No. 20-299

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

REPLY BRIEF FOR PETITIONER

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February 12, 2021

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

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The Commissioner tries and fails to distinguish the direct conflict between the Louisiana Supreme Court's decision, and decisions from the U.S. Third and Ninth Circuit Courts of Appeals and the Iowa Supreme Court, addressing the single federal question presented by Milliman's Petition: does arbitration of an insurance commissioner's pre-insolvency damages claims on behalf of an insolvent insurer, brought against non-policyholders with contractual arbitration rights, implicate, impair or interfere with a state regulation of the "business of insurance" under the McCarran-Ferguson Act (the "MFA")? The Commissioner concedes, as did the Louisiana Supreme Court, that the application of the MFA to these claims is a question of *federal* law. (Respondent's Brief in Opposition ("Resp. Br.") 15 n.5).

This Court has never directly addressed this MFA issue. This Court should grant the Petition because the tension between state insurance insolvency venue statutes, a majority of which require or permit insurance commissioners to bring these claims in state court, and the FAA's contrary mandate to protect and enforce contractual arbitration rights, has spawned decades of inefficient, expensive and unnecessary litigation yielding inconsistent results. There is a clear divide between every on point federal circuit decision, each of which has protected FAA-mandated arbitration rights, and contrary decisions in state courts of last resort. A decision by this Court on this singular MFA issue will provide national uniformity on a federal issue which should not be left to state legislatures and state courts.

The Commissioner tries to evade this conflict by wrongly asserting that "[e]very U.S. court of appeals

that has considered the federal question here" has ruled consistently with Louisiana. (Resp. Br. 25). In so arguing, the Commissioner obscures the crucial distinction between the pre-insolvency tort and contract damages claims he brings *against Milliman*, and claims brought *against an insolvent insurer's estate* by policyholders, reinsurers and other creditors. Federal courts understandably have held that the latter must be heard in the insolvency court to avoid piecemeal litigation and inconsistent results between policyholders and creditors competing for the same corpus of assets. This is, after all, the core function of the insolvency court, to marshal estate property and allocate it among competing claimants.

However, that is not the situation presented by *this case*. Milliman is not asserting any claim to or against estate assets, and the Commissioner's damages claims against Milliman neither implicate any policyholder or creditor rights, nor are part of the pending state insolvency proceeding. Every one of the federal circuit courts to have considered the issue presented by this case—*i.e.*, the arbitrability of contract or tort damages claims brought on behalf of an insolvent insurer against a non-policyholder pursuant to a pre-insolvency agreement providing for arbitration—has held that arbitration of such claims does not interfere with a state's regulation of the business of insurance, and has compelled insurance commissioners to arbitrate. The Louisiana Supreme Court erroneously disregarded, and ruled contrary to, this precedent.

The Commissioner's argument that the state legislature's purpose and public policy considerations in enacting Louisiana Rehabilitation, Liquidation, and Conservation Act ("RLCA") §2004 justify the Louisiana Supreme Court's decision ignores numerous

decisions of this Court making clear that a court cannot rely on policy considerations behind a state statute to vitiate a party's federally-protected arbitration rights. The Commissioner's argument also contravenes *U.S. Dept. of Treasury v. Fabe* and its teachings that a particular state law provision regulates the "business of insurance" only to the extent that it regulates policyholders, and that increasing the size of LAHC's estate, while it could "indirect[ly]" benefit policyholders, does not constitute the "regulation of the business of insurance." 508 U.S. 491, 508–09 (1993).

The Commissioner's arguments that the Louisiana decision reflects "our system of federalism… working as it should," and that "[e]ach state does it differently. This is how it should be," (Resp. Br. 6), ignore the fact that Congress enacted two controlling federal statutes relating to the singular federal question presented by Milliman's Petition. The Louisiana court was not free to ignore this Court's and other federal appellate precedent adjudicating what constitutes or impairs the "business of insurance" under the MFA.

Milliman and other interstate service providers rely on standard arbitration clauses to ensure fair, efficient and expert dispute resolution. Milliman has been litigating this same issue in four different states for over three years to protect its FAA rights on what is a federal law issue. So have four different state insurance commissioners. This is a burden this Court should spare for all parties engaged in these disputes.

ARGUMENT

I. The Commissioner Cannot Evade the Deep and Recurring Conflict Milliman's Petition Presents.

Contrary to Louisiana, the U.S. Third and Ninth Circuits, and the Iowa Supreme Court, have held that the arbitration of an insurance commissioner's damages claims arising out of an insolvent insurer's pre-insolvency agreements with a non-policyholder does not implicate or interfere with the state's regulation of the "business of insurance." *See 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); *Ommen v. Milliman*, 941 N.W.2d 310, 320 (Iowa 2020).

The Commissioner futilely tries to obscure this direct conflict. He first argues that some of the state venue statutes in each of these cases are worded differently. Some speak about delinquency proceedings, while some talk about all actions brought by the commissioner. What matters is that all of these state insolvency venue statutes are worded either to require or permit the commissioner to pursue its claims in state court. The central point the Commissioner misses is that each and all of these state provisions, as applied to pre-insolvency tort and contract claims against a non-policyholder, are preempted by the strong FAA mandate to arbitrate. *Unless* arbitration of such claims implicates or impairs the state's regulation of "the business of insurance" under the MFA, which it does not do.

Second, having conceded that the construction of the MFA is a federal law question (Resp. Br. 15 n.5; *S.E.C. v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65,

67, 69 (1959)), the Commissioner nonetheless argues that the RLCA is a "comprehensive regulatory scheme," and that the Legislature's express and implicit intentions and public policy concerns in enacting §2004, such as avoiding the threat of inconsistent outcomes or piecemeal litigation (Resp. Br. 16), compel the conclusion that the broadly-written venue statute regulates the business of insurance. In so arguing, the Commissioner's brief ignores this Court's repeated holdings—just as the Louisiana Court did—prohibiting courts from relying on such state "policy considerations" to vitiate an otherwise valid arbitration agreement. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis in original); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) ("courts [should] enforce the bargain of the parties to arbitrate, and not substitute [their] own views of economy and efficiency," and holding that arbitration agreement must be enforced even when arbitration would bifurcate proceedings, potentially leading to inefficiency and inconsistent results (quotations omitted)); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010) (the Supreme Court has never held "that courts may use policy considerations as a substitute for party agreement" concerning arbitration).

The Commissioner also runs afoul of this Court's well-settled law, and federal appellate cases, requiring that: (1) courts "narrowly construe" the MFA, *Riverview Health Inst. LLC v. Med. Mut. Of Ohio*, 601 F.3d 505, 513 (6th Cir. 2010), to address "the relationship between the insurance company and the policyholder," *S.E.C. v. Nat'l Secs., Inc.*, 393 U.S. 453, 459–60 (1969); and that (2) the specific state provision

at issue, as applied to the particular claims at issue, must be analyzed to determine whether it implicates or impairs the insurer-policyholder relationship. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 311, 313 (1999) (analyzing effect of MFA on RICO suit with respect to particular suit, rather than general operation of statute); *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (same); *Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 967 (8th Cir. 2008) (pursuant to the MFA, "our focus must be on the precise federal claims asserted"). The claims against Milliman involve neither policyholder legal rights disputes or claims, nor competing claims against LAHC's assets.

As this Court stated in *Fabe*, the MFA protects state regulation of "the relationship between the insurance company and the policyholder." 508 U.S. at 501. State statutes or actions that have only "indirect effects" on policyholders are not "regulation of the business of insurance." *Id.* at 509. This Court explained that actions that may benefit an insurer's creditors generally, such that they "ultimately may redound to the benefit of policyholders… do not escape preemption because their connection to the ultimate aim of insurance is too tenuous." *Id*. at 508–09. This describes precisely the Commissioner's claims against Milliman. Nowhere in his extensive discussion of *Fabe* does the Commissioner address this aspect of this Court's decision.

Consistent with *Fabe*, every single federal circuit court to address this issue has held that the commissioner's pursuit of pre-insolvency tort and contract claims against a non-policyholder contractor does not constitute the "business of insurance." As the Sixth Circuit stated in *AmSouth Bank*, "an ordinary suit against a tortfeasor by an insolvent insurance com-

pany implicates a 'regulation of the business of insurance' only in the attenuated fashion rejected in *Fabe*." 386 F.3d at 783. The Third Circuit's holding in *Suter* that arbitration of such claims does not impair the "business of insurance" is similarly consistent with *Fabe*: "the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act." 223 F.3d at 161.

The Commissioner ignores the critical distinction between these cases and decisions such as *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), and *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995), on which the Louisiana Supreme Court relied, as well as *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), on which the Commissioner relies. In those cases, a state insurer insolvency statute was held to reverse preempt the FAA with respect to claims ***against*** the estate, or asserting a right to the insolvent insurer's assets. Claims seeking insolvent estate assets are clearly part of the core delinquency proceeding, and adjudicating such claims separately would threaten the orderly liquidation of the insolvent insurer's estate and lead to "unequal treatment of claimants." *Munich*, 141 F.3d at 593. There is no such danger here. The Commissioner's action against Milliman has no bearing on the allocation between competing creditors of LAHC's property or assets. Enforcing the arbitration agreement that encompasses the Commissioner's claims will not "disrupt the orderly [rehabilitation] of" the insurer. *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997); *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").[1]

The Commissioner asserts that federal bankruptcy law is instructive because it confronts the same tension between estate administration and third-party arbitration rights. (Resp. Br. 10). Milliman agrees. However, the Commissioner ignores that with respect to damages claims brought on behalf of an estate against third-party contractors based on the debtor's pre-insolvency contractual rights, bankruptcy courts have "no discretion to refuse to compel… arbitration." *Gandy v. Gandy*, 299 F.3d 489, 495 (5th Cir. 2002); *see also Microbilt Corp. v. Chex Sys.*, 588 F. App'x 179, 180 (3d Cir. 2014); *Crysen/Montenay Energy Co. v. Shell Oil Co.*, 226 F.3d 160, 166 (2d Cir. 2000).

Finally, there is nothing unique about the RLCA venue provision that would distinguish this case from the authority Milliman cites. At least 26 states have similar statutes, including the Iowa, Montana and New Jersey statutes at issue in *Ommen*, *Bennett* and *Suter*, respectively. RLCA §2004, which the Louisiana court construed to permit ("may bring") claims in state court, is actually more permissive than the state laws at issue in *Suter*, 223 F.3d 150 ("All actions authorized pursuant to this section *shall* be brought in [state court]," N.J. Stat. 17B:32-34(e)), and *Bennett*, 968 F.2d at 972–73 ("All actions herein authorized *shall* be brought in [state court]," Mont. Code § 33-2-1308)

[1] The Commissioner notes that this Court denied certiorari in *Ernst & Young, LLP v. Clark*, 562 U.S. 1218 (2011). (Resp. Br. 5). However, the petitioner there did not raise the conflict created between the Kentucky Supreme Court's decision and the Third and Ninth Circuit authority Milliman cites.

(emphases added).[2] As the Iowa Supreme Court said about the similarly permissive Iowa Liquidation Act: "Nowhere... is it required that the liquidator must bring claims in a public forum. The opposite… is true." *Ommen*, 941 N.W.2d at 320. However, whether the venue provision is permissive or mandatory, the FAA preempts both where they are used to deny FAA-protected arbitration rights.

II. The Louisiana Supreme Court's Decision Is Not Based on "Independent State Law Grounds."

The Louisiana Supreme Court's decision was not based on independent state law grounds, as both the Commissioner and the Louisiana Supreme Court recognize that the Court did not merely construe its own state statute. Rather, the Louisiana Court acknowledged that it "must determine if the FAA… preempts Louisiana law" under the MFA. (App. 13a). That federal law analysis, and the holding that RLCA §2004 reverse preempts the FAA pursuant to the MFA, is dispositive to the Louisiana Supreme Court's decision.

The Commissioner's argument that certiorari should be denied because the Louisiana Supreme Court on remand "could" ultimately reach the same outcome based on other grounds is meritless. (Resp. Br. 31). First, in considering a petition, this Court examines

[2] *See also Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 8 F.3d 953 (3d Cir. 1993) ("All actions herein authorized shall be brought in [state court]," 40 Pa. Stat. § 221.4(d)); *Quackenbush*, 121 F.3d 1372 ("the [state] court in which such [insolvency] proceeding is pending shall have jurisdiction to hear and determine, in such proceeding, all actions or proceedings then pending or thereafter instituted by or against the person affected by a proceeding under this article," Cal. Ins. Code § 1058).

what the court below actually decided, and does not speculate on what the court below could have but did not decide under state law. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). For example, this Court regularly reverses state court criminal decisions for federal constitutional errors notwithstanding that the accused may be re-tried and convicted (or acquitted) upon remand. Such orders are not "advisory opinion[s]." (Resp. Br. 31).

Second, there is no legal basis to defeat arbitration here. At each juncture in this case, the Commissioner has conceded that, if LAHC brought this case directly, not through the Commissioner representing the insolvent estate, Milliman's arbitration clause would be upheld. (App. 40a, 58a–59a). New York State law would not change that result or withstand FAA preemption if this case is reversed.

III. The Conflict Here Has Spawned Inefficient Litigation and Contradictory Results, Is an Important Issue of Federal Law, and Warrants This Court's Review.

By highlighting decisions from courts of last resort in New York, Ohio and Kentucky that join with Louisiana's erroneous decision rejecting contractual arbitration rights, the Commissioner underscores the urgent need for review here. While the Commissioner asserts that "[e]ach state does it differently," he concedes that whether these lawsuits implicate or impair the "business of insurance" pursuant to the MFA is a question of federal law. (Resp. Br. 31).

This case involves a common scenario: an insurer becomes insolvent; the state insurance commissioner brings claims on behalf of its estate against a "deep-pocket" defendant; that defendant invokes an arbitra-

tion clause; but the commissioner seeks to proceed in state court. That scenario poses grave concerns directly to professional service providers nationwide, as actuaries, accountants and others rely on arbitration clauses to ensure fair, efficient and expert dispute resolution, and indirectly to the insurance industry, which relies on those professionals' services. (*See* Amicus Br. of Am. Ass'n of Certified Pub. Accountants, 14 (the decision below poses a "significant economic and structural threat to the accounting profession and insurance industry")).

Congress enacted the FAA precisely to protect such arbitration agreements from the "hostility" of state courts. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011). Allowing state courts to broadly define what constitutes the "business of insurance," without regard to governing federal precedent, as the Louisiana, Kentucky, Ohio and New York highest courts have done, threatens to allow that "hostility" to overwhelm the FAA in the insurance context.

Resolving this issue will not only benefit national accounting, actuarial and other professional firms. As noted in Milliman's Petition, the fight over arbitrability of a liquidator's claims against a non-policyholder has been litigated in dozens of cases, costing insolvent insurer estates time delays, and significant resources. (*See, e.g.*, Petition 11, n.2 (collecting federal cases concerning arbitrability of claims brought by an insurance liquidator)). The Commissioner is out of step even with his colleagues, as the National Association of Insurance Commissioners has written about the conflict. *See* NAIC Receiver's Handbook for Insurance Company Insolvencies (2018), pp. 499–500.

Milliman's recent experience highlights the need for uniformity on this issue. It makes no sense that the

Louisiana Supreme Court abrogated Milliman's FAA-protected arbitration rights based on the MFA, when two other state courts—including the Iowa Supreme Court in *Ommen*—and a Kentucky federal court upheld Milliman's right to arbitrate virtually identical claims pursuant to the same arbitration clause as a matter of federal law. Each of those other courts held that the arbitration of these claims did not implicate or impair the state's regulation of the "business of insurance" under the MFA.

CONCLUSION

Milliman's petition should be granted.

Respectfully submitted,

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