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## INTRODUCTION

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; the audit occurred before ACLIC’s insolvency. The court of appeals, reaffirming its earlier decision in *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 2003-Ohio-566, 800 N.E.2d 50, erroneously held that the Liquidator—who stands in ACLIC’s shoes and took over claims owned 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. (App. 12 ¶ 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.’” (App. 13-14 ¶ 19.)

The court of appeals’ ruling in this case and its decision in *Pipoly* are inconsistent with this Court’s precedent and Ohio statutes. 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 specifically 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. 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.

In addition, the court of appeals’ decision is contrary to settled Ohio law holding that a plaintiff whose claims are based on or arise out of a contract is bound by an arbitration clause in that contract. The Liquidator’s claims are obviously based on and arise out of the engagement letter: she alleges that E&Y negligently performed the audit of ACLIC’s financial statements that it provided pursuant to the engagement letter.

In holding that the Liquidator may walk away from *part* of a contract—the arbitration clause—the court of appeals has dramatically expanded the Liquidator’s power; the Liquidation Act 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). Here, the Liquidator did not disavow the contract or any term of the contract. Moreover, she did not even walk away from the contract; she has tried to walk away from only one provision. If permitted, this vast increase in the Liquidator’s power will have pernicious consequences. Under the court of appeals’ rationale, the Liquidator could disavow individual contract provisions imposing obligations on the insurer (for example, to provide coverage to policyholders) while retaining provisions that benefit the insurer (requiring policyholders to pay premiums). What is particularly disturbing about the court of

appeals permitting such conduct is that the court made policy in an area where the General Assembly has already acted. The legislature has given the Liquidator the power to avoid a contract. It did not, however, give her the power to pick and choose which individual provisions she will be bound by, as the court of appeals' decision permits. Nor is there any need to grant her that additional power: she already has the ability to avoid arbitration; she can simply disavow contracts with arbitration clauses. Her failure to exercise that option with the E&Y agreement is no reason for a judicial expansion of the statute.

The court of appeals' decision also seriously misconstrued the Liquidator's own tolling agreement with E&Y. In 2002, the Liquidator and E&Y entered into a tolling agreement that gave the Liquidator extra time to sue E&Y. 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 *Pipoly* 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." (App. 23 ¶ 38, emphasis added.)

The court's reasoning is illogical: under its view, 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. The court was wrong in concluding that the right to arbitration is not an affirmative defense; the great weight of Ohio authority holds that it is. And even if an arbitration clause is not an affirmative defense, it is undoubtedly a defense to a

lawsuit. This Court should hold that the agreement means what it says—“all defenses” means “all defenses”—and enforce the parties’ agreement as written. Contractual rights are vested as of the time the contract was executed, and in 2002 (and today, if E&Y’s first argument is accepted) arbitration was plainly a defense to the Liquidator’s suit. Accordingly, the Liquidator’s claims against E&Y must be arbitrated.

### **STATEMENT OF FACTS**

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

The relevant facts are straightforward and undisputed. E&Y, an accounting firm, audited the financial statements of ACLIC, an insurance company, for the year ending December 31, 1998. (Supp. 27 ¶¶ 3-4.) 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. (*Id.*) The complaint alleges that around this period of time ACLIC was experiencing undisclosed financial problems related to its loss reserves, receivables, and unrecorded liabilities. (Supp. 29, 32, 34 ¶¶ 13-14, 21-22, 27.) E&Y allegedly “failed to properly audit ACLIC’s financial statements ... in accordance with generally accepted auditing standards, and failed to detect material misstatements in those financial statements.” (Supp. 29 ¶ 14.)

E&Y “provided its auditing services pursuant to an engagement letter” (App. 5 ¶ 3), which was signed by E&Y and ACLIC’s parent company, United Chambers Administrators. (Supp. 1, 4.) E&Y’s engagement was to audit and report on the financial statements of both United Chambers and ACLIC, which the engagement letter referred to collectively as “the Company.” (Supp. 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”). (Supp. 3.) The engagement letter was signed by Thomas Sawicz, as President of United Chambers; Sawicz was President and CEO of both United Chambers’ subsidiary, ACLIC, and United Chambers’ corporate parent. (Supp. 4, 45.) The Liquidator never disavowed the engagement letter.

In March 2000, a little over a year after E&Y issued its audit report, the Superintendent of Insurance filed suit in the Franklin County Court of Common Pleas, seeking to place ACLIC in rehabilitation. On May 8, 2000, the court issued a Final Order of Liquidation, finding that ACLIC was insolvent and appointing the Superintendent as ACLIC’s Liquidator. (Supp. 8.) 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”; the order also 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, in this state or elsewhere.” (Supp. 11, 14 ¶¶ 4, 7(m).) These clauses gave the Liquidator ownership and control over any causes of action belonging to ACLIC, including the claims in this lawsuit. The Final Order also empowered the Liquidator to “disavow any contract to which [ACLIC] is a party.” (Supp. 14 ¶ 7(l).) The Final Order did not give the Liquidator the power to disavow part of a contract.

Just shy of two years later, the Liquidator and E&Y entered into a Tolling Agreement with an express “Effective Date” of May 2, 2002. (Supp. 6.) The Liquidator and E&Y agreed that the Liquidator, for one year after that date, could postpone suing E&Y for claims “arising out of accounting or auditing services provided by E&Y to ACLIC”; claims filed within that one-year period would not be deemed time-barred if they were not time-barred as of the Effective Date. (*Id.* ¶¶ 1, 3.) 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.” (*Id.* ¶ 5, emphasis added.)

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

Just under a year after signing the one-year Tolling Agreement, on April 30, 2003, the Liquidator filed suit against E&Y. The claims against E&Y were for professional negligence arising out of the auditing services provided under the engagement letter, and for recovery of the fees that ACLIC had paid to E&Y for those services. (Supp. 40-41 ¶¶ 49-56.) 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: *Pipoly*, 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*.

In September 2009, the trial court denied E&Y’s motion, holding simply that under *Pipoly* and *Hancock*, the Liquidator “cannot be compelled to arbitrate.” (App. 26.)

### **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. (App. 12-13, 20-21 ¶¶ 16-17, 33, quoting *Pipoly*, 155 Ohio App. 3d 171, at ¶ 39.) 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 without assent to arbitrate by the liquidator,” the “public policy expressed throughout” the Liquidation Act “defeats any general attitude of the courts favoring arbitration.” (App. 13-14 ¶ 19, quoting *Pipoly*, 155 Ohio App. 3d 171, at ¶ 42.) 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.” (App. 14 ¶ 20, quoting *Pipoly*, 155 Ohio App. 3d 171, at ¶ 45.) The court also decided that the Liquidator could walk away from a single provision within a contract (here, the arbitration clause). (App. 15-16 ¶¶ 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.” (App. 16-17 ¶ 26.) The court reasoned that because “the ‘right to arbitration’ is not an *affirmative* defense,” it was “not among the ‘*defenses*’ preserved by the Tolling Agreement.” (App. 23 ¶ 38, emphasis added.)

## ARGUMENT

**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 statutory code and strong policy favoring arbitration.**

### **A. The Liquidator Is Bound By The Arbitration Clause.**

- 1. The Liquidator stands in the shoes of the insolvent insurer and is bound by an arbitration clause in the insurer’s pre-insolvency contract.**

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).

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 the court). Accord, e.g., *Suter v. Munich Reins.* (3d Cir. 2000), 223 F.3d 150, 161 (stating, in a suit by a liquidator against a reinsurer “to enforce contract rights for an insolvent insurer,” that “we find no potential friction between the Liquidation Act and having this controversy decided by an arbitrator”) (New Jersey law); *Selcke v. New England Ins.* (7th Cir. 1993) (Posner, J.), 995 F.2d 688, 689-91 (ordering arbitration of claims by the rehabilitator of an insolvent insurer); *Koken v. Cologne Reins.* (M.D. Pa. 1999), 34 F. Supp. 2d 240, 253, 256 (“under Pennsylvania law, the Liquidator does stand in the shoes of the insolvent insurer and is bound by the insurer’s contractual agreements, even as to arbitration”—the liquidator’s contrary position “conflicts with the modern approach to arbitration”) (citation omitted); *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”). See also 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); *In re Griffin Trading Co.* (Bankr. N.D. Ill. 2000), 250 B.R. 667, 671, 674-75 (staying an adversary proceeding by a bankruptcy trustee against an auditor, because an arbitration clause in the auditor’s engagement letter with the debtor required the dispute to be arbitrated).

**2. The Liquidator is also bound by a contract’s arbitration clause when her claims are based on or arise out of that contract.**

Even if the Liquidator were not bound by the arbitration clause that ACLIC agreed to, her claims against E&Y are subject to arbitration for another reason: a third party whose claims are

based on or arise out of a contract must comply with 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. (Here, the Liquidator based her claim on the fact that E&Y was retained by ACLIC. Supp. 30, 40 ¶¶ 18-19, 50; see pp. 21, 24, *infra*.) In *Gerig*, this Court enforced a AAA arbitration provision against the Ohio Insurance Guaranty Association and others; the OIGA became involved in the suit (for medical malpractice) when the defendant hospital's insurer was found insolvent and ordered into liquidation. *Gerig*, 95 Ohio St. 3d 478, at ¶¶ 2, 12. The OIGA sought to use an affiliation agreement signed by the hospital and the defendant doctor to limit its damages; the affiliation agreement also contained an arbitration provision. *Id.* at ¶¶ 1, 5, 7. This Court held that arbitration was required, explaining that when nonsignatory litigants "derive their interest in [an] 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 any controversy relating to the agreement." *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"); *Baker v. Schuler*, 2d Dist. No. 02CA0020, 2002-Ohio-5386, 2002 WL 31243491, at \*6 (following this Court's decision in *Gerig* and holding that a wife is bound by an arbitration clause in a contract signed by her husband).

In short, it would violate settled Ohio law to permit the Liquidator to sidestep a contract's arbitration provision when her claims are based on or arise out of that contract, which is the

situation here. See *Gerig*, 95 Ohio St. 3d 478, at ¶¶ 18-20; *infra* at 23-25.

**3. The Liquidation Act does not permit the Liquidator to disavow part of a contract.**

The court of appeals did not follow either line of cases discussed thus far. Instead, it followed what it has admitted is a “minority” position on “the interplay between contractual obligations to arbitrate and the statutory rights of an insurance liquidator.” *John Hancock*, 2007-Ohio-6997, 2007 WL 4532704, at ¶ 13. The court of appeals thus 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.” (App. 13, 20-21 ¶¶ 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. (App. 15-16, 20-21 ¶¶ 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 Liquidation Act 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 Supp. 14 ¶ 7(l) (Final Order: the Liquidator may “disavow any contract to which [ACLIC] is a party”).<sup>1</sup> Nor do the Liquidation Act or 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

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<sup>1</sup> The Final Order also gave the Liquidator the power to “cancel all executory contracts.” (Supp. 23 ¶ 23.) Not only is this provision also limited to the contract as a whole, not individual provisions, but the E&Y engagement letter with ACLIC is not executory because E&Y has performed its obligations. In any event, the Liquidator never cancelled that agreement.

pre-existing contractual obligations, the Liquidator must “disavow [the] contract[.]” R.C. 3903.21(A)(11). The court of appeals stated that the Liquidator could “disavow the rights and obligations of *the interest with which she is charged*” (App. 12 ¶ 16, quoting *Pipoly*, 155 Ohio App. 3d 171, at ¶ 38) (emphasis added), a vague concept if ever there was one. But no such language appears in the Liquidation Act or the Final Order—both limit her to disavowing a *contract*. In other words, the Liquidation Act presupposes that the Liquidator will be bound by all of an insurer’s contracts, and it provides only one means for the Liquidator to avoid the insurer’s contractual obligations: “disavow [a] contract[.]” R.C. 3903.21(A)(11).

In holding that the Liquidator may just ignore *part* of an agreement, the court of appeals 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, at ¶ 29 (citations omitted; brackets added by Court; emphasis added). “It is not the role of this court to supplant the legislature by amending [its] choice” of statutory language. *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487, at ¶ 13. Nonetheless, the Liquidator has improperly taken for herself (with the approval of the court of appeals) a power that may be granted only by the General Assembly. “However, the legislature is the final arbiter of public policy,” not the Liquidator or the judicial branch. *State v. Smorgala* (1990), 50 Ohio St. 3d 222, 224, 553 N.E.2d 672, superseded by statute on other grounds, see *State v. Mayl*, 106 Ohio St. 3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, at ¶ 54.

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* (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”); *In re Italian Cook Oil Corp.* (3d Cir. 1951), 190 F.2d 994, 996-97 (a bankruptcy trustee is limited to either adopting or rejecting a debtor’s contract: the trustee “may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other”).

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 of an insurance liquidator. For example, under the court of appeals’ 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 contractual provisions that benefit the insurer’s policyholders.

If the Liquidator obtains the power to reject individual contract provisions, the results

would also be detrimental in the audit context. “As a matter of commercial reality, audits are performed in a client-controlled environment.” *Bily v. Arthur Young & Co.* (1992), 3 Cal. 4th 370, 399, 834 P.2d 745, 762. An auditor depends on the client’s cooperation in the audit process. Accordingly, E&Y’s contract with ACLIC provided that “[m]anagement is responsible for providing [E&Y] with all financial records and related information on a timely basis, and its failure to do so may cause [E&Y] to delay [its] report, modify [its] procedures, or even terminate [its] engagement.” Supp. 2. Under the court of appeals’ reasoning, the Liquidator could disavow this requirement, refuse to provide information to the auditor, and still insist that the auditor nonetheless provide an audit report.

Perhaps aware of these sorts of problems, the General Assembly wisely did not grant liquidators the power to jettison individual contract provisions. The statute should be enforced as written—the Liquidator may only disavow a “contract[,]” R.C. 3903.21(A)(11), not a provision within a contract.

**B. Nothing In The Liquidation Act Exempts A Liquidator From Arbitration, And The Arbitration Act Mandates Arbitration.**

The court of appeals also concluded 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” specifically 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.” (App. 12 ¶ 16, quoting *Pipoly*, 155 Ohio App. 3d 171, at ¶ 37.) Because, the court stated, the

Liquidator “must have freedom of action ... it would be inconsistent to compel arbitration against her.” (*Id.*, quoting *Pipoly*, 155 Ohio App. 3d 171, at ¶ 38.) 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.” (App. 13-14 ¶¶ 18-19, quoting *Pipoly*, 155 Ohio App. 3d 171, at ¶¶ 40, 42.) 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.” (App. 13-14 ¶¶ 19-20, quoting *Pipoly*, 155 Ohio App. 3d 171, at ¶¶ 42, 45.) 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 since the *Fabe* decision that caused the court of appeals to reverse course. Indeed, the legislature’s failure to take any action in the 13 years between *Fabe* and *Pipoly* suggests that the General Assembly 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, leading it to abandon *Fabe*. But as this Court has emphasized repeatedly, “[t]he Ohio Constitution vests the legislative power to resolve policy issues in the General Assembly”—“courts should not forget that the legislature’s valid laws control policy preferences.” *Smorgala*, 50 Ohio St. 3d at 224. Regardless of what “may be preferable from a

general policy standpoint,” this Court’s precedent makes clear that “[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.” *State ex rel. Ross v. Crawford Cnty. Bd. of Elections*, 125 Ohio St. 3d 438, 2010-Ohio-2167, 928 N.E.2d 1082, at ¶ 31 (quoting *Smorgala*, 50 Ohio St. 3d at 223). Accord, e.g., *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶ 22; *In re Wieland*, 89 Ohio St. 3d 535, 538, 2000-Ohio-233, 733 N.E.2d 1127. “[I]mpropriety and danger” result when courts “attempt to balance a legislative policy ... with a judicial policy limiting [the] application” of a legislative directive. *Smorgala*, 50 Ohio St. 3d at 223, 224.

The General Assembly’s directive is clear: the Arbitration Act provides that arbitration provisions “in *any* written contract ... shall be valid, irrevocable, and enforceable,” save for five inapplicable exceptions. R.C. 2711.01(A), (B)(1) (emphasis added). That emphatic legislative instruction cannot be tossed aside on the basis of the Liquidation Act’s general “statutory scheme,” “structure,” and “public policy,” as the court of appeals held. (App. 13-14 ¶¶ 18-19.) Statutes must be harmonized if at all possible; “without 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 (holding that because one statute does not “explicit[ly] preclu[de]” the operation of the other, the two are “easily reconcilable”). See also *United Tel. Co. v. Limbach* (1994), 71 Ohio St. 3d 369, 372-73, 643 N.E.2d 1129 (harmonizing and giving effect to both statutes where one statute “does not expressly exempt public utilities” from the other statute).

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—nothing in the Liquidation Act provides that

arbitration clauses do not apply to the Liquidator. On the contrary, the Liquidation Act explicitly recognizes that the Liquidator may be involved in proceedings in forums other than the Franklin County Court of Common Pleas: the 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, as the court of appeals held in 1990. *Fabe*, 68 Ohio App. 3d at 234. See also *Costle*, 839 F. Supp. at 275 (“other legal proceedings” in a liquidation order “include arbitration proceedings”); R.C. 2711.09 (referring to “an arbitration proceeding”); R.C. 2711.11 (same). In any event, arbitration clauses are enforced even when a statute provides that courts have exclusive jurisdiction over the claims, because an arbitration clause waives a judicial forum. *Shearson/American Express v. McMahon* (1987), 482 U.S. 220, 227-30, 107 S. Ct. 2332, 96 L. Ed. 2d 185.

Arbitration provisions must be enforced when, as in this instance, the other statute “does not preclude a waiver of judicial remedies.” *Academy of Medicine v. Aetna Health*, 108 Ohio St. 3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶ 17 (holding that the Valentine Act does not preclude arbitration); see also *McGuffey v. LensCrafters, Inc.* (2001), 141 Ohio App. 3d 44, 54, 749 N.E.2d 825 (rejecting the argument that R.C. 4123.90 “manifests a public policy disfavoring arbitration in retaliatory discharge actions”— “[t]he statute does not indicate an expressed public policy to preclude arbitration on such claims”). No provision in the Liquidation Act precludes arbitration.

Nor does the Arbitration Act exempt actions involving the Liquidator. Section 2711.01 “specifically lists five situations where arbitration, even though agreed to, will not be enforced. None of those exceptions applies to liquidation proceedings.” *Fabe*, 68 Ohio App. 3d at 232. See also *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") (affirming an order to arbitrate claims against E&Y).

In short, the court of appeals incorrectly concluded that the Liquidation Act "defeats any general attitude of the courts favoring arbitration." (App. 13-14 ¶ 19.) There is no provision in either the Liquidation Act or the Arbitration Act that precludes arbitration pursuant to a contract that the Liquidator did not disavow.<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. (App. 12 ¶ 16.) Indeed, its decision is based on a scarcely disguised hostility to arbitration. See App. 12-14, 16, 20-21 ¶¶ 16-20, 25, 33; see also *Hudson*, 2007-Ohio-6997, 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-

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<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) (emphasis added). No such grounds for revocation exist here, nor was there any revocation by the Liquidator. And the court of appeals did not rely upon this provision. Moreover, to revoke an arbitration clause under this provision, the basis for revocation must be a rule of law that applies to all contracts, not just arbitration clauses. Here, there is no general ground that exists for revoking this arbitration clause, and an anti-arbitration policy certainly does not provide such a ground. Citing nearly identical language in the analogous federal statute, the United States Supreme Court has held 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, 115 S. Ct. 834, 130 L. Ed. 2d 753.

1947, 865 N.E.2d 18, at ¶ 18. See also *Gerig*, 95 Ohio St. 3d 478, at ¶ 20 (“Ohio’s Arbitration Act, codified in R.C. Chapter 2711, ... embodies the public policy of supporting arbitration”); *Schaefer v. Allstate Ins.* (1992), 63 Ohio St. 3d 708, 711-12, 590 N.E.2d 1242 (noting “this court’s dedication to the strong public policy favoring arbitration” and “the favored status of the arbitration system of dispute resolution in this state”) (plurality opinion); *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”); *Lear v. Rusk Indus.*, 3d Dist. No. 5-02-26, 2002-Ohio-6599, 2002 WL 31716383, at ¶ 9 (“Our General Assembly also favors arbitration, as indicated by R.C. 2711.02”).

Arbitration “provides the parties with a relatively speedy and inexpensive method of 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. Ohio has long favored arbitration precisely because its “purpose” is “to avoid needless and expensive litigation.” *Springfield v. Walker* (1885), 42 Ohio St. 543, 546; accord *Harsco Corp. v. Crane Carrier* (1997), 122 Ohio App. 3d 406, 412, 701 N.E.2d 1040. See also *Dean Witter Reynolds, Inc. v. Byrd* (1985), 470 U.S. 213, 220, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (“the costliness and delays of litigation ... can be largely eliminated by agreements for arbitration”) (quoting a 1924 House Report); *Allied-Bruce*, 513 U.S. at 280 (arbitration “is usually cheaper and faster than litigation”) (quoting a 1982 House Report); *Stout v. Byrider* (N.D. Ohio 1999), 50 F. Supp. 2d 733, 737 (“Private arbitration offers potential real benefits to both parties in cost effective and quick resolution of disputes that may arise”), *aff’d* (6th Cir. 2000), 228 F.3d 709.

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. Given that arbitration proceedings are typically resolved much sooner than cases litigated in court, it makes no sense to create a presumption against arbitration—particularly a presumption that is contrary to the statutory language—when Ohio courts face crowded dockets and resources for the judiciary do not keep pace.

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.

The Liquidator is commanded 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.

**D. The Liquidator's Other Arguments To Avoid The Arbitration Clause Are Groundless.**

Unable to mount an effective argument based on the language of either the Arbitration Act or the Liquidation Act, the Liquidator has tried to fend off arbitration by asserting that the arbitration clause does not apply because the engagement letter was signed by ACLIC's parent company and that her claims are not related to the engagement letter. Neither contention is correct.

**1. ACLIC was a party to, and was bound by, the engagement letter.**

The Liquidator contends that "ACLIC was not a party to E&Y's engagement letter"; rather, it was signed by United Chambers, ACLIC's parent company, "on behalf of United Chambers." Mem. in Opp. to Jurisdiction at 4, 8. The Liquidator apparently believes that this means that ACLIC—and therefore she—is not bound by the arbitration provision in the engagement letter. This argument suffers from many flaws.

*First*, the Liquidator has waived any such argument. Her brief in the court of appeals (at 4-5, 12 n.5) noted that the engagement letter was signed by "United Chambers, American Chambers' parent." But she did not argue there that this made the slightest difference to the enforceability of the arbitration clause. Having abandoned any such argument in the court of appeals, she has waived the argument in this Court. See *State ex rel. VanCleave v. School Employees Ret. Sys.*, 120 Ohio St. 3d 261, 2008-Ohio-5377, 898 N.E.2d 33, at ¶ 29 ("VanCleave has waived her claim ... because she failed to raise this claim in the court of appeals"); *State ex rel. Brady v. Pianka*, 106 Ohio St. 3d 147, 2005-Ohio-4105, 832 N.E.2d 1202, at ¶ 14 ("Brady raises constitutional issues on appeal that she did not raise in the court of appeals, and thus she has waived them").

*Second*, the Liquidator ignores the actual language of the engagement letter. It provided

that E&Y would audit and report on the financial statements of both United Chambers and ACLIC, defined by the letter as “collectively, the Company.” (Supp. 1.) So ACLIC was a party to the engagement letter—it was included within the definition of the party contracting with E&Y (“the Company”). The Liquidator has never disputed that a corporate parent may sign an agreement on behalf of a subsidiary; one corporate party may sign an agreement on behalf of a related corporate party. *E.g.*, *Clute v. Ellis Hosp.* (1992), 184 A.D.2d 942, 945, 585 N.Y.S.2d 140, 143 (corporate parent entitled to contractual benefits because subsidiary acted on parent’s behalf when signing the contract); see *Master Consol. Corp. v. BancOhio Nat’l Bank* (1991), 61 Ohio St. 3d 570, 571-72, 574-77, 575 N.E.2d 817 (vice president of subsidiary had authority to direct lender to wire funds to parent corporation). We also note that although the letter was signed by Thomas Sawicz in his capacity as President of United Chambers, he was also President and CEO of ACLIC. (Supp. 4, 45.)

*Third*, the Liquidator’s own complaint admits that ACLIC was a party to the engagement letter: she stated that E&Y was “retained by ACLIC” (Supp. 30 ¶¶ 18-19) and “retained to conduct the audit of ACLIC’s December 31, 1998, Annual Statement” (Supp. 40 ¶ 50). She is bound by those admissions. “It is a well-settled rule, that parties are bound by their written admissions made in the progress of a cause as a substitute for proof of any material fact, and cannot repudiate them at pleasure.” *Peckham Iron Co. v. Harper* (1884), 41 Ohio St. 100, 105-06. An admission in a “pleading ... comes within the rule, and is binding as between parties to the suit, and in the same suit in which such admission is made.” *Id.* at 106. Accord, *e.g.*, *Gerrick v. Gorsuch* (1961), 172 Ohio St. 417, 178 N.E.2d 40, first paragraph of the syllabus (a defendant “is bound by” an admission in its answer, “and the plaintiff need not offer any evidence tending to prove such fact”); *Faxon Hills Constr. Co. v. United Brotherhood of Carpenters* (1958), 168 Ohio St. 8, 10, 151 N.E.2d 12 (“There should be no question that a distinct statement of fact

which is material and competent and which is contained in a pleading constitutes a judicial admission”). See also *Schott Motorcycle Supply v. American Honda* (1st Cir. 1992), 976 F.2d 58, 60-61 (holding that a plaintiff is bound by allegations in its complaint “that it was a party to the February 1985 Agreement”); *Ferguson v. Neighborhood Housing Servs.* (6th Cir. 1986), 780 F.2d 549, 550-51 (facts admitted in a pleading “are no longer at issue”).

*Fourth*, even if ACLIC had not been a party to the engagement letter, it was, at a minimum, a third-party beneficiary of the agreement to “audit and report on” ACLIC’s own financial statements. (Supp. 1.) A third-party beneficiary has “enforceable rights under a contract” when circumstances “indicate that the promisee intended to benefit the third party, and the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary.” *Anderson v. Olmsted Utility Equip.* (1991), 60 Ohio St. 3d 124, 130 & n.5, 573 N.E.2d 626 (holding that city workers were third-party beneficiaries because the contract referred to the city’s interest in “safety”). Third-party beneficiaries are bound by a contract’s arbitration provision. See *Fawn v. Heritage Mut. Ins.*, 10th Dist. No. 96APE12-1678, 1997 WL 359322, at \*2 (a third party seeking underinsurance benefits under an insurance policy is a third-party beneficiary who is bound by the policy’s arbitration clause); *Parsley v. Terminix Int’l* (S.D. Ohio 1998), 1998 WL 1572764, at \*7-9 (plaintiff must submit her claims to arbitration because she was an intended beneficiary of the contract containing the arbitration provision); *Composite Concepts v. Berkenhoff*, 12th Dist. No. CA2009-11-149, 2010-Ohio-2713, 2010 WL 2371991, at ¶ 19 (a third-party beneficiary of an agreement that benefited directly from the agreement is “estopped from denying the burdens of the agreement, including the obligation to submit any disputes ... to arbitration”). Because the engagement letter provides for an audit of ACLIC’s financial statements and it is undisputed that ACLIC was to be benefited by that audit report (it could not operate in Ohio with such a report), ACLIC—and therefore the Liquidator—would

certainly be a third-party beneficiary of the agreement if ACLIC were not an actual party to the agreement.

**2. The Liquidator's claims arise out of or relate to the services that E&Y provided pursuant to the engagement letter.**

The Liquidator also argues that the arbitration provision does not apply because the claims against E&Y “are not based on the engagement letter.” Mem. in Opp. to Jurisdiction at 5. Rather, the Liquidator asserts, the first claim against E&Y, for professional negligence, “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 [GAAS].’” *Id.* And the second claim, for the return of the fees paid to E&Y, is also supposedly “not based upon or dependent in any way upon the engagement letter.” *Id.* All of this is nonsense, which even the court of appeals did not accept.

*First*, the arbitration provision here is very broad: it applies to “[a]ny controversy or claim arising out of or relating to the services covered by this letter.” (Supp. 3, emphasis added.) As this Court has noted, “[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 Music*, 108 Ohio St. 3d 185, at ¶¶ 18-19 (noting that “creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision”). See also *Gerig*, 95 Ohio St. 3d 478, at ¶ 12 (describing a similar arbitration clause as “undeniably broad”); *Baker*, 2002-Ohio-5386, 2002 WL 31243491, at ¶ 39 (the scope of an agreement to arbitrate “‘any disputes or controversies that may arise’” is “extraordinarily broad”).

The broad arbitration clause here plainly covers the Liquidator’s claims, irrespective of whether they are based on a contract or common law. As the court of appeals noted, E&Y’s auditing services for ACLIC were provided “pursuant to [the] engagement letter.” (App. 5 ¶ 3.)

And the claims here undoubtedly “relat[e] to” (Supp. 3) those services: the complaint alleges that E&Y “failed to properly audit ACLIC’s financial statements” and “negligently failed to perform its duties” as auditor. (Supp. 29, 40 ¶¶ 14, 50.) See *Pennzoil Exploration & Prod. v. Ramco Energy* (5th Cir. 1998), 139 F.3d 1061, 1068 (under an agreement to arbitrate any claims that “relate to” a contract, “it is only necessary that the dispute ‘touch’ matters covered by the [contract] to be arbitrable”); *Parsley*, 1998 WL 1572764, at \*6 (an agreement to arbitrate claims “relating to” a contract “encompass[es] all claims, contractual or tort, touching on the contract”); *Griffin*, 250 B.R. at 671, 672 (an agreement to arbitrate “‘differences concerning [the auditor’s] services’” applies to “allegations that Checkers’ audit failed to produce the desired results”).

Indeed, if the Liquidator’s claims do not relate to the auditing services E&Y provided pursuant to the engagement letter, then those claims are not covered by the parties’ May 2002 Tolling Agreement, which gave the Liquidator an additional year to file claims “arising out of accounting or auditing services provided by E&Y to ACLIC” (Supp. 6 ¶ 1). Even assuming the claims would have been timely if filed in May 2002, the failure to include them in the Tolling Agreement would mean that the Liquidator’s claims are untimely, because any claims not arising out of or relating to the engagement letter are time-barred.

*Second*, the complaint here alleges the contractual nature of ACLIC’s relationship with E&Y. See Supp. 30 ¶¶ 18-19 (E&Y was “retained by ACLIC”); Supp. 40 ¶ 50 (E&Y was “retained to conduct the audit of ACLIC[.]”). It also alleges, in a paragraph that does not mention duties created by Ohio law, that E&Y “failed to properly audit ACLIC’s financial statements for the year ending December 31, 1998, in accordance with generally accepted auditing standards, and failed to detect material misstatements in those financial statements.” (Supp. 29 ¶ 14.) As explained earlier (at 21), the Liquidator is bound by these admissions in her complaint.

Moreover, an audit report for a client always states “whether [the] audit has been made in accordance with generally accepted auditing standards.” AICPA, Codification of Statements on Auditing Standards § 110.01 (2009). The fact that an insurance regulation *also* requires compliance with GAAS (OAC § 3901-1-50(H)) does not change the nature of the auditor’s duties. Put differently, even if an auditor has an obligation to comply with applicable law when the auditor agrees to be the auditor for a client, that obligation exists only as a result of *agreeing* to be that auditor. Further, the engagement letter itself refers to Ohio regulations: it states that E&Y will express an opinion on ACLIC’s financial statements “in conformity with generally accepted accounting principles or those prescribed or permitted by the Ohio Insurance Department, respectively.” (Supp. 1.) So the Liquidator’s contention that “E&Y’s failure to perform duties imposed by Ohio law” is “not based upon or dependent in any way upon the engagement letter” (Mem. in Opp. to Jurisdiction at 5) is simply wrong.

*Third*, the claim against E&Y to return the amounts paid to it for “services rendered to ACLIC” or “to entities related to ACLIC” (Supp. 40 ¶ 53) is also related to the engagement letter: it seeks the return of fees paid pursuant to the engagement letter, which estimated that E&Y’s audit fees would be about \$46,000. (Supp. 2.)

\* \* \*

In sum, for all of the reasons discussed above (at 7-25), the Liquidator is bound by the arbitration provision in the engagement letter, an agreement that she admittedly did not disavow.

**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.**<sup>3</sup>

The Final Order of Liquidation for ACLIC was issued on May 8, 2000. (Supp. 25.) The Liquidator had two years from that date to file any suits on behalf of ACLIC. R.C. 3903.24(B).

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<sup>3</sup> The Court need not reach this issue if it agrees with E&Y’s first proposition of law.

Six days before the limitations period expired, the Liquidator and E&Y signed a Tolling Agreement. (Supp. 6-7.) E&Y agreed to toll the statute of limitations for one year on any claims the Liquidator might assert “arising out of accounting or auditing services provided by E&Y to ACLIC” or arising out of transfers of money from ACLIC to E&Y. (Supp. 6 ¶ 1.) E&Y agreed that any suit filed by the Liquidator during the extra one-year period would not be deemed time-barred if it were not time-barred on the effective date of the Tolling Agreement. (*Id.* ¶ 3.) For her part, the Liquidator—in exchange for obtaining an additional year to file suit—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. (*Id.* ¶ 5, emphasis added.) In contrast to the engagement letter, there is no dispute that the Liquidator herself signed the Tolling Agreement and is bound by its terms.

The court of appeals badly misread the Tolling Agreement. The court 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,” and thus, “the matter was subject to the law as set forth in *Pipoly*, not *Fabe*.” (App. 23 ¶ 38, emphasis added.)

This makes no sense. The Tolling Agreement covers “all defenses,” not just “affirmative defenses.” Regardless of whether arbitration is an affirmative defense, it is clearly a defense—if arbitration is required, the court will not adjudicate a plaintiff’s claims. See *Baker*, 2002-Ohio-5386, 2002 WL 31243491, at ¶ 23 (the “right of arbitration was a meritorious defense in law to the [plaintiffs’] claims for relief”). 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”).

What is more, the court of appeals did not dispute that if arbitration is an affirmative defense, then the Tolling Agreement requires arbitration: the court held that “the matter was subject to the law as set forth in *Pipoly*, not *Fabe*,” only because “the ‘right to arbitration’ is not an affirmative defense.” (App. 23 ¶ 38, emphasis added.) But the right to arbitration *is* an affirmative defense, as the vast majority of Ohio cases (not cited by the court of appeals) recognize. See, e.g., *Church v. Fleishour Homes*, 172 Ohio App. 3d 205, 2007-Ohio-1806, 874 N.E.2d 795, at ¶ 82; *McGuffey*, 141 Ohio App. 3d at 51; *Harsco*, 122 Ohio App. 3d at 414; *Rossetti v. OM Fin. Life Ins.*, 5th Dist. No. 2008 CA 00083, 2008-Ohio-5889, 2008 WL 4885672, at ¶¶ 9-15; *Robbins v. Country Club Ret. Ctr.*, 7th Dist. No. 04 BE 43, 2005-Ohio-1338, 2005 WL 678765, at ¶ 71; *Middletown Innkeepers v. Spectrum Interiors*, 12th Dist. No. CA2004-01-020, 2004-Ohio-5649, 2004 WL 2380983, at ¶¶ 16-19; *Hilton v. Mill Rd. Constr.*, 1st Dist. No. C-030200, 2003-Ohio-7107, 2003 WL 23018579, at ¶ 11; *K.M.P., Inc. v. Ohio Historical Soc’y*, 4th Dist. No. 03CA2, 2003-Ohio-4443, 2003 WL 21995291, at ¶¶ 6, 16; *North Shore Auto Fin. v. Block*, 8th Dist. No. 82226, 2003-Ohio-3964, 2003 WL 21714583, at ¶ 20; *Atkinson v. Dick Masheter Leasing*, 10th Dist. No. 01AP-1016, 2002-Ohio-4299, 2002 WL 1934743, at ¶ 23. These cases are consistent with the definition of an affirmative defense: “[a] response to a plaintiff’s claim which attacks the plaintiff’s legal right to bring an action, as opposed to attacking the truth of [the] claim.” *State v. Grays*, 8th Dist. No. 79484, 2001-Ohio-4251, 2001 WL 1671161, at \*4 n.1.

The court of appeals did not mention this long line of precedent. Instead, it cited two cases going the other way on arbitration’s status as an affirmative defense, which the Liquidator did not cite—the only two such Ohio cases we are aware of and contrary to the definition of an affirmative defense under Ohio law. And even those cases do not dispute that arbitration is a defense. See *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. Indeed, we do not know of any other Ohio case holding that an arbitration clause is not a defense to a lawsuit—the court of appeals’ decision stands alone on this issue.

Either way—whether as a defense or an affirmative defense—a defense of arbitration clearly existed as of the effective date of the Tolling Agreement, May 2, 2002. As of that date, Ohio law required the Liquidator 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 engagement letter provided, all claims “arising out of or relating to the services covered by this letter.” (Supp. 3.) As already discussed, there can be no serious dispute that the claims here fall within this undeniably broad arbitration provision. It does not matter that the court of appeals in *Pipoly* later—and as we have shown, erroneously—purported to change 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”). See also *Eastwood Local School Dist. v. Eastwood Educ. Ass’n*, 172 Ohio App. 3d 423, 2007-Ohio-3563, 875 N.E.2d 139, at ¶ 27 (“Except where a contrary intent is evident, the parties to a contract are deemed to have contracted with reference to existing law”). 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 (ruling that a later Supreme Court decision that held a subrogation statute unconstitutional does not apply to a settlement agreement involving subrogation rights 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. 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. Arbitration was a key component in the engagement letter that E&Y had with ACLIC—it was the subject of a specific provision in the letter—and E&Y did not want to lose an arbitration forum. In the end, the Liquidator wants to have it both ways: keep the benefits of extending the limitations period, but deprive E&Y of a defense that existed at the time of the Tolling Agreement. This is fundamentally unfair: it would permit the Liquidator to take *all* of the extra time provided in the tolling agreement and assert *all* of her claims against E&Y, but would allow E&Y to assert only *some* of the defenses available to it at the time of the Tolling Agreement. The Liquidator should not be allowed to take advantage of the sole benefit conferred upon her by the agreement (extra time) while denying E&Y the sole benefit it obtained from the agreement (the ability to assert “all defenses,” including the arbitration defense, that existed on May 2, 2002). There is no reason why the Liquidator should not be bound by her own contract. Any other result would provide the Liquidator with unfettered power—of the heads-I-win, tails-you-lose variety—that has no basis in Ohio law.

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.<sup>4</sup>

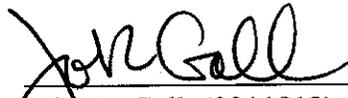
**CONCLUSION**

This Court should reverse the judgment of the court of appeals and enter an order requiring the court of appeals to remand this case to the trial court with instructions to grant E&Y’s motion to compel arbitration.

January 10, 2011

Respectfully submitted,

Stanley J. Parzen  
James C. Schroeder  
Mayer Brown LLP  
71 South Wacker Drive  
Chicago, Illinois 60606  
(312) 782-0600  
(312) 701-7711  
sparzen@mayerbrown.com  
jschroeder@mayerbrown.com

  
\_\_\_\_\_  
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)  
john.gall@ssd.com

*Attorneys for Defendant-Appellant  
Ernst & Young LLP*

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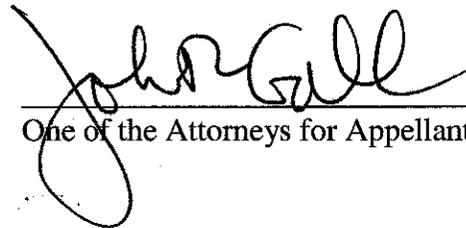
<sup>4</sup> The Liquidator wrongly suggests that E&Y argued in the court of appeals that arbitration was only an affirmative defense. See Mem. in Opp. to Jurisdiction at 12-13. Not so. E&Y’s principal point there was simply that “arbitration is considered a ‘defense’ under Ohio law.” E&Y Ct. App. Br. at 10. E&Y’s briefs referred repeatedly to the “defense of arbitration” and stated that arbitration was a “defense” without limiting it to affirmative defenses. See *id.* at 1, 2, 5, 8, 11, 13, 14, 17; E&Y Ct. App. Reply at 1, 2, 3, 4, 6, 8 n.3. Indeed, as E&Y’s reply brief noted (at 2), “[t]he Liquidator does not contest that arbitration is a defense.” For example, the Liquidator’s brief in the court of appeals argued (at 7-8) that what “the Tolling Agreement did was ensure that the parties did not lose their ability ... to ‘assert’ defenses to each other’s claims, solely because of the passage of as much as a year’s time ... Thus, while E&Y did not lose its right, because of the passage of time, to *assert* that the Liquidator’s claims should be arbitrated, the Liquidator did not lose *her* right, because of the passage of time, to argue that the claims should *not be* arbitrated.”

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of Appellant Ernst & Young LLP has been served upon the following by U.S. Mail, postage prepaid, this 10th day of January, 2011:

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

## **APPENDIX**

IN THE SUPREME COURT OF OHIO

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.

On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District

10-1324

Court of Appeals  
Case No. 09AP-949

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NOTICE OF APPEAL OF APPELLANT  
ERNST & YOUNG LLP

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Richard Cordray  
Attorney General of Ohio  
By: Outside Counsel  
Melvin D. Weinstein (0012174) (Counsel of  
Record)  
R. Kevin Kerns (0021781)  
Jennifer L. Mackanos (0075059)  
Richard W. Schuermann, Jr. (0032546)  
KEGLER BROWN HILL &  
RITTER CO., LPA  
65 East State Street, Suite 1800  
Columbus, Ohio 43215  
(614) 462-5400  
(614) 464-2634 (facsimile)  
[mweinstein@keglerbrown.com](mailto:mweinstein@keglerbrown.com)

*Attorneys for Plaintiff-Appellee*

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](mailto:jgall@ssd.com)

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

*Attorneys for Defendant-Appellant  
Ernst & Young LLP*

FILED

JUL 29 2010

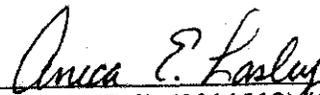
CLERK OF COURT  
SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF APPELLANT ERNST & YOUNG LLP**

Appellant Ernst & Young LLP hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 09AP-949 on June 15, 2010.

This case is one of public and great general interest.

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](mailto:jgall@ssd.com)

Stanley J. Parzen

MAYER BROWN LLP

71 South Wacker Drive

Chicago, Illinois 60606

*Attorneys for Defendant-Appellant*

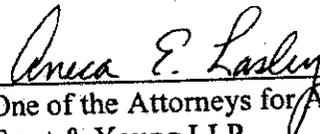
*Ernst & Young LLP*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal 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  
Ernst & Young LLP

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Hudson, Supt.,

Appellee,

v.

Ernst & Young, L.L.P.,

Appellant, et al.

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

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D E C I S I O N

Rendered on June 15, 2010

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Richard Cordray, Attorney General; Kegler Brown Hill & Ritter Co., L.P.A., Melvin D. Weinstein, R. Kevin Kerns, Jennifer L. Mackanos, and Richard W. Schuermann Jr., for appellee.

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

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, Judge.

{¶1} Defendant-appellant, Ernst & Young, L.L.P., 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.

{¶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, which provided 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. 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]." 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]." 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]." The parties further agreed 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

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<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.

but not limited to the statute of limitations." 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."

{¶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. 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

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<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."

{¶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 money from the reinsurers that was 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.

{¶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 money the liquidator might recover in its action against the reinsurers was not part of the liquidation estate until the dispute was

resolved, that money was not an asset 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.*, 68 Ohio App.3d 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 that 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 affect the amount of money appellee would have to pay American Chambers' creditors, arbitration of the claim would not prejudice 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 that 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 prejudiced. 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 the clauses 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*, 155 Ohio App.3d 171, 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 nonexclusive 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, therefore, where a party resisting arbitration is not a signatory to a written agreement to arbitrate, a presumption against arbitration arises. Id., 155 Ohio App.3d 171, 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 insure, 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.*, 155 Ohio App.3d 171, 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 without assent to arbitrate by 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.*, 155 Ohio App.3d 171, at ¶42.

{¶20} In so holding, we expressly overruled *Fabe*, 68 Ohio App.3d 226, 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 *a/ways* interfere with the liquidator's powers and will *a/ways* adversely affect the insolvent insurer's assets." (Emphasis sic.) *Id.*, 155 Ohio App.3d 171, at ¶45.

{¶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 Fin. Servs., Inc.*, 10th Dist. No. 06AP-1284, 2007-Ohio-6997. In that case, this court considered whether R.C. 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 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 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's 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." *Hudson*, 2007-Ohio-6997, 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 letter, 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 preliquidation 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 *Hudson 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 of error, all six reduce 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*, 2007-Ohio-6997, 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*, 68 Ohio App.3d 226, which, as noted above, held that the liquidator of an insolvent insurance company is bound by preappointment contractual obligations of the insurer, including binding-arbitration provisions contained within those contractual obligations, the negligence claim appellee that asserted against appellant was subject to the arbitration clause in the preappointment 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 preappointment contractual obligations of the insurer. We went on to note in *Pipoly*, however, that a liquidator could be bound by preappointment 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 that 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 preappointment 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 preappointment 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.* (March 29, 2002), 11th Dist. No. 2001-L-055, 2002 WL 479992,, citing *Mabrey v. Victory Basement Waterproofing* (1993), 92 Ohio App.3d 8.

{¶36} Civ.R. 8(C) sets forth a nonexhaustive 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 uses the phrase "arbitration and award" and not the single 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 single 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." (Emphasis added.) Id. at ¶23, 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. Thus, 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 preappointment 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 preappointment 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.

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COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

FILED  
COMMON PLEAS COURT  
SEP 10 AM 9:23  
CLERK OF COURTS

Ann H. Womer Benjamin, etc. :  
Plaintiff, : CASE NO. 03 CVH 04-4906  
-vs- : JUDGE FAIS  
Ernst & Young, LLP, *et al.*, :  
Defendants. :

**DECISION AND ENTRY DENYING DEFENDANT ERNST & YOUNG'S  
MOTION TO DISMISS, OR IN THE ALTERNATIVE,  
TO STAY AND TO COMPEL ARBITRATION**

Rendered this 9<sup>th</sup> day of September, 2009

FAIS, J.

**I. INTRODUCTION**

This matter is before the Court pursuant to Defendant Ernst & Young's ("Defendant") Motion to Dismiss, or in the Alternative, to Stay and to Compel Arbitration, filed July 14, 2003. On August 19, 2003, Plaintiff Ann H. Womer Benjamin, Ohio Superintendent of Insurance, in her capacity as Liquidator of American Chambers Life Insurance Company ("Plaintiff"), filed a Memorandum in Opposition. On September 19, 2003, Defendant filed a Reply. On September 30, 2003, Plaintiff filed a Surreply. On October 22, 2003, Defendant filed a Response to Plaintiff's Surreply.

On October 27, 2003, Plaintiff filed a Notice of Additional Authority, therein notifying the Court of the Tenth District Court of Appeals' decision issued in *Benjamin v. Pipoly* (Oct. 23, 2003), Franklin Cty. App. No. 03APP-21, unreported. On November 7, 2003, Defendant filed a Response to Plaintiff's Notice of Additional Authority.

On September 28, 2006, Plaintiff filed a second Notice of Additional Authority, therein notifying the Court of the Franklin County Court of Common Pleas' decision in *Benjamin v. John Hancock Financial Services, Inc., et al* (Sept. 20, 2006), Case No. 04CVH-01-1143. On November 6, 2006, Defendant filed a Response to Plaintiff's September 28, 2006, Notice of Additional Authority, advising the Court that on October 18, 2006, the Court in *Hancock* entered an order vacating its decision.

On January 16, 2008, Plaintiff filed a third Notice of Additional Authority to inform the Court of the Tenth District Court of Appeals' decision in *Benjamin v. John Hancock Financial Services, Inc., et al.* (Dec. 27, 2007), Case No. 06AP-1284, wherein the Court affirmed the September 20, 2006, Decision and Entry of the Franklin County Court of Common Pleas in *Benjamin v. John Hancock Financial Services, Inc., et al.*, Case No. 04CVH-01-1143.

On February 20, 2008, Defendant filed a Submission on the Court of Appeals' Decision in *Benjamin v. John Hancock Financial Services, et al.* On March 10, 2008, Plaintiff filed a Memorandum in Response to Defendant's Submission.

## II. FACTS

On April 30, 2003, Plaintiff filed its Complaint against Defendant based upon Defendant's alleged negligent performance of its duties as the independent certified public accountant retained to conduct the audit of American Chambers Life Insurance Company's ("ACLIC") December 31, 1998, Annual Statement, as well as alleged preferential transfers.<sup>1</sup>

## III. LAW AND ANALYSIS

Defendant filed the instant Motion to Dismiss or Compel Arbitration based upon the argument that Plaintiff's claims are not properly before this Court because Plaintiff, as

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<sup>1</sup> The Complaint also includes additional claims against Defendants Foley & Lardner and Michael H. Woolever which are not the subject of Defendant's instant Motion.

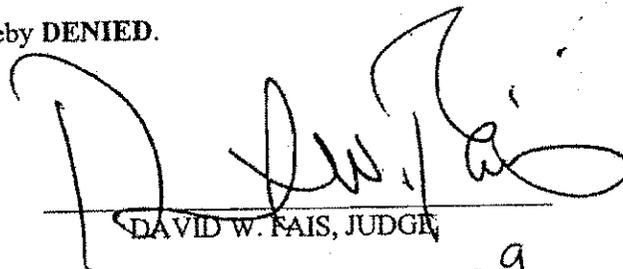
Liquidator, is bound by the agreement ACLIC made with Defendant to submit any disputes arising out of Defendant's engagement to mediation and, if then necessary, binding arbitration. Conversely, Plaintiff contends as Liquidator of an insolvent insurance company, Plaintiff is not precluded by arbitration provisions contained in the engagement agreement executed between Defendant and ACLIC.

The Court concurs with Defendant's position that courts should rigorously enforce arbitration agreements. *Bratt Enterprises v. Noble Int'l, LTD* (2000), 99 F. Supp. 2d 874; *Shearson/American Express, Inc. v. McMahon* (1987), 482 U.S. 220; *Dipietro v. Ginther*, 2002 Ohio 4772; *Southland Corp. v. Keating* (1984), 465 U.S. 1. However, the Court is persuaded by the decisions in *Benjamin v. Pipoly* (2003), 155 Ohio App.3d 171, 2003-Ohio-5666, and *Benjamin v. John Hancock Financial Services, et al.*, 10<sup>th</sup> Dist. No. 06AP-1284, 2007-Ohio-6997, where the Tenth District Court of Appeals held that the Superintendent of the Ohio Department of Insurance, as Liquidator of insolvent insurance companies, cannot be compelled to arbitrate. The Court agrees with Plaintiff that the facts in *Pipoly* and *Hancock* are directly on point; thus, Plaintiff, as Liquidator of ACLIC, cannot be compelled to arbitrate the present claims against Defendant.

#### IV. CONCLUSION

Based upon the foregoing, Defendant's Motion to Dismiss, or in the Alternative, to Stay and to Compel Arbitration, is hereby DENIED.

IT IS SO ORDERED.

  
\_\_\_\_\_  
DAVID W. FAIS, JUDGE

9-9-09

## RELEVANT STATUTES

### R.C. 2711.01(A):

A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

### R.C. 3903.21(A)(11), (12):

(A) The liquidator may do any of the following:

...

(11) Enter into such contracts as are necessary to carry out the order to liquidate, and to affirm or disavow any contracts to which the insurer is a party;

(12) Continue to prosecute and to commence in the name of the insurer or in his own name any and all suits and other legal proceedings, in this state or elsewhere, and to abandon the prosecution of claims he considers unprofitable to pursue further. If the insurer is dissolved under section 3903.20 of the Revised Code, he shall have the power to apply to any court in this state or elsewhere for leave to substitute himself for the insurer as plaintiff.

### R.C. 3903.41(A)(2):

(A) The value of any security held by a secured creditor shall be determined in one of the following ways, as the court may direct:

...

(2) By agreement, arbitration, compromise, or litigation between the creditor and the liquidator.