ORIGINAL

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,	:	Case No. 2010-1324
Plaintiff-Appellee,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
Ernst & Young LLP,	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT ERNST & YOUNG LLP

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INTRODUCTION

The Liquidator's brief ("Pl. Br.") is a complete turnaround from what she has argued earlier in this case and advances arguments she has not raised before. These arguments are thus waived, and this Court would be well within its right to refuse to consider the Liquidator's new contentions. 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; *State ex rel. Brady v. Pianka*, 106 Ohio St. 3d 147, 2005-Ohio-4105, 832 N.E.2d 1202, at ¶ 14. But even if the Court considers the new arguments, they are without merit. For example, the Liquidator now states she does not stand in ACLIC's shoes. But Ohio cases hold consistently that she does—as the Liquidator herself vigorously asserted in winning an earlier appeal in this case. She also argued in that appeal that when, as here, she sues in her capacity as Liquidator, she does not act in her public regulatory capacity or serve a public purpose, but rather acts as a trustee for the failed insurer. She now argues otherwise, but Ohio courts agree with her earlier position. As a result, the U.S. Supreme Court's *Waffle House* decision—which the Liquidator tellingly never mentioned in the court of appeals—does not apply. As the Seventh Circuit has held, *Waffle House* permits an agency to avoid an arbitration clause only when it is acting as a regulator, not when it stands in the shoes of a failed entity. No case has applied *Waffle House* to a liquidator and barred arbitration.

The Liquidator also contends that the Liquidation Act and the Arbitration Act are inconsistent, because the former ostensibly provides for centralized litigation of *all* claims involving the Liquidator in the Franklin County Court of Common Pleas. She is incorrect. The Liquidation Act provides for suits "and other legal proceedings" (a term that includes arbitration) "in this state or elsewhere." Indeed, the Liquidator has litigated many claims—including a preference action—outside of Ohio. Nothing in the Liquidation Act precludes arbitration, and nothing in the Arbitration Act precludes enforcing an arbitration provision against the

Liquidator. The ostensible "conflict" between the statutes is an illusion crafted by the Liquidator. No state with a similar liquidation statute permits liquidators to avoid arbitration.

At bottom, the Liquidator is asking this Court to rewrite the Ohio statutes based on vague policy arguments. But that is the responsibility of the General Assembly. The Liquidator is bound by the statutes as written, and the statutory language does not support her position.

ARGUMENT

I. The Liquidator Is Bound By An Arbitration Provision In A Contract Entered Into By An Insurer When, As Here, The Liquidator Does Not Disavow That Contract.

A. The Liquidator Is Bound By The Arbitration Clause.

The Liquidator contends that she is not bound by the arbitration clause because the Arbitration Act "does not bind non-signatories to an arbitration clause, and the Superintendent did not sign the engagement letter containing the clause." Pl. Br. 2; see also *id.* at 11, 25-28. This argument is incorrect and should be rejected.

1. The Liquidator must arbitrate because she stands in ACLIC's shoes.

The Liquidator admits that the arbitration provision here "would have applied to the insurance company if it had been the litigating party." Pl. Br. 9. But the Liquidator is just as bound as ACLIC would have been because, under established Ohio law, "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; see also *id.* at ¶ 14 ("'As a liquidator, the Superintendent steps into the shoes of the defunct insurance company and succeeds to all of its rights and remedies, and is subject to all defenses that could be raised against the company'") (quoting *Williams v. Continental Stock Transf. & Trust* (N.D. Ill. 1998), 1 F. Supp. 2d 836, 843).

The Liquidator argues, in essence, that she can pick and choose which shoes of a failed insurer she will step into. The Liquidator pronounces that "[s]he does not 'stand in the shoes' of a failed insurer … for all purposes"—"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," and "she is not in any way serving the interest of the failed insurer or its shareholders." Pl. Br. 2, 8, 19. However, there are several problems with this argument.

For starters, the Liquidator has waived it. She has never previously argued that she is not bound by the arbitration provision because she does not stand in the insurer's shoes. But the argument still fails even if considered.

First, the Liquidator's arguments in an earlier appeal in this case contradict her current position. She conceded there that "[o]nce the Superintendent is appointed as Liquidator, she 'stands in the shoes' of the insolvent insurer and conducts its operations for the benefit of its creditors, policyholders and shareholders." *Benjamin v. Ernst & Young*, 10th Dist. No. 04AP-799, 2005 WL 6503248, at *10 (Liquidator's brief). Further, she said, since "the *only* claims and damages asserted in the Complaint" against E&Y "are those of ACLIC, its policyholders and creditors," she sued only in her capacity "as the statutory liquidator of ACLIC, standing in the shoes of the insolvent insurer, its policyholders and creditors." *Id.* at *4-5. The court of appeals agreed. *Benjamin*, 167 Ohio App. 3d 350, at ¶¶ 14, 18. The Liquidator had it right the first time.

Second, the Liquidator now asserts—incorrectly—that her role as Liquidator is "devoted to public protection" and "serves a public purpose" that does "not in any way serv[e] the interest of the failed insurer or its shareholders." Pl. Br. 18-19. Again, that is inconsistent with her earlier brief, where she stressed that, while the Superintendent's acts "in her regulatory capacity *as Director*" of the Ohio Department of Insurance are undertaken for the public purpose of regulating "the ongoing business of insurance in Ohio as a whole," in her "legally separate and distinct" capacity *as Liquidator* "she 'stands in the shoes' of the insolvent insurer"—and "this action was commenced by the Superintendent *only* in the latter capacity." *Benjamin v. Ernst &*

Young, No. 04 AP-799, 2005 WL 6503248, at *9, 10 (Liquidator's brief) (emphasis added); accord *id.* at 12 ("'[t]he [s]uperintendent, as liquidator of an insurance company, does therefore, occupy a legal personality separate and distinct from the [s]uperintendent of insurance as the public official charged with regulating the industry generally'"). See also *Benjamin v. Ernst & Young*, 167 Ohio App. 3d 350, at ¶ 13 ("The liquidator holds the assets on behalf of, and for the benefit of, the members, policyholders, shareholders, and creditors of the insolvent insurer, *not for the benefit of the state of Ohio*") (emphasis added); *Hudson*, 2009-Ohio-4307, 2009 WL 2596962, at ¶ 39 (same); *FDIC v. Ernst & Young* (7th Cir. 2004), 374 F.3d 579, 581, 583 (explaining the FDIC's dual capacities—as receiver, when it "steps into the shoes of the failed bank," and as FDIC-Corporate, which "acts as guardian of the public fisc"—and holding that FDIC-Receiver is "the right entity to pursue any claim against [a bank's] accountants").

Third, the Liquidator's new position is contrary to established Ohio law. In addition to *Benjamin v. Ernst & Young*, Ohio courts have found in many other cases that the Liquidator stands squarely in the insurer's shoes. See *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 2003-Ohio-5666, 800 N.E.2d 50, at ¶ 40 ("the Superintendent of the Ohio Department of Insurance takes the place of the insolvent insurer for all practical purposes"); *id.* at ¶ 53 ("'this court has recognized the principle that the liquidator stands in the shoes of the insolvent insurer'") (quoting *Covington v. Lucia*, 151 Ohio App. 3d 409, 2003-Ohio-346, 784 N.E.2d 186, at ¶ 32); *Hudson v. Petrosurance, Inc.*, 10th Dist. No. 08AP-1030, 2009-Ohio-4307, 2009 WL 2596962, at ¶ 39 ("the Superintendent of Insurance, as liquidator, is essentially a court appointed private trustee who, for all practical purposes, stands in the insurer's shoes"). Similarly, the U.S. Supreme Court has recognized that the effect of the Liquidation Act "is to empower the liquidator to continue to operate the insurance company in all ways but one—the issuance of new policies." *United States Dep't of Treasury v. Fabe* (1993), 508 U.S. 491, 494, 113 S. Ct. 2202, 124 L. Ed. 2d 449. The

Act's provisions show that the Liquidator is standing in the insolvent insurer's shoes. R.C. 3903.18(A) (the liquidator shall "take possession of the assets of the insurer" and is vested with title to all of the insurer's assets); R.C. 3903.21(A)(6) (the liquidator may collect all debts and claims "belonging to the insurer"); R.C. 3903.21(A)(12) (the liquidator may commence and prosecute suits and other legal proceedings "in the name of the insurer"). See E&Y Br. 8 (citing cases from other jurisdictions holding that a liquidator stands in the insolvent insurer's shoes and is bound by a pre-insolvency arbitration clause).

The Liquidator's own cases confirm, in other contexts, that successors are bound by their predecessors' agreements. See *Peters v. Columbus Steel Castings*, 115 Ohio St. 3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, at ¶ 18 ("When Peters signed the arbitration agreement, he agreed to arbitrate his claims," which "bind[s] Peters's heirs, beneficiaries, successors and assigns" bringing a survival action); cf. *Henderson v. Lawyers Title Ins.*, 108 Ohio St. 3d 265, 2006-Ohio-906, 843 N.E.2d 152, at ¶ 43 (a contract beneficiary "'stands in the shoes'" of the promisee and is bound by an arbitration clause in the promisee's contract) (both cited at Pl. Br. 26).[1]

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

There is an independent reason why the Liquidator is bound by the arbitration clause here: a nonsignatory whose claims are based on or arise out of a contract is bound by an arbitration provision in that contract. *Gerig v. Kahn*, 95 Ohio St. 3d 478, 2002-Ohio-2581, 769 N.E.2d 381, at ¶¶ 11-19; *Milo Corp. v. Carlson-Miller*, 8th Dist. No. 78420, 2001 WL 824260, at *3; *Baker v. Schuler*, 2d Dist. No. 02CA0020, 2002-Ohio-5386, 2002 WL 31243491, at ¶¶ 36-

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1 Other cases cited by the Liquidator (at 25-26) are wholly inapposite. See *West v. Household Life*, 170 Ohio App. 3d 463, 2007-Ohio-845, 867 N.E.2d 868, at ¶¶ 14-17 (defendant could not enforce arbitration clause because defendant was not linked in any way to the signer of the provision); *Slusher v. Ohio Valley Propane*, 177 Ohio App. 3d 852, 2008-Ohio-41, 896 N.E.2d 715, ¶¶ 3, 30 (plaintiff's agreement to arbitrate did not apply to other individuals with personal injury claims who did not agree to arbitrate).

37 (all discussed at E&Y Br. 9). Cf. *Barrett v. Picker Int'l* (1990), 68 Ohio App. 3d 820, 826, 589 N.E.2d 1372 (third-party beneficiaries are bound by a forum-selection clause in a trust when they "seek to benefit from all the other trust terms"). The Liquidator misreads *Gerig* as applying only to "a successor to a signatory's contractual interests" (Pl. Br. 26), but *Gerig* says no such thing. It held that nonsignatories (a hospital patient and the Ohio Insurance Guaranty Association) were bound by an arbitration clause agreed to by a hospital and a doctor, because the nonsignatories sought to enforce insurance and indemnity provisions in the hospital-doctor agreement. The patient and OIGA were certainly not the successors to the hospital and doctor.

The Liquidator is equally off base in asserting—without any explanation at all—that her claims "do not arise from the engagement letter, but from her statutory mandate to marshal the estate's assets." Pl. Br. 26. E&Y's audit engagement with ACLIC did not somehow magically arise from thin air. It arose from the engagement letter. And the Liquidator offers no response to E&Y's showing that the claims against it arise out of or relate to the services that E&Y provided under that engagement letter. See E&Y Br. 23-25. Indeed, the Liquidator "acknowledges that her right to recover is partly connected to ACLIC's underlying hypothetical rights" and that she "would not be pursuing any claims against E&Y if ACLIC ... did not have an E&Y audit." Pl. Br. 27. The link between the engagement letter and the claims here includes the Liquidator's preference claim: she is seeking the return of money paid to E&Y by ACLIC under the engagement letter. See *Stechler v. Sidley, Austin Brown & Wood* (S.D.N.Y. 2005), 382 F. Supp. 2d 580, 588-90 & n.78 (a clause providing for arbitration of "'any dispute, controversy or claim arising out of or relating to'" the agreement applies to a claim to recover fees paid under the agreement); *Platovsky v. City of New York* (App. Div. 2008), 49 A.D.3d 842, 843, 855 N.Y.S.2d 571 (a fee dispute is covered by a broad arbitration clause). Because the claims here are so obviously tied to the engagement letter, the Liquidator is covered by the *Gerig* rule: her claims are based on or arise out of a contract with an arbitration clause, so she is bound by that clause.[2] As the Liquidator concedes, claims that "flow from" a contract with an arbitration provision must be arbitrated. Pl. Br. 26. That is the case here.

3. The Liquidation Act does not permit disavowal of part of a contract.

The Liquidator thus is doubly bound by the arbitration provision: she stands in the shoes of ACLIC, which agreed to the provision, and her claims are based on or arise out of the contract that contains the arbitration clause. Nonetheless, the Liquidator believes she can evade arbitration because, she contends, she has the right to disavow an arbitration clause even though she did not disavow the rest of the contract. Pl. Br. 22-23.

She does not argue that a statute permits her to selectively disavow an isolated provision within a contract while leaving the rest of the contract intact. No such statute exists. Instead, the Liquidator notes that "arbitration clauses may be severed" by courts when they violate Ohio law. *Id.* at 22. And if an arbitration clause may be severed by a court, why should it not "be equally severable by the Superintendent"? *Id.*; see also *id.* at 24-25. Simply put, because courts, not the Liquidator, have the constitutional responsibility to determine if an arbitration agreement violates Ohio law. The Liquidator's powers are limited to those granted by the General Assembly, and the Liquidation Act does not give her the power to disavow *part* of a contract—it permits the Liquidator only "to affirm or disavow any *contracts* to which the insurer is a party." R.C. 3903.21(A)(11) (emphasis added). Courts have held consistently that similar statutes do not permit disavowal of an individual contract provision. Consequently, a liquidator, or receiver or

[2] In contrast, the plaintiff's claims in *Henderson* (cited at Pl. Br. 26-27) were not based on the contract at all, but on the rate schedule that the defendant title insurer had filed with the State. 108 Ohio St. 3d 265, at ¶¶ 41-42. And the wrongful death claim in *Peters* (cited at Pl. Br. 26-27) cannot be analogized to the preference claim here: as already explained, the Liquidator's preference claim seeks the return of fees paid pursuant to the contract with the arbitration clause; the wrongful death claim brought by Peters's beneficiaries was entirely independent of the arbitration agreement Peters had signed. See 115 Ohio St. 3d 134, at ¶¶ 2, 17-19.

bankruptcy trustee cannot accept only favorable provisions and reject unfavorable provisions in the same contract. See E&Y Br. 11-12; *In re Ralston* (6th Cir. 1968), 401 F.2d 293, 295; *In re Cellnet Data Sys.* (3d Cir. 2003), 327 F.3d 242, 249; *In re Chi., R.I. & P. R.R.* (7th Cir. 1988), 860 F.2d 267, 272. The Liquidator does not cite any case going the other way. Indeed, construing § 3903.21(A)(11) to allow her to disavow an individual clause in a contract would violate the fundamental principle that courts cannot expand a statute beyond what the legislature enacted—the General Assembly makes public policy for the State, not the Liquidator or the judicial branch. E&Y Br. 11, 14-15. Moreover, the statute's "necessary or appropriate" provision (R.C. 3903.21(B)) does not permit the Liquidator to disregard the specific limit on her authority—to disavow only a "contract[]"—adopted by the legislature (§ 3903.21(A)(11)) and included in the Liquidation Order (Supp. 14 ¶ 7(l)). If § 3903.21(B) allowed the Liquidator to override express statutory limitations on her conduct, she would have power to do anything.

The Liquidator blithely dismisses the serious problems that could ensue if she were permitted to cherry-pick which contractual provisions she wanted to comply with and which she did not. See Pl. Br. 22-23; E&Y Br. 12-13. But the consequences of permitting the Liquidator to exercise such unfettered power cannot be waved aside on the theory that "surely no court would allow" the abuse of that power. Pl. Br. 23. The Seventh Circuit thinks the cherry-picking problem is real and significant. *FDIC*, 374 F.3d at 584. It is far better to withhold such power in the first place—especially since the Liquidation Act does not grant that power—rather than to require the judiciary to deal with the pernicious consequences later on a case-by-case basis.

Applying the Liquidation Act as written and holding that the Liquidator lacks power to disavow a single contract provision would not "conflict" with her power to "'disavow any contracts.'" Pl. Br. 22 (quoting R.C. 3903.21(A)(11)). It would be entirely consistent with the statute's actual language. If the Liquidator, in a future case, does not wish to arbitrate, in many cases she can simply disavow the entire contract, as she did in *Covington v. Lucia*, 151 Ohio App. 3d 409, at ¶ 31. Since she did not do that here, she must comply with the arbitration clause.

B. There Is No Conflict Between The Arbitration Act And The Liquidation Act.

The Liquidator does not point to—she cannot point to—any particular provision in the Liquidation Act that forbids compelling the Liquidator to comply with an arbitration clause in a contract she did not disavow. Instead, her argument that the Liquidation Act and the Arbitration Act conflict is based on the notion that the Liquidation Act provides for jurisdiction of *all* claims involving the Liquidator in one centralized forum, which "trumps the general preference for arbitration." Pl. Br. 8; see also *id.* at 9, 13-18. Arbitration allegedly "conflicts with" and "undermine[s]" this "comprehensive scheme." *Id.* at 15.

That is not so. There is nothing in R.C. 3903 explicitly stating that arbitration is barred in cases involving the Liquidator. Nor does R.C. 3903 implicitly suggest that arbitration is impermissible—nothing in the statutory language suggests that the statutory scheme would be adversely affected by enforcing an arbitration clause when the Liquidator brings a claim standing in an insolvent insurer's shoes. The statute, in fact, allows for arbitration proceedings. Most importantly, the Liquidation Act provides for the Liquidator's involvement in "*any and all* suits and *other legal proceedings*, in this state *or elsewhere*." R.C. 3903.21(A)(12) (emphasis added). The statute distinguishes "other legal proceedings" from "suits," so "other legal proceedings" must refer to something other than a lawsuit. Arbitration is referred to as a "proceeding" in the Arbitration Act (R.C. 2711.09, 2711.11); *Fabe v. Columbus Ins.* (1990), 68 Ohio App. 3d 226, 234, 587 N.E.2d 966, held that "arbitration proceedings" were "other legal proceedings" under § 3903.21(A)(12); and another court has held that "'other legal proceedings' ... include arbitration proceedings," *Costle v. Fremont Indem. Co.* (D. Vt. 1993), 839 F. Supp. 265, 275. The Liquidator does not address any of these points, although E&Y raised them in its opening brief (at 16). The Liquidator's failure to explain why the Liquidation Act's reference to "other legal proceedings" does not include arbitration proceedings speaks for itself.

Because the Liquidation Act's use of the broad term "other legal proceedings" includes arbitration, the Act's separate endorsement of arbitration to determine a security's value, R.C. 3903.41(A)(2), cannot reasonably be interpreted as implying the disapproval of all other uses of arbitration. See Pl. Br. 23. In fact, § 3903.41(A)(2) allows a court to "direct" arbitration to decide a security's value *even if there is no arbitration agreement*—which hardly suggests disapproval of arbitration when there *is* an arbitration clause in a contract the Liquidator did not disavow.

The Liquidator erroneously contends that the Liquidation Act establishes a "centralized system for resolving disputes in one court," the Franklin County Court of Common Pleas. Pl. Br. 8. Not only does § 3903.21(A)(12)'s reference to "other legal proceedings" encompass arbitration, but the same statute permits suits "in this state *or elsewhere*." (Emphasis added.) See also R.C. 3903.21(A)(6) (the liquidator can "[c]ollect all debts and moneys due and claims belonging to the insurer, *wherever located*") (emphasis added); § 3903.21(A)(6)(a) (the liquidator can "[i]nstitute timely action *in other jurisdictions* ...") (emphasis added).

In fact, there are many examples of suits by the Liquidator outside Ohio. See, *e.g.*, *Fabe v. WVP Corp.* (Mo. Ct. App. 1988), 760 S.W.2d 490 (negligence claim by Ohio Liquidator against architect); *Fabe v. Facer Ins.* (7th Cir. 1985), 773 F.2d 142 (in suit by Ohio Liquidator, rejecting an insurance agency's setoff claim), *aff'g* 588 F. Supp. 1330 (C.D. Ill. 1984); *Fabe v. Braswell* (4th Cir. 1987), 1987 WL 37519 (same); *Ratchford v. Manchester Life & Cas.* (8th Cir. 1982), 679 F.2d 741 (suit by Ohio Liquidator to set aside allegedly fraudulent conveyances).

The Liquidator has waived her argument (Pl. Br. 2-3, 15-17) that setoff claims must be litigated in Franklin County, because she did not raise it below. Besides, the point is irrelevant to this case because "E&Y has not filed a claim against the estate" (*id.* at 18); setoffs often involve matters *different* from the main claim, so they would not be covered by the engagement letter here; and in any event, the Fourth and Seventh Circuit cases just cited show that setoff claims may be litigated in the same non-Ohio forum as the Liquidator's claim. Further, if the Liquidator elects to file suit outside of Ohio (Pl. Br. 11)—as she has done before—the setoff system will not "work" as she says it should (*id.* at 17). It does, however, "work" once it is recognized that a non-Ohio forum can decide setoff claims—as the Liquidation Act envisions.

The Liquidator is incorrect in asserting—also for the first time in this case—that preference claims must be litigated in Franklin County. See Pl. Br. 9-10, 15-16. By its terms, the preference statute permits, but does not require, litigation in Franklin County. R.C. 3903.28(G) ("The Franklin county 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"). It says only that the Franklin County court "has jurisdiction" of preference actions—it does not say "exclusive" jurisdiction. And the reference to proceedings "filed in the state" suggests that proceedings elsewhere are permitted. Indeed, the Liquidation Act's broad provisions permitting "any and all suits and other legal proceedings, in this state *or elsewhere*" (R.C. 3903.21(A)(12), emphasis added) and proceedings to "[c]ollect all debts and moneys due and claims belonging to the insurer, *wherever located*" (R.C. 3903.21(A)(6), emphasis added) are certainly expansive enough to include preference claims. The Liquidator, in fact, *has* litigated preference claims outside of Ohio. See *Jump v. Goldenhersh* (E.D. Mo. 1979), 474 F. Supp. 1306, 1313-14 (successful action by Ohio Superintendent to recover legal fees paid by insurer; holding that the Ohio preference statute applied in a case pending outside Ohio), *aff'd*, 619 F.2d 11, 14 (8th Cir. 1980) (agreeing that Ohio preference law applied in suits by the Superintendent outside Ohio).

The Liquidator asserts that R.C. 3903.21(A)(12) "allows the *Superintendent* to decide to sue outside Franklin County, but does not allow a defendant ... to force the Superintendent to go elsewhere." Pl. Br. 11. But this provision shows the legislature's intent that there is no restriction on the forum at all; there is no limit on where claims can be brought. Together, the statute and the non-Ohio cases cited above show that the Act does not provide for exclusive jurisdiction in Franklin County. Moreover, the Liquidator ignores three key facts: her predecessor in interest—ACLIC—agreed to "go elsewhere"; the Liquidator did not disavow the contract in which ACLIC made that agreement; and the Liquidator's claims are based on or arise out of the same contract. As a result, the Liquidator is bound by the arbitration provision. This is not a case in which the defendant is simply attempting to "force" the Liquidator to arbitrate; the insurer *agreed* to arbitrate, and the Liquidator took no steps to repudiate the contract.

Even if the Liquidation Act *required* all cases involving the Liquidator to be brought in "a particular common pleas court" (Pl. Br. 16)—which it does not— this would provide no basis not to enforce an arbitration provision when the U.S. Supreme Court has held that an arbitration clause is *enforceable* as to claims within the "'exclusive jurisdiction'" of federal district courts. *Shearson/American Express v. McMahon* (1987), 482 U.S. 220, 227, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (quoting 15 U.S.C. § 78aa). Even a statute providing for "'exclusive jurisdiction'" in federal courts did not "show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* The same conclusion is even more appropriate here, where the Liquidation Act explicitly permits "other legal proceedings ... elsewhere" (R.C. 3903.21(A)(12)), actions "in other jurisdictions" (§ 3903.21(A)(6)(a)), and collections of debts and claims "wherever located" (§ 3903.21(A)(6)).

In short, the Liquidation Act does not "contain[] limitations as to arbitrability" and it "does not preclude a waiver of judicial remedies for the rights it creates." *Academy of Medicine v. Aetna Health*, 108 Ohio St. 3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶ 17 (reaching this conclusion about the Valentine Act). Nor is there anything in the Arbitration Act that exempts claims involving the Liquidator from its broad scope. See E&Y Br. 16-17. The Liquidator observes that the Arbitration Act contains "exceptions" (Pl. Br. 24), but she does not—and could not—contend that any of them apply here. She further notes that arbitration provisions must be enforced except upon "'grounds that exist at law or in equity for the revocation of any contract'" (*id.*, quoting R.C. 2711.01(A)), but of course she did *not* revoke the contract here, and she does not identify any ground for doing so that would apply to any contract. See E&Y Br. 17 n.2.[3]

Because there is no conflict between the Arbitration Act and the Liquidation Act, R.C. 1.51 (Pl. Br. 10) does not come into play at all—it applies only when "the conflict between the provisions is *irreconcilable*." R.C. 1.51 (emphasis added). As this Court has made clear, *both* of the allegedly conflicting statutes must be given effect unless one statute contains an "explicit preclusion of," *Board of Educ. v. Zaino*, 93 Ohio St. 3d 231, 235, 2001-Ohio-1335, 754 N.E.2d 789, or "expressly exempt[s]," *United Tel. Co. v. Limbach* (1994), 71 Ohio St. 3d 369, 372-73, 643 N.E.2d 1129, the other statute. That is emphatically not the case here. And since there is no conflict, the Arbitration Act requires enforcement of the arbitration clause. R.C. 2711.01(A).

What is more, "plaintiff has not demonstrated how [she] will be harmed if this dispute is referred to arbitration." *Fabe*, 68 Ohio App. 3d at 234. The Liquidator does not even attempt to explain why arbitration would adversely affect creditors' rights—she offers only conclusory statements that arbitration would "'affect'" and be "'prejudicial to'" creditors. Pl. Br. 21-22. True, arbitration "will have an impact on the amount of money plaintiff has to pay the creditors" (*Fabe*, 68 Ohio App. 3d at 236), but that is true of whatever forum ultimately resolves the Liquidator's claims. However, "arbitration of th[e] dispute will not adversely affect any party to the liquidation proceeding"; in particular, arbitration "will not affect the priority of claims of

[3] E&Y focuses on the Ohio Arbitration Act in this Court because the court of appeals held that that Act conflicted with the Liquidation Act. See App. 11-14, 16 ¶¶ 15-20, 25; Pl. Br. 24 n.2.

creditors." *Id.* If anything, arbitration is likely to be beneficial to creditors because arbitration is typically resolved much sooner than litigation, as this case (filed in 2003) illustrates. If the Liquidator's claims have merit, creditors will receive money more quickly through arbitration than through litigation. And arbitration—which this Court has strongly favored for over 100 years (E&Y Br. 17-18)—enjoys the "additional benefit of unburdening crowded court dockets." *Hayes v. Oakridge Homes*, 122 Ohio St. 3d 63, 2009-Ohio-2054, 908 N.E.2d 408, at ¶ 15.

C. The Liquidator's Other Arguments Are Meritless.

1. The *Waffle House* argument has been waived and is wrong.

The Liquidator asserts that her anti-arbitration position is supported by *EEOC v. Waffle House, Inc.* (2002), 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755. The EEOC alleged that Waffle House "engaged in employment practices that violated the ADA [the Americans with Disabilities Act], including its discharge of [Eric] Baker"; the EEOC sought both "injunctive relief to 'eradicate the effects of [Waffle House's] past and present unlawful employment practices'" and specific relief to make Baker whole. 534 U.S. at 283-84. In deciding to sue, the EEOC acts under a statute that "confers on the agency the authority to evaluate the strength of the public interest at stake," and the agency decides that the "public interest" warrants an EEOC suit only in rare instances—the EEOC "files suit in less than one percent of the charges filed [by employees] each year." *Id.* at 290 n.7, 291. Against this backdrop, the Court held that the EEOC was not bound by the arbitration clause in Baker's employment contract because

> we are persuaded that, pursuant to Title VII and the ADA, whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be *seeking to vindicate a public interest*, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. *Id.* at 295-96 (emphasis added).

The Liquidator contends that because she, like the EEOC, is purportedly "enforcing public rights under statutory authorization," *Waffle House*'s "reason[ing] that the public nature of the EEOC's mission means that the 'EEOC does not stand in the employee's shoes,'" applies to the Liquidator's claims, so she "does not 'stand in the shoes' of ACLIC" with respect to "ACLIC's arbitration commitments." Pl. Br. 29. This argument suffers from three fatal flaws.

First, the Liquidator has waived this argument—she never mentioned *Waffle House* in the court of appeals or at any other time in this litigation.

Second, the Liquidator ignores the fact that "the superintendent is two entities"—"the superintendent as liquidator *is a separate entity* from the superintendent as regulator." *Benjamin*, 167 Ohio App. 3d 350, at ¶¶ 19-20 (emphasis added). And "the Superintendent of Insurance, as liquidator, is essentially a court appointed *private* trustee who, for all practical purposes, stands in the insurer's shoes," *Hudson*, 2009-Ohio-4307, 2009 WL 2596962, at ¶ 39 (emphasis added), and does "*not* [act] for the benefit of the state of Ohio," *Benjamin*, 167 Ohio App. 3d 350, at ¶ 13 (emphasis added). It is only when acting in her separate capacity as regulator that the Superintendent is "'the public official charged with regulating the industry generally.'" *Id.* at ¶ 15. The two distinct roles are important because, as the Seventh Circuit has noted, *Waffle House* applies only when an agency is acting as a regulator, not when it is serving as a receiver or liquidator stepping into the shoes of a failed entity. *FDIC*, 374 F.3d at 581.

Third, the Liquidator's current argument is inconsistent with the position she took earlier in this case, when she distinguished between "the separate capacities of the Superintendent acting … as Director of ODI in her regulatory capacity"—in which she oversees "the ongoing business of insurance in Ohio as a whole"—and "as the statutory liquidator of ACLIC, standing in the shoes of the insolvent insurer, its policyholders and creditors." *Benjamin v. Ernst & Young*, No. 04 AP 799, 2005 WL 6503248, at *5, 10 (Liquidator's brief). See *id.* at *14 (agreeing with federal courts that "have recognized the same distinction between the regulatory and trustee capacities in cases concerning the Federal Deposit Insurance Corporation"); *id.* at 9 (stating that the Superintendent is bringing this suit "*only*" in her capacity as Liquidator standing in ACLIC's shoes, not in her regulatory capacity); *id.* at 11 ("when acting as a statutory liquidator," the Superintendent "resembles a court-appointed trustee"). See also pp. 3-4, *supra.*

2. The Liquidator's cases from other states are wholly inapposite.

The Liquidator contends that her argument against arbitration is supported by cases in other jurisdictions with "liquidation statutes most similar to Ohio's." Pl. Br. 30. In fact, the statutes are not similar. Those decisions are contrary to Ohio law and are nothing like this case:

- The Liquidator (at 31) relies on *In re Knickerbocker Agency* (1958), 4 N.Y.2d 245, 149 N.E.2d 885, and *Corcoran v. Ardra Ins.* (1990), 77 N.Y.2d 225, 567 N.E.2d 969, but New York's liquidation statute, unlike Ohio's, is the "exclusive statutory mechanism for resolving all disputes in the context of an insurance company receivership." *Foster v. Philadelphia Mfgrs.* (Pa. Commw. Ct. 1991), 592 A.2d 131, 133 (refusing to follow New York law and ordering arbitration of an insurance rehabilitator's claims because Pennsylvania statutes do not require all disputes to be resolved in one forum). See also *Knickerbocker*, 4 N.Y.2d at 252 (the New York statute provides for "exclusive jurisdiction"); *Corcoran*, 77 N.Y.2d at 232 (same). As discussed earlier, the Ohio Liquidation Act is not an exclusive jurisdiction statute: it explicitly grants the Liquidator the power to institute "any and all suits and other legal proceedings, in this state *or elsewhere*," R.C. 3903.21(A)(12) (emphasis added), to collect "all debts and moneys due and claims belonging to the insurer, *wherever located*," R.C. 3903.21(A)(6) (emphasis added), and to "[i]nstitute timely action *in other jurisdictions*," R.C. 3903.21(A)(6)(a) (emphasis added). *Fabe* refused to follow *Knickerbocker* in 1990, because *Knickerbocker* was inconsistent with both Ohio's venerable pro-arbitration policy and with statutes "permit[ting] the liquidator to bring actions against persons owing money to the insolvent insurer in other jurisdictions," such as § 3903.21(A)(6). 68 Ohio App. 3d at 232-33. See also *Costle*, 839 F. Supp. at 275 (refusing to follow New York cases and enforcing an arbitration provision, because "[a]n exclusive jurisdiction requirement is not found in the Vermont scheme" and the Liquidation Order there gave the liquidator the power to "'pursue collection in other jurisdictions'" and to participate in "'other legal proceedings,'" which includes arbitration).

- The Liquidator takes E&Y to task for its "particularly glaring" (Pl. Br. 30-31) omission of *Ernst & Young v. Clark* (Ky. 2010), 323 S.W.3d 682. What is glaring is the Liquidator's failure to acknowledge that Kentucky has a specific "statutory prohibition against compelling a liquidator to arbitrate." *Stephens v. American Int'l Ins.* (2d Cir. 1995), 66 F.3d 41, 43. See Ky. Rev. Stat. § 304.33-010(6) (an arbitration clause is enforceable against the liquidator only when it is "contained in a reinsurance agreement"); *Clark*, 323 S.W.3d at 688 (citing this statute and also explaining that Kentucky statutes provide a "broad grant of exclusive jurisdiction to the Franklin Circuit Court in matters relating to the delinquency of insurance companies"). Ohio has no such statutory prohibition against arbitration.

- *Munich Am. Reins. v. Crawford* (5th Cir. 1998), 141 F.3d 585 (cited at Pl. Br. 31), is equally inapposite. The Fifth Circuit affirmed the dismissal of a petition seeking arbitration under the Federal Arbitration Act because, before the federal case was filed, an Oklahoma state court had issued an injunction "precluding [plaintiffs] from commencing or prosecuting the FAA action in federal district court." 141 F.3d at 591. Moreover, the Fifth Circuit stated, "we do not hold in this opinion that [plaintiffs] have no right to arbitration"; in fact, it noted, "[t]he Oklahoma state court might well decide to order arbitration of this dispute." *Id.* at 594 n.5.

- *Davistar Corp. v. United Republic Life* (10th Cir. 1998), 152 F.3d 1277 (cited at Pl. Br. 32), is similar to *Munich*. It affirmed an order abstaining from deciding a motion to compel arbitration, because a state court had earlier issued a "blanket stay against all proceedings against the insolvent insurance company." *Id.* at 1281. The court stressed it did not preclude arbitration:

"[plaintiff] can bring this matter before the liquidation court, and if arbitration is the best way to resolve the conflict, it can be ordered by that court under its own aegis." *Id.* at 1282.

- The Liquidator cites *Koken v. Reliance Ins.* (Pa. Commw. Ct. 2004), 846 A.2d 778, in arguing that Pennsylvania does not enforce arbitration agreements in "certain circumstances" (Pl. Br. 33), but omits two critical points. First, the *Koken* court *endorsed* two prior decisions *enforcing* arbitration provisions against an insurance liquidator (*Koken v. Cologne Reins.* (M.D. Pa. 1999), 34 F. Supp. 2d 240, cited at E&Y Br. 8) and an insurance rehabilitator (*Foster*, 592 A.2d 131, cited *supra* at 16). See 846 A.2d at 780-81. Second, *Koken* did not enforce the arbitration clause there only because that suit was brought *against* the liquidator; however, the court made clear, when the liquidator "initiat[es] the lawsuit, the plaintiff *must be bound by agreements to arbitrate* unless grounds exist for the revocation of that agreement." 846 A.2d at 781 (emphasis added). "[T]he mere filing of a suit automatically implicates any contractual agreement to pursue arbitration." *Id.* Here, of course, the Liquidator initiated the lawsuit against E&Y—and thus under *Koken*, she "must be bound by [the] agreement[] to arbitrate." *Id.*

The Liquidator attempts to distinguish the cases E&Y has cited that enforce insurers' pre-insolvency arbitration agreements against liquidators. See Pl. Br. 32-33; E&Y Br. 8. Her argument is that those states "did not confer exclusive jurisdiction for liquidation within a specific court" (Pl. Br. 33), but as we have shown, Ohio does not do that either—the Liquidation Act explicitly contemplates suits and other proceedings in other states and other jurisdictions—so that does not distinguish those states from Ohio at all. To the contrary, the similarity of the statutory scheme in those states is a reason for this Court to hold, as those states do, that the Liquidator is bound by the arbitration agreement that ACLIC entered into.

II. The Liquidator's Reading Of The Tolling Agreement Would Render It Meaningless.

On the second issue on which this Court granted review, the Liquidator makes no attempt to defend the court of appeals' ruling. She thus effectively concedes that the court was wrong in holding that the Tolling Agreement—which preserved "all defenses that E&Y has of the Effective Date" (Supp. 6 ¶ 5)—did not preserve the defense of arbitration as it existed on that date (May 2, 2002), because "the 'right to arbitration' is not an affirmative defense" and therefore was "not among the 'defenses' preserved by the tolling agreement" (App. 23 ¶ 38).

Instead, the Liquidator contends that the Tolling Agreement "merely preserves the right to raise a defense," but it "does not create the right to succeed on the defense." Pl. Br. 35. Moreover, the Liquidator continues, E&Y can *never* succeed with its arbitration defense, because the law in effect at the time of the Tolling Agreement—embodied in *Fabe v. Columbus Ins.*—was later overruled, which means it "'never was the law.'" *Id.* at 36.

The Liquidator's argument that the Tolling Agreement preserved only the ability to assert a defense that would be a certain loser makes no sense. The preservation of a right to assert a defense that is bound to lose would be meaningless—and when interpreting a contract, this Court "avoid[s] interpretations that render portions meaningless." *Wohl v. Swinney*, 118 Ohio St. 3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, at ¶ 22. Under the Liquidator's theory, if a tolling agreement preserved the right to a limitations defense as of a certain date and a court later overruled earlier cases and held that a shorter limitations statute applied to the plaintiff's claims, the defendant would have lost its limitations defense by signing a tolling agreement. That cannot be right. Adopting such a rule would discourage parties from entering into tolling agreements.

The flaw in the Liquidator's reasoning can be traced to her failure to give any effect to the Tolling Agreement's preservation of "all defenses that E&Y has *as of the Effective Date*" (May 2, 2002). Supp. 6 ¶ 5 (emphasis added). She notes that a decision overruling an earlier decision is usually retrospective (Pl. Br. 35, citing *Peerless Elec. v. Bowers* (1955), 164 Ohio St. 209, 129 N.E.2d 467), but overlooks that *Peerless* explained that a "general exception to this rule is where contractual rights have arisen or vested rights have been acquired under the prior decision." *Id.* at 210. That is what occurred here: in preserving all defenses "as of the Effective Date," the Tolling Agreement established a contractual right to assert the defense of arbitration as it existed on May 2, 2002, when *Fabe* was the controlling law. (*Covington v. ACLIC*, 150 Ohio App. 3d 119, 2002-Ohio-6165, 779 N.E.2d 833, which the Liquidator cites (at 36), was not decided until November 2002—six months *after* the Tolling Agreement.) See also E&Y Br. 28 (citing other cases holding that contracts incorporate applicable law as of the date the contract was executed). E&Y simply asks to hold the Liquidator to the Tolling Agreement *she* signed.

The Liquidator goes on to argue that *Fabe* left it to the trial court's discretion to decide whether to order arbitration. Pl. Br. 36. This argument, too, has been waived—the Liquidator did not make it in the court of appeals. It is also incorrect: *after* reaching what it described as its "conclusion" that the Liquidator's arguments were "not well founded," *Fabe* observed that *some* bankruptcy courts—which have jurisdiction "somewhat similar to that of the common pleas court's jurisdiction over liquidation proceedings"—have held the decision on arbitration "to be within the sound discretion of the bankruptcy court," but *Fabe* did not adopt that view. 587 N.E.2d at 234-35. Rather, it stated that the Liquidation Act "in no way precludes the enforcement of the valid arbitration provision" there, and thus it followed R.C. 2711.01, which provides that arbitration agreements "'shall be ... enforceable.'" *Id.* at 232 (quoting § 2711.01), 236.

Finally, while the Liquidator notes (at 36-37) that the Tolling Agreement also gave E&Y more time to assert a claim, that obviously was not its purpose. E&Y hoped she would not sue at all, but sought to ensure that if she did, the delay would not harm E&Y. Under the Liquidator's theory, however, E&Y has been harmed by agreeing to her request for more time to sue.

CONCLUSION

This Court should reverse and order arbitration.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant Ernst & Young LLP has been served upon the following by U.S. Mail, postage prepaid, this 4th day of April, 2011:

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