No. 20-____

IN THE

Supreme Court of the United States

MILLIMAN, INC.,

Petitioner,

v.

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

SIMON A. STEEL
DENTONS US LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7077
simon.steel@dentons.com

REID L. ASHINOFF
Counsel of Record
JUSTIN N. KATTAN
ILYA SCHWARTZBURG
DENTONS US LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 768-6700
reid.ashinoff@dentons.com
justin.kattan@dentons.com
ilya.schwartzburg@dentons.com

Counsel for Petitioner

September 3, 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Milliman, Inc. performed pre-insolvency actuarial services for LAHC, a Louisiana health insurer, pursuant to a consulting agreement that requires the arbitration of any disputes arising out of or relating to that agreement. The Louisiana Insurance Commissioner, acting as rehabilitator of insolvent insurer LAHC, brought contract based damages claims in state court against Milliman. It is undisputed that if LAHC had brought these claims, they would have had to be arbitrated. However, the Louisiana Supreme Court held that the forum selection clause in the state's insurance insolvency statute permits the Commissioner to bring these claims in state court and to refuse to arbitrate them.

The question presented is:

Whether the Federal Arbitration Act (the "FAA") preempts the state's forum selection clause and requires the commissioner to arbitrate these pre-insolvency damages claims against a non-policyholder, *or* whether the arbitration of these claims impairs or interferes with the state's regulation of the business of insurance, such that the state's forum selection clause reverse preempts the FAA pursuant to Section 2(b) of the McCarran-Ferguson Act?

CORPORATE DISCLOSURE STATEMENT

Petitioner Milliman, Inc., has no parent company, and no publicly held company holds 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Proceedings involving Petitioner:

Donelon v. Shilling, No. 651069, 19th Judicial District Court, State of Louisiana. Judgment entered Aug. 25, 2017.

Donelon v. Shilling, No. 2017 CW 1545, Louisiana Court of Appeal, First Circuit. Judgment entered Feb. 28, 2019.

Donelon v. Shilling, No. 2019-C-00514, Louisiana Supreme Court. Judgment entered Apr. 27, 2020.

Other proceedings:

Donelon v. Shilling, No. 2017 CW 1483, Louisiana Court of Appeal, First Circuit. Judgment entered Feb. 28, 2019.

Donelon v. Shilling, No. 2019-C-00515, Louisiana Supreme Court. Judgment entered Sept. 6, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The opinion of the Louisiana Supreme Court will be reported at — So. 3d — and is reprinted in the Appendix ("App.") at 1a–21a. The Louisiana First Circuit Court of Appeals' opinion unanimously granting Milliman's appeal to compel arbitration is unreported, and is reprinted at 22a–53a. A transcript of the Louisiana 19th Judicial District Court's oral opinion denying Milliman's motion to compel arbitration is unreported, and is reprinted at App. 57a–63a.

JURISDICTION

The Louisiana Supreme Court entered Judgment on April 27, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> 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.

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides, in pertinent part:

> 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 . . . .

Section 22:2004(A) of the Louisiana Rehabilitation, Liquidation, and Conservation Act provides:

> An action under this Chapter brought by the commissioner of insurance, in that capacity, or as conservator, rehabilitator, or liquidator may be brought in the Nineteenth Judicial District Court for the parish of East Baton Rouge or any court where venue is proper under any other provision of law.

INTRODUCTION

This case presents, and deepens, a recurring and irreconcilable conflict on the question presented between decisions of (1) two federal circuit courts and the Iowa Supreme Court, all of which uphold the enforcement of arbitration clauses in pre-insolvency agreements against a state insurance commissioner acting as liquidator/rehabilitator for an insolvent insurer, and (2) multiple state supreme courts, including the Louisiana Supreme Court in this case, holding that their insurance commissioners are not required to arbitrate claims for money damages against non-policyholders arising from such pre-insolvency agreements.

This entrenched conflict presents an important question involving the intersection of two federal

statutes—the Federal Arbitration Act (the "FAA") and the McCarran-Ferguson Act—as applied to the claims at issue here. The FAA is a strong federal mandate to enforce arbitration agreements and to preempt, pursuant to the U.S. Supremacy Clause, state laws and state policies which are construed to preclude the enforcement of arbitration agreements. The McCarran-Ferguson Act creates a narrow exception where the federal statute would impair or interfere with the state's regulation of the "business of insurance," as that term is defined and applied by federal law; courts refer to this exception as "reverse preemption."

The Louisiana Supreme Court held that the forum selection clause in the Louisiana Rehabilitation, Liquidation, and Conservation Act (the "RLCA") reverse preempts the FAA pursuant to the McCarran-Ferguson Act, and allows that state's Insurance Commissioner to refuse arbitration and bring his otherwise arbitrable claims against Petitioner Milliman Inc. ("Milliman") in state court. (App. 19a).

The Kentucky Supreme Court reached the same result in 2010, holding that the forum selection clause in its state insurance insolvency statute reverse preempts the FAA, and therefore the Kentucky Commissioner did not have to arbitrate an insolvent insurer's damages claims against national accounting firm Ernst & Young. *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 692 (Ky. 2010). The New York Court of Appeals and Ohio Supreme Court have also relied on their state insurance insolvency statute forum selection provisions to defeat a pre-insolvency contractor's federal arbitration rights in cases brought by those states' insurance commissioners, though neither court undertook the requisite federal law analysis.

On the other hand, the United States Courts of Appeals for the Third and Ninth Circuits have each twice reached exactly the opposite result. These courts have held that an insurance commissioner's damages claims that arise from an insolvent insurer's pre-insolvency agreements with a non-policyholder do not implicate the state's regulation of the "business of insurance." Accordingly, they have compelled state insurance commissioners in California, Montana, New Jersey and Pennsylvania to arbitrate pre-insolvency damages claims, notwithstanding state insolvency statutes that, the commissioners argued, required those claims to be litigated in state court. The Third Circuit and Ninth Circuit have further held that requiring an insurance commissioner to arbitrate such pre-insolvency claims does not interfere with a state's regulation of the "business of insurance," and therefore the FAA is not reverse preempted by the McCarran-Ferguson Act. *See, e.g.*, *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000); *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972–73 (9th Cir. 1992).

The Louisiana Supreme Court decision is also in direct conflict with three other recent decisions, by the Iowa Supreme Court and Nevada Supreme Court, and by a Kentucky federal district court, each involving the same arbitration agreement, and substantively the same contract and tort claims against Milliman as the Louisiana Commissioner asserts here.[1] Each of those

[1] On Friday, August 28, Milliman received the Iowa liquidators' petition for certiorari seeking review of the Iowa Supreme Court's decision (*see Doug Ommen, in His Capacity as Liquidator of CoOportunity Health, et al., v. Milliman, Inc., et al.*, No. 20-249). That petition recognizes (in its second question presented) that the Iowa and Louisiana Supreme Court decisions deepen the existing conflicts concerning whether a state insurance commissioner, acting as rehabilitator or liquidator for an

courts compelled the state insurance commissioners, who were acting as liquidators for insolvent insurers, to arbitrate their pre-insolvency damages claims against Milliman (the Nevada Supreme Court, finding "no clear error of law" in the trial court's decision compelling arbitration, refused interlocutory review). Each of these decisions also held that the bringing of these claims by the state insurance commissioner is not the regulation of the "business of insurance," and further that arbitration does not interfere with or impair the state's regulation of the "business of insurance" pursuant to the McCarran-Ferguson Act.

These conflicts warrant this Court's review. Review is further warranted because the Louisiana Supreme Court is on the wrong side of this conflict, as its reasoning is inconsistent with this Court's and federal circuit courts' precedents.

In *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 508–09 (1993) this Court reaffirmed that state statutes or actions regulate the "business of insurance" under the McCarran-Ferguson Act only to the extent they "regulate policyholders." *Fabe* recognized that bringing additional funds into the estate of an insolvent insurer—which is what the Commissioner hopes to achieve here—while it could "indirect[ly]" benefit policyholders, does not constitute the "business of insurance" under the McCarran-Ferguson Act.

---

insolvent insurer, is bound to arbitrate the insurer's damages claims arising out of a pre-insolvency agreement with a broad arbitration clause. The Iowa petition also challenges and seeks this Court's review (first question presented) of the Iowa Supreme Court's construction of Iowa state contract law and provisions of the Iowa insurance insolvency statute. Milliman will respond to the Iowa petition at the appropriate time for filing its response.

Similarly, the choice of forum in which a commissioner brings pre-insolvency damages claims against non-policyholders does not impair or interfere with the state's regulation of the insurer-policyholder relationship. The federal circuit court and Iowa Supreme Court authority upholding arbitration is consistent with this Court's holdings regarding what constitutes or interferes with a state's regulation of the "business of insurance" under the McCarran-Ferguson Act. The Louisiana and other state supreme court decisions on the other side of this conflict are not.

Because the core issue here—construction of the McCarran-Ferguson Act as applied to the bringing of these pre-insolvency damages claims—is governed by federal law, only this Court can provide the certainty of a uniform national answer, binding both on federal and state courts, and on insurance commissioners and third party contractors doing business with insurers across the country.

Review is also warranted because of the increasing importance of this issue. In a majority of states, the forum selection clauses in the state insolvency statutes are written to require (like Kentucky) or permit (like Louisiana) state insurance commissioners to bring these pre-insolvency damages claims in state court, thereby avoiding pre-insolvency arbitration agreements. National professional service firms and other interstate contractors who regularly work with insurers around the country, *e.g.* accounting, consulting, and actuarial firms, need the protection of the FAA for their bargained-for arbitration rights, particularly where, as here, the arbitration clause does not contain an exception if the contracting insurer become insolvent. The current pandemic and ensuing economic turmoil is again challenging the solvency of many businesses, including insurers.

Such a ruling will end what will otherwise continue to be expensive and dilatory litigation for all parties, with contradictory rulings, as here, around the United States.

This Court should grant certiorari to correct the Louisiana Supreme Court's arbitration-adverse and erroneous interpretation of the FAA and the McCarran-Ferguson Act, and reaffirm the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Absent this Court's ruling on this federal law issue, state legislatures and state courts of last resort will be able to continue to "stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

STATEMENT OF THE CASE

1. This action was brought against Milliman by the Louisiana Commissioner of Insurance, acting as the rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"), an insolvent health care co-operative insurer, or "co-op," created in 2011 and funded pursuant to the Patient Protection and Affordable Care Act (the "ACA"). Milliman is one of the United States' leading actuarial firms, headquartered in Washington State. It provides actuarial and consulting services to insurers nationwide.

2. Pursuant to a 2011 "Consulting Services Agreement" (the "Agreement"), LAHC engaged Milliman to provide it with "actuarial support." (App. 27a–28a).

The Agreement contains a broad, unambiguous arbitration clause requiring the arbitration of all claims arising out of or relating to the Agreement:

> Disputes: In the event of any dispute arising out of or relating to the engagement of Milliman by [LAHC], 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. 24a). The arbitration clause has no exception should the insurer later become insolvent.

Milliman provided all of its actuarial services, fully performing its obligations to LAHC pursuant to the Agreement, from August 2011 to March 2014, prior to LAHC's insolvency. At or around the same time, Milliman provided similar services in other states to numerous other ACA co-ops under agreements with materially indistinguishable terms, including the same arbitration provision.

3. In 2015, LAHC became insolvent and was placed into rehabilitation. In November 2016, the Louisiana Insurance Commissioner, acting as Rehabilitator, filed an amended petition in Louisiana's 19th Judicial District Court (the "19th JDC") against several third party contractors who performed pre-insolvency work for LAHC, as well as LAHC's officers and directors. The petition pled two causes of action against Milliman, both of which arise out of and relate to Milliman's work under the Agreement: (1) "professional negligence and breach of contract," and (2) negligent misrepresentation. (App. 4a).

4. On February 17, 2017, Milliman moved to compel arbitration of both claims. At oral argument, the Commissioner conceded that his claims relate to and arise out of the Agreement, and therefore would be subject to arbitration had LAHC itself brought suit against

Milliman. (App. 58a–59a) (admitting that had LAHC filed the claims at issue, it "would be a pretty straightforward case" that the Agreement's arbitration provision applies).

Notwithstanding the Commissioner's acknowledgment, the trial court denied Milliman's motion, holding that the Commissioner's claims against Milliman "must . . . be brought in a Louisiana state court." (App. 62a).

5. Milliman appealed to the Louisiana First Circuit Court of Appeals (the "Louisiana First Circuit"), which stayed the action against Milliman and all other defendants pending resolution of the appeal.

On February 28, 2019, the Louisiana First Circuit unanimously reversed the trial court's denial of Milliman's motion to compel arbitration. (App. 22a). It found that "[t]he roots of each of the Commissioner's claims, whether resounding in contract or tort, are the Agreement." (App. 45a). The court explained that, under the governing rehabilitation order, the Commissioner "steps into the shoes of the insurer" and "is bound by the same constraints as is the insurer in the normal course of business." (App. 52a–53a). Accordingly, the court held that the Agreement's arbitration provision applied, and that neither Louisiana "public policy" nor Louisiana statutes can override Milliman's arbitration rights. (App. 53a).

6. The Commissioner appealed to the Louisiana Supreme Court, which unanimously reversed the Louisiana First Circuit on April 27, 2020. The Louisiana Supreme Court acknowledged that the Commissioner's action "aris[es] out of an agreement between the cooperative and a third-party contractor" that contains an arbitration clause. (App. 3a–4a).

However, it held that RLCA Section 22:2004(A)—pursuant to which the state Insurance Commissioner "may" bring rehabilitation proceedings in the 19th JDC "or any court where venue is proper"—permits the Rehabilitator "to choose where and how to litigate an action." (App. 8a). The court held that, "[b]y using the permissive 'may,' the statute does not foreclose the option of arbitration, if provided in a contract, but effectively delegates the choice to the Commissioner." (*Id.*).

The court emphasized public policy arguments to support its decision, including the "purpose and spirit of the RLCA," (*id.*), the Commissioner's role as "a protector of public interests," (*id.*), and the "substantial public interest" in consolidating proceedings in one forum to "promote[] the efficient and cohesive management of the affairs of insolvent insurers." (App. 9a–10a). It further stated that binding the Commissioner to a private arbitration agreement "would clearly violate the exclusivity of the rehabilitation scheme provided by law" and contravene Louisiana "public policy." (App. 12a).

The court then addressed whether the "FAA . . . preempts Louisiana law, thus compelling arbitration," or whether "state law reverse preempts the FAA by virtue of the McCarran-Ferguson Act." (App. 13a). It concluded that the RLCA as a whole was "enacted for the purpose of regulating the business of insurance" and that "Section 2004 is part of a coherent policy to address that interest." (App. 16a) (citations omitted). With respect to Section 22:2004(A) specifically, the court reasoned that it was enacted to avoid piecemeal litigation in different fora that might exacerbate litigation costs and generate inconsistent outcomes. (App. 18a). The court then concluded that:

> Forcing arbitration upon the Commissioner conflicts with the Louisiana law authorizing him to choose which forum to proceed in as rehabilitator. This conflict sufficiently impairs the Commissioner's rights under Section 2004 to trigger McCarran-Ferguson's reverse preemption effect.

(*Id.*).

7. The Louisiana Supreme Court remanded the case to the 19th JDC, the stay imposed by the Louisiana First Circuit was lifted, and extensive and burdensome discovery is ongoing in the trial court.[2]

8. The Louisiana action is one of four recent cases arising out of Milliman's provision of virtually identical services for ACA co-ops under contracts containing the same broad arbitration clause. In addition to Louisiana, the state insurance commissioners of Iowa, Kentucky and Nevada, acting as liquidator of their states' respective insolvent ACA co-ops, sued Milliman in state court on claims within the scope of the arbitration clause. In all four cases, Milliman moved to compel arbitration pursuant to section 2 of the FAA. In the three cases other than Louisiana, the courts compelled the state insurance commissioners to arbitrate, rejecting the commissioners' arguments that state insurance insolvency statutes reverse preempt the FAA under the McCarran-Ferguson Act. *See Ommen v. Milliman*, 941 N.W.2d 310 (Iowa 2020); *State ex rel Richardson v. Eighth Judicial Dist. Court in & for Cty.*

---

[2] The Louisiana Supreme Court denied Milliman's motion for a stay pending resolution of this Petition for Certiorari. Milliman is applying to this Court for a stay.

of Clark, 454 P.3d 1260 (Nev. 2019); *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588 (E.D. Ky. 2018).

REASONS FOR GRANTING THE PETITION

This case presents an entrenched conflict between two federal circuit courts and the Iowa Supreme Court, on the one hand, and two state supreme courts (including the Louisiana Supreme Court in this case), on the other hand, on the important and recurring question here: Whether an insurance commissioner's pre-insolvency damages claims against non-policy-holders constitute, and whether the arbitration of such claims impairs or interferes with, the state's regulation of the "business of insurance" under the McCarran-Ferguson Act.

The Third Circuit, Ninth Circuit and Iowa Supreme Court have held that such claims do not constitute, and arbitration of such claims does not impair or interfere with, the state's regulation of the "business of insurance" under the McCarran-Ferguson Act. These courts have compelled arbitration notwithstanding state insolvency forum selection statutes that generally seek to consolidate core insolvency matters in a single state court. In contrast, the Louisiana and Kentucky Supreme Courts have nullified an insurance commissioner's obligation to arbitrate such claims, holding that state insolvency forum selection statutes reverse preempt the FAA by virtue of the McCarran-Ferguson Act. (The Ohio Supreme Court and New York Court of Appeals have held that their state insurance commissioners need not arbitrate these claims, without reference to or analysis of federal law.)

I. The Louisiana Supreme Court's Decision Deepens The Conflict Between (1) Federal Circuit Courts and State Supreme Courts, and (2) Other State Supreme Courts On The Intersection Between the McCarran-Ferguson Act and the FAA.

Federal law—not state law—governs the question of what activities either constitute, or "invalidate, impair or supersede" the state's regulation of, the "business of insurance" under the McCarran-Ferguson Act. *S.E.C. v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 67, 69 (1959). A state's "classification does not control in deciding whether an activity is the 'business of insurance' under the McCarran-Ferguson Act." *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 13 (1st Cir. 1992), citing *Variable Annuity Life Ins. Co. of Am.*, 359 U.S. at 69.

The Louisiana Supreme Court's ruling directly contravenes unanimous federal circuit authority holding that an insurance commissioner's prosecution of damages claims against a third party that arise out of an insolvent insurer's pre-insolvency contract with that third party does not implicate, and arbitration of such claims does not impair or interfere with, the state's regulation of the "business of insurance" under the McCarran-Ferguson Act. *See Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381–82 (9th Cir. 1997); *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972 (9th Cir. 1992); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000); *Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959–61 (3d Cir. 1993); *see also AmSouth Bank v. Dale*, 386 F.3d 763, 781, 783 (6th Cir. 2004) ("[A]n ordinary suit against a tortfeaser by an insolvent insurance com-

pany" does not implicate the state's regulation of the business of insurance under McCarran-Ferguson).

The U.S. Court of Appeals for the Ninth Circuit has twice held that the FAA preempts state insurance insolvency forum selection statutes, and has compelled arbitration by the insurance commissioner of pre-insolvency, common law tort and contract claims on behalf of an insolvent insurer. In *Bennett*, the court upheld arbitration, rejecting the Montana Insurance Commissioner's argument that Montana's "comprehensive insurance regulatory scheme" which includes a forum selection statute mandating that "[a]ll actions herein authorized shall be brought in the [state] district court in the county in which the office of the commissioner is located" (Mont. Code Ann. § 33-2-1308), reverse preempts the FAA under the McCarran-Ferguson Act. 968 F.2d at 973. The court explained that "the liquidator is unable to explain why she is entitled to an advantage that the insolvent company whose position she now occupies did not have. Neither does she articulate how arbitration interferes with a valid state regulatory purpose." *Id*.

Similarly, in *Quackenbush*, on remand from this Court, the Ninth Circuit held that arbitration of the liquidator's third party common law damages claims against a contractor did not implicate or interfere with the "orderly liquidation" of the insolvent insurer, nor did arbitration interfere with California's insurance insolvency "statutory scheme for resolving claims against insolvent insurers." 121 F.3d at 1381. Unlike the Louisiana Supreme Court, the Ninth Circuit also adhered to this Court's instruction that a court has "no discretion to consider public-policy arguments in deciding whether to compel arbitration under the

FAA." *Id*. at 1382, citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

The U.S. Court of Appeals for the Third Circuit has also twice addressed the question presented. In *Grode*, the Third Circuit reversed the district court's decision to abstain and to deny the defendant's motion to compel arbitration of the Pennsylvania Commissioner's "ordinary contract action" brought on behalf of the insolvent insurer. 8 F.3d at 961. Pennsylvania's insurance insolvency statute forum selection provision required that "[a]ll actions herein authorized shall be brought in the Commonwealth Court of the Commonwealth of Pennsylvania." 40 Pa. Stat. Ann. § 221.4. The Third Circuit held that "[a]lthough the regulation of insolvent insurance companies is surely an important state interest . . . . [s]imple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests." *Grode*, 8 F.3d at 959–60. The Third Circuit rejected the Pennsylvania Insurance Commissioner's McCarran-Ferguson Act reverse preemption argument, stating that the "action instituted by the Commissioner in this case has nothing to do with Pennsylvania's regulation of insurance." *Id*. at 960.

In *Suter*, the Third Circuit again compelled arbitration, this time rejecting the New Jersey Insurance Commissioner's argument that "arbitration of this controversy . . . will impair New Jersey's Liquidation Act," 223 F.3d at 161, including the Act's provision that "[a]ll actions authorized pursuant to this section shall be brought in the Superior Court." N.J. Stat. Ann. §§ 17B:32–34(e). The Third Circuit concluded that "[t]his is not a delinquency proceeding or a proceeding similar to one. Nor is it a suit by a party

seeking access to assets of the insurer's estate . . . . What this proceeding is is a suit instituted by the Liquidator against a reinsurer to enforce contract rights for an insolvent insurer, which, if meritorious, will benefit the insurer's estate. Accordingly, we fail to perceive any potential for interference with the Liquidation Act proceedings before the Superior Court." 223 F.3d at 161. The Third Circuit also held that seeking to increase an insolvent insurer's assets was an insufficient connection to the "business of insurance" to trigger reverse preemption under the McCarran-Ferguson Act. *Id*. ("[T]he mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act.").[3]

---

[3] Federal district courts have also regularly held that "the McCarran Ferguson Act does not allow reverse preemption of the FAA when the Liquidator of an insurance company brings suit against a third-party independent contractor for tort or breach of contract claims." *Milliman*, 353 F. Supp. 3d at 604; *see also Koken v. Cologne Reins. (Barbados), Ltd.*, 34 F. Supp. 2d 240, 256 (M.D. Pa. 1999) (compelling arbitration where "this action has nothing to do with Pennsylvania's statutory scheme for the regulation of the business of insurance because it is not an action against an insolvent insurer's estate that might deprive it of assets"); *Midwest Emp'rs Cas. Co. v. Legion Ins. Co.*, No. 4:07CV870 CDP, 2007 WL 3352339, at *5 (E.D. Mo. Nov. 7, 2007) ("The ultimate issue in this case is a standard contract dispute, so the case does not involve the state's regulation of insurance."); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 274 (D. Vt. 1993) (same); *but see Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986) ("Enforcement of the [FAA] to require arbitration where it is forbidden by Article 74 [the New York Insurance Law] and would undermine the scheme of exclusive jurisdiction established by Article 74 in the Supreme Court would 'invalidate, impair or supersede' the state statute.").

The Louisiana decision also conflicts with federal circuit precedent outside the arbitration context. For example, in *AmSouth Bank*, the U.S. Court of Appeals for the Sixth Circuit held that "an ordinary suit against a tortfeaser by an insolvent insurance company" neither implicates nor impairs the state's regulation of the business of insurance under McCarran-Ferguson. 386 F.3d at 783. The Sixth Circuit rejected the argument that the Mississippi insolvency statute, which required that "action[s] herein authorized shall be brought in the Chancery Court of the First Judicial District of Hinds County," reverse preempted the federal Declaratory Judgment Act. Miss. Code Ann. § 83-24-9. The Sixth Circuit held that where a receiver is suing in tort or contract, its claims implicate the business of insurance only in an attenuated fashion in that the insolvent estate might have more assets as a result of a successful suit. *AmSouth Bank*, 386 F.3d at 783.

The Sixth Circuit also held that the state's forum selection provision does not implicate the state's regulation of the business of insurance, stating that even where a litigation generally is "integral to" the performance of an insurance contract, "the choice of forum [is] not." *Id*. at 781.

The Iowa Supreme Court's recent decision compelling the Iowa Insurance Commissioner to arbitrate his pre-insolvency tort claims against Milliman fully accords with this uniform federal appellate precedent. *Ommen*, 941 N.W.2d at 313. The Iowa Supreme Court held that "the McCarran-Ferguson Act does not permit reverse preemption of the FAA" with respect to the common law claims at issue, and that arbitration of these claims would not impede "the state process designed to protect the interests of policyholders." *Id*.

at 320–21. Notwithstanding the Iowa Liquidation Act provision mandating that "[a]ll actions authorized in this chapter shall be brought in the district court in Polk county," Iowa Code Ann. § 507C.4, the Iowa Supreme Court explained that arbitration "does not impede the liquidator's ability to conduct an orderly dissolution . . . . 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." *Ommen*, 941 N.W.2d at 320. The court further stated that "[r]equiring 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." *Id*.

Relying on *Fabe*, the Iowa Supreme Court also held that, although the liquidator's claims could indirectly benefit policyholders by increasing the coffers of the insolvent insurer's estate, the "liquidator is not litigating on behalf of policyholders, and we are not persuaded that any indirect effects on the policyholders are sufficient" to find reverse preemption under the McCarran-Ferguson Act. *Id.*, citing *Fabe*, 508 U.S. at 508.

Similarly, in *State ex rel Richardson*, 454 P.3d 1260, the Nevada Supreme Court denied the state Insurance Commissioner's application for interlocutory review of a trial court order which granted Milliman's motion to compel arbitration. The Commissioner argued that "enforcement of an arbitration agreement against an insurance liquidator pursuing contract and tort damages against third parties would thwart the insurance liquidator's broad statutory powers and the general policy under [state law] to concentrate creditor claims in a single, exclusive forum." *Id*. at *1. The Nevada Supreme Court found that "at issue here is not

a creditor's claim against the Co-Op; at issue is [the Commissioner's] breach-of-contract and tort claims against several third parties on behalf of the Co-Op, which happens to be in receivership." *Id*. Accordingly, the Nevada court did not find a clear error of law with the trial court's order. *Id*.

In the fourth case against Milliman involving the same common law claims and the same broad arbitration clause, a Kentucky federal court compelled arbitration of the Kentucky Insurance Commissioner's claims against Milliman. *Milliman, Inc. v. Roof*, 353 F. Supp. 3d at 603. The federal district court held that the FAA supersedes the Kentucky liquidation statute (the "IRLL"), including its provision for "exclusive jurisdiction" of all claims in state court. The federal court further held that "Kentucky's prohibition of arbitration between insolvent insurance companies and third-party contractors does not trump the mandate of the Federal Arbitration Act," and that "the McCarran-Ferguson Act does not allow reverse-preemption of the FAA when the Liquidator… brings suit against a third party independent contractor for tort or breach of contract claims." *Id*. at 594, 604.

However, the Louisiana Supreme Court is not the only state court of last resort to refuse to order the state's insurance commissioner to arbitrate these claims. In 2010, the Kentucky Supreme Court held that the IRLL's forum selection provision, by virtue of the McCarran-Ferguson Act, reverse preempts the FAA and precludes arbitration of the commissioner's (acting as liquidator) common law claims brought against a third party. *Ernst & Young, LLP*, 323 S.W.3d at 692. The Kentucky Supreme Court held that "[p]ursuant to [the IRLL], the federal policy favoring arbitration is subordinated to the state's superior

interest in having matters relating to the rehabilitation of an insurance company adjudicated in the Franklin Circuit Court." *Id.*

The Kentucky Supreme Court determined that the "public policy" concerns that the state legislature sought to address in the IRLL supersede a party's arbitration right under the FAA. Specifically, the Kentucky court found that "[i]nconsistent and incompatible results are possible if the Rehabilitator's claims against Ernst & Young are resolved by arbitration, while other issues pertaining to the . . . rehabilitation are adjudicated in the Franklin Circuit Court. Piecemeal adjudication and the potential for inconsistent verdicts are what the General Assembly sought to avoid by the IRLL's strong grant of exclusive jurisdiction to the Franklin Circuit Court." 323 S.W.3d at 690–91.[4]

The Ohio Supreme Court and the New York Court of Appeals have also held that their respective state insurance insolvency statutes preclude their state insurance commissioners from being compelled to arbitrate common law damages claims against a non-policyholder. In doing so, neither court analyzed whether the FAA preempted the state law. Rather, the Ohio Supreme Court held that its insurance commissioner acting as liquidator cannot be bound to an insolvent insurer's pre-insolvency arbitration agreement because he stands in a "public protection" role. *Taylor v. Ernst & Young*, 958 N.E.2d 1203, 1210–13 (Ohio 2011). The

[4] The Kentucky federal district court in *Milliman* refused to follow the Kentucky Supreme Court decision, criticizing it for "not provid[ing] a robust analysis" of reverse preemption under the McCarran-Ferguson Act. 353 F. Supp. 3d at 603. Thus, in Kentucky, whether your FAA arbitration rights will be enforced likely depends on whether you are in state or federal court. This is the very definition of conflicting decisions.

New York Court of Appeals has also long held, without addressing federal law, that the Superintendent of Insurance cannot be compelled to arbitrate because the New York State Insurance Law does not expressly authorize the Superintendent to do so. *Corcoran v. Ardra Ins. Co., Ltd.*, 567 N.E.2d 969, 972–73 (N.Y. 1990); *Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885, 891 (N.Y. 1958).

Simply put, there is no way to square the analyses and holdings of the U.S. Courts of Appeals for the Third, Sixth and Ninth Circuits and the Iowa Supreme Court, on the one hand, with the Louisiana and Kentucky Supreme Court decisions, on the other hand, on the questions raised by this Petition. These decisions have fully developed the relevant arguments on both sides of the question.

Importantly, this issue is likely to recur around the country. The Louisiana statute at issue is not unique; the insolvency statutes in over half of U.S. states and territories have forum selection provisions that are substantially similar to those of Louisiana or Kentucky.[5] No court except this one can create uni-

[5] *See, e.g.*, Colo. Rev. Stat. Ann. § 10-3-504(5); Conn. Gen. Stat. Ann. § 38a-906(e); D.C. Code Ann. § 31-1303(e); Ga. Code Ann. § 33-37-4(e); Haw. Rev. Stat. Ann. § 431:15-104(g); Idaho Code Ann. § 41-3304(5); Ind. Code Ann. § 27-9-1-3(f); Iowa Code Ann. § 507C.4(5); Kan. Stat. Ann. § 40-3608(e); Ky. Rev. Stat. Ann. § 304.33-040(3)(a); Miss. Code. Ann. § 83-24-9(5); Mo. Ann. Stat. § 375.1154(6); Mont. Code Ann. § 33-2-1308; Neb. Rev. Stat. Ann. § 44-4804(5); N.J. Stat. Ann. § 17B:32-34(e); N.C. Gen. Stat. Ann. § 58-30-15(d); N.D. Cent. Code Ann. § 26.1-06.1-04(5); Ohio Rev. Code Ann. § 3903.04(E); 40 Pa. Stat. Ann. § 221.4(d); 26 P.R. Laws Ann. § 4004(5); 27 R.I. Gen. Laws Ann. § 27-14.3-4(e); S.C. Code Ann. § 38-27-60(f); S.D. Codified Laws § 58-29B-7; Tenn. Code Ann. § 56-9-104(e); Tex. Ins. Code Ann. § 443.005(g); Utah

formity on this federal law question for businesses across the country that contract with insurance companies. The conflict on the question presented is substantial, continuing, and ripe for this Court's review.

II. The Louisiana Supreme Court Decision Is Incorrect.

A. Application of The RLCA Forum Selection Provision To The Louisiana Commissioner's Claims Against Milliman Does Not Constitute the State's Regulation of The "Business Of Insurance."

The McCarran-Ferguson Act was passed "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *S.E.C. v. Nat'l Secs., Inc.*, 393 U.S. 453, 459–60 (1969) (emphasis added). Accordingly, "courts should narrowly construe the McCarran-Ferguson Act," *Riverview Health Inst. LLC v. Med. Mut. Of Ohio*, 601 F.3d 505, 513 (6th Cir. 2010), citing *Nat'l Secs., Inc.*, 393 U.S. at 460, the focus of which is on "the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship . . . are laws regulating the 'business of insurance.'" *Nat'l Secs., Inc.*, 393 U.S. at 460.

Thus, in *Fabe*, this Court held that to the extent the Ohio priority statute at issue "regulates policyholders, [it] is a law enacted for the purpose of regulating the business of insurance." 508 U.S. at 508. However, to the extent another portion of the same statute does not regulate policyholders "it is not a law enacted for the purpose of regulating the business of insurance." *Id.*;

Code Ann. § 31A-27a-105(8); Vt. Stat. Ann. tit. 8, § 7032(e); 22 V.I. Code Ann. § 1269(a); Wis. Stat. Ann. § 645.04(3).

see also Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) (whether a statute was enacted for the purpose of regulating the "business of insurance" depends on (1) "whether the practice has the effect of transferring or spreading a policyholder's risk," (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured," and (3) "whether the practice is limited to entities within the insurance industry.").

Even if the Commissioner's suit against Milliman could indirectly benefit policyholders by increasing the size of LAHC's estate, such "indirect" benefits to policyholders do not constitute the "business of insurance" under the McCarran-Ferguson Act. *Fabe*, 508 U.S. at 508. "[E]very business decision made by an insurance company has some impact on its reliability… and its status as a reliable insurer." *Id.* at 508–09 (citation omitted). That does not make every business decision of an insurance company part of the "business of insurance" under the McCarran-Ferguson Act.

The RLCA's forum selection provision, as applied to the Commissioner's claims against Milliman, does not constitute the business of insurance or regulate the insurer-policyholder relationship. "Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests," and therefore do not constitute the "business of insurance." *Grode*, 8 F.3d at 959–61; *AmSouth Bank*, 386 F.3d at 783 ("An ordinary suit against a tortfeaser by an insolvent insurance company" does not constitute the business of insurance under McCarran-Ferguson).

B. Arbitration Of The Louisiana Commissioner's Claims Against Milliman Would Not Impair or Interfere With The State's Regulation Of The Business Of Insurance.

When assessing whether a general federal statute "impairs" the operation of a state law, the proper inquiry is whether the particular suit being brought would impair state law. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 311, 313 (1999) (analyzing effect of McCarran-Ferguson Act on RICO suit with respect to particular suit, rather than only general operation of statute). *See also AmSouth Bank*, 386 F.3d at 783 (stating that McCarran-Ferguson "business of insurance" analysis must be "defined with respect to the particular cause of action" at issue), citing *Humana Inc.*, 525 U.S. at 311, 313; *Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 967 (8th Cir. 2008) (in conducting reverse preemption analysis, "our focus must be on the precise federal claims asserted").

The Louisiana Supreme Court ignored this on-point federal circuit authority in holding that arbitration of the Commissioner's claims would interfere with Louisiana's regulation of the business of insurance. Instead, it relied on *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) and *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998). (App. 14a–16a). However, both are inapposite cases denying arbitration of claims brought *against* a liquidator, claiming some right to the assets of the insolvent insurer's estate. Of course, claims made *against* an insolvent estate's assets are clearly part of the core liquidation proceeding; thus courts properly

have held that arbitrating such claims could threaten the orderly liquidation of the insolvent insurer's estate.[6]

There is no such danger here. This case neither threatens nor claims an interest in LAHC assets or property, nor will it affect any policyholder's legal rights or claims. The Commissioner's action against Milliman has no bearing on the administration, allocation or ownership of LAHC's property or assets, which is the province of the insolvency action. Enforcing the Agreement's arbitration clause therefore will not "disrupt the orderly [rehabilitation] of" LAHC. *Quackenbush*, 121 F.3d at 1381; *see also AmSouth Bank*, 386 F.3d at 780 (distinguishing claims by "angry creditors attempt[ing] to sue insolvent insurance companies in federal court to jump ahead in the queue of claims," from claims "where the insurance companies are themselves the natural plaintiffs").

As the Third Circuit explained in *Grode*:

> Insurance companies tend to issue identical policies to a large number of people, rendering a single forum necessary to dispose equitably of the company's limited assets so as to avoid a race to the courthouse. However, such a concern is not present in this case. This is not a suit against the insurance company or the Insurance Commissioner, or a claim on assets of the debtor . . . . The insolvent insurance company . . . is the plaintiff, not the defendant. As a result, there is not a large number of similarly situated

[6] That said, any conflict between *Munich* and *Stephens*, on the one hand, and the Third, Sixth and Ninth Circuit precedent cited above, on the other hand, only exacerbates the split in authority that supports Milliman's petition.

> plaintiffs competing for a limited amount of money. The insolvent insurer in liquidation is not called upon to dissipate its funds defending unconnected suits across the country. Rather, the insurance company is the only plaintiff and the defendants are not insolvent.

8 F.3d at 960 (quotations omitted).

Although not addressing reverse preemption under the McCarran-Ferguson Act, federal courts in the bankruptcy context routinely make this same distinction between preference claims and other "core" insolvency matters, on the one hand, as distinct from contract and tort actions brought against third party contractors by the trustee. Core insolvency proceedings and claims seeking assets of the bankrupt estate must proceed in the bankruptcy court. On the other hand, if the proceeding involves claims which arise from a debtor's pre-petition common law and contract rights (like the claims in this case), bankruptcy courts have "no discretion to refuse to compel arbitration." *See, e.g.*, *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 495 (5th Cir. 2002) (stating that bankruptcy courts have "no discretion to refuse to compel the arbitration of matters not involving 'core' bankruptcy proceedings"); *Microbilt Corp. v. Chex Sys. (In re Microbilt Corp.)*, 588 F. App'x 179, 180 (3d Cir. 2014); *Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.)*, 226 F.3d 160, 166 (2d Cir. 2000); *Hays & Co. v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1155–57 (3d Cir. 1989).

The Louisiana Supreme Court also erred in holding that the Commissioner's choice of a state court forum for litigation is integral to the State's regulation of the "business of insurance." Arbitration does not alter

"substantive rights," the scope of the relief available, or eliminate court review of the arbitration award; it merely regulates the choice of initial forum. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987). As the Iowa Supreme Court held in *Ommen*, arbitration "does not impede the liquidator's ability to conduct an orderly dissolution . . . . 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." *Ommen*, 941 N.W.2d at 320 ("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.")

Even where litigation generally is "integral to" the performance of an insurance contract, and thus implicates the business of insurance, "the choice of forum [is] not." *AmSouth Bank*, 386 F.3d at 781; *Bennett*, 968 F.2d at 972 ("Application of the FAA does not impair the liquidator's substantive remedy under Montana law. Instead it simply requires the liquidator to seek relief through arbitration.").

Significantly, the Louisiana Supreme Court's construction of RLCA Section 22:2004(A)—that the statute gives the Commissioner the choice of whether to arbitrate his claims against Milliman or litigate them in state court (App. 7a)—effectively concedes that arbitration would neither impair nor interfere with the ongoing insolvency proceedings. The Louisiana statute would not have afforded the Commissioner the option to arbitrate if arbitration of these claims would impair or interfere with the orderly rehabilitation of LAHC. The Louisiana Supreme Court did not address or explain this fundamental flaw in its reasoning.

Moreover, the FAA mandate to arbitrate cannot be reverse preempted by a state statute that permits the arbitration of these claims, except where the Commissioner decides he would rather bring these claims in his home state court. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (citation omitted).

The Louisiana Supreme Court's improper expansion of reverse preemption to protect purported state "policies" also contravenes this Court's holding that a court cannot rely on "policy considerations" to vitiate an otherwise valid arbitration agreement. *Dean Witter Reynolds, Inc.*, 470 U.S. at 217 ("[C]ourts [should] enforce the bargain of the parties to arbitrate, and not substitute [their] own views of economy and efficiency") (quotations omitted); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010) (stating that the U.S. Supreme Court has never "held that courts may use policy considerations as a substitute for party agreement" concerning arbitration). A court has "no discretion to consider public-policy arguments in deciding whether to compel arbitration under the FAA." *Quackenbush*, 121 F.3d at 1382, citing *Dean Witter Reynolds*, 470 U.S. at 218.

Moreover, this Court has rejected the specific state "public policy" considerations underlying the Louisiana Supreme Court's decision as a basis to deny a party's right to arbitrate. The FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in original). And an arbitration clause must be enforced

as drafted even when arbitration would bifurcate proceedings, potentially leading to inefficiency and inconsistent results. *Dean Witter Reynolds*, 470 U.S. at 217.

III. The Question Presented Is An Important, Recurring Issue Of Federal Law, And Warrants This Court's Review In This Case.

The question presented in this case is a recurring one of substantial legal and practical importance, and is the subject of an irreconcilable split, and extensive state and lower court litigation. *See* NAIC Receiver's Handbook for Insurance Company Insolvencies (2018), pp. 499–500 (discussing this significant split in authority concerning arbitrability of disputes involving insurance commissioners acting as liquidators).[7] This singular federal question under the McCarran-Ferguson Act—whether state insurance insolvency forum selection provisions consolidating rehabilitation insolvency proceedings in a single state court may override federal statutes and contracts providing for arbitration—is the subject of considerably more litigation and conflict.

A definitive ruling would have great impact on companies that regularly do business with insurers, particularly in light of the COVID-19 pandemic. There will likely be a wave of new insurer insolvencies nationwide as insurers are forced to litigate over and bear many of the costs of this pandemic, through massive numbers and dollar amounts of health insurance, business interruption, and other coverage claims

[7] Available at https://www.naic.org/documents/prod_serv_fin_receivership_rec_bu.pdf.

that could not have been foreseen or accounted for in the pricing of these products. *See, e.g.*, *COVID-19 puts insurers in tricky situation; risks range from litigation to insolvency*, AlphaStreet (Apr. 8, 2020), https://news.alphastreet.com/covid-19-puts-insurers-in-tricky-position-risks-range-from-insolvency-to-litigation/. And there is every reason to expect that state insurance commissioners nationwide will react, as the Louisiana Commissioner did in this case, by looking for out-of-state deep-pockets—such as professional service firms—to sue on behalf of the insolvent insurers, and will seek to pursue those suits in their home state courts.

Every significant insurer contracts for the services of (frequently national) auditors, actuaries, accountants, and other diverse professional service firms. Professional services firms such as Milliman and Ernst & Young (the defendant in both the Ohio and Kentucky Supreme Court cases addressed above), insist on broad arbitration clauses in those contracts because arbitration is essential to limit their litigation costs and manage their risks. It is an essential element of the bargain between insurers and professional service firms that the professional services firm—particularly an out-of-state firm—will not be forced to defend itself in the insurers' home-state courts, before home-state judges and jurors. But under the law as it currently stands in the state courts of Louisiana, Kentucky, Ohio and New York, that contract will not be honored when it is most important to do so—when the insurer goes into insolvency.

Given that the Louisiana Supreme Court utilized the state's forum selection provision—which is substantively identical to forum selection provisions in no less than 25 other states' insolvency statutes (*see* footnote 4, *supra*)—and the state's broad public policy

rationales to vitiate an otherwise binding arbitration agreement, the decision is clearly part of "the judicial hostility towards arbitration that prompted the FAA[, which] had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *AT&T Mobility LLC*, 563 U.S. at 342 (FAA preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (Kentucky's clear-statement rule, requiring explicit and complex legal waivers before arbitration will be permitted, disfavors arbitration agreements and therefore is preempted by the FAA); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (holding that a California statute invalidating class arbitration waivers is preempted by the FAA).

The Court should grant certiorari because only this Court can resolve the conflict among the courts of appeals and state courts of last resort regarding the application of the McCarran-Ferguson Act in this important context. In doing so, it should also act, once again, to prevent the FAA from being undermined by precisely the kind of state court hostility that it was enacted to combat.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON A. STEEL
DENTONS US LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7077
simon.steel@dentons.com

REID L. ASHINOFF
Counsel of Record
JUSTIN N. KATTAN
ILYA SCHWARTZBURG
DENTONS US LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 768-6700
reid.ashinoff@dentons.com
justin.kattan@dentons.com
ilya.schwartzburg@dentons.com

Counsel for Petitioner

September 3, 2020

APPENDIX

APPENDIX A

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE — NEWS RELEASE #014

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinion(s) handed down on the 27th day of April, 2020 are as follows:

BY Crain, J.:

2019-C-00514 JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC. VS. TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA (Parish of East Baton Rouge)

We granted this writ to determine whether the Louisiana Commissioner of Insurance, as rehabilitator of a health insurance cooperative, in an action arising out of an agreement between the cooperative and a third-party contractor, is bound by an arbi-

tration clause in that agreement. We find the Commissioner not bound by the arbitration clause.

REVERSED AND REMANDED.

Retired Judge James H. Boddie, Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

Weimer, J., concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2019-C-00514

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.

vs.

TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

April 27, 2020

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

CRAIN, J.[1]

We granted this writ to determine whether the Louisiana Commissioner of Insurance, as rehabilitator of a health insurance cooperative, in an action

[1] Retired Judge James Boddie, Jr., appointed Justice ad hoc, sitting for Justice Clark.

arising out of an agreement between the cooperative and a third-party contractor, is bound by an arbitration clause in that agreement. We find the Commissioner not bound by the arbitration clause.

BACKGROUND

The facts critical to resolving this issue are not disputed. The Louisiana Health Cooperative, Inc. ("LAHC"), a health insurance cooperative created in 2011 pursuant to the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 *et seq*. (2010), entered an agreement with Milliman, Inc. for actuarial and other services. By July 2015, the LAHC was out of business and allegedly insolvent.

Louisiana Insurance Commissioner James J. Donelon ("Commissioner"), through the Deputy Commissioner of Financial Solvency, filed suit in the Nineteenth Judicial District Court seeking a permanent order of rehabilitation relative to the LAHC. The district court entered an order confirming the Commissioner as rehabilitator and vesting him with authority to enforce contract performance by any party who had contracted with the LAHC.

The Commissioner then sued multiple defendants in the Nineteenth Judicial District Court, asserting claims against Milliman for professional negligence, breach of contract, and negligent misrepresentation. According to that suit, the acts or omissions of Milliman caused or contributed to the LAHC's insolvency.

Milliman responded by filing a declinatory exception of lack of subject matter jurisdiction, arguing the Commissioner must arbitrate his claims pursuant to an arbitration clause in the agreement between the

LAHC and Milliman.[2] The Commissioner contended he is not bound by the arbitration clause and, pursuant to Louisiana Revised Statutes 22:257(F), exclusive jurisdiction for the claims against Milliman rests in the Nineteenth Judicial District Court.[3]

The district court denied Milliman's exception. The court of appeal reversed, treating Milliman's exception as an exception of prematurity and sustaining it, thus requiring the Commissioner to arbitrate his claims. *Donelon v. Shilling*, 2017-1545 (La. 2/28/19), 2019 WL 993328 (unpublished).

---

[2] Section 4 of the agreement provides "any dispute arising out of or relating to the engagement of Milliman by [the LAHC] . . . will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association." We note that the American Arbitration Association administers the case, but the applicable arbitration law is the Federal Arbitration Act (9 U.S.C. § 1 *et seq*.) because the FAA applies to all arbitrations "involving [interstate] commerce." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). Milliman is domiciled in Washington and the LAHC in Louisiana; therefore, interstate commerce is involved.

[3] Louisiana Revised Statutes 22:257(F) provides:

> The commissioner is specifically empowered to take over and liquidate the affairs of any health maintenance organization experiencing financial difficulty at such time as he deems it necessary by applying to the Nineteenth Judicial District Court for permission to take over and fix the conditions thereof. The Nineteenth Judicial District Court shall have exclusive jurisdiction over any suit arising from such takeover and liquidation. The commissioner shall be authorized to issue appropriate regulations to implement an orderly procedure to wind up the affairs of any financially troubled health maintenance organization.

The Commissioner now makes several arguments for reversing the court of appeal. He argues a choice-of-law provision dictates that New York law applies, which law prohibits enforcement of arbitration agreements in contracts with insolvent insurers in either liquidation or rehabilitation. If state law applies, the Commissioner avers it reverse preempts the Federal Arbitration Act pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011*, et. seq*. He also asserts the Nineteenth Judicial District Court has exclusive jurisdiction, points to policy reasons to distinguish himself, as rehabilitator, from the LAHC when enforcing the contract, and contends the court of appeal incorrectly applied the direct-benefits estoppel doctrine to enforce the arbitration clause.

ANALYSIS

We must determine whether the Commissioner can be compelled to arbitrate pursuant to an arbitration clause in an agreement to which he is not a party. Critical to this determination is the source of the Commissioner's authority to enforce the contract. To the extent the source is statutory, private parties have a limited ability to contractually interfere.

Louisiana Constitution Article IV, Section 11, provides, "There shall be a Department of Insurance, headed by the commissioner of insurance. The department shall exercise such functions and the commissioner shall have powers and perform duties authorized by this constitution or provided by law." The drafters of the constitution chose to leave the task of defining the powers and duties of the Commissioner to the legislature. *See Wooley v. State Farm Fire & Cas. Ins. Co*., 2004-882 (La. 1/19/05), 893 So. 2d 746, 767, ("Ultimately, [the 1973 Constitutional Convention delegates] voted not to designate any powers and

duties in the constitution and to allow the legislature to specify the Commissioner's powers and duties.") The legislature then enacted, in Chapter 9 of the Insurance Code, the Louisiana Rehabilitation, Liquidation, Conservation Act ("RLCA"), La. R.S. 22: 2001, *et seq.*, comprehensively setting forth the Commissioner's rights and obligations relative to insolvent insurers.

Louisiana Revised Statutes 22:2008[4] and 2009[5] generally give the Commissioner the right to enforce the contracts of an insolvent insurer. Louisiana Revised Statutes 22:2004(A) governs where the Commissioner may bring an action to enforce such

---

[4] Louisiana Revised Statutes 22:2008 provides in pertinent part:

> A. After a full hearing, which shall be held by the court without delay, the court shall enter an order either dismissing the petition or finding that sufficient cause exists for rehabilitation or liquidation and directing the commissioner of insurance to take possession of the property, business, and affairs of such insurer and to rehabilitate or liquidate the same as the case may be. The commissioner of insurance shall be responsible on his official bond for all assets coming into his possession. The commissioner of insurance and his successor and successors in office shall be vested by operation of law with the title to all property, contracts, and rights of action of the insurer as of the date of the order directing rehabilitation or liquidation.

[5] Louisiana Revised Statutes 22:2009 provides in pertinent part:

> A. Upon the entry of an order directing rehabilitation, the commissioner of insurance shall immediately proceed to conduct the business of the insurer and take such steps towards removal of the causes and conditions which have made such proceedings necessary as may be expedient.

contracts, providing, in pertinent part: "[a]n action under this Chapter brought by the commissioner of insurance, in that capacity, or as conservator, rehabilitator, or liquidator may be brought in the Nineteenth Judicial District Court for the parish of East Baton Rouge or any court where venue is proper under any other provision of law."[6]

This suit related to the contract between the LAHC and Milliman is "an action brought under [the RLCA]" by "the commissioner of insurance . . .as rehabilitator." The plain language of Louisiana Revised Statutes 22:2004(A) grants authority for the Commissioner to bring such an action in the Nineteenth Judicial District Court or any *court* where venue is proper. The statute permits the Commissioner to choose where and how to litigate an action. By using the permissive "may," the statute does not foreclose the option of arbitration, if provided in a contract, but effectively delegates the choice to the Commissioner. We hold that Louisiana Revised Statutes 22:2004(A) is an express grant of authority for the Commissioner to bring this suit in court, rather than arbitration.

This holding is consistent with the purpose and spirit of the RLCA. The Commissioner is a protector of public interests, and the legislature designed the statutory scheme to ensure the protection of such interests. Louisiana Revised Statutes 22:2(A)(1) provides, in pertinent part: "Insurance is an industry

---

[6] Louisiana Revised Statutes 22:2004 is titled "Venue." An arbitration clause has been characterized by this court as a type of venue selection clause. See *e.g. Hodges v. Reasonover*, 2012-0043 (La. 7/2/12), 103 So.3d 1069, 1076 ("An arbitration clause does not inherently limit or alter either party's substantive rights; it simply provides for an alternative venue for the resolution of disputes.")

affected with the public interest and it is the purpose of this Code to regulate that industry in all its phases. Pursuant to the authority contained in the Constitution of Louisiana, the office of the commissioner of insurance is created. It shall be the duty of the commissioner of insurance to administer the provisions of this Code." The Commissioner's role is aptly described in *LeBlanc v. Bernard*, 554 So. 2d 1378, 1381 (La. App. 1 Cir. 1989), *writ denied*, 559 So. 2d 1357 (La. 1990):

> The Commissioner of Insurance as rehabilitator or liquidator owes an overriding duty to the people of the State of Louisiana. The *raison d'etre* of his office is because the insurance industry is "affected with the public interest." La. R.S. 22:2. Any duties imposed upon that office, therefore, must be performed with the public interest foremost in mind. The Commissioner's responsibilities as rehabilitator or liquidator include, additionally, protection of the policyholders, creditors, and the insurer itself. *Republic of Texas Savings Assoc. v. First Republic Life Ins. Co.*, 417 So. 2d 1251, 1254 (La. App. 1 Cir.) *writ denied*, 422 So.2d 161 (La. 1982).
>
> This court has previously held that defendant, as rehabilitator, "does not stand precisely in the shoes of First Republic." *Id.*

Also supportive of our interpretation is Louisiana Revised Statutes 22:2004(C), which provides: "If an action is filed in more than one venue, the court *shall consolidate* all such cases into one court where venue is proper." Both this statutory requirement for consolidation and the Commissioner's authority to enforce contracts in the venue of his choice promote the

efficient and cohesive management of the affairs of insolvent insurers, which is a matter of substantial public interest.

The Commissioner urges that Louisiana Revised Statutes 22:257(F) vests "exclusive jurisdiction" for this action in the Nineteenth Judicial District Court. However, this statute applies only to the "*takeover and liquidation* of a health maintenance organization." The subject suit arises from the rehabilitation of the LAHC, not its liquidation.[7] Nevertheless, Louisiana Revised Statutes 22:257(F) does support our view of the RLCA as a comprehensive statutory scheme facilitating the Commissioner's management of insolvent insurers. Specifically, the statute aligns with Louisiana Revised Statutes 22:2009, which allows the Commissioner to convert a rehabilitation proceeding to liquidation when he deems it necessary. Thus, the Commissioner may choose the Nineteenth Judicial District Court to bring an action as rehabilitator, then convert from rehabilitation to liquidation where the Nineteenth Judicial District Court's jurisdiction is mandatory. Louisiana Revised Statutes 22:2004(C)'s use of "one court" likewise facilitates the transition between these different types of receivership.

The ability of the Commissioner to seek to enjoin interference with rehabilitation proceedings is also part of the statutory scheme and reinforces the Commissioner's authority to choose a court as the forum to proceed. Louisiana Revised Statutes 22:2006 grants the court "jurisdiction over matters brought by . . . the commissioner of insurance . . .to issue an injunction." Louisiana Revised Statutes 22:2007(D) then provides, "The court having jurisdiction over a proceeding under this Chapter [the RLCA] shall have the authority to issue such orders, including injunctive relief, as

appropriate, for the enforcement of this Section [delinquency proceeding or any investigation related to the insolvency proceeding]." An arbitrator is not typically empowered to issue injunctive relief. *Horseshoe Entm't v. Lepinski*,[7] 40,753 (La. App. 2 Cir. 3/8/06), 923 So. 2d 929, 936, *writ denied*, 2006-0792 (La. 6/2/06), 929 So. 2d 1259.

Both parties have argued extensively that the contract controls. Particularly, they contend resolution of the arbitrability issue hinges on the parties' contractual intent relative to an apparent conflict between a New York choice of law provision and the arbitration clause. However, to the extent the agreement seeks to alter a statutory right granted to the Commissioner, the parties' intent is not determinative. Where the legislature, through positive law, empowers the Commissioner to bring an action in court, private parties cannot contract to deprive him of that right. *See* La. C.C. art. 1971 (parties are free to contract for any object that is *lawful*, possible, and

---

[7] As part of a comprehensive statutory scheme relating to the management of insolvent insurers, the legislature has purposefully distinguished between "liquidation" and "rehabilitation." Thus, Louisiana Revised Statutes 22:257(F) does not directly apply to the commissioner as rehabilitator. This legislative distinction is evidenced in Louisiana Revised Statutes 22:2008 (providing for the suspension of prescription when the commissioner seeks a rehabilitation order, but interruption if he seeks an order of liquidation); Louisiana Revised Statutes 22:2009 (providing for the commissioner of insurance to immediately proceed to conduct the business of the insurer as rehabilitator and also providing for the conversion from rehabilitation to liquidation when necessary); Louisiana Revised Statutes 22:2010 (providing for the commissioner to proceed to liquidate the property, business, and affairs of the insurer.)

determined or determinable.)[8] The court in *Brown v. Associated Ins. Consultants, Inc.*, 97-1396 (La. App. 1 Cir. 6/29/98), 714 So. 2d 939, 942 noted:

> This statutory scheme for the liquidation and/or rehabilitation of insurers is comprehensive and exclusive in scope. . . .
>
> Moreover, any attempt. . . to enjoin the Commissioner (through the appointed liquidator) from performing his role as liquidator would clearly violate the exclusivity of the rehabilitation scheme provided by law.

Because Louisiana Revised Statutes 22:2004(A) grants the Commissioner the right to choose the forum for his action, a private agreement depriving him of that right, "would clearly violate the exclusivity of the rehabilitation scheme." *Brown*, 714 So.2d 942. Consequently, the parties' intent is not relevant and

---

[8] *See also Louisiana Smoked Prod., Inc. v. Savoie's Sausage & Food Prod., Inc*., 96-1716 (La. 7/1/97), 696 So. 2d 1373, 1380–81 ("In a free enterprise system, parties are free to contract except for those instances where the government places restrictions for reasons of public policy. The state may legitimately restrict the parties' right to contract if the proposed bargain is found to . . . contravene some . . . matter of public policy.") *See Bernard v. Fireside Commercial Life Ins. Co.,* 633 So. 2d 177, 185 (La. App. 1 Cir. 1993), ("Louisiana has enacted a statutory scheme specifically designed for insurance insolvency, which takes precedence over general law to the extent that the general law is inconsistent with the provisions or purpose of the comprehensive, statutory scheme.") By statutorily addressing insurance insolvency, general contract law is overridden to the extent it is inconsistent with the RLCA, or the purposes behind it. *Crist v. Benton Casing Serv.,* 572 So. 2d 99, 102 (La. App. 1 Cir. 1990), *writ denied*, 573 So. 2d 1143 (La. 1991).

we pretermit any analysis of the allegedly conflicting provisions in the agreement.

Similarly, we find it unnecessary to address the doctrine of direct benefits estoppel and its effect on the Commissioner as a non-signatory to the agreement.[9] This jurisprudentially created type of estoppel is an equitable remedy. *Courville*, 218 So.3d at 148. Equitable remedies are only available in the absence of legislation and custom. La.Civ.Code art. 4. Because an express grant of authority exists in favor of the Commissioner, resort to equity is unwarranted. *See Gulf Refining Co.*, 171 So.2d 846, 854 (1936).

Our holding that Louisiana law allows the Commissioner to decline binding arbitration does not dispose of the issue entirely. We must now determine if the FAA, the applicable federal arbitration law, preempts Louisiana law, thus compelling arbitration. By operation of the Supremacy Clause in the United States Constitution, we acknowledge the FAA preempts inconsistent state law. 9 U.S.C. § 1, *et seq.*; U.S. Const. art. VI, Clause 2. Louisiana Revised Statutes 22:2004(A) is arguably inconsistent with the FAA, which favors arbitration. However, the Commissioner argues state law reverse preempts the FAA by virtue of the McCarran-Ferguson Act. McCarran-Ferguson exempts from federal preemption state laws enacted "for the purpose of regulating the business of insurance." 15 U.S. § 1012. Congress has mandated that "[t]he business of insurance, and every person engaged

---

[9] Direct benefits estoppel prevents a non-signatory from escaping the effects of an arbitration clause when he knowingly exploits and receives a benefit from the agreement containing the arbitration clause. *See Courville v. Allied Professionals Insurance Co.*, 2016-1354 (La. App. 1 Cir. 4/12/17), 218 So.3d 144, 148, n.3, *writ denied*, 2017-0783 (La. 10/27/17), 228 So.3d 1223.

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

Courts have adopted a three-part test to determine when a state law, through application of McCarran-Ferguson, reverse preempts federal law: (1) when the federal statute is not specifically related to the insurance business, (2) when the state statute was enacted to regulate insurance, and (3) when application of the federal statute would invalidate, impair, or supersede the state statute. *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006).

The FAA does not specifically relate to "the business of insurance." *Id.* Thus, the first test for reverse preemption is satisfied.

Next is whether Louisiana Revised Statutes 22:2004(A) was enacted "for the purpose of regulating the business of insurance." *Id.* The Commissioner persuasively argues Louisiana's comprehensive statutory scheme for handling insolvent insurers, including the right to choose the forum for actions brought by him as rehabilitator, serves the purpose of regulating the business of insurance and is within the scope of McCarran-Ferguson. *See Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 591 (5th Cir. 1998).

In *Munich* the court considered whether Oklahoma law governing insurance company delinquency proceedings reverse preempted the FAA. Oklahoma, like most states, enacted its insurance regulatory scheme under the "shield provided by the McCarran-Ferguson

Act." *Id.,* citing *Harford Cas. Ins. Co. v. Corococan*, 807 F.2d 38, 43 (2d Cir.1986). Oklahoma courts, as the "primary expositors of Oklahoma law and public policy, have expressly declared that Oklahoma's Insurers Liquidation Act is designed to protect the public in general, and *policyholders of an insolvent insurer in particular.*" *Id.* at 592. The court ultimately held the provisions of the insurance insolvency scheme were enacted for the purpose of regulating the business of insurance and reverse preempted the FAA, thus exempting the Oklahoma insurance commissioner from arbitration. [10]

The *Munich* court relied heavily on *Stephens v. American Int'l Ins. Co.,* 66 F.3d 41 (2d Cir.1995), which found an anti-arbitration provision in Kentucky's

---

[10] The *Munich* court utilized a three-part test set forth in *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982) to evaluate whether the Oklahoma law regulated the business of insurance: (1) "whether the practice in question has the effect of transferring or spreading a policyholder's risk;" (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured;" and (3) "whether the practice is limited to entities within the insurance industry." The court in *Pierno* noted that no single factor is determinative, but examination of all the factors may lead to the conclusion that a state law regulates the "business of insurance." *Id.* The *Munich* court found Oklahoma's comprehensive regulatory scheme sufficient to satisfy at least two of three *Pireno* factors: "First, it is crucial to the relationship between the insurance company and its policyholders for both parties to know that, in the event of insolvency, the insurance company will be liquidated in an organized fashion." *Munich*, 141 F.3d 585 (1998). Second, the court found the liquidation scheme limited, by its nature, to entities in the insurance industry. "It does not apply to insolvent companies generally, but only to insolvent insurance companies." *Id*. The same factors are met relative to Louisiana's comprehensive regulatory scheme.

Insurance Rehabilitation and Liquidation Law was enacted to regulate the business of insurance and was not preempted by the FAA. The *Stephens* court reasoned the Kentucky liquidation scheme protects policyholders 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." *Stephens*, 66 F.3d at 45.

Although not binding on us, we are persuaded by these federal court decisions. While *Munich* and *Stephens* involved liquidation, not rehabilitation, the distinction is immaterial when considering the overall statutory scheme, as both are legal devices used by the Commissioner to manage insolvent insurers. Similar to Oklahoma and Kentucky, Louisiana's RLCA was enacted for the purpose of regulating the business of insurance. Louisiana Revised Statutes 22:2004(A), is part of the RLCA. La. R.S. 22:2001*, et seq.* Section 2004(A) authorizes the Commissioner to select the forum for "all actions under [the RLCA] brought by the commissioner . . . as rehabilitator." Section 2008 gives the Commissioner "title to all property, contracts, and rights of action of the insurer." Section 2009 mandates that the Commissioner "proceed to conduct the business of the insurer." This statutory scheme for rehabilitation and liquidation of insurers is comprehensive and exclusive in scope. *Brown v. Associated Ins. Consultants, Inc.*, 97-1396 (La. App. 1 Cir. 6/29/98), 714 So. 2d 939, 942. It balances the interests of policyholders, creditors, and claimants. *LeBlanc v. Bernard*, 554 So. 2d at 1383–84. It was enacted to regulate insurance "in the public interest." La. R.S. 22:2(A)(1). Section 2004 is part of a coherent policy to address that interest. *Health Net, Inc. v. Wooley*, 534 F.3d 487, 496 (5th Cir. 2008).

Milliman argues *United States Treasury Dept. v. Fabe*, 508 U.S. 491, 505, 113 S.Ct. 2202, 124 L.Ed. 2d 449 (1993) prohibits consideration of the insurance statutory scheme as a whole when determining whether a specific statute was enacted for the purpose of regulating the business of insurance. We disagree. The *Fabe* court considered whether a federal priority statute was superseded by a conflicting state priority statute, where the latter was part of a larger statutory scheme enacted to regulate insolvent insurers. The *Fabe* court observed that an individual statute can reverse preempt federal law to the extent the specific statute regulates policyholder interests. However, the court found the provisions that did not directly affect policyholder interests were not enacted for the purpose of regulating the business of insurance and, thus, had no reverse preemptive effect. The *Munich* court rejected an expansive application of the *Fabe* holding, finding "the court stopped short of directing that [a parsing of statutes] approach be taken in every case." *Munich*, 141 F.3d 592. It continued:

> This uncertainty need not concern us today, however, because if we are required to parse [Oklahoma Insurance regulation law], the specific provisions of the statute at issue here —vesting exclusive original jurisdiction of delinquency proceedings in the Oklahoma state court and authorizing the court to enjoin any action interfering with the delinquency proceedings—are laws enacted clearly for the purpose of regulating the business of insurance. These provisions give the state court the power to decide all issues relating to disposition of an insolvent insurance company's assets, including whether any given property

> is part of the insolvent estate in the first place.

Id.

Louisiana, like Oklahoma, adopted a comprehensive scheme to regulate insolvent insurers, including granting the Commissioner, as rehabilitator, the authority to choose which forum to bring an action. The policy reasons for this grant of discretion mirror those of Oklahoma: "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." *Munich*, 141 F.3d at 593. While each of these concerns alone may not justify avoiding the arbitration clause, collectively they support our holding that the venue selection provision in Section 2004 was enacted for the purpose of regulating the business of insurance.

Last, reverse preemption does not apply unless the FAA acts to "invalidate, supersede, or impair" the RLCA, particularly the venue provision. Forcing arbitration upon the Commissioner conflicts with the Louisiana law authorizing him to choose which forum to proceed in as rehabilitator. This conflict sufficiently impairs the Commissioner's rights under Section 2004 to trigger McCarran-Ferguson's reverse preemption effect.

CONCLUSION

For the reasons stated herein, we find the Louisiana Rehabilitation, Liquidation, and Conservation Act, specifically Louisiana Revised Statutes 22:2004(A), prevents the Commissioner from being compelled to arbitration. We reverse the judgment of the court of appeal and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

SUPREME COURT OF LOUISIANA

No. 2019-C-00514

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.

versus

TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

April 27, 2020

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

WEIMER, J., concurring.

The statute central to this case, La. R.S. 22:2004(A), provides that an "action by the commissioner of insurance, in that capacity, or as conservator, rehabilitator, or liquidator may be brought in the Nineteenth Judicial District Court for the parish of East Baton Rouge or any court where venue is proper under any

other provision of law." (Emphasis added.) Arbitration is not mentioned in the statute. Accordingly, I believe the commissioner is not statutorily authorized to elect arbitration, but is limited to litigation, in court, as described in La. R.S. 22:2004(A). Thus, I respectfully concur; I join the majority opinion in all other respects.

APPENDIX B

STATE OF LOUISIANA COURT OF APPEAL
FIRST CIRCUIT

———

2017 CW 1545

———

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.

versus

TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

———

Judgment Rendered: FEB 28 2019

****

On review from the Nineteenth Judicial District
Court Parish of East Baton Rouge State of Louisiana

Case No. 651,069

The Honorable Timothy E. Kelley

****

V. Thomas Clark, Jr. Grant J. Guillot Baton Rouge, Louisiana	Attorneys for Applicant-Relator Milliman, Inc.
Harry A. Rosenberg New Orleans, Louisiana	
H. Alston Johnson Baton Rouge, Louisiana	
J.E. Cullens, Jr. Edward J. Walters, Jr. Darrel J. Papillion David Abboud Thomas Jennifer Wise Moroux Baton Rouge, Louisiana	Attorneys for Respondent, James J. Donelon, Commissioner of Insurance for the State of Louisiana, in His Capacity as Rehabilitator of Louisiana Health Cooperative, Inc., Louisiana Health Cooperative, Inc., Billy Bostick

****

BEFORE: HIGGINBOTHAM, HOLDRIDGE, and PENZATO, JJ.

HOLDRIDGE, J.

In this writ application, applicant, Milliman, Inc. ("Milliman"), challenges the ruling of the trial court, which overruled Milliman's Declinatory Exception raising the objection of Lack of Subject Matter Jurisdiction.[1] For the following reasons, we reverse the ruling of the trial court and dismiss the claims of James J. Donelon, Commissioner of Insurance for the

[1] The companion case involving the Declinatory Exception raising the objection of Improper Venue and writ application filed by Buck Consultants, LLC, Docket No. 2017 CW 1483, is decided by this Court under a separate ruling.

State of Louisiana, through his duly appointed Receiver, Billy Bostick, against Milliman, without prejudice.

FACTS AND PROCEDURAL HISTORY

This matter arises from the insolvency and the rehabilitation of Louisiana Health Cooperative, Inc. ("LAHC"). LAHC executed a Consulting Services Agreement ("Agreement") with Milliman for actuarial services. The Agreement states, in pertinent part, as follows:

> This Agreement is entered into between [Milliman] and [LAHC] (Company) as of August 4, 2011. Company has engaged Milliman to perform consulting services as described in the letter dated August 4, 2011 and attached hereto. The parties agree that these terms and conditions will apply to all current and subsequent engagements of Milliman by Company unless specifically disclaimed in writing by both parties prior to the beginning of the engagement. In consideration for Milliman agreeing to perform these services, Company agrees as follows.
>
> * * *
>
> 4. DISPUTES. 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. . . .
>
> 5. CHOICE OF LAW. The construction, interpretation, and enforcement of this Agree-

> ment shall be governed by the substantive contract law of the State of New York without regard to its conflict of laws provisions. In the event any provision of this agreement is unenforceable as a matter of law, the remaining provisions will stay in full force and effect.

Representatives of Milliman and LAHC signed the Agreement on August 4, 2011, and August 15, 2011, respectively.

A Proposal for Actuarial Services ("Engagement Letter") from Milliman to Beam Partners, dated August 4, 2011, was attached to the Agreement. The Engagement Letter outlined that Beam Partners was working with LAHC, which is sponsored by Ochsner Health System, to investigate the creation of a Consumer Operated and Oriented Plan ("CO-OP") in Louisiana. Beam Partners, on behalf of LAHC, had asked Milliman to provide a proposal for actuarial support of the proposed CO-OP, with initial support including assistance with a feasibility study and LAHC's loan application in response to Funding Opportunity Announcement No. 00-000-11-001, CFDA 93.545 released from the U.S. Department of Health and Human Services on July 28, 2011. The Engagement Letter provided Milliman's work plan as well as timing, staffing, and professional fees.

It is alleged that LAHC became registered with the Louisiana Secretary of State on September 12, 2011, and applied for and received loans from the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, in 2012. However, it is undisputed that, by July 2015, LAHC stopped doing business.

On September 21, 2015, in response to a verified petition and testimony on behalf of Caroline Brock, Deputy Commissioner of Financial Solvency for the Louisiana Department of Insurance and Billy Bostick, a Permanent Order of Rehabilitation and Injunctive Relief (the "Rehabilitation Order") was signed, confirming James J. Donelon, Commissioner of Insurance for the State of Louisiana ("the Commissioner") as Rehabilitator of LAHC and Billy Bostick as Receiver of LAHC. The Rehabilitation Order further states, in pertinent part, as follows:

> [T]he requirements for rehabilitation under the provisions of La. R.S. 22:2001, et seq., have been met . . . LAHC shall be and hereby is placed into rehabilitation under the direction and control of the Commissioner
>
> * * *
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that . . . any and all persons and entities shall be and hereby are permanently enjoined from obtaining preferences, judgments, attachments or other like liens or the making of any levy against LAHC, its property and assets
>
> * * *
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Rehabilitator shall be and hereby is entitled to the right to enforce or cancel . . . contract performance by any party who had contracted with LAHC.
>
> * * *
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that LAHC providers and

> contractors are required to abide by the terms of their contracts with LAHC
>
> * * *
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Rehabilitator and Receiver of LAHC . . . shall be and hereby are allowed and authorized to . . . [c]ommence and maintain all legal actions necessary, wherever necessary, for the proper administration of this rehabilitation proceeding
>
> * * *
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all contracts between LAHC and any and all persons or entities providing services to LAHC . . . shall remain in full force and effect unless canceled by the Receiver, until further order of this Court.

On August 31, 2016, the Commissioner, as Rehabilitator of LAHC, through his duly appointed Receiver, Billy Bostick, filed a Petition for Damages and Jury Demand, in a separate matter from the rehabilitation proceeding, asserting claims of breach of fiduciary duty, breach of contract, negligence, and gross negligence against multiple defendants and seeking damages in connection with LAHC's failure. Milliman was named as a defendant in the Commissioner's First Supplemental, Amending and Restated Petition for Damages and Request for Jury Trial filed on November 29, 2016.

The Commissioner alleged professional negligence, breach of contract, and negligent misrepresentation against Milliman. The Commissioner stated that Milliman was engaged *via* the Engagement Letter to

provide "actuarial support" for LAHC including the production of a feasibility report and loan application.

The Commissioner further alleged that Milliman was engaged *via* a separate engagement letter dated November 13, 2012, to develop 2014 premium rates in Louisiana.[2]

As to the professional negligence and breach of contract claims, the Commissioner alleged the following: (1) the feasibility study was prepared using unrealistic and unreasonable assumption sets failing to consider the possibility of adverse enrollment and/or medical loss ratio scenarios; (2) Milliman conditioned its payment upon LAHC being awarded a loan, compromising its actuarial independence and breaching its duty to LAHC; (3) Milliman's feasibility study and pro forma reports were unreliable, inaccurate, and not the result of careful professional analysis; (4) Milliman owed a duty to LAHC to exercise reasonable care in accordance with the professional standards for actuaries; (5) Milliman provided actuarial memorandums for 2014 rate filings utilizing unreasonable assumptions, grossly underestimating the level of non-claim expenses in 2014, and providing no basis for assumptions made therein; (6) Milliman breached its duty to LAHC by failing to discharge its duties with reasonable care, failing to act in accordance with the professional standards applicable to actuaries, failing to produce an accurate and reliable feasibility study, failing to set premium rates that were accurate and reliable, and failing to exercise the reasonable judgment expected of professional actuaries under like circumstances; and (7) Milliman's failure to exercise

---

[2] A copy of the November 13, 2012 Engagement Letter has not been provided to this Court and is not in evidence.

reasonable care, failure to act in accordance with the professional standards applicable to actuaries and breach of contract were the legal causes of all or substantially all of LAHC's damages. The Commissioner further alleged that Milliman's advice and reports to LAHC negligently misrepresented the actual funding needs and premium rates of LAHC, and Milliman had a duty to provide accurate and up-to-date information to LAHC that Milliman knew or should have known LAHC would rely on in making its decision concerning premium amounts.

In response to the First Supplemental, Amending and Restated Petition for Damages, Milliman filed a Declinatory Exception raising the objection of Lack of Subject Matter Jurisdiction, asserting that the Commissioner's claims against it must be arbitrated, pursuant to the arbitration provision in the Agreement. Milliman requested that the Commissioner's claims against it be dismissed, with prejudice. Attached to Milliman's exception was a copy of the Agreement and the Engagement Letter.

The Commissioner opposed the exception arguing, in pertinent part, as follows: (1) the Rehabilitation, Liquidation, Conservation Act, La. R.S. 22:2001 *et seq.* ("the RLC Act") of the Louisiana Insurance Code is comprehensive and exclusive in scope, and La. R.S. 22:257(F) gives the Nineteenth Judicial District Court exclusive jurisdiction of this matter; (2) arbitration interferes with the rehabilitation proceeding in violation of the Rehabilitation Order; (3) the Commissioner did not sign the Agreement and is not bound by the arbitration provision; (4) Milliman does not cite or distinguish Ohio Supreme Court's decision in *Taylor v. Ernst & Young, L.L.P.*, 2011-Ohio-5262, 130 Ohio St. 3d 411, 958 N.E.2d 1203; (5) the Commissioner

does not stand precisely in the shoes of the insolvent insurer because he acts as an officer of the State and owes an overriding duty to the people of the State of Louisiana; and (6) the Commissioner's claims do not arise from the Engagement Letter because the Commissioner is not seeking a declaration of Milliman's obligations under the Engagement Letter and the Commissioner's allegations against Milliman do not require the court to interpret the Engagement Letter to determine Milliman's obligations. Attached to the Commissioner's opposition was a copy of the First Supplemental, Amending and Restated Petition for Damages and the Rehabilitation Order.

Milliman filed a reply arguing, in pertinent part, as follows: (1) the Commissioner is vested with title to all contracts of LAHC, pursuant to La. R.S. 22:2008(A), and no provision of the RLC Act vests the Commissioner with greater rights than those LAHC held; (2) La. R.S. 22:257(F), which gives the Nineteenth Judicial District Court exclusive jurisdiction over suits arising from the takeover and liquidation of a health maintenance organization, does not apply herein because LAHC is not in liquidation; (3) enforcement of the arbitration provision does not violate the Rehabilitation Order; (4) the Commissioner is bound to the arbitration provision, despite being a non-signatory, because the Commissioner has sued Milliman for breach of the Agreement; (5) the Ohio Supreme Court's decision in *Taylor* is not binding on this Court and is factually distinguishable; (6) the Commissioner stands in the shoes of LAHC for purposes of exercising the rights and being obligated by the restrictions of the Agreement; and (7) the Commissioner's claims against Milliman arise out of the Agreement because the Engagement Letter was incorporated into the Agreement and the claims against Milliman arise out of

the contractual relationship between LAHC and Milliman.

A hearing on the Declinatory Exception raising the objection of Lack of Subject Matter Jurisdiction was held on August 25, 2017. Copies of the Agreement, the Engagement Letter and the Rehabilitation Order were introduced into evidence at the hearing.

The trial court denied the exception. Milliman filed a writ application, seeking supervisory review of the trial court's judgment that denied its Declinatory Exception raising the objection of Lack of Subject Matter Jurisdiction and asking that the trial court's judgment be reversed. We granted *certiorari* and stayed the trial court proceeding.

ERROR

Milliman argues that the trial court erroneously denied its Declinatory Exception raising the objection of Lack of Subject Matter Jurisdiction, where the trial court found that the Commissioner's claims against Milliman must be heard in the Nineteenth Judicial District Court rather than in arbitration, in violation of the language of the Rehabilitation Order, the Louisiana Insurance Code, the Louisiana Binding Arbitration Law and Federal Arbitration Act, and controlling jurisprudence of this Court and the U.S. Supreme Court.

STANDARD OF REVIEW

Milliman filed a Declinatory Exception raising the objection of Lack of Subject Matter Jurisdiction, arguing that the Commissioner's claims should be dismissed with prejudice because the trial court does not have subject matter jurisdiction in light of the arbitration provision in the Agreement. Subject

matter jurisdiction is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted. La. Code Civ. P. art. 2. A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void. *See* La. Code Civ. P. arts. 3 and 925(C). A trial court is precluded from exercising jurisdiction once arbitration has commenced. *Williams v. International Offshore Services, LLC*, 2011-1240 (La. App. 1 Cir. 12/7/12), 106 So.3d 212, 217, *writ denied,* 2013-0259 (La. 3/8/13), 109 So.3d 367. Furthermore, subject matter jurisdiction cannot be waived or conferred by the consent of the parties. *Id.* However, arbitration has not yet commenced in this matter, and the trial court has not yet been divested of subject matter jurisdiction. Moreover, the arbitration provision is powerless to waive or confer subject matter jurisdiction. Therefore, an exception of lack of subject matter jurisdiction is not a proper procedural vehicle to raise arbitration.

However, "[e]very pleading shall be so construed as to do substantial justice." La. Code Civ. P. art. 865. In this regard, an exception is treated as what it actually is, not as what it is entitled. *Smith v. Smith*, 341 So.2d 1147, 1148 (La. App. 1 Cir. 1976) *(citing Jackson v. Dickens*, 236 So.2d 81, 83 (La. App. 1 Cir. 1970)). The defense that a plaintiff is not entitled to judicial relief because of a valid agreement to submit claims to arbitration may be raised by the dilatory exception of prematurity. *Green v. Regions Bank*, 2013-0771 (La. App. 1 Cir. 3/19/14), 2014 WL 3555820, *2 (unpublished) *(citing Cook v. AAA Worldwide Travel Agency*, 360 So.2d 839, 841 (La. 1978); *O'Neal v. Total Car Franchising Corp*., 44,793 (La. App. 2 Cir. 12/16/09), 27 So.3d 317, 319). Therefore, this Court

will consider Milliman's Declinatory Exception raising the objection of Lack of Subject Matter Jurisdiction as a Dilatory Exception raising the objection of Prematurity, which properly raises arbitration.

Louisiana Code of Civil Procedure article 926(A)(1) provides for the dilatory exception raising the objection of prematurity. Such an objection is intended to retard the progress of the action rather than defeat it. La. Code Civ. P. art. 923. A suit is premature if it is brought before the right to enforce the claim sued on has accrued. La. Code Civ. P. art. 423.

Prematurity is determined by the facts existing at the time suit is filed. *Houghton v. Our Lady of the Lake Hospital, Inc*., 2003-0135 (La. App. 1 Cir. 7/16/03), 859 So.2d 103, 106 *(citing Hidalgo v. Wilson Certified Express, Inc.*, 94-1322 (La. App. 1 Cir. 5/14/96), 676 So.2d 114, 116; *Allied Signal, Inc. v. Jackson*, 96-0138 (La. App. 1 Or. 2/14/97), 691 So.2d 150, 157 n.9, *writ denied,* 97-0660 (La. 4/25/97), 692 So.2d 1091). Evidence may be introduced to support or controvert the exception, when the grounds do not appear from the petition. La. Code Civ. P. art. 930. The objection of prematurity raises the issue of whether the judicial cause of action has yet come into existence because some prerequisite condition has not been fulfilled. *Bridges v. Smith*, 2001-2166, (La. App. 1 Cir. 9/27/02), 832 So.2d 307, 310, *writ denied,* 2002-2951 (La. 2/14/03), 836 So.2d 121. The objection contemplates that the action was brought prior to some procedure or assigned time, and is usually utilized in cases where the applicable law or contract has provided a procedure for one aggrieved of a decision to seek relief before resorting to judicial action. *Plaisance v. Davis*, 2003-0767 (La. App. 1 Cir. 11/7/03), 868 So.2d 711, 716, *writ denied,* 2003-3362 (La. 2/13/04), 867 So.2d

699; *Harris v. Metropolitan Life Insurance Co.*, 2009-34 (La. App. 1 Cir. 2/5/10), 35 So.3d 266, 274. An exception of prematurity raising a question of law is subject to a *de novo* standard of review on appeal. *Bridges v. Citimortgage, Inc.*, 2011-1508 (La. App. 1 Cir. 5/24/12), 2012 WL 1922457, *1, *writ denied,* 2012-1739 (La. 11/2/12), 99 So.3d 673 *(citing* La. Code Civ. P. art. 926; *Bridges*, 832 So.2d at 310).

The facts are not in dispute with respect to this writ application. The issue before us is whether the trial court correctly interpreted and applied the law in denying the exception and refusing to enforce the arbitration provision. This is a question of law subject to a *de novo* standard of review.

Appellate review of questions of law is simply a review of whether the trial court was legally correct or legally incorrect. *Bridges*, 832 So.2d at 310 *(citing City of Baker School Board v. East Baton Rouge Parish School Board*, 99-2505 (La. App. 1 Cir. 2/18/00), 754 So.2d 291, 292). On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and renders judgment on the record. *Bridges*, 832 So.2d at 310 *(citing Northwest Louisiana Production Credit Association v. State, Department of Revenue and Taxation*, 98-1995 (La. App. 1 Cir. 11/5/99), 746 So.2d 280, 282.

When the issue of failure to arbitrate is raised by the dilatory exception raising the objection of prematurity, the defendant pleading the exception has the burden of showing the existence of a valid contract to arbitrate, by reason of which the judicial action is premature. *Green*, 2014 WL 3555820 at *2 *(citing Cook*, 360 So.2d at 841; *O'Neal*, 27 So.3d at 319). If the dilatory exception of prematurity is sustained, the premature

action shall be dismissed. *Green*, 2014 WL 3555820 at *2 *(citing* La. Code Civ. P. art 933).

DISCUSSION

The positive law of Louisiana favors arbitration. *Aguillard v. Auction Mgmt. Corp*., 2004-2804 (La. 6/29/05), 908 So.2d 1, 7 *superseded by statute on other grounds,* as stated in *Arkel Constructors, Inc. v. Duplantier & Meric, Architects, L.L.C*., 2006-1950 (La. App. 1 Cir. 7/25/07), 965 So.2d 455, 458-59. Louisiana Revised Statutes 9:4201 of the Louisiana Binding Arbitration Law ("LBAL"), specifically states as follows:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Such favorable treatment echoes the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*. *Aguillard*, 908 So.2d at 7. Section 2 of the FAA provides:

> 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.

The Louisiana Supreme Court in *Aguillard* adopted the liberal federal policy favoring arbitration agreements, and a Louisiana presumption of arbitrability now exists with regard to the enforceability of arbitration agreements. *See Vishal Hospitality, LLC v. Choice Hotels International, Inc*., 2004-0568 (La. App. 1 Cir. 6/28/06), 939 So.2d 414, 416, *writ denied,* 2006-2517 (La. 1/12/07), 948 So.2d 152 *(citing Aguillard*, 908 So.2d at 3-4). Louisiana courts look to federal law in interpreting the LBAL, because it is virtually identical to the FAA. *Snyder v. Belmont Homes, Inc*., 2004-0445 (La. App. 1 Cir. 2/16/05), 899 So.2d 57, 60, *writ denied,* 2005-1075 (La. 6/17/05), 904 So.2d 699. In this regard, determinations regarding the viability and scope of arbitration clauses would be the same under either law, and is consistent with the federal jurisprudence interpreting the FAA which may be considered in construing the LBAL. *Lafleur v. Law Offices of Anthony G. Buzbee, P.C*., 2006-0466 (La. App. 1 Cir. 3/23/07), 960 So.2d 105, 111, *called into doubt on other grounds,* as stated in *Arkel Constructors*, Inc., 965 So.2d at 459 (citations omitted).

Even when the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration. *Aguillard*, 908 So.2d at 18. The weight of this presumption is heavy and arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue. *Id*. Therefore, even if some legitimate doubt could be

hypothesized, the Louisiana Supreme Court requires resolution of the doubt in favor of arbitration. *Id*.

A two-step analysis is applied to determine whether a party is required to arbitrate. *Snyder*, 899 So.2d at 61-62 *(citing Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002), *opinion supplemented on denial of rehearing,* 303 F.3d 570 (5th Cir. 2002)). The first inquiry is whether the party has agreed to arbitrate the dispute, which contains two questions: (1) whether there is a valid agreement to arbitrate; and (2) whether the dispute in question falls within the scope of that arbitration agreement. Then, the court must determine whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. *Fleetwood Enterprises, Inc*., 280 F.3d at 1073.

Validity of the Agreement to Arbitrate

As to whether there is a valid agreement to arbitrate, arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute he has not agreed so to submit. *Snyder*, 899 So.2d at 63 *(citing Billieson v. City of New Orleans*, 2002-1993 (La. App. 4 Cir. 9/17/03), 863 So.2d 557, 561, *writ denied,* 2004-0563 (La. 4/23/04), 870 So.2d 303). The burden of proof is on Milliman to establish that a valid and enforceable arbitration agreement exists. *See Lafleur*, 960 So.2d at 109. If Milliman satisfies its burden of proof establishing its right to arbitration, the burden then shifts to the Commissioner to demonstrate that he did not consent to arbitration or his consent was vitiated by error, which rendered the arbitration provision unenforceable. *Id*.

The policy favoring arbitration does not apply to a determination of whether there is a valid agreement

to arbitrate between the parties. *Snyder*, 899 So.2d at 62. Rather, ordinary state law contract principles determine who is bound. *Id*. In determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement. *Id*. at 61.

In making that determination[3], Louisiana's codal provisions concerning choice of laws provide, in part, that the parties are free to select the law that will govern contracts "except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537." La.

---

[3] The trial court did not address the choice-of-law provision contained in the Agreement. The issue was first raised *via* the Commissioner's Post-Argument Brief filed after oral argument with this Court. *(Commissioner's Post Argument Brief, pp. 4-8)*.

Generally, an appellate court will not consider issues raised for the first time on appeal. *Segura v. Frank*, 630 So.2d 714, 725 (La. 1994). Uniform Rules, Courts of Appeal, Rule 1-3 further articulates that "[t]he Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise." As noted in the Official Revision Comment (a) to La. Code Civ. P. art. 2164, "[t]he purpose of this article [Article 2164] is to give the appellate court complete freedom to do justice on the record irrespective of whether a particular legal point or theory was made, argued, or passed on by the court below." This Court has considered a question of conflicts or choice of laws for the first time on appeal, when the question is necessarily invoked by the issues before it. *See e.g. Berard v. L-3 Communications Vertex Aerospace, LLC*, 2009-1202 (La. App. 1 Cir. 2/12/10), 35 So.3d 334, 340, n.1, *writ denied,* 2010-0715 (La. 6/4/10), 38 So.3d 302.

Because courts apply the contract law of the particular state governing the agreement containing the arbitration provision when determining the validity of the arbitration provision, we must determine what state's law applies to the Agreement.

Civ. Code art. 3540. In this regard, the Agreement contains a choice-of-law provision which states, in pertinent part, as follows: "The construction, interpretation, and enforcement of this Agreement shall be governed by the substantive contract law of the State of New York without regard to its conflict of laws provisions."

In order to determine if New York law should be applied, it must first be determined whether Louisiana law is applicable under an analysis of La. Civ. Code art. 3537 and, if so, whether New York law contravenes the public policy of Louisiana. Louisiana Civil Code article 3537 provides that the issue of which state law applies to a conventional obligation "is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue." *See also* La. Civ. Code art. 3515. In making this analysis, we must look to each state's connection to the parties and the transaction, as well as its interests in the conflict, to determine which state would bear the most serious legal, social, economic, and other consequences if its laws were not applied to the issues at hand. La. Civ. Code art. 3537, 1991 Revision Comments — Comment (c).

There is no record evidence as to the place of negotiation, formation, and performance of the Agreement. It is undisputed that LAHC is a Louisiana corporation doing business in Louisiana. Moreover, the object of the Agreement was to prepare a feasibility study and assist with LAHC's loan application to enable it to offer insurance in Louisiana. It is undisputed that Milliman is domiciled in Washington with its principal place of business in Washington.

Louisiana has a strong public policy favoring the enforcement of arbitration provisions. However, the

New York courts have prohibited the enforcement of arbitration provisions in contracts with insurers when the insurer is insolvent and is in either rehabilitation or liquidation. *See e.g. Matter of Allcity Insurance Co.*, 66 A.D.2d 531, 535-38, 413 N.Y.S.2d 929, 932 (1979); *Knickerbocker Agency, Inc. v. Holz*, 4 N.Y.2d 245, 251-54, 149 N.E.2d 885, 889 (1958); *Washburn v. Corcoran*, 643 F.Supp. 554, 556-57 (S.D.N.Y. 1986). For reasons discussed in this opinion, Louisiana contains no such limitation. Therefore, La. Civil Code art. 3540 precludes the application of New York law herein, because the application of New York law would reach a different result than that reached by the application of Louisiana law.

Applying Louisiana law, arbitration agreements and provisions are to be enforced unless they are invalid under principles of Louisiana state law that govern all contracts. *Lafleur*, 960 So.2d at 112. Applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements. *Id*. One of the conditions of a valid contract is the consent of both parties. *Id*. *(citing* La. Civ. Code art. 1927).

The parties do not dispute that the underlying arbitration agreement, as between LAHC and Milliman is valid. Representatives of both LAHC and Milliman signed the Agreement. It is well-settled that a party who signs a written instrument is presumed to know its contents. *Aguillard*, 908 So.2d at 17.

However, the Commissioner did not sign the Agreement and argues that he is not bound to the arbitration provision contained therein. Milliman responded that the Commissioner has asserted claims against it based on Milliman's alleged breach of the Agreement,

yet impermissibly seeks to avoid the arbitration provision in that same Agreement.

A non-signatory to a contract containing an arbitration provision may be bound by that provision under accepted theories of agency or contract law. *Courville v. Allied Professionals Insurance Co*., 2016-1354 (La. App. 1 Cir. 4/12/17), 218 So.3d 144, 148, n.3, *writ denied,* 2017-0783 (La. 10/27/17), 228 So.3d 1223 (internal citations omitted). When a signatory to a contract requiring arbitration seeks to compel a non-signatory to arbitrate a dispute, as in the present case, the signatory is required to establish that the non-signatory derived a direct benefit from the contract. *Id*. Direct-benefit estoppel applies when a non-signatory plaintiff sues to enforce a contract containing an arbitration provision yet seeks to avoid an arbitration provision. *Id*. The non-signatory cannot have it both ways; he cannot rely on the contract when it works to his advantage and then repudiate the contract when it works to his disadvantage. *Id*. On the other hand, when the non-signatory's claims are not associated with the enforcement of the contract containing the arbitration provision, the non-signatory is not bound to arbitrate those claims. *Id*.

The Commissioner has brought breach of contract, professional negligence, and negligent misrepresentation claims against Milliman based on Milliman's allegedly deficient performance under the Agreement. The Commissioner's breach of contract claims against Milliman seek to enforce the Agreement containing the arbitration provision. Furthermore, claims for negligence and negligent performance arising from work performed pursuant to a contract may be contractual in nature and subject to the arbitration provision in the contract. *See e.g. Green*, 2014 WL 355820, at *5-7;

Shroyer v. Foster, 2001-0385 (La. App. 1 Cir. 3/28/02), 814 So.2d 83, 89, *superseded by statute on unrelated grounds,* as stated in *Arkel Constructors, Inc.*, 965 So.2d at 458-49. Apart from the Agreement, there would have been no performance by Milliman and no alleged breach of professional standards and negligent misrepresentation. As such, the Commissioner's claims against Milliman for professional negligence and negligent misrepresentation, like the claim for breach of contract, are associated with the enforcement of the Agreement, making direct-benefit estoppel applicable. The Commissioner, despite being a non-signatory, cannot sue to enforce the Agreement and avoid the arbitration provision. Accordingly, the arbitration provision is valid.

Scope of the Arbitration Provision

Next, it must be determined whether, the Commissioner's claims against Milliman fall within the scope of the arbitration provision. The Commissioner argues that his claims do not arise from the Engagement Letter because the Commissioner is not seeking a declaration of Milliman's obligations thereunder and his allegations against Milliman do not require the court to interpret the Engagement Letter to determine Milliman's obligations. Milliman argues that its contractual relationship and obligations with LAHC are embodied in the Engagement Letter, and the conduct complained of arises out of the contractual relationship. Milliman notes that it would not have had a duty to LAHC but for the Agreement.

In construing an arbitration agreement under the FAA, for example, a determination of whether a dispute falls within an arbitration clause requires the court to characterize the clause as "broad" or "narrow." *Snyder*, 899 So.2d at 62 *(citing* Hornbeck Offshore

(1984) *Corp. v. Coastal Carriers Corp*., 981 F.2d 752, 754-55 (5th Cir. 1993)). If the court finds that the clause is broad, then any dispute between the parties falls within the scope of the clause if it is connected with or related to the contract. *Id*. A narrow clause, for example, restricts and requires that the dispute literally "arise out of the contract" and relate to the parties' performance of the contract. *Id*. *(citing Pennzoil Exploration & Production Co. v. Ramco Energy Ltd*., 139 F.3d 1061, 1067 (5th Cir. 1998). However, a broad arbitration clause governs disputes that "relate to" or "are connected with" the contract. *Pennzoil Exploration & Production Co.*, 139 F.3d at 1067.

The arbitration provision at issue states that "[i]n the event of any dispute arising out of or relating to the engagement of Milliman by Company [LAHC], parties agree that the dispute will be resolved by final and binding arbitration ..." The term "any," when used in an arbitration provision, is broad. *See e.g. In Re Complaint of Hornbeck Offshore (1984) Corp*., 981 F.2d 752, 755 (5th Cir. 1993) (arbitration clauses containing the "any dispute" language are of the broad type).

Moreover, other courts have found the phrase "relating to," in particular, to be very broad in the context of arbitration provisions. *See e.g. Prima Paint Corp. v. Flood & Conklin Manufacturing Co*., 388 U.S. 395, 406, 87 S.Ct. 1801, 1807, 18 L.Ed.2d 1270 (1967) (agreement to arbitrate "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof" is "easily broad enough" to encompass a claim of fraud in the inducement regarding the contract); *See also Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 165 (5th Cir.

1998); *Hamel-Schwulst v. Country Place Mortgage, Ltd*., 406 Fed. Appx. 906, 913 (5th Cir. 2010).

Furthermore, broad arbitration provisions mandating arbitration for claims "arising from or relating to" the contract have been found to include tort claims such as negligent misrepresentation, negligent manufacture, and negligent repair as well as any disagreement over any rights and violations reasonably traceable to the pertinent contract. *See e.g. Rain CII Carbon LLC v. ConocoPhillips Co*., 2012-0203 (La. App. 4 Cir. 10/24/12), 105 So.3d 757, 763, *writ denied,* 2012-2496 (La. 1/18/13), 107 So.3d 631 (arbitration clause providing "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration" was broad enough to include breach of contract claims as well as claims for negligent representation, unfair trade practices, and indemnification); *See also Vector Electric & Controls, Inc. v. ABM Industries Inc.*, No. CV31500252JWDRLB (M.D. La. Jan. 11, 2016), 2016 WL 126752 at *5; Snyder, 899 So.2d at 62 *(citing Izzi v. Mesquite Country Club*, 186 Cal.App.3d 1309, 231 Cal. Rptr. 315 (1986). Therefore, we find the arbitration provision at issue herein is of the broad type.

The Commissioner specifically alleged that Milliman was engaged, *via* the Engagement Letter dated August 4, 2011, to provide "actuarial support' for LAHC, including production of a feasibility study and loan application." Furthermore, the Commissioner alleged that Milliman was engaged, *via* a separate engagement letter dated November 13, 2012, to "develop 2014 premium rates in Louisiana" for LAHC. The remainder of the Commissioner's allegations attack Milliman's actuarial work, the feasibility study, pro forma reports, actuarial memorandums prepared

for the 2014 rate filings, and advice on LAHC's funding needs. Each of these claims relates to LAHC's engagement of Milliman to provide a feasibility study, assist with LAHC's loan application, and develop premium rates.[4] The roots of each of the Commissioner's claims, whether resounding in contract or tort, are the Agreement. But for Milliman's allegedly defective performance under the Agreement, the Commissioner would have no tort claim against Milliman.

The Commissioner further relies upon *Taylor*, a decision from the Ohio Supreme Court, arguing that the claims do not fall under the scope of the arbitration provision, because the Commissioner is not seeking a declaration of Milliman's obligations under the Agreement. In *Taylor*, Ernst & Young ("E & Y"), an independent accounting firm, provided auditing services to American Chambers Life Insurance Company ("ACLIC"). E & Y submitted an audit report to the Ohio Department of Insurance ("ODI"). The audit was undertaken pursuant to an engagement letter signed by E & Y and ACLIC that contained an arbitration clause. The *Taylor* decision does not provide the exact language of the arbitration provision but states that "[t]he agreement provides that all claims 'related to' the services covered in the engage-

[4] As noted, a copy of the Engagement Letter dated November 13, 2012, is not in evidence. However, the copy of the Agreement in evidence reflects that its "terms and conditions will apply to all current and subsequent engagements of Milliman by [LAHC] unless specifically disclaimed in writing by both parties prior to the beginning of the engagement." There is no allegation or record evidence that either LAHC or Milliman disclaimed the terms of the Agreement, in writing or otherwise, prior to the beginning of the November 2012 engagement. Therefore, Milliman's work under the 2012 engagement would fall under the terms of the Agreement and the arbitration provision.

ment letter shall be arbitrated." *Id*. at 1213, n.5. The superintendent later filed an action to place ACLIC in rehabilitation, and a final liquidation order was entered based on ACLIC's insolvency. The superintendent then filed suit against E & Y alleging that E & Y had "negligently failed to perform its duties as the independent certified public accountant retained to conduct the audit of ACLIC's December 31, 1998, Annual Statement, thus breaching the duties owed (i.e. the malpractice claim), and E & Y had received preferential or fraudulent payments of more than $25,000 (i.e. the preference claim). E & Y sought to compel the matter to arbitration.

The Ohio Supreme Court found that the test for whether the claims fell under the scope of the arbitration provision was not whether the superintendent's claims "relate to" the subject matter of the engagement letter but instead whether the liquidator, a nonsignatory, asserted claims that arise from the contract containing the arbitration clause. *Id*. at 1213. In reference to the claim for malpractice, the court found that this claim arose from statutory duties and certifications filed in public record by ACLIC and E & Y and did not seek judicial interpretation of the engagement letter. The claims could be resolved without reference to the engagement letter and did not arise from the engagement letter and was not arbitrable. As to the preference claim, the court found that preference and fraudulent-transfer claims arise only by virtue of statute and arise only in favor of the liquidator, and they could not as a matter of law arise from a contract entered into by an insolvent insurer.

This Court is not bound by decisions of the Ohio Supreme Court. Nevertheless, the *Taylor* decision is distinguishable. In *Taylor*, the liquidator sued for

breach of the auditor's statutory duties, specifically malpractice and preference claims, that did not require reference to the contract or engagement letter for determination. Moreover, the *Taylor* liquidator did not sue for breach of contract. In the present case, the Commissioner is suing for breach of contract, which requires reference to the Agreement and the incorporated Engagement Letter. Furthermore, the Commissioner's claims for negligence and negligent misrepresentation are not determinable by reference to any particular statutory duty of actuaries, and the Commissioner cites no statutory duty that Milliman allegedly breached. As such, *Taylor* is distinguishable.

In the present case, each of the Commissioner's claims relate to Milliman's engagement. Moreover, even if the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration. *Aguillard*, 908 So.2d at 18. Accordingly, all of the Commissioner's claims against Milliman fall within the scope of the arbitration provision.

Whether the Claims Are Non-Arbitrable

Finally, it must be determined whether any statute or legal constraint renders the matter non-arbitrable. Both the FAA and the LBAL contain identical language that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." La. R.S. 9:4201; 9 U.S.C. § 2. Federal courts interpreting the FAA allow for a determination to be made as to whether any federal statute or policy renders the claims non-arbitrable. *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008). Utilizing federal cases to interpret the LBAL, it must be determined whether any statute or

legal constraints external to the parties' agreement foreclosed the arbitration of those claims. *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 3353-55, 87 L.Ed.2d 444 (1985); *Sherer*, 548 F.3d at 381.

In this regard, the Commissioner argues that the RLC Act and La. R.S. 22:257(F) preclude arbitration and venue is mandatory in the Nineteenth Judicial District Court. Milliman argues that the Insurance Code does not grant the Commissioner greater rights than LAHC had, under the Agreement, and La. R.S. 22:257(F) is not applicable because LAHC is not in "liquidation." The RLC Act sets forth the provisions pertaining to rehabilitation, liquidation, and conservation of insurers. La. R.S. 22:2001. La. R.S. 22:2(A)(1) states that insurance is "an industry affected with the public interest." The Commissioner is charged with the duty of administering the Insurance Code. La. Const. art. IV, § 11; La. R.S. 22:2(A)(1). As liquidator or rehabilitator of an insurance company, the Commissioner acts as an officer of the state to protect the interests of the public, the policyholders, the creditors, and the insurer. *Green v. Louisiana Underwriters Ins. Co.*, 571 So.2d 610, 615 (La. 1990). However, the Commissioner's role as such does not involve the assertion or protection of any state interest or right. *Id*. The Commissioner, in his role as liquidator or rehabilitator, represents the insurer's interests and not the state's. *Id*. at 615, n.10.

The statutory scheme for the liquidation and/or rehabilitation of insurers is comprehensive and exclusive in scope. *Brown v. Associated Ins. Consultants, Inc.*, 97-1396 (La. App. 1 Cir. 6/29/98), 714 So.2d 939, 942. This statutory scheme takes precedence over general law to the extent that the general law is

inconsistent with the provisions or purpose of the comprehensive, statutory scheme. *Bernard v. Fireside Commercial Life Ins. Co*., 92-0237 (La. App. 1 Cir. 1993), 633 So.2d 177, 185, *writ denied,* 93-3170 (La. 1994), 634 So.2d 839.

Louisiana Revised Statutes 22:2004 (renumbered from La. R.S. 22:732.3 by 2008 La. Acts, No. 415, § 1, eff. Jan. 1, 2009) is entitled "Venue" and states as follows:

> A. An action under this Chapter brought by the commissioner of insurance, in that capacity, or as conservator, rehabilitator, or liquidator may be brought in the Nineteenth Judicial District Court for the parish of East Baton Rouge or any court where venue is proper under any other provision of law.
>
> B. Any action under this Chapter may also be brought in the parish where at least twenty-five percent of the policyholders of the insurer reside.
>
> C. If an action is filed in more than one venue, the court shall consolidate all such cases into one court where venue is proper.

When originally added by 1993 La. Acts, No. 955, § 1, La. R.S. 22:2004 stated as follows:

> An action under this Part brought by the commissioner of insurance, in that capacity, or as conservator, rehabilitator, or liquidator may be brought in the Nineteenth Judicial District Court for the Parish of East Baton Rouge or any court where venue is proper under any other provision of law, at the sole

option of the commissioner of insurance. *See* 1993 La. Acts, No. 955, § 1.

However, in 1997, the legislature amended the statute to its current form, removing the language "at the sole option of the commissioner of insurance" from the statute. *See* 1997 La. Acts, No. 1298, § 1. Accordingly, venue for actions brought by the Commissioner of Insurance, pursuant to the RLC Act, is no longer at the sole option of the Commissioner or Insurance.

LAHC is in rehabilitation, pursuant to the Rehabilitation Order designating the Commissioner as Rehabilitator and authorizing him to commence and maintain all legal actions necessary, wherever necessary, for the proper administration of the rehabilitation proceeding. LAHC presently is not in liquidation, which is different than rehabilitation.[5] Prematurity is

---

[5] Louisiana Revised Statutes 22:2009 (formerly La. R.S. 22:736) sets out the duties of the Commissioner as a rehabilitator. *Dardar v. Insurance Guaranty Association*, 556 So.2d 272, 274 (La. App. 1 Cir. 1990). Under this statute, the Commissioner conducts the business of the insurer in an attempt to remove the causes and conditions which were grounds for the rehabilitation and may apply to the court at any time for either an order directing liquidation, if further efforts to rehabilitate the insurer would be futile, or for an order permitting the insurer to resume control of the business, if the causes and conditions which made the proceeding necessary have been removed. *Id*.

La. R.S. 22:2010 (formerly La. R.S. 22:737), however, deals with the duties of the Commissioner as a liquidator. *Dardar*, 556 So.2d at 274. Under this statute, he may sell property of the insurer, give notice to claimants of the insurer to present claims and, to protect policyholders of the insurer whose contracts were cancelled by the liquidation order, solicit a contract whereby a solvent insurer assumes some or all liabilities of former policyholders. *Id*. These acts for the most part are subject to the prior approval of the court. *Id*.

determined by the facts existing at the time suit is filed. *Houghton*, 859 So.2d at 106. As such, the exclusive venue provision of La. R.S. 22:257(F) does not apply and does not render the matter non-arbitrable. *See also Wooley v. AmCare Health Plans of Louisiana, Inc.*, 2005-2025 (La. App. 1 Cir. 10/25/06), 944 So.2d 668, 677 n.7 (in a suit by the Commissioner against contractor of insolvent insurer, this Court noted that there was "no mandatory Louisiana venue statute applicable herein and . . . [La. R.S. 22:2004(A) formerly] La. R.S. 22:732.3 [(A)] controls in Louisiana").

Furthermore, nothing in the Rehabilitation Order expressly prohibits arbitration. The Rehabilitation Order notes that the "Rehabilitator . . . shall be and hereby are allowed and authorized to . . . [c]ommence and maintain all legal actions necessary, wherever necessary, for the proper administration of this rehabilitation proceeding . . ." Moreover, contracts such as the Agreement remain in "full force and effect," and "LAHC providers and contractors [such as Milliman] are required to abide by the terms of their contracts with LAHC . . ."

The Commissioner argues that the Rehabilitation Order's injunction provisions prevent arbitration. However, the injunction provisions of the Rehabilitation Order are not applicable to bar arbitration because Milliman is not suing LAHC, the Commissioner, or the Receiver and does not seek any property, encumbrance, or liability from LAHC, the Commissioner, or the Receiver. Instead, Milliman is the defendant. Moreover, the assertion of exceptions, including those asserting an arbitration provision like the present case, causes no interference in violation of the Rehabilitation Order.

Citing this Court's decisions in *LeBlanc v. Bernard*, 554 So.2d 1378, 1381 (La. App. 1 Cir. 1989), *writ denied,* 559 So.2d 1357 (La. 1990), and *Republic of Texas Savings Association v. First Republic Life Insurance Co.*, 417 So.2d 1251, 1254 (La. App. 1 Cir. 1982), *writ denied,* 422 So.2d 161 (La. 1982), the Commissioner argues that public policy prohibits arbitration because he "owes an overriding duty to the public of the State of Louisiana" and does not stand precisely in the shoes of the insolvent insurer. In *LeBlanc*, 554 So.2d at 1379-80, this Court found that the Commissioner does not stand in the shoes of an insolvent insurer; however, in *LeBlanc*, a claim was brought *against* the Commissioner as a party defendant by a plaintiff seeking to dissolve a sale and regain certain immovable property under the control of the Commissioner in his capacity as rehabilitator of an insurance company. Similarly, in *Republic of Texas Savings Association*, 417 So.2d at 1253-54, the Commissioner objected to a foreclosure proceeding being brought against the insolvent insurer's property, and this Court found that the Commissioner did not stand in the shoes of the insolvent insurer in that he was not barred from raising certain defenses, although the insurer may have been barred from asserting said defenses.

In the present case, the Commissioner, as plaintiff, sued Milliman. No claims are being brought against the Commissioner, LAHC, or LAHC's property, as contrasted with facts of *LeBlanc* and *Republic of Texas Savings Association*. Since the *LeBlanc* and *Republic of Texas* decisions, this Court has found that the Commissioner, as rehabilitator, "takes control of the insurer, has the authority to conduct business . . . steps into the shoes of the insurer" and "is bound by the same constraints as is the insurer in the normal course

of business." *Dardar v. Insurance Guaranty Association*, 556 So.2d 272, 274 (La. App. 1 Cir. 1990).

Similarly, the Rehabilitation Order states that "LAHC providers and contractors are required to abide by the terms of their contracts with LAHC . . ." Although La. R.S. 22:2009(E)(4) allows the Commissioner to "disavow any contracts to which the insurer is a party," it only allows disavowal of an entire contract rather than repudiating certain provisions. The Commissioner is bound to the terms of the Agreement including the arbitration provision, as LAHC would have been.

This Court is bound to uphold the arbitration provision, since we have found no exception in the law or jurisprudence that would allow for an exception to its enforcement. In light of Louisiana's strong public policy favoring arbitration and consistent with the views expressed herein, we find that the trial court erred in overruling Milliman's exception.

CONCLUSION

For the reasons stated, the judgment of the trial court is reversed. The claims of the Commissioner against Milliman are dismissed, without prejudice.

REVERSED.

APPENDIX C

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

Suit No.: 651,069 Section: 22

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.

versus

TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC. AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

September 15, 2017

JUDGMENT

A contradictory hearing regarding the following matters:

1. DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION, filed herein by defendant, Milliman, Inc. ("Milliman");
2. DECLINATORY EXCEPTION OF IMPROPER VENUE, filed herein by defendant, Buck Consultants, LLC ("Buck");

3. PEREMPTORY EXCEPTION OF PRESCRIPTION, filed herein by defendant, Group Resources Incorporated ("GRI"); and
4. CGI's MOTION FOR SUMMARY JUDGEMENT, filed herein by defendant, CGI Technologies and Solutions, Inc. ("CGI").

was held pursuant to applicable law on August 25, 2017, in Baton Rouge, Louisiana, before the Honorable Timothy Kelley; present at the hearing were:

J. E. Cullens, Jr., attorney for plaintiff, James J. Donlon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc.

James A. Brown, attorney for defendant, Buck Consultants, LLC

W. Brett Mason, attorney for defendant, Group Resources Incorporated

V. Thomas Clark, Jr., attorney for defendant, Milliman, Inc.

Frederick Theodore Le Clercq, attorney for defendant, Beam Partners, LLC

Harry J. Philips, Jr., attorney for defendant, CGI Technologies and Solutions, Inc.

Considering the evidence and exhibits admitted at this hearing, the pleadings and memoranda filed by the parties, applicable law, the argument of counsel, and for the reasons stated in open court at the hearing of this matter:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that MILLIMAN INC.'S DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION is DENIED.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that BUCK CONSULTANTS, LLC'S DECLINATORY EXCEPTION OF IMPROPER VENUE is DENIED.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that GROUP RESOURCES INCORPORATED'S PEREMPTORY EXCEPTION OF PRESCRIPTION is DENIED.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that CGI TECHNOLOGIES AND SOLUTIONS, INC.'S MOTION FOR SUMMARY JUDGMENT is DENIED, WITHOUT PREJUDICE.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that this Court's previous order staying general discovery regarding the merits of this litigation dated April 26, 2017, is hereby LIFTED; furthermore, it is contemplated that all parties will timely confer and propose a CASE SCHEDULING ORDER it is contemplated that all parties will timely confer and propose and acceptable case scheduling order to be adopted by this Court.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that each defendant shall have 30 days from the date of the mailing of the signed judgment to file a notice of intent to seek supervisory writs.

SIGNED this 19 day of September, 2017, at Baton Rouge, Louisiana.

/s/ Timothy Kelley
HON. JUDGE TIMOTHY KELLEY, 19th JDC

PLEASE PROVIDE NOTICE OF JUDGMENT PURSUANT TO LSA–CCP ART. 1913

APPENDIX D

[1] NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

CIVIL SECTION 22

No. 651069

JAMES J. DONELON

v.

TERRY S. SHILLING, *et al.*

FRIDAY, AUGUST 25, 2017

HEARING AND ORAL REASONS FOR JUDGMENT ON (1) DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION FILED ON BEHALF OF MILLIMAN, INC., (2) DECLINATORY EXCEPTION OF IMPROPER VENUE FILED ON BEHALF OF BUCK CONSULTANTS, LLC, (3) EXCEPTION OF PREMATURITY, OR IN THE ALTERNATIVE, MOTION TO STAY PROCEEDINGS FILED ON BEHALF OF BEAM PARTNERS, LLC, AND (4) PEREMPTORY EXCEPTION OF PRESCRIPTION FILED ON BEHALF OF GROUP RESOURCES, INC.

THE HONORABLE TIMOTHY KELLEY,
JUDGE PRESIDING

APPEARANCES

J CULLENS,JR & JENNIFER MOROUX
JAMES BROWN
SKIP PHILIPS & RYAN FRENCH

W. MASON
V. CLARK, JR. & GRANT GUILLOT
RICHARD BAUDOUIN

FOR

PLAINTIFFS

BUCK CONSLTNS CGI TECHNOLOGY &
SOLUTIONS GROUP RESOURCES MILLIMAN,
INC. TRAVELER'S CAS. SURITY CO

REPORTED AND TRANSCRIBED BY KRISTINE
M. FERACHI, CCR #87173

* * *

[30] IN THE WEEK. SO, I JUST WANTED TO CORRECT THAT STATEMENT. GO AHEAD.

MR. CULLENS: EVERY STATE, AND THAT -- INSURANCE IS PROBABLY ONE OF THE MOST IMPORTANT STATE INTERESTS THAT THEY HAVE, AND EACH STATE DOES THINGS A LITTLE BIT DIFFERENTLY.

THE COURT: I JUST WANTED TO CORRECT A STATEMENT I HAD MADE IN AN OFFHAND COMMENT, THAT THAT WAS AN INCORRECT STATEMENT. GO AHEAD.

MR. CULLENS: SO, LOOKING AT IT, LOOKING AT THE EQUITIES INVOLVED, THE LAW INVOLVED, RECOGNIZING IT IS NOT AN

IRRELEVANT OR UNIMPORTANT FACT, MILLIMAN IS TRYING TO ENFORCE AN ARBITRATION PROVISION, NOT AGAINST A SIGNATORY TO THE CONTRACT, L.A.H.C. I THINK THAT WOULD BE A PRETTY STRAIGHTFORWARD CASE. THEY ARE TRYING TO ENFORCE AN ARBITRATION PROVISION AGAINST A NON-SIGNATORY TO THE CASE; NAMELY, THE COMMISSIONER OF INSURANCE THROUGH THE RECEIVER.

IF YOUR HONOR HAS READ TAYLOR, IN OHIO THEY DEVELOPED A JURISPRUDENTIAL RULE THAT SAYS UNDER THOSE CIRCUMSTANCES, INSTEAD OF BEING A PRESUMPTION OF ARBITRABILITY, IF YOU TRY TO ENFORCE AN ARBITRATION PROVISION AGAINST A NON-SIGNATORY, THERE IS A PRESUMPTION OF NON-ENFORCEABILITY. WE LOOKED FOR LOUISIANA COUNTERPART. LOUISIANA – NO LOUISIANA CASE HAS ADDRESSED THAT ISSUE. THEY HAVE NOT RULED ONE WAY OR THE OTHER. IT SIMPLY HAS NOT BEEN BROUGHT UP, BUT I WOULD RESPECTFULLY, WE WOULD

* * *

[51] THIS CLAUSE, SECTION 2004 DEALS ONLY WITH THE VENUE FOR THOSE PROCEEDINGS. THEY CAN GO CHASE COMPANIES OR INDIVIDUALS WHEREVER THEY WANT. AS YOU SEE, IF YOU LOOK UNDER PARAGRAPH-B, THERE IS A PREDICATE THERE FOR 25 PERCENT OF THE POLICYHOLDERS AND WHERE THEY RESIDE.

THE COURT: YES, BUT IT TALKS ABOUT IN THE PARISH. WHAT IS THE ONLY STATE THAT HAS PARISHES? US.

MR. CLARK: WHAT I MEANT THOUGH, YOUR HONOR, WAS, IT IS DRIVEN BY NATURE OF WHERE ARE THE INTERESTS HELD TO PURSUE AN ORDER OF LIQUIDATION AND REHABILITATION, NOT TO PURSUE A BUSINESS CLAIM.

THE COURT: I UNDERSTAND WHAT YOU ARE TRYING TO ARGUE. YOU ARE SAYING THIS IS NOT — YOUR ACTION, WHERE THEY ARE CHASING CLAIMS TO OBTAIN FUNDS FOR THE HEALTHY REHABILITATION OF THIS IN ORDER TO ENABLE THAT TO OCCUR DOES NOT FALL UNDER THAT CHAPTER. IT FALLS UNDER GENERAL CONTRACT OR TORT LAW.

MR. CLARK: EXACTLY, AND IN THAT CASE, THE ARBITRATION CLAUSE — EXCUSE ME, THE ARBITRATION PROVISION RECOGNITION AND 9:4201 SHOULD CONTROL THIS.

THE COURT: OKAY. THANKS.

MR. CLARK: THANK YOU, YOUR HONOR.

THE COURT: I THINK YOU AND I JUST HAVE TO AGREE TO DISAGREE, AND UNFORTUNATELY, THE DISAGREEMENT AMONG US GOES AGAINST YOU.

THE DISPUTE VERY DEFINITELY PRESENTS A [52] NOVEL QUESTION, WHETHER THE COMMISSIONER AS THE REHABILITATOR IS EQUALLY BOUND TO THE TERMS OF THE AGREEMENT ENTERED INTO BY THE INSOLVENT INSURER THAT HAS BEEN PLACED IN ITS CHARGE. IN THIS CASE, THE PLAINTIFF'S CLAIMS AT LEAST IN PART ARISE OUT OF HIS CONTRACTURAL OBLIGATIONS SET FORTH IN A CONSULTING SERVICES AGREEMENT. THE PLAINTIFF HAS

SET FORTH SEVERAL ARGUMENTS ATTEMPTING TO EXCULPATE HIM FROM ARBITRATING IN NEW YORK; HOWEVER, HIS ONLY PUBLIC POLICY ARGUMENT FRANKLY IS VERY SUCCESSFUL IN DOING SO. THE PUBLIC POLICY CONSIDERATIONS IMPLICATED HERE ARE OVERWHELMINGLY IN FAVOR OF THE PLAINTIFF. AS A REHABILITATOR, THE COMMISSIONER HAS AN OVERRIDING DUTY TO PROTECT OUR PUBLIC. AS NOTED IN THE LEBLANC VERSUS BERNARD — THE COMMISSIONER'S OFFICE IS BECAUSE THE INSURANCE INDUSTRY IS, QUOTE, AFFECTED WITH THE PUBLIC INTEREST.

LOUISIANA R.S. 22:2, ANY DUTIES IMPOSED UPON THAT OFFICE THEREFORE MUST BE PERFORMED WITH THE PUBLIC INTEREST FOREMOST IN ITS MIND. FOR THIS REASON THE COMMISSIONER AS REHABILITATOR DOES NOT MERELY STAND IN THE SHOES OF L.A.H.C. DONELON'S DUTIES OWED UNDER THE R.L.C. ARE MUCH MORE EXPANSIVE AND EXTENDS NOT ONLY TO L.A.H.C., BUT ALSO TO THE CITIZENS OF LOUISIANA. IT IS IMAGINABLE THAT MANY DOMESTIC INSURANCE COMPANIES' LOCATIONS WITHIN THE STATE HAVE ENTERED INTO AGREEMENTS WITH THIRD PARTIES THAT CONTAINS ARBITRATION OR [53] FORUM SELECTION CLAUSES, AND IT WOULD BE ABSURD TO REQUIRE DONELON TO LITIGATE ANY DISPUTE ARISING OUT OF THESE AGREEMENTS ALL OVER THE U.S. NOT ONLY WOULD IT STRAIN THE FINANCIAL RESOURCES OF THE STATE, BUT IT WOULD ALSO COMPROMISE DONELON'S ABILITY TO EFFECTIVELY EXECUTE HIS STATUTORY RESPONSIBILITIES

AS REHABILITATOR. THUS, WHILE LOUISIANA'S PUBLIC INTEREST IN ENFORCING ARBITRATION AGREEMENTS IS STRONG, DONELON'S DUTY TO THE PUBLIC IS STRONGER.

IT SHOULD BE NOTED THAT MILLIMAN ENTERED INTO AN AGREEMENT WITH THE LOUISIANA INSURANCE COMPANY. IT IS CERTAINLY FORESEEABLE THAT SHOULD L.A.H.C. GO UNDER, IT WOULD BE SUBJECT TO A TAKEOVER BY THE INSURANCE COMMISSION. MILLIMAN ARGUES THAT LOUISIANA R.S. 22:2004 IS PERMISSIVE AND THEREFORE ALLOWS FOR ARBITRATION. HOWEVER, LOUISIANA R.S. 22:2004 READ IN PARI MATERIA WITH 22:257 OF THE H.M.O. ACT SUGGESTS OTHERWISE. ALTHOUGH THE COMMISSIONER MAY CHOOSE THE VENUE IN WHICH TO BRING THIS ACTION, THE ACTION MUST NONETHELESS BE BROUGHT IN A LOUISIANA STATE COURT. IT WOULD NOT MAKE SENSE FOR THE LEGISLATURE TO RESTRICT JURISDICTION TO LOUISIANA ONLY FOR LIQUIDATION ACTIONS WHILE ALLOWING REHABILITATION ACTIONS TO BE LITIGATED ANYWHERE IN THE UNITED STATES.

NEXT, LOUISIANA R.S. 9:4201 OF THE LOUISIANA BINDING ARBITRATION LAW PROVIDES THAT ARBITRATION AGREEMENTS ARE ENFORCEABLE SAVE [54] UPON SUCH GROUNDS AS EXIST AT LAW OR IN EQUITY. IN THIS CASE THERE ARE GROUNDS THAT EXIST AT LAW, AND PUBLIC POLICY CONCERNS WHICH FALL WITHIN THAT STATUTE AS THE EXCEPTION TO A BINDING ARBITRATION REQUIREMENT. FURTHER, THE REHABILITA-

TION ORDER SPECIFICALLY EXCLUDES THE ABILITY TO ADJUDICATE ANY ISSUE IN ANY OTHER VENUE OTHER THAN THIS.

SO, I HAVE TO DENY THE EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION, AND COSTS ASSESSED FOR THIS HEARING ONLY AGAINST MILLIMAN.

NEXT WOULD BE IMPROPER VENUE BY BUCK CONSULTANTS, L.L.C. I WONDER HOW THAT IS GOING TO GO. GO AHEAD.

MR. BROWN: YOUR HONOR, I WOULD BEGIN BY POINTING OUT THAT THERE IS A DISTINCTION BETWEEN ARBITRATION AND FORUM SELECTION.

THE COURT: THERE SURE IS.

MR. BROWN: JAMES BROWN REPRESENTING BUCK CONSULTANTS. THE REHABILITATION ORDER —

THE COURT: I AM SORRY, LET ME INTERRUPT YOU. MR. CULLENS, AS YOU WON THAT, WOULD YOU DO THE ORDER ON THAT EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION, PLEASE?

MR. CULLENS: YES, YOUR HONOR.

THE COURT: MAKE SURE UNDER 9.5 YOU PROVIDE IT TO OPPOSING COUNSEL AT LEAST FIVE DAYS PRIOR TO SUBMITTING IT TO ME. TIME FOR THE CLOCK TO START FOR YOUR POST-HEARING RELIEF; IN THIS CASE IT WOULD BE A WRIT, WOULD BE THE DAY AFTER MY SECRETARY, WHO IS A DEPUTY

* * *