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In the
Supreme Court of Ohio

MARY TAYLOR, Superintendent of the Ohio Department of Insurance, in her capacity as Liquidator of the American Chambers Life Insurance Company,	:	Case No. 2010-1324
Plaintiff-Appellee,	:	On Appeal from the Tenth District Court of Appeals
v.	:	Court of Appeals Case No. 09AP-949
ERNST & YOUNG LLP,	:	
Defendant-Appellant.	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE
MARY TAYLOR, SUPERINTENDENT OF OHIO DEPARTMENT OF INSURANCE

JOHN R. GALL* (0011813)
Counsel of Record
ANECA E. LASLEY (0072366)
Squire Sanders & Dempsey (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
614-365-2700
614-365-2499 fax
jgall@ssd.com

STANLEY J. PARZEN
JAMES C. SCHROEDER
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606

Counsel for Defendant-Appellant
Ernst & Young LLP

MICHAEL DEWINE (0009181)
Attorney General of Ohio
ALEXANDRA T. SCHIMMER* (0075732)
Chief Deputy Solicitor General
Counsel of Record
STEPHEN P. CARNEY (0063460)
Deputy Solicitor
THADDEUS H. DRISCOLL (0083962)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Plaintiff-Appellee
Mary Taylor, Superintendent of Ohio
Department of Insurance, as Liquidator

MELVIN D. WEINSTEIN (0012174)
Kegler Brown Hill & Ritter Co., LPA
65 E. State Street, Suite 1800
Columbus, Ohio 43215
614-462-5400; 614-464-2634 fax

Special Counsel for Plaintiff-Appellee
Mary Taylor, Superintendent of Ohio
Department of Insurance, as Liquidator

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INTRODUCTION

This case pits the integrity of Ohio's system for liquidation of failed insurance companies, which is designed as a public-protection process in open court, against a party's demand to send a dispute to private arbitration. Ohio's comprehensive system for liquidating insurers (the "Liquidation Act," R.C. Chapter 3903) directs the Superintendent of the Ohio Department of Insurance, in her capacity as a court-appointed Liquidator,[1] to secure an insurer's assets and resolve its liabilities under the guidance of one forum, the Franklin County Common Pleas Court. Here, she seeks to do just that, as she is in the midst of liquidating the assets of American Chambers Life Insurance Company ("ACLIC"). She seeks to recover from ACLIC's former auditor, Defendant-Appellant Ernst & Young, LLP ("E&Y"), based on claims that E&Y violated Ohio law in the audits it conducted before ACLIC was liquidated, and that E&Y received preferential payments from ACLIC before the liquidation. The Liquidation Act provides for both claims to be brought in the Franklin County Common Pleas Court. But E&Y insists that the Superintendent's claims must be sent to arbitration, because E&Y's engagement letter for the ACLIC audit included a mandatory arbitration clause, and E&Y insists that the clause binds the Superintendent as ACLIC's purported successor. The Superintendent urges the Court to hold, as the appeals court did, that the Liquidation Act precludes enforcement of a pre-insolvency private arbitration agreement against the Superintendent.

The Liquidation Act is a specific, detailed system for administering insurance company liquidations and any related claims, so to the extent that it conflicts with Ohio's general policy favoring arbitration, the Liquidation Act governs. Indeed, on its own terms, Ohio's Arbitration

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[1] Ohio's current Superintendent of Insurance, and thus the Liquidator and the Plaintiff-Appellee here, is Lt. Gov. Mary Taylor. On January 10, 2011, she replaced Superintendent Mary Jo Hudson, who was the named Appellee when E&Y appealed to this Court.

Act does not apply where other laws trigger non-enforcement, and the Liquidation Act is such a law.

Also, the Arbitration Act, under this Court's precedent, does not bind non-signatories to an arbitration clause, and the Superintendent did not sign the engagement letter containing the clause at issue. E&Y's attempt to bind the Superintendent, by portraying her as ACLIC's successor in interest or as "standing in the shoes" of ACLIC, fails because it fundamentally misapprehends the nature of the Superintendent's role in a liquidation. The Superintendent, when acting as a Liquidator, serves in a distinct legal capacity pursuant to the Liquidation Act and the Liquidation Order appointing her to serve in that capacity. She does not "stand in the shoes" of a failed insurer, or its former management or current shareholders, for all purposes. While she does succeed to the failed insurer's interests in certain respects, by taking over its assets and liabilities, she acts with a completely different statutory purpose, and she deploys unique statutory tools to meet that purpose. The Liquidation Act directs her to protect the creditors and the general public, including policyholders and claimants of all types, and she does so to the exclusion of any consideration of the company or shareholders' interests.

Moreover, the Liquidation Act is premised on having a centralized system for resolving liquidations and related claims against, or by, the failed insurer. The Liquidation Act provides that the liquidation itself can be brought *only* in the Franklin County Common Pleas Court, and all claims against the estate of the liquidated insurer must be brought there. The statute also authorizes the Superintendent to bring claims against others, to bolster the estate's assets, in the same court. Allowing those claims to be re-routed to private arbitration undercuts the Liquidation Act's comprehensive framework. That is especially so when the Superintendent and another party have claims against each other, as such opposing claims must be setoff—but that does not work if the claim against the Superintendent is in the liquidation court, as it must be, while her opposing claim is heard elsewhere. Any conflict must be resolved in favor of the Liquidation Act, which is both later enacted and more specific than the general Arbitration Act.

Finally, the Court should also reject E&Y's backup argument, which asserts that a tolling agreement between E&Y and the Superintendent entitles E&Y to compel the Superintendent to arbitrate. E&Y says that the agreement froze in time, as binding law, a Tenth District decision that allowed such arbitration in liquidation. E&Y is wrong for several reasons, primarily because preserving a defense merely ensures the right to *raise* the defense, not a right to succeed on it.

For these and other reasons below, the Court should affirm the appeals court. It should reject E&Y's attempt to chip away at Ohio's Liquidation Act, and it should hold that the Superintendent is not bound by an arbitration clause contained in a party's pre-insolvency agreement with a failed insurer.

STATEMENT OF THE CASE AND FACTS

A. E&Y provided auditing services to ACLIC pursuant to an engagement letter that included a mandatory arbitration clause, and ACLIC entered liquidation.

E&Y agreed to provide auditing services to ACLIC, an insurance company, for the year ending December 31, 1998. *Hudson v. Ernst & Young, L.L.P.* (10th Dist.) ("App. Op."), 189 Ohio App. 3d 60, 2010-Ohio-2731, ¶ 2. E&Y's services to ACLIC and to ACLIC's parent company were provided pursuant to an engagement letter issued to, and signed by, the parent. *Id.* at ¶ 3; Engagement Letter of Nov. 30, 1998, E&Y Supplement ("Supp.") at S-1-S-5.

The engagement letter contained a mandatory arbitration clause, stating that "[a]ny controversy or claim arising out of or relating to the services covered by this letter shall be submitted first to voluntary mediation, and if mediation is not successful, then to binding arbitration" in conformance with an attached enclosure. Supp. at S-3. In addition, the engagement letter contained a severability clause, which stated that "if any portion of the [engagement letter] is held to be void, invalid, or otherwise unenforceable, in whole or part, the remaining portions of [the letter] shall remain in effect." *Id.*

On February 25, 1999, E&Y submitted a report to the Ohio Department of Insurance ("ODI") certifying that it had audited ACLIC's financial statements fairly and in accordance with generally accepted auditing standards. App. Op. at ¶ 2. Soon after, ACLIC became insolvent.

In March 2000, the Superintendent filed an action in the Franklin County Court of Common Pleas, seeking at first to place ACLIC in rehabilitation. *Id.* at ¶ 4. Eventually, the trial court found that ACLIC was insolvent, and it issued a Final Order of Liquidation ("Liquidation Order") in May 2000. *Id.*; Supp. at S-8. The Order appointed the Superintendent as ACLIC's Liquidator, and empowered the Superintendent to exercise the various powers outlined in the

Liquidation Act, such as the power to "enter into such contracts as are necessary to carry out this Order to Liquidate, and to affirm or disavow any contract to which [ACLIC] is a party." Supp. at S-10, S-14. The Superintendent proceeded to liquidate ACLIC. App. Op. at ¶ 5.

B. The Superintendent and E&Y signed a tolling agreement to extend the time for either to file claims against the other, and the Superintendent later sued E&Y in the Franklin County Court of Common Pleas.

The Superintendent was interested in pursuing claims against E&Y, based on professional negligence and violations of Ohio law regarding auditing standards, and based on payments that E&Y received from ACLIC after ACLIC became financially insolvent but before ACLIC entered liquidation. Before the Superintendent sued, she and E&Y entered into a tolling agreement in May 2002. App. Op. at ¶ 5; Supp. at S-6-S-7. The agreement tolled for one year the statute of limitations for claims that either party had against the other. Specifically, it tolled the Superintendent's time for filing claims "arising out of accounting or auditing services provided by E&Y to ACLIC" or "arising out of transfers of monies or other property from ACLIC to E&Y." *Id.* at S-6. Inversely, it extended E&Y's time for any claims it had against the Superintendent, based on any claims that E&Y would have had against ACLIC.

The tolling agreement also preserved each party's right to raise any defenses that it would have had as of the date of the tolling agreement. It provided that E&Y "may otherwise assert, as defenses to any lawsuit or claim the Liquidator [i.e., the Superintendent] 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.*; App. Op. at ¶ 5. The agreement likewise preserved the Superintendent's defenses. Agreement, Supp. at S-6.

In April 2003, the Superintendent sued E&Y (along with other parties that are not part of this appeal) in the Franklin County Court of Common Pleas, alleging various violations of Ohio law. App. Op. at ¶ 6; Supp. at S-26-42. Specifically, the Superintendent alleged that E&Y failed to perform its duties as mandated by Ohio law, made false representations to ODI, and received preferential and/or fraudulent payments. App. Op. at ¶ 6; Compl., Supp. at S-26-S-42.

C. E&Y sought to transfer the dispute to arbitration, but both the trial court and the appeals court held that the Liquidation Act precluded enforcement of the arbitration clause against the Superintendent.

In response to the Superintendent's suit, E&Y sought to transfer the dispute to arbitration. Specifically, it moved to dismiss the complaint on that basis, or to stay the case and compel the Superintendent to arbitrate. *Id.* at ¶ 7. The trial court denied E&Y's motion in September 2009. See Order of Sept. 10, 2009, Appx. at A-24-A-26. The trial court relied on a 2003 decision by the Tenth District Court of Appeals, *Benjamin v. Pipoly* (10th Dist.), 155 Ohio App. 3d 171, 2003-Ohio-5666, which had overruled an earlier Tenth District decision, *Fabe v. Columbus Insurance Company* (10th Dist. 1990), 68 Ohio App. 3d 226, 236. In *Fabe,* the appeals court had allowed some pre-insolvency arbitration agreements to be enforced against the Superintendent in liquidation proceedings, but left it to the trial court's discretion to determine if the particular arbitration would threaten the liquidation process. *Id.* In *Pipoly,* the court held instead that pre-insolvency arbitration agreements signed by insurers were not enforceable against the Superintendent in liquidation. *Id.* at ¶ 43. The *Pipoly* court reasoned that the Liquidation Act's purpose of centralizing claims precluded sending such claims to arbitration, and it also explained that the Superintendent, as a non-signatory to an arbitration clause, was not bound by the insurer's agreement. *Id.*

On appeal, E&Y recognized that *Pipoly* was the controlling case law in the Tenth District, but reserved the right to later challenge (as it does now) whether *Pipoly* was correct. See E&Y Apt. Br. at 2 n.1. That reservation aside, E&Y sought mainly to distinguish *Pipoly,* arguing that the tolling agreement changed the result here. E&Y argued that the tolling agreement, which was signed when *Fabe* controlled in the Tenth District, grandfathered in a right to enforce arbitration. Specifically, E&Y said that the agreement, by preserving all defenses available at the time of the agreement, preserved its defense of dismissal in favor of arbitration.

The Tenth District affirmed. The appeals court restated *Pipoly*'s reasoning that the Liquidation Act, and the Superintendent's broad power under the Act, supplanted the general policy favoring arbitration. *Id.* at ¶¶ 13-20. It also noted that it had followed *Pipoly* in a subsequent decision. *Id.* at ¶¶ 21-25 (citing *Benjamin v. John Hancock Financial Services, et al.*, 10th Dist. No. 06AP-1284, 2007-Ohio-6997, ¶ 23). The court also rejected E&Y's argument regarding the tolling agreement. App. Op. at ¶¶ 34-38.

E&Y appealed to this Court, which accepted jurisdiction. See Order of Oct. 27, 2010.

ARGUMENT

The Court should hold that Ohio's Liquidation Act governs, not Ohio's Arbitration Act, and that the Liquidation Act does not permit the Superintendent to be bound by an insurer's pre-insolvency agreement. The Liquidation Act conflicts with compelling arbitration because the Act authorizes the Superintendent to resolve liquidation and ancillary disputes in one centralized forum—the Franklin County Court of Common Pleas. The Liquidation Act's specific, centralized system for resolving disputes in one court trumps the general preference for arbitration. Further, when the Superintendent acts as a Liquidator, she serves a public purpose on behalf of claimants and exercises statutory powers to meet that purpose. Thus, although she takes over the failed insurer's assets and liabilities, she does not "stand in the shoes" of the insurer for procedural and jurisdictional purposes, so she does not inherit the insurer's commitments on such matters.

The Court should also hold that the tolling agreement does not require arbitration here, as such agreements merely preserve the right to *raise* defenses, not the right to succeed on a defense. And tolling agreements do not freeze case law as of the date of agreement, displacing all later legal developments.

For these and other reasons below, the Court should affirm the lower courts' denial of E&Y's motion to compel arbitration, and should allow this dispute to be resolved in the Franklin County Court of Common Pleas, as the Liquidation Act provides.

Plaintiff-Appellee Superintendent's Proposition of Law No. 1:

The Superintendent of the Ohio Department of Insurance, as liquidator of an insolvent insurance company, may pursue her claims against third parties in the Franklin County Court of Common Pleas, as the Liquidation Act provides, and is not bound by a mandatory arbitration clause contained in a pre-liquidation private agreement.

The Superintendent of Insurance, when acting as a Liquidator and pursuing claims against third parties, cannot be bound by a private arbitration agreement that otherwise would have applied to the insurance company if it had been the litigating party. The Liquidation Act establishes the Superintendent's right to pursue claims in the court in which all liquidation cases are heard—the Franklin County Court of Common Pleas. The Arbitration Act cannot override the Liquidation Act to provide for compelled arbitration: Either the Arbitration Act does not apply here on its own terms, or, if it applies, it creates a conflict that must be resolved in favor of the Liquidation Act.

A. Ohio's framework for reconciling divergent statutes requires the specific jurisdictional provisions of the Liquidation Act to prevail over the general provisions of the Arbitration Act.

This case presents a textbook example of a seeming conflict between two statutes. The Liquidation Act provides for a centralized forum for resolving insurer liquidations, creating exclusive jurisdiction in the Franklin County Court of Common Pleas to hear liquidations: "All actions authorized in sections 3903.01 to 3903.59 of the Revised Code shall be brought in the court of common pleas of Franklin [C]ounty." R.C. 3903.04(E). The Liquidation Act also authorizes the Superintendent to sue, locally or elsewhere, to recover assets for the estate. R.C. 3903.21(A)(12)-(13).

In addition, the Act contains an additional jurisdictional provision addressing "preferences," namely, claims by the Superintendent that another party received a payment improperly from the insurer in the period before the liquidation: "The Franklin [C]ounty court of common pleas has jurisdiction of any proceeding initiated by the liquidator filed in the state to hear and determine the rights of any parties under this section." R.C. 3903.28(G). The Superintendent alleges such a preference claim against E&Y. See Compl., Supp. at S-15-S-16, Fifth Claim for Relief, *id.* at ¶ 55 ("The Transfers constitute preferences avoidable by Plaintiff under R.C. 3903.28(A).").

The Arbitration Act, by contrast, generally provides for enforcement of arbitration agreements. Thus, if that Act applies here, it seems to create a statutory conflict between the Liquidation Act and the Arbitration Act, triggering Ohio's framework for resolving such conflicts.

The Court's, and the General Assembly's, rules for resolving potential statutory conflicts are straightforward. Ohio Revised Code 1.51 instructs the Court to try to harmonize the statutes, giving effect to both, if possible; and if that is not possible, the Court must prioritize the specific law over the general law, with possible consideration of which law was later enacted:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

The Court has routinely applied this rule: "[W]hen two statutes, one general and the other special, cover the same subject matter, the special provision is to be construed as an exception to the general statute which might otherwise apply." *State ex rel. Dublin Secs., Inc. v. Ohio Div. of Secs.* (1994), 68 Ohio St. 3d 426, 429. Here, this framework ensures that the Liquidation Act must prevail, regardless of whether the resolution is characterized as giving effect to both statutes, or as resolving a conflict between them.

First, the Court can give effect to both statutes, avoiding a conflict, if the Court determines that the Arbitration Act does not apply here on its own terms. The Superintendent maintains that she is not bound by the arbitration clause, both under the rule that non-signatories are not bound by such clauses, *Council of Smaller Enters. v. Gates, McDonald & Co.* ("*COSE*") (1998), 80 Ohio St. 3d 661, 666-67, and under the *Waffle House* rule against binding government agencies suing under statutory enforcement power. See Part C below (citing *Equal Employment Opportunity Comm'n v. Waffle House, Inc.* (2002), 534 U.S. 279). Either theory, by precluding mandated arbitration here, would give effect to both the Arbitration Act and the Liquidation Act.

In sharp contrast, the statutes cannot be harmonized in favor of mandatory arbitration, because no theory of the two statutes can eliminate the Liquidation Act's authorization for the Superintendent to sue E&Y in Franklin County Court of Common Pleas, where the liquidation is being heard. Nevertheless, E&Y gamely tries this approach, insisting that "[t]here is no conflict here, irreconcilable or otherwise." E&Y Br. at 15. But that insistence mischaracterizes R.C. 3903.21(A)(12), which allows the *Superintendent* to decide to sue outside Franklin County, but does not allow a defendant, such as E&Y, to force the Superintendent to go elsewhere. And it simply ignores the preference claim and that claim's special jurisdictional provision. Moreover, several other provisions of the Liquidation Act, as detailed below in Part B, create a comprehensive framework for resolving claims, and that framework conflicts with compelling the Superintendent to arbitrate. Consequently, if the Arbitration Act applies in its own terms, a conflict exists.

If a conflict exists, then the Liquidation Act must control, because it is plainly more specific than the general Arbitration Act. The Liquidation Act governs the detailed, specific context of liquidating insurance companies, and it addresses jurisdiction to resolve claims against and by the failed insurer's estate. The Arbitration Act, by contrast, is a general act that governs arbitration clauses in all manner of contracts in all types of contexts. That much seems indisputable, and indeed, E&Y does not even offer an argument for resolving a conflict in its favor; it puts all its eggs in the basket of avoiding conflict by insisting that the Liquidation Act does not conflict at all.

Similarly, E&Y does not attempt to argue in favor of applying R.C. 1.51's last clause, and that clause cannot plausibly apply. That clause allows for a general statute to prevail over a specific one if "the general provision is the later adoption and the manifest intent is that the general provision prevail." R.C. 1.51. Neither condition is met here. The Arbitration Act is not the later provision: it was enacted in 1931, while the Liquidation Act came decades later in 1983. See *Fabe*, 68 Ohio App. 3d at 232 ("the present statute, R.C. Chapter 2711, was enacted in 1931"); *Covington v. Ohio Gen. Ins. Co.* (2003), 99 Ohio St. 3d 117, 2003-Ohio-2720, ¶ 7 (noting Ohio's 1983 enactment of Liquidation Act, adopting the 1978 Model Act developed by national experts in the field). Also, the Arbitration Act does not contain any "manifest intent" to apply in situations involving insurer liquidations.

In sum, E&Y can prevail *only* if it can show that the Liquidation Act does not apply here on its own terms. If any conflict arises, the demand for arbitration must yield. And as shown below, such a conflict does exist, as the Liquidation Act provides for a centralized liquidation process that does not allow for the Superintendent to be bound by an arbitration clause that applied to a failed insurer.

B. The Liquidation Act establishes a comprehensive system for resolving liquidations and related disputes in one centralized forum, and compelling the Superintendent to arbitrate would improperly conflict with that system in several ways.

As noted above, the Liquidation Act prevails in any conflict with the Arbitration Act, so E&Y can succeed only if no conflict exists. E&Y cannot succeed in that way, however, because the conflict here is stark. The Liquidation Act has many provisions that, separately and together, are inconsistent with compelling the Superintendent to arbitrate.

1. Ohio's Liquidation Act establishes a comprehensive system for resolving the assets and liabilities of a failed insurance company.

As part of Ohio's broader scheme of regulating the insurance business, Ohio enacted the Insurers Supervision, Rehabilitation, and Liquidation Act in 1983. Ohio's Act, codified in R.C. Chapter 3903, adopted the 1978 Model Act developed by national experts in the field. The 1978 model replaced earlier models, and Ohio's enactment likewise fully replaced earlier Ohio laws. See *Covington v. Ohio Gen. Ins. Co.*, 2003-Ohio-2720, ¶ 7. The Liquidation Act states its purpose as "protection of the interests of insureds, claimants, creditors, and the public generally," and adds that such protection should proceed "with minimum interference with the normal prerogatives of the owners and managers of insurers." R.C. 3903.02(D); see *Fabe v. Prompt Ins. Co.* (1994), 69 Ohio St. 3d 268, 275.

The Liquidation Act grants Ohio's Superintendent of Insurance three levels of oversight. See generally *Fabe,* 69 Ohio St. 3d at 272-75. First, the Superintendent may order a troubled insurer to be placed under "supervision," which involves oversight closer than the normal regulatory scheme that applies to all insurers. R.C. 3903.09. Second, under worse conditions, the Superintendent may file a complaint for a court order authorizing her to "rehabilitate" the insurer. R.C. 3903.12. Third, if the insurer is insolvent, or under other serious conditions, the Superintendent may file a complaint for an order to liquidate the insurer. R.C. 3903.16(A).

A complaint for liquidation must be filed in the Franklin County Court of Common Pleas, R.C. 3904.04(E), and if the court approves liquidation, that approval vests the Superintendent with broad powers to act as Liquidator and achieve the Act's public-protection purposes. Only the Superintendent may be the Liquidator, though she may hire employees to assist her. Among other powers, the Superintendent may take title to all assets of the insurer, R.C. 3903.18(A); "collect all debts and moneys due and claims belonging to the insurer, wherever located," R.C. 3903.21(A)(6); manage the insurer's property, R.C. 3903.21(A)(9); continue to prosecute and commence in the name of the insurer any and all suits and other legal proceedings, R.C. 3903.21(A)(12); and "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," R.C. 3903.21(A)(11).

The Superintendent may also "do such other acts not herein specifically enumerated, or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation." R.C. 3903.21(B). The Superintendent performs these acts under the "under the general supervision of the court," R.C. 3903.18(A), and several specific acts require the court's ongoing approval. See R.C. 3903.21; see, e.g., R.C. 3903.21(A)(3) (requiring court approval to fix compensation for compensation of employees assisting with liquidation).

The Liquidation Act establishes a system for creditors to file claims against the liquidation estate. For those who had claims against the insurer pre-liquidation, the Act extinguishes those claims and replaces them with the right to seek redress in the liquidation court. R.C. 3903.24(A); R.C. 3903.35 et seq. Those claims must be filed by a date specified in a notice sent after a liquidation order, regardless of the underlying statute of limitations that would have applied if the claimant had sued the insurer in ordinary litigation. R.C. 3903.22(B); R.C. 3903.36. The Act sets out a comprehensive system for reviewing the validity of claims and for paying them according to a "priority" system based on the categories of creditors. See R.C. 3903.36-.45.

The Act also authorizes the Superintendent to file claims against others, based on claims that the insurer had against those others, R.C. 3903.24(B), or based on transfers or preferential payments that a party received from the insurer before liquidation. The Superintendent may pursue general claims in the liquidation court, namely, the Franklin County Court of Common Pleas, or, at the Superintendent's option, in other courts, R.C. 3903.21(A)(12), while preference claims belong in Franklin County under a dedicated provision, R.C. 3903.28(G). The Act provides a statute of limitations for the Superintendent to pursue such claims, replacing any limitations period that would have applied if the insurer were the plaintiff. R.C. 3903.24(B). The Act also provides for applying setoffs if a claimant and the Superintendent both have claims running against the other, R.C. 3903.30, and it provides that claimants who have received preferences must surrender them before a claim may be allowed, R.C. 3903.29(A).

All of the above provisions add up to a comprehensive scheme that conflicts with, and would be undermined by, compelled arbitration.

2. Compelled arbitration would conflict with the Liquidation Act's system for resolving claims in a centralized forum according to unique procedural rules.

Compelling the Superintendent to arbitrate would conflict with and undermine several aspects of the Liquidation Act's jurisdictional and procedural provisions.

First, compelling arbitration would undermine the Liquidation Act's fundamental jurisdictional prescription: to allow for all claims to be heard in the liquidation court, which can only be the Franklin County Court of Common Pleas. R.C. 3903.04(E). To be sure, R.C. 3903.21(A)(12) also allows the Superintendent to pursue claims in other forums, but it expressly makes that the Superintendent's *choice,* so she undoubtedly has the power to bring cases in Franklin County, based on the liquidation context, even if those cases would not otherwise be properly venued there.

Moreover, the Act contains an additional jurisdictional provision addressing "preferences," namely, claims by the Superintendent that another party received a payment improperly from the insurer in the period before the liquidation: "The Franklin [C]ounty court of common pleas has jurisdiction of any proceeding initiated by the liquidator filed in the state to hear and determine the rights of any parties under this section." R.C. 3903.28(G). That provision, unlike R.C. 3903.21(A)(12), does not refer to filing claims elsewhere.

Notably, these jurisdictional provisions specify a particular common pleas court, in a particular geographic location. That distinguishes this statute from "exclusive" jurisdictional provisions that merely require claims to be heard in a certain type of court. For example, the federal Securities Exchange Act of 1934 vests "exclusive jurisdiction" over certain securities fraud claims in the "district courts of the United States," precluding state-court jurisdiction. 15 U.S.C. 78aa; see *Shearson/American Express v. McMahon* (1987), 482 U.S. 220, 227. In *Shearson,* the United States Supreme Court held that the private claims at issue could be subject to arbitration, and E&Y cites *Shearson* as support for its claim that arbitration clauses can trump "exclusive jurisdiction" provisions. E&Y Br. at 16. But E&Y is wrong, because the Liquidation Act's provision for *one* location is far different from a mere jurisdictional commitment to state or federal court, or to common pleas courts generally, and so on.

Second, the Liquidation Act's jurisdictional provisions are intertwined with the specialized claims-resolution process—especially in the context of mutual claims between the Superintendent and another party, or a preference or transfer issue—and that process would be undermined by forced arbitration and removal of select counterclaims from the centralized forum. No one doubts that claims *against* the estate can be brought only in the liquidation court. Ohio Revised Code 3903.24(A) expressly *extinguishes* pre-liquidation claims against the insurer, even if already filed and pending; R.C. 3903.35 replaces the extinguished claims with the right to file claims in the liquidation. The Act provides that "[m]utual debts or mutual credits between the insurer and another person in connection with any" liquidation proceeding "shall be set off and the balance only shall be allowed or paid." R.C. 3903.30. Thus, if the Superintendent wished to pursue a claim against a party that also has a claim against the estate, the Superintendent would file her claim in Franklin County: If both claims are in the Franklin County Common Pleas Court, the setoff system works.

But under E&Y's approach, a competing claim and counterclaim could be fragmented in different forums, frustrating the setoff rule. The claim against the Superintendent or estate undoubtedly would go to the liquidation court, but the Superintendent's counterclaim could be sent to arbitration, splitting the two competing claims. Worse yet, it is likely, in many cases, that the same issues providing the basis for the Superintendent's claim against a party would also provide a defense to the party's claim against the estate. For example, if an office supply store had provided allegedly defective furniture to the insurer pre-insolvency, the Superintendent might have a claim against the store to recover sums that the insurer had already paid. At the same time, the store might have a claim for unpaid invoices, and the Superintendent would point to the defects as a defense and a reason for nonpayment. Under E&Y's view, the Superintendent's claim for recovery, including the issue of defects, could be subject to arbitration, if the supply contract had an arbitration clause. But the store's claim for unpaid invoices, raising the same defect issue, would be in the liquidation court. That unavoidable result of E&Y's approach is untenable.

In addition to the general setoff rule, the Liquidation Act provides an additional rule for claimants that have received preferences or improper transfers: such claimants may not pursue their claims against the estate unless they first surrender the amount of the preference or transfer. R.C. 3903.29(A). Here, the Superintendent has alleged that E&Y received a preference, and she seeks to recover that amount. While E&Y has not filed a claim against the estate, its position would, again, mean that any such two-way claims could be split in two forums.

Third, and notably, all of the various claims-processing provisions share a common thread: The procedural rules in the Liquidation Act supplant the rules that would otherwise apply to claims against the insurer pre-insolvency. For example, the claims deadline trumps any statute of limitations that would have applied had the claimant sued the insurer. See R.C. 3903.22(B); R.C. 3903.24(C). Likewise, for the Superintendent's claims against third parties, R.C. 3903.24(C) replaces the underlying claim's statute of limitations with one specific to liquidation, by allowing a filing for a fixed time after the liquidation order, and tolling the time between a liquidation complaint and a liquidation order. If the Liquidation Act may displace statutes of limitations, jurisdictional rules, and venue provisions, then surely it may displace arbitration clauses, which are, in a sense, jurisdictional or venue provisions.

All of these provisions show the Act's commitment to resolving the liquidation in one centralized forum, with procedures that override any contrary procedural rules connected with the pre-liquidation claims against, and by, the failed insurer.

3. The Liquidation Act gives the Superintendent broad powers to achieve a public-protection purpose, including a power to disavow contracts or arbitration clauses, and those powers conflict with compelled arbitration.

In addition to centralizing resolution of claims, the Act grants the Superintendent broad power, including a power to disavow contracts or arbitration clauses, and it confers upon her a role devoted to public protection, which means that she does not "stand in the shoes" of a failed insurer such as ACLIC when she exercises her statutory powers.

This Court and the United States Supreme Court have described the breadth of the Superintendent's powers as a Liquidator, along with the liquidation court's oversight. The General Assembly "conferred upon the Superintendent and a trial court broad discretionary and equitable powers relating to the supervision, rehabilitation and liquidation of insurance companies." *Fabe,* 69 Ohio St. 3d at 274. The Act is "part of a complex and specialized administrative structure for the regulation of insurance companies from inception to dissolution." *U.S. Treasury, et al. v. Fabe, Superintendent of Ins.* (1993), 508 U.S. 491, 494. The Act confers different powers for the Superintendent at each level of intervention, from supervision to rehabilitation to liquidation. *Fabe*, 69 Ohio St. 3d at 272-75 (explaining all three levels); R.C. 3903.09 (supervision); R.C. 3903.12 (rehabilitation); R.C. 3903.16(A) (liquidation).

Of those three levels, the Superintendent's powers are, not surprisingly, broadest in liquidation. The general directive is to marshal assets and collect all she can, and then to process all claims against the estate. Thus, the Superintendent may take title to all assets of the insurer, R.C. 3903.18(A); "collect all debts and moneys due and claims belonging to the insurer, wherever located," R.C. 3903.21(A)(6); continue to prosecute and commence in the insurer's name any and all suits and other legal proceedings, R.C. 3903.21(A)(12); and so on.

Notably, the Liquidation Act provides an open-ended clause for further powers, as "necessary," beyond the enumerated ones, as "may be necessary or appropriate . . . in aid of the purpose of liquidation." R.C. 3903.21(B). And the Act's provisions "shall be liberally construed to effect" its purpose of protecting claimants and the general public. R.C. 3903.02(C).

In addition to granting the Superintendent broad powers, the Liquidation Act provides that the Superintendent serves a public purpose, in conjunction with the Court—she is not in any way serving the interest of the failed insurer or its shareholders. R.C. 3903.02(D) expressly states that the Liquidation Act's purpose is "the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers." See *Fabe*, 69 Ohio St. at 273 ("R.C. Chapter 3903 was enacted for the benefit of the 'general citizenry.'"). Not only does this state a public-protection purpose, but it disclaims any protection of the interests of insurance companies, or their owners and managers, saying only that the companies' "normal prerogatives" should not be interfered with beyond the minimum necessary for public protection.

That latter directive of minimal interference, of course, shrinks to at or near zero in moving from supervision or rehabilitation to liquidation, where any allowance for the company's interests is gone. In liquidation, there is no more management, and no more interest in maintaining the insurer's future viability; and the shareholders' interest in any assets is at the bottom of the list. R.C. 3903.42(I). That contrasts sharply with, for example, the federal bankruptcy laws governing reorganization. In that latter scenario, the "debtor-in-possession," which is often essentially the company itself, seeks to have the court approve a plan that balances the interests of creditors in receiving some payment against the reformed company's interest in having a firm foundation to move forward after bankruptcy. Under Ohio's Liquidation Act, there is no such balancing; the Superintendent is tasked with protecting creditors alone, with no consideration for the insurer's (or owners') interests. That difference is critical, for, as shown below, it is why it is inaccurate to say that the Superintendent merely "stands in the shoes" of the failed insurer. The Superintendent inherits, or represents, the claimants' interests, not the company's.

The Superintendent's public-protection role is further confirmed by other provisions, including its reliance on the court as a partner in overseeing the liquidation, and by the fact that only the Superintendent, a public official, may be a Liquidator. While she serves in a distinct capacity as Liquidator, different from her normal regulatory role as Superintendent—for example, the Superintendent-as-Liquidator hires employees that are not public employees, and the liquidation office is not a government body—she still serves the purpose of protecting the public. Further, while the Act establishes provisions for liquidation records that differ from the public records law that applies to public offices, the specific balance between public and confidential shows that the General Assembly sought to have a partly public process, with limited exceptions. Having liquidation cases in a public court further buttresses the public aspect of the entire process, while having such cases shunted into private arbitration undercuts that transparency.

All of these features would be undermined if the Superintendent could be compelled to arbitrate. It would replace a public process in court with a private one in arbitration, and it would impose arbitration's confidentiality in place of the General Assembly's carefully-calibrated balancing openness and select confidentiality.

Indeed, the Tenth District adopted the rule it did precisely because it recognized the conflict between the Liquidation Act and any compelled arbitration under the Arbitration Act. In *Pipoly,* the court explained that the Superintendent "must have freedom of action to do those acts most beneficial in achieving her objectives" of protecting the public interest. *Pipoly*, 2003-Ohio-5666, ¶ 38 (citing R.C. 3903.02(D)). Similarly, in *Covington v. ACLIC,* the court explained that "compelling arbitration would affect the rights of other creditors and frustrate the purpose of the liquidation statute," and it accordingly imposes a clear conflict with the Liquidation Act in this context. *Covington v. Am. Chambers Life Ins. Co.* (10th Dist.), 150 Ohio App. 3d 119, 2002-Ohio-6165, ¶ 26. And in *Covington v. Lucia* (10th Dist.), 151 Ohio App. 3d 409, 2003-Ohio-346, ¶ 31, the court explained again:

> To permit the officers and directors of a regulated industry to attempt to defeat the liquidation statutes by privately contracting to resolve allegations of corporate mismanagement in a private forum of their own choosing is contrary to the purposes

> of the liquidations act and prejudicial to the rights of policyholders and creditors who have been harmed by the insolvency of the corporations.

In all of those decisions, the Tenth District was right.

By contrast, in *Fabe,* when the Tenth District had ruled the other way, the court mistakenly misapprehended the Superintendent's role and the Liquidation Act's commitment to centralized resolution and to the Superintendent's broad power. The *Fabe* court cited the Superintendent's power to sue in other courts as a reason to rule against the Superintendent, but it failed to give weight to the fact that the Act makes it her choice. See *Fabe*, 68 Ohio App. 3d at 233. And *Fabe* did not consider the jurisdictional provision for preference claims, which does not have the same other-forums clause, as no such preference claim was before the court there. Indeed, to the extent that *Fabe* allowed for arbitration to be compelled or denied depending on the claim at issue, *id.* at 235-36, it is likely that this case would not have been a candidate for arbitration even under *Fabe.*

In addition to undermining all these general powers, compelling arbitration would conflict with the Superintendent's specific power to selectively "affirm or disavow any contracts to which the insurer is a party." R.C. 3903.21(A)(11). E&Y argues that this power is all-or-nothing, and does not allow for disavowal of the arbitration aspect of the agreement. But that is not so, as arbitration clauses may be severed, *Ignazio v. Clear Channel Broad., Inc.*, 113 Ohio St. 3d 276, 2007-Ohio-1947, ¶ 20, and if a clause may be treated as a separate agreement by courts, it should be equally severable by the Superintendent. That is especially so when joined with the provisions for the Franklin County forum. And the engagement letter itself provided for severability of any clauses, thus including the arbitration clause. Supp. at S-6. Finally, this argument does not raise the danger that E&Y suggests, as it would not allow the Superintendent to cherry-pick contract clauses to, for example, demand good and services, while refusing payment. The Superintendent must still prove her claims on the merits, and surely no court would allow such a claim for free services. By contrast, a selective disavowal of arbitration merely places the dispute before the court to be resolved fairly; it does not by itself resolve the claim unfairly.

4. The security-value provision supports the Superintendent, not E&Y.

Against all this, E&Y cites a single Liquidation Act provision as purported support for arbitration in liquidation proceeding. R.C. 3903.41(A)(2) provides that questions of a security's value may be referred to arbitration, at the liquidation court's discretion. E&Y cites that as proof that the Act "*endorses* arbitration to determine a security's value." E&Y Br. at 2 (emphasis in original).

But that security-value provision supports the Superintendent, not E&Y, for several reasons. First, the General Assembly's narrow allowance for arbitration in that one scenario shows that it was aware of the possibility of arbitration in liquidation, but it chose to provide for it in *just that one scenario*—showing that it did not intend to endorse it wholesale. Second, even this narrow allowance creates an *option*, at the court's discretion, while E&Y seeks a rule *compelling* arbitration when a clause exists, regardless of the court's discretionary view. Indeed, if E&Y's view were correct, its proposition of law could *override* the security-value provision. That would occur if, for example, an agreement creating a security interest contained a mandatory arbitration clause for all purposes, including valuation. Under E&Y's view, the clause would guarantee enforcement of arbitration, but that would remove the court's statutory discretion to choose arbitration. Thus, the provision shows why E&Y is wrong.

In sum, all of these provisions show a conflict between the Liquidation Act and compelling the Superintendent to arbitrate. Again, as noted above, E&Y cannot show that a conflict between the two Acts is resolved in favor of the Arbitration Act. And as shown below, not only does the

Arbitration Act provide no ammunition for overriding the Liquidation Act, but in fact, standard Arbitration Act law confirms that arbitration cannot be compelled here.

C. Ohio's Arbitration Act does not overcome the Liquidation Act here, and in fact, it confirms that the Superintendent cannot be compelled to arbitrate.

Ohio's Arbitration Act does not override the Liquidation Act here, and in fact, established arbitration-law principles confirm why the Superintendent cannot be forced to arbitrate.

Ohio's Arbitration Act generally provides for the enforcement of arbitration clauses in contracts, while both the statute and case law establish various exceptions. See R.C. 2711.01(A). Specifically, it provides that arbitration agreements are "valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." *Id.* Case law from this Court, other Ohio courts, and other state and federal courts establish several critical limits on the enforceability of arbitration clauses.[2]

The statute's express terms allow for non-enforcement on any "grounds that exist at law or in equity for the revocation of any contract," and that opens the door for severing an arbitration clause where appropriate without cancelling an entire contract. *Id.* After all, if any given grounds could operate only to cancel the *entire* contract, the statutory clause would have no meaning, as an entirely invalid contract cannot be the basis for arbitration or anything else. And

[2] E&Y argues, and the Superintendent agrees, that E&Y's claim should be resolved under Ohio's Arbitration Act. See E&Y Br. at 15. E&Y nowhere cites or relies on the analogous Federal Arbitration Act ("FAA"), 9 U.S.C. 1 et seq., as the basis for its claim, and it cites the FAA only once as "analogous." See E&Y Br. at 17 n.2. The Superintendent notes, however, that the engagement letter's attachment specifically calls for disputes about the arbitration clause's enforceability to be resolved under the FAA. Supp. at S-6. Also, E&Y claimed in its appellate brief below that the FAA governed. See Appellant's Tenth Dist. Br. at 2 n.1. That state-federal distinction might seem irrelevant, as both statutes the same language and employ similar principles. But it matters because E&Y's commitment to Ohio's Arbitration Act is an implicit concession that Ohio law may supersede the engagement letter's terms. In addition, the state-law analysis confirms that this is a matter of the General Assembly's intent regarding two of its own laws, as opposed to the different framework that applies to intersecting state and federal statutes.

indeed, this Court has held that unenforceable arbitration terms are severable from the remainder of a contract, *Ignazio*, 2007-Ohio-1947, ¶ 20, and the engagement letter had a severability clause.

That means that any grounds for revoking the contract would also apply to rejecting the arbitration clause, and here, the Liquidation Act and its many provisions amount to grounds at law to reject the clause. In addition, two particular barriers to enforcement apply here. First, the Superintendent was not a signatory to the engagement letter and is not ACLIC's successor in interest, as she has independent claims based on statute. Second, she is acting under a special statutory right-to-sue, which trumps any private parties' arbitration clause.

1. The Superintendent is a non-signatory, and her unique role precludes any finding that she is a mere successor in interest to ACLIC.

E&Y complains that the appeals court not only reached the wrong result, but that it has also established a presumption *against* arbitration. But E&Y has no basis for objecting to that presumption as a starting point, because such a presumption would apply here in any case, and it is E&Y's burden to overcome that presumption.

This Court has already adopted a presumption against forcing a non-signatory to abide by a arbitration agreement. *COSE*, 80 Ohio St. 3d at 666-67 (citing *First Options v. Kaplan* (1995), 514 U.S. 938, 941-45). In *COSE*, the party against whom an arbitration agreement was being enforced had signed the agreement. *Id.* The Court contrasted that situation from what had occurred in *First Options*, in which the "parties resisting arbitration had not personally signed the document containing the arbitration clause." *Id.* at 666; *First Options*, 514 U.S. at 941. In this latter scenario, the Court instead found, "the presumption is *against* arbitrability." *COSE*, 80 Ohio St. 3d at 667 (emphasis in original). Of course, the Superintendent is not a signatory.

Ohio's appeals courts have routinely applied this precedent. See, e.g., *West v. Household Life Ins. Co.* (10th Dist.), 170 Ohio App. 3d 463, 2007-Ohio-845, ¶¶ 10-12 ("[E]ven more fundamental than the subject matter of the dispute is whether the parties to the pending litigation are the same parties who agreed to arbitrate in the first place."); *Slusher v. Ohio Valley Propane Servs.* (4th Dist.), 177 Ohio App. 3d 852, 2008-Ohio-41, ¶¶ 29-31 ("[P]ublic policy certainly does not require that parties arbitrate when they have not agreed to do so."). The Court also reaffirmed this position recently in *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134, 2007-Ohio-4787, ¶ 7 ("[O]nly signatories to an arbitration agreement are bound by its terms.").

E&Y can overcome this presumption only if it can show that the Superintendent is a successor to a signatory's contractual interests. *Gerig v. Kahn*, 93 Ohio St. 3d 478, 2002-Ohio-2581, ¶¶ 18-19. But that exception does not apply, by definition, to non-signatories whose interests might be related to, but do not flow from, the contractual interest of a signatory to the arbitration agreement. *Henderson, et al. v. Lawyers Title Ins. Corp.*, 108 Ohio St. 3d 265, 2006-Ohio-906, ¶ 42. E&Y insists that it overcomes the presumption because, in its view, the Superintendent "stands in the shoes" of ACLIC and is suing solely on a contract.

Several factors show that the Superintendent does not stand in ACLIC's shoes, but she stands instead in a public-protection role that contrasts with succeeding ACLIC's interests. First, as the above discussion of the Liquidation Act shows, she is charged with representing the creditors' and general public's interests, and that orientation is fundamentally different from representing the estate's or shareholders' interests. This role is distinct from debtors-in-possession in bankruptcy, for example, as such actors seek to balance paying creditors with keeping assets in the company to go forward post-bankruptcy. Here, the sole goal is recovery for creditors.

Second, the Superintendent's rights do not arise from the engagement letter, but from her statutory mandate to marshal the estate's assets. That makes this case unlike *Gerig*, in which the non-signatory sought *solely* a declaratory judgment on the rights of the signatories to the contract. *Gerig*, 2002-Ohio-2581, ¶ 4. It falls instead under *Henderson,* 2006-Ohio-906, ¶ 42, in which non-signatory parties claimed their own rights in a title insurance dispute, even if those rights had some connection to the contracting parties that had adopted an arbitration clause. The Superintendent acknowledges that her right to recover is partly connected to ACLIC's underlying hypothetical rights, as of course, the Superintendent would not be pursuing any claims against E&Y if ACLIC and the liquidation did not exist or did not have an E&Y audit. But the Superintendent's rights are ultimately rooted in the *creditors'* rights to recover from the estate, which are distinct from what would have been ACLIC's.

Third, this difference of interest is especially strong with regard to the Superintendent's claim to recover preferential payments made to E&Y before ACLIC's liquidation, as such claims are purely a statutory creation. ACLIC itself had no such claims, and such claims could never have arisen absent the liquidation. This scenario falls squarely under *Peters*, 2007-Ohio-4787, ¶¶ 17-19, in which the Court held that a decedent could not bind his beneficiaries to arbitrate wrongful-death claims arising out of his own death. Such claims exist only upon death, by statutory creation, and are the beneficiaries' independent claims. *Id.* The Court explained that "[*i*]*njured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in persons other than themselves.*" *Id.* at ¶ 15 (quoting *Thompson v. Wing* (1994), 70 Ohio St. 3d 176, 183) (emphasis in *Peters*). Likewise, the preference claim here was triggered only when ACLIC "died." ACLIC never possessed such a claim, and the Superintendent possesses it by virtue of statute, not from "standing in the shoes" of ACLIC.

In sum, the Superintendent is enforcing independent claims of violations of Ohio law against E&Y, "not attempting to enforce any rights under the contract between [the signatories]." See *Covington v. Lucia*, 2003-Ohio-346, ¶ 31. See also *I Sports v. IMG Worldwide, Inc.* (8th Dist.), 157 Ohio App. 3d 593, 2004-Ohio-3631, ¶ 23 ("[the non-signatories] are not attempting to enforce any rights under the contract between [signatories]"); *State Dep't of Admin. Servs. v. Design Group, Inc.* (10th Dist.), No. 07AP-215, 2007-Ohio-6278, ¶¶ 12-14. Therefore, E&Y has failed to overcome the presumption that the arbitration agreement does not apply to the non-signatory Superintendent.

2. The Superintendent is enforcing a statutory right to sue to protect the public interest, and under *Waffle House,* that cannot be overcome by a private party's arbitration commitments.

The non-signatory argument above applies to all non-signatories, private and public alike. This separate argument, however, is unique to those entrusted by statute with enforcing public rights. It plainly applies here, and it prevents forcing the Superintendent to arbitrate.

The United States Supreme Court has held that mandatory arbitration agreements cannot be enforced against a government agency suing under a specific statutory grant of a right to sue, even when the agency's suit aligns with the private interest of a party who would be bound by an arbitration clause. See *Equal Employment Opportunity Comm'n v. Waffle House, Inc.* (2002), 534 U.S. 279. In *Waffle House,* an employment contract contained a mandatory arbitration clause, and it would have covered an employee's discrimination claim against his employer, Waffle House, if he had sued directly. *Id.* at 282. However, the employee instead filed an administrative complaint with the Equal Employment Opportunity Commission ("EEOC"), and the EEOC then sued Waffle House under its own power, charging Waffle House with discriminating against that particular employee, and the EEOC demanded "victim-specific" relief, such as back pay, reinstatement, and compensatory damages, for that employee. *Id.* at 283-84.

The Court rejected Waffle House's argument that the employee's agreement to arbitrate bound the EEOC, which had a statutory right to sue as a procedural matter, regardless of whether the substance of the suit related to the employee's discrimination claims. "Proarbitration goals," the Court held, "do not require [an] agency to relinquish its statutory authority if it has not agreed to do so." *Id.* at 294. Further, the Court found that the EEOC's acts are inherently in the public interest, by their nature, even when the EEOC seeks only victim-specific relief in a particular case. *Id.* at 296. The Court reasoned that "to hold otherwise would undermine the detailed enforcement scheme created by Congress to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function." *Id.*

Notably, the Court in *Waffle House* specifically reasoned that the public nature of the EEOC's mission means that the "EEOC does not stand in the employee's shoes," *id.* at 297, and it compared the inapplicability of an arbitration clause to the inapplicability of a private party's statute of limitations when the EEOC pursues claims. Here, likewise, the Superintendent does not "stand in the shoes" of ACLIC for purposes of inheriting ACLIC's statute of limitations, and it should not inherit ACLIC's arbitration commitments, either.

As in *Waffle House,* the Superintendent is enforcing public rights under statutory authorization. Indeed, she falls more squarely under the *Waffle House* rule than even the EEOC did in *Waffle House* itself. In both cases, a statute authorized a public actor to pursue the public interest by suing, and in both cases, opposing litigants argued that the agency was bound by a private party's arbitration commitment. But in *Waffle House,* even though the EEOC had a public purpose in opposing discrimination, it was nevertheless true that the relief sought would flow to the particular employee, thereby allowing him, in effect, to recover without following the arbitration path to which he had committed. Here, by contrast, any recovery by the Superintendent will *not* benefit ACLIC, but will benefit solely the creditors.

In addition, *Waffle House* also shows why E&Y is mistaken in its reliance on *Shearson/American Express*, 482 U.S. at 227, as support for allowing arbitration clauses to trump "exclusive jurisdiction" provisions in federal statutes. In *Shearson,* the United States Supreme Court enforced an arbitration clause against a private party that sought to pursue federal securities-fraud claims in court. *Id.* But under *Waffle House,* such a clause would not bind the federal government if it pursued its own enforcement action, even if the action involved an underlying dispute between private parties that had agreed to arbitrate.

Consequently, *Waffle House* alone justifies a ruling for the Superintendent, as this case, too, involves rejecting arbitration so that the enforcement of public rights remains paramount over private agreements.

For all these reasons, the Arbitration Act does not override the Liquidation Act, and to the contrary, standard arbitration principles confirm why the Superintendent cannot be compelled to arbitrate here.

D. Other states with broadly worded statutes for liquidating insolvent insurance companies have found that pre-insolvency arbitration agreements do not apply against insurance liquidators.

The States with liquidation statutes most similar to Ohio's have found that pre-insolvency arbitration agreements against liquidators inherently conflict with the statutory remedial scheme. In its brief, E&Y invokes the analyses of several States but notably neglects to mention New York and Kentucky, both of which have far-reaching liquidation statutes that vest jurisdiction in a specialized court, as well as federal court decisions refusing to enforce arbitration clauses against state liquidators from Utah and Oklahoma. E&Y's omission of Kentucky is particularly glaring, given that it is the most recent State to weigh in on these issues and that E&Y itself was the losing party in the Kentucky case. The Court should side with the better-reasoned and more on-point cases, which support the Superintendent.

The New York Court of Appeals has long interpreted its liquidation statute as trumping pre-insolvency arbitration agreements. *Knickerbocker Agency, Inc. v. Holz* (N.Y. 1958), 4 N.Y.2d 245, 252-53; *Corcorn v. Ardra Ins. Co.* (1990), 77 N.Y.2d 225, 232-33. The court has cited the broad authority of the New York Superintendent of Insurance as well as the jurisdictional requirement in the Supreme Court. *Knickerbocker Agency, Inc.*, 4 N.Y.2d at 252-53. "Since therefore, another *court* should not be permitted to interfere with the jurisdiction of the court in which the liquidation proceeding is pending, *a fortiori*, an arbitrative tribunal may not interfere with the exercise of such jurisdiction." *Id.* (emphasis in original).

The Supreme Court of Kentucky recently came to the same conclusion in addressing the same issue within the Kentucky liquidation statute. *Ernst & Young, LLP v. Clark* (Ky. 2010), 323 S.W.3d 682. As in New York, the court found that the statute at issue conferred a "broad grant of exclusive jurisdiction to the Franklin Circuit Court in matters relating to the delinquency of insurance companies [that] preempts and supersedes the Federal Arbitration Act and its policy favoring arbitration." *Id.* at 688. The Kentucky Supreme Court reasoned that the state legislature "did not intend for that grant of jurisdiction to be overruled by an insurance company's agreement to arbitrate issues critical to the state's interest in the rehabilitation or liquidation of the insurance company." *Id.*

Similarly, both the Fifth and Tenth Circuits have refused to enforce arbitration clauses, citing the respective state liquidation laws of Utah and Oklahoma as controlling. See *Munich Amer. Reins. Co. v. Crawford* (5th Cir. 1998), 141 F.3d 585, 591 ("[r]egardless of the nature of the reinsurers' action, ordering it resolved in a forum other than the receivership court nevertheless conflicts with the Oklahoma law . . . ."); *Davister v. United Republic Life Ins. Co.* (10th Cir. 1998), 152 F.3d 1277, 1281-82 ("[I]t is the policy of the State of Utah to consolidate in one forum all matters attendant to the liquidation of a domiciled insurance company.").

By contrast, the statutes construed in the decisions cited by E&Y are distinguishable. *None* of them involved statutes that vested original, exclusive jurisdiction for adjudicating liquidation claims in a single court. Ohio's law is most similar to New York's and Kentucky's, as it names the Franklin County Common Pleas Court as the sole venue for liquidation cases, so the Court here should reach a similar result.

In sharp contrast to this similarity between Ohio's law and those of the States rejecting compelled arbitration, the States cited by E&Y mostly provide for general jurisdiction around the State, without centralization. See E&Y Br. at 8 (citing cases). In New Jersey, the general trial courts have general jurisdiction for any of the proceedings under New Jersey's insurance statute. See N.J. Stat. § 17:30C-2 ("[T]he Superior Court shall have original jurisdiction of delinquency proceedings under this act."); see *Suter v. Munich Reins. Co.* (3d Cir. 2000), 223 F.3d 150, 161-62. The same is true under California's law. See Cal Ins. Code § 1011 ("[T]he superior court of the county in which the principal office of a person described in Section 1010 is located shall . . . issue its order vesting title to all of the assets of that person . . ."); see *Quackenbush v. Allstate Ins. Co.* (9th Cir. 1997), 121 F.3d 1372, 1375. Illinois also has a similarly broadly-worded statute governing liquidation proceedings. See § 215 Ill. Comp. St. 5/187(3) ("[T]he word "court" shall mean the court before which the conservation, rehabilitation, or liquidation proceeding of the company is pending, or the judge presiding in such proceedings"). Moreover, the Illinois-based case that E&Y cites, *Selcke v. New England Ins.* (7th Cir. 1993), 995 F.2d 688, did not even involve a claim that the case belonged in a state liquidation court under state liquidation law. Instead, the Illinois liquidator sued in federal court, and the sole issue was whether the dispute at issue was within the scope of the relevant arbitration clause.

The federal court in *Koken v. Cologne Reinsurance* (M.D. Pa. 1999), 34 F. Supp. 2d 240, 250-51, also concluded that Pennsylvania's statute did not confer exclusive jurisdiction for liquidation within a specific court. Also, Pennsylvania has not adopted a solidly pro-arbitration view, as a state court there (as opposed to the federal court in *Cologne Reinsurance*) refused to enforce an arbitration agreement against the state Superintendent acting in its liquidation capacities under certain circumstances. See *Koken v. Reliance Ins. Co.* (Pa. Commw. Ct. 2004), 846 A.2d 778, 780-81.

Finally, the Vermont statute also did not place exclusive jurisdiction within a specific court for liquidation proceedings. See 8 V.S.A. § 7073 ("[W]ithin 120 days of a final determination of insolvency of an insurer by a court of competent jurisdiction of this state, the liquidator shall make application to the court for approval of a proposal to disburse assets out of marshalled assets."); see *Costle v. Fremont Indem.* (D. Vt. 1993), 839 F. Supp. 265, 275. Indeed, the *Costle* court specifically cited this distinction between Vermont and New York—noting that Vermont did not have an exclusive, centralized forum, but New York did—as a reason not to follow New York's approach. Thus, to the extent the Vermont court suggested a centralized-forum requirement would lead to a different result, *Costle* supports the Superintendent here.

In addition, each of the cases cited by E&Y predate the United States Supreme Court's 2002 decision in *Waffle House*, 534 U.S. 279. As explained above, *Waffle House* held that an agency's statutory authority to vindicate the public interest cannot be limited by an arbitration agreement signed by private parties, even if the agency is vindicating the rights of a party that signed an arbitration agreement. *Id.* at 284. That principle alone could lead to a different result, so the pre-*Waffle House* decisions cited by E&Y are questionable precedents.

In sum, while Ohio's law alone leads to a conclusion against compelled arbitration here, the better view of sister States' laws supports the Superintendent here as well.

Plaintiff-Appellee Superintendent's Proposition of Law No. 2:

A tolling agreement preserving the right to assert "defenses" does not guarantee success on those defenses or entitle a party to lock in the case law governing the claims or defenses as of the date of the tolling agreement.

As an alternative to its argument for arbitration generally, E&Y argues that it is entitled to unique right to enforce its arbitration clause, on the theory that it preserved a defense of arbitration by executing the tolling agreement in 2002. E&Y's theory is that at the time, the controlling case law in the Tenth District allowed for enforcing arbitration agreements against the Superintendent, so the tolling agreement "locked in" that precedent as the law governing the parties. E&Y Br. at 28-30. The tolling agreement did no such thing, and the Court should reject this argument.

First, the "preservation" of a defense merely preserves the right to raise a defense, and to consider it not waived; it does not create the right to succeed on the defense, nor does it create the right to have the defense or claim considered solely under the case law applicable on the date of a tolling agreement. Such an approach would warp the process of entering tolling agreements.

Second, E&Y's attempt to link this theory to its expectation interests, and to the principle that contracts are read in light of contemporaneous law, is unavailing. See E&Y Br. at 28-29 (citing *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 210). Under *Peerless* and similar cases, new case law is routinely applied "retrospectively as well" as prospectively, absent a "specific provision in a decision declaring its application to be prospective only." *State ex rel. Bosch v. Indus. Comm'n of Ohio* (1982), 1 Ohio St. 3d 94, 98; see also *Peerless*, 164 Ohio St. at 210. In *Peerless,* the Court explained "[t]he general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that *it never was the law*." If later-overruled decisions of this Court can be considered "never the law," then surely that is even more so for opinions of the appeals court. Thus, *Fabe,* which allowed for enforcement of arbitration, "never was the law." *Id.*

Further, E&Y's "vested rights" argument, which says that its "right" to arbitration vested when it purportedly signed the tolling agreement in reliance on *Fabe,* is mistaken. *Fabe* did not, contrary to E&Y's implicit suggestion, hold that mandatory arbitration clauses always or even presumptively control against the Superintendent in liquidation. Instead, *Fabe* said that arbitration *could* be allowed, but it left it to the trial court's discretion, to be applied based on whether the claim at issue was central or ancillary to the liquidation. *Fabe*, 68 Ohio App. 3d at 235-36. Indeed, before the Tenth District overruled *Fabe* in *Pipoly,* that court also *refused,* under the *Fabe* regime, to enforce an arbitration clause against the Superintendent—by applying *Fabe* and simply assessing the claim there differently. *Covington v. Am. Chambers Life Ins. Co.*, 2002-Ohio-6165, ¶ 26. Also, *Fabe* did not include a preference claim, so it did not address the separate jurisdictional provision that applies here. Thus, E&Y could not have reasonably relied on *Fabe* as providing an absolute right to arbitrate; at most, *Fabe* gave E&Y a fair shot at persuading the court to go its way.

In addition, E&Y is mistaken in suggesting that it must have gained this right as part of the tolling agreement because it granted the Liquidator the tolling rights, while the right to assert defenses was the "sole benefit it obtained from the agreement." E&Y Br. at 29. That is not so. The tolling agreement gave both sides more time to file any claims against the other, and it gave both sides the same preservation of defenses. See Supp. at S-7. Perhaps E&Y did not have any viable claims against the Superintendent in the end, but it received the right to extend the time to pursue them.

Further, even if E&Y is viewed solely as the potential defendant, with the Superintendent solely as potential plaintiff, the tolling agreement gave E&Y—just as any similar tolling or standstill agreement does for other potential defendants—the benefit of more time to resolve the dispute without the cost of actual litigation. Typically, the alternative to a tolling agreement is not that the potential plaintiff misses the deadline and goes away. Instead, the plaintiff, if not given more time, must sue. Consequently, E&Y's claim—that the entitlement to the arbitration defense was the "sole benefit it obtained"—rings hollow, as it gained other benefits, and its reliance on *Fabe*, if it existed, was sorely misplaced.

Moreover, if E&Y's view were correct, it would have been "entitled" to the *Fabe*-era law, once it "locked it in" through the tolling agreement, even if *this* Court had reviewed one of the many similar cases in recent years, and if this Court, rather than the Tenth District, had been the one to replace the *Fabe* approach with the *Pipoly* rule. Routine tolling agreements cannot interfere with this Court's appellate review by insulating parties from normal evolution of the law. And in any case, the tolling agreement, by preserving "defenses," cannot be fairly said to represent a clear meeting of the minds that the parties were freezing in place the then-case law.

Accordingly, the tolling agreement did not preserve a defense that E&Y never had the right to make in the first place. The Court should reject E&Y's arguments to the contrary.

CONCLUSION

For the above reasons, the Court should affirm the Tenth District's decision affirming the trial court's denial of E&Y's motion to dismiss or its alternative motion to stay and to compel the Superintendent to arbitrate.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ALEXANDRA T. SCHIMMER* (0075732)
Chief Deputy Solicitor General
Counsel of Record
STEPHEN P. CARNEY (0063460)
Deputy Solicitor
THADDEUS H. DRISCOLL (0083962)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Plaintiff-Appellee
Mary Taylor, Superintendent of Ohio
Department of Insurance, as Liquidator

MELVIN D. WEINSTEIN (0012174)
Kegler Brown Hill & Ritter Co., LPA
65 E. State Street, Suite 1800
Columbus, Ohio 43215
614-462-5400
614-464-2634 fax

Special Counsel for Plaintiff-Appellee
Mary Taylor, Superintendent of Ohio
Department of Insurance, as Liquidator

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Plaintiff-Appellee Mary Taylor, Superintendent of Ohio Department of Insurance, was served by U.S. mail this 23rd day of February, 2011, upon the following counsel:

John R. Gall
Aneca E. Lasley
Squire Sanders & Dempsey (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215-6197

Stanley J. Parzen
James C. Schroeder
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606

Counsel for Defendant-Appellant
Ernst & Young LLP

Stephen P. Carney
Deputy Solicitor