No. 20-299

IN THE

Supreme Court of the United States

MILLIMAN, INC.,

Petitioner,

v.

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

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner presents compelling reasons to grant its Petition to review a unanimous Louisiana Supreme Court decision that correctly addressed and resolved the federal question of whether certain state laws governing post-receivership insurance proceedings reverse preempt the Federal Arbitration Act ("FAA") under the McCarran-Ferguson Act ("MFA").

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STATEMENT OF THE CASE

This lawsuit arises out of the creation, regulation, and failure of Louisiana Health Cooperative, Inc. ("LAHC"), a Louisiana Nonprofit Corporation that holds a health maintenance organization ("HMO") license from the Louisiana Department of Insurance ("LDI"). LAHC was a Consumer Operated and Oriented Plan ("CO-OP") established by the Patient Protection and Affordable Care Act ("ACA"). Incorporated in 2011, LAHC eventually applied for and received more than $65 million in loans from the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS"). Pursuant to the ACA, these loans were to be awarded only to entities that demonstrated a high probability of becoming financially viable. The LDI placed LAHC in rehabilitation in September 2015 and a Receiver was appointed to take control of the failed Louisiana CO-OP.

The Commissioner[1] originally sued approximately twenty (20) defendants who are allegedly responsible for the catastrophic failure of LAHC. As alleged and pled by the Commissioner, LAHC failed miserably after only eighteen months in operation due to the actionable conduct of the named defendants, including Milliman. Because of defendants' gross negligence, as of December 31, 2015, LAHC had lost more than $82 million.

Milliman provided professional actuarial services to LAHC from approximately August 2011 to March 2014. Milliman's services included preparing the feasibility

1. "Commissioner" refers to the Plaintiff in the underlying suit and the Respondent here, James J. Donelon, Commissioner of Insurance for the State of Louisiana in his capacity as Rehabilitator of LAHC, through his duly appointed Receiver, Billy Bostick.

study supporting LAHC's loan application to CMS and setting LAHC's 2014 premium rates. Milliman held itself out as having expertise to provide actuarial services and advice to health insurers like LAHC. However, Milliman failed to produce a feasibility study that was accurate and reliable and, further, failed to set premium rates for LAHC that were accurate and reliable. Milliman's advice and financial reports concerning LAHC's funding and premium needs negligently misrepresented the HMO's true financial condition to LAHC and anyone else who relied upon them, including the LDI regulators. For example, despite Milliman projecting a modest loss of about $1.9 million in 2014 in its loan application to CMS, LAHC actually lost about $20 million in its first year in business. And although LAHC projected turning a modest profit of about $1.7 million in 2015, it actually lost more than $54 million by the end of that year.

In response to the Commissioner's suit, Milliman filed a motion demanding that all of the Commissioner's claims against it be referred to arbitration based upon an arbitration clause found in the Consulting Services Agreement between Milliman and LAHC (the "Agreement"). After extensive briefing and extended oral argument in the Louisiana courts, on April 27, 2020, a unanimous Louisiana Supreme Court denied Milliman's motion seeking arbitration and ruled that "the Louisiana Rehabilitation, Liquidation, and Conservation Act, specifically Louisiana Revised Statutes 22:2004(A), prevents the Commissioner from being compelled to arbitration." *Donelon v. Shilling*, --- So.3d ---; 2020 WL 2079362 (La. 4/27/20); App. 19a.[2]

2. A copy of this opinion is found in the Appendix ("App.") to Milliman's Petition for a Writ of *Certiorari* ("Petition") filed herein,

On April 3, 2020, the Iowa Supreme Court ruled that Milliman's arbitration agreement with the Iowa CO-OP was enforceable against the Iowa Liquidator. *Ommen v. Milliman*, 941 N..2d 310 (Iowa 4/3/20) ("*Ommen*"). On August 28, 2020, the Iowa Liquidator filed its Petition for Writ of *Certiorari* with this Court seeking review of the Iowa Supreme Court's decision in *Ommen*. Doc. No. 20-249. Milliman filed its "Brief in Opposition" to the Iowa Liquidator's Petition on October 28, 2020.

ARGUMENT

I. RULE 10 CONSIDERATIONS SUPPORT DENIAL

Milliman's Petition stretches cases well outside their factual bases and beyond their legal holdings to manufacture a nonexistent split of authority, relies upon a claims-priority case not involving the FAA to allege a failure to follow this Court's precedent, and neglects to recognize and advise this Honorable Court that important state law issues make this case an inappropriate one for review. Milliman's argument essentially boils down to its contention that the Louisiana Supreme Court erred in applying established federal precedent. Milliman's Petition presents neither a real or compelling conflict of opinion nor an unsettled question of federal law worthy of review.

Despite Milliman's insistence to the contrary, *Donelon* and *Ommen* do not conflict on the federal question presented here. Significantly, the core issue addressed

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at 1a-21a. Respondent will refer to this opinion as *Donelon* and will cite to it as "App. # a."

in *Ommen* revolved around whether, according to Iowa state law, the Liquidator could disavow a pre-receivership agreement containing an arbitration clause, not whether a post-receivership venue provision in the Iowa Liquidation Act prohibited the enforcement of an arbitration clause against the Liquidator. The Iowa Supreme Court in *Ommen* did not reach the federal question presented here: whether any Iowa law "regulating the business of insurance" prohibited arbitration in post-receivership proceedings and reverse preempted the FAA under the MFA. Unlike the Iowa Supreme Court, however, the Louisiana Supreme Court first interpreted Louisiana's comprehensive regulatory scheme, including La. R.S. 22:2004(A), to mandate the consolidation of all post-receivership actions into single, state court venue; only after this threshold issue of state law was resolved did the Louisiana Supreme Court address the interplay between the MFA and the FAA to reach its correct ruling in *Donelon*. Rule 10(b) considerations, namely that no state court of last result has decided an important federal question in a way that conflicts with either a decision of another state court of last resort or a United States court of appeals, do not support Milliman's Petition and are discussed in detail in Section III.A, *infra*. *See* Sup. Ct. R. 10(b) ("Rule 10").

Although Milliman contends that there is an "irreconcilable conflict on the question presented," in fact, all federal circuit courts confronted with the question presented here have decided it in the same way as the unanimous Louisiana Supreme Court did in *Donelon*: the MFA reverse preempts the FAA when a state law provides for an exclusive venue provision or mandates that all post-receivership actions be consolidated in a single, state

court. Indeed, this Court has three times considered, and three times denied, similar petitions for writ of *certiorari* on virtually the same question and arguments presented here. *See Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999); *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998); *Ernst & Young v. Clark*, 323 S.W.3d 682 (Ky. 2010), *cert. denied*, 562 U.S. 1218 (2010). Rule 10(a) considerations do not support Milliman's Petition and are discussed in detail in Section III.B, *infra*.

Contrary to Milliman's suggestion, the *Donelon* opinion is consistent with this Court's ruling in *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), and the decisions of the Second, Fifth, and Tenth Circuits, which have considered the immediate federal issue and ruled the same way as the Louisiana Supreme Court: that a state's statutory scheme regarding post-receivership proceedings should be considered insurance regulation under the MFA. These Rule 10 considerations do not support Milliman's Petition and are discussed in detail in Sections III.C and III.D, *infra*.

Moreover, Milliman's request for a "uniform national answer" to its question is better directed to the United States Congress, not this Honorable Court. Petition, p. 6. According to Milliman's Petition, currently about 25 states prohibit pre-receivership forum selection clauses, like Milliman's arbitration clause here, to be enforced against an insurance receiver in post-receivership proceedings. The other 25 states do not prohibit such forum selection clauses from being enforced in post-receivership proceedings. So, as it stands now, about half of the states

(like Iowa) would allow Milliman's arbitration clause to be enforced against a Commissioner, and about half (like Louisiana) would not. Each state does it differently. This is how it should be. Our system of federalism, as manifested in the current interplay between the MFA and FAA and as supported by an accurate reading of *Fabe*, *Munich*, *Stephens*, *Davister*, *Suter*, *Bennett*, *Clark*, *Ommen*, and *Donelon*, is working as it should. Milliman, in essence, asks this Court to fix something that is not broken. It is neither appropriate nor within this Honorable Court's constitutional power to create a "uniform national" law that would, in effect, strip each state of its authority to regulate post-receivership proceedings as it deems appropriate pursuant to the authority reserved to it by the MFA.

Additionally, *certiorari* is improvident where, as here, granting Milliman's Petition to review a question of federal law will not resolve the ultimate issue of whether Milliman's arbitration agreement is enforceable against the Commissioner according to state law. Upon remand from this Court, the Louisiana Supreme Court may declare Milliman's arbitration provision unenforceable as a matter of state law, thereby not changing the ultimate outcome in this case. These considerations are discussed in Section IV, *infra*. This Court should decline Milliman's invitation to issue an advisory opinion.

II. LOUISIANA'S RLCA, INCLUDING ITS POST-RECEIVERSHIP VENUE PROVISION, REGULATES THE BUSINESS OF INSURANCE AND PROHIBITS THE ENFORCEMENT OF ANY PRIVATE FORUM SELECTION CLAUSE, INCLUDING AN ARBITRATION AGREEMENT, THAT FRUSTRATES STATE INSURANCE LAW

Before addressing Rule 10 considerations in greater detail, a discussion of the federal question involved in *Donelon* is appropriate.

A. The Interplay Between the FAA and the MFA

In 1925, Congress enacted the FAA, 9 U.S.C. § 1, *et seq.*, to reflect the United States' acceptance of arbitration as a permitted method of dispute resolution. This Court currently reads the FAA as embodying a "national policy favoring arbitration" that is, in general, grounded in Congress' full Commerce Clause power. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003). The reach of the FAA is not, however, unlimited.

Twenty years later, Congress enacted the MFA, 15 U.S.C. § 1101, *et seq.*, in 1945 for the specific purpose of consigning to the States broad and primary responsibility for regulating the insurance industry. *See SEC v. National Sec., Inc.*, 393 U.S. 453, 458 (1969). In relevant part, the MFA provides:

> 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 ... unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). This affirmative declaration frees state insurance regulation from the coercive force of the Commerce Clause, which normally invalidates state laws that materially burden commerce. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). Ordinarily, federal law preempts conflicting state law by virtue of the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. The MFA reverses that effect in those cases involving state regulation of the insurance industry. Stated simply, in the realm of insurance regulation, state law reigns supreme.

According to its terms and this Court's guidance, the MFA permits a state law to reverse preempt a federal statute only if: (1) the federal statute does not specifically relate to the "business of insurance," (2) the state law was enacted for the "purpose of regulating the business of insurance," and (3) the federal statute operates to "invalidate, impair, or supersede" the state law. *United States Department of Treasury v. Fabe*, 508 U.S. 491, 500-502 (1993). There is no question that the FAA does not relate specifically to the business of insurance. Therefore, the Louisiana Supreme Court only dealt with the second and third questions of the *Fabe* test in *Donelon.*

According to this Court's analysis in *Fabe*, the category of laws enacted "for the purpose of regulating the business of insurance" is broad and consists of those laws "that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance. This category necessarily encompasses more than just the 'business of insurance.'" *Fabe*, 508 U.S. 491, 505 (quoting Black's Law Dictionary 1236, 1286 (6th ed.1990)). Statutes that focus on protecting the relationship between the insurer and insured are certainly laws regulating the

business of insurance. *Id.* at 501. So are statutes focused on the post-receivership priority of claims scheme to the extent they deal with policyholder interests. *Id.* at 505-06.

Given the facts involved in *Donelon*, and as is further discussed in Section III.B, *infra*, the second step of the *Fabe* test is clearly satisfied here. There can be no reasonable doubt that Louisiana's Rehabilitation, Liquidation, Conservation Act ("RLCA"), La. R.S. 22:2001, *et seq.*, was enacted to regulate the business of insurance as contemplated in the MFA. The specific Louisiana law in question is the venue provision of Louisiana's RLCA, La. R.S. 22:2004(A) ("§2004"). When a Louisiana insurance company is declared insolvent and placed into state receivership proceedings by the Commissioner, §2004 empowers the Commissioner to choose and consolidate all actions into a single state court. Because the consolidation of all post-receivership actions assures a more orderly handling of claims by preventing piecemeal litigation in multiple forums, conflicting rulings on claims, the unequal treatment of claimants, and the unnecessary and wasteful dissipation of the funds of the insolvent insurer, Louisiana's post-receivership venue provision manifests a purpose of protecting policyholders, creditors, and the public at large.

According to this Court's precedent and its analysis in *Fabe*, the three criteria relevant in determining whether a regulated practice should be considered "regulating the business of insurance" under the MFA include whether: (1) the practice has the effect of transferring or spreading a policyholder's risk; (2) the practice is an integral part of the policy relationship between the insurer and the insured; and (3) the practice is limited

to entities within the insurance industry. *See Fabe,* 508 U.S. at 502;*Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). None of these criteria is dispositive. *Id.* In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), this Court recognized that "whatever the exact scope" of this term as used in the MFA, regulations relating both to an insurance company's "status as a reliable insurer" and those statutes "aimed at protecting or regulating this relationship [between the insurance company and the policyholder], directly or indirectly are laws regulating the 'business of insurance.'" *Id.* at 568-69.

All three *Pireno* factors strongly indicate that Louisiana's post-receivership scheme regulates the business of insurance. 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. *See Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998); *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41, 44-45 (2nd Cir. 1995); *Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1041 n. 9 (3d Cir.1988); *Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885, 889-891 (N.Y Ct. App. 1958). Insurance companies are ineligible for the protections afforded by the federal Bankruptcy Code, see 11 U.S.C. § 109; such protections instead are provided by state laws, like Louisiana's RLCA, which are shielded from federal interference by the MFA. The experience of the federal bankruptcy courts, which evidences the importance of consolidating all of the assets of an insolvent company and the claims against those assets in a single forum, supports the legitimacy of the Louisiana scheme in protecting the

interests of policyholders. Louisiana's RLCA effectively transfers or spreads the policyholder's risk of not being made whole in the event of an insurance company's insolvency.

Second, an implicit benefit of the insurance contract between the insurer and insured is that, in the event of the insurance company's insolvency, an attempt to make the insured whole will be undertaken by placing the insurer in receivership and administering the affairs of the failed insurance company pursuant to Louisiana's RLCA. This inherent promise that the Louisiana RLCA will control post-receivership proceedings is an integral part of the policy relationship between the insurer and the insured. Once in receivership, Louisiana's RLCA vests the Commissioner with, *inter alia*, all "rights of action" of the insurer and authorizes him to file suit in a single state court pursuant to §2004 and marshal all available assets for the benefit of insureds (policyholders), creditors, and the public pursuant to the RLCA. See La. R.S. 22:2008.

Third, there is no dispute that Louisiana's comprehensive regulatory scheme for post-receivership proceedings is limited to entities in the insurance industry. It does not apply to insolvent companies generally, but only to insolvent insurance companies. Considering the three *Pireno* factors, and as correctly found by *Donelon*, Louisiana's RLCA, including §2004, were enacted for the purpose of "regulating the business of insurance."

Indeed, this Court in *Fabe*, when analyzing whether Ohio's post-receivership priority scheme would reverse preempt the conflicting federal priority scheme, correctly observed: "The Ohio statute is enacted 'for the purpose

of regulating the business of insurance' to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims. That the policyholder has become a creditor and the insurer a debtor is not relevant." *Id.* at 506. As explained by this Court in *Fabe*, when an insurance company fails, the performance contemplated by the terms of the insurance policy also fails:

> Without performance of the terms of the insurance policy, there is no risk transfer at all. . . . The Ohio priority statute is designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy. Because it is integrally related to the performance of insurance contracts after bankruptcy, Ohio's law is one "enacted by any State for the purpose of regulating the business of insurance."

Fabe, 508 U.S. at 504. Because Louisiana's ultimate purpose in mandating the consolidation of all post-receivership actions into single court is to protect policyholders, §2004 is a state law that regulates the business of insurance under the MFA.[3]

The third step of the *Fabe* test presents the question of whether the application of the FAA would "invalidate,

3. As further evidence of Louisiana's strong interest in making sure policyholders are made whole in the event of insolvency, Louisiana's priority of claims statute ranks policyholder claims ahead of general creditor claims. See La. R.S. 22:254(G).

impair, or supersede" provisions of a state statute regulating insurance. Once Louisiana's RLCA as a whole, or §2004 specifically, is determined to be a law enacted to regulate the business of insurance, then it logically follows that any pre-receivership forum selection agreement which designates a forum other than the venue determined by §2004 will necessarily "invalidate, impair, or supersede" Louisiana insurance law. Any contrary finding would frustrate the orderly, comprehensive, post-receivership scheme contemplated by Louisiana's RLCA and §2004. Forcing the Commissioner to arbitrate claims against Milliman, while simultaneously litigating related claims arising out of the failure of LAHC against numerous other defendants in state court, would undoubtably "invalidate, impair, or supersede" the insurance laws of Louisiana.

Significantly, Louisiana's post-receivership venue law does not prohibit only arbitration clauses, but rather, §2004 prohibits all private forum selection clauses that would thwart Louisiana's orderly regulatory scheme.[4] Milliman's characterization of the Louisiana Supreme

4. For example, LAHC hired another actuarial firm, Buck Global, LLC ("Buck") in 2014, *inter alia*, to set the 2015 premiums for LAHC. The Commissioner has sued Buck for its professional malpractice and Buck remains a defendant in the pending litigation in Louisiana state court. Buck's contract with LAHC contained a forum selection clause that designated New York as the only venue for any dispute arising out of the contract. Although Buck filed motions to have the Commissioner's claims against it severed and transferred to New York, the trial, appellate, and supreme court of Louisiana all rejected Buck's demand. Consider the very real prejudice to the Commissioner if the claims against Milliman are decided by a private arbitration panel, while his claims against Buck and the other defendants are decided by the Louisiana state court.

Court's ruling as "arbitration-adverse" and part of "the judicial hostility toward arbitration" is incorrect. Petition, pp. 7, 31. Rather, any private contract, including but certainly not limited to an arbitration agreement, which would effectively nullify Louisiana's scheme regarding post-receivership proceedings, runs afoul of Louisiana's insurance regulation and the strong federal policy embodied in the MFA.

B. *Donelon* Correctly Applied Federal Law to Conclude that Louisiana's RLCA, including §2004, Reverse Preempts the FAA Under the MFA

Louisiana law recognizes the inherently public purpose of insurance regulation and gives the Commissioner broad authority to manage, oversee, and regulate the business of insurance from before an insurance company begins selling insurance, during its existence, and in the event of insolvency, until it is either rehabilitated or liquidated. "Insurance is an industry 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." La. R.S. 22:2(A)(1) (emphasis added).

Interpreting Louisiana law regarding insolvent insurance companies, the Louisiana Supreme Court held that La. R.S. 22:2004(A) "is an express grant of authority for the Commissioner to bring this suit in court, rather than arbitration." *Donelon*, App. 8a. Given that it is the

province of a state's highest court to interpret that state's laws, and that this Court defers to a state's interpretation of its own law, Louisiana's interpretation of §2004 is controlling here. *See Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r]'of state law.").[5] Significantly, if Louisiana's highest court had interpreted §2004 as not mandating the consolidation of all post-receivership actions into a single court, then arguably that would have ended the reverse preemption analysis. In such a case, there would be no need to analyze or consider the interplay between the FAA and the MFA because enforcement of a pre-receivership arbitration agreement would not conflict with or impair state insurance law. Indeed, this is what the Iowa Supreme Court decided in *Ommen*, the Third Circuit decided in *Suter*, and the Ninth Circuit decided in *Bennett*; see discussion in Sections III.A and III.B, *infra*.

By mischaracterizing the Commissioner's suit here as a "simple contract and tort action," Milliman ignores that the Commissioner's claims are inextricably tied to the regulation of insurance companies in Louisiana. But for Milliman's negligent feasibility study, LAHC would have never sold a single policy to Louisiana's citizens. But for Milliman's failure to properly assess the financial condition of LAHC and adjust its premiums accurately, LAHC would not have lost more than $20 million in its first year of operation. The very claims which Milliman would take to arbitration arise directly out of Louisiana's

5. Of course, however, the issues of whether §2004 regulates the business of insurance and/or whether forcing the Commissioner to submit to arbitration "impairs" state law under the MFA present federal questions.

intense interest in the regulation of Louisiana HMOs like LAHC. The nexus between the Commissioner's claims and the regulation of insurance is far from "attenuated" as Milliman argues. Rather, the Commissioner's claims raise serious public-policy issues integral to Louisiana's interests both in regulating the business of insurance and in ensuring that policyholders, healthcare providers, and other creditors who did business with LAHC are protected.

By enacting the RLCA and §2004, Louisiana's legislature proclaimed that Louisiana courts would decide all disputes relating to a failed domestic insurance company. The problems with allowing a private arbitration panel to decide these inherently public issues which impact insurance law and regulation in Louisiana are numerous. First, if Milliman's Agreement is enforced against the Commissioner, the arbitrators' ruling would be "confidential": the public would never know about Milliman's role in the collapse of LAHC. Second, any ruling by the foreign arbitration panel would not be subject to judicial review; the arbitrators could rule completely in violation of Louisiana and federal law and no appeal could be had from their ruling. Third, Milliman will be subject to only "limited discovery" as determined by the foreign arbitration panel, and without access to full discovery; the public and the Commissioner may never learn the full extent of Milliman's role in LAHC's failure. Fourth, if the Commissioner is forced to arbitrate against Milliman while simultaneously litigating against numerous other defendants regarding the failure of LAHC in state court, the likelihood of inconsistent and incompatible verdicts is all but certain. Defendants in both proceedings will undoubtedly point fingers at the respective empty chairs in their respective rooms, thereby violating Louisiana's

RLCA and prejudicing the rights of policyholders, healthcare providers, and the public at large.

III. NO COMPELLING SPLIT OF AUTHORITY REGARDING THE INTERPLAY BETWEEN THE FAA AND THE MFA EXISTS

A. *Donelon* and *Ommen* Do Not Conflict—Rule 10(b)

Although the specific rulings in *Donelon* and *Ommen* are certainly different, the two courts' analysis of the federal question presented here are compatible and in accord with one another and with federal precedent. The Iowa Supreme Court in *Ommen* interpreted and decided that the Iowa Liquidation Act "expressly permits the liquidator to sue or defend [the insolvent insurance company] in 'any necessary forum,' including 'arbitration panels'" and that "[n]owhere in the Iowa Liquidation Act is it required that the liquidator must bring claims in a public forum." *Ommen*, 941 N.W.2d at 319-20. Because of this interpretation of Iowa state law, the Iowa Supreme Court did not reach the issue of whether any Iowa law "regulating the business of insurance" prohibited arbitration in post-receivership proceeding and reverse preempted the FAA through the MFA. Like Third Circuit in *Suter* and the Ninth Circuit in *Bennett* (see Section III.B, *infra*), the Iowa Supreme Court in *Ommen* did not decide the federal question that is inherent in the interplay between the FAA and the MFA once it has been determined that a state law enacted for the purpose of regulating the business of insurance actually conflicts with the FAA.

Louisiana, on the other hand, has decided that its state regulatory scheme and §2004 *does* require litigation

in a specific public forum (state court). Because Iowa and Louisiana law are different—as determined by the highest court in each state—there is no conflict between *Donelon* and *Ommen*. And given that there is no compelling conflict between *Donelon* and *Ommen*, Milliman cannot point to a decision of a state court of last resort that conflicts with the decision of the Louisiana Supreme Court and therefore fails to satisfy Rule 10(b) in this regard.[6] Indeed, other state courts of last resort have ruled just like the Louisiana Supreme Court did in *Donelon*. *See* Section III.D.4, *infra*.

B. Cases Cited by Milliman Do Not Reflect a Split of Authority Between Federal Circuit Courts—Rule 10(a)

Milliman has primarily cited two federal circuit court cases, *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3rd Cir. 2000) and *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992), for the proposition that this case presents "a recurring and irreconcilable conflict on the question" of whether a state exclusive venue provision for post-receivership actions by or against an insurance receiver is one "regulating the business of insurance." An analysis of *Suter* and *Bennett* and the other cases cited by Milliman, however, reveal no such compelling split of authority worthy of review pursuant to Rule 10(a).

In *Suter*, the New Jersey liquidator filed suit in state court against a German reinsurer of an insolvent insurance company, seeking damages for breach of

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6. *See* fn. 8, *infra*, for a brief discussion of the Nevada Supreme Court's summary ruling in *Richardson*.

certain reinsurance treaties. Because the subject treaties contained arbitration clauses governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), the defendant removed the action to federal court pursuant to 9 U.S.C. § 205. After removal, the reinsurer moved the federal court to compel arbitration. The Liquidator argued, *inter alia*, that the Convention was reverse preempted by the New Jersey Liquidation Act under the MFA.

The Liquidator in *Suter* based its argument that the Convention was reversed preempted on N.J. Stat. Ann. § 17:30C-2, which provided that, in full: "The Superior Court shall have original jurisdiction of delinquency proceedings under this act." Significantly, this statute is not identical to or even comparable to the Louisiana statute at issue in *Donelon*, § 2004, which requires that all post-receivership actions—not simply the delinquency proceeding itself—be consolidated into a single state court. Unlike Louisiana law, the New Jersey Liquidation Act at issue in *Suter* did not mandate that all post-receivership actions brought by the Commissioner be consolidated into a single venue.

As such, the Third Circuit easily dismissed the Liquidator's argument for reverse preemption through the MFA by pointing out the "obvious" fact that "This is not a delinquency proceeding or a proceeding similar to one." *Id.* at 161. Instead, the Third Circuit characterized the proceeding at issue in *Suter* as "a suit instituted by the Liquidator against a reinsurer to enforce contract rights for an insolvent insurer," and not a delinquency proceeding that would have implicated the forum

selection provision found in N.J. Stat. Ann. § 17:30C-2. After finding that this state statute did not apply and assuming—without discussion—that the provisions of the New Jersey Liquidation Act raised by the Liquidator "were enacted for the purpose of regulating the business of insurance," the Third Circuit found that there would be no "impairment" of the New Jersey Liquidation Act if the Convention's arbitration clause was ultimately enforced. *Id.* at 161. There is nothing controversial about this finding of *Suter*; and this ruling is not at odds with *Donelon*. In this regard, *Suter* is comparable with *Ommen*. Had Louisiana's venue provision not mandated consolidation of all post-receivership actions into a single state court, like the New Jersey Liquidation Act in *Suter* or the Iowa Liquidation Act in *Ommen*, then the Louisiana Supreme Court would have probably ruled similarly to *Ommen* and *Suter* and not addressed the federal question involving the interplay between the FAA and the MFA.

Moreover, the Third Circuit considered and distinguished the Fifth Circuit's *Munich*[7] decision by, in part, acknowledging that "the Oklahoma statute at issue [in *Munich*] vested the state court with 'exclusive original jurisdiction.'" *Id.* at 162 (quoting *Munich*, 141 F.3d at 590). In other words, according to the Third Circuit's correct logic, had the New Jersey Liquidation Act vested the state court with exclusive jurisdiction, then both *Munich* and the argument in favor of reverse preemption of the Convention through the MFA would have been compelling.

The second pillar of Milliman's "irreconcilable conflict" argument rests on the Ninth Circuit's decision

7. *See* Section III.D.1, *infra*, for a discussion of *Munich*.

in *Bennett*, rendered in 1992 prior to *Fabe*. In *Bennett*, a Montana Liquidator filed suit in state court against several reinsurers. Defendants removed the suit to federal court and filed a motion to compel arbitration because the subject contracts contained broad arbitration provisions. The Ninth Circuit essentially interpreted the arbitration agreements in light of the strong federal policy favoring arbitration and ruled that the arbitration agreements should be enforced against the Liquidator.

Other than referring to the FAA in passing, the Ninth Circuit undertook no meaningful analysis of the FAA or of its interplay with the MFA in *Bennett*. The Ninth Circuit did not even cite the MFA independently, much less analyze it or discuss whether Montana's post-receivership regulatory scheme constitutes the regulation of the business of insurance. The only reference to the MFA made by the Ninth Circuit in *Bennett* is found in its discussion of another case, *State of Idaho ex rel. Soward v. United States*, 858 F.2d 445 (9th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989), a creditor priority dispute. In *Soward*, the Ninth Circuit erroneously ruled that a state's priority scheme for the payment of claims "cannot be described as regulating the "business of insurance," and held that the federal priority statute preempted the state priority scheme. *Bennett*, 968 F.2d at 973. Of course, within a year of when *Bennett* was decided in the Ninth Circuit, this Court reached the exact opposite conclusion in *Fabe*. Obviously, *Fabe* severely undermines the analysis employed by the Ninth Circuit in both *Soward* and *Bennett*.

Milliman also discusses several other cases in support of its Petition. These other cases are even less helpful to Milliman than *Suter* and *Bennett*. In *Quackenbush*

v. Allstate Ins. Co., 121 F.3d 1372 (9th Cir. 1997), a suit involving reinsurance litigation, the Ninth Circuit observed:

> Under *Fabe*, there is no question that California's insurer-insolvency provisions regulate the "business of insurance" and are saved from preemption by the [MFA]. . . . [I]f a California law prohibited arbitration of disputes involving an insolvent insurer, then that law would undoubtedly also be saved from preemption by the FAA. But no such law exists. In short, this lawsuit by [the Commissioner] against Allstate does not provoke a conflict between the [FAA] and California's insolvency scheme. Therefore, the [MFA] simply does not apply.

Id. at 1381-82. Again, if the state law at issue does not provide for an exclusive venue or mandate consolidation into a single forum for all post-receivership actions, then the Ninth Circuit's observation in *Quackenbush* is correct: there is no conflict between state law and the FAA and a reverse preemption analysis under the MFA is unnecessary.

Grode v. Mutual Fire, Marine and Inland Ins. Co., 8 F.3d 953 (3rd Cir. 1993) is another Third Circuit decision that involves comparable facts and the same issues that were addressed in *Suter*. *Grode* deals with issues involving the Convention, removal, and abstention—not the interplay between the FAA and the MFA.

AmSouth Bank v. Dale, 386 F.3d 763 (6th Cir. 2004), is a diversity action in which the Sixth Circuit concluded that the MFA did not reverse preempt declaratory judgment

actions against insolvent insurance companies. *Dale* did not involve either the FAA or a state's statutory scheme for rehabilitating or liquidating an insolvent insurer. It is simply inapposite to the issues presented here.[8]

C. The Louisiana Supreme Court's Analysis of the Interplay Between the MFA and the FAA Accords with *Fabe*—Rule 10(c)

Milliman's argument that the Louisiana Supreme Court's decision in *Donelon* is "inconsistent with this Court's" precedent in *Fabe* is equally unavailing for Rule 10(c) purposes. *Fabe* strongly supports *Donelon*.

Fabe did not involve the interplay between the FAA and the MFA. No arbitration agreement was at issue in *Fabe*. The issue in *Fabe* was whether, under the MFA, a federal priority statute was reverse preempted by a conflicting Ohio priority statute that was part of a "complex and specialized administrative structure" designed for the regulation of insurance company insolvency. *Fabe*, 508 U.S. at 493–94. Examining each priority provision of the Ohio statute separately, the Court held that the priorities for administrative costs and policyholder claims displaced

8. Milliman's reliance on the decisions of related cases involving the same arbitration agreement in states other than Louisiana is clearly misplaced. In *Richardson v. Eighth JDC*, 454 P.3d 1260 (Nev. 2019)(Table), the Nevada Supreme Court did not address the merits of the underlying dispute. A summary finding that a lower court did not commit "clear legal error" is far from an endorsement of Milliman's position taken here. And *Milliman v. Roof*, 353 F.Supp.3d 588 (E.D. Ky. 2018) is a district court decision by a single judge which was not appealed to the circuit court; Rule 10 does not include consideration of federal district court decisions.

the federal priority, but that the federal priority trumped all other claims. *Id.* at 509. This Court reasoned that the Ohio statute was enacted for the purpose of regulating the business of insurance to the extent it regulated policyholder interests. *Id.* at 508. But to the extent that the statute was designed to further the interests of other creditors, *Fabe* found that it did not have such a purpose and found that no reverse preemption under the MFA was justified as to those specific provisions of state law. *Id.*

Fabe's holding and analysis suggests that a state statute may require parsing to determine the extent of its preemptive power under the MFA. At the same time, however, this Court stopped short of directing that this approach be taken in every case. *Id.* at 509 n. 8. Any uncertainty surrounding *Fabe*, however, does not help Milliman's position. Louisiana' RLCA, taken as a whole, is a comprehensive statutory scheme that constitutes "regulating the business of insurance." Even if this Court were required to parse Louisiana's RLCA, the specific provision of the RLCA at issue here—vesting the Commissioner authority to select the forum and mandating consolidation of all post-receivership actions into a single Louisiana state court—is a law enacted for the purpose of regulating the business of insurance. To preserve both the Louisiana RLCA as a whole, and apply §2004 in particular, it follows that either all private forum selection clauses, including arbitration, must give way to Louisiana law, or none do. Although there are certainly cases that lend themselves to a parsing of a particular state law to determine its relationship to the concerns of policyholders, this is not one of them. Again, once it is determined that either the RLCA as a whole, or §2004 in particular, is a state law enacted for the purpose of regulating the business of insurance, it necessarily

follows that enforcing a private forum selection clause will improperly "impair, invalidate, or supersede" state law.[9]

That both policyholders and others are benefited by the ability the Commissioner to administer receivership proceedings in a single venue does not alter this analysis. Because §2004 is "reasonably necessary" to further the primary goal of protecting policyholders, even though its application may also benefit other creditors, it remains a state law that regulates the business of insurance. In this respect, the provisions of the Louisiana's RLCA, including §2004, are comparable to the Ohio provision giving a preference to post-receivership administrative expenses considered in *Fabe*. Therefore, the ruling of the Louisiana Supreme Court in *Donelon* that §2004 was enacted for the purpose of regulating the business of insurance is entirely in line with *Fabe* and need not be reviewed by this Court.

D. *Donelon* Accords with Federal Circuit Courts and State Courts of Last Resort Which Have Addressed the Immediate Issue—Rule 10(b)

Every United States court of appeals that has considered the federal question presented here has ruled just like the Louisiana Supreme Court did in *Donelon*. Milliman's suggestion to this Court that *Donelon* "directly contravenes unanimous federal circuit authority" is baseless.

1. Fifth Circuit—*Munich v. Crawford*

In *Munich v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998), the Fifth Circuit addressed

9. *See* discussion of *Munich* at Section III.D.1, *infra.*, and discussion of *Fabe* and *Donelon* at Section II, *supra.*

the same issue decided by the Louisiana Supreme Court in *Donelon*: "whether state laws governing insurance company delinquency proceedings reverse pre-empt the FAA under the [MFA]." *Id.* at 587. In *Munich*, two reinsurers asserted that their claims relating to a failed insurance company must be resolved by arbitration pursuant to their pre-receivership agreements with the failed insurance company. The Oklahoma Commissioner maintained that the FAA was reverse preempted by the MFA given Oklahoma's post-receivership law that mandated a single, state court forum to resolve all claims arising out a failed insurance company.

After acknowledging that *Fabe*'s holding and analysis suggest that a state receivership statute may require parsing in some cases to determine the scope of its preemptive effect under the MFA, the Fifth Circuit determined that no such parsing was necessary in *Munich* given Oklahoma's exclusive venue provision.

> [E]ven if we are required to parse [the Oklahoma Liquidation Act], 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.

Id. at 592-93 (some citations omitted). After recognizing and discussing all of the problems solved by consolidating all post-receivership actions into a single forum, the Fifth Circuit adopted the reasoning of *Fabe* to support its holding.

The Fifth Circuit further rejected the reinsurer's contention that arbitration would not "invalidate, impair, or supersede" Oklahoma law because the funds at issue were "never an asset of the insolvent estate." *Id.* at 594. According to the Fifth Circuit, "Regardless of the nature of the reinsurers' action, ordering it resolved in a forum other than the receivership court nevertheless conflicts with the Oklahoma law giving the state court the power to enjoin any action interfering with the delinquency proceeding." *Id.* at 595. In other words, whether the reinsurers were fighting over existing or future assets that have been or may become a part of the insurance company's estate, Oklahoma has an interest in mandating that all such claims be brought or consolidated into a single, state law forum. The Fifth Circuit affirmed the dismissal of the case and held that Oklahoma law reverse preempted the FAA under the MFA and prohibited the enforcement of the arbitration agreement against the Commissioner. *Munich* is on all fours with *Donelon*.

2. Tenth Circuit—*Davister v. United Republic*

In *Davister Corp. v. United Republic*, 152 F.3d 1277 (10th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999), a corporation sold stock and transferred real property to a Utah insurance company prior to receivership. After Utah's Commissioner instituted a liquidation proceeding in state court, the corporation filed suit in federal court in Utah to compel arbitration pursuant to a pre-receivership agreement. Specifically, the corporation in *Davister* requested relief from a post-receivership stay order issued by the Utah liquidation court that effectively stayed a state court proceeding in Texas where the real property was located.

On appeal, the Tenth Circuit rejected the corporation's argument that the FAA mandated that its arbitration agreement be enforced against the Utah Commissioner. Instead, the Tenth Circuit addressed whether the MFA reverse preempts the FAA given the facts at issue and, after analyzing *Fabe* and *Munich*, concluded that "[w]e think it evident the Utah statute [providing for a stay of all related post-receivership actions] meets the test of having been enacted for the purpose of regulating the business of insurance," and that "the answer is obvious [that] [a]llowing a putative creditor to pluck from the entire litigation proceeding one discrete issue and force arbitration . . . would certainly impair the progress of the orderly resolution of all matters involving the insolvent company" and would "[u]nquestionably" impact policyholders. *Id.* at 1281 (footnotes and some citations omitted). The Tenth Circuit's analysis of Utah's uniform stay procedures comports with the Louisiana Supreme Court's analysis of Louisiana's post-receivership venue procedures at issue in *Donelon*.

Indeed, the reasoning and result in *Davister* is even more compelling here given the source of the arbitration agreement and the relationship between the parties. In *Davister*, a third-party corporation entered into a stock and real estate deal with the insurance company while it was still solvent. The pre-receivership transaction at issue in *Davister* arguably had relatively little to do with the business of insurance prior to insolvency. Here, in stark contrast, the work performed by Milliman for LAHC prior to receivership was essential to both the business of insurance and the regulation of insurance. Stated differently, selling real property to an insurance company is somewhat attenuated to the business of insurance.

However, determining the financial condition of the insurance company, advising LAHC that it was a viable insurance company, applying for more than $65 million in federal start-up and solvency loans, and setting the premiums charged by LAHC, however, all go to the core business of insurance. Milliman's actuarial work in this case goes to heart of what insurance regulation is aimed at protecting: that the risk undertaken by policyholders of an insurance company is reasonable and sound.

3. Second Circuit—*Stephens v. American*

In *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir.1995), which involved facts comparable to those in *Donelon*, the Second Circuit held that the Kentucky Liquidation Act reverse preempted the FAA by operation of the MFA. *Id.* at 45. Kentucky had enacted a comprehensive scheme for the liquidation of insolvent insurance companies, including a provision nullifying the effect of arbitration clauses against the receiver. The appellees, reinsurance companies seeking to compel arbitration regarding their rights of setoff under the reinsurance agreements, argued that the anti-arbitration provision was not enacted to protect policyholders and deprived them of their bargained-for right to arbitration. *Id.* The Second Circuit refused to limit its focus to the anti-arbitration provision, but instead, examined the Kentucky Liquidation Act as a whole. It concluded that Kentucky's Liquidation Act protected 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." *Id.*

4. Other Favorable State Court Cases

Other state court cases which have address the immediate issue have ruled just like the Louisiana Supreme Court did in *Donelon*. *See Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010), *cert. denied*, 562 U.S. 1218 (2011); *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203 (Ohio 2011); *Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885, 889-891 (N.Y. Ct. App. 1958).

IV. OTHER ADEQUATE AND INDEPENDENT STATE LAW GROUNDS EXIST TO AFFIRM THE ULTIMATE RULING IN *DONELON*

The Louisiana Supreme Court focused its opinion in *Donelon* on the MFA reverse preemption issue; however, the court acknowledged that other state law issues that the Commissioner had briefed and argued below may also provide an alternative basis for finding Milliman's arbitration agreement unenforceable. Although the Louisiana Supreme Court did not address these other state law issues in *Donelon*,[10] nothing prevents it from doing so if this Court were to grant *certiorari*, reverse the Louisiana Supreme Court's ruling regarding MFA reverse preemption, and remand for further proceedings. In other

10. Because §2004 prohibited enforcement of the arbitration clause under the MFA, the Louisiana Supreme Court understandably reasoned that it was unnecessary to address or resolve the Commissioner's other arguments regarding why, according to state law, Milliman's arbitration clause is unenforceable. "Consequently, the parties' intent is not relevant and 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." *Donelon*, App. 12a-13a.

words, because this Court's ruling will not resolve all underlying state law issues involving the determination of whether Milliman's arbitration agreement is enforceable against the Commissioner, this Court should decline review.

A. The Risk of Rendering an Advisory Opinion

As has been repeatedly observed, this Court should not review judgments of state courts that could rest on adequate and independent state grounds, because "if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). While the Commissioner does not question this Court's jurisdiction–because the "plain statement" requirement of *Michigan v. Long* appears lacking in the Louisiana Supreme Court's ruling—Respondent respectfully suggests that it behooves this Court to decline Milliman's invitation to render an advisory opinion here.

As Milliman itself has argued to this Court in its opposition brief filed in *Ommen*: "Even if this Court were to conclude that there is sufficient ambiguity concerning the roles of state and federal law in the [State] Supreme Court's decision for this Court to have **jurisdiction** to review it, the high likelihood is that, upon any remand, the [State] Supreme Court would reaffirm the same result as a matter of state law." *Ommen*, No. 20-249, Milliman's Opposition Brief, p. 14 n. 4 (emphasis in original). Here, if this Court were to grant writs in *Donelon*, its decision would be an advisory opinion, given that an application of

state contractual law also leads to the inevitable conclusion that Milliman's arbitration provision cannot be enforced against the Commissioner.

B. According to State Law, the Direct Benefit Estoppel Doctrine Does Not Bind the Commissioner, a Non-Signatory, to Milliman's Arbitration Contract

Whether an arbitration contract should be enforced against a non-signatory to that contract is a matter of state law. "Despite [the FAA] policy favoring enforcement of arbitration agreements, the Supreme Court has also recognized that, under the savings clause in § 2, general state contract principles still apply to assess whether those agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law." *Duhon v. Activelaf, LLC*, 2016-0818 *6 (La. 10/19/2016); --So.3d.--; 2016 WL 6123820, *cert. denied*, 137 S.Ct. 2268 (2017)(Mem)(*citing Casarotto*, 517 U.S. at 686-87). The Commissioner's defense here (i.e., that he is not a signatory to the underlying arbitration contract) is comparable to the other, well-recognized contractual defenses available to him under state law; e.g., lack of consideration, cause, duress, or fraud. Such questions regarding the enforceability of a contract are entirely controlled by state law. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). Federal law is not involved in determining whether the direct benefit estoppel doctrine applies here to bind the Commissioner as a non-signatory.

Louisiana courts have specifically recognized that the Commissioner, in his capacity as rehabilitator, does

not simply "stand in the shoes" of the insurer, but that his responsibilities include protection of the general public and the policyholders and creditors as well as the insurer itself. *See, e.g., LeBlanc v. Bernard*, 554 So.2d 1378, 1381(La. App. 1st Cir.1989), *writ denied*, 559 So.2d 1357 (La.1990). Because the Commissioner does not simply "stand in the shoes" of LAHC, the direct-benefit estoppel doctrine is inapplicable against the Commissioner, a non-signatory, as a matter of state law.

In a case that is both factually and legally analogous to the immediate one, *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203 (Ohio 2011), the Ohio Supreme Court concluded that a pre-receivership arbitration agreement executed by an insurer is not subsequently enforceable against an insurance commissioner, recognizing that the commissioner's important role in protecting the public interest means that he or she does not stand precisely in the shoes of the insurer. The court in *Taylor* relied upon this Court's reasoning in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). In *Waffle House*, this Court held that when the EEOC brought an enforcement action in its own name, both in the public interest and on behalf of a complaining employee, the EEOC was not bound by an arbitration provision contained in that employee's employment agreement. *Id.* at 297–98. This Court ruled that because of the EEOC's broad enforcement authority, it was not required to arbitrate even the claims for "victim-specific" relief, even though the victim had agreed to arbitrate such claims. *Id.*

The Commissioner here, just like the EEOC in *Waffle House*, is pursuing claims on behalf of policyholders, creditors, and other impacted parties, based upon

Milliman's alleged professional malpractice in generating financial reports that it knew would be submitted to, and relied upon by, LAHC and regulators. In short, according to state law, the Commissioner's claims are not entirely derivative of LAHC's claims and the direct benefit estoppel doctrine does not bind the Commissioner to the arbitration agreement as a non-signatory.

C. According to State Law, by Choosing New York Law Regarding the Enforcement of their Agreement, Milliman and LAHC Agreed Not to Arbitrate Post-Receivership Disputes Involving the Commissioner

A court faced with a contract that contains both an arbitration agreement and a choice-of-law provision, must determine the intent of the parties by construing the specific language and context involved to determine, according to state law, the scope of the parties' agreement. Milliman and LAHC agreed in Section 5 of their Agreement that New York law would govern the "construction, interpretation, and enforcement of this Agreement." By agreeing to have New York law control the "enforcement" of their Agreement, LAHC and Milliman agreed not to subject post-receivership disputes involving the Commissioner to arbitration. Under New York and federal law, courts must assume during the arbitrability analysis that, as part of making a choice of law on "enforcement" of the contract, the parties intended to adopt provisions of the law selected into the contract unless the contract states otherwise. *See Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 647 N.E.2d 1308, (N.Y. Ct. App. 1995), *cert denied*, 516 U.S. 811 (1995); *Diamond Waterproofing Systems, Inc. v. 55 Liberty*

Owners Corp., 826 N.E.2d 802, 806 (N.Y. Ct. App. 2005); *N.J.R. Associates v. Tausend*, 973 N.E.2d 730 (N.Y. Ct. App. 2012); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995). Here, by applying state-law contract principles, there is no need to consider whether the FAA is reverse preempted under the MFA. Federal law is not involved in determining the scope of the parties' agreement. Simply stated, if the Louisiana Supreme Court addresses this threshold issue of contractual interpretation under state law, it will likely conclude that LAHC and Milliman did not agree to arbitrate this post-receivership dispute involving the Commissioner.

CONCLUSION

Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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