersen, LLP, 784 A.2d 464 (Conn. Super. Ct. 2001)

Cordial v. Ernst & Young, 483 S.E.2d. 248 (W. Va. 1996)

Taylor v. Ernst & Young, LLP, 958 N.E.2d 1203 (Ohio 2011)

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002)

Rent-A-Center, Inc. v. Iowa Civil Rights Commission, 843 N.W.2d 727 (Iowa 2014)

Donelon v. Shilling, 19th Judicial District Court, Parish of East Baton Rouge, LA, Case No. 651069 (appeal pending)

Arthur Andersen v. Superior Court, 67 Cal. App. 4th 1481 (Cal. Ct. App. 1998)

McRaith v. BDO Seidman, LLP, 909 N.E.2d 310 (Ill. App. Ct. 2009)

In re Integrity Ins. Co., 573 A.2d 928 (N.J. Super. Ct. App. Div. 1990)

Nev. St. §§ 696B.010-696B.570

Suter v. Munich Reinsurance Co., 223 F.3d 150 (3d Cir. 2000)

Javitch v. First Union Securities, Inc., 315 F.3d 619 (6th Cir. 2003)

Griswold v. Coventry First LLC, 762 F.3d 264 (3d Cir. 2014)

Jacks v. CMH Homes, Inc., 856 F.3d 1301 (10th Cir. 2017)

Applied Energetics Inc. v. NewOak Capital Mkts, LLC, 645 F.3d 522 (2d Cir. 2011)

Dasher v. RBC Bank (USA), 745 F.3d 1111 (11th Cir. 2014)

Goldman, Sachs & Co. v. City of Reno, 747 F.3d 733 (9th Cir. 2014)

II. Preemption Does Not Eviscerate the Liquidators' State Law Defenses to Milliman's Attempt to Enforce the Agreement.

Wesley Ret. Serv's, Inc. v. Hansen Lind Meyer, Inc., 594 N.W.2d 22 (Iowa 1999)

Iowa R. App. P. 6.903(2)(g)(1)

Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996)

AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986)

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006)

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, n.12 (1967)

Roth v. Evangelical Lutheran Good Samaritan Society, 886 N.W.2d 601 (Iowa 2016)

15 U.S.C. §§ 1011-1012

Munich Am. Reins. Co. v. Crawford, 141 F.3d 585 (5th Cir. 1998)

Standard Sec. Life Ins. Co. of New York v. West, 267 F.3d 821 (8th Cir. 2001)

United States Department of Treasury v. Fabe, 508 U.S. 491 (1993)

Washburn v. Corcoran, 643 F. Supp. 554 (S.D.N.Y. 1986)

Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277 (10th Cir. 1998)

Stephens v. American Int'l Ins. Co., 66 F.3d 41 (2nd Cir. 1995)

Murff v. Professional Medical Ins. Co., 97 F.3d 289 (8th Cir. 1996)

Iowa Code § 507C.1

Iowa Code § 507C.21

Ernst & Young, LLP v. Clark, 323 S.W.3d 682 (Ky. 2010)

Gerling-Konzern Globale Rueckversicherungs-Ag v. Selcke, No. 93-C-4439, 1993 WL 443404 (N.D. Ill. Oct. 29, 1993)

Corcoran v. Universal Reinsurance Corp., 713 F. Supp. 77 (S.D.N.Y. 1989)

Florida Department of Financial Svs. v. General Reinsurance Corp., Case No. 4:08CV443-WS, 2009 WL 10673255 (N.D. Fla. Feb. 2, 2009)

Amwest Surety Ins. Co. v. Wagner, 245 F. Supp. 2d 1038 (D. Neb. 2002)

Kessner v. One Beacon Ins. Co., No.: 4:09cv3003, 2009 WL 1408973 (D. Neb. 2009)

PRS Ins. Group, Inc. v. Credit General Ins. Co., 294 B.R. 609 (D. Del. 2003)

Beam Partners, LLC v. Atkins, No. 3:17-cv-004-GFVT, 2018 WL 4344456 (E.D. Ky. Sept. 11, 2018)

Milliman, Inc. et al. v. Roof, No. 3:18-cv-00012, 2018 WL 526814 (D. Ky. Oct. 23, 2018)

Bennett v. Liberty Nt'l Fire Ins. Co., 968 F.2d 969 (9th Cir. 1992)

Costle v. Fremont Indemn. Co., 839 F. Supp. 265 (D. Vt. 1993)

Suter v. Munich Reinsurance Co., 223 F.3d 150 (3d Cir. 2000)

AmSouth Bank v. Dale, 386 F.3d 763 (6th Cir. 2004)

Quackenbush v. Allstate Ins. Co., 121 F.3d 1372 (9th Cir. 1997)

Saunders v. Farmers Ins. Exch., 537 F.3d 961 (8th Cir. 2008)

Humana, Inc. v. Forsyth, 525 U.S. 299 (1999)

Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277 (10th Cir. 1998)

Iowa Code § 507C.1

Walling v. Iowa Mut. Liab. Ins. Co., 292 N.W. 157 (Iowa 1940)

Hager v. Doubletree, 440 N.W.2d 603 (Iowa 1989)

Benjamin v. Pipoly, 800 N.E.2d 50 (Ohio Ct. App. 2003)

Covington v. Lucia, 784 N.E.2d 186 (Ohio Ct. App. 2003)

Iowa Code § 507C.21

State ex rel. Hager v. Carriers Ins. Co., 440 N.W.2d 386 (Iowa 1989)

AAA Commercial Arbitration Rules & Mediation Procedures

Ernst & Young, LLP v. Clark, 323 S.W.3d 682 (Ky. 2010)

ROUTING STATEMENT

The Court should retain this appeal under Iowa R. App. P. 6.1101(2)(c)-(d), and (f) because it involves important legal issues of first impression in Iowa, and the matter presents fundamental and urgent issues of broad public importance requiring prompt and ultimate determination by the Iowa Supreme Court.

The issue on appeal is whether a statutory liquidator of an insolvent insurer is bound by an arbitration clause in an agreement signed by a company incorporator long before the insolvency. The appeal turns on legal questions of first impression in Iowa that affect the public interest, including construction of a court-appointed liquidator's authority under the Iowa Insurers Supervision, Rehabilitation, and Liquidation Act, Iowa Code § 507C *et seq.* ("Liquidation Act" or "Act"). Resolution of this appeal has important implications for this and other liquidation proceedings. As a result, if this case is transferred to the intermediary court, there will no doubt be a further appeal.

The underlying case has been stayed in its entirety pending appeal at Milliman's request. If this Court retains the appeal, that will mitigate against the additional delay caused in the underlying proceeding.

STATEMENT OF THE CASE

CoOportunity Health, Inc. ("CoOportunity") was an Iowa-based insurer that collapsed in 2014. First Amended Petition App. 7 (¶¶ 4-7). Upon the petition of the Iowa Insurance Commissioner, the Honorable Arthur E. Gamble of the Polk County District Court ("Liquidation Court") declared the company insolvent and appointed Appellees as the Liquidators of the company pursuant to the Iowa Liquidation Act. App. 8-9 (¶¶ 12-16).

The Liquidators filed this civil lawsuit against Milliman[1] and the Founders[2] of CoOportunity pursuant to their statutory authority to protect the interests of CoOportunity's policyholders and creditors. App. 6, 37-52, 54-56. The Liquidators assert the malpractice and other tort claims on behalf of the company's policyholders and creditors. App. 37-52, 54-56.

Milliman filed a Motion to Dismiss and Compel Arbitration ("Motion") based on an agreement signed by an incorporator of CoOportunity in 2011 ("Agreement"), before CoOportunity was established and long before the company went into liquidation. App. 63. The Liquidators resisted Milliman's

[1] "Milliman" includes Milliman, Inc., Kimberley Hiemenz, and Michael Sturm.

[2] CoOportunity was founded by Stephen Ringlee, David Lyons, and Clifford Gold (the "Founders"). The Founders are not parties to this appeal.

Motion. App. 103-130, 241-244. After briefing closed, the Court heard oral argument on December 8, 2017.

On February 6, 2018, the District Court entered an Order Denying Milliman Inc., *et al.*'s Motion to Dismiss and Compel Arbitration ("Order"). App. 259-266. Milliman has appealed that Order. App. 267-270.

STATEMENT OF THE FACTS

I. CoOportunity became a federally funded CO-OP based upon Milliman's guidance and actuarial projections, and is now in Liquidation.

CoOportunity was one of twenty-three start-up health insurers (or "CO-OPs") launched under the Affordable Care Act. App. 7. Milliman aggressively pursued the "cottage industry" that grew up around this federally funded program, touting its actuarial expertise to assist the CO-OPs to secure federal funding and set plan rates. App. 11-14 (¶¶ 29-44), 47 (¶151).

With Milliman's guidance and actuarial projections, CoOportunity secured $145 million in federal loans to capitalize and launch the company. App. 7 (¶2), 15 (¶48), 20 (¶71). CoOportunity opened member enrollment in October 2013, and started covering health claims in January 2014. App. 7 (¶ 5). After operating just one year, CoOportunity lost over $163 million. App. 16 (¶ 55). The Iowa Insurance Commissioner instituted rehabilitation proceedings against CoOportunity in December 2014. App. 8 (¶¶ 11-13).

CoOportunity is now in liquidation in the Polk County District Court, *In re Liquidation of CoOportunity Health, Inc.*, Case No. EQCE077579. App. 8 (¶ 12). Policyholders, creditors, and taxpayers have suffered damage and are left footing the bill for CoOportunity.[3] App. 10 (¶¶ 21-22).

The Liquidation Court appointed the Iowa Insurance Commissioner to serve as the Rehabilitator and then Liquidator of CoOportunity pursuant to the Iowa Liquidation Act, §§ 507C.13.1 and 507C.18.1. App. 8 (¶¶ 14–15).

II. The Liquidators have a special public protection role and brought this suit pursuant to their statutory mandate to protect policyholders.

The Liquidators brought this action against Milliman to recover damages caused by Milliman's wrongdoing as a part of their public protection role and pursuant to their statutory mandate to marshal the assets of the estate for the benefit of policyholders, creditors, and the general public. App. 9-10 (¶¶ 18, 21). The Liquidators assert claims of malpractice, breach of fiduciary duty, negligent misrepresentation, intentional misrepresentation, aiding and abetting breach of fiduciary duty, and conspiracy against Milliman. App. 37-52 (¶¶ 140-167), 54-55 (¶¶174-181).

[3] Milliman worked with the majority of the start-up CO-OPs, most of which have failed. Representatives of defunct CO-OPs in at least three other states (Nevada, Kentucky, and Louisiana) have also brought claims against Milliman.

The Liquidators also asserted claims against the Founders of CoOportunity. App. 11 (¶ 25), 52-53 (¶¶168-173), 56-58 (¶¶ 182-192).

The Liquidators allege that Milliman prepared reports that Milliman knew would be submitted to the company and its regulators. App. 18-31 (¶¶ 66-110). Milliman knew that the company's regulators were relying upon Milliman's supposed independent actuarial certifications of viability. App. 42 (¶ 143(ii)-(iii)), 43-46 (¶ 143(v)-(xvi)), 47 (¶¶ 149-150), 48-52 (¶¶ 154(iii)-(vi), 157-162, 164-166). The Liquidators allege that "Milliman failed to be honest, forthright, and candid with CoOportunity, HHS, and state regulators about the true and accurate financial condition of the company," and that Milliman made false representations or failed to disclose relevant facts to regulators. App. 42 (¶ 143(ii)-(iii)), 45-46 (¶ 143(xv)-(xvi)), 48-49 (¶154(iii)-(vi)), 50 (¶ 160), 51-52 (¶ 164). The Liquidators further allege that "CoOportunity, policyholders, state and federal regulators and creditors relied upon the Milliman Defendants' representations and actuarial certifications in making business and regulatory decisions about the company." App. 51 (¶162), 52 (¶ 166).

Any judgments entered against Milliman in this action will accrue to the benefit of the insureds, policyholders, creditors, and citizens of Iowa and Nebraska, and will serve to deter future wrongful acts. App. 10 (¶ 20), 260.

III. Milliman moved to dismiss the lawsuit under an arbitration clause in an Agreement signed by one of the Founders.

In an attempt to avoid or limit exposure for its role in the collapse of CoOportunity, Milliman seeks to enforce an Agreement signed by one of the Founders on September 30, 2011, before the company was even established. App. 64-65, 76-77.[4] The Liquidators are not signatories to the Agreement. App. 77.

The Agreement purports to require a confidential arbitration and application of New York law, even though none of the parties or events at issue have any nexus to New York. *Id.* The Agreement attempts to insulate Milliman from liability by limiting a malpractice recovery to three times fees paid, and providing that Milliman will not be liable for any lost profits, incidental, or consequential damages. App. 76. Milliman offered the Founders a personal incentive to enter into the one-sided Agreement by promising that Milliman would not seek to collect against the Founders personally if the federal government did not approve the funding application. *Id.*

The Liquidators have asserted that, by entering into the one-sided and unfair Agreement, the Founders breached their fiduciary duties. App. 14-15

[4] CoOportunity was incorporated as Midwest Members Health on October 4, 2011; it changed its name to CoOportunity in March 3, 2014. App. 90.

(¶¶ 45-47), 17 (¶¶ 59-61), 53 (¶172(i)). The Liquidators allege Milliman conspired with the Founders and aided and abetted these breaches. App. 54-56. The Liquidators disavowed the entire Agreement, pursuant to Iowa Code § 507C.21.1.k, and do not seek to enforce any provision of that Agreement. App. 15 (¶ 46).

IV. The District Court denied Milliman's Motion.

On February 6, 2018, after considering extensive briefing and hearing oral argument, the District Court entered its Order denying Milliman's Motion. App. 259-266. The Court held that the Liquidators are not bound by the arbitration clause in the Agreement for several reasons, any of which independently supports affirmance.

First, the Court held that "the Liquidators are not signatories to the Agreement. It is fundamental that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" App. 261 (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 646 (1986) (citing cases)).

The Court held that "[s]tate law governs the question of whether there is a binding agreement to arbitrate," and "[a] non-signatory may be bound by an arbitration agreement *only* if traditional principles of state law allow the contract to be enforced against the nonparty." App. 262 (citing *Arthur Andersen LLP v.*

Carlisle, 556 U.S. 624, 631 (2009)). Further, any "presumption" in favor of arbitration "does not apply where, as in this case, a non-party to the agreement disputes the agreement is binding and enforceable against the party." App. 262 (citing cases).

The Court rejected Milliman's argument that the Liquidators are bound by the Agreement as successors to CoOportunity, holding:

> Under Iowa law the Liquidators are not mere successors of CoOportunity. As a matter of law they do not stand only in CoOportunity's shoes. Rather, the Liquidators brought this action pursuant to the Iowa Legislature's broad grant of statutory authority to the Liquidators under Iowa Code § 507C.21(1)(*m*) to bring claims on behalf of policyholders and creditors, as well as on behalf of CoOportunity. Other courts confronting the issue have held the liquidator is not a mere successor and is not bound by the defunct insurer's arbitration agreement.

App. 262 (citing *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203, 1211 (Ohio 2011)) (footnote omitted).

The Court also held that the Liquidators' "claims do not arise from or relate to the Agreement." App. 262. The Court held:

> The Liquidators do not seek to enforce or recover under the Agreement. . . . Rather, the Liquidators' claims arise from Milliman's alleged malpractice and public statements certifying the viability of CoOportunity, as well as the Liquidators' statutory right under section 507C.21(1)(*m*) to assert claims on behalf of the company, policyholders, creditors, and others.

App. 263.

In addition, the Court held that "the Liquidators have disavowed the Agreement in its entirety, as authorized under Iowa Code § 507C.21(1)(*k*). The Liquidators' disavowal is an independent alternative ground upon which the court refuses to compel arbitration as provided for in section 2 of the [FAA]." App. 263 (footnote omitted). The Court held:

> The court rejects Milliman's argument that the Liquidators' authority to disavow contracts applies only to executory or ongoing contractual obligations. This is not supported by the plain language of the statute, cases construing an insurance liquidator's disavowal authority, and the express purpose of the Act to effectuate the goals of policyholder and creditor protection.

App. 263.

In further support of its Order, the Court held that "the language of the Act confirms that the Legislature enacted this comprehensive statute to protect the interests of CoOportunity's policyholders," and that "[f]orcing the Liquidators to arbitrate would interfere with (1) the public's interest in the proceeding; (2) the Liquidators' right of forum selection under the Act; (3) the Act's purposes of economy and efficiency; (4) the protection of CoOportunity policyholders and creditors; and (5) the Liquidators' authority to disavow the Agreement." App. 263. The Court noted:

> It is not lost upon this court that the Legislature could have chosen to restrain the reach of a liquidator in situations such as the instant matter and require the result Milliman argues for here. It is telling to the court that the Legislature has not done so. The court will not

> supply that which is within the authority of the Legislature to provide.

App. 264.

Finally, the Court held that "the Act expressly involves the 'business of insurance,'" and thus the Court "cannot compel arbitration under the FAA because, under the McCarran-Ferguson Act, the Act reverse preempts the FAA, such that the FAA must give rise to the rights and remedies prescribed in the Act. *See* 15 U.S.C. § 1012(*b*)." App. 264.

The Court concluded:

> For all of the reasons stated above, the court finds and concludes that the Liquidators have exercised their statutory authority properly. They are not bound by the arbitration clause discussed above, which they have disavowed. Milliman's Motion to Dismiss and Compel Arbitration should therefore be denied.

App. 264.

Milliman has filed this appeal from the Court's Order.

ARGUMENT

Milliman's Motion is about far more than merely proceeding with the Liquidators' claims in a different forum. The Agreement purports to limit Milliman's liability to three times its fees and shield Milliman from any liability for incidental, consequential, or other damages caused by Milliman's actions. Enforcing this Agreement containing such one-sided terms intended only to

protect Milliman against financial liability and to insulate the proceeding from public scrutiny would violate the fundamental purpose of the Liquidation Act—protecting the interests of insureds, claimants, creditors, and the public.

Regardless of whether state or federal law applies to Milliman's Motion to Compel Arbitration, a threshold determination under either law is whether there is an enforceable contract providing for arbitration. If there is *not* an enforceable agreement under state law, then arbitration must be denied under the FAA or state law, meaning there would be no conflict requiring preemption analysis.

There is no enforceable contract here because: (1) the Liquidators are non-signatories and never agreed to a confidential arbitration; (2) the Liquidators are not bound by the company's pre-insolvency Agreement because they are not mere successors; rather, they have a special, statutory public protection role and assert claims on behalf of policyholders and creditors (3) and the Liquidators have not invoked rights under the tainted Agreement; to the contrary, they have exercised their authority to disavow the entirety of the Agreement to protect policyholders. Contrary to Milliman's new preemption argument, the FAA does not preempt state law defenses to enforceability of a contract.

It is only if the Court determines that there is an enforceable contract that the Court must consider preemption. Under the federal McCarran-Ferguson Act, state laws that regulate the business of insurance like the Iowa Liquidation Act preempt federal laws of general application like the FAA. Here, a confidential arbitration impairs and impedes the Iowa Liquidation Act, particularly the statutory provisions intended to protect policyholders. The FAA must yield to the state laws intended to protect policyholders.

I. The District Court Properly Ruled That the Statutory Liquidators of an Insolvent Insurer Are Not Required To Arbitrate Based on a Pre-Insolvency Contract That the Liquidators Never Signed or Invoked and Which They Have Wholly Disavowed.

A. Statement of Preservation of Issue for Appellate Review and Scope and Standard of Review.

The Liquidators agree that the Court reviews the District Court's denial of a motion to compel arbitration for correction of errors at law. *See Wesley Retirement Svs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 29 (1999). The Court can "affirm the district court ruling on *any* ground urged in the trial court." *Lloyd v. Drake University*, 686 N.W.2d 225, 229 (Iowa 2004) (emphasis added).

Milliman asserts that the Court should "scrutinize the record more closely" because it claims the District Court adopted the Liquidators' proposed order. Milliman Br. p. 22. Rather than "rubber stamping" the proposal, the

District Court *augmented*[5] the legal analysis in the Order. In any event, the issues presented are purely legal. The Liquidators agree that the issue of whether the Liquidators are bound by a pre-insolvency contract under state law is preserved for appeal.

B. The Liquidators Should Not Be Required to Arbitrate Because Arbitration is Fundamentally a Matter of Contract; A Party Cannot be Required to Submit to Arbitration Any Dispute Which the Party Has Not Agreed So to Submit.

The starting point for any motion to compel arbitration must be the fundamental rule that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 646 (1986) (citation omitted); *Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727, 732-33, 736 (Iowa 2014) (The enforceability of an agreement to arbitrate "flows from the consent of the parties to the agreement . . . Nonparties don't have to arbitrate.") (citations omitted). "Arbitration under the [FAA] is a

[5] The District Court added to the proposed order: "It is not lost upon the court that the Legislature could have chosen to restrain the reach of a liquidator in situations such as the instant matter and require the result Milliman argues for here. It is telling to the court that the Legislature has not done so. The court will not supply that which is within the authority of the Legislature to provide. . . . In this vein the court also observes that the liquidation statutes in most other states do not approximate the depth and breadth of the authority granted to the Liquidators by the Legislature under the Act." App. 263-264 and n. 5; *compare* Liquidators' Proposed Order, App. 251-252.

matter of consent, not coercion. . . . It goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). *See also* App. 261.

The Court must *first* determine "whether there is a valid agreement to arbitrate between the parties." *Nickel v. Evangelical Lutheran Good Samaritan Society*, No. 4:17-cv-00126-SMR-HCA, 2017 WL 5633300, at * 2 (S.D. Iowa June 27, 2017) (citations omitted); *Molina v. Evangelical Lutheran Good Samaritan Soc.*, 995 F. Supp. 2d 944, 947 (S. D. Iowa 2014). Whether a valid and enforceable contract exists is a matter of state law. *Molina*, 995 F. Supp.2d at 947 (citations omitted).

Milliman admits the non-signatory[6] Liquidators are not "technically" parties to the Agreement (Milliman Br. p. 44), but claims Iowa courts "routinely" enforce arbitration against non-signatories. A non-signatory may be bound by an arbitration agreement *only* if traditional principles of state law allow the contract to be enforced against the nonparty. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009); *see also Bullis v. Bear, Stearns & Co.*, 553 N.W.2d 599, 602 (Iowa 1996). Milliman fails to cite a *single* case from

[6] The Agreement states: "In the event of any dispute arising out of or relating to the engagement of Milliman by Company, *the parties agree* that the dispute will be resolved by final and binding arbitration . . . " App. 76 (emphasis added).

Iowa or any other jurisdiction holding that an insurance liquidator that has disavowed a professional services agreement is nonetheless bound to arbitrate when asserting malpractice and other tort claims.

The Liquidators are not parties to the Agreement, and they are not bound by the Agreement, as set forth below. Accordingly, they cannot be required to arbitrate under the Agreement, and the Order must be affirmed.

C. The Liquidators Are Not Bound Because They Have Exercised Their Statutory Authority to Disavow the Agreement in its Entirety for the Benefit and Protection of the Estate, Policyholders, and Creditors.

Both federal and Iowa law provide that arbitration is not required where the contract is unenforceable due to various contract defenses, *e.g.*, fraud, duress, lack of consideration. *See* 9 U.S.C. § 2 (arbitration agreements are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."); Iowa Code § 679A.1.2 ("A provision in a written contract to submit to arbitration a future controversy arising between the parties is valid, enforceable, and irrevocable *unless grounds exist at law or in equity for the revocation of the contract*).

The Liquidators exercised their statutory authority under Iowa Code § 507C.21.1.k to disavow the entirety of the Agreement. Under that statute, the Liquidators may "affirm or disavow contracts to which the insurer is a party."

The Liquidator's disavowal falls squarely within the FAA's and Iowa Arbitration Act's savings clauses as "grounds as exist at law or in equity for the revocation of any contract." In *Benjamin v. Pipoly*, 800 N.E.2d 50 (Ohio Ct. App. 2003), the court held that the liquidator's "power to disavow pursuant to" the Ohio liquidation statute "is a ground that exists at law 'for the revocation of any contract.' Thus, the liquidator's exercise of the power to disavow, conferred upon her by R.C. 3903.21(A)(11), is not violative of the FAA." *Id.* at 63; *see also National Credit Union Admin. Bd. v. Goldman, Sachs & Co.*, Case No.: 13-civ-6721, 2014 WL 297518, at *2, 4-5 (S.D.N.Y. Jan. 28, 2014) (holding that a liquidating agent's act of repudiating a contract fell within the saving clause of the FAA).

Milliman cites to *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995) – a case that did not involve a liquidator or a disavowal of a contract – for the general proposition that a state may not "decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause." 513 U.S. at 281 (cited in Milliman Br. at 36). But "[t]he Liquidators do not seek to enforce any provision of the Agreement." App. 15 (¶ 46). Far from singling out the arbitration clause, the Liquidators have disavowed the Agreement in its entirety. App. 5 (¶¶ 46-47, 50).

Milliman does not cite to a *single case* holding that the FAA allows arbitration under a contract that a liquidator has disavowed as permitted under state law. None of the cases Milliman cites in support of its "primacy" argument involve a liquidator's disavowal of a contract. Milliman Br. p. 36. Milliman cites two federal cases purportedly for this proposition. However, in *Bennett v. Liberty Nt'l Fire Ins. Co.*, 968 F.2d 969, 972 (9th Cir. 1992), the court held only that because liquidator was "attempting to *enforce* Glacier's contractual rights, she is bound by Glacier's pre-insolvency agreements." (emphasis added). Similarly, in *Costle v. Fremont Indemn. Co.*, 839 F. Supp. 265, 272 (D. Vt. 1993), the court that "if a liquidator seeks to *enforce* an insolvent company's rights under a contract, she must also suffer that company's contractual liabilities . . . including arbitration provisions." (emphasis added).

The courts in *Bennett* and *Costle* did not even mention the word "disavow" or reference *any* disavowal statute. Yet, Milliman recites the Montana disavowal statute, after which Milliman claims that the court in *Bennett* "nonetheless" held that the liquidators were bound. Milliman Br. p. 37. Milliman similarly claims that the court in *Costle* enforced arbitration "*notwithstanding* the Vermont liquidation statute" that permits disavowal. *Id.*

(emphasis added). In so doing, Milliman suggests rulings that simply do not exist, in the Ninth Circuit, Vermont, or anywhere else.

1. The Liquidators' Authority to Disavow is Not Limited to Executory Contracts.

Milliman argues that the Court should limit the Liquidators' statutory right to disavow contracts to "executory" contracts. This is contrary to the plain language of the Liquidation Act; it is not supported by any case law; and was properly rejected by the District Court. App. 263.

The Act is unambiguous that the Liquidator may "*affirm or disavow contracts* to which the insurer is a party." Iowa Code § 507C.21.1.k (emphasis added). Nowhere in § 507C.21 is there a mention of "executory contracts" or any limitations on what contracts the liquidator can disavow. If the Iowa legislature wanted to impose such a limitation, they could have done so, as they have in other statutes.[7]

To limit a liquidator's disavowal authority to "executory contracts" when there is no such limitation in the statute is contrary to the bedrock principle that

[7] *See* Iowa Code § 428A.2 (making an exception to property taxes for "[a]ny executory contract for the sale of land . . ."); § 524.103 (defining "agreement for the payment of money" to include "accounts receivable and executory contracts"); § 554.13208 (determining rules for waiver "affecting an executory portion of a lease contract"); § 554.13505 (allowing cancelation of lease obligations "that are still executory on both sides" but that "any right based on prior default or performance survives").

the "terms of a statute must be enforced as written." *State v. Iowa Dist. Court for Johnson County*, 730 N.W.2d 677, 679 (Iowa 2007) (citation omitted); Iowa R. App. P. 6.904(3)(m) (a litigant need not support with citations the well-established rule that in "construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said"). As this Court held:

> When a statute's text is plain and its meaning clear, we do not search for meaning beyond the statute's express terms. . . . Statutory text may express legislative intent by omission as well as inclusion. . . . *When a proposed interpretation of a statute would require the court to read something into the law that is not apparent from the words chosen by the legislature, the court will reject it.*

Johnson County, 730 N.W.2d at 679 (emphases added) (citations omitted); *State v. Beach*, 630 N.W.2d 598, 600 (Iowa 2001) ("Intent may be expressed by the omission, as well as the inclusion, of statutory terms." (internal citation omitted)).

The Legislature admonished that the Liquidation Act "shall be liberally construed to effect the purpose" of the Act, which "is the protection of the interests of insureds, claimants, creditors and the public." Iowa Code § 507C.1.3-4. The Act provides that its enumeration of a liquidator's powers is not exclusive, and it "does not limit the liquidator or exclude the liquidator from

exercising a power not listed . . . that may be necessary or appropriate to accomplish the purposes of this chapter." Iowa Code § 507C.21.2.

Courts construing the authority of insurance liquidators have not limited their disavowal power to executory contracts. In *Covington v. Lucia*, 784 N.E.2d 186 (Ohio Ct. App. 2003), the statutory liquidator filed suit against the insurer's former officers and directors. The court held that the liquidator was not bound by the arbitration provision in the officers and directors' severance agreements, which he had disavowed. The court held that the "liquidator has made it abundantly clear that he has no desire to become a successor to [the] severance agreement and, in fact….the liquidator seeks to disavow the severance agreement." *Id.* at 192. The court held: "To permit [the officer] to have his action decided privately and separately from his fellow officers when the liquidator has disavowed the contract is contrary to the interests of insured, claimants, creditors, and the public generally as well as the interest of the liquidator who in the pursuit of his duties represents them." *Id.* at 191.

Similarly, in *Benjamin v. Pipoly*, the liquidator brought suit against the insurers' former officers and directors. 800 N.E.2d at 52. The court held the liquidator was not bound by an arbitration provision in the defendants' employment contracts, which the liquidator had disavowed, holding:

> A liquidator is appointed to perform specific functions, including preserving and maximizing the value of the insolvent insurer and protecting the interests of both those with direct pecuniary connections to the insurer and the general public. *The liquidator must have freedom of action to do those acts most beneficial in achieving her objectives. Within this demesne, the liquidator may affirm or disavow the rights and obligations of the interest with which she is charged, and it would be inconsistent to compel arbitration against her when such an obligation predates her appointment.*

800 N.E.2d at 58–59 (emphasis added).

Similarly, in *State ex rel. Wagner v. Kay*, 722 N.W.2d 348 (Neb. Ct. App. 2006), the court held that a liquidator who brought suit against an insurer's former officers and directors for breach of fiduciary duty was not bound by an arbitration clause in a severance agreement:

> [W]hen a liquidator is appointed by court order, such liquidator is not automatically bound by the preappointment contractual obligations of the insurer. [Nebraska statute] Section 44-4821(1)(m) provides that a liquidator shall have the power "to affirm or disavow any contracts to which the insurer is a party." The Liquidator in the present case is not seeking to enforce the agreements; but instead, he is disavowing them, which is one of his express powers.

722 N.W.2d at 357-58 (citing *Benjamin*, 800 N.E.2d at 58-61).

In a similar context, federal law grants the Federal Deposit Insurance Corporation ("FDIC") authority, when acting as conservator or receiver of an insured depository institution, to "disaffirm or repudiate any contract . . . to which such institution is a party." 12 U.S.C. § 1821(e)(1)(A). Most courts

agree that the FDIC may disavow non-executory contracts. "As many courts have noted, the statute explicitly provides that a conservator or receiver 'may disaffirm any contract or lease,' not just executory contracts." *Hennessy v. FDIC*, 58 F.3d 908, 919 n.8 (3d Cir. 1995) (quotation omitted). "[T]he weight of authority suggests that the FDIC can repudiate both executory and nonexecutory contracts." *FDIC v. Johnson*, No. 12-CV-00209, 2012 WL 5818259, at *3 (D. Nev. Nov. 15, 2012); *see also Burris v. FDIC*, No. 09-C-302, 2011 WL 833270, at *1 (E.D. Wis. Mar. 3, 2011) (citing *Hennessy*, 58 F.3d at 919 ("[U]nder FIRREA, the FDIC's power to repudiate is not limited to executory contracts.")).[8]

Milliman claims that: "This Court has long held that only *executory* contracts can be disavowed," but neither of the cases Milliman cites stands for this proposition. Milliman's Br. at 37-38 (emphasis original). First, the cases are *outside* the insurance liquidation context, and do not involve the Liquidation Act's express statutory authorization to affirm or disavow *any* contract. Second, both cases involved claims brought *against* a receiver under an *executory*

[8] In contrast, the federal Bankruptcy Code *explicitly limits* the trustee's power to "assume or reject any *executory contract* or unexpired lease of the debtor." 11 U.S.C. § 365 (emphasis added). The Iowa Legislature, however, chose *not* to include any such limiting language in its Liquidation Act.

contract. In *Maxwell v. Missouri Valley Ice & Cold Storage Co.*, 164 N.W. 329 (Iowa 1917), the Court held that "a receiver is not liable upon" the company's contracts "*unless* he adopts the contracts as his own. The general rule is that no executory contract is binding upon the receiver until adopted by him." *Id.* at 332. The Court also stated that a "receiver is not bound to accept the executory contracts, *or otherwise step into the shoes*" of the company. *Id.* (emphasis added). In *State v. Associated Packing Co.*, 192 N.W. 267, 269-70 (Iowa 1923), the Court merely repeated this rule, that "a receiver is not bound to carry out the terms of an executory contract entered into by the debtor."

The Court's opinion in *Maxwell* is instructive, as the Court explained that the basis for a receiver's right to disavow contracts is his obligation to free the estate from being bound by contracts which the company improvidently entered:

> Courts take possession for the protection and conservation of the property. We say, therefore, that the appointment of the plaintiff as receiver did not bind him to the performance of the contracts of the original owner made before his appointment. He may adopt these contracts if, in his judgment, they are for the best interests of the estate which he is called on to manage . . . or he may repudiate them if not for the best interests of the trust.

164 N.W. at 331. As the Court in *Maxwell* observed, "Improvident contracts are often the very basis of the conditions which make the appointment of a receiver necessary for the protection of the assets in the interest of creditors." *Id.* at 332.

So it is here. The Liquidators alleged that the Founders' very act of entering into the Agreement was itself a breach of the Founders' fiduciary duties to CoOportunity. App. 53 (¶ 172(i)). Milliman promised the Founders that it would not collect tens of thousands of dollars of its fees from them personally if CoOportunity did not secure federal funding, creating an improper incentive for Milliman to skew their projections in an effort to convince federal officials to approve and fund the company. App. 15 (¶¶ 48-50), 17-18 (¶¶ 59-62). In exchange, the Founders granted Milliman heavily one-sided terms. App. 15 (¶ 47), 16 (¶ 56). These are *precisely* the reason the Liquidators are allowed to disavow given their public protection role. This Court can affirm on the sole basis that the District Court properly held the Liquidators are not bound by the Agreement because they have disavowed it.

D. The Liquidators Are Not Bound as Mere Successors to CoOportunity Because They Have a Special, Statutory Public Protection Role and Assert Claims on Behalf of the Policyholders, Creditors, and the Public.

The Liquidators are not bound by the Agreement because they have not sued on behalf of CoOportunity and are not its mere successors. Rather, the Liquidators brought his action in their public protection role and pursuant to their statutory mandate to protect the interests of policyholders, creditors, and the public.

The Liquidation Act provides "a comprehensive scheme for the…liquidation of insurance companies…as part of the regulation of the business of insurance, the insurance industry, and insurers in this state." Iowa Code § 507C.1.4.g. The Act specifies the different capacities in which liquidators can bring suits in the performance of their functions. *First*, liquidators can "prosecute and institute in the name of the insurer or in the liquidator's own name any and all suits and other legal proceedings." Iowa Code § 507C.21.1(l). *Second*, and applicable here, the Act *separately* provides that liquidators may "[p]rosecute an action *on behalf of the creditors, members, policyholders or shareholders of the insurer* against . . . any other person." Iowa Code § 507C.21.1(m) (emphasis added); *see also id.* at § 507C.21.1(s) (liquidators can *"*[e]xercise and enforce the rights, remedies, and power of a creditor, shareholder, policyholder, or member….").

Here, Liquidators' Petition alleges that they bring this claim "on behalf of the company, its creditors, and policyholders, including policyholder-level claimants as authorized under Iowa Code § 507C.21.1, to protect and maximize the assets of the estate of CoOportunity for the benefit of policyholders, creditors, and the general public." App. 10 (¶ 21). The Liquidators allege that Milliman's actions caused damage to "CoOportunity, policyholders, and creditors." App. 46 (¶ 144), 49 (¶ 155), 51 (¶ 162), 52 (¶ 167). The Liquidators

also allege that they bring this claim in their "public-protection role" and that "any judgments in favor of them accrue to the benefit of insureds, policyholders, creditors, and the citizens of Iowa and Nebraska." App. 10 (¶ 20).

While a liquidator *may* "stand in the shoes" of a defunct company (*e.g.*, where the liquidator *elects* to enforce the contractual rights of the company), that authority does not address, and has never been construed as a limitation on, a liquidator's *separate* statutory authority to assert claims *on behalf of the company's creditors, policyholders, the public, and other impacted parties.*

The Liquidators' claims are based upon multiple reports prepared by Milliman, which Milliman knew would be submitted to the company *and its regulators*. App. 18-31 (¶¶ 66-110). The Liquidators allege that "Milliman failed to be honest, forthright, and candid with CoOportunity, HHS, *and state regulators* about the true and accurate financial condition of the company," App. 48-49 (¶154(iii)-(v)) (emphasis added); that Milliman made false representations or failed to disclose relevant facts *to regulators*, App. 42 (¶ 143(ii)-(iii)), 45-46 (143(xv)-(xvi)), 48-49 (154(iii)-(vi)) , 50 (¶160), 51-52 (¶164); and that "CoOportunity, policyholders, *state and federal regulators and creditors relied upon the Milliman Defendants' representations and actuarial certifications in making business and regulatory decisions*" about the company. App. 51 (¶ 162), 52 (¶ 166) (emphasis added). For example, the federal

government relied upon Milliman's representations in determining CoOportunity's applications to become a CO-OP and for $145 million in tax-payer funded federal loans. *See id.*

These allegations make clear that the Liquidators have sued in their public protection role based upon their allegations that Milliman's conduct caused CoOportunity to open and continue to operate, to the detriment of regulators, policyholders, creditors, and the taxpaying public. *See, e.g.*, *Reider v. Arthur Andersen, LLP*, 784 A.2d 464, 477 (Conn. Super. Ct. 2001) (liquidators sued in public protection role where they alleged that based upon accounting firm's misreporting of the true financial status of the insurer, "the Insurance Commissioner, as the representative of the public, including all past and future policyholders and First Connecticut itself, was induced to permit First Connecticut to remain in business, thus allowing it to accumulate debt well in excess of its assets."); *Cordial v. Ernst & Young*, 483 S.E.2d. 248, 257 (W. Va. 1996) ("Given the broad public interest in the sound administration of insurance firms, evidenced by the comprehensive scheme of insurance regulation found in [statutes], it seems apparent that [Insurance Commissioner], as receiver, is carrying out a duty that runs to the public in pursuing the claims of 'policyholders, creditors, shareholders or the public.'") (citations omitted).

In a case directly on point, the Ohio Supreme Court held that a statutory liquidator "does not stand in the shoes as a mere successor in interest of the insolvent insurer" when it brings suit "in a public protection role," and it is thus not bound by the insurer's agreement to arbitrate. *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203, 120-11 (Ohio 2011). In *Taylor*, Ernst & Young provided audit services to an insurer pursuant to an engagement letter that contained an arbitration clause. 958 N.E.2d at 1206. Ernst & Young submitted the audit to regulators certifying the accuracy of the company's financial statements. *Id.* A year later, the superintendent of insurance placed the insurer in liquidation. *Id.* The liquidator brought professional malpractice claims against Ernst & Young, alleging that its negligence allowed the insurer's "financial condition to go undetected and, consequently, allowed it to continue transacting business, causing harm to [company], its policyholders and creditors, and the public." *Id.*

Like Milliman here, Ernst & Young argued that the liquidator "stands in the shoes of the insolvent insurer." *Id.* at 1207. The court rejected this argument, holding that "the characteristics of the liquidator's public-protection role confirm that she does not stand in the shoes of the insolvent insurer." *Id.* at 1211. The court concluded:

> [E&Y's] argument that the liquidator is, in essence, ACLIC, is inconsistent with the nature of the liquidator's claims. *Any assertion that the liquidator is a mere successor in interest* who brings breach-of-contract claims on behalf of ACLIC *ignores the fact that the superintendent did not bring this suit on behalf of ACLIC and its shareholders but, rather, in her capacity as liquidator of ACLIC for the protection of "the rights of insureds, policyholders, creditors, and the public generally."*

Id. at 1213 (citation omitted) (emphasis added).

The Court in *Taylor* noted its decision is in accord with *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). In that case, the Supreme Court held that when the EEOC brought an enforcement action in its own name, both in the public interest and on behalf of a complaining employee, the EEOC was not bound by an arbitration provision contained in that employee's employment agreement. *Id.* at 297–98. The Court ruled that because of the EEOC's broad enforcement authority, it was not required to arbitrate even the claims for "victim-specific" relief (*i.e.*, backpay, reinstatement, compensatory and punitive damages), despite the fact the victim had agreed to arbitrate such claims. *Id.*

The Iowa Supreme Court adopted the *Waffle House* analysis in *Rent-A-Center, Inc. v. Iowa Civil Rights Commission*, 843 N.W.2d 727 (Iowa 2014). There, the Court held that the Iowa Civil Rights Commission was not subject to an arbitration agreement between an employer and employee because it "was not a party to the agreement and its interest [are] not derivative of the

employee's." *Id.* at 728. As this Court held: "The essential point of *Waffle House* is that the FAA's reach does not extend to a public agency that is neither a party to an arbitration agreement nor a stand-in for a party." *Rent-A-Center*, 843 N.W.2d at 736 (citing *Waffle House*, 534 U.S. at 289).

As in *Waffle House* and *Rent-A-Center*, the Liquidators are not a mere "stand-in" for CoOportunity. Milliman's attempt to distinguish these cases does not hold water. Milliman asserts that *Rent-A-Center* and *Waffle House* "were based on the agency's own prosecutorial authority to bring charges as part of a statutory enforcement action." Milliman's Br. p. 43-44. That is *exactly* what the Liquidators here have done. The Liquidators are pursuing claims on behalf of policyholders, creditors, and other impacted parties, based upon Milliman's misrepresentations and omissions in documents that it knew would be submitted to, and relied upon, regulators.

In another recent case directly on point – involving Milliman's role in the collapse of another CO-OP – a Louisiana state court *denied* Milliman's motion to dismiss a suit brought against it by the Rehabilitator of a defunct CO-OP and to compel arbitration, holding that the Rehabilitator was not bound by the terms of the CO-OP's agreement with Milliman. *See Donelon v. Shilling*, in the 19th Judicial District Court, Parish of East Baton Rouge, LA, Case No. 651069, appeal pending, App. 190-194, 333-336. The court held:

> As a rehabilitator, the Commissioner has an overriding duty to protect our public . . . Any duties imposed upon that office therefore must be performed with the public interest foremost in its mind. For this reason the *Commissioner as Rehabilitator does not merely stand in the shoes of [the insolvent insurer]. [The Rehabilitator's] duties owed under the [statute] are much more expansive and extends not only to [the insolvent insurer], but also to the citizens of Louisiana.*

App. 334 (emphasis added).[9]

Courts have consistently rejected Milliman's arguments that the liquidator merely stands in the shoes of the defunct insurer. In *Arthur Andersen v. Superior Court*, 67 Cal. App. 4th 1481 (Cal. Ct. App. 1998), the court *rejected* the argument that an insurance liquidator is bound by the company's conduct and knowledge, holding that "the Insurance Commissioner does not sue as the mere assignee of Cal-American for damage done to Cal-American, but rather in his statutory capacity for damage done to the policyholders and other creditors of Cal-American." *Id.* at 1495. The court explained:

> In carrying out these duties, the Insurance Commissioner acts not in the interests of the equity owners of the insurance company, but rather in the interests of policyholders. Thus the Insurance Commissioner in this case is not seeking merely to prosecute

[9] In the Louisiana action, Milliman *distinguished* the roles of rehabilitator and liquidator, and argued that because the company was only in rehabilitation, the rehabilitator was limited to asserting claims *only* on behalf of the company. App. 168-170. By implication, Milliman concedes a statutory liquidator has unique authority to bring claims on behalf of the company *as well as policyholders and creditors*.

> claims of an entity under receivership. To the contrary, the essence of the Insurance Commissioner's claim is that [accounting firm] damaged the policyholders.

Id.

In *Cordial,* the court *rejected* an accounting firm's argument that "the rights of the respective receivers rise no higher than those of the corporations which they represent" and that the receiver was subject to defenses the firm would have against the insurer. 483 S.E.2d at n. 9. The court held, "since Commissioner, acting as receiver, "is vindicating the rights of the public, including the Blue Cross creditors, policyholders, providers, members, and subscribers, we find no merit in this contention." *Id.*; s*ee also McRaith v. BDO Seidman, LLP,* 909 N.E.2d 310, 321, 336 (Ill. App. Ct. 2009) (court rejected BDO's argument that "the Liquidator then stands in the shoes of those [insurance companies] and is subject to all defenses that could be asserted against them by BDO," and held that the misconduct of the insurer's principals could not be imputed to "the Liquidator, who is statutorily charged with preserving the rights of the policyholders and creditors.").

Milliman acknowledges that the Liquidators "may also be empowered to assert claims 'on behalf of' creditors and policyholders" but it incorrectly asserts that "no such legal claims have been pleaded here." Milliman's Br. at 40. Milliman's conclusory assertion disregards the plain terms of the Liquidators'

Petition, which clearly alleges: "The Liquidators assert the allegations and claims herein *on behalf of* the company, its creditors and policyholders . . . for the benefit of policyholders, creditors, and the general public." App. 10 (¶ 21) (emphasis added).

Milliman attempts to minimize the nature of the Liquidators' claims by asserting that they will *merely* "benefit its creditors by increasing the size of the estate." Milliman's Br. at 41. But this benefit to the estate is *exactly* the point. The Liquidators are charged with recovering and marshaling the assets of the insolvent insurer's estate, so that there will be assets to satisfy claims of creditors, policyholders, and the taxpayers who would otherwise be left footing the bill. *See In re Integrity Ins. Co.*, 573 A.2d 928, 935 (N.J. Super. Ct. App. Div. 1990) (liquidator may assert claims "'on behalf of' its creditors and policyholders, provided that the objective of such a suit is to increase the assets of the estate of the insolvent insurer to which the creditors and policyholders, as well as the public, may look for satisfaction of their debt"); *Reider*, 784 A.2d at 477 ("Because that harm was allegedly suffered by the estate of First Connecticut, causing a diminution of its assets to the common detriment of the public and all persons generally interested in the insurer's continuing solvency, those claims may properly be brought by the Liquidator to recover the lost monies for the estate.").

Contrary to Milliman's suggestion, there is *nothing* in the Liquidation Act which requires, or even suggests, that a Liquidators' claim "on behalf of" creditors and policyholders must be in the nature of a claw-back, set off, or return of assets, and this Court should not read into the Act a limitation that does not exist. The *only* case that Milliman cites for this proposition is the unpublished order of a Nevada trial court, which was drafted by Milliman's attorneys, and which does not cite to *any* authority in support of Milliman's novel "clawing back" argument. App. 508, 511.

Moreover, the cases relied upon by Milliman are inapplicable, because in each of those cases the liquidator sought to *enforce* the contract at issue. In the Nevada lawsuit, where the liquidator asserted claims against Milliman for breach of its contract with the defunct insurer, as well as other claims, the court held "[w]here, as here, a plaintiff's tort, contract and statutory claims relate to and arise from the work done pursuant to the contractual relationship, they all should be arbitrated together." App. 506. Unlike the Liquidators here, the liquidator in the Nevada action did not seek to disavow the contract – nor could it. Unlike in Iowa, the Nevada statutes do *not* outline the receiver's powers, and

the statute is silent on a receiver's power to disavow or reject the insurer's contract. *See* Nev. St. §§ 696B.010-696B.570.[10]

In addition, the Nevada court expressly found that the Plaintiff did not plead or assert "any such grounds to revoke the Agreement." App. 505. Thus, the Nevada case does not help Milliman here, where the Liquidators are not suing under the Agreement (unlike the Nevada liquidator) and they have exercised their statutory authority to disavow.

Indeed, in *every* case cited by Milliman, the liquidator *elected to enforce rights under the contract* containing the arbitration provision and brought suit for breach of that very contract. *See, e.g.*, *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 161 (3d Cir. 2000) ("What this proceeding is is a suit instituted by the Liquidator against a reinsurer *to enforce contract rights for an insolvent insurer*") (emphasis added); *Bennett,* 968 F.2d at 972 ("Arbitration should…[be] ordered *if the liquidator sought to enforce Glacier's contractual rights*") (emphasis added); *Costle,* 839 F. Supp. at 272 (stating where a "liquidator seeks to enforce" rights under a contract, the liquidator is bound by arbitration clause

[10] The Nevada and Iowa statutes are based on *different* model acts. The 1936 Uniform Insurers Liquidation Act was the NAIC's first model liquidation act, which Nevada adopted in 1971. In 1978, the NAIC approved the Insurers Rehabilitation and Liquidation Act, which Iowa adopted in 1984.

in that contract).[11] These cases are readily distinguishable because the Liquidators here are not invoking any rights under the Agreement.

The District Court correctly held the Liquidators are not bound as "mere successors" to CoOportunity. This Court may affirm on this basis alone.

E. The Liquidators' Claims Do Not Arise From the Agreement Between CoOportunity and Milliman; Rather, They Independently Arise From Milliman's Misconduct and The Liquidators' Public Protection Role.

Milliman devotes much of its Brief arguing that a non-signatory to an agreement is nonetheless bound if the claims "arise out of" or "relate to" the negligent services provided under the agreement. The Liquidators' claims and requests for relief do not depend upon or arise under the Agreement, which the Liquidators have disavowed. Rather, they arise from Milliman's professional negligence and misrepresentations to the company, regulators, policyholders, and the public regarding the financial viability of the company.

The holding in *Taylor* is directly on point. Like Milliman, Ernst & Young argued that the liquidator was bound by an arbitration agreement in its

[11] Milliman's position is not supported under *Javitch v. First Union Securities, Inc.*, 315 F.3d 619 (6th Cir. 2003). In *Javitch*, which involved a receiver, not a liquidator, the court held that whether a receiver is bound by the debtor's arbitration agreements "depends on the authority granted … and actually exercised by the receiver," and held that where a receiver appears in a capacity *other* than as a claimant on behalf of the company, the receiver is *not* bound by the company's arbitration agreement. *Id.* at 626-27.

engagement letter with the defunct insurer, arguing that the liquidator's professional negligence claims "arise from" or "relate to" the engagement letter. 958 N.E.2d at 1213. The court rejected this argument, and held that whether the claims "'relate to' the subject matter of the engagement letter" "is not the applicable test" because the liquidator was not a signatory to the agreement. *Id.* at 1213, n.5. The correct "test is whether the liquidator, a nonsignatory, has asserted claims that arise from the contract containing the arbitration clause." *Id.* at 1213.

To answer that test, the Court focused on the nature of the liquidator's claims and held that the liquidator's malpractice claim "does not arise from the engagement letter," for two reasons:

> First, the malpractice claim plainly *does not seek a declaration of a signatory's rights and obligations under the engagement letter. … Second, the malpractice claim arises independently of the engagement letter because it arises from the powers given to the liquidator by the General Assembly together with the allegedly false or misleading audit report E & Y filed with [the Ohio Department of Insurance]*.

Id. at 1214 (emphasis added).

The court emphasized that the liquidator was not attempting to enforce the insurer's contract rights against Ernst & Young; rather, the liquidator asserted *direct* claims that she would have, *regardless* of the engagement terms:

> [T]he liquidator alleges that E & Y represented in its certification that was filed with [Department of Insurance] that it conducted the audit in accordance with generally accepting auditing standards but that E & Y did not, in fact, conduct its audit in accordance with those standards and, therefore, failed to discover or disclose the material misstatements in the financial statements. As a result, the liquidator alleges, even though ACLIC was already insolvent, the superintendent, ACLIC's creditors, and the public did not know it. *This claim plainly arises from the statutory duties and certifications filed in public record by ACLIC and E & Y. In no form does the liquidator seek judicial interpretation of the engagement letter.*
>
> [T]he liquidator has a *direct dispute* with E & Y – that is, she claims that ACLIC's policyholders, creditors, and the public, as well as [the Department of Insurance] itself, relied on and were misled by the audit report that E & Y prepared and filed with [the Department of Insurance]. Consequently, she alleges, the superintendent was hindered in exercising a greater level of oversight sooner, and E & Y thereby caused harm to policyholders, creditors, and the public by aiding ACLIC in continuing to transact business. *By its nature, this is a dispute between E & Y and the liquidator on behalf of the estate's creditors*.

Id. at 1215 (emphasis added).

Milliman argues that the Court should bind the Liquidators to an Agreement they did not sign by invoking a general "presumption" in favor of arbitration. Milliman's Br. p. 45. Any "presumption" applies only to *parties* to the Agreement, not non-signatories. A "presumption in favor of arbitration does not extend, however, to non-signatories to an agreement; it applies only when both parties have consented to and are bound by the arbitration clause." *Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (3d Cir. 2014); *see also*

Jacks v. CMH Homes, Inc., 856 F.3d 1301, 1304–05 (10th Cir. 2017) ("this presumption disappears when the parties dispute the existence of a valid arbitration agreement") (citation omitted).[12] And, in fact, courts have held that "there is a counterweighing presumption *against arbitration* when a party seeks to invoke an arbitration provision against a nonsignatory." *Taylor*, 958 N.E.2d at 1210 (emphasis added) (citations omitted). There is no "presumption" binding a *non-party* to a contract it did not sign or agree to, as the District Court correctly held. App. 262.

Finally, Milliman asserts that the Liquidators' claims must arise from the Agreement because the Liquidators refer to the Agreement in their Petition. However, the Liquidators discuss the terms and circumstances of the Agreement only as evidence of a relationship tainted by conflict, questionable financial incentives, and improper motives. Far from asserting claims under the Agreement, which the Liquidators have disavowed, their Petition cites to the Agreement as evidence that the Founders and Milliman breached their fiduciary

[12] *Accord Applied Energetics Inc. v. NewOak Capital Mkts, LLC*, 645 F.3d 522, 526 (2d Cir. 2011) ("[T]he presumption [in favor of arbitrability] does not apply to disputes concerning whether an agreement to arbitrate has been made."); *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1116 (11th Cir. 2014) (same); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014) (same).

duties by putting their self-interests above those of the company. The Liquidators, policyholders, and creditors *still* have the same causes of action against Milliman, with or without the Agreement. The Court should affirm the District court's ruling that the non-signatory Liquidators are not bound.

II. Preemption Does Not Eviscerate the Liquidators' State Law Defenses to Milliman's Attempt to Enforce the Agreement.

A. Statement of Preservation of Issue for Appellate Review and Scope and Standard of Review.

Milliman did not really raise before the District Court any constitutional preemption issues, and did not even mention the Supremacy Clause. The only preemption argument that Milliman made in the District Court was that "[a]llowing a liquidating trustee *to pick and choose* provisions of expired contracts to disavow" results in "'covert' discrimination" against arbitration that is precluded by the FAA. App. 73. However, the Liquidators have not *singled out* the arbitration provision; rather, they disavowed the Agreement in its *entirety*. Other than its "pick and choose" argument, Milliman did not argue below that any other aspect of the Act or the Liquidators' authority thereunder is preempted by the FAA, as it now argues for the first time in its Appellate Brief.

"[A]n issue not raised in the district court and ruled upon by that court cannot be considered for the first time on appeal." *Wesley* 594 N.W.2d at 29. The District Court's Order did not address this preemption issue, and Milliman

did not file any "motion requesting such a ruling." *Id.* To the contrary, Milliman did not even include FAA preemption in the proposed order it submitted to the District Court. *See* Milliman's proposed order. Thus, this issue was not preserved for appellate review. *Id.*[13]

B. Federal Law Does Not Preempt the Liquidators' Defenses to the Contract.

The centerpiece of Milliman's argument on appeal is federal preemption and the Supremacy Clause. Milliman now invokes broad concepts of federal Supremacy to stretch preemption to restrict *all defenses* to a claim of enforceable contract. This is *contrary* to the Supreme Court's directive, and would result in *elevating* contracts with an arbitration clause above all others. Instead, the purpose of the FAA was to place them on *equal footing* with all other contracts.

Even if it was preserved, Milliman's attempt to reframe the issue fails. The Liquidators' contract defenses here (*i.e.*, that they are non-signatories, not mere successors, and have disavowed) are similar to the many other well-recognized defenses to a claim of contract, *e.g.*, lack of consideration,

[13] Milliman offers only a conclusory statement that *all* of the "issues addressed herein are preserved for review because Milliman moved below to compel arbitration," citing broadly to its papers below. Milliman's Br. p. 22. Milliman does not provide any "references to the places in the record" where this specific "issue was raised and decided," as required by Iowa R. App. P. 6.903(2)(g)(1).

duress, or fraud. The question regarding the *enforceability* of contract is *entirely* controlled by state law. In *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996), the Court held that state law should be applied to determine the enforceability of a contract "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." *Id.* at 686-87 (emphasis added). The *only* limitation is that a court may not "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Id.* at 687 (emphasis original). Thus, states are precluded from "singling out" arbitration provisions for suspect status, and such provisions must "be placed upon the same footing as other contracts." *Id.* (citation omitted).

The United State Supreme Court has referred to the FAA's basic objective as assuring that courts treat arbitration agreements "like all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006). That Court has also recognized that to immunize an arbitration agreement from judicial challenge on grounds applicable to all other contracts would be to "elevate it over other forms of contract." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, n.12 (1967).

Roth v. Evangelical Lutheran Good Samaritan Society, 886 N.W.2d 601 (Iowa 2016), a case relied upon by Milliman (Milliman's Br. p. 24), holds that FAA preemption does not apply to an agreement to which the plaintiffs are not a

party. In *Roth*, the children of the deceased, who were also the executors of his estate, sued a nursing home based upon the death of their father. The father had a contract with the nursing home containing an arbitration clause. *Id.* at 603. The Iowa Supreme Court held that the children were not bound by that agreement. *Id.* at 613. The Court focused on the capacity in which the children brought their claim, holding that because they sued for loss of consortium, which *under Iowa law belongs to the children*, they were not bound by the decedent's arbitration agreement.[14] *Id.* at 613. "[W]e do not find the Roth children's consortium claims subject to arbitration. . . . These claims belong to the adult children, and they never personally agreed to arbitrate." *Id.*

The *Roth* Court mentioned FAA preemption in the course of its discussion of the *separate* issue of whether the Iowa consortium statute requires a jury trial, citing the FAA as one factor in its holding that arbitration agreements are generally enforceable under the consortium statute. *Id.* at 611. But the Court held that the arbitration agreement at issue was not enforceable *against the children*, because they were not parties to it: "Given the FAA's

[14] On the other hand, the Court stated that if the children had brought a claim in their capacity as estate representatives for wrongful death, which *under Iowa law belongs to the estate*, then their representative claim would have been subject to the decedent's arbitration agreement. *Id.* at 608.

status as substantive law, it seems quite wrong that an adult child could be bound to that body of law absent his or her agreement." *Id.* at 613-14.

In sum, based upon the Liquidators' disavowal and contract defenses, they are not bound by any enforceable contract. Because there is no enforceable contract under state law, the FAA does not require arbitration. That does not raise a federal preemption issue.

C. The Iowa Liquidation Act Reverse Preempts the FAA by Operation of the McCarran-Ferguson Act.

As set forth above, the FAA expressly carves out from arbitration those contracts that are unenforceable under state law. *Only* if the Court determines that the Liquidators are somehow bound by the Agreement, must the Court then answer this question: Must arbitration under the FAA give way to the rights and remedies of the Liquidation Act, under the reverse preemption principles of the McCarran-Ferguson Act?

McCarran-Ferguson creates a statutory exception to the general rule of federal preemption by allowing state laws enacted "for the purpose of regulating the business of insurance" to be exempt from preemption by federal laws of general application. 15 U.S.C. § 1012. Congress "declare[d] the continued regulation…by the...States of the business of insurance is in the public interest…." *Id.* at § 1011. Congress mandated that "[t]he business of insurance,

and every person engaged therein, shall be subject to the laws of the…States which relate to the regulation…of such business." *Id*. at § 1012(a). No federal law "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…unless such Act specifically relates to the business of insurance." *Id*. at § 1012(b).

Courts have adopted a three-part test to determine whether McCarran-Ferguson reverse-preemption applies: "(1) the federal statute does not specifically relate to the 'business of insurance,' (2) the state law was enacted for the 'purpose of regulating the business of insurance,' and (3) the federal statute operates to 'invalidate, impair, or supersede' the state law." *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998); *see also Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821, 823 (8th Cir. 2001) (same). These factors are each met here, as set forth below.[15]

1. The Liquidation Act was enacted for the purpose of regulating the business of insurance.

In *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993) the Court addressed whether the federal priority statute preempted Ohio's insurance liquidation statute relating to priority of claims. *Id.* at 493. The Court

[15] There is no dispute that the first factor is met here, as it is well-established that "the FAA does not relate specifically to the business of insurance." *Munich*, 141 F.3d at 591; *see also Standard Sec.*, 267 F.3d at 823.

explained that the business of insurance is not "confined entirely to the writing of insurance contracts, as opposed to their performance." *Id.* at 502–03. Rather, "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Id.* at 505. The Court found that because the Ohio priority law was "aimed at protecting or regulating the performance of an insurance contract . . . it follows that it is a law enacted for the purpose of regulating the business of insurance" under McCarran-Ferguson. *Id.* (citations omitted).

"[F]ederal courts have long held that state laws protecting or regulating the relationship between the insurance company and the policyholder, either directly or indirectly, like laws providing for the rehabilitation, liquidation or dissolution of insurance companies, are 'laws regulating the business of insurance.'" *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986).

Several federal circuits have found liquidation statutes to constitute the "business of insurance" because they relate, directly or indirectly, to policyholder protection. *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir. 1998) (holding a Utah "statute consolidating all claims against a liquidating insurer . . . was enacted to protect policyholders" and was the "business of insurance"); *Stephens v. American Int'l Ins. Co.*,

66 F.3d 41, 44-45 (2nd Cir. 1995) (holding a Kentucky statute precluding arbitration was the "business of insurance" by ensuring an orderly and predictable liquidation process); *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289, 291 (8th Cir. 1996) (holding a Missouri statute staying all actions against an insolvent insurer as the "business of insurance" because it "protects policyholders" by preserving the assets of the estate, thus "enhancing the ability of an insolvent insurance company to perform its contractual obligations); *Munich*, 141 F.3d at 590-91 (Oklahoma statute vesting exclusive jurisdiction in state court is the "business of insurance" because it the "complex and comprehensive scheme" of insolvency statutes ensures an "orderly and predictable" process).

The Iowa Legislature has expressly declared that the Liquidation Act was enacted for the "purpose of regulating the business of insurance" with the purpose of policyholder protection. The Legislature declared:

> *The purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public . . . through* all of the following:
> ***
> (f) *Regulation of the insurance business* by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.
>
> (g) Providing for a comprehensive scheme for the rehabilitation and liquidation of insurance companies and those subject to this chapter as part of the regulation of the business of insurance, the insurance industry, and insurers in this state.

> *Proceedings in cases of insurer insolvency and delinquency are deemed an integral aspect of the business of insurance and are of vital public interest and concern.*

Iowa Code §507C.1.4(f)-(g) (emphases added).

As the District Court noted, "the liquidation statutes in most other states do not approximate the depth and breadth of the authority granted to the Liquidators by the Legislature under the Act." App. 264, n. 5. The Iowa Legislature has directed the purpose of the Act is "the protection of the interests of insureds, claimants, creditors, and the public;" (§ 507C.1.4); such proceedings are of "vital public interest and concern" (§ 507C.1.4.g); the liquidator is vested with authority to disavow any of the insurer's contracts (§ 507C.21); and the liquidator is vested with authority to prosecute an action "on behalf of creditors, members, policyholders" as well as the company (*Id.*).[16]

The Kentucky Supreme Court's decision in *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010), involves a very similar factual scenario as the instant case. There, the rehabilitator alleged that audits conducted by Ernst &

[16] The Liquidators have authority to proceed in other forums in certain instances (§ 507C.21.1, subsections f(1), l, and t). And, as Milliman notes, the Liquidation Order allows the Liquidator to bring or defend claims in arbitration if that is a "necessary forum" (for example, if the Liquidator *affirms* a contract and sues to *enforce* it). But these provisions giving the Liquidator authority to arbitrate when *necessary* do not vitiate the Act's overriding policy that liquidation proceedings occur under the authority of the Iowa court.

Young "for statutory submission by AIK Comp to Kentucky's insurance regulators indicated that the group was financially sound," when, in fact, the insurer "was in a deficit position and was unable to pay its claims." *Id.* at 686. The rehabilitator sued Ernst & Young, alleging that its "audits had been negligently prepared, and had concealed AIK Comp's declining financial condition." *Id.* The court held that there "can be no reasonable doubt that the IRLL [Kentucky's liquidation statute] . . . was enacted to regulate the 'business of insurance,'" explaining:

> We can hardly overstate the degree to which the regulation of insurance permeates this controversy. The very claims which Ernst & Young would take to arbitration arise directly out of Kentucky's intense interest in the regulation of worker's compensation insurance. *The audits that form the core of the Rehabilitator's claims were performed by Ernst & Young for AIK Comp to comply with state insurance regulations which include a review of such audits by the state's insurance commissioner to monitor the solvency of AIK Comp. The IRLL is itself the ultimate measure of the state's regulation of the insurance business: the take-over of a failing insurance company.*

Id. at 688-89 (citations omitted) (emphasis added). The same policies apply here. Milliman provided actuarial certifications of viability to CoOportunity *and* its regulators that they relied upon in overseeing the financial health of the company. Now that the company is in liquidation, the Liquidators have exercised their authority to disavow the one-sided Milliman Agreement to protect policyholders and to assert claims on behalf of policyholders. Other

courts have similarly held a state liquidation constitutes the business of insurance.[17]

Milliman relies heavily on the opinions from a Kentucky federal court, but those opinions are distinguishable for two reasons. First, the Kentucky liquidator sued to *enforce* the contracts with Milliman and others, and the liquidators did *not* disavow[18] any of the contracts. *Beam Partners, LLC v. Atkins*, No. 3:17-cv-004-GFVT, 2018 WL 4344456, *1, 7 (E.D. Ky. Sept. 11, 2018); *Milliman, Inc. et al. v. Roof*, No. 3:18-cv-00012, 2018 WL 526814, *3 (D. Ky. Oct. 23, 2018); App. 340 (¶ 4), 342-344, 355-361.

---

[17] *See, e.g., Gerling-Konzern Globale Rueckversicherungs-Ag v. Selcke,* No. 93-C-4439, 1993 WL 443404, at * 1 (N.D. Ill. Oct. 29, 1993) ("State statutes regulating the liquidation of insurance companies are laws regulating the business of insurance, to the extent that their purpose is to protect policyholders by securing payment of their claims."); *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77, 79-80 (S.D.N.Y. 1989) (remanding liquidator's action against a creditor based on abstention and McCarran Ferguson); *Florida Department of Financial Svs. v. General Reinsurance Corp.*, Case No. 4:08CV443-WS, 2009 WL 10673255, at *4 (N.D. Fla. Feb. 2, 2009) (remanding receiver's claim to state court); *Amwest Surety Ins. Co. v. Wagner*, 245 F. Supp. 2d 1038, 1044 (D. Neb. 2002) (same); *Kessner v. One Beacon Ins. Co.*, No.: 4:09cv3003, 2009 WL 1408973 (D. Neb. 2009) (same); *PRS Ins. Group, Inc. v. Credit General Ins. Co.*, 294 B.R. 609 (D. Del. 2003) (federal bankruptcy provisions regarding preference and fraudulent transfer were reverse preempted by the state insurance code).

[18] The Kentucky liquidator has authority to disavow, Ky. St. 304.33-240(12).

Second, the Kentucky liquidator asserted the claims *only* on behalf of the insolvent insurer, and *not* on behalf of policyholders and creditors. App. 340 (¶ 4), 342-344, 355-361. Accordingly, the court noted the "outcome of this litigation does not affect the policy holders of KYHC." *Milliman*, 2018 WL 526814, *8. The court stated that "[h]ad [the] case involved a policy holder…this litigation would" concern the business of insurance. *Id.* * 9. Here, inure to the benefit of the estate, with policyholders having the highest priority claim after administrative expenses.

Beyond that, the Kentucky federal court erred by treating the liquidator's claim as just another garden-variety breach of contract claim. The court ignored the liquidator's statutory public protection role. And the court disregarded the fact that Milliman – like the auditor in *Ernst & Young* – prepared reports that were provided *to the insurance regulators* and which regulators relied upon in regulating the insurer's solvency, and which directly precipitated the liquidation proceedings. The federal court ignored the effect of Milliman's actions on the state's regulatory oversight and, instead, treated it like just another contractor who owes the insurer some money.

Each of the remaining cases that Milliman relies upon involves a garden-variety breach of contract claim, where the liquidator was suing to *enforce* the very contract containing the arbitration clause. *Costle*, 839 F. Supp.

at 273 (liquidator "seeks to enforce contractual provisions requiring the payment of reinsurance proceeds"); *Bennett*, 968 F.2d at 970 (liquidator sued reinsurer and management company to recover money due to the insurer); *Suter*, 223 F.3d at 161 (suit against a reinsurer to enforce contract rights for an insolvent insurer); *AmSouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004) ("This dispute involves the Receivers' attempt to recover money in an ordinary common-law-damages suit," and "the insurance companies are themselves the natural plaintiffs, as Receivers vociferously argue"); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1374 (9th Cir. 1997) (insurance liquidator brought claims "to recover monies owed by [reinsurer] to [defunct insurer] under a number of reinsurance agreements").

2. Requiring the Liquidators to pursue these claims in a confidential arbitration would impair the operation of the Liquidation Act and protection of policyholders.

Requiring arbitration under the FAA would operate to "invalidate, impair, or supersede" the state's Liquidation Act by forcing the Liquidators to pursue their claims in a confidential arbitration with limited remedies and by disregarding the Liquidators' statutory disavowal of the Agreement in order to protect policyholders.

Milliman argues that McCarran-Ferguson does not apply because, it asserts, there is "no conflict" between the FAA and the Act. Milliman's Br.

p. 47. However, McCarran-Ferguson is not limited to instances of a direct conflict. The word "impair" means, "*in addition to a 'direct conflict'* with state law, any application of federal law that would '*frustrate any declared state policy or interfere with a State's administrative regime*.'" *Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 963 (8th Cir. 2008) (quoting *Humana, Inc. v. Forsyth*, 525 U.S. 299, 310 (1999)) (emphasis added). The issue is "not whether [the state law] prohibits arbitration, but whether enforcing arbitration invalidates, impairs, or supersedes the enforcement of the state process designed to protect the interests of policyholders." *Davister*, 152 F.3d at 1282.

Enforcing the Agreement under the FAA would frustrate the policy behind the Liquidation Act and interfere with Iowa's statutory regime designed to protect the interest of policyholders for several reasons – none of which Milliman addresses in its Brief.

Confidential arbitration violates the policy of the Liquidation Act, which makes clear that the public (including policyholders) has an inherent interest in these proceedings. *See* Iowa Code § 507C.1.4.g; *Walling v. Iowa Mut. Liab. Ins. Co.*, 292 N.W. 157 (Iowa 1940); *Hager v. Doubletree*, 440 N.W.2d 603, 608 (Iowa 1989) ("Iowa's interest in orderly liquidation of insolvent insurance companies is shown by the statement of purpose found in" the Act) (citing

§ 507C.1(4)). Other courts recognize that a confidential arbitration thwarts public policy. *See Pipoly*, 800 N.E.2d at 61; *Covington*, 784 N.E.2d at 191.

The District Court held that "[f]orcing the Liquidators to arbitrate would interfere with (1) the public's interest in the proceeding; (2) the Liquidators' right of forum selection under the Act; (3) the Act's purposes of economy and efficiency; (4) the protection of CoOportunity policyholders and creditors; and (5) the Liquidators' authority to disavow the Agreement" in order to protect policyholders. App. 263.

The Agreement subjects the confidential arbitration to the Commercial Arbitration Rules of the American Arbitration Association. These rules conflict with the Liquidator's authority because discovery is subject to the discretion of the arbitrator. Under Iowa Code § 507C.21.1.e, the Liquidator has authority to subpoena witnesses, administer oaths, and to compel testimony or production of documents. This authority may be exercised in the context of an action against third parties to recover on behalf of the estate and others, within the Iowa Rules of Civil Procedure. *See State ex rel. Hager v. Carriers Ins. Co*., 440 N.W.2d 386, 388–89 (Iowa 1989). In contrast, AAA Rule L-2(f) provides that it is only in "exceptional cases, at the discretion of the arbitrator, upon good cause

shown" that the "arbitrator may order depositions." *See* AAA Commercial Arbitration Rules & Mediation Procedures, p. 38.[19]

Subjecting the Liquidator to arbitration works as more than a mere forum selection clause—it potentially strips the Liquidator of his policyholder protection powers (*e.g.*, to disavow the one-sided Agreement) and his statutory authority to investigate and prosecute these claims in a transparent, public forum. *See Ernst & Young*, 323 S.W.3d at 690 ("compelling arbitration would remove virtually all of the supervisory authority of the" designated state court, meaning "all discovery issues, evidentiary disputes, and determinations of applicable law would be made by the arbitrators, not by the court as the General Assembly intended"). Because applying the FAA would impair the provisions of the Liquidation Act, the FAA does not apply.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should affirm the District Court's Order and grant the Liquidators all other relief deemed just and equitable.

[19] *https://www.adr.org/sites/default/files/Commercial%20Rules.pdf.*

REQUEST FOR ORAL ARGUMENT

In order to expedite this appeal, which involves fully-briefed legal issues that have already been orally argued in a lengthy hearing - the transcript of which is part of the record on appeal - the Court should deny Milliman's request for oral argument. The matter has been fully vetted and is ripe for ruling without need for yet another argument. At Milliman's request, the District Court has stayed the underlying lawsuit pending this appeal. This appeal should proceed as expeditiously as possible, so that the proceedings below can resume and the Liquidators can proceed to carry out their duties.

Respectfully submitted,

/s/ Kevin J. Driscoll

Kevin J. Driscoll AT0002245
John David Hilmes AT0003523
FINLEY LAW FIRM P.C.
699 Walnut Street, Suite 1700
Des Moines, IA 50309
Telephone: (515) 288-0145
Fax: (515) 288-2724
kdriscoll@finleylaw.com
jhilmes@finleylaw.com

ATTORNEYS FOR
PLAINTIFFS-APPELLEES

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 609(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font and contains 12,837 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

CERTIFICATE OF SERVICE

The undersigned certifies that on the 3rd day of December, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System, which will send notice of electronic all attorneys of record. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

/s/ Kevin J. Driscoll