

ORIGINAL

IN THE SUPREME COURT OF COURT OHIO

Mary Jo Hudson, Superintendent of the	:	
Ohio Department of Insurance, in her	:	Supreme Court Case No. 10-1324
capacity as Liquidator of the American	:	
Chambers Life Insurance Company,	:	
	:	Appeal from the Franklin County
Plaintiff-Appellee,	:	Court of Appeals,
	:	Tenth Appellate District
vs.	:	
	:	Court of Appeals Case No.
Ernst & Young, LLP,	:	09AP-949
	:	
Defendant-Appellant.	:	

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF MARY JO HUDSON, SUPERINTENDENT
OF THE OHIO DEPARTMENT OF INSURANCE, AS LIQUIDATOR OF
THE AMERICAN CHAMBERS LIFE INSURANCE COMPANY**

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I. STATEMENT AS TO WHY THIS CASE HAS NEITHER PUBLIC NOR GREAT GENERAL INTEREST

This action comes to the Supreme Court by way of discretionary appeal from the Tenth District Court of Appeals, based on Appellant Ernst & Young LLP's ("E&Y") claim that this case "raises important questions of public or great general interest." (E&Y Mem. in Support of Jurisdiction ["Mem. in Support"] at 1). In fact, this case has neither public nor great general interest, and to make such a claim E&Y has had to vastly overstate the nature, scope and significance of the Tenth District's ruling.

The American Chambers Life Insurance Company ("ACLIC") was determined to be insolvent and placed into liquidation by the Franklin County Court of Common Pleas in 2000. In 2003, the Superintendent of Insurance, acting in her capacity as Liquidator of ACLIC, filed suit against E&Y alleging, among other things, that E&Y was the independent certified public accountant that conducted the audit of ACLIC's financial statements as of December 31, 1998, and that E&Y failed to properly audit those financial statements in accordance with generally accepted auditing standards, as required by Ohio law. This appeal arises from E&Y's unsuccessful attempt to compel arbitration of the Liquidator's claims.

The Tenth District's decision in this case, affirming the trial court's rejection of E&Y's arbitration demand, is anything but a radical departure from settled case law, as E&Y suggests. Indeed, it is precisely the *opposite*: it is the third in a line of decisions by the Tenth District, going back to 2003, in which the court (with seven different judges participating on three separate panels) has unanimously held that compelling the Liquidator to arbitrate her claims on behalf of the creditors and policyholders of insolvent insurance companies would "substantially impair the effective application and essential purposes of" R.C. Chapter 3903, the Insurers Supervision, Rehabilitation and Liquidation Act ("Ohio Liquidation Act"). See e.g., *Benjamin v.*

Pipoly, 155 Ohio App.3d 171, 2003-Ohio-5666; *Hudson v. John Hancock Fin. Servs.* 10th Dist. No. 06AP-1284, 2007-Ohio-6997.

In *Pipoly* the Tenth District reviewed Ohio's statutory provisions and case law concerning arbitration, noting that parties are generally not required to submit their disputes to arbitration unless they previously agreed, in writing, to arbitrate those disputes. *Pipoly*, 2003-Ohio-5666 at ¶36. The court further noted that where a party resisting arbitration is not a signatory to a written agreement to arbitrate, a presumption against arbitration arises. (*Id.*) The court then held that since the liquidator had not signed the agreements at issue in those cases, there was a presumption against arbitration, "particularly in light of the strong policy considerations embodied within" R.C. Chapter 3903 "that vest broad powers both in the liquidator and the courts." *Id.* at ¶37.

Pipoly and *Hancock* both reinforced the Ohio Liquidation Act's statutory framework, established in 1983, that has the express purpose of enabling a court-appointed Liquidator, as an "arm" of the court, to conduct an efficient, effective and *public* administration of an insolvent insurer's estate under court supervision in a *centralized* forum. *Pipoly* held that given the broad and comprehensive statutory scheme embodied in the Ohio Liquidation Act, "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" and therefore "*ipso facto* violates public policy." *Id.* at ¶45 (emphasis in original); see also *Hancock*, 2007-Ohio-6997 at ¶¶17-19.

Those rulings in *Pipoly* and *Hancock* were expressly reaffirmed by the Tenth District in this case. They hardly reflect a new concept in the world of insurance liquidations, having been for 50 years the law of the State of New York, a hub of commerce and insurance where E&Y maintains its headquarters. While certainly important to the administration of ACLIC's

liquidation estate, and perhaps to E&Y as well, the Tenth District's ruling in this case has no application beyond its very narrow context, where a private party like E&Y attempts to force the Liquidator into *confidentially* arbitrating what is statutorily dictated to be a public matter: the resolution of claims of an insolvent insurer's estate.

Notably, this Court declined to review the Tenth District's ruling in *Hancock*. Although E&Y acknowledges that fact, stating that "[t]his Court denied review in *John Hancock* by a 4-3 vote[.]" (Mem. in Support at 5), E&Y fails to note that in *Hancock*, it (as *amicus curiae*) and John Hancock both filed Memoranda in Support of Jurisdiction in which they made the *same* arguments that E&Y is making here, citing many of the *same* cases. This Court found all of those arguments wanting in *Hancock*, and E&Y has offered nothing new here to suggest that they should fare any better the second time around.

II. APPELLEE'S STATEMENT OF THE CASE AND FACTS

A. ACLIC's Liquidation Proceedings Began In March 2000

In March 2000, the Ohio Department of Insurance ("ODI") filed an action in the Franklin County Common Pleas Court seeking to place ACLIC in rehabilitation. In May 2000, the court issued a Final Order of Liquidation, finding that ACLIC was insolvent, appointing the Superintendent of Insurance as ACLIC's Liquidator, and empowering the Liquidator to, among other things, "enter into such contracts as are necessary to carry out this Order to Liquidate, and to affirm or disavow any contract to which [ACLIC] is a party." As will be discussed below, this clause does not, as a matter of law, require the Liquidator to either disavow or affirm any contract in its *entirety*, as claimed by E&Y; rather, the Liquidator is free to disavow an arbitration clause in a contract while enforcing or affirming the remainder of the contract. *See*

Hancock, 2007-Ohio-6997 at ¶¶19-20 (holding that the Liquidator may “sever” and “repudiate” arbitration clauses in contracts).

B. The Lawsuit and E&Y’s Motion to Compel Arbitration

On April 20, 2003, the Liquidator filed suit against E&Y, alleging that E&Y was the independent certified public accountant that conducted the audit of ACLIC’s financial statement as of December 31, 1998, and that E&Y failed to perform those duties as mandated by Ohio law, made false representations to ODI, and received preferential and/or fraudulent payments contrary to Ohio law. In response, E&Y filed a Motion to Dismiss or Stay and Compel Arbitration (“Motion to Compel Arbitration”) that was eventually overruled by the trial court, in September 2009, based on the Tenth District’s rulings in *Pipoly* and *Hancock*.

In its arguments to the Tenth District, E&Y first asserted that the Liquidator was bound to arbitrate her claims against E&Y because the claims arose out of E&Y’s “engagement letter with American Chambers,” which contained an arbitration provision. In its Memorandum in Support of Jurisdiction, E&Y has carefully reworded that claim, now contending only that it “‘provided its auditing services pursuant to an engagement letter,’ which bound both E&Y and ACLIC.” (Mem. in Support at 4). In other words, E&Y is not claiming that ACLIC – much less the Liquidator – was actually a *party* to its engagement letter; instead it claims merely that ACLIC was somehow “bound” by the letter.

The reason for E&Y’s shift in its argument is obvious: its engagement letter not only stated on its face that it was *with* United Chambers Administrators, Inc. (ACLIC’s parent company), it was signed *by* the president of United Chambers on *behalf of* United Chambers.

Thus, E&Y is implicitly acknowledging that neither the Liquidator *nor* ACLIC was ever a party to the engagement letter that formed the very basis for E&Y's Motion to Compel Arbitration.¹

Not only were the Liquidator and ACLIC not parties to E&Y's engagement letter with United Chambers, but the Liquidator's claims against E&Y are not based *on* the engagement letter. To the contrary, the Liquidator's First Claim against E&Y is based solely on E&Y's failure to perform duties imposed by Ohio law, including the duty to audit ACLIC's financial statements "in a manner conforming to generally accepted auditing standards." (Ohio Administrative Code §3901-1-50(H)). The Liquidator's Second Claim asserts that subsequent to March 13, 1999, "at a time when ACLIC was insolvent, ACLIC paid E&Y the sum of more than \$25,000 . . . for or on account of an antecedent debt for goods or services rendered to ACLIC, or for goods and services rendered or to be rendered to entities related to ACLIC[,]" and that the Liquidator is entitled to the return of those moneys. (Complaint at ¶¶53-56).

In short, not only were ACLIC and the Liquidator not parties to E&Y's engagement letter, the Liquidator's claims are not based upon or dependent in any way upon the engagement letter, completely undercutting the entire basis for E&Y's arbitration demand.²

C. E&Y's Subsequent Assertion That It Had A Right To Arbitrate Pursuant to The Tolling Agreement

In February 2008, almost five years after filing its Motion to Compel Arbitration, and after the Tenth District had issued its decision in *Hancock*, E&Y argued for the first time that the Liquidator was also bound to arbitrate its claims against E&Y because of language in a tolling agreement the parties had entered into in May 2002, a year before the Liquidator had filed suit.

¹ Elsewhere in its Memorandum, E&Y reverts to its claim that "ACLIC and E&Y signed" the engagement letter (Mem. in Support at 8), although that it is indisputably not the case.

² E&Y claims in a footnote that the Tenth District "did not accept [the Liquidator's] argument." (Mem. in Support at fn.1). Notably, E&Y failed to cite any language in the court's opinion reflecting that it "did not accept" the argument; there is none. Instead, the Court of Appeals rejected E&Y's appeal on other grounds discussed herein.

In the tolling agreement, the parties had agreed that they could, for a period of up to one year, “forbear and postpone the filing, commencement and prosecution of any and all claims or causes of action” they had against one another. As part of the tolling agreement, the parties also agreed that they could each “assert,” as defenses to any “lawsuits or claims” they might later file against one another, “all defenses” they had as of the date of the tolling agreement.

Although the tolling agreement mentioned no specific “defenses” other than the statute of limitations, E&Y argued that the tolling agreement’s “reservation of ‘defenses’ incorporated, as a matter of law” the “defense of arbitration recognized under Rule 8 of the Ohio Rules of Civil Procedure[.]” (E&Y Brief to Court of Appeals at p. 15).³ E&Y contended that *Fabe v. Columbus Ins.* (1990), 68 Ohio App.3d 226 was the “controlling decision” when E&Y entered into the tolling agreement, that *Fabe* therefore controls whether the Liquidator can be compelled to arbitrate her claims against E&Y, and that under *Fabe* the “Liquidator was bound by arbitration clauses in the insurer’s pre-insolvency agreements.” (Mem. in Support at 5).

In making all these arguments, E&Y completely ignored the fact that: (a) the tolling agreement does not contain a *single* reference to arbitration, much less an agreement to arbitrate or an acknowledgement of some right to “an arbitration forum;” (b) the only “defense of arbitration recognized under Rule 8” is the affirmative defense listed in Civ.R. 8(C), *i.e.*, “arbitration and award,” which plainly has no application here; and (c) *Fabe* was expressly overruled by *Pipoly*, which had the effect of rendering *Fabe* a nullity. *See, e.g., Wears v. Motorists Mut. Ins. Co.*, 9th Dis. No. 22027, 2005-Ohio-341, at ¶9.

³ Although E&Y claims now that it would not have entered into the tolling agreement “if it thought it might lose an arbitration forum[.]” (Mem. in Support at 3), E&Y cites no evidence supporting that claim and there is, of course, no such evidence in the record.

D. The Court of Appeals' Decision.

In its decision in this case, the Tenth District reaffirmed its prior decisions in *Pipoly* and *Hancock*; thus, even if ACLIC *had* been a party to the engagement letter containing the arbitration provision, the Liquidator could not be compelled as a result to arbitrate her claims against E&Y.

The court also rejected E&Y's argument that the tolling agreement gave it a right to arbitration; citing decisions from other Ohio appellate courts recognizing that the "right to arbitrate is not an affirmative defense pursuant to Civ.R. 8(C)[,]" unlike the defense of "arbitration and award," which is specifically listed in the rule. (Decision at ¶35). The court held that the right to arbitration was therefore "not included among the defensive rights reserved to [E&Y] under the Tolling Agreement[,]" and that the tolling agreement "did not manifest [the Liquidator's] election to adopt the pre-appointment engagement letter and expressly assume the rights and obligations contained therein, including the right to arbitration." (*Id.* at ¶38).

III. ARGUMENT

Proposition of Law No. 1: The Superintendent Of Insurance, As Liquidator Of An Insolvent Insurance Company, May Pursue Her Claims Against Third Parties In The Liquidation Court, Even Where Those Third Parties Claim To Have Entered Into Pre-Liquidation Contracts With The Insurer That Provide For Arbitration.

A. ACLIC Was Not A Party To E&Y's Engagement Letter And The Liquidator's Claims Against E&Y Are Not Based On The Engagement Letter.

E&Y initially argues that the Liquidator "stands in the shoes of the insolvent insurer and is bound by an arbitration clause in a contract that the Liquidator does not disavow[,]" and that "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." (Mem. in Support at 6-7). E&Y's argument is flawed in numerous respects.

First, as was noted above, ACLIC was *not a party* to E&Y's engagement letter with United Chambers. Moreover, as was also noted above, the Liquidator's claims against E&Y were not "based on" the engagement letter; they were instead based on E&Y's failure to perform the duties imposed upon it by Ohio law as ACLIC's accountant, including:

- (a) its duty pursuant to OAC §3901-1-50(H) to audit ACLIC's financial statements in a manner conforming to generally accepted auditing standards;
- (b) its duty pursuant to OAC §3901-1-50(I) to inform ACLIC's Board of Directors or Audit Committee in writing if ACLIC had materially misstated its financial condition as reported to the Superintendent; and
- (c) its duty pursuant to OAC §3901-1-50(K), to furnish a letter for inclusion with ACLIC's financial statement stating E&Y's understanding that the annual audited financial report and E&Y's opinion thereon would be filed with the Superintendent, and that the Superintendent would be relying on that information in the monitoring and regulation of insurers such as ACLIC.

(Complaint at ¶19). While E&Y contends that the Complaint "alleged the contractual nature of ACLIC's relationship with E&Y[.]" (Mem. in Support at fn. 1), E&Y is again wrong: all the Complaint alleged was that OAC §3901-1-50(E)(1) required that ACLIC "register with the Superintendent the name and address of the independent certified public accountant retained to conduct the annual audit of ACLIC's financial statements[.]" and that ACLIC had registered E&Y "as the independent certified public accountant retained to conduct the audit of ACLIC's financial statements as of December 31, 1998[.]" (Complaint at ¶¶17-19, 50-51).

B. Even Assuming That ACLIC Was A Party To E&Y's Engagement Letter, And That The Liquidator's Claims Against E&Y Are Based On The Engagement Letter, The Liquidator Cannot Be Compelled To Arbitrate Her Claims Against E&Y.

However, even assuming that ACLIC had entered into the engagement letter with E&Y, *and* that the Liquidator's claims were "based on" the engagement letter, the Liquidator *still* would not be bound to arbitrate her claims against E&Y. As the Tenth District has repeatedly

held, the Ohio Liquidation Act is designed to protect the “interests of insureds, claimants, creditors, and the public generally,” to enhance the “efficiency and economy of liquidation,” and “to minimize legal uncertainty and litigation.” R.C. 3903.02(D); *Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App. 3d 350, 357, 2006-Ohio-2739 at ¶14 (“[A]ny actions commenced by the Liquidator are on behalf of the insurance company and its creditors and policyholders.”)

By virtue of the Liquidation Act, the Liquidator has “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*, 2003-Ohio-5666 at ¶28. Those “broad and largely unfettered powers” include powers that were not available to the insolvent insurer, such as disavowing contracts and contractual arbitration provisions. *Id.* at ¶38; *Hancock*, 2007-Ohio-6997 at ¶¶19-20. Compelling the Liquidator to arbitrate would “substantially impair the effective application and essential purposes of” the Liquidation Act. *Pipoly* at ¶51-52; *Hancock* at ¶17.

E&Y argues – as it previously argued in *Hancock* – that the Tenth District’s rulings are contrary to the decisions of “other courts” in other jurisdictions. (Mem. in Support at 6). That argument is not only irrelevant, it completely ignores the fact that many other states and jurisdictions – including the State of New York – follow the same approach as that of the Tenth District, and hold that forcing an insurance liquidator into arbitration is completely inconsistent with the largely unfettered powers granted to her as the foundation of an orderly statutory liquidation scheme. *See e.g. Knickerbocker Agency v. Holz* (N.Y. 1958), 149 N.E.2d 885.⁴

⁴*See also, Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998) (applying Oklahoma law); *Stephens v. American Int’l Ins. Co.*, 66 F.3d 41, 46 (2nd Cir. 1995) (Kentucky law); *Davister Corp. v. United Rep. Life Ins. Co.*, 152 F.3d 1277, 1281-82 (10th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) (Utah law); *Eden Financial Group, Inc. v. Fidelity Bankers Life Ins. Co.*, 778 F. Supp. 278, 282 (E.D. Va. 1991) (Virginia law).

E&Y then argues – as it also argued in *Hancock* – that the Tenth District’s rulings are inconsistent with the “general principle that a third party whose claims are based on a contract is bound by an arbitration clause within that contract[,]” citing *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, at ¶¶18-19 (Mem. in Support at 7). However, the cases E&Y cites are inapposite, because they involve private parties, not an insurance liquidator created by statute and given broad statutory powers, under the supervision of the Franklin County Common Pleas Court, “to maximize the assets available to her in discharging her duties to claimants, shareholders and creditors of the insolvent insurance company.” *Pipoly*, 2003-Ohio-5666 at ¶28.

Finally, E&Y argues – again, just as it argued in *Hancock*, citing the same cases – that the Tenth District’s rulings wrongly allow the Liquidator to “disavow a single clause within a contract,” *i.e.*, an arbitration provision, claiming that “[t]here is no legal basis for these rulings.” (Mem. in Support at 8). E&Y thereby ignores that the fact that the Ohio Arbitration Act itself allows for revocation of an arbitration provision. R.C. 2711.01(A) states that an arbitration provision may be held unenforceable for “grounds that exist at law or in equity for the revocation of any contract.” Thus, an arbitration provision may properly be considered apart from the contract as a whole, and held unenforceable while the remainder of the contract is enforced. *See also Nagrampa v. Mailcoups, Inc.* (9th Cir. 2006), 469 F.3d 1257, 1263-65 (arbitration provision may be severed from the agreement as a whole where evidence exists that the arbitration provision itself was subject to revocation).

C. E&Y’s Attempt To Manufacture A Conflict Between The Arbitration Act and Liquidation Act Is Unavailing.

According to E&Y, the Tenth District erred by “toss[ing] aside” the Arbitration Act in favor of the Liquidation Act. (Mem. in Support at 10). E&Y argues that there is “no conflict” between the Liquidation Act and the Arbitration Act, and both must therefore be given full

effect, because the Liquidation Act has no “provision exempting the Liquidator from an arbitration provision the insurer agreed to in a contract that the Liquidator did not disavow[,]” and the Arbitration Act does not “exempt actions involving the Liquidator.” (*Id.* at 11).

E&Y’s simplistic argument – another reformulation of an argument it made in *Hancock* – ignores the fact that under basic rules of statutory interpretation, the specific and tailored Liquidation Act, setting forth a comprehensive statutory scheme dealing only with insolvent insurance companies, controls the more general statute, the Arbitration Act. R.C. 1.51. For this very reason, and contrary to E&Y’s claim, the Tenth District properly held in *Pipoly*, and reaffirmed in this case, that “[a]bsent express statutory authorization for private arbitration to proceed despite the lack of assent to same on the part of the liquidator, . . . 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.” (Decision at ¶19).

E&Y also argues that the Tenth District’s rulings in *Pipoly*, *Hancock* and this case are error because there had been “no changes in statutory language” causing “the court of appeals to reverse course” from its ruling in *Fabe*. (Mem. in Support at 10). E&Y thus appears to be suggesting that an appellate court may never reverse its prior rulings absent “changes in statutory language” – an argument for which it notably fails to cite any authority whatsoever.

Apparently recognizing the futility of its arguments, E&Y is reduced to making the wild accusations that the Tenth District has “a scarcely disguised hostility to arbitration” and an “eager[ness] to protect the Liquidator from arbitration[,]”(Mem. in Support at 12, 14), thereby suggesting that the Tenth District’s rulings have been made for improper purposes. The fact that E&Y relies on such unfounded accusations says far more about the merits of E&Y’s argument than it says about the Tenth District’s rulings.

Proposition of Law No. 2: A Tolling Agreement Preserving E&Y's Right To Assert Unspecified "Defenses" To The Liquidator's Claims Does Not Give E&Y A Right To Arbitration, Where Arbitration Is Not An Affirmative Defense Pursuant To Civ.R. 8 And Where The Tenth District Has Overruled The Case Authority Relied Upon By E&Y For its Claimed Right To The "Defense of Arbitration."

E&Y argues that the Tenth District "badly misread" the tolling agreement the Liquidator signed with E&Y in 2002, because the court did not agree that the tolling agreement preserved E&Y's "contractual right to assert 'all defenses' – including arbitration – that existed as of May 2, 2002[,]" when the tolling agreement was signed. (Mem. in Support at 14, 15). According to E&Y, it had "a defense of arbitration" on May 2, 2002; citing *Fabe*, it contends that "[a]t that time, the Liquidator had to arbitrate when she did not disavow a contract containing an arbitration clause." (*Id.* at 14). E&Y states that "[b]ecause *Fabe* was the governing law as of May 2002, E&Y has a right to arbitrate" the Liquidator's claims and "[i]t does not matter that *Pipoly* later changed the law." (*Id.* at 14-15).

There are at least two fundamental flaws in E&Y's claim. First, the Tenth District ruled that the tolling agreement's reference to "all defenses" did not include the defense of arbitration, because "arbitration" is not an affirmative defense under Civ.R.8(C). (Decision at ¶¶35-38). While E&Y now claims that "[t]his makes no sense[,]" and that "[w]hether arbitration is an affirmative defense . . . is irrelevant[,]" (Mem. in Support at 14), that is directly *contrary* to what E&Y argued to the court of appeals. As was noted above, E&Y specifically argued to the Tenth District that the tolling agreement's "reservation of 'defenses' incorporated, as a matter of law, . . . the defense of arbitration *recognized under Rule 8 of the Ohio Rules of Civil Procedure and Fabe*" (E&Y Brief to Court of Appeals at p. 15; emphasis supplied). In rejecting that argument, the Tenth District correctly pointed out that the only "defense of arbitration" recognized in

Civ.R. 8 is the defense of “arbitration and award,” which has absolutely no application here. (Decision at ¶35).

Thus, whether arbitration was one of the affirmative defenses listed in Civ.R. 8 – the issue E&Y now says is “irrelevant” – was an issue that E&Y *itself raised* as one of the very bases of its argument that the tolling agreement “preserved” its “right to arbitration.” E&Y cannot complain that the Tenth District erred in basing its decision on an “irrelevant issue” where the issue was one that E&Y had presented as a basis for its appeal. *See, e.g., Zawahiri v. Alwattar*, 10th Dist. App. No. 07AP-925, 2008-Ohio-3473 (refusing to consider argument on appeal that was contradictory to argument made to lower court); *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (stating that “[a]ppellant cannot change the theory of his case and present these new arguments for the first time on appeal”).

E&Y’s argument is fatally flawed for yet another reason: E&Y claims that because *Fabe* was the “governing law” in 2002 when it entered into the tolling agreement, *Fabe* remained the governing law thereafter, even though it was expressly overruled by *Pipoly* in 2003. (Mem. in Support at 14-15). However, Ohio law is settled that as a general rule, “a decision issued by a court of superior jurisdiction that overrules a former decision is retrospective in operation. Thus, the effect of the subsequent decision is not that the former decision was ‘bad law,’ but *rather that it never was the law.*” *Wears v. Motorists Mut. Ins. Co.*, 9th Dis. No. 22027, 2005-Ohio-341, at ¶9 (emphasis supplied). *See also, Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209; *State ex rel. Bosch v. Indus. Comm.* 438 N.E.2d 415, 418 (Ohio 1982)(“In the absence of a specific provision in a decision declaring its application to be prospective only . . . the decision shall be applied retrospectively as well.”) As the U.S. Supreme Court has explained: “The effect

of subsequent decisions is not to make new law, but only to hold that the law always meant what the court now says it means[.]” *Fleming v. Fleming* (1924), 264 U.S. 29, 31-32. Thus, once *Pipoly* overruled *Fabe*, the effect was that *Fabe* “never was the law.”

E&Y notes that in *Peerless Electric*, the Court noted an exception to the rule that a decision overruling a prior decision applies retroactively, “where contractual rights have arisen, or vested rights have been acquired, under the prior decision.” (Mem. in Support at 15). The problem with that argument is that even assuming, *arguendo*, that *Fabe* can be held to require “enforcement” of the “contract rights” that arose or were vested under the tolling agreement, E&Y cannot logically claim that a “contract right” to arbitrate arose under the tolling agreement, or that it acquired a “vested right to arbitrate,” where the tolling agreement does not *mention* arbitration, much less provide for the parties’ agreement to arbitrate, and arbitration – as distinguished from “arbitration and award” – was not an affirmative defense in the first place. E&Y’s argument is simply baseless.

The Ohio Liquidation Act was in full force and effect when the parties entered into the Tolling Agreement. Only the interpretation and application of that law changed in 2003 with the *Pipoly* decision. Accordingly, the law as stated in *Pipoly*, as recently reaffirmed in *Hancock*, applies to this dispute as if it were the controlling case law at the time the engagement letter and tolling agreement were entered into.

IV. CONCLUSION

For all the reasons set forth above, Appellee respectfully submits that there is no basis whatsoever for this appeal, and this Court should therefore deny jurisdiction in this case.

Respectfully submitted,

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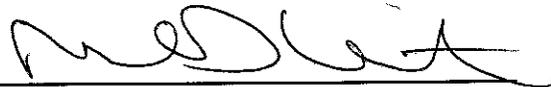


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by regular U.S. Mail this 23rd day of August, 2010 upon John Gall, Esq., and Aneca Lasley, Esq., Squire, Sanders & Dempsey LLP, 1300 Huntington Center, 41 South High Street, Columbus, Ohio 43215, and Stanley J. Parzen, Esq., Mayer Brown LLP, 71 South Wacker Drive, Chicago, Illinois 60606, Attorneys for Defendant Ernst & Young LLP.



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