BEFORE THE IOWA SUPREME COURT

No. 18-0335

DOUG OMMEN, in his capacity as Liquidator of CoOportunity Health, and DAN WATKINS, in his capacity as Special Deputy Liquidator of CoOportunity Health,

Plaintiffs-Appellees,

v.

STEPHEN RINGLEE, DAVID LYONS, and CLIFFORD GOLD,

Defendants,

and

MILLIMAN, INC., KIMBERLEY HIEMENZ, and MICHAEL STURM,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
HON. JEANIE K. VAUDT

APPELLANTS' BRIEF

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ROUTING STATEMENT

This case is appropriate for Supreme Court retention in light of the substantial constitutional question presented by the District Court's erroneous construction of Iowa Code §§ 507C.1, *et seq*. (the "Iowa Liquidation Act") [1] to create a conflict with the rights of Defendant-Appellants under the Federal Arbitration Act (the "FAA"), as well under the Iowa Arbitration Act. Iowa R. App. P. 6.1101(2)(a). This matter also raises an issue of first impression under Iowa law regarding whether statutory insurance liquidators can be compelled to arbitrate claims arising out of an agreement, pursuant to the FAA and well-settled federal appellate law squarely on point. *Id*. 6.1101(2)(c). Supreme Court retention is also proper to address issues of broad public importance and questions regarding the District Court's deviation from long-standing authority on these issues by misconstruing the Iowa Liquidation Act to undermine a valid arbitration agreement. *Id.* 6.1101(2)(d), (2)(f).

STATEMENT OF CASE

Plaintiffs-Appellants Doug Ommen, in his capacity as Liquidator of CoOportunity Health ("CoOportunity"), and Dan Watkins, in his capacity as

[1] This chapter of the Iowa Code also deals with insurer supervision and rehabilitation in addition to liquidation, but is defined here as the "Iowa Liquidation Act" for ease of reference.

Special Deputy Liquidator of CoOportunity Health (collectively, "Plaintiffs" or "Liquidators"), filed a First Amended Petition ("Petition") (App. 6–60) against Defendants-Appellants Milliman, Inc., Kimberley Hiemenz, and Michael Sturm (collectively "Milliman"), among other defendants.

Plaintiffs' Petition asserts common law tort damages claims against Milliman that relate to and arise entirely out of the pre-liquidation work Milliman performed for CoOportunity pursuant to a 2011 Consulting Services Agreement (the "Agreement") (App. 76–77). The Agreement includes an unambiguous arbitration provision which states that any "dispute arising out of or relating to the engagement of Milliman by [CoOportunity]" must be resolved by final and binding arbitration. Notwithstanding these undisputable facts, the District Court erroneously denied Milliman's motion to compel arbitration in a February 6, 2018 Order ("Order") (App. 259–266) substantially prepared by Liquidators' counsel (App. 247–252).

By this appeal, Milliman seeks to enforce its rights under the FAA to compel the Liquidators to arbitrate their common law claims against Milliman. U.S. and Iowa Supreme Court precedent holds that a plaintiff cannot avoid the supremacy of the FAA by invoking state law provisions for the purpose of evading an arbitration agreement. Moreover, uncontroverted, on-point federal appellate authority holds that state insurance liquidators

must arbitrate their common law damages claims against third parties who performed pre-insolvency services for the insurer pursuant to an agreement that contains a broad arbitration clause. The same body of caselaw holds that because such third-party damages claims do not implicate a state's regulation of the "business of insurance," the FAA is not "reverse preempted" by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*. No federal appellate decision anywhere in the country holds otherwise.

The District Court below disregarded this controlling federal and Iowa authority in denying Milliman's motion to compel arbitration. Instead, the District Court credited Plaintiffs' legally flawed efforts to plead away their arbitration obligations in holding that: 1) Plaintiffs' claims do not arise out of relate to the Agreement; (2) the policies and provisions of the Iowa Liquidation Act preclude arbitration of Plaintiffs' claims against Milliman; and (3) the McCarran-Ferguson Act "reverse preempts" the FAA. Each of these holdings is an error of law.

STATEMENT OF FACTS

I. COOPORTUNITY

The Federal Patient Care and Affordable Care Act ("ACA") established the Consumer Operated and Oriented Plan ("Co-Op") program to

fund not-for-profit health insurance companies to offer health insurance to individuals and small groups. (App. 7, ¶ 1.)

In July 2011, the federal government invited potential Co-Ops to apply for federal start-up and solvency loans. (App. 11, ¶ 29; App. 20, ¶ 67.) CoOportunity was one of 23 Co-Ops that were awarded funding through the federal Co-Op program in 2012. (App. 7, ¶ 2.)

II. THE COOPORTUNITY/MILLIMAN CONSULTING SERVICES AGREEMENT

Milliman, Inc. is a leading actuarial and consulting firm. Pursuant to the September 30, 2011 Agreement between CoOportunity and Milliman (App. 14, ¶ 45; App. 76–77), Milliman provided actuarial and consulting services to CoOportunity starting in October 2011. (App. 18–20, ¶ 66.)

Paragraph 5 of the Agreement contains a broad and unambiguous arbitration provision, which states, in relevant part:

> DISPUTES. In the event of any dispute arising out of or relating to the engagement of Milliman by Company, the parties agree that the dispute will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association.

(App. 76.)

III. THE APPLICABLE LIQUIDATION ORDER EXPRESSLY AUTHORIZES PLAINTIFFS TO SUE ON BEHALF OF COOPORTUNITY AND TO ARBITRATE SUCH CLAIMS WHEN NECESSARY

CoOportunity was licensed to do business in Iowa and Nebraska and began enrolling members in 2013. (App. 7, ¶¶ 3, 5.) After experiencing continued adverse claims experience, CoOportunity was ultimately declared insolvent and placed into liquidation by Order dated March 2, 2015. ("Liquidation Order") (App. 218–240.) Plaintiffs bring this case in their capacity as the liquidators for CoOportunity pursuant to the authority granted to them in the Liquidation Order and attempt to recover monetary damages for the CoOportunity estate. (App. 9, ¶ 16; App. 10, ¶ 21; *see also* App. 242.)

The Liquidation Order, consistent with the Iowa Liquidation Act, vests Plaintiffs "with the title to the property, contracts, and rights of action and the books and records of CoOportunity wherever such interests may be located" and the authority to sue or defend "for CoOportunity." (App. 223, ¶ 1; App. 227, ¶ 16; *see also* Iowa Code §§ 507C.18(1), 507C.21(l).)

Both Plaintiffs and the District Court erroneously interpreted the Liquidation Order and Act as granting Plaintiffs the unfettered discretion to select their forum for any litigation they bring, thereby allowing Plaintiffs to avoid arbitration. The opposite is true. Consistent with the Iowa

Liquidation Act, the Liquidation Order expressly authorizes and directs Plaintiffs to sue "in any necessary forum," including before "arbitration panels":

> The Liquidator and the Special Deputy are hereby authorized to deal with the property, business and affairs of CoOportunity and CoOportunity's estate, and, ***in any necessary forum, to sue*** or defend ***for CoOportunity***, or for the benefit of CoOportunity's policyholders, creditors and shareholders in the courts and tribunals, agencies or ***arbitration panels of this state and other states*** or in any applicable federal court in the Liquidator's name as Commissioner of Insurance of the State of Iowa, in his capacity as Liquidator, or the Special Deputy in his capacity as Special Deputy Liquidator, or in the name of CoOportunity Health.

(App. 227, ¶ 16 (emphasis added)); *see also* Iowa Code § 507C.21(l) (authorizing liquidators to institute "suits and other legal proceedings, in this state or elsewhere"); Iowa Code § 507C.24(2) (liquidator may "institut[e] a suit or proceeding upon a claim . . . in a proceeding, judicial or otherwise").

This provision in the Liquidation Order applies squarely to the claims Plaintiffs assert in the Petition on behalf of CoOportunity. (*Id.*) It would also apply to any other action brought directly "for the benefit of CoOportunity's policyholders, creditors and shareholders." (*Id.*) Such claims must still be brought in the "necessary forum," *i.e.*, not necessarily in Polk County District Court, and, in this case, in arbitration. (*Id.*)

IV. ALL OF THE CLAIMS IN PLAINTIFFS' PETITION ARISE OUT OF OR RELATE TO THE ENGAGEMENT OF MILLIMAN PURSUANT TO THE AGREEMENT

The Petition describes the contracted-for work that Milliman provided: "CoOportunity retained the Milliman Defendants to provide actuarial professional services for purposes of working on critical aspects of the company's plans including initial and later federal funding applications, rate setting, and financial reporting to federal and state regulators." (App. 13, ¶ 39.) Plaintiffs allege that Milliman owed a "duty of care to provide professional actuarial services," based on the "actuary-client relationship" between CoOportunity and Milliman. (App. 37–41, ¶¶ 141–42.) The Petition does not allege any basis for this relationship other than the Agreement. (*See* App. 6–60.) The actuary-client relationship and related duty of care is the predicate for Plaintiffs' malpractice claim. (App. 37–41, ¶¶ 141–42.)

To provide the contracted-for services, the Petition asserts that Milliman prepared various reports and documents for CoOportunity, including, among other things, feasibility studies, rate filings, and federal pro formas. (*See, e.g.*, App. 13, ¶ 39; App. 15, ¶ 49; App. 18, ¶ 64; App. 18–20, ¶ 66; App. 25–26, ¶ 95.) Plaintiffs devote the factual allegations in the Petition (App. 18–34, ¶¶ 64–126) to describing Milliman's purportedly

deficient performance in providing these contracted-for services. Every cause of action Plaintiffs bring against Milliman is based on Milliman's alleged failure to perform one of these services adequately. For example, Milliman's alleged failure to properly set CoOportunity's rates and prepare pro forma financials are bases for Plaintiff's Malpractice claims against Milliman. (App. 42–43, ¶ 143(iv); App. 44, ¶ 143(x); App. 46–47, ¶¶ 147–148; App. 50, ¶ 159; App. 51, ¶ 164(ii); App. 54, ¶ 177(ii), (iii); App. 55, ¶ 180(i), (ii).)

Milliman is also accused of misrepresenting CoOportunity's financial health and improperly certifying CoOportunity's viability. Milliman is alleged to have made these misrepresentations and improper certifications in the contracted-for feasibility studies and pro formas that Milliman prepared pursuant to the Agreement. (App. 24, ¶ 88; App. 26, ¶ 97.) These and similar accusations are made throughout Plaintiffs' Malpractice claims against Milliman. (App. 43–44, ¶ 143(vii), (viii); App. 47, ¶¶ 149–50; App. 50, ¶ 160; App. 51-52, ¶ 164; App. 54, ¶ 177(iii), (iv); App. 55, ¶ 180(ii), (iii).)

The remainder of Plaintiffs' allegations against Milliman challenge the terms of the Agreement itself. Specifically, Plaintiffs allege that Milliman failed to disclose a purported conflict of interest created by

Paragraph 2 of the Agreement, in which Milliman agreed not to seek payment for its work if CoOportunity did not secure federal funding. (*See*, *e.g.*, App. 17–18, ¶¶ 59–63; App. 37, ¶ 142(i), (ii); App. 41-42, ¶ 143(i), (iii); App. 48, ¶ 154(i).) As part of a 30-paragraph section of the Petition focusing on the "Engagement Terms," Plaintiffs allege, *inter alia*:

> ***The terms of the Agreement between CoOportunity and Milliman created an improper incentive for Milliman to convince federal officials to approve and fund the project.*** Approval and funding was the only way Milliman could recover its fee of $110,000 for the initial feasibility study and business plan, and also ensure future fees for the provision of additional actuarial services to CoOportunity and the other to-be-formed CO-Ops. ***The improper financial motivation compromised Milliman's objectivity and independence in certifying the feasibility study and business plan***.

(App. 17–18, ¶ 62 (emphasis added).)

This purported conflict of interest, and the resulting "improper" feasibility study and business plans, are bases for Plaintiffs' Malpractice (App. 37, ¶ 142(i), (ii); App. 41–42, ¶ 143(i), (iii); App. 48, ¶ 154(i); App. 54, ¶ 177(i); App. 55, ¶ 180) causes of action against Milliman.

In sum, all of Plaintiffs' claims on their face "arise out of" and "relate to" the engagement of Milliman by CoOportunity pursuant to the Agreement.

ARGUMENT

I. STANDARD OF REVIEW

An appeal may be taken as of right from an order denying an application to compel arbitration. *Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816, 817 (Iowa 2002). A ruling on a motion to compel arbitration is reviewed for correction of errors of law. *See id.* Each of the District Court's holdings was an error of law because each one rests on the court's misinterpretation of the FAA, the Iowa Liquidation Act and/or the McCarran-Ferguson Act, and the court's erroneous application of these statutes to the claims at issue here. The issues addressed herein are preserved for review because Milliman moved below to compel arbitration. (*See* App. 63–74.)

Where, as here, the District Court's order is adopted nearly verbatim from the proposed order submitted by Plaintiffs, this Court must "scrutinize the record more closely and carefully when performing [its] appellate review." *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 97 (Iowa 2011) (citation omitted).

II. THE FAA MANDATES ARBITRATION OF PLAINTIFFS' CLAIMS AGAINST MILLIMAN AND PREEMPTS CONTRARY STATE LAW

The FAA is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or

procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In furtherance of that policy, the U.S. Supreme Court has expressly prohibited states from enacting any statute or "policy" that is "directly contrary to the [FAA's] language and Congress' intent" to favor arbitration. *Allied-Bruce Terminix Co., Inc., v. Dobson* 513 U.S. 265, 281 (1995) ("The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent." (citation omitted)).

Under the FAA, arbitration clauses such as the one in the Agreement are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (limiting the "for the revocation of any contract" exception to "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability"). The U.S. Supreme Court has held that the statutory protection of arbitration agreements is not subject to "any additional limitations under State law." *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

In *Roth v. Evangelical Lutheran Good Samaritan Society*, this Court expressly recognized Congress's intent, and the U.S. Supreme Court's holdings affirming the primacy of the FAA over state law:

> The United States Supreme Court has indicated on several occasions that the [FAA] preempts state laws that purport to forbid arbitration of certain state-law claims. ***"When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative***." *Preston v. Ferrer*, 552 U.S. 346, 359 (2008). "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

886 N.W.2d 601, 611-12 (Iowa 2016) (emphasis added); *Heaberlin Farms, Inc.*, 641 N.W.2d at 819 (holding that the FAA "preempts the Iowa [arbitration] act" where a contract "evidenc[es] a transaction involving commerce"). *See also Southland Corp.*, 465 U.S. at 10 (holding that, in the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

In accordance with this well-settled jurisprudence, federal courts, including the U.S. Courts of Appeals for the Third, Sixth and Ninth Circuits, have unanimously held that state insurance liquidators must arbitrate their

common law damages claims against third parties who performed pre-insolvency services for the insurer pursuant to a contract, ***and*** that a liquidator's prosecution of these third party claims through arbitration neither implicates nor interferes with the state's regulation of the "business of insurance" or ongoing liquidation proceedings. *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161-62 (3d Cir. 2000) (compelling arbitration of insurance liquidator's common law damages claims against third party based upon the insolvent insurer's pre-insolvency agreement); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1382 (9th Cir. 1997) (same); *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 970 (9th Cir. 1992) (enforcing an insolvent insurer's pre-insolvency agreement to arbitrate all disputes "arising out of" the agreement against the state's insurance liquidator); *Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959 (3d Cir. 1993) ("The complex regulations relating to insolvent insurance companies have to do with plans of rehabilitation and payment to policy holders. Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests."); *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (holding that receivers' common law damages claims against third parties do not implicate the state's regulation of the "business of insurance," "have

only an attenuated connection to regulating the business of insurance," and therefore are not required to be resolved in the liquidation court).

Most recently, in a case on all fours with this one, the Eastern District of Kentucky federal court in *Beam Partners, LLC, et al. v. Atkins, Liquidator of KY Health Coop.*, No. 17-CV-004 GFVT, 2018 WL 4344456 (E.D. Ky. Sept. 11, 2018), granted a motion to compel arbitration against the statutory liquidator for the Kentucky insolvent healthcare Co-Op ("KYHC"). In a thoroughly reasoned 29-page opinion, the court held that the FAA supersedes Kentucky's Insurers Rehabilitation and Liquidation Law ("IRLL"), including its provision that purported to provide for exclusive jurisdiction in Kentucky state court. The court required the arbitration of claims brought by a liquidator seeking common law damages against third party contractors who performed services for the insolvent insurer—just like Milliman in this case.[2]

Acknowledging the primacy of the FAA over conflicting state statutes, the federal district court determined that these third party damages claims did not present the "rare situation" where state law trumps the FAA:

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[2] The same Kentucky liquidator brought common law tort and contract claims against Milliman arising out of its work performed for the Co-Op. Milliman's petition to compel arbitration, which is procedurally and legally identical to Beam's petition in all relevant respects, but was filed later, remains pending before the Eastern District of Kentucky. *See Beam Partners*, 2018 WL 4344456, at *1-2.

> Federal judges often find themselves at the intersection of state and federal law and faced with the dilemma of which direction to turn. Occasionally, an area of state law can circumvent the Founding Fathers' dictate that federal law reign supreme, ***but only in rare situations***. After several hearings and many hundreds of pages of briefing, the Court finds that this situation does not arise here. ***Kentucky's prohibition of arbitration between insolvent insurance companies and third-party contractors does not trump the mandate of the Federal Arbitration Act*** that valid arbitration agreements must be upheld.

Beam Partners, 2018 WL 4344456, at *1 (emphasis added).

In reaching its conclusion, the court held that the IRLL must yield to the FAA and the Supremacy Clause. Correctly recognizing that the construction and application of the FAA, and of the McCarran-Ferguson Act, is "an inquiry of federal law," the court expressly refused to follow a contradictory ruling by the Kentucky Supreme Court, which had held that the IRLL reverse preempted the FAA. *Id.* at *9 ("Federalism does not require this Court to follow the holdings of the Kentucky Supreme Court with regard to federal questions.").

In this case, the District Court's Order denying Milliman's motion to compel cites no on-point contrary federal cases, because there are none. There is no legal basis for the District Court's holding that the Liquidators are not bound by the arbitration clause in CoOportunity's Agreement with Milliman. Rather, each of the District Court's rationales for denying

arbitration here—(1) that Plaintiffs' claims do not arise out of relate to the Agreement; (2) that the policy and provisions of the Iowa Liquidation Act preclude the arbitration of these claims; and (3) that the McCarran Ferguson Act "reverse preempts" the FAA—are errors of law.

III. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE IOWA LIQUIDATION ACT SUPERSEDES THE FAA AND PRECLUDES ENFORCEMENT OF THE ARBITRATION CLAUSE IN THE AGREEMENT

A. Summary of the District Court's Errors

The District Court erroneously disregarded this Court's, and the U.S. Supreme Court's, clear precedent and held that the Iowa Liquidation Act supersedes Milliman's federal rights under the FAA. Instead of looking to on-point federal law on the legal issue of whether Milliman's federal arbitration rights can be "reverse preempted" by state law here, the District Court broadly and improperly construed the Liquidation Act to hold that arbitrating these claims would interfere with the state's regulation of the "business of insurance." (App. 264.)

For example, the District Court credited the Liquidator's argument that their claims did not "arise from or relate to" the Agreement. (App. 262.) This holding ignored the plain language of the Liquidators' Petition, discussed at length above, as well as Iowa and federal law holding that a party cannot avoid its arbitration obligations simply by labeling its claims in

tort. Regardless of how the Liquidators chose to label their claims, they are arbitrable because, but for the Agreement and the work Milliman performed pursuant to it, the Liquidators would have no claims to bring.

The District Court also credited the Liquidators' argument that, because the Iowa Liquidation Act allows the Liquidators to bring claims "on behalf of" CoOportunity's policyholders and creditors, they do not stand "only" in the shoes of CoOportunity as legal successor, and can therefore avoid arbitration under the Iowa Liquidation Act. (*Id.*) This argument is disingenuous, and also contrary to federal FAA and Iowa law.

Plaintiffs admitted in both their petition and briefing below that ***this*** Petition "seek[s] to recover damage ***for the financial loss to CoOportunity***" directly caused by Milliman's allegedly defective work, which damages would go to "the estate of [CoOportunity]." (App. 242 (emphasis added); *see also* App. 260 ("The Liquidators confirm any recovery in the action will inure to the general benefit of all policyholders and creditors.").) On its face, and consistent with Plaintiffs' admission, the Petition asserts only common law damages claims that belong ***to CoOportunity*** as the result of Milliman's work, all of which was done before CoOportunity entered liquidation in March 2015. It does not assert any viable causes of action against Milliman that belonged to CoOportunity's creditors or policyholders.

In the same vein, Plaintiffs declared in their Petition that they were invoking another Liquidation Act provision and "disavowing" the Agreement in order to avoid its arbitration requirement. In allowing the Liquidators to do so, the District Court again failed to heed U.S. Supreme Court and other caselaw that prohibits the use of a state law to avoid an arbitration agreement. Well-settled law also provides that no plaintiff, including an insurance liquidator, can simultaneously sue for damages based on the defendant's work done pursuant to an agreement, while "disavowing" and avoiding the arbitration clause in the same agreement. Nor is disavowal of a fully performed contract permitted under Iowa Supreme Court law.

Finally, the District Court erred by construing the Iowa Liquidation Act to conflict with and "reverse preempt" the FAA pursuant to the McCarran-Ferguson Act. (App. 264.) The District Court should never have found a conflict requiring it to conduct a preemption analysis at all, since both the Liquidation Act and Liquidation Order expressly authorize the Liquidators to arbitrate these claims. Nothing in either the Liquidation Order or the Liquidation Act provides that all of a liquidator's claims must be filed and heard in Polk County District Court, or in any other public courtroom, or as part of the delinquency proceedings.

Having unnecessarily engaged in the McCarran-Ferguson analysis, the lower court then compounded its error by holding that the Iowa Liquidation Act reverse preempts the FAA and precludes the arbitration of these claims. The court failed to follow well-settled U.S. Supreme Court and federal appellate law unambiguously holding that, under the McCarran-Ferguson Act, the "business of insurance" and what may "interfere" with it are defined: (1) "narrowly"; and (2) by assessing the ***specific action*** at issue—here, the prosecution by the Liquidator of this third party damages claim—to determine whether arbitration interferes directly with the insurer-policyholder relationship or the ongoing delinquency proceedings. On this question, unanimous federal appellate authority holds that arbitrating claims such as these by an insurance liquidator does not interfere with the "business of insurance." There is no "reverse preemption" of the FAA here.

B. Plaintiffs' Claims Arise Out Of and Relate To the Work Milliman Performed Pursuant to the Agreement

The U.S. Supreme Court has long held that courts must "liberally construe" a valid arbitration provision, "resolving any doubts in favor of arbitration … unless it may be said with positive assurance that the arbitration clause is not susceptible of such an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986); *see also Parm v. Bluestem Brands, Inc.*, 898 F.3d 869, 873-74 (8th Cir. 2018) (accord).

Where, as here, the arbitration clause is broad, the liberal federal policy favoring arbitration agreements requires that "a claim goes to arbitration if the underlying factual allegations ***simply touch*** matters covered by the arbitration provision." *Leonard v. Delaware N. Companies Sport Serv., Inc.*, 861 F.3d 727, 730 (8th Cir. 2017) (emphasis added). Accordingly, even when applying state-law principles of contract interpretation, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. Of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989); *MedCam Inc. v. MCNC*, 414 F.3d 972, 975 (8th Cir. 2005) (citations and quotation marks removed) (stating that courts considering a broad arbitration clause must

"examine the language of the contract in light of the strong federal policy in favor of arbitration").

On their face, Plaintiffs' causes of action against Milliman each arise out of and relate to 1) the actuarial consulting services Milliman performed pursuant to the Agreement, and 2) an alleged wrongful "conflict of interest" created by Paragraph 2 of the Agreement itself, which, the Plaintiffs allege, tainted all of Milliman's reports and other work. As set forth in Section IV of the Statement of Facts, Plaintiffs' claims for malpractice, breach of duty and alleged deficient work product and financial reporting, cannot be detached from the contractual relationship pursuant to which all of that work was performed.

The District Court did not cite a single case in support of its conclusion that Plaintiffs' common law tort claims are not within the scope of the Agreement's arbitration provision. Nor could it. Iowa and federal courts have uniformly held that "a party may not avoid a contractual arbitration clause merely by casting its complaint in tort." *OHI (IOWA), Inc. v. USA Healthcare-Iowa, LLC*, 780 N.W.2d 248, 2010 WL 447112, at *4 (Iowa Ct. App. 2010) (quoting *Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993)); *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 499–500 (8th Cir. 2007) ("[u]nder the Federal

Arbitration Act, we generally construe broad language in a contractual arbitration provision to include tort claims arising from the contractual relationship."); *Kroll v. Doctor's Assocs*., 3 F.3d 1167, 1170 (7th Cir.1993) ("A plaintiff may not avoid an otherwise valid arbitration provision merely by casting its complaint in tort. The touchstone of arbitrability in such situations is the relationship of the tort alleged to the subject matter of the arbitration clause.") (internal quotation and citation omitted); *Acevedo Maldonado v. PPG Indus*., 514 F.2d 614, 616 (1st Cir. 1975) ("Broad [arbitration] language … covers contract-generated or contract-related disputes between the parties however labeled; it is immaterial whether claims are in contract or in tort.")

It is irrelevant that Plaintiffs did not plead a claim for breach of contract. Absent the contractual relationship between the parties, the Plaintiffs' claims "would either not exist or look entirely different." *Valspar Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 104 F. Supp. 3d 977, 981–82 (D. Minn. 2015) (holding that a broad contractual arbitration clause contained in a "Payment Agreement" encompassed the plaintiff's claims under a completely different agreement, because the plaintiff's claims "touch matters covered by the Payment Agreement and its arbitration clause"

(quotation marks and citation omitted)). *See also Witt v. Nation-Wide Horse Transportation, Inc.*, 197 F. Supp. 3d 1146 (S.D. Iowa 2016) (accord).

Because Plaintiffs' claims indisputably "had their genesis in, arose out of, and related to" CoOportunity's contractual relationship with Milliman and the work Milliman performed under the Agreement, the District Court's erroneous conclusion to the contrary must be reversed. *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 801 (8th Cir. 2005), quoting *Kroll*, 3 F.3d at 1170.[3]

C. The District Court Erroneously Held that the Liquidator Can Disavow the Arbitration Agreement under Iowa Liquidation Act § 507.21(1)(k)

In their Petition, Plaintiffs purport to disavow the Agreement precisely because their claims arise out of and relate to the Agreement, and they are seeking to avoid its otherwise applicable arbitration provision. (App. 15, ¶ 46 ("To the extent the Agreement applies, the Liquidators disavow the

[3] Earlier this year, the Eighth Judicial District Court in Clark County, Nevada granted Milliman's motion to compel arbitration in a similar case brought by the Nevada Insurance Commissioner, acting as liquidator of that state's insolvent ACA Co-Op, where the liquidator's claims "arise from Milliman's work done pursuant to the Agreement." (*Nevada v. Milliman, Inc.*, No. A-17-760558-B (Nev. 8th J.D.C., Mar. 8, 2018) (the "Nevada Order") (App. 502–11.) In its papers before the District Court, Plaintiffs relied heavily on a Louisiana trial court decision denying Milliman's motion to compel arbitration against that state's Insurance Commissioner, acting as Rehabilitator for an insolvent ACA Co-Op. However, earlier this year, the Louisiana First Circuit Court of Appeal granted Milliman's application for a writ of certiorari for an expedited interlocutory appeal, granted Milliman's request to stay further trial court proceedings, and currently has the appellate writ *sub judice*.

Agreement").) By construing the Iowa Liquidation Act to permit Plaintiffs to disavow the Agreement, the District Court erroneously: (1) allowed the Iowa disavowal provision to trump the FAA; and (2) failed to follow the controlling precedent of this Court which limits the application of the disavowal power to executory contracts.

As to the first, the District Court's misinterpretation of the Iowa Liquidation Act to allow Plaintiffs to evade a contractual arbitration clause that otherwise applies to their claims violates controlling federal and Iowa precedent on the primacy of the FAA over contrary state law. *See, e.g.*, *Southland Corp.*, 465 U.S. at 10; *Roth*, 886 N.W.2d at 611-12. No plaintiff, including an insurance liquidator, can simultaneously sue for damages based on one party's work done pursuant to an agreement, while "disavowing" and avoiding the arbitration clause in the same agreement. *Allied-Bruce Terminix Cos., Inc.*, 513 U.S. at 281 ("What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful.").

Several courts in jurisdictions that, like Iowa, have statutory language permitting a liquidator to "disavow" an insolvent insurer's agreements, have nonetheless found that a liquidator cannot avoid a contractual arbitration

provision when they are pursuing common law claims that arise under the agreement at issue. For example, in *Bennett*, 968 F.2d at 972, the U.S. Court of Appeals for the Ninth Circuit enforced a contractual arbitration provision against a Montana liquidator. The Montana liquidation statute contains the identical broad "affirm or disavow contracts" language as Iowa's statute, with no statutory limitation of "disavowal" only to executory contracts. Mont. Code Ann. § 33-2-1345(1)(k). The Ninth Circuit nonetheless held that where, as here, the liquidator's claims arose from and related to an underlying contract between the insolvent insurer and the defendant, the liquidator could not avoid the contract's "perceived liabilities", *i.e.*, the arbitration provision. 968 F.2d at 972, n.4.

Similarly, in *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272 (D. Vt. 1993), the court enforced a contractual arbitration provision against an insurance company liquidator notwithstanding that the Vermont liquidation statute, like the Iowa law, permits a liquidator to "affirm or disavow any contracts to which the insurer is a party." Vt. Stat. Ann., tit. 8, § 7060(a)(12).

As to the second error, Plaintiffs cannot disavow the Agreement because Milliman already fully performed under it. This Court has long held that only ***executory*** contracts can be disavowed. *Maxwell v. Missouri Valley*

Ice & Cold Storage Co., 164 N.W. 329 (Iowa 1917); *State v. Associated Packing Co.*, 192 N.W. 267 (Iowa 1923).

The District Court rejected this controlling precedent solely because the Iowa Liquidation Act does not expressly limit the Liquidators' disavowal power to executory contracts. (App. 263.) That rationale is simply wrong. Like the Iowa Liquidation Act, the disavowal statute at issue in *Maxwell* did not expressly limit a trustee's disavowal power to "executory" contracts. Yet, *Maxwell* evaluated the purpose of the disavowal power and determined that it makes no sense to allow a trustee to disavow a contract that has already been fully performed. The Court explained that a receiver can refuse to be bound by ***executory*** contracts because "improvident contracts are often the very basis of the conditions which make the appointment of a receiver necessary for the protection of the assets in the interest of creditors" *Id*. at 332; *see also Associated Packing Co.*, 192 N.W. at 267 (distinguishing fully executed contracts from executory ones, and finding that receiver could refuse the contract ***because it was executory***); 65 Am. Jur. 2d Receivers § 165 ("A receiver has the power to accept or reject executory contracts in order to preserve assets of the receivership estate and to promote the best interests of all parties.").

Here, the Liquidators' claims against a third party contractor do not involve protection of the assets of the insolvent estate. The Petition seeks to obtain Milliman's assets to add to the coffers of the estate. Plaintiffs' attempted disavowal of the fully-performed Agreement has no bearing on the ***preservation*** of the insolvent insured's estate.

D. Plaintiffs' Petition Asserts Claims That Solely Belong To CoOportunity And The Liquidator As CoOportunity's Legal Successor

Plaintiffs' statutory authority to bring an action "on behalf of" CoOportunity's creditors and policyholders under Iowa Code § 507C.21(1)(m) was not a proper basis for the District Court to conclude that Plaintiffs' claims in their petition do not arise out of or relate to the Agreement. (App. 263–64.)

Plaintiffs concede that ***this*** action "seek[s] to ***recover damages for the financial loss to CoOportunity***, and that the recovery will go to the [CoOportunity] estate ...." (App. 242 (emphasis added); *see also* App. 10, ¶ 21 (stating that this action against Milliman is intended to "maximize the assets of the estate of CoOportunity").) This accords with both the Liquidation Order and the Liquidation Act, which vest Plaintiffs with the contract rights and obligations ***of CoOportunity*** to assert those rights and the

authority to sue ***for CoOportunity***. (App. 223, ¶ 1; App. 227, ¶ 16; Iowa Code §§ 507C.18(1), 507C.21(l).)

While Plaintiffs may also be empowered to assert claims "on behalf of" creditors and policyholders under section 507C.21(1)(m), the Petition makes clear that no such legal claims have been pleaded here. The claims against Milliman do not seek the return of CoOportunity's assets, nor to claw back or redistribute estate assets among CoOportunity's creditors, nor involve policyholders' efforts to create a setoff against an insolvent insurer's assets.[4] The Liquidators' claims do not involve an alleged post-insolvency preference or fraudulent conveyance. This case is entirely separate from the ongoing liquidation proceeding. It neither threatens nor states any interest in CoOportunity's assets or property, and it will not affect any policyholder or creditor rights. *See AmSouth Bank*, 386 F.3d at 780 (distinguishing claims by "angry creditors attempting to sue insolvent insurance companies in federal court to jump ahead in the queue of claims," from claims "where the insurance companies are themselves the natural plaintiffs").

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[4] As a clear contrast to this case, in *Stephens v. American International Ins. Co.*, 66 F.3d 41, 44 (1995), on which Plaintiffs relied below, the Second Circuit Court of Appeals held that a cedent's setoff claims against an insolvent reinsurer's estate were not arbitrable, particularly "[s]ince reinsurance is a practice which falls within the 'business of insurance.'" The Court held that "reinsurance is not merely 'an integral part of the policy relationship between the insurer and insured,' it *is* the policy relationship between the two parties." *Id*. (italics in original).

The District Court's contrary holding ignored the critical distinction between claims that ***belong*** to CoOportunity's creditors or policyholders, and claims that belong to CoOportunity, but may ultimately ***benefit*** its creditors or policyholders by increasing the size of the estate. As the U.S. Third Circuit Court of Appeals stated in *Suter*:

> It is true, as the Liquidator stresses, that if the District Court or an arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act.

223 F.3d at 161 (explaining further that if the liquidator were meritorious in its action against a reinsurer to enforce rights for an insolvent insurer, the damages recovered will merely "benefit the insurer's estate").

The Nevada trial court addressed this very issue in the Nevada Order. The court rejected the Nevada liquidator's conclusory assertion that she had brought claims "on behalf of" the Nevada Co-Op's creditors and policyholders, and that therefore the claims had to be adjudicated in the insolvency court and not in arbitration. Instead, the Nevada court evaluated the nature of the liquidator's damages claims, and concluded that the liquidator's common law damages claims against Milliman, even if they ultimately benefit creditors and policyholders by "increas[ing] the coffers of the estate," belonged to the insolvent Co-Op:

> All of Plaintiff's claims here belonged only to NHC because they are ordinary common law and contractual damages claims based on NHC's pre-insolvency rights. Plaintiff seeks monetary damages from Milliman, not the return of NHC assets, and not the clawing back and redistribution among creditors of estate assets. Plaintiff's action against Milliman does not involve set offs, or proofs of claim, or claims arising from the Nevada liquidation statute. This case is separate and distinct from the ongoing Receivership Action and it neither threatens nor states an interest in NHC assets or property, nor will it affect any creditors' rights. Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors.

(App. 508–09.)

Whether or not Plaintiffs' claims may "benefit" CoOportunity's creditors or policyholders is irrelevant not only under the settled law discussed in this brief, but also under the controlling Liquidation Order. Paragraph 16 of the Liquidation Order expressly confirms that claims attacking Milliman's work pursuant to the Agreement, *even if* "for the benefit of CoOportunity's policyholders, creditors, and shareholders," must still be brought "***in any necessary forum***," including "***arbitration panels***" (*Id*. (emphasis added).)

It is also irrelevant whether Plaintiffs are or are not "mere" successors of CoOportunity, or whether they might or might "not stand only in CoOportunity's shoes." (App. 262.) Plaintiffs may wear many hats in their role as statutory liquidators: they may, among other things, pursue actions to clawback estate asserts, or resolve insurance coverage disputes brought by

policyholders, or address the priority of creditor claims seeking money from the estate. What matters here, however, is that in ***this*** Petition, Plaintiffs only bring common law tort claims for damages allegedly caused "to CoOportunity." Therefore, the liquidator "stands in the shoes of the insolvent insurer" and "is bound by [the insurer's] pre-insolvency agreements." *Bennett*, 968 F.2d at 972; *see also Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 626-27 (6th Cir. 2003) (a receiver "stands in the shoes of the entity in receivership," and, therefore, the receiver is "bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver").

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002), and *Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727 (Iowa 2014), on which the District Court relied, are inapposite and only reinforce Milliman's argument that Plaintiffs' claims are subject to arbitration. (App. 261.) Unlike Plaintiffs' claims against Milliman, the state and federal agency claims at issue in *Rent-A-Center* and *Waffle House, Inc.* were ***not*** simply causes of action that could have been brought by the affected employees who had entered into arbitration agreements with their employers. Rather, they were based on the agency's own prosecutorial authority to bring charges as part of a statutory enforcement action. *Rent-A-Center, Inc.*, 843

N.W.2d at 731, 734; *Waffle House, Inc.*, 534 U.S. at 283, 291. *See, e.g.*, *Rent-A-Center, Inc.*, 843 N.W.2d at 731 (explaining that the Iowa Attorney General's criminal justice bureau prosecutes the charges on behalf of the Iowa Civil Rights Commission). Therefore, the "essential point" of *Rent-a-Center* and *Waffle House* is that "the FAA's reach does not extend to a public agency that is neither a party to an arbitration agreement nor a stand-in for a party." *Id*. at 736 (citing *Waffle House, Inc.*, 534 U.S. at 289). Here, by contrast, the Liquidators' action against Milliman is comprised of ***only*** pre-insolvency common law claims that belonged ***to CoOportunity*** and could only have been brought ***by CoOportunity***. Because the Liquidators are legal successors to CoOportunity with respect to the claims against Milliman, *Rent-a Center* and *Waffle House* have no application to this case.

E. It Is Immaterial That Plaintiffs Are Non-Signatories To the Agreement

Nor is it relevant that Plaintiffs are technically "non-signatories" to the Agreement. (App. 262.) If that had any impact on the arbitrability of a liquidator's claims, there would be ***no*** cases requiring insurance company liquidators to arbitrate when they bring claims based on a defunct insurer's pre-insolvency rights. Instead, the opposite is true.

Iowa courts routinely enforce arbitration provisions against non-signatories under well-recognized principles of agency or contract law. *See*,

e.g., *Bullis v. Bear, Stearns & Co., Inc.*, 553 N.W.2d 599, 602 (Iowa 1996) (reversing district court's denial of motion to compel arbitration against non-signatory); *DB Acoustics, Inc. v. Great River Contractors, L.L.C.*, No. 09-1260, 2010 WL 1375319, at *2–3 (Iowa Ct. App. April 8, 2010). Because Plaintiffs' claims originally belonged to the signor of the Agreement, they are bound by the arbitration provision. In *Roth*, this Court held that a non-signatory is bound to an arbitration provision where, as here, that non-signatory brings claims that either belonged originally to a signor of the agreement, or are derivative of such claims. 886 N.W.2d at 608.

The fact that the District Court embraced this red herring argument reflects a fundamental misunderstanding of the issues at play under the FAA analysis. The actual issue is whether the Agreement provided that CoOportunity would not continue to be bound to arbitrate post-insolvency, ***not*** whether the Liquidators signed or assented to the Agreement. Under the FAA, unless the intent is made clear and unambiguous in the arbitration agreement itself to exclude a claim from arbitration, the law and presumption is in favor of enforcing the arbitration clause. *AT&T Techs*, 475 U.S. at 650; *Highlands Wellmont Health Network, Inc.v. John Deere Health Plan, Inc.*, 350 F.3d 568, 577 (6th Cir. 2003) ("Where the arbitration clause is broad, ***only an express provision excluding a specific dispute***, or

the ***most forceful evidence*** of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators.") (emphasis added, internal quotes and citations omitted); *Parm v. Bluestem Brands, Inc*., 898 F.3d 869, 873-74 (8th Cir. 2018) (accord).

Nothing in the Agreement so much as even suggests that CoOportunity or its Liquidators would not be bound to its Agreement to arbitrate if CoOportunity became insolvent. In *Quackenbush*, the U.S. Ninth Circuit Court of Appeals squarely rejected a similar argument advanced by the insurance liquidator here, holding: "The parties agreed to arbitrate 'any dispute . . . with respect to any transaction.' There is simply no reason to believe that the parties somehow intended to exclude post-insolvency disputes from arbitration." 121 F.3d at 1380. The same is true here.

F. The District Court Erred in Holding that the Iowa Liquidation Act Contradicts the FAA and Reverse-Preempts the FAA under the McCarran-Ferguson Act

Unanimous on-point federal authority contravenes the District Court's holding that it "cannot compel arbitration under the FAA because, under the McCarran-Ferguson Act, the [Iowa Liquidation] Act reverse-preempts the FAA." (App. 264.) The District Court misconstrued disparate provisions of the Liquidation Act to create a conflict with the FAA, rather than construing the Iowa Act's language (1) as written, and (2) to avoid creating Supremacy

Clause issues. A McCarran-Ferguson analysis should not have even been applied here because there is no conflict between the FAA and the Iowa Liquidation Act or the Liquidation Order, both of which authorize the Liquidators to arbitrate the claims they assert against Milliman.

1. McCarran-Ferguson Does Not Apply Because There is no conflict between the FAA and the Iowa Liquidation Act

The Iowa Liquidation Act authorizes Plaintiffs to "prosecute [and] institute … suits and ***other legal proceedings***," which includes arbitration. Iowa Code § 507C.21.1(l) (emphasis added). *See Costle*, 839 F. Supp. at 275 ("This Court interprets 'other legal proceedings' [as used in the insurance liquidation statute] to include arbitration proceedings."); Nevada Order (App. 510) (finding no conflict between the Nevada Liquidation Act and the FAA because the receiver was expressly authorized to institute and prosecute "any and all suits ***and other legal proceedings***") (emphasis added). The Liquidation Order entered pursuant to the Iowa Act likewise allows Plaintiffs to sue in "***any necessary forum***" and expressly includes "the ***arbitration panels*** of this state and other states." (App. 227, ¶ 16 (emphasis added).) Nowhere in the Order does the District Court address these critical provisions that undermine the District Court's creation of a conflict between federal and state law.

Tellingly, the District Court also cited no provision of the Iowa Liquidation Act to support its conclusion that the Liquidators' claims "must be resolved in a public forum of the Liquidators' choosing." (App. 263.) In fact, nothing in the Liquidation Act or the Liquidation Order requires the Liquidators' common law tort damages claims against Milliman to be heard in any public forum, or exclusively in Polk County District Court, or before any court at all.

Plaintiffs are well aware that neither the Act nor the Liquidation Order provides them with the unfettered right to bring a defendant into Iowa State Court at their discretion. To that end, Plaintiff sued the U.S. Department of Health & Human Services ("HHS") in the U.S. District Court for the Southern District of Iowa for payments allegedly owed to CoOportunity. *See Gerhart v. U.S. Dep't of Health and Human Svcs.*, No. 16-cv-00151 (S.D. Iowa). If Plaintiffs in fact had the unfettered right to select their forum for litigation, no doubt they would have sued HHS in Polk County.

2. The Liquidators' Prosecution of these Claims Does Not Constitute or Interfere with the "Business of Insurance"

What constitutes, or interferes with, the "business of insurance" under the McCarran-Ferguson Act is strictly a question of federal law. *See, e.g.*, *S.E.C. v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 67 (1959); *First Nat'l Bank of E. Arkansas v. Taylor*, 907 F. 2d 775, 780 n.8 (8th Cir. 1990);

Beam Partners, 2018 WL 4344456 (E.D. Ky. Sept. 11, 2018). McCarran-Ferguson states that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The statute was passed "to assure that the activities of insurance companies in ***dealing with their policyholders*** would remain subject to state regulation." *S.E.C. v. Nat'l Secs., Inc.*, 393 U.S. 453, 459-60 (1969) (emphasis added) ("Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does [McCarran-Ferguson] apply.") The U.S. Supreme Court has stated that "courts should narrowly construe the McCarran-Ferguson Act," and that the focus of the act is on "***the relationship between the insurance company and the policyholder***. Statutes aimed at protecting or regulating ***this relationship*** ... are laws regulating the 'business of insurance.'" *Id.* at 460 (emphasis added).

Uniform federal caselaw throughout the United States construing the McCarran-Ferguson Act has held that "[a]n ordinary suit against a tortfeaser by an insolvent insurance company" neither implicates nor impairs the business of insurance under McCarran-Ferguson. *AmSouth*, 386 F.3d at 783

("Where the insolvent insurer is itself a plaintiff in an ordinary contract or tort action, courts tend to look unfavorably on claims of McCarran-Ferguson preemption of the FAA."); *Bennett*, 968 F.2d at 972 (holding that "[a]pplication of the FAA" to insurance liquidator's common law damages claims against a third party "does not impair the liquidator's substantive remedy under Montana law. Instead it simply requires the liquidator to seek relief through arbitration. The liquidator has presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer."); *Grode*, 8 F.3d at 959–60 (holding no reverse preemption because liquidator's "contract or tort action" against third party has "nothing to do with [the State's] regulation of insurance"); *Suter*, 223 F.3d at 161 (3d Cir. 2000) (same); *Beam Partners*, 2018 WL 4344456 at *10 ("[T]he McCarran-Ferguson Act does not allow reverse-preemption of the FAA when the Liquidator of an insurance company brings suit against a third-party independent contractor for tort or breach of contract claims."); *Koken v. Reins. (Barbados) Ltd.*, 34 F. Supp. 2d 240, 247 (M.D. Pa. 1999) (granting motion to compel arbitration where "this action has nothing to do with Pennsylvania's statutory scheme for the regulation of the business of insurance because it is not an action against an insolvent insurer's estate that might deprive it of assets"); *Midwest Employers Cas. Co. v. Legion Ins. Co.*,

No. 4:07CV870 CDP, 2007 WL 3352339, at *5 (E.D. Mo. Nov. 7, 2007) ("The ultimate issue in this case is a standard contract dispute, so the case does not involve the state's regulation of insurance."); *Costle*, 839 F. Supp. at 275. *See also* App. 508-509 ("[A]rbitrating Plaintiff's damages claims against Milliman will not interfere with, invalidate, impair or supersede this state's statutory liquidation scheme … or the State's regulation of insurance.")

In *Suter*, 223 F.3d at 161, the Third Circuit compelled arbitration and rejected a liquidator's argument that "the arbitration of this controversy... will impair New Jersey's Liquidation Act," holding:

> This is not a delinquency proceeding or a proceeding similar to one [nor] a suit by a party seeking to access the assets of the insurer's estate. . . . What this proceeding is is a suit instituted by the Liquidator against a reinsurer to enforce contract rights for an insolvent insurer, which, if meritorious, will benefit the insurer's estate. Accordingly, we fail to perceive any potential for interference with the Liquidation Act proceedings before the Superior Court.

Id.

Similarly, in *AmSouth*, four state insurance receivers sued two banks in a third-party tort action "to recover money in an ordinary common-law-damages suit." *Id.* at 780. The Sixth Circuit held that where a receiver or liquidator sues in tort or contract, such a proceeding implicates the business of insurance only "in an attenuated fashion" in that the liquidated insurer

might have more assets as a result of its successful tort suit. Citing the Supreme Court decision in *Fabe*, the Sixth Circuit held that seeking to increase a defunct insurer's assets—the entire purpose of the Liquidators' suit against Milliman here—was an insufficient connection to the "business of insurance" to trigger reverse preemption under McCarran-Ferguson. 386 F.3d at 783.

AmSouth also confirms that state statutes that seek to regulate the forum in which a liquidator or insurer can sue do not regulate the "business of insurance." The Sixth Circuit stated that even where a litigation generally is "integral to" the performance of an insurance contract—and thus implicates the business of insurance—"the choice of forum [is] not." *Id.* at 781, citing *Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 838-40 (6th Cir. 1996).

The recent Kentucky District Court decision in *Beam Partners, LLC*, is similarly instructive. The *Beam* court addressed whether the liquidator's common law tort and contract claims implicated the state's regulation of the "business of insurance," and held that they did not:

> The outcome of this litigation does not affect the policy holders of KYHC, there is no transfer or spreading of insurance policy risk, and this has no direct effect on the relationship between KYHC and its insured policy holders. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). This litigation involves a contract dispute between a business and its management company, not an insurance contract. *Fabe*, 508 U.S. at 505. Simply because the business is an insurance

> company and has become insolvent is not relevant to the regulation of the business of insurance.

Beam Partners, 2018 WL 4344456, at *9.

The *Beam* court, like the Sixth Circuit, also held that aspects of a statute that merely affect a liquidator's right of forum selection, as opposed to its "substantive rights," do not interfere with the IRLL:

> Arbitration does not deprive the Liquidator of any substantive rights, only altering the forum in which the Liquidator may pursue those rights. Mandating arbitration in this case does not alter the disposition of claims of the policy holders and does not "invalidate, impair, or supersede" the IRLL as a whole. The arbitration of the Liquidator's claims against a third party contractor does not impair the delinquency proceedings in state court, nor does it invalidate the protections of the IRLL.

(*Id*.).

Notably, unlike the Iowa Liquidation Act, which specifically authorizes the Liquidators to arbitrate claims when necessary, the Kentucky Supreme Court has interpreted the IRLL to nullify contractual arbitration provisions in third party contracts in favor of exclusive jurisdiction in Franklin Circuit Court. Thus while the District Court's reverse preemption ruling in this case was based on the purported "depth and breadth of authority granted to the Liquidators by the [Iowa] Legislature under the Act," (App. 264, n. 5), Plaintiffs obviously have no more "authority" to avoid arbitration under the Iowa Liquidation Act than the Kentucky liquidator purported to have under the IRLL.

The District Court's holding that the Iowa Liquidation Act as a whole generally regulates the business of insurance is both wrong ***and*** misses the point. The correct analysis is whether the Plaintiffs' "***prosecution of [their] common law cause[s] of action at issue***" constitutes or interferes with the business of insurance. *AmSouth*, 386 F.3d at 780 (emphasis added); *Brown v. Cassens Transp. Co.*, 546 F.3d 347, 358 (6th Cir. 2008) (stating that, when determining what falls within the "business of insurance," "the focus is on how to characterize ***conduct*** undertaken by private actors, rather than how to ***characterize state laws*** in regard to what they regulate") (emphasis added). The District Court undertook no such assessment. Had it done so, the answer would have been clear: as a matter of well-settled law, Plaintiffs' prosecution of these claims neither constitutes the business of insurance, nor does arbitration interfere with the business of insurance.

Unable to cite to any authority to contravene the on-point federal precedent discussed above—because there is none—the District Court cited only *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491 (1993) to support its holding. However, the *Fabe* decision did not involve the question of the enforceability of an arbitration clause against a state insurance liquidator. Moreover, the Supreme Court's reasoning in *Fabe* makes clear that bringing additional funds into the insurer, while it may "indirect[ly]" benefit

policyholders, does not constitute the "business of insurance", and is insufficient to justify reverse preemption under the McCarran-Ferguson Act:

> We hold that the Ohio priority statute, to the extent that it regulates policyholders, is a law enacted for the purpose of regulating the business of insurance. To the extent that it is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance. Of course, every preference accorded to the creditors of an insolvent insurer ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company. This argument, however, goes too far: 'But in that sense, every business decision made by an insurance company has some impact on its reliability… and its status as a reliable insurer…. *Royal Drug* rejected the notion that such indirect effects are sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act.

508 U.S. at 508-09 (citations omitted).

The Liquidators below similarly relied only on inapposite cases in which a third party plaintiff brought claims ***against*** the liquidator, or claims involving the rights to the assets of an insolvent insurer's estate. Here, however, as in *Amsouth*, *Suter*, *Quackenbush*, *Bennett*, *Beam* and the other caselaw discussed above, enforcing the Agreement's arbitration clause will not "disrupt the orderly liquidation of" CoOportunity, or otherwise "impair" Iowa's insolvency scheme. *Quackenbush*, 121 F.3d at 1381.

3. The District Court Erroneously Relied on Public Policy Concerns to Vitiate Milliman's Arbitration Rights

The District Court further erred in holding that "[f]orcing the Liquidators to arbitrate would interfere with," *inter alia*, "the public's

interest in the proceeding" and "the Act's purposes of economy and efficiency." (App. 263.) A court cannot rely on public policy considerations to vitiate a binding arbitration clause. As the Eighth Circuit stated in *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir. 2001), when "determining whether a dispute is properly arbitrable … our authority does not extend to the consideration of public-policy advantages or disadvantages resulting from the enforcement of the agreement." *See also Quackenbush*, 121 F.3d at 1382 (holding that trial court "had no discretion to consider public-policy arguments about the state statute in deciding whether to compel arbitration under the FAA"), citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("[C]ourts [should] enforce the bargain of the parties to arbitrate, and 'not substitute [their] own views of economy and efficiency.'").

In all events, the District Court's holding contravenes this Court's express recognition of the cost savings and efficiencies of arbitration which will inure to the ***benefit*** of the State and CoOportunity's creditors. *State v. Pub. Employment Relations Bd.*, 744 N.W.2d 357, 362 (Iowa 2008).

4. The District Court's and Plaintiffs' Reliance on *Taylor v. Ernst & Young, LLP* Was Improper

Plaintiffs clearly tried to model their Petition, and drafted the Order that the District Court signed, in an effort to follow the Ohio Supreme

Court's split majority decision in *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203 (Ohio 2011), in which the Court denied a third party contractor's motion to compel arbitration of a state insurance liquidator's common law tort claims. However, Plaintiffs' and the District Court's reliance on *Taylor* only underscores why the order denying Milliman's motion to compel arbitration must be reversed. Like the District Court here, the *Taylor* court completely disregarded the on-point FAA jurisprudence discussed above, and failed to conduct the requisite analysis under federal law of whether the Ohio statute at issue was superseded by the FAA.

Furthermore, the *Taylor* court, like the District Court here, erroneously relied on so-called "public policy" concerns in order to vitiate the otherwise valid arbitration agreement at issue. As the *Taylor* dissenting judges correctly stated, the majority improperly determined that the liquidator's claims at issue arose under "public policy," rather than the very engagement letter pursuant to which Ernst & Young performed its work:

> [T]he duties imposed by Ohio law that E&Y allegedly failed to perform are the same as those set forth in the engagement letter, and whether cast in tort or contract, the issue is one that falls within the broad scope of the arbitration provision. It also bears repeating that the claim alleges that ACLIC "retained" E & Y to conduct its audit and that retention occurred only because of the engagement letter. Moreover, although the liquidator may be empowered by statute to assert this claim, the basis for the claim is E&Y's alleged negligence, which arose from the services it rendered pursuant to the engagement letter.

958 N.E.2d at 1222 (O'Donnell, J., concurring in part, dissenting in part).

The dissent's rationale accords with the well-settled law discussed in Section A, *supra*, and should be applied here. By contrast, embracing the majority's strained approach would set dangerous precedent, upending long standing authority on the interpretation of broad arbitration provisions like the one in this case. Companies doing business in Iowa expect that their contracts, including their arbitration agreements, will be honored and enforced by Iowa courts in accordance with federal law. *Taylor* and the District Court's order would undermine that expectation.

Both Plaintiffs and the District Court also ignored key differences between this case and *Taylor*. First, *Taylor* was based in large part on Ohio law's presumption ***against*** arbitration when a party seeks to invoke an arbitration provision against a non-signatory. *Id*. at 1210. There is no such presumption under Iowa law. *See DB Acoustics, Inc.*, 2010 WL 1375319, at *2*; Roth*, 886 N.W.2d at 608.

Moreover, unlike here, in *Taylor* there was apparently no governing liquidation order before the Court that expressly authorized the liquidator to arbitrate when necessary. (App. 227, ¶ 16.) Thus, while the Ohio Supreme Court held that the Ohio liquidation statute afforded the liquidator the

unilateral right to decide where to bring claims, the Iowa Liquidation Act and Liquidation Order do not afford Plaintiffs that unilateral discretion.

Of course, even if the Iowa statute does afford Plaintiffs such discretion—like the Kentucky IRLL does—the District Court erred in determining that a liquidator's choice of forum is an interest that can supersede Milliman's federal arbitration rights. A state's interest in adjudicating any and all cases involving an insolvent insurer in a single court is *not* 'the business of insurance' under federal law, at least where a liquidator is the plaintiff suing for damages, as here. As the *Beam* court stated in holding that the FAA preempts the IRLL's forum selection provision, "[a]rbitration does not deprive the Liquidator of any substantive rights, only altering the forum in which the Liquidator may pursue those rights. Mandating arbitration in this case does not alter the disposition of claims of the policy holders and does not 'invalidate, impair or supersede' the IRLL as a whole." *Beam Partners*, 2018 WL 4344456, at *10.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellants Milliman, Inc., Kimberly Hiemenz, and Michael Sturm respectfully request that the judgment of the District Court be reversed, that their motion to dismiss the

First Amended Petition be granted, and that Plaintiffs be compelled to arbitrate their claims against Milliman.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request to be heard orally upon the submission of this appeal.

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PROOF OF SERVICE

I hereby certify that on the 3rd day of December, 2018, I electronically filed the foregoing Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the below listed attorneys. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 10,436 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in Times New Roman 14 pt.

Dated: December 3, 2018

/s/ Stephen R. Eckley