No. ______

IN THE

# Supreme Court of the United States

DOUG OMMEN, IN HIS CAPACITY AS
LIQUIDATOR OF COOPORTUNITY HEALTH, INC., and
DAN WATKINS, IN HIS CAPACITY AS SPECIAL
DEPUTY LIQUIDATOR OF COOPORTUNITY HEALTH, INC.,
*Petitioners*,

v.

MILLIMAN, INC., ET AL.,
*Respondents*.

**On Petition for Writ of Certiorari**
**to the Supreme Court of Iowa**

## PETITION FOR WRIT OF CERTIORARI

DOUGLAS J. SCHMIDT
KIRSTEN A. BYRD
MICHAEL T. RAUPP
*Counsel of Record*
HUSCH BLACKWELL LLP
4801 Main St., Suite 1000
Kansas City, MO 64112
(816) 983-8000
michael.raupp
@huschblackwell.com

*Counsel for Petitioners*

August 28, 2020

## QUESTIONS PRESENTED

For over 50 years this Court has upheld the Federal Arbitration Act's (FAA) aim to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). While the FAA preempts state-law defenses that single out arbitration agreements, it preserves defenses applicable to all contracts. 9 U.S.C. § 2.

In the decision below, however, the Iowa Supreme Court held the FAA preempts the generally applicable statutory authority of an insurance liquidator to disavow a defunct insurer's improvident contracts. Merely because the contract at issue contained an arbitration clause, the court found preemption applied, thereby elevating the contract for special protection and furthering a split with state courts that appropriately refuse to apply FAA preemption to generally applicable defenses. The court did so despite the disavowal defense's general applicability and the Liquidators' disavowal of the entire contract, including onerous provisions contrary to the Liquidators' public-protection role.

Further, the court expanded a split among state and federal courts by holding that the McCarran-Ferguson Act (McCarran-Ferguson) does not exempt the disavowal defense from FAA preemption.

The questions presented are:

Whether the FAA preempts the generally applicable disavowal defense codified in Iowa's Liquidation Act; and

If so, whether McCarran-Ferguson exempts the disavowal defense from preemption.

## PARTIES TO THE PROCEEDING

Petitioners are Doug Ommen, in his capacity as Liquidator of CoOportunity Health, Inc., and Dan Watkins, in his capacity as Special Deputy Liquidator of CoOportunity Health, Inc. Petitioners were plaintiffs in the trial court and appellees in the Iowa Supreme Court.

Respondents are Milliman, Inc., Kimberley Hiemenz, and Michael Sturm. Respondents were defendants in the trial court and appellants in the Iowa Supreme Court.

Stephen Ringlee, David Lyons, and Clifford Gold were defendants in the trial court, but were not involved in the proceedings relevant to this petition.

## STATEMENT OF RELATED PROCEEDINGS

*Ommen v. Ringlee*, No. 18-0335 (Iowa) (opinion and judgment entered April 3, 2020; procedendo issued May 12, 2020).

*Ommen v. Milliman, Inc.*, No. LACL 138070 (Iowa D. Ct.) (order denying motion to dismiss and compel arbitration issued February 6, 2018; notice of appeal filed February 23, 2018).

There are no additional proceedings in any court that are directly related to this case.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..................................... i
PARTIES TO THE PROCEEDING ........................ ii
STATEMENT OF RELATED PROCEEDINGS .... iii
TABLE OF AUTHORITIES ................................... vi
PETITION FOR WRIT OF CERTIORARI .............. 1
OPINIONS BELOW ................................................ 3
JURISDICTION ...................................................... 3
STATUTORY PROVISIONS INVOLVED ............... 4
STATEMENT OF THE CASE ................................. 4

A. Factual And Procedural Background ....... 4
B. The Decision Below .................................. 7

REASONS FOR GRANTING THE PETITION ....... 9

I. The Iowa Supreme Court's Decision Violates The Federal Arbitration Act And This Court's "Equal Footing" Precedents, And, In Doing So, Exacerbates A Conflict With State Courts Appropriately Preserving Generally Applicable Contract Defenses. ........................................................ 11
II. State Supreme Courts And Federal Circuit Courts Are Divided On Whether McCarran-Ferguson Exempts Insurance Liquidation Statutes From FAA Preemption. .................................................... 19
III. The Questions Presented Are Extremely Important And Warrant This Court's Review Now .................................................... 27

CONCLUSION ...................................................... 29

APPENDIX

Appendix A
Opinion, *Ommen v. Ringlee*,
No. 18-0335 (Apr. 3, 2020) .......................... App.1a

Appendix B
Order Denying Milliman, Inc. et al.'s
Motion to Compel Arbitration,
*Ommen v. Milliman, Inc.*,
No. LACL 138070 (Feb. 6, 2018) .............. App.57a

Appendix C
Relevant Statutory Provisions .................. App.65a
9 U.S.C. § 2 .......................................... App.65a
15 U.S.C. § 1012(b) ............................... App.65a
Iowa Code Ann. § 507C.1 ..................... App.66a
Iowa Code Ann. § 507C.21 ................... App.67a

## TABLE OF AUTHORITIES

Page(s)

**Cases**

*Allied-Bruce Terminix Cos. v. Dobson*,
513 U.S. 265 (1995) .................................. 7, 12

*AT&T Mobility LLC v. Concepcion*,
563 U.S. 333 (2011) ...................................... 12

*Atkins v. CGI Techs & Sols, Inc.*,
724 F. App'x 383 (6th Cir. 2018)............ 24, 26

*Berent v. CMH Homes, Inc.*,
466 S.W.3d 740, 748-58 (Tenn. 2015)........... 18

*Buckeye Check Cashing, Inc. v. Cardegna*,
546 U.S. 440 (2006) ...................................... 12

*Cain v. Midland Funding, LLC*,
156 A.3d 807 (Md. 2017) .............................. 18

*Davister Corp. v. United Republic Life Ins. Co.*,
152 F.3d 1277 (10th Cir. 1998).............. 22, 23

*DIRECTV, Inc. v. Imburgia*,
136 S. Ct. 463 (2015) .............................. 11, 12

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

*Donelon v. Shilling*,
___ So.3d ___, 2020 WL 2306075
(La. Apr. 27, 2020) ...................... 10, 20, 26, 28

*EEOC. v. Waffle House, Inc.*,
534 U.S. 279 (2002) ...................................... 12

*Epic Sys. Corp. v. Lewis*,
138 S. Ct. 1612 (2018) .................................. 12

*Ernst & Young, LLP v. Clark*,
323 S.W.3d 682 (Ky. 2010)...................... 21, 25

*GGNSC Holdings, LLC v. Lamb ex rel. Williams*,
487 S.W.3d 348 (Ark. 2016) .......................... 16

*Hales v. ProEquities, Inc.*,
885 So. 2d 100 (Ala. 2003) ............................ 18

*Humana Inc. v. Forsyth*,
525 U.S. 299 (1999) ....................................... 20

*Kindred Nursing Centers Ltd. P'ship v. Clark*,
137 S. Ct. 1421 (2017) ......................... 1, 11, 12

*McGill v. Citibank, N.A.*,
393 P.3d 85 (Cal. 2017) ................................. 17

*Milliman, Inc. v. Roof*,
353 F. Supp. 3d 588 (E.D. Ky. 2018) ...... 11, 25

*Morgan v. Sanford Brown Inst.*,
137 A.3d 1168 (N.J. 2016)............................. 17

*Munich Am. Reinsurance Co. v. Crawford*,
141 F.3d 585 (5th Cir. 1998) ............. 21, 22, 26

*Norfolk and W. Ry. Co. v. Am. Train Dispatchers Ass'n*,
499 U.S. 117 (1991) ................................. 15, 22

*Perry Homes v. Cull*,
258 S.W.3d 580 (Tex. 2008) .......................... 17

*Perry v. Thomas*,
482 U.S. 483 (1987) ....................................... 11

*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,
388 U.S. 395 (1967) ......................... i, 1, 12, 18

*State ex rel Richardson v. Eighth Judicial Dist. Court in & for Cty. of Clark*,
454 P.3d 1260, 2019 WL 7019006 (Nev. Dec. 19, 2019) .........................................*passim*

*State ex rel. U-Haul Co. of W. Va. v. Zakaib*,
752 S.E.2d 586 (W. Va. 2013) ........................ 18
*Stephens v. Am. Int'l Ins. Co.*,
66 F.3d 41 (2d Cir. 1995) .............................. 22
*Suter v. Munich Reinsurance Co.*,
223 F.3d 150 (3d Cir. 2000) .............. 23, 24, 27
*U.S. Dep't of Treasury v. Fabe*,
508 U.S. 491 (1993) ................................. 26, 27
*Vaden v. Discover Bank*,
556 U.S. 49 (2009) ........................................ 12
*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*,
489 U.S. 468 (1989) ................................... 3, 12

**Statutory Authorities**

15 U.S.C. § 1012(b) ............................................*passim*
28 U.S.C. § 1257(a) ..................................................... 3
42 U.S.C. § 18042........................................................ 4
9 U.S.C. § 2........................................................*passim*
Iowa Code § 507C.21..........................................*passim*
Iowa Code Ann §§ 507C.1............................... 4, 23, 27

**Additional Authorities**

Health CO-OP, *National Association of Insurance Commissioners* (Feb. 12, 2020),
https://content.naic.org/cipr_topics/topic_health_co_op.htm................................. 28, 29

## PETITION FOR WRIT OF CERTIORARI

Under the Federal Arbitration Act (FAA), contracts containing arbitration clauses are to be placed on "equal footing" with all other contracts. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017). That is, the FAA makes arbitration agreements as enforceable as other contracts, "but not more so." *Prima Paint*, 388 U.S. at 404 n.12. This is a case of the "more so," in which the Iowa Supreme Court found the FAA preempted a generally applicable contract defense because the contract happened to contain an arbitration clause.

The Iowa legislature vested liquidators of defunct insurance companies with extensive authority, including the ability to disavow contracts improvidently entered into by the predecessor insurance company. Iowa Code § 507C.21(1)(k). The contract at issue here included several terms contrary to the Liquidators' role of safeguarding and recovering assets through open and transparent proceedings. These terms included substantial limitations on recoverable damages, choice-of-law provisions compelling the application of out-of-jurisdiction law, confidentiality provisions inconsistent with the Liquidators' public-protection role, and a clause requiring "confidential" arbitration. The Liquidators therefore disavowed the contract in its entirety. As a result, the Liquidators asserted no breach-of-contract claims in their lawsuit. When Respondents moved to compel arbitration, the trial court properly denied the motion due to the Liquidators' disavowal.

In the decision below, however, the Iowa Supreme Court reversed. In a short preemption discussion,

the court recognized the equal-footing doctrine, but incorrectly concluded that the doctrine required the court to compel arbitration. According to the court, since Respondents had already performed their professional services under the contract, allowing the Liquidators to disavow would "amount[] to nothing more than singling out the arbitration provision for evasion." App.16a. On that basis, the court held the FAA preempted the Liquidators' disavowal authority. The court did not mention the other onerous provisions contained in the contract the Liquidators disavowed. Nor did the court's cursory discussion properly apply the equal-footing doctrine: the relevant question is whether the defense itself is generally applicable (as disavowal certainly is), *not* whether application of a generally applicable defense happens to preclude arbitration. By misapplying the equal-footing doctrine, the Iowa Supreme Court defied this Court's consistent jurisprudence and *elevated* contracts that contain arbitration agreements above those that do not. Unsurprisingly, this errant decision furthered a conflict with the vast majority of state courts that properly retain generally applicable defenses.

The court then landed on the wrong side of a split among state and federal courts regarding the interaction between McCarran-Ferguson and the FAA. McCarran-Ferguson exempts state statutes from federal preemption if enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Courts are hopelessly divided on whether state insurance-liquidation mechanisms trigger this doctrine of "reverse preemption" with respect to the FAA. In this case, that should have been an easy

answer, because the state statute at issue—the disavowal authority—plainly regulates the business of insurance. Nevertheless, the court refused to apply McCarran-Ferguson, holding that the Iowa Liquidation Act, viewed generally and as a whole, was not impaired by the court's application of the FAA. Once again, that is the wrong scope of inquiry, and it further exacerbates the errant side of the split among courts on this issue.

## OPINIONS BELOW

The Iowa Supreme Court's opinion is reported at 941 N.W.2d 310 and reproduced at App.1a-56a.[1] The trial court's opinion is unreported but reproduced at App.57a-64a.

## JURISDICTION

The Iowa Supreme Court issued its opinion on April 3, 2020.

On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari in this case to August 31, 2020.

This Court has jurisdiction under 28 U.S.C. § 1257(a). *See, e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 473 n.4 (1989).

---

[1] The Iowa Supreme Court issued an opinion correction notice on June 10, 2020, directing that certain typographical errors in the opinion be corrected. The opinion reproduced at App.1a-56a includes those corrections.

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FAA, 9 U.S.C. § 2, the relevant provisions of McCarran-Ferguson, 15 U.S.C. § 1012(b), and the relevant provisions of Iowa's Liquidation Act, Iowa Code Ann. §§ 507C.1, 507C.21, are reproduced at App.65a-71a.

## STATEMENT OF THE CASE

### A. Factual And Procedural Background

CoOportunity Health, Inc. (CoOportunity) was a nonprofit health insurer established under the Affordable Care Act's Consumer Operated and Oriented Plan (CO-OP) program. *See* App.4a; 42 U.S.C. § 18042. This program provided federal loans to "foster the creation of qualified nonprofit health insurance issuers to offer qualified health plans in the individual and small group markets in the States in which the issuers are licensed to offer such plans." 42 U.S.C. § 18042.

In July 2011, the federal government announced a funding opportunity under the CO-OP program, inviting nonprofit insurance companies to apply for federal funding. App.5a. Shortly thereafter, CoOportunity's founders engaged Respondent Milliman, Inc. (Milliman) to provide actuarial consulting services. *Ibid.* Specifically, CoOportunity relied on Milliman to secure approval for federal funding, set the rates CoOportunity would charge for insurance policies, and provide other actuarial services. *Ibid.*

At the inception of this relationship, the parties signed a Consulting Services Agreement. App.4a-5a. This Agreement limited CoOportunity's maximum recovery arising from any malpractice to three times

the professional fees paid to Milliman. App.59a. It prevented any recovery of lost profits, consequential damages, and punitive damages. *Ibid.* It called for the application of New York law. *Ibid.* And, it contained an arbitration clause requiring confidential arbitration: "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 under the Commercial Arbitration Rules of the American Arbitration Association." App.6a.

CoOportunity secured its federal loan of $145 million in 2012, began enrolling policyholders in 2013, and began covering healthcare claims in January 2014. App.4a. After just a year of operation, CoOportunity suffered losses in excess of $163 million. *Ibid.* Early in 2015, the Iowa Insurance Commissioner declared CoOportunity insolvent, and the Iowa District Court (Liquidation Court) subsequently placed the company into liquidation by a Final Order of Liquidation dated March 2, 2015. *Ibid.* The Liquidation Court appointed the Iowa Insurance Commissioner, Petitioner Doug Ommen, as liquidator, and Dan Watkins as special deputy liquidator (together, the "Liquidators"). *Ibid.*; *see also* Iowa Code § 507C.21(1)(a).

The Iowa Insurers Supervision and Liquidation Act (Liquidation Act) vests liquidators with substantial authority. Iowa Code § 507C.21. Entitled "Powers of liquidator," this provision of the Liquidation Act contains 23 separate subsections authorizing various actions of insurance liquidators. Of note here, liquidators may "[p]rosecute an action on behalf of the creditors, members, policyholders or

shareholders of the insurer against an officer of the insurer, or any other person." Iowa Code § 507C.21(1)(m). Additionally, liquidators may "[e]nter into contracts as necessary to carry out the order to liquidate and affirm or disavow contracts to which the insurer is a party." Iowa Code § 507C.21(1)(k).

The Liquidators filed suit against Milliman for its role in CoOportunity's collapse under the Liquidators' "statutory mandate to preserve and collect the assets of the company and to protect the interests of policyholders, creditors, and the public." App.58a. The Liquidators asserted common law tort claims against Milliman, seeking money damages for "professional negligence, breach of fiduciary duty, and reckless, willful, or intentional misconduct." App.5a. The liquidators asserted no breach-of-contract claims. Milliman moved to dismiss and compel arbitration based upon the arbitration clause in the Agreement. *Ibid.* The Liquidators opposed, explaining they disavowed the Agreement in its entirety. *See* App.61a-62a.

The trial court denied the motion to compel arbitration. App.57a-64a. The court ruled that the Liquidators were non-signatories to the contract and were not bound by the terms of the arbitration clause. App.59a-61a. Further, the trial court found that the Liquidators disavowed the contract pursuant to Iowa Code § 507C.21(1)(k), and the Liquidators could therefore not be compelled to arbitrate. App.61a-62a. Finally, the court ruled it could not compel arbitration under the FAA in any event, because McCarran-Ferguson exempted the relevant provisions of the Iowa Liquidation Act from federal

preemption. App.63a. Milliman appealed this decision, and the Iowa Supreme Court retained immediate jurisdiction over the appeal. *See* App.3a.

**B. The Decision Below**

The Iowa Supreme Court reversed. The court first held that the non-signatory Liquidators were bound by the terms of the arbitration agreement.[2] Add.7a-15a. Turning to the preemption issue, the court began by framing it correctly: whether the Liquidators' disavowal of the "entire 2011 Agreement" ran afoul "of the FAA's mandate to place arbitration agreements on an equal footing with other contracts." App.15a (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

But instead of evaluating whether the disavowal defense is generally applicable to all contracts (it is), the court decided that because Milliman had "already performed" services under the agreement, allowing disavowal of the entire agreement "amounts to nothing more than singling out the arbitration provision for evasion." App.16a. Even though the Liquidators did not assert any breach-of-contract claims, the court confusingly found it "difficult to reconcile the ability of the liquidator to disavow the 2011 Agreement while still retaining the ability to assert claims against Milliman pursuant to the same contract." App.15a. Under that suspect reasoning, the court found that the FAA preempted the Liquidators' ability to disavow the Agreement: "To avoid treating the arbitration provision as 'suspect status,' and to place the provision on equal footing as

---

[2] Although the Liquidators disagree with this conclusion, it is not challenged in this petition.

other contracts, the liquidator cannot be permitted to disavow the 2011 Agreement under Iowa Code section 507C.21(k)." App.16a (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). The court said nothing of the additional provisions of the Agreement negated by the disavowal, nor did it discuss whether the disavowal defense applies to all contracts generally.

Having found FAA preemption, the court next addressed whether McCarran-Ferguson exempted the disavowal defense from federal preemption. The court analyzed this question by looking at the Iowa Liquidation Act as a whole and evaluating whether requiring arbitration under the FAA would "invalidate, impair, or supersede operation of the Iowa Liquidation Act." App.17a-19a. The court found it would not because the Act did not *require* the Liquidators to bring claims in state court and the liquidation order contemplated that the Liquidators had the *ability* to participate in arbitration proceedings. App.19a-21a. The court therefore held that compelling arbitration changed only the forum in which the Liquidators must assert their claims and did not "impede the liquidator's ability to conduct an orderly dissolution." App.21a.

Justice Appel dissented. On the preemption question, he correctly recognized how straightforward this inquiry should have been: "state law that is generally applicable and does not discriminate against arbitration provisions does not offend the FAA." App.47a (citing *Doctor's Assocs.*, 517 U.S. at 686-87 (1996)). The dissent accurately explained that that the disavowal authority does not so discriminate because it "applies to all contracts,

empowering the insurance commissioner to disavow contracts that it believes impair the public interest in a state liquidation proceeding." *Ibid.* "There is simply nothing in Iowa Code section 507C.21(1)(k) that 'single[s] out arbitration provisions for suspect status.'" App.47a-48a (alteration in original) (quoting *Doctor's Assocs.*, 517 U.S. at 687).

The dissent further explained that even if the disavowal authority conflicted with the FAA, it would be exempted from federal preemption by McCarran-Ferguson. App.48a-55a. Preventing the Liquidators from disavowing the Agreement and forcing them to arbitrate the claims in a confidential arbitration proceeding under New York law interferes with the Iowa Liquidation Act's purpose of providing a comprehensive scheme for the efficient liquidation of insurance companies. App.51a-52a. It also impairs the ability of the Iowa Insurance Commissioner (through the Liquidators) to enforce Iowa law. App.52a-53a. Accordingly, Justice Appel concluded that McCarran-Ferguson would exempt the disavowal authority from FAA preemption.

## REASONS FOR GRANTING THE PETITION

The FAA's express preservation of generally applicable contract defenses is the bedrock of this Court's equal-footing jurisprudence. The decision below plainly violates decades of this Court's precedents by treating contracts with arbitration clauses more favorably than those without. The Liquidators' authority to disavow contracts applies to any contract, irrespective of whether it contains an arbitration clause. That general applicability preserves the defense under § 2 of the FAA. The Iowa Supreme Court's contrary decision ignores the

FAA, violates this Court's precedents, and stands in stark conflict with state courts elsewhere that correctly preserve generally applicable defenses.

Further, the decision below exacerbates the errant side of a divide among state and federal courts on whether McCarran-Ferguson exempts state insurance liquidation statutes from FAA preemption. Indeed, courts have reached different outcomes on this question, with the majority of courts holding that McCarran-Ferguson does apply. That should have been the easy conclusion here, because Iowa's disavowal authority for insurance liquidators was undoubtedly established to regulate the business of insurance and is impaired by the inability to apply it to contracts containing arbitration clauses. Nevertheless, the decision below held otherwise, deepening a split this Court should resolve.

This Court's resolution of these issues is needed now. This case alone involves millions of dollars of policyholder and taxpayer funds in a proceeding that—by statute—is supposed to be open and transparent. Further, several liquidators of defunct CO-OPs have sued Respondent Milliman on similar theories, and state courts are currently reaching divergent conclusions on whether the FAA preempts the ability of liquidators to assert generally applicable defenses in contesting arbitration. *Compare Donelon v. Shilling*, ___ So.3d ___, 2020 WL 2306075, at *1 (La. Apr. 27, 2020) (holding McCarran-Ferguson exempts Louisiana's liquidation statutes from preemption in a case involving the same arbitration clause and the same movant, Milliman), *with* App.1a-56a; *State ex rel Richardson v. Eighth Judicial Dist. Court in & for Cty. of Clark*,

454 P.3d 1260 (Table), 2019 WL 7019006, at *1 (Nev. Dec. 19, 2019); *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 604 (E.D. Ky. 2018). The status quo is simply untenable and warrants the Court's review now.

## I. The Iowa Supreme Court's Decision Violates The Federal Arbitration Act And This Court's "Equal Footing" Precedents, And, In Doing So, Exacerbates A Conflict With State Courts Appropriately Preserving Generally Applicable Contract Defenses.

Section 2 of the FAA provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In accordance with that directive, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs.*, 517 U.S. at 686. A state-law defense is not preempted by the FAA "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," but is preempted if the state law is "applicable *only* to arbitration provisions." *Id.* at 686-87 (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

This principle, articulated consistently throughout this Court's precedents interpreting the FAA, requires courts to "place arbitration agreements 'on equal footing with all other contracts.'" *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017) (quoting *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 465

(2015)). To be sure, this Court has most frequently employed this doctrine to preclude state-law defenses that single out arbitration clauses for adverse treatment; but, in doing so, this Court consistently reiterates that the purpose of those rulings is to put arbitration agreements on equal footing with all other contracts. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018); *Kindred*, 137 S. Ct. at 1424; *DIRECTV*, 136 S. Ct. at 465; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Vaden v. Discover Bank*, 556 U.S. 49, 64 (2009); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006); *Doctor's Assocs.*, 517 U.S. at 687; *Allied-Bruce*, 513 U.S. at 281.

Indeed, over 50 years ago this Court explained that the purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint*, 388 U.S. at 404 n.12 (emphasis added); *see also EEOC. v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002); *Volt*, 489 U.S. at 478. Immunizing an agreement to arbitrate from a generally applicable defense would "elevate it over other forms of contract—a situation inconsistent with" § 2 of the FAA. *Prima Paint*, 388 U.S. at 404 n.12.

1. The Iowa Supreme Court's decision ignores § 2 of the FAA and this Court's equal-footing precedents by elevating contracts that contain arbitration clauses above those that do not. The Iowa Liquidation Act confirms that liquidators may "disavow contracts to which the insurer is a party." Iowa Code § 507C.21(1)(k). Under that authority, the Liquidators may disavow any contract they choose, no matter whether it contains an arbitration

clause or not. Thus, there is no question this "law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Doctor's Assocs.*, 517 U.S. at 686. Because the statute addresses the "revocability . . . of contracts generally," it is not preempted by the FAA. *See ibid.*

That should have been the end of the inquiry. The Iowa Supreme Court's attempt to *justify* its contrary decision by *invoking* the equal-footing doctrine (especially by citing *Doctor's Associates* to do so) is puzzling. In *Doctor's Associates*, this Court found the FAA preempted a Montana state statute requiring a printed notice—"typed in underlined capital letters"—on the first page of a contract explaining it was subject to arbitration. 517 U.S. at 684. If such a notice did not appear, "the contract may not be subject to arbitration." *Ibid.* Not surprisingly, this Court held the FAA preempted that "threshold limitation[] placed specifically and solely on arbitration provisions," because it placed "arbitration agreements in a class apart from 'any contract,' and singularly limit[ed] their validity." *Id.* at 688.

Here, the Iowa Supreme Court created its own division, treating contracts containing arbitration clauses "in a class apart" from all other contracts. *See id.* at 687-88. Because the disavowal defense is generally applicable, that decision cannot be reconciled with the FAA, *Doctor's Associates*, or any of this Court's precedents.

The Iowa Supreme Court claimed that because Respondents had already performed their services under the contract, the Liquidators' disavowal

"amount[ed] to nothing more than singling out the arbitration provision for evasion" and was therefore preempted by the FAA. App.16a. That holding is not supported by any authority. This Court has never held, or even intimated, that the preemption inquiry changes depending on how much of a contract has been performed. To the contrary, the inquiry focuses on the defense *itself*, not whether *use* of a generally applicable defense happens to preclude arbitration. *See Doctor's Assocs.*, 517 U.S. at 686.

Indeed, the Iowa Supreme Court's contrary rule swallows the FAA's express preservation of defenses that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. To be sure, the vast majority of disputes naturally arise *after* parties have performed the obligations of their contracts. According to the decision below, once that performance occurs, defenses previously preserved by § 2 are somehow transformed into preempted defenses simply because the remedy provisions of the contract are all that remain. Such a theory is plainly inconsistent with the FAA.

Take, for example, defenses this Court recognizes as preserved by § 2 of the FAA: fraud, duress, and unconscionability. *Doctor's Assocs.*, 517 U.S. at 686. No one would seriously suggest a party can assert a valid fraud defense up until the contract's services are performed, at which time the FAA preempts the fraud defense and forces the party to arbitrate. Yet that is precisely what the Iowa Supreme Court held here, in contravention of the FAA.

Perhaps most telling—even under the Iowa Supreme Court's warped theory of § 2 of the FAA—is the omission of any discussion of the other terms

present in the disavowed Agreement. The Agreement substantially limited Milliman's potential liability for misconduct, it called for application of New York law, and it required any arbitration to be confidential. App.59a. Mentioning these items would have illustrated the Liquidators were disavowing much more than just an arbitration clause, so the court simply omitted any reference.

In fact, the Liquidators disavowed the contract in its entirety—the arbitration clause, the damage limitations, and everything else therein. The Liquidators did not assert a breach-of-contract claim, *nor could they*, because they disavowed the entire contract; as the court recognized elsewhere in the opinion, the Liquidators asserted only "common law tort claims." *See* App.4a. Thus, while the Liquidators' disavowal provided certain benefits to the estate, it also posed certain risks by requiring the estate to pursue more uncertain causes of action.[3] Weighing that risk is a judgment the Iowa Legislature leaves to the discretion of liquidators with respect to *any* contract of the insurer.

In any event, all that matters for purposes of the preemption inquiry is the general applicability of the disavowal statute. The Iowa Supreme Court's effort

---

[3] Milliman is a sophisticated entity that has long practiced in the highly regulated insurance industry, so any suggestion it was unaware of, or surprised by, the Liquidators' ability to disavow the Agreement is not well taken. *See, e.g.*, *Norfolk and W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) ("Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms.").

to skirt § 2 of the FAA is contrary to this Court's precedents and ignores the plain language of the statute.

2. Unfortunately, the Iowa Supreme Court is not alone in refusing to preserve generally applicable contract defenses as the FAA commands.

In *GGNSC Holdings, LLC v. Lamb ex rel. Williams*, for example, the Arkansas Supreme Court rejected an unconscionability defense in conclusory fashion based on the public policy favoring arbitration. 487 S.W.3d 348, 358 (Ark. 2016). As the dissent explained, that "truncated analysis violates our mandate to treat arbitration agreements the same as any other contract." *Id.* at 359 (Danielson, J., dissenting). Instead of performing a substantive analysis of the unconscionability defense, the court's reflexive use of the public policy favoring arbitration to set aside the defense elevated contracts containing arbitration clauses above those that did not. *See id.* at 359-60. As the dissent explained it, that violated even the Arkansas Supreme Court's previous recognition "that the national policy favoring arbitration is not a requirement that arbitration agreements be elevated above other types of contracts." *Id.* at 360.

Just like the Iowa Supreme Court's opinion, the majority opinion in *GGNSC* "singled out arbitration agreements for special status instead, such that they need not be scrutinized as contracts at all." *Id.* at 361. In fact, the Iowa Supreme Court's decision here is an even more egregious violation of the FAA and this Court's equal-footing principles, as it negated the entirety of a generally applicable defense

(disavowal) as opposed to altering the application of a defense.

In any event, decisions flouting the plain language of the FAA and this Court's equal-footing precedents cannot stand.

3. Not surprisingly, far more prevalent are decisions from several other states appropriately preserving generally applicable defenses under § 2 of the FAA.

For example, in *McGill v. Citibank, N.A.*, the California Supreme Court held that the FAA did not preempt a state law permitting revocation of *any* contract "that purports to waive, in all fora, the statutory right to seek public injunctive relief" under several of the State's consumer protection laws. 393 P.3d 85, 94 (Cal. 2017). The court explained that the FAA does not require enforcement of such a waiver, "in derogation of this generally applicable contract defense, merely because the provision has been inserted into an arbitration agreement." *Id.* at 94-95. Notably, the defense raised in *McGill* was statutory, just like the disavowal authority asserted by the Liquidators here.

In *Morgan v. Sanford Brown Institute*, the New Jersey Supreme Court explained that § 2 of the FAA preserved generally applicable contract defenses, including a state statute imposing requirements on consumer contracts generally, as well as defenses to the elements of contract formation. 137 A.3d 1168, 1177, 1181 (N.J. 2016). Similarly, in *Perry Homes v. Cull*, the Texas Supreme Court applied the generally applicable defense of waiver to an arbitration agreement, explaining that "because most agreements can be waived by the parties' conduct,

arbitration contracts should not be *more* enforceable than other contracts." 258 S.W.3d 580, 597 (Tex. 2008) (footnote omitted); *see also Cain v. Midland Funding, LLC*, 156 A.3d 807, 814 (Md. 2017) (applying waiver defense in light of § 2 of the FAA); *Hales v. ProEquities, Inc.*, 885 So. 2d 100, 105 (Ala. 2003) (quoting *Prima Paint*, 388 U.S. at 404 n.12, in holding that arbitration agreements are "as enforceable as other contracts, but not more so," and applying the generally applicable defense of waiver to an arbitration agreement).

In *State ex rel. U-Haul Co. of West Virginia v. Zakaib*, the West Virginia Supreme Court applied its rules for interpreting "clickwrap" agreements, as well as its generally applicable doctrine of incorporation by reference, to an arbitration agreement. 752 S.E.2d 586, 593 (W. Va. 2013). In doing so, the court noted that the FAA "does not favor or elevate arbitration agreements to a level of importance above all other contracts." *Ibid.* Because the doctrines at issue were generally applicable, they applied to arbitration agreements just as they would to any other contract. *Ibid.*

Finally, in *Berent v. CMH Homes, Inc.*, the Tennessee Supreme Court engaged in an extensive analysis of § 2 and this Court's precedents, concluding they preserved the state's generally applicable unconscionability defense—including an analysis of mutuality of obligations as a relevant factor. 466 S.W.3d 740, 748-58 (Tenn. 2015).

Importantly, the *Berent* court ultimately *enforced* the arbitration clause at issue, illustrating these decisions from various states are not outcome driven. No matter whether courts ultimately decide to

enforce the agreement, their analysis all begins from the same footing: because generally applicable defenses are at issue, FAA preemption simply does not apply.

Contrary to that sound approach, the Iowa Supreme Court ignored the FAA and this Court's precedents by finding the FAA preempted the generally applicable disavowal defense. In so doing, the court furthered a split with the overwhelming—and correct—body of case law preserving generally applicable contract defenses. This Court should resolve that split and uphold its equal footing-precedents.

## II. State Supreme Courts And Federal Circuit Courts Are Divided On Whether McCarran-Ferguson Exempts Insurance Liquidation Statutes From FAA Preemption.

Had the decision below correctly resolved the arbitration question, there would have been no need to analyze McCarran-Ferguson. But because the court found the FAA preempted the generally applicable disavowal defense, the court next analyzed whether McCarran-Ferguson applied to the liquidation statute, a question that has divided courts across the country. The answer here should have been easy, because the disavowal statute at issue plainly meets this Court's test for application of McCarran-Ferguson. Unfortunately, the Court ruled otherwise, further exacerbating the split among the courts.

1. On one side of the divide, the majority of courts have held that McCarran-Ferguson exempts state liquidation statutes from FAA preemption. Those decisions accurately explain that state

liquidation statutes were enacted "for the purpose of regulating the business of insurance"; that the FAA does not "specifically relate to the business of insurance"; and that the FAA would "invalidate, impair, or supersede" the liquidation statutes. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999) (articulating the elements for application of McCarran-Ferguson).

Most recently, in *Donelon v. Shilling*, the Louisiana Supreme Court reviewed the disposition of a motion to compel arbitration filed by Milliman (the same Respondent in this case) in a lawsuit filed by the rehabilitator of a defunct health insurance CO-OP (the same posture as this case). 2020 WL 2306075, at *1. Applying the McCarran-Ferguson factors, the court began by easily dispensing with the seemingly uncontroversial factor that the FAA does not "specifically relate to the business of insurance." *Id.* at *5.

Turning to the Louisiana liquidation and rehabilitation statutes, the court explained they were expressly enacted for the purpose of regulating the business of insurance. Moreover, the "statutory scheme for rehabilitation and liquidation of insurers is comprehensive and exclusive in scope," it "balances the interests of policyholders, creditors, and claimants," and it "was enacted to regulate insurance 'in the public interest.'" *Id.* at *6. The Louisiana legislature included in this "comprehensive scheme to regulate insolvent insurers" provisions granting the rehabilitator "the authority to choose which forum to bring an action." *Id.* at *7. Borrowing from the Fifth Circuit's analysis of a similar Oklahoma liquidation statute, the court described the policy

reasons for vesting the liquidator with such discretion: "the orderly adjudication of claims; the avoidance of unnecessary and wasteful dissipation of the insolvent company's funds that would occur if the receiver had to litigate in different forums nationwide; the elimination of the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants." *Ibid.* (internal quotation marks omitted) (citing *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 593 (5th Cir. 1998)). Accordingly, the court held that the venue-selection provision was "enacted for the purpose of regulating the business of insurance." *Ibid.*

Finally, the court held that compelling arbitration would conflict with the rehabilitator's authority to choose the venue and would substantially impair his rights. Thus, the court found that McCarran-Ferguson exempted the Louisiana statute from preemption by the FAA.

Similarly, in *Ernst & Young, LLP v. Clark*, the Kentucky Supreme Court held that McCarran-Ferguson precluded FAA preemption of the state's insurance liquidation law. 323 S.W.3d 682 (Ky. 2010). In explaining that law was designed to regulate the business of insurance, the court correctly observed that the liquidation statute "is itself the ultimate measure of the state's regulation of the insurance business: the take-over of a failing insurance company." *Id.* at 689. The Kentucky statute vested the Franklin Circuit Court with exclusive jurisdiction of matters in rehabilitation or liquidation, which the court described as in conflict with compelled arbitration pursuant to the FAA. *Id.* at 690-92.

The majority of federal circuit courts to address the issue have reached the same conclusion. In *Stephens v. American International Insurance Co.*, the Second Circuit also found Kentucky's liquidation act was exempted from FAA preemption by McCarran-Ferguson. 66 F.3d 41, 43 (2d Cir. 1995). The court explained that the liquidation statute "'protects' policyholders—whether they are individual policyholders or ceding insurance companies—by assuring that an insolvent insurer will be liquidated in an orderly and predictable manner and the anti-arbitration provision is simply one piece of that mechanism." *Id.* at 45.

Likewise, in *Munich American Reinsurance Co. v. Crawford*, the Fifth Circuit held that the exclusive-jurisdiction provision in Oklahoma's insurance liquidation statute triggered application of McCarran-Ferguson and precluded FAA preemption. 141 F.3d at 590. Specifically, in finding that the FAA would substantially impair application of the state liquidation statute, the court recognized that "Oklahoma's policy of placing ultimate control over all issues relating to the insolvency proceedings in a single court is aimed at protecting the relationship between the insurance company and its policyholders." *Id.* at 593.

And in *Davister Corp. v. United Republic Life Insurance Co.*, the Tenth Circuit held that McCarran-Ferguson prevented FAA preemption of a Utah liquidation statute allowing the liquidation court to enter a blanket stay of all claims against the insolvent insurer. 152 F.3d 1277, 1281 (10th Cir. 1998). "Allowing a putative creditor to pluck from the entire liquidation proceeding one discrete issue

and force arbitration contrary to the blanket stay entered by the Utah state court would certainly impair the progress of the orderly resolution of all matters involving the insolvent company." *Ibid.* The court described it as "[u]nquestionabl[e]" that such a situation would "directly impact the policyholders because it deals with a purported asset of the insurance company that could be apportioned to them." *Ibid.* "Recognition of that consequence makes apparent the conflict between the terms of the FAA and the Utah law." *Ibid.*

2. The Iowa Supreme Court's decision falls on the opposite side of the split. The court declined to apply McCarran-Ferguson, focusing on its belief that the FAA did not invalidate, impair, or supersede the Iowa Liquidation Act. Specifically, because the Liquidators "can bring the same claims in arbitration as [they] asserted in district court" and there are no "procedural impediments to a full recovery in arbitration," the court found that forcing the Liquidators to arbitrate would not interfere with the operation of the liquidation statute. *See* App.21a. The court made this ruling without once mentioning the specific portion of the statute at issue—the disavowal authority—and also without evaluating the effect of the "comprehensive scheme for the . . . liquidation of insurance companies" that the Iowa legislature expressly adopted. Iowa Code § 507C.1(4)(g).

Unfortunately, the decision below is not alone in this misguided approach. Other courts have likewise failed to consider the comprehensive liquidation scheme created by state legislatures for insurance liquidations. For example, in *Suter v. Munich*

*Reinsurance Co.*, the Third Circuit held that compelling arbitration pursuant to the FAA would not impair the New Jersey liquidation statute, claiming that "the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act." 223 F.3d 150, 161 (3d Cir. 2000).[4]

In *Atkins v. CGI Technologies & Solutions, Inc.*, the Sixth Circuit held it improper to broadly evaluate the liquidation statute as a whole; rather, the court said the focus should be on "whether the *particular* action under federal law would *directly* impair" state law regulation of insurance. 724 F. App'x 383, 392 (6th Cir. 2018). In that case, the court held that compelling arbitration would not violate Kentucky's exclusive-jurisdiction provision (described *supra* at 21-22), because the case had already been removed from state to federal court. *Ibid.*

Next, in *another* opinion reviewing a motion to compel arbitration filed by Milliman in a case against a CO-OP liquidator, the Nevada Supreme Court declined to issue an extraordinary writ, finding the high bar necessary for such relief was not met. *Richardson*, 2019 WL 7019006, at *1. The opinion contained only cursory analysis of McCarran-Ferguson, but the Court expressed skepticism at its application, noting that the liquidator initiated the

---

[4] McCarran-Ferguson was a secondary issue in *Suter*, asserted by the liquidators as an alternative basis to resolve the case. The court also ruled against the liquidators on the primary argument—whether a term in the parties' contract constituted a waiver of the right of removal under the Convention Act—a conclusion reached over then-Judge Alito's dissent. *See Suter*, 223 F.3d at 162-65 (Alito, J., dissenting).

suit on behalf of the defunct insurer and that the liquidator asserted *both* breach-of-contract and tort claims. *Ibid.*

Finally, in *yet another* decision involving Milliman's efforts to compel arbitration against a CO-OP in liquidation—this time in federal court—the Eastern District of Kentucky ruled that McCarran-Ferguson did not exempt Kentucky's insurance liquidation act from preemption. *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 604 (E.D. Ky. 2018). In so holding, the court reached a conclusion directly contrary to the Kentucky Supreme Court's opinion in *Ernst & Young*, 323 S.W.3d at 689 (discussed *supra*). These opposite and irreconcilable decisions illustrate that this is issue is dividing even state and federal courts *within the same state* evaluating McCarran-Ferguson's effect on the *same state statute*.

As these discussions demonstrate, state and federal courts are divided on the interaction between McCarran-Ferguson and the FAA in the context of insurance liquidations. While the majority view holding that state liquidation statutes are exempt from FAA preemption is plainly correct, the Court's intervention to resolve this split is warranted. The current—and expanding—national patchwork of varying applications of these two federal statutes is simply unsustainable. That is especially true for the specific issue in this case, as a variety of courts have issued strikingly conflicting opinions on the same question involving the same respondent.

3. For two reasons, it should have been easy for the Iowa Supreme Court to avoid landing on the wrong side of the split in authority.

*First*, the specific provision the court found preempted by the FAA is the Liquidators' ability to disavow contracts. There is little question that *specific provision* was passed to regulate the business of insurance and that it would be substantially impaired by a ruling that a contract cannot be disavowed if it contains an arbitration clause. But the Iowa Supreme Court did not even mention the disavowal authority in its McCarran-Ferguson analysis. Had it properly focused its analysis on the statutory provision at issue, it would have avoided the errant ruling.

Ironically, it is the cases *refusing* to apply McCarran-Ferguson that have highlighted the importance of focusing on the particular statutory provision involved; indeed, that was the thrust of the Sixth Circuit's decision in *Atkins*. *See* 724 F. App'x at 392. In fact, it was the same argument Milliman made, albeit unsuccessfully, to the Louisiana Supreme Court. *Donelon*, 2020 WL 2306075, at *6-7.[5] Suffice it to say, no matter the scope of analysis, the Iowa Supreme Court erred. If the liquidation statute is considered as a whole, McCarran-Ferguson should apply for the reasons articulated by the majority view above. And narrowing the aperture only *helps* the Liquidators' position, as McCarran-Ferguson would plainly protect the Liquidators' disavowal authority.

---

[5] It remains unsettled whether *U.S. Department of Treasury v. Fabe*, 508 U.S. 491 (1993), requires an analysis of a specific provision of a statute or consideration of the statute as a whole. *See, e.g.*, *Crawford*, 141 F.3d at 592 ("*Fabe*'s holding in this respect is simply unclear.").

*Second*, the Liquidators filed this case "on behalf of the company, policyholders, creditors and other impacted parties" and asserted only tort claims. Some courts evaluating cases in which liquidators sued on behalf of *only* the company—and asserted breach-of-contract claims arising from the same contract containing the arbitration clause—have held the potential impact on policyholders is too attenuated to implicate McCarran-Ferguson under this Court's decision in *Fabe*, 508 U.S. at 501. *See Suter*, 223 F.3d at 161. While the Liquidators disagree with that conclusion, such a situation is simply not present here.

Despite these straightforward grounds on which the Iowa Supreme Court should have applied McCarran-Ferguson, it failed to do so. Instead, the decision below exacerbates an established and deepening split among the courts. This Court should resolve it.

## III. The Questions Presented Are Extremely Important And Warrant This Court's Review Now.

The chief purpose of the Iowa Liquidation Act is the "protection of the interests of insureds, claimants, creditors, and the public." Iowa Code § 507C.1(4). Millions of dollars of funds belonging to policyholders and taxpayers are on the line in this case alone, in a liquidation that is supposed to occur under the scrutiny of the public eye.

Dissenting from the decision below, Justice Appel explained the detrimental impact of the court's errant ruling, chronicling the litany of issues resulting from the decision and describing the outcome as "flatly contrary to the traditional historic

commitment of the State of Iowa to regulating the insolvency of insurance companies and the statutory acquiesce of Congress in the broad exercise of that authority unfettered by federal meddling through bankruptcy proceedings or the FAA." App.54a. Justice Appel continued:

> The insurance commissioner, a public official charged with representing the public interest, seeks to chase after potential wrongdoers who have allegedly, through their torts, caused untold damage on members of the Iowa public. The catastrophic failure of the health insurance entity left countless Iowans to scramble. The interests of Iowa healthcare providers who relied upon CoOportunity for timely payment were no doubt threatened. The case demands a thorough airing and public accountability. Yet, according to the majority, the dispute will be handled confidentially in some office in New York applying New York law pursuant to the cramped remedies provided by the private insider contract.

App.55a.

Perhaps most telling of the need for this Court's urgent review, various state courts are reaching different conclusions about the interaction of the FAA with state liquidation statutes arising from *this same Respondent's* efforts to enforce arbitration agreements against liquidators of defunct CO-OPs. App.16a-21a; *Donelon*, 2020 WL 2306075, at *6-7; *Richardson*, 2019 WL 7019006, at *1. That conflict alone warrants this Court's review now, not to mention the broader conflicts discussed above.

Finally, 19 of the original 23 CO-OP entities have now closed. *See* Health CO-OP, *National Association*

*of Insurance Commissioners* (Feb. 12, 2020), https://content.naic.org/cipr_topics/topic_health_co_op.htm. These liquidation proceedings, coupled with those of traditional insurers, illustrate that the questions presented are timely and necessitate the Court's resolution.

Given the basis for the Iowa Supreme Court's decision—that the FAA preempts the Liquidators' statutory disavowal authority—this case presents an ideal vehicle to confirm the purely legal holding that the FAA preserves generally applicable contract defenses. And, to the extent the Court reaches it, this case squarely presents the McCarran-Ferguson issue as well. The decision below flouts this Court's established authority on both questions. This Court should not allow that deviation to stand and fester in liquidation proceedings nationwide.

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,

DOUGLAS J. SCHMIDT
KIRSTEN A. BYRD
MICHAEL T. RAUPP
*Counsel of Record*
HUSCH BLACKWELL LLP
4801 Main St., Suite 1000
Kansas City, MO 64112
(816) 983-8000
michael.raupp
@huschblackwell.com

*Counsel for Petitioners*

August 28, 2020

# APPENDIX

## APPENDIX A

## IN THE SUPREME COURT OF IOWA

No. 18-0335

Filed April 3, 2020

**DOUG OMMEN**, in His Capacity as Liquidator of CoOportunity Health, and **DAN WATKINS**, in His Capacity as Special Deputy Liquidator of CoOportunity Health,

Appellees,

vs.

STEPHEN RINGLEE, DAVID LYONS, and CLIFFORD GOLD,

Defendants,

and

**MILLIMAN, INC., KIMBERLEY HIEMENZ, and MICHAEL STRUM**,

Appellants.

---

Appeal from the Iowa District Court for Polk County, Jeanie K. Vaudt, Judge.

The defendants appeal the district court's denial of their motion to dismiss and compel arbitration. **REVERSED AND REMANDED WITH DIRECTIONS**.

Stephen H. Locher of Belin McCormick, P.C., Des Moines, Reid L. Ashinoff and Justin N. Kattan of Dentons US LLP, New York, New York, Stephen R. Eckley (until withdrawal), Matthew C. McDermott, and Christopher J. Jessen of Belin McCormick, P.C., Des Moines, for appellants.

Kirsten A. Byrd of Husch Blackwell LLP, Kansas City, Missouri, and Kevin J. Driscoll and John David Hilmes of Finley Law Firm, P.C., Des Moines, for appellees.

**CHRISTENSEN, Chief Justice**.

In 2014, a multimillion dollar Iowa-based health-insurance provider collapsed. The question we must answer is whether a court-appointed liquidator of the now-insolvent health insurer, pursuing common law tort claims against a third-party contractor, is bound by an arbitration provision in a preinsolvency agreement between the health insurer and the third-party contractor.

The plaintiff in this case is a court-appointed liquidator of an insolvent health-insurance provider. Prior to its insolvency, the health-insurance provider entered into an agreement with a third-party contractor for actuarial consulting services. The third-party contractor assisted the health-insurance provider in securing federal funding approval and setting rates. One year after the health-insurance

provider began operations, it was declared insolvent and placed into liquidation.

The liquidator of the health-insurance provider filed a petition against the third-party contractor, asserting common law tort damages for preliquidation work the contractor performed under the agreement. The third-party contractor submitted a motion to dismiss and compel arbitration because the agreement between itself and the health-insurance provider contained an arbitration provision.

The district court denied the third-party contractor's motion. It determined that the liquidator's claims did not arise out of or relate to the agreement, that the Iowa Liquidation Act precludes arbitration of the liquidator's claims, and that the McCarran-Ferguson Act reverse preempts the Federal Arbitration Act (FAA). The third-party contractor appealed the judgment, and we retained the appeal.

On our review, we conclude the court-appointed liquidator is bound by the arbitration provision because, under the principles of contract law and as pled, the liquidator stands in the shoes of the health-insurance provider and is bound by the preinsolvency arbitration agreement. Therefore, the liquidator's claims cannot be detached from the contractual relationship between the health-insurance provider and the third-party contractor, pursuant to which all of the preinsolvency work was performed. We also conclude the liquidator cannot use Iowa Code section 507C.21(*k*) (2017) to disavow a preinsolvency agreement that the third-party contractor already performed. Finally, in this case, the McCarran-Ferguson Act does not permit reverse preemption of

the FAA when the liquidator asserts common law tort claims against a third-party contractor. Courts in other states have unanimously required liquidators to arbitrate their claims against the same third-party contractor under the same arbitration provision.

**I. Background Facts and Proceedings.**

Because we are reviewing a ruling on a motion to dismiss, we take as true the petition's well-pled facts. *See Karon v. Elliot Aviation*, 937 N.W.2d 334, 335 (Iowa 2020); *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).

Doug Ommen and Dan Watkins are court-appointed liquidators of the now-insolvent CoOportunity Health—an Iowa-based insurer.[1] CoOportunity was a nonprofit health insurer launched under the Affordable Care Act. In 2012, CoOportunity secured a $145 million federal start-up loan to launch the company. Member enrollment began in October 2013 and CoOportunity started the coverage of healthcare claims in January 2014. After one year of operation, CoOportunity faced significant financial distress; it reported $163 million in losses. CoOportunity was declared insolvent and placed into liquidation by a Final Order of Liquidation on March 2, 2015.

The liquidator of CoOportunity filed a petition against Milliman and the founders of CoOportunity, asserting common law tort damages for preliquidation work Milliman performed for CoOportunity pursuant to a 2011 Consulting Services Agreement (2011 Agreement). Milliman is an actuarial and consulting

---

[1] We will refer to the court-appointed liquidators, Doug Ommen and Dan Watkins, as "the liquidator."

firm. Before CoOportunity secured its $145 million loan, the federal government, on July 28, 2011, announced a funding opportunity inviting nonprofit health insurance companies, such as CoOportunity, to apply for federal funding. CoOportunity relied on Milliman to secure federal funding approval, set rates, and provide other actuarial work. On September 30, 2011, a CoOportunity founder signed the 2011 Agreement for Milliman to provide "consulting services" including "general actuarial consulting services." The liquidator's petition seeks to recover millions in losses sustained by CoOportunity "as a result of the professional negligence, breach of fiduciary duty, and reckless, willful, or intentional misconduct by the actuarial firm, Milliman, Inc."

Milliman submitted a motion to dismiss and compel arbitration pursuant to Iowa arbitration laws and the FAA. It indicated the liquidator's claims arose out of and related to its engagement by CoOportunity pursuant to the 2011 Agreement. The 2011 Agreement contained an arbitration provision which stated any dispute "will be resolved by final and binding arbitration."

The district court entered an order denying Milliman's motion to dismiss and compel arbitration. It determined the liquidator's claims did not arise out of or relate to the 2011 Agreement, the liquidator disavowed the 2011 Agreement, the Iowa Liquidation Act precluded arbitration of the liquidator's claims against Milliman, and the McCarran-Ferguson Act reverse preempted the FAA.

Milliman appealed the district court's order, which we retained.

**II. Standard of Review.**

The denial of a motion to compel arbitration is reviewed for correction of errors at law. *Bullis v. Bear, Stearns & Co.*, 553 N.W.2d 599, 601 (Iowa 1996); *see Heaberlin Farms, Inc. v. IGF Ins.*, 641 N.W.2d 816, 818, 823 (Iowa 2002).

**III. Analysis.**

This case presents the novel issue of whether a court-appointed liquidator of a now-insolvent health insurer, pursuing common law tort claims against a third-party contractor, is bound by an arbitration provision in a preinsolvency agreement between the health insurer and the third-party contractor. The relevant portion of the arbitration provision in this case 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* under the Commercial Arbitration Rules of the American Arbitration Association.

(Emphasis added.) This written provision to resolve *any dispute* by arbitration is central to the issue before us. We must determine whether the parties are bound to that arbitration agreement. We note that courts in other jurisdictions have unanimously required the liquidator to honor the same arbitration provision in pursuing claims against Milliman. *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 603-04, 606 (E.D. Ky. 2018) (granting Milliman's petition to compel arbitration of the tort and contract claims brought against it by the liquidator of an insolvent Kentucky healthcare cooperative); *Donelon v. Shilling*, 2017 CW 1545, 2019 WL 993328, at *13–14 (La. Ct. App. Feb. 28, 2019)

(reversing the district court's denial of Milliman's motion to compel arbitration and ordering arbitration of the Louisiana Insurance Commissioner's claims against Milliman); *State ex rel. Richardson v. Eighth Judicial Dist. Ct.*, No. 77682, 2019 WL 7019006, at *1 (Nev. Dec. 19, 2019) (order denying petition for writ of mandamus) (allowing Milliman's motion to compel arbitration to proceed and rejecting liquidator's argument that arbitrating her common law damages claims against Milliman would "thwart the insurance liquidator's broad statutory powers and the general policy under" Nevada law). We reach the same conclusion.

**A. Is the Liquidator Bound by the Preinsolvency Arbitration Agreement?** The thrust of the FAA, 9 U.S.C. §§ 1–14 (Supp. IV 2017), declares a written agreement to arbitrate in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2. Essentially, section 2 of the FAA is a "congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). A party to the arbitration agreement may petition a court for an order to compel arbitration. 9 U.S.C. § 4; *Bullis*, 553 N.W.2d at 601. Where the arbitrability of a dispute between parties occurs in state court, as is the case here, the FAA governs. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, 103 S. Ct. at 941. According to the Supreme Court, the FAA "places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Rent-A-Ctr., W., Inc.*

*v. Jackson*, 561 U.S. 63, 67, 130 S. Ct. 2772, 2776 (2010) (citation omitted). States may regulate arbitration agreements under general principles of contract law, and states may even invalidate arbitration agreements under the same grounds for the revocation of any contract. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843 (1995). States, however, may not decide a contract is fair enough to enforce its terms but not fair enough to enforce its arbitration agreement. *Id.* That type of state policy is made unlawful by the FAA and would place arbitration agreements on an unequal footing with other contracts, contrary to the FAA's language and congressional intent. *Id.* Congress's intent, according to *Southland Corp. v. Keating*, is to "foreclose state legislative attempts to undercut the enforceability of arbitration agreements." 465 U.S. 1, 16, 104 S. Ct. 852, 861 (1984). Doubts about the scope of arbitrable issues are to be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25, 103 S. Ct. at 941.

The liquidator asserts arbitration cannot be compelled because he did not sign the 2011 Agreement that contained the arbitration provision. The parties do not dispute the liquidator did not sign the 2011 Agreement. Instead of categorically banning nonsignatories from arbitration as the liquidator suggests, we believe the analysis depends on general principles of contract law. As we stated in *Bullis*, "Whether one is bound by an arbitration agreement that she did not sign depends on the general principles of contract law . . . ." 553 N.W.2d at 602; *see Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902 (2009); *Rent-A-Ctr., Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727, 732–33 (Iowa 2014).

Our caselaw discussing whether a court-appointed liquidator is bound to a preinsolvency arbitration agreement is sparse. In *Rent-A-Center*, we held the FAA's reach did not extend to a public agency that was not a party to the arbitration agreement nor "a stand-in for a party." 843 N.W.2d at 736. We looked to whether the agency's claims were "merely derivative" of the employee's claims and whether the agency simply "'[stood] in the employee's shoes' or act[ed] as a 'proxy' for the employee." *Id.* at 734 (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297–98, 122 S. Ct. 754, 766 (2002)). Because the agency in *Rent-A-Center* was "acting in its prosecutorial capacity" and its claims were "independent of [the employee's] own claims, in order to protect the public interest," it was not bound to arbitration under the FAA. *Id.* at 737. The arbitration agreement between the employee and Rent-A-Center did not "displace any independent authority" the agency had "to investigate and rectify violations" of the Iowa Civil Rights Act. *Id.* at 741 (quoting *Preston v. Ferrer*, 552 U.S. 346, 359 n.7, 128 S. Ct. 978, 987 n.7 (2008)).

As the liquidator has pled his case against Milliman, the liquidator's claims are a derivative of another party's claims, in this case, CoOportunity.[2] More squarely on point is *Roth v. Evangelical*

---

[2] To the extent the liquidator attempts to bring the Department of Health and Human Services (HHS) or "state and federal regulators" within the ambit of its misrepresentation claims, those entities are not included in the limited statutory authority granted a liquidator to prosecute claims on behalf of specific insurer stakeholders. *See* Iowa Code § 507C.21(*m*) (granting liquidator authority to "[p]rosecute an action on behalf of the creditors, members, policyholders or shareholders of the insurer against an officer of the insurer, or any other person").

*Lutheran Good Samaritan Society*, 886 N.W.2d 601 (Iowa 2016). There, we regarded a wrongful-death claim brought by a personal representative as a claim that stands in the shoes of the decedent, not as an independent claim. *Id.* at 608–09. We explained, "[W]hen a personal representative brings a *wrongful-death* action against a party with whom the decedent entered into a binding arbitration agreement, the case is subject to arbitration." *Id.* at 608. In Iowa, the wrongful death statute did not create a new cause of action in the decedent's survivors. *Id.* Rather, it preserved the rights and liabilities a decedent had at the time of his death. *Id.*

In this case, the liquidator's petition is on behalf of CoOportunity and seeks to recover damage for the financial loss to CoOportunity. The petition states the liquidator's action is to recover millions in losses sustained by CoOportunity "as a result of the professional negligence, breach of fiduciary duty, and reckless, willful, or intentional misconduct by the actuarial firm, Milliman, Inc." This authority is pursuant to the Final Order of Liquidation, which vests with the liquidator "the title to the property, contracts, and rights of action and the books and records of CoOportunity" and the right to "carry out all direct, indirect and/or related aspects of the liquidation of CoOportunity." What matters here is that in this petition the liquidator brings common law tort claims for alleged damages to CoOportunity.

It makes no difference that the liquidator frames the complaint in tort, because Milliman's alleged duties arise solely from the 2011 Agreement

containing the arbitration provision.[3] Without the 2011 Agreement, Milliman would not have performed any work that could give rise to claims by the liquidator. The liquidator, standing in CoOportunity's shoes, may not avoid a contractual arbitration agreement merely by "casting its complaint in tort." *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993) (quoting *In re Oil Spill by "Amoco Cadiz" Off Coast of France Mar. 16, 1978*, 659 F.2d 789, 794 (7th Cir. 1981)); *see Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1198 (10th Cir. 2009) ("Focusing on the facts rather than on a choice of legal labels prevents a creative and artful pleader from drafting around an otherwise-applicable arbitration clause."); *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 499–500 (8th Cir. 2007) ("Under the Federal Arbitration Act, we generally construe broad language in a contractual arbitration provision to include tort claims arising from the contractual relationship[.]"); *Taylor v. Ernst*

[3] *Cf. Donelon*, 2019 WL 993328, at *11 (distinguishing claims in that case against Milliman as actuary from breach of an auditor's statutory duties involved in *Taylor v. Ernst & Young, L.L.P.*, 958 N.E.2d 1203, 1210–12 (Ohio 2011), which did not require reference to contractual obligations to ascertain extent of duties). As in *Donelon*, the liquidator here identified no statutory duties owed by Milliman, but instead relied solely on Milliman's contractual relationship with CoOportunity and its accompanying contractual obligations to support each of his claims. To the extent the liquidator alleges generalized harm to CoOportunity's creditors or policyholders, the petition fails to identify any noncontractual duties owed by Milliman to those policyholders or creditors. We therefore have no occasion to consider whether nonparty tort claims would be subject to the contractual arbitration provision.

*& Young, L.L.P.*, 958 N.E.2d 1203, 1222 (Ohio 2011) (O'Donnell, J., concurring in part and dissenting in part) ("[T]he duties imposed by Ohio law that E & Y allegedly failed to perform are the same as those set forth in the engagement letter, and whether cast in tort or contract, the issue is one that falls within the broad scope of the arbitration provision.").[4]

---

[4] In *Taylor*, the Ohio Supreme Court majority held that the liquidator was not required to arbitrate because his claims did not "arise from the contract containing the arbitration clause." 958 N.E.2d at 1213 (majority opinion). The same opinion recognizes the converse that liquidators are bound to arbitrate when asserting claims arising from a contract requiring arbitration. *Id.* at 1214. That is what we have here. Indeed, as the Ohio Supreme Court has held, "it would be inequitable to allow [the liquidator] to avoid arbitration while simultaneously seeking a substantive benefit of the contract that contained the arbitration clause." *Id.*; *Gerig v. Kahn*, 769 N.E.2d 381, 385-86 (Ohio 2002) (enforcing arbitration agreement against nonsignatory liquidator); *Covington v. Lucia*, 784 N.E.2d 186, 190–91 (Ohio Ct. App. 2003) ("The overriding principle in *Gerig*, and the cases cited therein, is that when seeking to enforce rights under a contract, a nonsignatory can be bound by that contract's arbitration clause.").

Courts have noted insurance liquidators act for the public interest. *See, e.g.*, *Mitchell v. Taylor*, 43 P.2d 803, 804 (Cal. 1935) (en banc); *Arthur Andersen v. Super. Ct.*, 79 Cal. Rptr. 2d 879, 882 (Ct. App. 1998). But those cases did not involve claims arising from an insolvent insurer's agreement with a third party that included an arbitration clause. Neither the Iowa legislature nor the Iowa Insurance Commissioner has prohibited health insurance co-ops from including arbitration provisions in contracts with third-party contractors such as Milliman. *See, e.g.*, Iowa Code § 505.8. It is too late for the liquidator to impose such a provision in this case. The liquidator, having stepped into the shoes of CoOportunity, cannot now after-the-fact cherry-pick his agreement with Milliman and decide he is bound only by the parts he likes.

Here, the arbitration provision is broad: "In the event of *any dispute* arising out of or relating to the engagement of Milliman by Company" the parties agree to arbitrate. (Emphasis added.) In light of the arbitration provision's general breadth, we have no reason to believe the parties somehow meant to exclude postinsolvency disputes from arbitration. *See Quackenbush v. Allstate Ins.*, 121 F.3d 1372, 1380 (9th Cir. 1997); *Bennett v. Liberty Nat'l Fire Ins.*, 968 F.2d 969, 972 (9th Cir. 1992) ("[B]ecause the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce [the insolvent insurer's] contractual rights, she is bound by [the insolvent insurer's] pre-insolvency [arbitration] agreements." (Footnote omitted.)).

Where the language of the arbitration provision is broad, a claim will proceed to arbitration if the underlying allegations "simply touch" matters covered by the provision. *Leonard v. Del. N. Cos. Sport Serv., Inc.*, 861 F.3d 727, 730 (8th Cir. 2017) (quoting *Unison Co. v. Juhl Energy Dev., Inc.*, 789 F.3d 816, 818 (8th Cir. 2015)). The liquidator's claims arise out of and relate to the work Milliman completed pursuant to the 2011 Agreement with CoOportunity. The petition sets forth claims that relate to either Milliman's actuarial consulting services or to a conflict of interest in the 2011 Agreement. For instance, the liquidator's petition states,

> CoOportunity retained the Milliman Defendants to provide actuarial professional services for purposes of working on critical aspects of the company's plans, including initial and later federal funding applications, rate

> setting, and financial reporting to federal and state regulators.
>
> . . . .
>
> The terms of the agreement between CoOportunity and Milliman created an improper incentive for Milliman to convince federal officials to approve and fund the project. . . . The improper financial motivation compromised Milliman's objectivity and independence in certifying the feasibility study and business plan.
>
> Milliman did not disclose [its] financial interest in CoOportunity (and the other CO-Ops) receiving federal funding approval or its potential conflict of interest to HHS . . . .

The liquidator's claims cannot be detached from the contractual relationship between Milliman and CoOportunity, pursuant to which all of the work was performed. Therefore, under the principles of contract law, we conclude the liquidator stands in CoOportunity's shoes; his claims are merely derivative of CoOportunity's claims. *See Roth*, 886 N.W.2d at 608; *Rent-A-Ctr.*, 843 N.W.2d at 736. Accordingly, the liquidator is bound by the preinsolvency arbitration agreement. *See Donelon*, 2019 WL 993328, at *9 (holding that the Louisiana Insurance Commissioner, despite being a nonsignator, is bound by Milliman's arbitration agreement).

Our conclusion is in accordance with federal jurisprudence, holding that a state insurance liquidator must arbitrate common law damages claims asserted against third-party contractors for

preinsolvency work pursuant to an agreement. *See, e.g.*, *Suter v. Munich Reins.*, 223 F.3d 150, 161-62 (3d Cir. 2000); *Quackenbush*, 121 F.3d at 1382; *Bennett*, 968 F.2d at 970; *Milliman, Inc.*, 353 F. Supp. 3d at 603-04.

**B. Can the Court-Appointed Liquidator Disavow the 2011 Agreement Pursuant to Iowa Code Section 507C.21(k)?** The liquidator alternatively claims arbitration cannot be compelled because Iowa law permits the court-appointed liquidator to disavow the entire 2011 Agreement. Pursuant to the Iowa Liquidation Act, the liquidator may "[e]nter into contracts as necessary to carry out the order to liquidate *and affirm or disavow contracts to which the insurer is a party*." Iowa Code § 507C.21(*k*) (emphasis added). The liquidator attempts to shoehorn the power to disavow a contract into the FAA's "grounds as exist at law" language for the revocation of any contract. *See* 9 U.S.C. § 2. However, permitting the liquidator to disavow the entire 2011 Agreement may run afoul of the FAA's mandate to place arbitration agreements on an equal footing with other contracts. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 281, 115 S. Ct. at 843. The issue with the liquidator's position is that it attempts to disavow a contract that Milliman *already* performed. The 2011 Agreement does not vanish. Milliman rendered its consulting services under the 2011 Agreement, and the rights established under that contract still exist. It is difficult to reconcile the ability of the liquidator to disavow the 2011 Agreement while still retaining the ability to assert claims against Milliman pursuant to the same contract. *See Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272 (D. Vt. 1993) ("[I]f a liquidator seeks to

enforce an insolvent company's rights under a contract, she must also suffer that company's contractual liabilities."); *Taylor*, 958 N.E.2d at 1221 (O'Donnell, J., concurring in part and dissenting in part) ("[T]he liquidator cannot prosecute an action for breach of contract or one involving a contract on the authority conferred in [the Ohio Liquidation Act] and yet seek to escape arbitration by disavowing an arbitration provision contained in that contract pursuant to [the Ohio Liquidation Act].").

Disavowing the entire 2011 Agreement, while allowing the liquidator to assert claims pursuant to the same agreement, amounts to nothing more than singling out the arbitration provision for evasion. The liquidator cannot pick and choose which provisions in the contract existed. To avoid treating the arbitration provision as "suspect status," and to place the provision on equal footing as other contracts, the liquidator cannot be permitted to disavow the 2011 Agreement under Iowa Code section 507C.21(*k*). *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656 (1996). Moreover, if section 507C.21(*k*) were interpreted to allow disavowal of a preinsolvency arbitration agreement with a third-party contractor, "this would raise serious questions as to its validity under the Supremacy Clause of the United States Constitution," as we explained in *Roth*. 886 N.W.2d at 611.

**C. Does the McCarran-Ferguson Act Permit Reverse Preemption of the FAA?** We must also consider the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-15. McCarran-Ferguson establishes "reverse preemption," where state law preempts federal law. This federal statute says,

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

*Id.* § 1012(b). For reverse preemption to apply, (1) the federal statute must not specifically relate to the business of insurance, (2) the state statute must have been enacted for the purpose of regulating the business of insurance, and (3) the federal statute would, "invalidate, impair, or supersede" the state statue. *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998). We will discuss the three factors as necessary.

The district court, agreeing with the liquidator, found the Iowa Liquidation Act required the liquidator's claims be resolved in a public forum of the liquidator's choosing, subject to the rules and procedures established by the Iowa legislature. The liquidator asserts requiring arbitration under the FAA would "invalidate, impair, or supersede" operation of the Iowa Liquidation Act. Milliman, on the other hand, questions whether there is any conflict between the FAA and the Iowa Liquidation Act. If there is no conflict, McCarran-Ferguson's reverse preemption is inapplicable. *See id.*

The Iowa Liquidation Act authorizes the liquidator to "[c]ontinue to prosecute and to institute . . . any and all suits and *other legal proceedings*." Iowa Code § 507C.21(1)(*l*) (emphasis added). Pursuant to the Iowa Liquidation Act, the Final Order of Liquidation in this case expressly permits the liquidator to sue or

defend CoOportunity in "any necessary forum," including "arbitration panels."

> The Liquidator and the Special Deputy are hereby authorized to deal with the property, business and affairs of CoOportunity and CoOportunity's estate, *and, in any necessary forum, to sue or defend for CoOportunity*, or for the benefit of CoOporunity's policyholders, creditors and shareholders *in the courts and tribunals, agencies or arbitration panels* of this state and other states or in any applicable federal court in the Liquidator's name as Commissioner of Insurance of the State of Iowa, in his capacity as Liquidator, or the Special Deputy in his capacity as Special Deputy Liquidator, or in the name of CoOportunity Health.

(Emphasis added.) The liquidator claims enforcing the arbitration agreement under the FAA would frustrate the policy of the Iowa Liquidation Act and strip the authority to prosecute claims in a transparent, public forum. The Iowa legislature stated the purpose of the Iowa Liquidation Act as follows:

> The purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public, with minimum interference with the normal prerogatives of the owners and managers of insurers, through all of the following:
>
> *a.* Early detection of a potentially dangerous condition in an insurer and prompt application of appropriate corrective measures.

*b.* Improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry.

*c.* Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation.

*d.* Equitable apportionment of any unavoidable loss.

*e.* Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extending the scope of personal jurisdiction over debtors of the insurer outside this state.

*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)(*a*)–(*g*).

We disagree with the liquidator that requiring arbitration under the FAA would invalidate, impair, or supersede operation of the Iowa Liquidation Act. Nowhere in the Iowa Liquidation Act is it required that the liquidator must bring claims in a public

forum. The opposite of the liquidator's assertion is true. Iowa granted the liquidator power to prosecute suits and "other legal proceedings." *See id.* § 507C.21(1)(*l*). The liquidator's power to prosecute other legal proceedings is recognized in the Final Order of Liquidation, which specifically contemplates that the liquidator may sue or defend CoOportunity in "arbitration panels." In fact, the Iowa Liquidation Act does not prohibit arbitration of the liquidator's claims against Milliman. The liquidator frames the issue as whether enforcing arbitration under the FAA "invalidates, impairs, or supersedes the enforcement of the state process designed to protect the interests of policyholders." *Davister Corp. v. United Republic Life Ins.*, 152 F.3d 1277, 1282 (10th Cir. 1998). The case before us, however, does not involve the disposition of claims by policyholders. *Cf. U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 508, 113 S. Ct. 2202, 2212 (1993) (holding the Ohio priority statute, "to the extent that it regulates policyholders," was exempt from preemption, but priority given to employees and general creditors was not free from preemption under the McCarran-Ferguson Act). The liquidator is not litigating on behalf of policyholders, and we are not persuaded that any indirect effects on the policyholders are sufficient to avoid preemption under the McCarran-Ferguson Act. The *Fabe* court noted the indirect-effects argument "goes too far." *Id.* "[I]n that sense, every business decision made by an insurance company has some impact on its reliability . . . and its status as a reliable insurer." *Id.* (quoting *Grp. Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 216–17, 99 S. Ct. 1067, 1076 (1979)).

CoOportunity's liquidator brings common law tort claims against a third-party contractor. Requiring

arbitration only alters the forum in which the liquidator may pursue his common law tort claims. The interests and rights of policyholders under Iowa's statutory scheme are not altered. *See Milliman*, 353 F. Supp. 3d at 603 (rejecting reverse-preemption and stating that "[m]andating arbitration in this case does not alter the disposition of claims of the policy holders and does not 'invalidate, impair, or supersede' the [Kentucky Liquidation Act] as a whole").

The arbitration forum does not impede the liquidator's ability to conduct an orderly dissolution. Discovery, including depositions, are permitted in the arbitration proceedings. The liquidator can bring the same claims in arbitration as it asserted in district court, and the liquidator has identified no procedural impediments to a full recovery in arbitration. Moreover, the FAA leaves no discretion with the district courts "to consider public-policy arguments in deciding whether to compel arbitration under the FAA." *Quackenbush*, 121 F.3d at 1380, 1382. In short, there is no conflict here between the FAA and the Iowa Liquidation Act. Accordingly, in this case, we hold the McCarran-Ferguson Act does not permit reverse preemption of the FAA.

**IV. Conclusion.**

For the aforementioned reasons, we hold the court-appointed liquidator of a now-insolvent health insurer, pursuing common law tort claims against a third-party contractor, is bound by an arbitration provision in a preinsolvency agreement between the health insurer and the third-party contractor. We reverse the district court judgment and remand the case with directions to enter an order compelling arbitration.

**REVERSED AND REMANDED WITH DIRECTIONS.**

All justices concur except Appel, J., who dissents.

#18-0335, *Ommen v. Milliman, Inc.*

**APPEL, Justice (dissenting).**

I respectfully dissent. The majority holds that the Iowa insurance commissioner's effort to sue a consulting firm allegedly responsible for the insolvency of a provider of an Iowa health insurance to the public under the Affordable Care Act will be decided by a panel of private arbitrators in New York applying New York law under the terms of a private insider agreement rather than by an Iowa judge and jury in an Iowa courtroom applying Iowa law. The majority holds that a private insider agreement between the insurer and its consultants, which dramatically limits the potential liability of the consultants to the detriment of policyholders and the public, is binding on the state's chief regulator, the insurance commissioner, in a liquidation proceeding under Iowa Code chapter 507C even though the insurance commissioner was not a party to the private insider agreement. Further, the majority enforces the private insider agreement even though the insurance commissioner has exercised the power given to him by the legislature to disavow the contract.

The panel of private arbitrators which the majority believes should decide the insurance commissioner's case will not be required to permit broad discovery that the insurance commissioner would be entitled to under Iowa law. The private arbitrators will meet in New York and will be required to apply the law of New York, not the law of Iowa. The private arbitrators

meeting in New York and applying New York law will determine whether to enforce strict limitations on damages provided in the private insider agreement between the founders of the failed health insurance company and its professional consultants. The private arbitrators will decide disputed questions of law and fact. If they follow the terms of the private insider agreement, they will be precluded from awarding punitive damages. Once the panel or arbitrators operating in private have made their decision under New York law, the insurance commissioner will have only strictly limited rights to appeal the privately determined decision.

Enforcement of the arbitration provision of the private insider agreement thus establishes a very favorable terrain for the insider consultants at the expense of the insureds, creditors, and the public. A person on the street would understandably see the application of the private insider agreement against the insurance commissioner as an example of the big shots protecting themselves, while the public gets the shaft.

If this were simply a private business dispute between signatories to an agreement requiring arbitration, the sending of this matter to New York for a private arbitration under New York law with limited discovery and tightly curtailed remedies might not be objectionable. But this is not an inconsequential private dispute between signatories to an agreement that may properly be decided in confidential proceedings in some New York high-rise.

This case is infused to the bone with public policy considerations arising from the catastrophic failure of a health insurance entity under the Affordable Care

Act. Indeed, the provision of healthcare through insurance carriers under the Affordable Care Act is one of the most incandescent public policy issues of our time. Here, the insurer somehow allegedly managed to lose $163 million in its first year of operation, became insolvent in short order, and left thousands of policyholders to scramble to obtain alternate coverage.

The public, through the Iowa insurance commissioner, a nonsignatory to the contract including the arbitration provision, seeks to hold those allegedly responsible accountable in a public proceeding in an Iowa courtroom pursuant to the commissioner's broad and comprehensive authority granted by the legislature in the broad and comprehensive provisions of Iowa Code chapter 507C governing the liquidation of insurance companies. Because the insurance commissioner is a public official charged with vindicating public interests, he does not simply "stand in the shoes" of the insurer in a way that allows the arbitration provision to which the commissioner never agreed to be enforced against him. And, in any event, the commissioner has exercised the power given to him by the legislature to disavow the private insider contract which the majority now seeks to enforce.

Here, the insurance commissioner has launched a claim against an insider claiming, among other things, malpractice, misrepresentation, breach of fiduciary duty, and fraud in connection with the creation and operation of a health insurer in the state of Iowa. The public interest in this kind of litigation is enormous. Yet, the majority sees this dispute over the failure of a health insurer and the resulting public carnage as a controversy for private and secret

resolution through an unaccountable private arbitrator outside the comprehensive regulatory framework adopted by the Iowa General Assembly for liquidation of insurers.

Does the law support this startling result? The answer is no.

First, the insurance commissioner as liquidator is unlike a receiver under the Bankruptcy Code, but is a public officer who acts on behalf of "insureds, claimants, creditors [largely healthcare providers], and the public." Iowa Code § 507C.1(4) (2017). The legislature named the insurance commissioner as liquidator for a reason, namely, to see that a publically accountable officer is responsible to see that the public interest, and not that of insiders like Milliman, are zealously protected. The majority fails to place Iowa's insurance liquidation statute in the context of the long history of intense public regulation of the insurance industry. The insurance commissioner does not stand in the shoes of CoOportunity, but stands in the shoes of the public. Unlike a private wind-down of a bankrupt local pawnshop, the liquidation of an insolvent insurance company is the public's business.

As a result, the insurance commissioner as liquidator does not merely stand in the shoes of the insurer but represents broader public interests. As liquidator, the insurance commissioner is acting within the scope of his official duties as a public official. He is charged with protecting not the insolvent insurance entity, but "the insured, claimants, creditors, and the public." *Id.* The insurance commissioner is thus not bound by an arbitration provision in a private insider agreement to which the commissioner is not a party.

But if there is any doubt, there is a second and equally powerful reason to affirm the district court. The legislature in Iowa Code section 507C.21(1)(*k*) provided the insurance commissioner with an extraordinary power, the power to "disavow contracts to which the insurer is a party." In other words, private ordering by third parties and the insurer is not binding on the insurance commissioner. In disavowing a contract, the insurance commissioner does not stand in the shoes of a private party who has no power to generally disavow contracts, but in the shoes of the public.

Importantly, the legislature chose to vest the insurance commissioner with this extraordinary power to disavow contracts entered into by the insurance company without qualification. *Id.* It could, of course, have limited that power to *executory* contracts, as it has repeatedly done in other contexts, but it chose not to do so. The broad power to "disavow contracts" is a manifestation of what before today has been universally recognized, namely, the strong public interest in all aspects of the insurance business.

Further, the legislature made clear that the provisions of the chapter "shall be liberally construed to effect the purpose" of the chapter, namely, "protection of the interests of the insureds, claimants, creditors, and the public." Iowa Code § 507C.1(3)-(4). Protection of the interests of "insureds, claimants, creditors, and the public" is exactly what the insurance commissioner seeks to do in this case as he seeks to hold accountable insiders who, allegedly, contributed to the demise of the entity.

But the majority ignores the legislative direction to narrowly construe the disavowal language to

protect the insider, Milliman, from public accountability. The majority drives resolution of the important issues in this case into the hand of a private arbitrator by affirmatively amending the statute by careting in a nonexistent qualifier to limit the insurance commissioner's power to disavow to "*executory* contracts." But such a limitation, of course, is totally absent from the statutory provision. Any such material narrowing of the broad powers of the insurance commissioner must await legislative action. In this populist age with abiding concerns about insider privileges, the prospects of such an insider-protecting amendment seem rather slim. This court has no business amending a statute that the political process has declined to correct.

In light of the unqualified power of the insurance commissioner to disavow contracts, the majority understandably resorts to another ground, namely, that the disavowal by the insurance commissioner, even if authorized by the plain language of Iowa Code section 507.21(1)(*k*), violates the Federal Arbitration Act (FAA). There is federal caselaw indicating that a state statute that *discriminates* against arbitration clauses violates the FAA. But, the broad and unqualified disavowal provision of Iowa Code section 507C.21(1)(*k*) does not discriminate against arbitration provisions in a way that contravenes even the extraordinarily muscular interpretations of the FAA by the United States Supreme Court.

And, federal law has affirmatively protected the ability of states to engage in the regulation of the business of insurance through enactment of the sweeping McCarran-Ferguson Act. Under the McCarran-Ferguson Act, "[n]o Act of Congress shall be construed to invalidate, impair or supersede any

law enacted by any State for the purpose of regulating the business of insurance. . . ." 15 U.S.C. § 1012(b) (Supp. IV 2017). McCarran-Ferguson has been interpreted to require "reverse preemption," namely that the reach of any act of Congress is preempted in the face of a state's regulation of the business of insurance.

A threshold question under McCarran-Ferguson is whether the liquidation of an insurance company by the insurance commissioner is "for the purpose of regulating the business of insurance." The Iowa legislature certainly thinks so. The legislature declared that proceedings in cases of insurance insolvency "are deemed an integral aspect of the business of insurance." Iowa Code § 507C.1(4)(*g*). That conclusion seems unassailable in light of the comprehensive scheme provided for the liquidation of insurance companies under Iowa Code chapter 507C. As a result, to the extent there is a conflict between Iowa Code section 507C.21(1)(*k*) and the FAA, it is the FAA, and not the Iowa statutory provision regulating the business of insurance, that would be unenforceable.

Further, for reasons that will be explained below, the sending of this important public litigation off to New York will substantially frustrate the ability of the Iowa insurance commissioner to implement the provisions of Iowa Code chapter 507C. As a result, the insider private agreement cannot be enforced through application of the FAA; instead, to the extent there is a conflict, the FAA is reversed preempted by the provisions of Iowa law.

For these reasons, the district court refused to dismiss the action brought by the insurance

commissioner and send the file off to a private arbitrator in New York City to apply New York state law. The district court got it right. For those not yet convinced, here are the details.

## I. Factual and Procedural Background.

**A. Overview of the Amended Petition.** The Iowa insurance commissioner brought an amended petition in Polk County district court against Milliman, Inc., two of its actuaries, and three individuals alleged to be the founders of a failed insurance company called CoOportunity Health, Inc. The more than fifty-page petition details the failure of CoOportunity and alleges a total of ten causes of action against the defendants. The insurance commissioner demanded a jury trial in the amended petition.

According to the petition, CoOportunity was one of twenty-three entities established throughout the United States under the Affordable Care Act. The entity was organized under Iowa law and headquartered in West Des Moines. CoOportunity opened for enrollment in October of 2013 and started covering health claims in January 2014.

CoOportunity was in business for only about a year. During that period of time, the insurance commissioner alleged that the business suffered catastrophic losses totaling $163 million dollars. The insurance commissioner ultimately obtained a liquidation order from the district court to deal with the insolvent entity.

Counts I through IV of the amended petition alleged that the Milliman defendants engaged in professional malpractice, breached fiduciary duties, made negligent misrepresentations, and engaged in

intentional and willful or reckless misrepresentations. Counts V through X of the amended petition alleged that the founders breached fiduciary duties as founders; aided and abetted the breach of fiduciary duty by the Milliman defendants; engaged in a conspiracy to commit Milliman's wrongful failure to meet the standard of care by ignoring the true financial condition of CoOportunity; were negligent and failed to act in the best interest of the insurer, policyholders and creditors; received preferential payments in the form of bonus and severance payments; and engaged in prepetition fraudulent transfers.

Under the majority's approach in this case, counts I through IV alleging breach of various duties by the Milliman defendants would be resolved in New York arbitration, while the Iowa insurance commissioner's claims that the founders aided and abetted Milliman's breach of duties and conspired with Milliman to commit various wrongs would be tried in Iowa district court.

**B. The Consulting Services Agreement.** During the organizational phase of CoOportunity, Milliman and the founders signed a "Consulting Services Agreement." Milliman was to provide actuarial and consulting services in connection with the business. The private insider agreement was signed by one of the founders and a representative of Milliman.

The private insider agreement limited the liability of Milliman under any theory of law, including negligence, tort, breach of contract, or otherwise, to three times the professional fee paid to Milliman. The limitation did not apply, however, to cases involving

intentional fraud or willful misconduct of Milliman. The private insider agreement declared that the arbitrators lacked the power to impose punitive or exemplary damages.

The private insider agreement also markedly limited the liability of the founders to Milliman. The founders were not liable for any of Milliman's fees "in the event that the health cooperative is dissolved and does not receive funds to become a going concern." The private agreement provided that any disputes would be resolved by a panel of three arbitrators pursuant to the commercial arbitration rules of the American Arbitration Association. Under the private agreement, the arbitrators have the authority "to permit limited discovery." The arbitrators have the power to shift costs and attorney fees to "the prevailing party." The arbitration "shall be confidential, except as required by law."

The consulting services agreement provided that the construction, interpretation, and enforcement of the agreement "shall be governed by the substantive contract law of the State of New York without regard to its conflict of laws provisions." As a result, under the terms of the private insider agreement, the arbitrators could apply New York state law even though the forum had no nexus whatsoever to the underlying facts and, under the conflicts law of the State of New York, the law of the State of Iowa would normally apply.

**C. District Court Ruling.** The Milliman defendants moved to dismiss the claims against them and sought an order compelling arbitration pursuant to the consulting services agreement. The district court denied the relief sought by Milliman.

According to the district court, the arbitration provision in the private insider agreement signed by Milliman and a representative of the founders did not bind the statutory liquidator. According to the district court, the insurance commissioner as liquidator did not merely stand in the shoes of CoOportunity but had a broad grant of authority to protect policyholders and creditors by bringing claims. Accordingly, the liquidator was not bound by the arbitration provision of the consulting services agreement.

The district court further noted that the liquidator had disavowed the consulting services agreement in its entirety as authorized by Iowa Code section 507C.21(l)(*k*). The district court rejected the argument of the Milliman defendants that the disavowal authority extended only to "executory contracts."

Finally, the district court found that the provisions of Iowa Code chapter 507C expressly involve "the business of insurance" and that the case falls within the meaning of the phrase in United States Supreme Court precedent. As a result, the district court declined to compel arbitration of the matter under the FAA because "the McCarran-Ferguson Act reverse preempts the FAA and . . . the rights and remedies in Iowa Code Chapter 507C prevail."

The Milliman defendants appealed.

**II. Because the Insurance Commissioner as Liquidator Is Acting on Behalf of the Public and Not a Receiver Simply Standing in the Shoes of the Insolvent Insurer, the Judgment of the District Court Should Be Affirmed.**

**A. Strong Public Interest in the Business of Insurance.** To begin with, it has long been

recognized that contracts of insurance do not simply involve the two parties directly involved, but also affect vital public interests. A leading insurance authority puts it this way: "Insurance is a highly regulated industry due to its well-recognized importance to the public interest." 1 Steven Plitt et al., *Couch on Insurance* § 2:1 (3d ed.), Westlaw (database updated Dec. 2019) (footnote omitted). As noted by the United States Supreme Court, "Government has always had a special relation to insurance." *Osborn v. Ozlin*, 310 U.S. 53, 65, 60 S. Ct. 758, 763 (1940). The Supreme Court later observed that a state's police power "extends to all the great public needs" and "is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation.'" *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109, 71 S. Ct. 601, 603 (1951) (first quoting *Noble State Bank v. Haskell*, 219 U.S. 104, 111, 31 S. Ct. 186, 188 (1911); and then quoting *Osborn*, 310 U.S. at 65, 60 S. Ct. at 763). *See generally* Karl L. Rubinstein, *The Legal Standing of an Insurance Insolvency Receiver: When the Shoe Doesn't Fit*, 10 Conn. Ins. L.J. 309, 314–15 (2004) [hereinafter Rubinstein, *Legal Standing*]. An insurance contract is not an arm's-length sale of a peppercorn where market forces may be left alone.

**B. Government Interest in Insurance Insolvency Beyond Narrow Interest of Insurer.** A small dose of historical perspective will demonstrate the public interest in the liquidation of insurance companies. Prior to 1898, insurance insolvencies were subject to federal bankruptcy proceedings and thus treated like any other business failure. The 1898 Bankruptcy Act removed insurance insolvencies from

bankruptcy proceedings, thereby recognizing that insurance was affected by the public interest, regulated by state regulators with specialized knowledge and expertise, and better handled by state insurance receivers than bankruptcy trustees. *See* Jeffrey E. Thomas & Susan Lyons, *The New Appleman on Insurance Law Library Edition* § 96.01[1], at 96-3 (2018).

State regulatory frameworks enacted after 1898 differ materially *from* those in ordinary bankruptcy proceedings.

> [B]ecause insurance is affected by a public purpose and enforced through the state's police powers, policyholders are treated more favorably than other unsecured creditors. Bankruptcy law distinguishes between secured and unsecured creditors and does not afford favorable treatment to policyholders.

*Id.* § 96.01[2], at 96-5 to 96-6.

In other words, the fact that an insurance company crosses into insolvency does not eliminate the public interest in the business of insurance. As noted by the United States Supreme Court, "[The] solvency [of insurers] are of great concern . . . [and the potential impact of insolvency] demonstrates the interest of the public in it." *German All. Ins. v. Lewis*, 233 U.S. 389, 413, 34 S. Ct. 612 (1914). According to Couch, "The state has an important and vital interest in the liquidation of an insolvent insurance company." 1 Steven Plitt et al., *Couch on Insurance* § 5:35. Indeed,

> [t]he solvency of insurers is . . . a matter of vital public concern both in regard to preventing insurer insolvencies and in regard to handling them when they do occur. . . . The injury to

> policyholders, third party claimants, general creditors, shareholders and the general public is very serious even in the smallest of cases.

Rubinstein, *Legal Standing*, 10 Conn. Ins. L.J. at 315. As stated by one observer, "State regulation of insurers is a 'cradle-to-grave process,' commencing with the licensing of an insurer and, in cases of business failure, terminating with receivership proceedings in state court and, in certain instances, dissolution." Philip A. O'Connell et al., *Insurance Insolvency: A Guide for the Perplexed*, 27 No. 14 Ins. Litig. Rep. 669 (2005).

Notably as in the allegations in this case,

> [i]nsurer insolvencies most frequently result from acts or omissions that either overstate its assets, understate its liabilities, or both. . . . Whether inept or intentional, the fault is often that of corporate management, but sometimes a substantial share of the fault is upon third parties who have acted in concert with management.

Rubinstein, *Legal Standing*, 10 Conn. Ins. L.J. at 315. It is in precisely the kind of case before the court here that the public interest in enforcement of tort law is very high.

**C. Protection of Public Interest in Iowa Code Chapter 507C.** Because of the intense public interest in the proper handling of insurance insolvency, the National Association of Insurance Commissioners first proposed the Uniform Insurer's Liquidation Act and later, the Insurers Rehabilitation and Liquidation Model Act. Rubinstein, *Legal Standing*, 10 Conn. Ins. L.J. at 317. Iowa has enacted a version of the Model Act in Iowa Code chapter 507C.

Under the Iowa version, only the insurance commissioner, or a designee of the insurance commissioner, can be appointed as liquidator. As liquidator, the insurance commissioner is acting in his official capacity as an officer of the state. Courts have emphasized that the insurance commissioner in the insolvency context acts for the benefit of the general public, as well as policyholders and creditors. *See, e.g.*, *20th Century Ins. v. Garamendi*, 878 P.2d 566, 580 (Cal. 1994) (en banc); *Mitchell v. Taylor*, 43 P.2d 803, 804 (Cal. 1935); Rubinstein, *Legal Standing*, 10 Conn. Ins. L.J. at 318. If the legislature did not see liquidation of an insurance company as infused with the public interest, it could have allowed the appointment of a private individual to wind down the affairs of the insurance company. But the legislature made a deliberate choice not to do that.

Iowa Code chapter 507C vests the insurance commissioner with sweeping powers in liquidation proceedings. Under Iowa Code section 507C.42(2), after costs and administration of expenses, claims of policy holders are given top priority in a liquidation. This special priority rule reflects the importance of protecting rights of the public over other claimants, particularly corporate insiders. Iowa Code section 507C.21(1)(*k*) authorizes the insurance commissioner to affirm or disavow contracts, a very powerful provision not available to a private party. The power to disavow contracts is a tool to allow the insurance commissioner to advance the public interests by the rejection of ill-advised contracts into which the insurer may have entered. Finally, Iowa Code section 507C.21(1)(*m*) authorizes the insurance commissioner to bring litigation "on behalf of creditors, members, policyholders, or shareholders" against any persons.

These strong provisions demonstrate that the insurance commissioner as liquidator works for the general public and not simply as a successor to the insolvent insurer. Certainly the legislature thinks so. For instance, Iowa Code section 507C.1(4) declares that the purpose of the liquidation chapter "is the protection of the interests of insured, claimants, creditors, and the public." The purposes are to be achieved, among other things, through "[e]quitable apportionment of any unavoidable loss." Iowa Code § 507C.1(4)(*d*). Of course, the insurance commissioner is seeking to equitably apportion the loss through prosecution of its action against Milliman. Further, the legislature had declared in Iowa Code section 507C.1(4)(*g*) that the purpose of the chapter is accomplished, in part, by

> [p]roviding 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.*

*Id.* (emphasis added). The proposition that the insurance commissioner acting as liquidator acts as a public officer, and not merely as a private representative, was well recognized in the California case of *Arthur Andersen LLP v. Superior Court*, 79 Cal. Rptr. 2d 879 (Ct. App. 1998). In *Arthur Andersen*, an insurance commissioner acting as liquidator sued the accounting firm of Arthur Andersen for negligence. *Id.* at 881. There, the court rejected the notion that the insurance commissioner was a mere

receiver of the insolvent insurer, emplacing that the insurance commissioner acting as a regulator "is not acting to protect the investment of the insurance company's owners, but instead to protect the policy-buying public." *Id.* at 882.

The Ohio Supreme Court took an approach similar to *Arthur Andersen* in *Taylor v. Ernst & Young, L.L.P.*, 958 N.E.2d 1203 (Ohio 2011). The *Taylor* court rejected the narrow argument that the insurer's liquidator simply stood in the shoes of the insurer, noting that the liquidator sought to protect "the rights of insureds, policyholders, creditors, and the pubic generally." *Id.* at 1213 (*quoting Fabe v. Prompt Fin., Inc.*, 631 N.E.2d 614, 620 (Ohio 1994)).

As in *Andersen* and *Taylor*, the Iowa insurance commissioner does *not* simply stand in the shoes of the insurer, but has been charged by the legislature to protect broader public interests.

**D. Impact of Public Interest of Insurance Commissioner on Enforceability of Arbitration Clause**.

1. *Introduction.* The fighting issue in this case is whether a privately agreed upon arbitration clause between the founder and Milliman is binding on the insurance commissioner as liquidator. It is clear, of course, that the insurance commissioner is not a signatory to the arbitration agreement. A nonsignatory may be bound by an arbitration agreement, but only if traditional principles of state law allow the contract to be so enforced. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902 (2009). If the insurance commissioner was a mere representative of the insurer, however, he

might be seen as simply "stepping into the shoes" of the insurer.

2. *More than in the shoes of the insolvent insurer.* But as seen above, the insurance commissioner is not merely "stepping into the shoes" as a mere receiver. The insurance commissioner is also acting as a regulator. As was noted decades ago, the liquidator

> not only represents the insolvent insurance company, but he also represents its policyholders, the beneficiaries under the policies, the creditors, and is the representative of the public interest in the enforcement of the insurance laws as applicable to the policies of an insolvent insurance company.

*English Freight Co. v.* Knox, 180 S.W.2d 633, 640 (Tex. Civ. App. 1944).

More recently, in *Arthur Andersen* the court observed,

> Nor can AA's argument that the Insurance Commissioner acts only as an ordinary receiver exonerate AA from liability for negligent misrepresentations in an audit report. When carrying out his statutory regulatory duty of monitoring the claims-paying ability of an insurer, *the Insurance Commissioner is not acting to protect the investment of the insurance company's owners, but instead to protect the policy-buying public*. The Insurance Commissioner hence represents *far broader interests than those typically represented by an ordinary receiver*, whose potential claims are limited to those of the company in receivership.

*Arthur Andersen*, 79 Cal. Rptr. 2d at 882 (emphasis added).

A similar observation was made in an Ohio court, which found that

> [t]o permit the officers and directors of a regulated industry to attempt to defeat the liquidation statutes by privately contracting to resolve allegations of corporate mismanagement in a private forum of their own choosing is contrary to the purposes of the liquidation act and prejudicial to the rights of policyholders and creditors who have been harmed by the insolvency of the corporations.

*Covington v. Lucia*, 784 N.E.2d 186, 191-92 (Ohio Ct. App. 2003).

The Ohio Supreme Court came to the same conclusion in *Taylor*, 958 N.E.2d 1203. After determining that the liquidator of an insurance company did not merely stand in the shoes of the insurer, the *Taylor* court declared that the case presented "a garden-variety attempt to enforce an arbitration clause against a nonsignatory." *Id.* at 1213. *Andersen*, *Covington*, and *Taylor* stand for the proposition that an arbitration provision agreed upon by an insurer is not binding on the insurance commissioner acting as liquidator under insurance liquidation statutes in light of his distinctive public responsibilities as the liquidator.

3. *No presumption of arbitrability.* Milliman suggests that under the FAA, there is a strong presumption that matters that relate to the underlying contract are subject to arbitration. That is true enough. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419 (1986). But this presumption does not arise until it has been shown that there is an underlying agreement to

arbitrate. *Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (3d Cir. 2014). In determining whether there is, in fact, an underlying agreement to arbitrate, the presumption is *against* arbitration. *Taylor*, 958 N.E.2d at 1213.

Further support for this proposition that an arbitration clause may not be enforced against a nonsignatory liquidator with public responsibilities may be found in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002). In this disability discrimination case, the EEOC brought an action seeking victim-specific relief. *Id.* at 283-84, 122 S. Ct. at 758-59. The victim, however, had signed a contract agreeing to arbitrate employment claims. *Id.* at 282, 122 S. Ct. at 758. The question in *Waffle House* was whether the EEOC was subject to the arbitration provision signed by the victim. *Id.*

The Supreme Court held that the EEOC was not subject to the arbitration provision between the victim and the employer. *Id.* at 289, 122 S. Ct. at 762. The *Waffle House* Court emphasized that the EEOC was empowered by statute to bring claims that sought victim-specific relief and that the EEOC was master of any such claim. *Id.* at 289-91, 122 S. Ct. at 762-63. In bringing such claims, the *Waffle House* Court noted that "the agency may be seeking to vindicate a public interest . . . even when it pursues entirely victim-specific relief." *Id.* at 296, 122 S. Ct. at 765. Where the public agency has authority to bring a claim and does so in the public interest, even when the relief sought is specific to a victim who signed an arbitration agreement, the public interest prevails and the arbitration agreement is not enforceable.

We adopted the *Waffle House* approach in *Rent-A-Center, Inc. v. Iowa Civil Rights Commission*, 843 N.W.2d 727, 732-33, 735-36 (Iowa 2014). In *Rent-A-Center*, we declared that "[t]he 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." *Id.* at 736.

**III. In Any Event, the Insurance Commissioner Validly Exercised His Unqualified Legislative Power to Disavow in Total the Insider Contract Between the Founders and Milliman.**

**A. Legislative Vesting in Insurance Commissioner of Unqualified Power to Disavow Contracts.** The Iowa version of the Insurers' Rehabilitation and Liquidation Model Act vests the insurance commissioner as liquidator with very broad powers. One of the broad powers vested in the commissioner is Iowa Code section 507C.21(l)(*k*) that provides that the insurance commissioner as liquidator may "affirm or disavow contracts to which the insured is a party." In this case, the insurance commissioner has disavowed the contract between the Founders and Milliman that, among other things, limited any liability Milliman might have to three times its fee for services.

The legislature's vesting in the insurance commissioner the power to disavow contracts is unqualified. Further, Iowa Code section 507C.1 provides that the act "shall be liberally construed to effect the purpose" which is "the protection of interests of the insureds, claimants, creditors, and the public." Combining these provisions means that if there is an

insider contract that stands in the way of vindicating the interests of the insureds, claimants, creditors, and the public, the insurance commissioner may disavow the contract.

The insurance commissioner has reasonably concluded that the disavowal of the contract between the insurer and Milliman is in the public interest. The contract between the founders and Milliman was an inside deal that dramatically limited Milliman's liability for consequential damages. The insurance commissioner reasonably decided that disavowal of the contract, thereby eliminating application of any cap on damages, and pursuit of residual common law claims was in the best interest of the public.

**B. No Limitation to Executory Contracts.** Milliman suggests that the power to disavow contracts is limited to executory contracts. Other state courts construing a similar disavowal power have not limited them to executory contracts. For instance, in *Covington*, the insurance commissioner alleged that corporate insiders engaged in various torts, including breach of fiduciary duty, negligence, fraudulent transfers, and corporate mismanagement. 784 N.E.2d at 187. But the potential defendants had severance agreements which limited their liability. *Id.* The insurance commissioner disavowed the severance contracts, while the insiders argued that they were entitled to have the dispute resolved in arbitration as required by the severance agreement. *Id.*

The *Covington* court held that the insurance commissioner had the power to disavow the severance agreements. *Id.* at 192. The *Covington* court noted that, as here, the insurance commissioner was not

seeking to enforce any rights under the contract, but was pressing contract claims. *Id.* Further, the *Covington* court observed,

> To permit [the officer] to have his action decided privately . . . when the liquidator has disavowed the contract is contrary to the interests of insureds, 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. The *Covington* court further emphasized,

> To permit the officers and directors of a regulated industry to attempt to defeat the liquidation statutes by privately contracting to resolve allegations of corporate mismanagement in a private forum of their own choosing is contrary to the purposes of the liquidation act and prejudicial to the rights of policyholders and creditors who have been harmed by the insolvency of the corporations.

*Id.* at 191-92.

A few months after *Covington*, the same Ohio court decided *Benjamin v. Pipoly*, 800 N.E.2d 50 (Ohio Ct. App. 2003). The *Benjamin* court emphasized that the disavowal provision in Ohio law needed to be liberally interpreted to advance the purpose of the statute. *Id.* at 57. The *Benjamin* court noted that "[t]he liquidator must have freedom of action to do those acts most beneficial in achieving her objectives," and is not "automatically bound by . . . pre-appointment contractual obligations." *Id.* at 58-59.

The Nebraska Supreme Court considered the question in *State ex rel. Wagner v. Kay*, 722 N.W.2d 348 (Neb. Ct. App. 2006). Like *Covington* and

*Benjamin*, *Wagner* held that the insurance commissioner as liquidator could disavow severance agreements of former officers and directors. *Id.* at 357-58.

Aside from the well-reasoned caselaw, it is clear that the Iowa legislature must have been aware of the difference between the term "contract" and "executory contract." On four occasions, the legislature has used the term "*executory* contract" when it wanted to qualify a legislatively granted power. *See, e.g.*, Iowa Code § 428A.2 (making an exception to property taxes for "[a]ny executory contract for the sale of land"); *id.* § 524.103 (defining "agreement for the payment of money" to include "accounts receivable and executory contracts"); *id.* § 554.13208 (determining rules for waiver "affecting an executory portion of a lease contract); *id.* § 554.13505 (allowing cancellation of lease obligations that "are still executory on both sides"). The legislature, however, did not use the term "executory" when it enacted Iowa Code section 507C.21(l)(*k*). Further, the legislature may be presumed to have been aware of the longstanding provision of the Federal Bankruptcy Code that expressly limits a trustee's power to "executory" contracts. 11 U.S.C. § 744. There is simply no such provision in Iowa law. Our charge is to apply the law as we find it.

Milliman cites *Maxwell v. Missouri Valley Ice & Cold Storage Co.*, 181 Iowa 108, 164 N.W. 329 (1917), and *State v. Associated Packing Co.*, 195 Iowa 1318, 192 N.W. 267 (1923), as supporting the position that the insurance commissioner's power to disavow contracts extends only to executory contracts. These older cases predate the Act, have nothing to do with insurance, and do not involve the insurance

commissioner exercising unqualified powers of disavowal in the public interest pursuant to statutory authority. Rather, these are simply older cases involving ordinary receivers in less regulated businesses. As a result, nothing in these pre-Act, noninsurance cases suggest that the Iowa insurance commissioner's later, unqualified, legislatively established power to disavow contracts should be limited to executory contracts. Indeed, the language of these cases prior to the enactment of the Act indicate that the legislature knew exactly what it was doing when it declined to limit the disavowal authority in Iowa Code section 507C.21(1)(*k*).

Milliman also cites anti-cherry-picking cases where courts have prohibited insurance liquidators from attempting to disavow certain provisions of contracts while enforcing other provisions. For example, in *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit held that because the liquidator was attempting to enforce contractual rights of the insurer, she was bound by the preinsolvency agreements. *Id.* at 972. Similarly, in *Costle v. Fremont Indemnity Co.*, 839 F. Supp. 265 (D. Vt. 1993), the district court refused to allow a liquidator to enforce an insolvent insurance company's rights under an agreement and at the same time escape the arbitration provision of that agreement. *Id.* at 272.

Here, however, the insurance commissioner is not cherry-picking the contract *between* Milliman and the founders. It has disavowed the entire agreement. All claims brought by the insurance commissioner in this proceeding sound in tort, not contract. As a result,

cases like *Bennett* and *Costle* are not applicable under the facts presented here.

**C. Power to Disavow Not Preempted by Federal Arbitration Act**.

1. *Generally applicable state law not preempted by FAA.*[5] Milliman further asserts that the power of the insurance commissioner to disavow contracts is preempted in light of the extraordinarily muscular interpretation of the FAA in recent cases of the United States Supreme Court.[6] But state law that is generally applicable and does not discriminate against arbitration provisions does not offend the FAA. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87, 116 S. Ct. 1652, 1656 (1996).

The disavowal provisions of Iowa Code section 507C.21(1)(*k*) do not discriminate against arbitration provisions. Iowa Code section 507C.21(1)(*k*) applies to all contracts, empowering the insurance commissioner to disavow contracts that it believes impair the public interest in a state liquidation proceeding. There is simply nothing in Iowa Code

---

[5] The district court did not rule upon the question of whether the exercise of disavowal authority by the insurance commissioner under Iowa Code section 507C.21(1)(*k*) discriminates against arbitration clauses and is thus invalid under the FAA. The Milliman defendants did not file an Iowa Rule of Civil Procedure 1.904(2) motion. As a result, the issue has been waived. Nonetheless, in the alternative, I briefly address the merits of the issue here.

[6] *See, e.g.*, Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Act Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 127-31 (2006); Davis S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration A Act*, 67 Law & Contemp. Probs. 5, 23-26 (2004).

section 507C.21(1)(*k*) that "single[s] out arbitration provisions for suspect status." *Id.* at 687, 116 S. Ct. at 1656. As a result, the general disavowal provision is within the scope of the savings clause of the FAA which does not preempt state law that prevents arbitration "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

2. *Reverse preemption under McCarran-Ferguson Act.* In any event, even if there is a conflict between the broad and liberally construed powers of the insurance commissioner to disavow contracts and the FAA in this case, preemption of federal, and not state law, results. That is because of reverse preemption under the McCarran-Ferguson Act. A brief review of background history will illuminate the nature of reverse preemption under McCarran-Ferguson.

Historically, the regulation of insurance has been a matter of state concern. In *Paul v. Virginia*, 75 U.S. 168, 185 (1868), the United States Supreme Court held that Congress lacked the power under the Commerce Clause to regulate insurance, thus leaving the field to state regulators. In *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S. Ct. 1162, 1164, 1178 (1944), the Supreme Court reversed its position and held that a contract of insurance between an insurer and a policyholder in different states constitutes interstate commerce and was thus subject to federal antitrust laws. *See* Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry*, 43 Cath. U. L. Rev. 399, 401 (1994).

After *South-Eastern Underwriters*, the Congress quickly endorsed the historical role of state regulators by enacting the McCarran-Ferguson Act. Under

McCarran-Ferguson, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating insurance . . . unless such [Federal] Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

In *Humana Inc. v. Forsyth*, 525 U.S. 299, 307, 119 S. Ct. 710, 716 (1999), the United States Supreme Court established a three-part test to determine when reverse preemption of federal law occurs under McCarran-Ferguson. Reverse preemption occurs if (1) the state statute was enacted for the purpose of regulating the business of insurance; (2) the federal statute involved does not specifically relate to the business of insurance; and (3) the application of the federal statute would "invalidate, impair, or supersede" the state statute regulating insurance. *Id.*

In analyzing the first prong, Congress did not provide any guidance on the meaning of the phrase "regulating the business of insurance." In *United States Department of Treasury v. Fabe*, 508 U.S. 491, 508, 113 S. Ct. 2202, 2211–12 (1993), however, the United States Supreme Court declared that the provisions of McCarran-Ferguson protecting state regulation of insurance were not to be narrowly construed.

The Iowa legislature certainly believes that the first prong of the *Forsyth* test has been satisfied. Through adoption of the applicability provisions in Iowa Code section 507C.1(4)(*f*)-(*g*), the legislature has declared that the provisions of Iowa Code chapter 507C were enacted "for the purpose of regulating the business of insurance," as quoted in 15 U.S.C. § 1012(b).

Such express declarations of the Iowa legislature do not bind this court. We have the power, in interpreting statutes, to tell the legislature that the unambiguous declaration that the liquidation statute is "for the purpose of regulating the business of insurance" is wrong and must be ignored in this case.

But the better reasoned judicial authority agrees with the legislature's declaration that the provisions of Iowa Code chapter 507C regulate the business of insurance. For instance, in *Fabe v. United States Department of Treasury*, 939 F.2d 341 (6th Cir. 1991), *aff'd in part, rev'd in part*, 508 U.S. 491, the Sixth Circuit held that Ohio's liquidation statute amounted to "a regulation of the 'business of insurance' within the meaning of the McCarran-Ferguson Act and thus subject solely to the provisions of state law absent explicitly conflicting legislation." *Id.* at 343.

Strikingly, the majority cites *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372 (9th Cir. 1997), for the proposition that this case should be sent to arbitration. In actuality, *Quackenbush* unequivocally supports my position. *Quackenbush* declares that

> [u]nder *Fabe*, there is no question that California's insurer-insolvency provisions regulate the "business of insurance" and are saved from preemption by the McCarran–Ferguson Act. Thus, Allstate could not invoke the FAA to compel arbitration of its claims against Mission, which must be pursued through California's statutory insolvency scheme.

*Id.* at 1381.

Exactly on point! As it turns out, however, the claim in *Quackenbush* was not brought under the

state's statutory insurance insolvency scheme, but was brought outside the statutory context. *Id.* at 1381. As a result, the McCarran–Ferguson Act did not apply. *Id.* at 1381-82. Here, however, it is undisputed that the insurance commissioner's claim is brought under the Iowa statutory insurance insolvency scheme.

Other cases follow *Quackenbush*. Following the Sixth and Ninth Circuits, the Tenth Circuit held in *Davister Corp. v. United Republic Life Insurance*, 152 F.3d 1277, 1281 (10th Cir. 1998), that the FAA was reverse preempted by a state liquidation regime designed to protect the interests of policyholders. Similarly, in *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986), the federal district court held that law related to liquidation of insurance companies was a state law regulating insurance and that the FAA had to yield to its provisions.

The second prong of the *Forsyth* test has been met in this case. The FAA is not a statute specifically related to the business of insurance.

That leaves the third prong of the *Forsyth* test.[7] Sending the case against the Milliman defendants to a private arbitration in New York plainly interferes with Iowa Code chapter 507C. Iowa Code section 507C.1(4)(*g*) declares that one of the purposes of chapter 507C is to "enhance[] efficiency and economy of liquidation" and to provide "a comprehensive scheme" for the liquidation of insurance companies. Iowa Code § 507C.1(4)(*c*), (*g*). If Milliman succeeds

---

[7] While the district court addressed the first prong of the *Forsyth* test, it did not address the second and third prongs. Again, as the Milliman defendants did not file a motion to expand the findings of the district court, the issue has been waived.

divesting the Polk County district court of jurisdiction of the insurance commissioner's claims against Milliman, the interconnected causes of action in the litigation will be split into two forums. Claims against Milliman will be decided in New York, but claims involving the founders, including the claim that they aided and abetted and conspired with Milliman, will remain in Polk County district court. Such slicing and dicing of the litigation would neither be efficient nor comprehensive, as such piecemeal litigation and the possibility of inconsistent verdicts plainly impairs the ability of the insurance commissioner to fulfill the statutory purposes of Iowa Code chapter 507C. *See* Iowa Code § 507C.1(4)(*c*) (stating the purpose of the statute is to protect "the interests of insureds, claimants, creditors, and the public" through "[e]nhanced efficiency and economy of liquidation"); *id.* § 507C.1(4)(*g*) (stating the purpose of the statute is promoted through a comprehensive scheme of liquidation); *see also Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 691 (Ky. 2010).

Further, sending the fundamental public policy issues involved in the litigation to a confidential arbitration proceeding in New York where New York law is to be applied obviously impairs the ability of the insurance commissioner to enforce Iowa law. The question of whether the insurance commissioner may disavow the consulting services agreement, thereby avoiding the draconian limitation of consequential damages and the exclusion of punitive damages, should not be decided by private arbitrators with limited rights of appeal. *See Benjamin*, 800 N.E.2d at 61; *Covington*, 784 N.E.2d at 191. Further, the broad power of the insurance commissioner to subpoena witnesses and compel production of documents under

Iowa Code section 507C.21(1)(*e*) would now be subject to the discretion of a panel of arbitrators.

Finally, proceedings pursuant to liquidation of an insurance company are "of vital public interest and concern." Iowa Code § 507C.1(4)(*g*). To have the proceedings in this case conducted confidentially in New York is plainly inconsistent with the public's interest in the regulation of insurance and the purposes of Iowa Code chapter 507C.

The practical consequences of the approach of the majority is stunning. The dispute between the insurance commissioner and Milliman will be sent to a panel of arbitrators in New York. The disavowed contract calls for the dispute to be governed not by the laws of Iowa, but the laws of New York. It may not matter, however, as the private arbitrators will not be bound to apply the law. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407, 87 S. Ct. 1801, 1808 (1967) (Black, J., dissenting) (noting arbitrators are not bound to apply the law). Further, the parties will not be entitled to wide discovery as ordinarily afforded by the Iowa rules of civil procedure, but will instead engage is such discovery as allowed by the grace of the private arbitrators in the exercise of unreviewable discretion. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 Neb. L. Rev. 397, 489 (1998) (observing that discovery in arbitration is limited). The process will also be confidential, contrary to the public interest. *See Benjamin*, 800 N.E.2d at 61; *Covington*, 784 N.E.2d at 191. The ultimate decision of the private arbitrators, based on whatever law the arbitrator chooses and after whatever discovery is tolerated, will be subject

to judicial review only on the narrowest of grounds. *See* 9 U.S.C. § 10.

In the arbitration, there will be a question of whether the damages limitation provision of the insider contract may be enforced in light of the effort of the insurance commissioner to disavow the contract. *That* protean issue, heavy with public policy implications and dramatically affecting the remedy that might be available, will, apparently be decided by private arbitrators in New York, not the Iowa courts. The arbitrators may well decide that the provision of the agreement prohibiting punitive damages in most instances may well be enforceable. And factual issues related to the liquidators theory of liability and proven damages will not be not be decided by an Iowa jury, but by three arbitrators not subject to voir dire and who do not receive instructions on the law.

All this is flatly contrary to the traditional historic commitment of the State of Iowa to regulating the insolvency of insurance companies and the statutory acquiesce of Congress in the broad exercise of that authority unfettered by federal meddling through bankruptcy proceedings or the FAA. It represents the privatization of public law at its starbursting zenith or, more accurately perhaps, at its unilluminated nadir. And it demonstrates how the FAA has been ripped from its very modest historical moorings[8] and recruited as a grotesque gargoyle-like accomplice in the privatization of public law.

[8] For a detailed explanation of how the FAA has been transformed from a modest rule into a protean nemesis of public law, see my dissent in *Karon*. *See Karon v. Elliott Aviation*, 937 N.W.2d 334, 348 (Iowa 2020) (Appel, J., dissenting).

Further, the access to justice issues are obvious. The insurance commissioner, a public official charged with representing the public interest, seeks to chase after potential wrongdoers who have allegedly, through their torts, caused untold damage on members of the Iowa public. The catastrophic failure of the health insurance entity left countless Iowans to scramble. The interests of Iowa healthcare providers who relied upon CoOportunity for timely payment were no doubt threatened. The case demands a thorough airing and public accountability. Yet, according to the majority, the dispute will be handled confidentially in some office in New York applying New York law pursuant to the cramped remedies provided by the private insider contract.

Of course, at this stage, the pleadings of the insurance commissioner are only allegations. But the insurance commissioner, on behalf of the public, is lawfully entitled to attempt to make the case against the Milliman defendants in a public courtroom in Iowa where Iowa law applies; where Iowa courts make the necessary legal determinations; and where any factual disputes, including the amount of damages, if any, will be resolved by a fair and impartial Iowa jury.

The liquidation of this insolvent entity by the insurance commissioner is a regulatory action, not a private garage sale.

**IV. Conclusion.**

The insurance commissioner acting as liquidator does not simply stand in the shoes of the insured in this case but is a state official representing the interests of policyholders, creditors, and the public. As a result, the insurance commissioner as a nonsignatory is not subject to an arbitration provision

in an insider contract between the founders and Milliman. Further, the insurance commissioner has lawfully disavowed the contract pursuant to the Iowa legislature's unqualified grant of authority, Iowa Code section 507C.21(1)(*k*). Nothing in the FAA precludes the insurance commissioner from exercising his discretion to disavow an insider contract that contains an arbitration provision when he determines under a general disavowal statute that to do so is in the public interest. In any event, the McCarran-Ferguson Act prevents the application of federal law to state regulation of the business of insurance. As a result, the ruling of the district court refusing to dismiss the insurance commissioner's action should be affirmed.

## APPENDIX B

## IN THE IOWA DISTRICT COURT FOR POLK COUNTY

| | |
|---|---|
| DOUG OMMEN, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>MILLIMAN, INC., et al.,<br><br>Defendants. | Case No. LACL 138070<br><br>**ORDER DENYING MILLIMAN, INC., ET AL.'S MOTION TO DISMISS AND COMPEL ARBITRATION** |

Under authority provided by the Insurers Supervision, Rehabilitation, and Liquidation Act, Iowa Code chapter 507C (2017) (the Act)[1], Plaintiffs Doug Ommen, et al. (the Liquidators) filed a Petition on June 5, 2017, against Defendants Milliman, Inc., et al. (Milliman) alleging claims arising from the fall of failed insurance company CoOportunity Health, Inc. (CoOportunity). Before the court is Milliman's Motion to Dismiss and Compel Arbitration (the Motion), resisted by the Liquidators.

Hearing on the Motion and Resistance was held on Friday, December 8, 2017. Representing Milliman

[1] All references are to the 2017 Iowa Code unless otherwise indicated.

was attorney Steven Eckley. Representing the Liquidators was attorney Kirsten Byrd.

The court, having considered Milliman's Motion to Dismiss and Compel Arbitration, the Liquidators' Resistance, Milliman's Reply, the Liquidators' Supplemental Brief and Milliman's Supplemental Authority, and having heard oral argument by the parties on December 8, 2017, denies Milliman's Motion to Dismiss and Compel Arbitration for the following reasons:

## OVERVIEW OF THE LIQUIDATORS' CLAIMS

Plaintiffs are the statutory liquidators of CoOportunity. Plaintiffs brought this lawsuit as part of their statutory mandate to preserve and collect the assets of the company and to protect the interests of policyholders, creditors, and the public. The Liquidators' First Amended Petition asserts claims against Milliman for (1) malpractice, (2) breach of fiduciary duty, (3) negligent misrepresentation, (4) intentional misrepresentation, (5) aiding and abetting breach of fiduciary duty, and (6) conspiracy. The First Amended Petition also asserts related tort and other claims against the company's founders/directors/officers.

The Liquidators' claims against Milliman focus on Milliman's alleged malpractice and statements to CoOportunity and regulators regarding the viability of the company. The Liquidators allege these statements were inaccurate, incomplete, and misleading. As permitted by Iowa Code section 507C.21, the Liquidators assert their claims on behalf of the company, policyholders, creditors, and other impacted parties because the Liquidators allege they were damaged by the insolvency. The Liquidators

confirm any recovery in the action will inure to the general benefit of all policyholders and creditors. See Iowa Code §§ 507C.21(1)(*m*) and 507C.18.

## MILLIMAN'S MOTION TO DISMISS AND COMPEL ARBITRATION

Milliman[2] asks the court to compel the Liquidators to pursue their claims against Milliman in a confidential arbitration proceeding, based upon a Consulting Services Agreement (the Agreement) signed by a CoOportunity founder in 2011 before the company was formed.

The Agreement purports to require a confidential arbitration and application of New York law. It attempts to limit any malpractice recovery to three times fees paid, and to insulate Milliman from punitive damages, lost profits, and consequential damages. The Liquidators allege Milliman offered the founders a personal incentive to enter into the Agreement by agreeing Milliman would not seek to collect against the founders personally if the federal government did not approve the funding application for CoOportunity. The Liquidators allege the Agreement is evidence of a tainted relationship, lack of independence, conflict of interest, and motive.

## ANALYSIS

It is undisputed 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." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 646 (1986)

---

[2] "Milliman" refers to Defendants Milliman, Inc., Kimberley Hiemenz, and Michael Sturm.

(citation omitted); *Wells Enters., Inc. v. Olympic Ice Cream*, 903 F. Supp. 2d 740, 746 (N.D. Iowa 2012) ("[A] party who has not agreed to arbitrate a dispute cannot be forced to do so."). The enforceability of an agreement to arbitrate "flows from the consent of the parties to the agreement." *Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727, 732-33 (Iowa 2014) (citation omitted); see also *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Arbitration under the [Federal Arbitration Act] is a matter of consent, not coercion. . . . It goes without saying that a contract cannot bind a nonparty."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

State law governs the question of whether there is a binding agreement to arbitrate. *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 946 (8th Cir. 2001) (citations omitted). There may be a presumption in favor of arbitration in certain circumstances. This presumption does not apply where, as in this case, a non-party to the agreement disputes the agreement is binding and enforceable against the non-party. *See e.g., Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1304-05 (10th Cir. 2017); *White v. Sunoco, Inc.*, No. 16-2808, 2017 WL 38641616, at *3 (3d Cir. Sept. 5, 2017); *Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (3d Cir. 2014); *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203, 1210 (Ohio 2011). 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).

Milliman claims that the Liquidators are bound as successors. 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 section 507C.21(1)(*m*) to bring claims on behalf of policyholders and creditors, as well as on behalf of CoOportunity.[3] Other courts confronting this issue have held that the liquidator is not a mere successor and is not bound by the defunct insurer's arbitration agreement. *See e.g., Taylor*, 958 N.E.2d at 1211.

The Liquidators do not seek to enforce or recover under the Agreement. Their claims do not arise from or relate to 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.

In addition, the Liquidators have disavowed the Agreement in its entirety, as authorized under Iowa Code section 507C.21(1)(*k*).[4] The Liquidators'

[3] Iowa Code section 507C.21(1)(*m*) permits the liquidator to "[p]rosecute an action on behalf of the creditors, members, policyholders, or shareholders of the insurer against an officer of the insurer, or any other person."

[4] Iowa Code section 5o7C.21(1)(k) permits the liquidator to "enter into contracts as necessary to carry out the order to

disavowal is an independent alternative ground upon which the court refuses to compel arbitration as provided for in section 2 of the Federal Arbitration Act (the FAA). 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.

Further, the language of the Act confirms that the Legislature enacted this comprehensive statute to protect the interests of CoOportunity's policyholders. The Act requires the Liquidators' claims be resolved in a public forum of the Liquidators' choosing, subject to the rules and procedures established by the Legislature. Forcing 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. 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

---

liquidate and affirm or disavow contracts to which the insurer is a party."

will not supply that which is within the authority of the Legislature to provide.[5]

Finally, the Act expressly involves the "business of insurance."[6] It falls within the meaning of that phrase in accordance with the United States Supreme Court's opinion in *United States Department of Treasury v. Fabe*, 508 U.S. 491, 500-09 (1993). 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 way to the rights and remedies prescribed in the Act. *See* 15 U.S.C. § 1012(b).

**CONCLUSION**

For all of the reasons stated above, the court finds and concludes that the Liquidators have exercised

---

[5] 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.

[6] The plain language of Iowa Code section 507C.1(4)(g) confirms this:

> The purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public ... through all of the following:
>
> . . . .
>
> *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)(9).

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.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Defendant Milliman, Inc., et al.'s Motion to Dismiss and Compel Arbitration is **DENIED**.

Costs are assessed to Defendant Milliman, Inc., et al.

## APPENDIX C

1. 9 U.S.C. § 2 provides:

### § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 15 U.S.C. § 1012(b) provides:

### § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

#### (b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of

September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

3. Iowa Code Ann. § 507C.1 provides:

**507C.1 Short title — construction — purpose**

1. This chapter shall be cited as the "Insurers Supervision, Rehabilitation, and Liquidation Act".

2. This chapter shall not be interpreted to limit the powers granted the commissioner by any other law.

3. This chapter shall be liberally construed to effect the purpose stated in subsection 4.

4. The purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public, with minimum interference with the normal prerogatives of the owners and managers of insurers, through all of the following:

*a.* Early detection of a potentially dangerous condition in an insurer and prompt application of appropriate corrective measures.

*b.* Improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry.

*c.* Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation.

*d.* Equitable apportionment of any unavoidable loss.

*e.* Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extending the scope of personal jurisdiction over debtors of the insurer outside this state.

*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.

4. Iowa Code Ann. § 507C.21 provides:

**507C.21. Powers of liquidator**

1. The liquidator may:

*a.* Appoint a special deputy to act for the liquidator under this chapter, and determine the special deputy's reasonable compensation. The special deputy shall have all powers of the liquidator granted by this section. The special deputy shall serve at the pleasure of the liquidator.

*b.* Hire employees and agents, legal counsel, actuaries, accountants, appraisers, consultants, and other personnel as the commissioner may deem necessary to assist in the liquidation.

*c.* With the approval of the court fix the reasonable compensation of employees and agents, legal counsel, actuaries, accountants, appraisers and consultants.

*d.* Pay reasonable compensation to persons appointed and defray from the funds or assets of the insurer all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of the insurer. If the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the commissioner may advance the costs so incurred out of an appropriation for the maintenance of the division. Amounts so advanced for expenses of administration shall be repaid to the commissioner for the use of the division out of the first available moneys of the insurer.

*e.* Hold hearings, subpoena witnesses, and compel their attendance, administer oaths, examine a person under oath, and compel a person to subscribe to the person's testimony after it has been correctly reduced to writing, and in connection to the proceedings require the production of books, papers, records or other documents which the liquidator deems relevant to the inquiry.

*f.* Collect debts and moneys due and claims belonging to the insurer, wherever located. Pursuant to this paragraph, the liquidator may:

(1) Institute timely action in other jurisdictions to forestall garnishment and attachment proceedings against debts.

(2) Perform acts as are necessary or expedient to collect, conserve or protect its assets or property, including the power to sell, compound, compromise or

assign debts for purposes of collection upon terms and conditions as the liquidator deems best.

(3) Pursue any creditor's remedies available to enforce claims.

*g.* Conduct public and private sales of the property of the insurer.

*h.* Use assets of the estate of an insurer under a liquidation order to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under section 507C.42.

*i.* Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with property of the insurer at its market value or upon terms and conditions as are fair and reasonable. The liquidator shall also have power to execute, acknowledge, and deliver deeds, assignments, releases and other instruments necessary to effectuate a sale of property or other transaction in connection with the liquidation.

*j.* Borrow money on the security of the insurer's assets or without security and execute and deliver documents necessary to that transaction for the purpose of facilitating the liquidation. Money borrowed pursuant to this paragraph shall be repaid as an administrative expense and have priority over any other class 1 claims under the priority of distribution established in section 507C.42.

*k.* Enter into contracts as necessary to carry out the order to liquidate and affirm or disavow contracts to which the insurer is a party.

*l.* Continue to prosecute and to institute in the name of the insurer or in the liquidator's own name any and all suits and other legal proceedings, in this

state or elsewhere, and to abandon the prosecution of claims the liquidator deems unprofitable to pursue further. If the insurer is dissolved under section 507C.20, the liquidator may apply to any court in this state or elsewhere for leave to substitute the liquidator for the insurer as plaintiff.

*m*. Prosecute an action on behalf of the creditors, members, policyholders or shareholders of the insurer against an officer of the insurer, or any other person.

*n*. Remove records and property of the insurer to the offices of the commissioner or to other place as may be convenient for the purposes of efficient and orderly execution of the liquidation. A guaranty association or foreign guaranty association shall have reasonable access to the records of the insurer as necessary to carry out the guaranty's statutory obligations.

*o*. Deposit in one or more banks in this state sums as are required for meeting current administration expenses and dividend distributions.

*p*. Unless the court orders otherwise, invest funds not currently needed.

*q*. File necessary documents for record in the office of a recorder of deeds or record office in this state or elsewhere where property of the insurer is located.

*r*. Assert defenses available to the insurer as against third persons including statutes of limitation, statutes of fraud, and the defense of usury. A waiver of a defense by the insurer after a petition in liquidation has been filed shall not bind the liquidator. If a guaranty association or foreign guaranty association has an obligation to defend a suit, the liquidator shall defer to the obligation and may defend

only in the absence of a defense by the guaranty association.

*s.* Exercise and enforce the rights, remedies, and powers of a creditor, shareholder, policyholder, or member, including the power to avoid a transfer or lien that may be given by the general law and that is not included with sections 507C.26 through 507C.28.

*t.* Intervene in a proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and act as the receiver or trustee whenever the appointment is offered.

*u.* Enter into agreements with a receiver or commissioner of insurance of any other state relating to the rehabilitation, liquidation, conservation or dissolution of an insurer doing business in both states.

*v.* Exercise powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with this chapter.

*w.* Audit the books and records of all agents of the insurer which relate to the business of the insurer.

2. This section does not limit the liquidator or exclude the liquidator from exercising a power not listed in subsection 1 that may be necessary or appropriate to accomplish the purposes of this chapter.