



**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST .....1

STATEMENT OF THE CASE AND FACTS .....3

    A. Background .....3

    B. The Litigation.....5

    C. The Court of Appeals’ Decision .....5

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....6

Proposition of Law No. I: An insurance liquidator that does not disavow a contract entered into by an insurer is bound by an arbitration provision in that contract, which must be enforced pursuant to Ohio’s strong policy favoring arbitration .....6

    A. The Liquidator Stands In The Shoes Of The Insolvent Insurer And Is Bound By An Arbitration Clause In A Contract The Liquidator Does Not Disavow .....6

    B. The Arbitration Act Does Not Conflict With The Liquidation Act.....9

    C. This Court Has Long Held That Ohio Has A Strong Policy Favoring Arbitration And That Arbitration Agreements Must Be Enforced .....12

Proposition of Law No. II: A tolling agreement that preserves “all defenses” as of its effective date preserves an arbitration defense that existed on the effective date .....14

CONCLUSION.....15

PROOF OF SERVICE.....16

APPENDIX Appx. Page

    Decision of the Franklin County Court of Appeals  
    (June 15, 2010).....1

**EXPLANATION OF WHY THIS IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

The Superintendent of Insurance, in her capacity as Liquidator of a failed insurer, American Chambers Life Insurance Company (“ACLIC”), is suing Ernst & Young LLP (“E&Y”) for an allegedly negligent audit of ACLIC’s financial statements that occurred before ACLIC’s insolvency. In its decision (“Op.”), the court of appeals held that the Liquidator—who stands in ACLIC’s shoes and took over claims owed by ACLIC—is not bound by the arbitration provision in the signed engagement letter binding E&Y and ACLIC. In fact, the court ruled, the Liquidator will *never* be bound by a pre-existing arbitration clause unless she affirmatively elects to arbitrate—even when, as here, the Liquidator has *not* disavowed the agreement containing the arbitration provision. Thus, the court held that there is “a presumption against arbitration” in cases involving the Liquidator. Op. ¶ 16. Moreover, the court ruled, it does not matter that the Liquidator has not disavowed the agreement at issue; she can simply ignore one provision in that agreement—here, the arbitration clause. At bottom, the court’s decision rests on its view that compelling arbitration under the Arbitration Act (R.C. Chapter 2711) *always* interferes with the Liquidator’s powers under the Liquidation Act (R.C. Chapter 3903) and that the public policy of the Liquidation Act “defeats any general attitude of the courts favoring arbitration.” Op. ¶ 19.

The court’s ruling raises important questions of public or great general interest:

I. This Court has held repeatedly, in decisions stretching back for decades, that arbitration is strongly favored in Ohio. Arbitration provides a means to resolve disputes quickly and economically; this benefits the parties and decreases the burden on the judicial system. Yet the court of appeals has taken it upon itself to create an exception to the legislature’s statutory enactments and this Court’s longstanding policy favoring arbitration—indeed, it has created a presumption *against* arbitration—that has no basis in the pertinent statutes: the Arbitration Act

does not exempt claims by the Liquidator, and the Liquidation Act has no provision stating that the Liquidator is not bound by arbitration clauses in contracts that insurers signed before insolvency. (The Liquidation Act mentions arbitration only once, in R.C. § 3903.41(A)(2), which *endorses* arbitration to determine a security's value.) The court of appeals' ruling usurps the legislature's power and rests on an inherent hostility to arbitration squarely at odds with this Court's pro-arbitration jurisprudence, which will cause confusion with litigants and lower courts unless overturned by this Court. The court of appeals' approach is especially unfair to parties, like E&Y, that would not have signed the agreements at issue without an arbitration clause.

Furthermore, in holding that the Liquidator may walk away from *part* of a contract, while leaving the rest of the contract in place, the court of appeals has dramatically expanded the Liquidator's power; the statute allows a Liquidator only to "disavow any *contracts* to which the insurer is a party," not parts of contracts. R.C. § 3903.21(A)(11) (emphasis added). If left undisturbed, this vast increase in the Liquidator's power will have pernicious consequences. Under the court's rationale, the Liquidator could disavow the obligation to pay for goods and services the insurer received but did not pay for before going under. She could disavow policy limits in a reinsurance contract and compel a reinsurer to bear unlimited liability. Or she could disavow specific provisions in the contracts of the insurer's policyholders. This Court should make clear that the statute means what it says: the Liquidator may disavow entire contracts, but not individual contractual provisions. What is particularly disturbing about the decision below is that the court of appeals is making policy in an area where the legislature has already acted. The legislature has given the Liquidator the power to avoid a contract. That power—confirmed in the Final Order of Liquidation—gives the Liquidator the power to avoid onerous contracts, including those with arbitration clauses. It does not, however, give her the power to pick and chose which individual provisions she will be bound by, as the court of appeals' decision permits.

II. The court of appeals' decision also causes serious problems for anyone signing a tolling agreement. The Liquidator and E&Y entered into a Tolling Agreement that gave the Liquidator extra time to bring suit. But E&Y would not have done so if it thought it might lose an arbitration forum. Accordingly, the agreement was worded broadly to preserve E&Y's ability to assert "all defenses that E&Y has as of the Effective Date" of the agreement, May 2, 2002. (In May 2002, arbitration was clearly a defense to a suit by the Liquidator: *Fabe v. Columbus Ins.* (1990), 68 Ohio App. 3d 226, 587 N.E.2d 966, held that the Liquidator was bound by an arbitration clause in an insurer's pre-insolvency agreements, and *Fabe* remained the law until the court of appeals overruled it in October 2003.) The court of appeals, however, held that the Tolling Agreement's preservation of "all defenses" did not include the defense of arbitration because "the 'right to arbitration' is not an *affirmative* defense." Op. ¶ 38 (emphasis added).

Potential litigants routinely enter into tolling agreements with language similar to the agreement here. The meaning of those agreements is now cast into doubt as a result of the court of appeals' ruling. Formerly, parties could feel comfortable that "all defenses" meant "all defenses." Not any more. Under the court of appeals' decision, a tolling agreement that preserves "all defenses" really only preserves "affirmative defenses," and if the defense at issue is not an affirmative defense the defendant is out of luck. Unless this Court accepts jurisdiction and reverses, tolling agreements entered into before the court of appeals' decision no longer mean what the parties thought they meant at the time. And parties entering into future tolling agreements will wonder how to word them in order to preserve all possible defenses. Using the broad phrase "all defenses" will no longer suffice.

### **STATEMENT OF THE CASE AND FACTS**

#### **A. Background.**

The relevant facts are straightforward and undisputed. E&Y, an accounting firm, audited

the financial statements of ACLIC for the year ending December 31, 1998. In February 1999, E&Y provided an audit report, which stated that E&Y had performed its audit in accordance with generally accepted auditing standards and that ACLIC's financial statements were presented in material conformity with generally accepted accounting principles. The complaint alleges that around this period of time, ACLIC was experiencing undisclosed financial problems.

E&Y "provided its auditing services pursuant to an engagement letter," which bound both E&Y and ACLIC. Op. ¶ 3 & n.1. The engagement letter included an arbitration clause, which stated that "[a]ny controversy or claim arising out of or relating to the services covered by this letter" must be submitted first to mediation and then, if mediation is not successful, to binding arbitration conducted in accordance with the rules of the American Arbitration Association ("AAA"). The Liquidator never disavowed the engagement letter.

In March 2000, the Superintendent of Insurance filed suit in the Franklin County Court of Common Pleas, seeking to place ACLIC in rehabilitation. In May 2000, the court issued a Final Order of Liquidation, finding that ACLIC was insolvent and appointing the Superintendent as ACLIC's Liquidator. The Final Order provided that "[t]he Liquidator is vested by operation of law with the title to all assets of [ACLIC], including...all property, ... contracts, rights of action, ... and is authorized to deal with same in his own name as Liquidator"; granted the Liquidator the power to "[c]ontinue to prosecute and to commence in the name of [ACLIC] or in his own name any and all suits and other legal proceedings"; and empowered the Liquidator "to affirm or disavow any contract to which [ACLIC] is a party." Final Order, ¶¶ 4, 7(l), 7(m).

Two years later, the Liquidator and E&Y entered into a Tolling Agreement with an express "Effective Date" of May 2, 2002. The parties agreed that the Liquidator could postpone suing E&Y for one year after that date and that claims filed within that one-year period would not be deemed time barred if they were not time barred as of the Effective Date. In addition, the

Liquidator and E&Y agreed that “E&Y may otherwise assert, as defenses to any lawsuit or claim the Liquidator may file against E&Y, *all defenses that E&Y has as of the Effective Date*, including but not limited to the statute of limitations.” Tolling Agreement ¶ 5 (emphasis added).

### **B. The Litigation.**

Just under a year after signing the Tolling Agreement, on April 30, 2003, the Liquidator filed this case against E&Y and ACLIC’s lawyers, who are no longer in the case. The claims against E&Y were for professional negligence arising out of the auditing services provided under the engagement letter, and for recovery of fees that ACLIC paid to E&Y. In July 2003, E&Y moved to dismiss or stay and compel arbitration pursuant to the arbitration provision in the engagement letter. At the time, the controlling decision on the issue was *Fabe v. Columbus Ins.* (1990), 68 Ohio App. 3d 226, 587 N.E.2d 966, which held that because the Liquidator stood in the shoes of an insolvent insurer, she was bound by arbitration clauses in the insurer’s pre-insolvency agreements. The parties later submitted additional briefs discussing two subsequent decisions: *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 2003-Ohio-566, 800 N.E.2d 50, which overruled *Fabe* in October 2003, and *Hudson v. John Hancock Fin. Servs.*, 10th Dist. No. 06AP-1284, 2007-Ohio-6997, 2007 WL 4532704, which reaffirmed *Pipoly*. This Court denied review in *John Hancock* by a 4-3 vote. 118 Ohio St. 3d 1462, 2008-Ohio-2823, 888 N.E.2d 1114.

In September 2009, the Court of Common Pleas denied E&Y’s motion, holding simply that under *Pipoly* and *Hancock*, the Liquidator “cannot be compelled to arbitrate.”

### **C. The Court of Appeals’ Decision.**

The court of appeals upheld the trial court’s ruling, and reaffirmed its own decisions in *Pipoly* and *John Hancock*. The court held that the Liquidator was not bound by an insurer’s agreement to arbitrate unless she “affirmatively indicate[d] her election” to arbitrate. Op. ¶¶ 16-17, 33 (quoting *Pipoly*). Reasoning that the “structure” of the Liquidation Act reflected a

“strong interest in centralizing” claims involving insolvent insurers, the court ruled that “[a]bsent express statutory authorization for private arbitration to proceed despite the [Liquidator’s] lack of assent,” the “public policy expressed throughout” the Liquidation Act “defeats any general attitude of the courts favoring arbitration.” *Id.* ¶ 19 (quoting *Pipoly*). Thus, the court concluded, “[i]n our view, compelling arbitration against the will of the liquidator will *always* interfere with the liquidator’s powers and will *always* adversely affect the insolvent insurer’s assets.” *Id.* ¶ 20 (quoting *Pipoly*). The court also decided that the Liquidator could walk away from a single provision within a contract (here, the arbitration clause). *Id.* ¶¶ 24-25.

In addition, the court ruled that the Tolling Agreement—which preserved “all defenses that [E&Y] has of the Effective Date”—did not preserve the defense of arbitration as it existed on that date (May 2, 2002), when “*Fabe* was the controlling law.” *Id.* ¶ 26. The court thought that because “the ‘right to arbitration’ is not an *affirmative* defense,” it was “not among the ‘defenses’ preserved by the Tolling Agreement.” *Id.* ¶ 38 (emphasis added).

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I: An insurance liquidator that does not disavow a contract entered into by an insurer is bound by an arbitration provision in that contract, which must be enforced pursuant to Ohio’s strong policy favoring arbitration.**

**A. The Liquidator Stands In The Shoes Of The Insolvent Insurer And Is Bound By An Arbitration Clause In A Contract The Liquidator Does Not Disavow.**

It is well settled that “the liquidator stands in the shoes of the insolvent insurer.” *Benjamin v. Ernst & Young*, 167 Ohio App. 3d 350, 2006-Ohio-2739, 855 N.E.2d 128, at ¶ 18. Thus, the liquidator “succeeds to all of [the insurer’s] rights and remedies, and is subject to all defenses that could be raised against the company.” *Id.* at ¶ 14 (quoting *Williams v. Continental Stock Trans. & Trust* (N.D. Ill. 1998), 1 F. Supp. 2d 836, 843, which applied New York law).

Because a liquidator stands in the shoes of the insolvent insurer, other courts have held

that “she is bound by [the insolvent insurer’s] pre-insolvency [arbitration] agreements.” *Quakenbush v. Allstate Ins.* (9th Cir. 1997), 121 F.3d 1372, 1380 (brackets added by court). Accord, e.g., *Costle v. Fremont Indem.* (D. Vt. 1993), 839 F. Supp. 265, 272 (the liquidator “stands in the shoes of Ambassador and is thus bound by Ambassador’s pre-insolvency contracts, including arbitration provisions”). Moreover, even if this were not the rule, there is a general principle that a third party whose claims are based on a contract is bound by an arbitration clause within that contract. *Gerig v. Kahn*, 95 Ohio St. 3d 478, 2002-Ohio-2581, 769 N.E.2d 381, at ¶¶ 18-19. In *Gerig*, this Court enforced an arbitration provision, explaining that when nonsignatory litigants “derive their interest in the agreement” through a signatory to that agreement, “they can have no greater right than [the signatory] to a judicial interpretation of that agreement.” *Id.* at ¶ 18. Not only was enforcement of the arbitration provision there “in keeping with this court’s long history of favoring and encouraging arbitration,” but “it would be inequitable to allow an interested nonsignatory to determine the forum in which an agreement is to be interpreted when the signatories previously agreed in writing to arbitrate.” *Id.* at ¶¶ 19-20. See also *Milo Corp. v. Carlson-Miller*, 8th Dist. No. 78420, 2001 WL 824260, at \*3 (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act”).<sup>1</sup>

---

<sup>1</sup> The Liquidator has argued that the arbitration provision does not apply because the claims against E&Y are unrelated to the engagement letter and arose as a matter of law. The court of appeals did not accept that argument. That is understandable: the complaint alleged the contractual nature of ACLIC’s relationship with E&Y (Compl. 18-19, 50-51), and a negligence claim, unlike a negligent misrepresentation claim, requires privity. See *Bily v. Arthur Young & Co.* (Cal. 1992), 834 P.2d 745, 760-73. Moreover, the broad language in the arbitration provision here, which applies to “[a]ny controversy or claim arising out of or relating to the services covered by this letter,” clearly covers the Liquidator’s claims; E&Y’s auditing services were provided “pursuant to [the] engagement letter.” Op. ¶ 3. And “[a]n arbitration clause that contains the phrase ‘any claim or controversy arising out of or relating to the agreement’ is considered ‘the paradigm of a broad clause.’” *Academy of Medicine v. Aetna Health*, 108 Ohio St. 3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶¶ 18-19 (noting that “creative pleading of claims

The court of appeals did not follow these cases. Instead, it held that the Liquidator is not bound by an arbitration provision unless she “affirmatively indicate[s]...her election to be responsible for those prior obligations.” Op. ¶¶ 17, 33. Moreover, the court ruled, it is irrelevant that the Liquidator did not disavow the engagement letter that ACLIC and E&Y signed; she may simply walk away from a single provision in that letter—the arbitration clause. *Id.* ¶¶ 24-25, 33.

There is no legal basis for these rulings. The Liquidator’s power to act comes from the liquidation order: “Without the liquidation order, the superintendent is unable to use any of these powers because they rest with the insurer.” *Benjamin*, 167 Ohio App. 3d 350, at ¶ 13. The liquidation order, in turn, is derived from the powers set forth in the Liquidation Act. And neither the statute nor the Final Order of Liquidation here permits the Liquidator to disavow a single clause within a contract—rather, the Liquidator may only “disavow any *contracts* to which the insurer is a party.” R.C. § 3903.21(A)(11) (emphasis added); see Final Order ¶ 7(l) (the Liquidator may “disavow any contract to which [ACLIC] is a party”). Nor do the statute and the Final Order provide that individual contractual provisions are void unless the Liquidator affirmatively elects to be bound by them. Again, in order to avoid an insurer’s pre-existing contractual obligations, the Liquidator’s must “disavow [the] contract[.]” R.C. § 3903.21(A)(11).

In holding that the Liquidator may just ignore *part* of an agreement, the court violated this Court’s maxim that courts “cannot extend the statute beyond that which is written, for ‘[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.’ To do so would enlarge the scope of the statute beyond that which the General Assembly enacted.” *Sarmiento v. Grange Mut. Cas.*, 106 Ohio St. 3d 403, 2005-Ohio-5410, 835 N.E.2d 692, ¶ 29 (citations omitted; brackets added by Court). In fact, the Liquidator has taken for herself (with the approval of the court of appeals) a power that may be granted only as something other than contractual cannot overcome a broad arbitration provision”).

by the General Assembly. The Liquidation Act means what it says: the Liquidator may “disavow any *contracts*,” R.C. § 3903.21(A)(11), not “provisions in contracts,” or “parts of contracts.” See *FDIC v. Ernst & Young, LLP* (N.D. Ill. 2003), 256 F. Supp. 2d 798, 805 (the FDIC “purportedly repudiated the arbitration provision in [the] engagement letter,” but “[t]he plain text of [the statute] provides for the repudiation of ‘a contract,’ rather than a provision thereof. The statute does not permit the FDIC to repudiate only those provisions of a contract with which it is dissatisfied”), *aff’d* (7th Cir. 2004), 374 F.3d 579; *Real Estate Marketers v. Wheeler* (Fla. App. 1974), 298 So. 2d 481, 483-84 (a receiver has “the option of either accepting or rejecting executory contracts,” but “having elected to accept a contract, he is bound thereby. While he may pick which contracts he will honor, he may not pick which Parts of a contract he will honor”).

Indeed, if the Liquidator had the power to walk away from part of a contract, all sorts of mischief might ensue. As the Seventh Circuit said in affirming *FDIC*, a case involving an insolvent bank, the ability to repudiate selected provisions could allow the FDIC to

walk away from the obligation to pay for goods and services that the bank had received before its failure. Or maybe the FDIC could claim a right to repudiate words (such as “not”) or to repudiate the decimal point out of a figure (turning a borrower’s promise to pay “10.9% interest” into “109% interest”). ... Cherry picking is not allowed by the rejection power in bankruptcy; why should it be permitted under § 1821(e)?

374 F.3d at 584 (citations omitted). The same is true in the insurance context. For example, under the court of appeals’ decision, the Liquidator would have the power to reject the policy limits in a reinsurance contract, transforming a reinsurer’s limited obligation into a limitless one. The legislature wisely did not grant liquidators that power. The statute should be enforced as written—the Liquidator may only disavow a “contract[],” not a provision within a contract.

#### **B. The Arbitration Act Does Not Conflict With The Liquidation Act.**

The court of appeals also thought that the Liquidation Act (R.C. Chapter 3903) conflicts

with the Arbitration Act (R.C. Chapter 2711). The court did not point to any specific statute providing that the Liquidator cannot be bound by an arbitration clause in a contract that an insurer agreed to before becoming insolvent. There is no such statute. Indeed, the Liquidation Act mentions “arbitration” only once, and then favorably: the Act *approves* of arbitration as a means for determining the disputed value of a security. R.C. § 3903.41(A)(2).

Instead, the court relied on the supposedly “strong policy considerations embodied within Chapter 3903...that vest broad powers both in the liquidator and in the courts.” Op. ¶ 16 (quoting *Pipoly*). Because, the court stated, the Liquidator “must have freedom of action...it would be inconsistent to compel arbitration against her.” *Id.* The court thought it “clear” from the Liquidation Act’s general “statutory scheme” that “the General Assembly did not contemplate turning over the administration of liquidation proceedings and incidental actions to private arbitrators”—the Act’s “structure” indicated a “strong interest in centralizing claims and defenses raised against an insolvent insurer into a single forum.” *Id.* ¶¶ 18-19 (quoting *Pipoly*). Thus, “[a]bsent express statutory authorization for private arbitration to proceed” without the Liquidator’s consent, the court concluded that “the public policy expressed throughout” Chapter 3903 “defeats any general attitude of the courts favoring arbitration”—“compelling arbitration against the will of the liquidator will *always* interfere with the liquidator’s powers and will *always* adversely affect the insolvent insurer’s assets.” *Id.* ¶¶ 19-20 (quoting *Pipoly*). All of this is contrary to that court’s view in 1990: “there is nothing in R.C. Chapter 3903 governing liquidation proceedings that either expressly or impliedly prohibits arbitration in such proceedings.” *Fabe*, 68 Ohio App. 3d at 232-33.

There were no changes in statutory language that caused the court of appeals to reverse course. Indeed, the failure of the legislature—the “final arbiter of public policy,” *State v. Smorgala* (1990), 50 Ohio St. 3d 222, 224, 553 N.E.2d 672—to take any action in the 13 years

between *Fabe* and *Pipoly* suggests that it did not disagree with *Fabe*. Nor has the Superintendent of Insurance promulgated any regulations to try to avoid *Fabe*. Rather, the court of appeals decided on its own that public policy on arbitration had somehow changed between 1990 and 2003, and it adopted what it later admitted was a “minority” position on “the interplay between contractual obligations to arbitrate and the statutory rights of an insurance liquidator.” *John Hancock*, 2007 WL 4532704, at ¶ 13 (citing cases). See also *Suter v. Munich Reins.* (3d Cir. 2000), 223 F.3d 150, 160-61; *Koken v. Cologne Reins.* (M.D. Pa. 1999), 34 F. Supp. 2d 240, 253; cf. 12 C.F.R. § 363.5(c)(2) (2009) (the FDIC, which oversees insolvent banks, permits arbitration provisions in engagement letters between auditors and banks).

The Arbitration Act—which enforces arbitration provisions “in any written contract” save for five inapplicable exceptions, R.C. § 2711.01(A), (B)(1)—cannot be tossed aside on the basis of the Liquidation Act’s general “statutory scheme,” “structure,” and “public policy.” Op. ¶¶ 18-19. Statutes must be harmonized if at all possible; unless there is “an irreconcilable conflict” between two statutory schemes, courts are “require[d]...to give effect to *both*.” *Board of Educ. v. Zaino*, 93 Ohio St. 3d 231, 235, 2001-Ohio-1335, 754 N.E.2d 789.

There is no conflict here, irreconcilable or otherwise. The Liquidation Act does not have any provision exempting the Liquidator from an arbitration provision the insurer agreed to in a contract that the Liquidator did not disavow. On the contrary, the Liquidation Act permits the Liquidator to bring not only “suits,” but also “other legal proceedings, in this state or elsewhere,” R.C. § 3903.21(A)(12)—which certainly includes arbitrations. *Fabe*, 68 Ohio App. 3d at 233-34. Arbitration provisions must be enforced when, as here, the statute “does not preclude a waiver of judicial remedies.” *Academy of Music*, 108 Ohio St. 3d 185, at ¶ 17 (holding that the Valentine Act does not preclude arbitration). Nor does the Arbitration Act exempt actions involving the Liquidator. See *Sasaki v. McKinnon* (1997), 124 Ohio App. 3d 613, 617, 707 N.E.2d 9

(“Reviewing the precepts of R.C. 2711.01 et seq., which are stated in mandatory terms that favor the application of arbitration, we cannot divine an intention to exempt shareholders’ derivative actions from application of that chapter”). The court of appeals was wrong in thinking that the Liquidation Act “defeats any general attitude of the courts favoring arbitration.” Op. ¶ 19.<sup>2</sup>

**C. This Court Has Long Held That Ohio Has A Strong Policy Favoring Arbitration And That Arbitration Agreements Must Be Enforced.**

Even though (1) the Liquidation Act has no provision stating that the Liquidator cannot be bound by an arbitration clause agreed to by an insurer, and (2) the Arbitration Act does not exempt the Liquidator from its broad scope, the court of appeals held that there is a “presumption against arbitration” in cases involving the Liquidator. Op. ¶ 16. Indeed, its decision is based on a scarcely disguised hostility to arbitration. See *id.* ¶¶ 16-20, 25, 33; see also *Hudson*, 2007 WL 4532704, at ¶¶ 11-12; *Pipoly*, 155 Ohio App. 3d 171, at ¶¶ 39-45.

A presumption against arbitration is flatly inconsistent with this Court’s “long history of favoring and encouraging arbitration,” *Gerig*, 95 Ohio St. 3d 478, at ¶ 20, and “this state’s strong public policy in favor of arbitration,” *Ignazio v. Clear Channel*, 113 Ohio St. 3d 276, 2007-Ohio-1947, 865 N.E.2d 18, at ¶ 18. See also *Fabe*, 68 Ohio App. 3d at 232 (“as early as 1835 the Ohio Supreme Court recognized the benefits of arbitration,” in 1920 the Ohio Supreme Court held “that contracts for arbitration are binding,” “statutory provisions for arbitration” have existed for “well over one hundred years and the present statute, R.C. Chapter 2711, was enacted in 1931”).

Arbitration “provides the parties with a relatively speedy and inexpensive method of

---

<sup>2</sup> The Arbitration Act provides that arbitration clauses “shall be” enforced, “except upon grounds that exist at law or in equity for the revocation of any contract.” R.C. § 2711.01(A). No such grounds exist here. The Supreme Court has held that nearly identical language in the analogous federal statute means that “[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [Federal Arbitration] Act makes any such state policy unlawful.” *Allied-Bruce Terminix Cos. v. Dobson* (1995), 513 U.S. 265, 281.

conflict resolution and has the additional advantage of unburdening crowded court dockets.” *Mahoning County Bd. v. Mahoning County TMR* (1986), 22 Ohio St. 3d 80, 83, 488 N.E.2d 872. “Arbitration is favored because its purpose is to avoid needless and expensive litigation.” *Harsco Corp. v. Crane Carrier* (1997), 122 Ohio App. 3d 406, 412, 701 N.E.2d 1040. The AAA, the arbitrator designated in the engagement letter here, is the leading arbitration organization in the country, and it routinely resolves disputes in much less time than litigation would take—within 9-1/2 months on average. S. Partridge, *Commercial Leasing Finance Disputes Recommended Rules and Sample Clauses*, 560 PLI/Real 373, 382 (2008). This case, in contrast, has been pending since 2003, and the parties are nowhere near even beginning to litigate the merits. If the Liquidator had not objected to arbitration, this dispute would have been over years ago.

Moreover, disputes involving accounting issues are particularly well suited to arbitration. In *Sasaki*, where the Eighth District held that claims involving alleged accounting improprieties must be arbitrated under the arbitration clause there, the court rejected the argument that a “trial court or a jury would do a better job at evaluating the evidence and applicable law,” explaining:

To the contrary, it would appear that in matters of complex litigation involving securities and investments, a panel of arbitrators versed in the issues common to that industry is better suited to review the litigation than a general jurisdiction trial court or a jury panel drawn from the general population, which is, more likely than not, untrained in the intricacies of the financial markets, sophisticated corporate accounting and their governing regulations.

124 Ohio App. 3d at 617. This is precisely why E&Y’s engagement letters require arbitration.

The Liquidator is supposed to be interested in “[e]nhanced efficiency and economy of liquidation.” R.C. § 3903.02(D)(3). Efficiency and economy would be far better served by enforcing arbitration clauses against the Liquidator rather than giving her a blanket exemption from them, which is contrary to decades of this Court’s precedent holding that arbitration is strongly favored in Ohio and that arbitration provisions must be enforced.

**Proposition of Law No. II: A tolling agreement that preserves “all defenses” as of its effective date preserves an arbitration defense that existed on the effective date.**

The court of appeals was so eager to protect the Liquidator from arbitration that it badly misread the Tolling Agreement that the Liquidator herself signed in 2002. In exchange for tolling the statute of limitations on any claims that the Liquidator might assert, the Liquidator agreed that “E&Y may otherwise assert, as defenses to any lawsuit or claim the Liquidator may file against E&Y, *all defenses that E&Y has as of the Effective Date*” of the agreement, May 2, 2002. Tolling Agreement ¶ 5 (emphasis added). The court of appeals held that “all defenses” did not include the defense of arbitration, on the curious rationale—not even advanced by the Liquidator—that because “the ‘right to arbitration’ is not an *affirmative* defense,” it was “not among the ‘*defenses*’ preserved by the Tolling Agreement.” Op. ¶ 38 (emphasis added).

This makes no sense. The Tolling Agreement covers “all defenses,” not just “affirmative defenses.” Whether arbitration is an affirmative defense—an issue on which the lower courts are divided, although the court of appeals did not note the split<sup>3</sup>—is irrelevant: it is clearly a defense, and the Tolling Agreement explicitly applies to “all defenses.” See *Albright v. W.L. Gore & Assocs.* (D. Del. July 31, 2002), 2002 WL 1765340, at \*2, 4 (a tolling agreement that preserved “defenses” “preserved any and all defenses...that [defendant] might later wish to assert”).

A defense of arbitration existed as of May 2, 2002. At that time, the Liquidator had to arbitrate when she did not disavow a contract containing an arbitration clause. *Fabe*, 68 Ohio App. 3d at 232-36. Not until October 2003 did the court of appeals overrule *Fabe* in *Pipoly*.

Because *Fabe* was the governing law as of May 2002, E&Y has a right to arbitrate, as the

---

<sup>3</sup> Compare *Church v. Fleishour Homes*, 172 Ohio App. 3d 205, 2007-Ohio-1806, 874 N.E.2d 795, at ¶ 82; *Harsco*, 122 Ohio App. 3d at 414; *Atkinson v. Dick Masheter Leasing*, 10th Dist. No. 01AP-1016, 2002-Ohio-4299, 2002 WL 1934743, at ¶ 23 (arbitration is an affirmative defense), with *Garvin v. Independence Place Condo. Ass’n*, 11th Dist. No. 2001-L-055, 2002-Ohio-1472, 2002 WL 479992, at \*1-2; *Mabrey v. Victory Basement Waterproofing* (1993), 92 Ohio App. 3d 8, 14, 633 N.E.2d 1205 (arbitration is not an affirmative defense).

engagement letter provided, all claims “arising out of or relating to the services covered by this letter.” It does not matter that *Pipoly* later changed the law. “Contracts incorporate the law applicable at the time of their creation.” *Erie Metroparks Bd. v. Key Trust Co.*, 145 Ohio App. 3d 782, 789, 2001-Ohio-2888, 764 N.E.2d 509 (determining whether there was a breach of contract by applying “[t]he common law of Ohio at the time the 1881 lease was executed”). Moreover, contractual rights are “vested at the time the contractual obligations of the contract [a]re fulfilled.” *Clark v. Bureau of Workers’ Comp.*, 10th Dist. No. 02AP-743, 2003-Ohio-2193, 2003 WL 1995716, at ¶ 12 (holding that a later Supreme Court decision does not apply to a settlement agreement executed before that ruling). Even when a decision of this Court has been overruled, it still applies “where contractual rights have arisen or vested rights have been acquired under the prior decision.” *Peerless Elec. v. Bowers* (1955), 164 Ohio St. 2d 209, 210, 129 N.E.2d 467.

E&Y has a contractual right to assert “all defenses”—including arbitration—that existed as of May 2, 2002. E&Y would not have signed the Tolling Agreement—and thus the Liquidator would not have had an extra year to bring suit—if it thought it might lose its arbitration defense. It is fundamentally unfair to permit the Liquidator to take advantage of the benefit conferred upon her by the agreement (extra time) and to deny E&Y the principal benefit it obtained from the agreement (the ability to assert the arbitration defense that existed on May 2, 2002).

Courts cannot “rewrite the parties’ contract,” *Foster Wheeler Enviresponse v. Franklin County* (1997), 78 Ohio St. 3d 353, 362, 678 N.E.2d 519, or issue “interpretations that render portions meaningless or unnecessary,” *Wohl v. Swinney*, 118 Ohio St. 3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, at ¶ 22. The court of appeals violated these basic precepts in holding that a Tolling Agreement that preserved “all defenses” did not apply to the defense of arbitration.

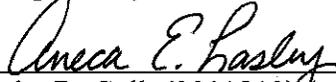
### **CONCLUSION**

E&Y respectfully urges the Court to accept jurisdiction of this appeal.

July 29, 2010

Stanley J. Parzen  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, Illinois 60606

Respectfully submitted,

  
\_\_\_\_\_  
John R. Gall (0011813) (counsel of record)  
Aneca E. Lasley (0072366)  
SQUIRE, SANDERS & DEMPSEY L.L.P.  
2000 Huntington Center  
41 South High Street  
Columbus, Ohio 43215-6197  
(614) 365-2700  
(614) 365-2499 (facsimile)  
jgall@ssd.com

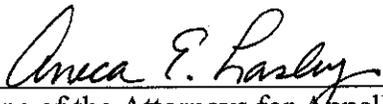
*Attorneys for Defendant-Appellant  
Ernst & Young LLP*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction has been served upon the following by U.S. Mail, postage prepaid, this 29th day of July, 2010:

Melvin D. Weinstein  
R. Kevin Kerns  
Jennifer L. Mackanos  
Richard W. Schuermann, Jr.  
Kegler Brown Hill &  
Ritter Co., LPA  
65 East State Street, Suite 1800  
Columbus, Ohio 43215

*Attorneys for Plaintiff-Appellee*

  
\_\_\_\_\_  
One of the Attorneys for Appellant

John R. Gall

016220.00003

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
10th DISTRICT OHIO  
2010 JUN 15 PM 2:06  
CLERK OF COURTS

[Mary Jo Hudson], Superintendent of  
the Ohio Department of Insurance, in her  
capacity as Liquidator of the American  
Chambers Life Insurance Company,

Plaintiff-Appellee,

v.

Ernst & Young, LLP,

Defendant-Appellant,

Foley & Lardner et al.,

Defendants-Appellees.

CCJRG  
AEL  
Docket

RECEIVED  
JUN 15 2010  
J.R.G.

No. 09AP-949  
(C.P.C. No. 03CVH-04-4906)  
(REGULAR CALENDAR)

---

D E C I S I O N

Rendered on June 15, 2010

---

*Richard Cordray, Attorney General, by Outside Counsel  
Kegler Brown Hill & Ritter Co., LPA, Melvin D. Weinstein,  
R. Kevin Kerns, Jennifer L. Mackanos, and Richard W.  
Schuermann, Jr., for plaintiff-appellee.*

*Squire, Sanders & Dempsey L.L.P., John R. Gall, and  
Aneca E. Lasley; Mayer Brown, LLP, Stanley J. Parzen, and  
Daniel J. Hildebrand, for defendant-appellant.*

---

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Ernst & Young LLP ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas in which that court denied appellant's motion to dismiss or, in the alternative, to stay and compel arbitration in this action brought by plaintiff-appellee, Mary Jo Hudson, in her capacity as Liquidator of the American Chambers Life Insurance Company ("appellee").

{¶2} The following facts are taken from the record and are undisputed unless otherwise noted. American Chambers Life Insurance Company ("American Chambers"), was a life, accident, and health insurance company that transacted business in Ohio. Appellant, an independent accounting firm, audited American Chambers' financial statements for the year ending December 31, 1998, and, on February 25, 1999, submitted a report to the Ohio Department of Insurance ("ODI") certifying that it had conducted its audit in accordance with generally accepted auditing standards and that American Chambers' financial statements presented fairly, in all material respects, American Chambers' financial position.

{¶3} Appellant provided its auditing services pursuant to an engagement letter ("engagement letter"), which provided, in pertinent part, that appellant would audit and report on American Chambers' financial statements, that the objective of the audit was to express an opinion on the fairness, in all material respects, of the presentation of the financial statements in conformity with generally accepted accounting principles or those prescribed or permitted by ODI, and that appellant would conduct the audit in accordance

with generally accepted auditing standards. The engagement letter included an arbitration clause.<sup>1</sup>

{¶4} On March 13, 2000, appellee filed an action in the Franklin County Court of Common Pleas, seeking to place American Chambers into rehabilitation. On May 8, 2000, that court issued a final order of liquidation ("final order"). The final order determined that American Chambers was insolvent under Ohio's regulatory statutes and appointed appellee as liquidator.

{¶5} The liquidation proceeded and, on May 2, 2002, appellant and appellee entered into a Tolling Agreement, under which the parties agreed that, for a "Tolling Period" of one year from May 2, 2002, "the Liquidator may forbear and postpone the filing, commencement and prosecution of any and all claims or causes of action it may have against [appellant]." (Tolling Agreement at ¶1.) The parties likewise agreed that appellant could postpone, for one year from the effective date of the agreement, the pursuit of any claims "arising out of accounting or auditing services provided by [appellant] to [American Chambers]" or "arising out of transfers of monies or other property from [American Chambers] to [appellant]." *Id.* at ¶2. The parties agreed that any such claims filed by either party during the tolling period "shall not be deemed time barred if such lawsuit or claim was not time barred as of the Effective Date [of the Tolling Agreement]." *Id.* at ¶3-4. The parties further agreed that "[appellant] may otherwise assert, as defenses to any lawsuit or claim the Liquidator may file against [appellant], all

---

<sup>1</sup> The parties dispute whether American Chambers was actually a signatory to the engagement letter or whether its parent company, United Chambers, was the signatory and only party other than appellant. This dispute is inconsequential to our analysis.

defenses that [appellant] has as of the Effective Date, including but not limited to the statute of limitations." Id. at ¶5. In addition, the parties agreed that appellee could assert "as defenses to any lawsuit or claim [appellant] may file against [American Chambers], all defenses that [American Chambers] has as of the Effective Date, including but not limited to the statute of limitations." Id. at ¶6.

{¶6} On April 30, 2003, appellee commenced the present action against appellant. In its complaint, appellee alleged that, contrary to appellant's duty under applicable provisions of the Ohio Administrative Code, and contrary to the assertions in appellant's February 25, 1999 report, appellant failed to properly audit American Chambers' financial statements in accordance with generally accepted auditing standards and failed to discover or disclose material misstatements in those financial statements. (Complaint at ¶19, 24-25.) Appellee asserted two claims against appellant: (1) that appellant negligently failed to perform its duties as the independent certified public accountant retained to conduct the audit of American Chambers' December 31, 1998 annual statement; and (2) that appellant accepted a \$25,000 preferential or fraudulent payment from American Chambers in contravention of Ohio law.<sup>2</sup>

{¶7} On July 15, 2003, appellant moved to dismiss the complaint or to stay and compel arbitration of appellee's claim. Appellant based its motion upon the arbitration clause in the engagement letter between appellant and American Chambers, which provided that, "[a]ny controversy or claim arising out of or relating to the services covered

---

<sup>2</sup> Appellee's complaint also included claims against the law firm of Foley & Lardner and one of the firm's partners, Michael H. Woolever. Those claims are not at issue in the instant appeal.

by this letter or hereafter provided by us to the Company \* \* \* shall be submitted first to voluntary mediation, and if mediation is not successful, then to binding arbitration, in accordance with the dispute resolution procedures set forth in the attachment to this letter." (Engagement Letter at 3.)

{¶8} Appellant argued that, pursuant to this court's decision in *Fabe v. Columbus Ins. Co.* (1990), 68 Ohio App.3d 226, the negligence claim appellee filed against appellant was subject to the arbitration clause. In *Fabe*, this court held that an arbitration clause in a reinsurance agreement was binding upon the court-appointed liquidator of an insolvent insurance company. *Fabe* involved the liquidator's attempt to recover monies from the reinsurers which were allegedly owed to the insolvent insurer. The reinsurers moved to compel arbitration. The liquidator objected, claiming that he was not subject to the arbitration clause and that the trial court had exclusive jurisdiction over any and all disputes arising in the course of the liquidation proceedings. *Id.*

{¶9} This court noted that the modern trend in the law was to favor and encourage arbitration, and that nothing in the liquidation statutes prohibits arbitration. Accordingly, we held that, if possible, the liquidation and arbitration statutes should be construed as to give effect to both. We determined that, "only if compelling arbitration would somehow interfere with the liquidator's powers under R.C. 3903.18 and 3903.21 could such a contractual arbitration provision be held unenforceable in liquidation proceedings." *Id.* at 233.

{¶10} We further stated that, because any monies the liquidator might recover in its action against the reinsurers were not part of the liquidation estate until the dispute

was resolved, those monies were not assets of the liquidation estate. "While it is true that the resolution of the dispute will have an impact on the amount of money plaintiff [the liquidator] has to pay the creditors of [the insolvent insurer], arbitration of that dispute will not adversely affect any party to the liquidation proceeding." *Id.* at 236. Finding that prosecuting a claim for money damages through arbitration "will not affect the priority of claims of creditors," this court affirmed the trial court's order compelling arbitration.

{¶11} Appellant argued that *Fabe* controlled the instant matter because the negligence claim appellee asserted against it was not one the liquidation statutes were designed to resolve and was not based upon the insurance code; rather, the claim was based upon appellant's obligations under the engagement letter. Appellant maintained that, as in *Fabe*, appellee was merely attempting to recover money allegedly owed to American Chambers. Appellant argued that, although resolution could have an impact on the amount of money appellee would have to pay American Chambers' creditors, arbitration of the claim would not adversely affect the priority of the rights of creditors.

{¶12} On August 19, 2003, appellee filed a response to appellant's motion, arguing that she was not bound by the arbitration clause in the engagement letter because the negligence claim appellee asserted against appellant was completely independent of any duties established under the engagement letter. Appellee contended that her complaint alleged that appellant failed to perform its auditing duties in a manner consistent with its obligations under Ohio law and its written representations to ODI. Appellee maintained that *Fabe* was inapplicable because, in that case, the liquidator sought to enforce the agreement containing the arbitration clause, whereas, in the instant

case, appellee was not seeking to enforce any agreement at all, much less one containing an arbitration clause.

{¶13} While the motion was still pending in the trial court, this court released its decision in *Benjamin v. Pipoly*, 155 Ohio App.3d 171, 2003-Ohio-5666. In *Pipoly*, the liquidator of two insolvent insurance companies instituted an action against the directors and officers of the insolvent insurers for breach of fiduciary duties. Each of the directors and officers had an employment agreement which contained an arbitration clause. The directors and officers moved the trial court to stay the action and refer the liquidator's claims to arbitration. They argued that the liquidator should be deemed to have agreed to arbitration, even though the liquidator had not actually executed any of the employment agreements. They maintained that the liquidator "[stood] in the shoes" of the insolvent insurers and, as such, was bound by any provision in their employment agreements, including the arbitration provisions contained therein, to which the insolvent insurers would be bound. *Id.* at ¶15. They further argued that to give effect to the arbitration provision in their employment contracts would not affect the priority of creditors of the liquidation estate, nor would any party to the liquidation be adversely affected. The trial court, relying on this court's decision in *Fabe*, concluded that it should give effect to both the liquidation statutes and the arbitration clauses, and sustained the motions to stay and refer to arbitration.

{¶14} On appeal, the liquidator argued that the arbitration clauses were unenforceable against her because she was not a party to the employment agreements and she expressly disavowed them pursuant to R.C. 3903.21(A)(11). In response, the

directors and officers argued that, although the liquidator was not a signatory to the employment agreements, she should be bound by the arbitration language contained therein because the insolvent insurers—the entities on whose behalf she was appointed the liquidator—were bound by them and remain so. They further argued, relying on *Fabe*, that the liquidator's power to disavow contracts should not operate to nullify the arbitration clauses so long as enforcement of same would not affect the priority of creditors of the liquidation estate or adversely affect any party to the liquidation. In response, the liquidator argued that strong policies embodied within Ohio's insurance liquidation statutes outweighed the general policy favoring arbitration as a means of settling disputes.

{¶15} This court conducted a thorough examination of Ohio's statutory scheme governing insurance company liquidations, concluding that the scheme was "abounding in features designed to vest within the liquidator broad and largely unfettered powers, under the supervision of the courts, to maximize the assets available to her in discharging her duties to claimants, shareholders and creditors of the insolvent insurance company." *Pipoly* at ¶28. In particular, this court noted that R.C. 3903.18(A) vests broad powers in the liquidator regarding the insolvent insurer's assets, including the title to all of the property, contracts, and rights of action of the insolvent insurer, as of the entry of the final order of liquidation. In addition, we noted that R.C. 3903.21(A) contains a non-exclusive list of enumerated powers vested in the court-appointed liquidator, including, pursuant to R.C. 3903.21(A)(11), the power to enter into contracts necessary to carry out the order to

liquidate, and to affirm or disavow any contracts to which the insolvent insurer is a party. Id. at ¶27.

{¶16} We next analyzed Ohio's statutory provisions and pertinent case law governing arbitration. We noted that, in general, parties to an action are not required to submit their claims to arbitration unless the parties previously agreed in writing to arbitrate their disputes, and, as such, where a party resisting arbitration is not a signatory to a written agreement to arbitrate, a presumption against arbitration arises. Id. at ¶36. Applying these principles, we concluded that, since the liquidator had not signed the employment agreements, a presumption against arbitration existed that the directors and officers had not and could not sufficiently rebut, "particularly in light of the strong policy considerations embodied within Chapter 3903 of the Ohio Revised Code that vest broad powers both in the liquidator and in the courts." Id. at ¶37. We explained: "A liquidator emanates from an order of the court and acts as an arm or extension of the court. A liquidator is appointed to perform specific functions, including preserving and maximizing the value of the insolvent insurer, and protecting the interests of both those with direct pecuniary connections to the insurer and the general public. The liquidator must have freedom of action to do those acts most beneficial in achieving her objectives. Within this demesne, the liquidator may affirm or disavow the rights and obligations of the interest with which she is charged, and it would be inconsistent to compel arbitration against her when such an obligations predates her appointment." Id. at ¶38.

{¶17} Accordingly, we held that "when a liquidator is appointed by court order \* \* \*, she is not automatically bound by the pre-appointment contractual obligations of the

insurer. To be so bound, the liquidator must affirmatively indicate her election to be responsible for the prior obligations of the former operators." *Id.* at ¶39. We concluded that, because the liquidator was never a party to the employment contracts and there was nothing in the record to demonstrate that she adopted any of the agreements and expressly assumed the liabilities contained therein, the arbitration provisions within the agreements could not be enforced against the liquidator. *Id.*

¶18} We further held that, "where \* \* \* private arbitration impinges upon a broad statutory scheme that invests sweeping powers in a state official, enforcement of arbitration ipso facto violates public policy. \* \* \* [I]t is clear from the statutory scheme that the General Assembly did not contemplate turning over the administration of liquidation proceedings and incidental actions to private arbitrators in forums shielded from public scrutiny, judicial review of which would be sharply limited. Without express statutory authorization, we cannot say that the legislature intended that arbitrators, subject to selection by the parties themselves and charged with the execution of no public trust, would determine such matters." *Id.* at ¶40.

¶19} Additionally, we stated that "[t]he structure of Ohio's system serves the state's strong interest in centralizing claims and defenses raised against an insolvent insurer into a single forum. Absent express statutory authorization for private arbitration to proceed despite the lack of assent to same on the part of the liquidator, we hold that the public policy expressed throughout R.C. Chapter 3903, and particularly within R.C. 3903.02 and 3903.21, defeats any general attitude of the courts favoring arbitration." *Id.* at ¶42.

{¶20} In so holding, we expressly overruled *Fabe*, stating: "R.C. 3903.18(A) vests in the liquidator title to not only property and contracts, but 'rights of action.' Further, R.C. 3903.21(A)(11) grants the liquidator the power to 'affirm or disavow any contracts to which the insurer is a party.' Contrary to the court's view in *Fabe*, we hold that [the liquidator's] causes of action against [the directors and officers] are an asset of the insolvent insurer even before the attendant legal and factual issues are fully and finally determined. In our view, compelling arbitration against the will of the liquidator will *always* interfere with the liquidator's powers and will *always* adversely affect the insolvent insurer's assets." *Id.* at ¶45. (Emphasis sic.)

{¶21} In January 2008, appellee submitted as additional authority in support of its opposition to appellant's motion this court's decision in *Hudson v. John Hancock Financial Servs., Inc.*, 10th Dist. No. 06AP-1284, 2007-Ohio-6997. In that case, this court considered whether Chapter 3903 precluded enforcement of arbitration clauses against a court-appointed liquidator of an insolvent insurer when those arbitration provisions were part of a contract that the liquidator otherwise sought to enforce.

{¶22} In *Hudson*, a dispute arose between the liquidator and John Hancock over amounts potentially owed by John Hancock under several reinsurance agreements pursuant to which John Hancock reinsured risks initially insured by the insolvent insurer. Prior to the insurer becoming insolvent, it filed an action in federal court alleging breach of contract and bad faith claims against John Hancock under one of the reinsurance contracts. John Hancock invoked the arbitration clause in the reinsurance agreement and the district court granted John Hancock's motion to dismiss the insurer's complaint.

Shortly thereafter, the insurer went into liquidation. The court-appointed liquidator continued the arbitration process until 2003, when this court decided *Pipoly*. Based upon *Pipoly*, the liquidator abandoned arbitration with John Hancock over reinsurance issues and filed an action alleging breach of contract and bad faith claims on all of the reinsurance agreements, including the one that had been the subject of the federal lawsuit. John Hancock filed a motion for dismissal or a stay pending arbitration, arguing that the liquidator was obligated under the reinsurance agreement arbitration provision.

{¶23} Applying *Pipoly*, the trial court denied the motion for stay and referral to arbitration. John Hancock appealed, first arguing that *Pipoly* should be overruled as wrongly decided on the question of whether the purposes and policies embodied in R.C. Chapter 3903 outweigh the general public policies in favor of arbitration set forth in state and federal statutes. Finding our decision in *Pipoly* to have fully weighed the public policy in favor of arbitration against the specific statutory scheme addressing the powers and duties of a court-appointed liquidator of an insolvent insurance company, we declined to revisit our holding in *Pipoly* for the simple purpose of reweighing the public policy analysis included therein.

{¶24} John Hancock next attempted to distinguish *Pipoly* because, in that case, the liquidator disavowed the contracts in toto; in contrast, the liquidator sought to enforce the reinsurance rights of the insolvent insurer against John Hancock while invalidating the arbitration clause. John Hancock argued that it was inconsistent to permit the liquidator to accept the benefits of the reinsurance agreements while renouncing problematic portions thereof.

{¶25} We rejected John Hancock's reading of *Pipoly*, noting the general principle that arbitration clauses may be severed from the underlying contract if unenforceable. Explaining *Pipoly*, we averred that "*Pipoly* clearly states that private arbitration conflicts with and undermines the policies and procedures set forth in the Ohio Liquidation Act, and arbitration clauses are consequently unenforceable against the liquidator. This does not create a corollary that the liquidator is thereby obligated to relinquish all rights in any contract held by the insolvent insurer that contains an arbitration clause." *Id.* at ¶19. We further noted that *Pipoly* expressly overruled our prior decision in *Fabe*, and that by doing so, this court "manifestly expressed an intent \* \* \* that *Pipoly* should be applied in instances in which the liquidator is attempting to obtain benefits under a reinsurance agreement while repudiating an arbitration clause that conflicts with the purposes and policies of the Liquidation Act." *Id.* at ¶22. Accordingly, we concluded that the trial court did not err in applying *Pipoly* to the facts of the case, "both because we continue to adhere to the analysis set forth in *Pipoly* regarding the interaction between contractual arbitration clauses [and] the Ohio Liquidation Act \* \* \* and because we find the holding in *Pipoly* applicable to actions by the liquidator to recover under reinsurance agreements." *Id.* at ¶23.

{¶26} In response to appellee's submission, appellant maintained that *Hudson* did not bar its motion to dismiss or to refer to arbitration because the Tolling Agreement, executed by appellee and appellant on May 2, 2002, preserved all defenses available to appellant as of the date of that agreement. Appellant pointed particularly to paragraph five of the Tolling Agreement which, as noted above, provides that "[appellant] may

otherwise assert, as defenses to any lawsuit or claim the Liquidator may file against [appellant], all defenses that [appellant] has as of the Effective Date, including but not limited to the statute of limitations." Appellant maintained that among the defenses available to it on May 2, 2002, was the right to arbitrate any dispute between it and American Chambers as required under the terms of the engagement letter. Appellant contended that as of May 2, 2002, the date the Tolling Agreement was executed, *Fabe* was the controlling law and, pursuant to that decision, appellee stood in the shoes of American Chambers and was thus bound by American Chambers' agreement to arbitrate any disputes with appellant arising out of the engagement letter. Appellant argued that it would be manifestly unfair for appellee to argue that the change in the law after *Fabe* deprived appellant of a defense that existed at the time the parties executed the Tolling Agreement. In support, appellant asserted the general principle that parties to a contract are deemed to have contracted with reference to existing law.

{¶27} Appellee filed a response, arguing that this court's decision in *Pipoly*, which expressly overruled *Fabe*, applied to the instant case. Appellee noted the general principle that a decision issued by a court of superior jurisdiction that overrules a former decision is retrospective in its operation and the effect is not that the former decision was bad law, but that it never was the law. Appellant argued that the Ohio Liquidation Act was in full force and effect when appellant and American Chambers executed the engagement contract, as well as when appellant and appellee later executed the Tolling Agreement. Appellant argued that only the interpretation and application of that law changed in 2003 with the *Pipoly* decision. Accordingly, argued appellant, the rule in *Pipoly*, which was

affirmed in *Hudson*, applied to the dispute as if it were the law at the time the contracts were executed.

{¶28} Appellee further challenged appellant's contention that the instant case is distinguishable from *Pipoly* and *Hudson* due to appellee's having entered into the Tolling Agreement with appellant. Appellee argued that the Tolling Agreement does not constitute an agreement by appellee to arbitrate, as it does not contain any reference to arbitration. Appellee maintained that the Tolling Agreement merely preserved appellant's right to raise certain defenses, but did not concede that any such defenses were valid. Appellee noted that the arbitration provision appellant seeks to enforce is contained in the pre-liquidation agreement between appellant and American Chambers, not in the Tolling Agreement between appellant and appellee.

{¶29} On September 10, 2009, the trial court issued a decision and judgment entry denying appellant's motion to dismiss or, in the alternative, to stay and to compel arbitration. The court indicated that, while it agreed in principle with appellant's position that courts should rigorously enforce arbitration agreements, it was nonetheless persuaded by this court's decisions in *Pipoly* and *Hudson*. The court concluded that the facts in *Pipoly* and *Hudson* were directly on point, and, as a result, appellee could not be compelled to arbitrate her claims against appellant.

{¶30} Appellant timely appeals, advancing six assignments of error:

[1.] The trial court erred in concluding that the Plaintiff, as Liquidator of American Chambers Life Insurance Company ("American Chambers"), cannot be compelled to arbitrate the claims against Ernst & Young LLP ("E&Y").

[2.] The trial court erred in concluding that the Plaintiff, as Liquidator of American Chambers, is not bound by the arbitration provisions contained in the engagement agreement executed between E&Y and American Chambers.

[3.] In holding that the Liquidator was not required to arbitrate the dispute with E&Y, the trial court erred in failing to enforce the Tolling Agreement between the parties, which preserved all claims and defenses as of May 2002, when *Fabe v. Columbus Ins. Co.* (1990), 68 Ohio App.3d 226, 587 N.E.2d 966, was the controlling law and established E&Y's right to compel arbitration.

[4.] The trial court erred in concluding that the facts of *Benjamin v. Pipoly*, 155 Ohio App.3d 171, 2003 Ohio 5666, 800 N.E.2d 50 and *Benjamin v. John Hancock Financial Services, Inc.*, Franklin App. No. 06AP-1284, 2007 Ohio 6997, 2007 Ohio App. Lexis 6137 are directly on point with the facts of this case.

[5.] In holding that the Liquidator was not required to arbitrate the dispute with E&Y, the trial court erred in concluding that the Liquidator was not bound to comply with the provisions of the Ohio Insurance Code governing repudiation of contracts.

[6.] In holding that the Liquidator was not required to arbitrate the dispute with E&Y, the trial court erred in concluding that the Liquidator was not required to comply with the Final Order of Liquidation and *Benjamin v. Ernst & Young LLP* (July 6, 2004), Ohio Ct. Cl. No. 2003-08886-PR, 2004 Ohio 3811.

{¶31} Although appellant sets forth six separate assignments error, all six resolve to a single issue, that is, whether the trial court erred in denying appellant's motion to dismiss or, in the alternative, to stay and to compel arbitration. "A trial court's decision granting or denying a stay of proceedings pending arbitration is a final appealable order, R.C. 2711.02(C), and is subject to de novo review on appeal with respect to issues of law, which commonly will predominate because such cases generally turn on issues of

contractual interpretation or statutory application." *Hudson* at ¶8, citing *Peters v. Columbus Steel Castings Co.*, 10th Dist. No. 05AP-308, 2006-Ohio-382, ¶10.

{¶32} As noted previously, appellant based its July 15, 2003 motion to dismiss the complaint or to stay and to compel arbitration upon the arbitration clause contained in the engagement letter between it and American Chambers. That arbitration clause provided that any controversy or claim arising out of or relating to the auditing services provided by appellant would be submitted to arbitration. Appellant maintained that pursuant to this court's decision in *Fabe*, which, as noted above, held that the liquidator of an insolvent insurance company is bound by pre-appointment contractual obligations of the insurer, including binding arbitration provisions contained within those contractual obligations, the negligence claim appellee asserted against appellant was subject to the arbitration clause in the pre-appointment contract between appellant and American Chambers.

{¶33} However, as noted above, while the motion was still pending in the trial court, this court decided *Pipoly*, which expressly overruled *Fabe* and held that a court-appointed liquidator is not automatically bound by pre-appointment contractual obligations of the insurer. We went on to note in *Pipoly*, however, that a liquidator could be bound by pre-appointment contractual obligations of the insurer, including the obligation to arbitrate, if the liquidator affirmatively indicated his or her election to be responsible for those prior obligations. We found that the liquidator in *Pipoly* was not so bound because she was not a party to the employment agreements which contained the arbitration provisions and there was nothing in the record to demonstrate that she adopted any of the agreements and expressly assumed the obligations contained therein. Accordingly, we concluded

that the arbitration provisions included in the employment agreements could not be enforced against the liquidator.

{¶34} Thereafter, appellant, apparently concluding that, under our holding in *Pipoly*, the arbitration provisions included in the pre-appointment engagement letter between it and American Chambers could not be enforced against appellee, as she was not a party to that agreement, maintained that the Tolling Agreement, executed between appellant and appellee, manifested appellee's election to adopt the pre-appointment engagement letter and expressly assume the obligations contained therein, including the obligation to arbitrate. As noted above, appellant relied particularly on paragraph five of the Tolling Agreement, which provides that appellant could assert as defenses to any lawsuit or claim filed by appellee, all defenses appellant had as of the effective date of the Tolling Agreement. Appellant contends that the right to arbitration is an affirmative defense under Ohio law and, thus, is included among the defensive rights expressly reserved to appellant under the Tolling Agreement. Appellant maintains that, as of May 2, 2002, the effective date of the Tolling Agreement, *Fabe* was the controlling law on the issue and bound appellee to American Chambers' arbitration agreement with appellant as provided in the engagement letter.

{¶35} We disagree with appellant's assertion that the right to arbitration is an affirmative defense. Appellant points to Civ.R. 8(C), which lists "arbitration and award" as an affirmative defense. We note, however, that courts have held that the right to arbitrate is not an affirmative defense pursuant to Civ.R. 8(C). *Garvin v. Independence Place*

*Condominium Assn.*, 11th Dist. No. 2001-L-055, 2002-Ohio-1472, citing *Mabrey v. Victory Basement Waterproofing* (1993), 92 Ohio App.3d 8.

{¶36} Civ.R. 8(C) sets forth a non-exhaustive list of affirmative defenses: "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." In our view, "arbitration and award," as contemplated by Civ.R. 8(C), pertains to situations where the matter has already been arbitrated and an award has been made pursuant to that arbitration. We note that the rule utilizes the phrase "arbitration and award" and not the singular term "arbitration." Had the drafters of the rule intended to include the "right to arbitration" among the affirmative defenses, the drafters could have done so by expressly including the phrase "right to arbitration" or by using the singular term "arbitration."

{¶37} This interpretation comports with the definition of "affirmative defense" set forth in Black's Law Dictionary (7th ed.1999): "[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's \* \* \* claim, even if all the allegations in the complaint are true." Thus, we agree with the *Garvin* court's averment that "[a]rbitration and award," as set forth in Civ.R. 8(C), is not the same as the right to arbitrate under R.C. 2711.02. This court recognized this distinction in *Atkinson v. Dick Masheter Leasing II, Inc.*, 10th Dist. No. 01AP-1016, 2002-Ohio-4299, wherein we noted that "Civ.R. 8(C) provides that 'arbitration and award' is a matter that *must* be affirmatively

pled. Courts have held that an arbitration defense, pursuant to R.C. 2711.02, *should* be affirmatively pled." Id. at ¶23 (emphasis added), citing *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406.

{¶38} We thus conclude that the "right to arbitration" is not an affirmative defense, pursuant to Civ.R. 8(C), and is thus not included among the defensive rights reserved to appellant under the Tolling Agreement. ~~As such, we conclude that appellee's execution~~ of the Tolling Agreement, which preserves defensive rights to appellant, does not manifest appellee's election to adopt the pre-appointment engagement letter and expressly assume the rights and obligations contained therein, including the right to arbitration. As the right to arbitration was not among the "defenses" preserved by the Tolling Agreement, the matter was subject to the law as set forth in *Pipoly*, not *Fabe*. Pursuant to *Pipoly*, appellee was not bound by the pre-appointment contractual obligations of American Chambers to arbitrate any disputes arising out of appellant's provision of auditing services. Accordingly, the trial court did not err in denying appellant's motion to dismiss the complaint or, in the alternative, to stay and to compel arbitration.

{¶39} For the foregoing reasons, appellant's six assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

TYACK, P.J., and McGRATH, J., concur.

---