Journal of Dispute Resolution

Volume 2004 | Issue 2 Article 8

2004

On Hostile Ground: Ohio's Notice to Insolvent Insurance Companies with Arbitration Agreements - Bejamin v. Pipoly

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On Hostile Ground: Ohio's Notice to Insolvent Insurance Companies with Arbitration Agreements

Benjamin v. Pipoly[1]

I. INTRODUCTION

Congress enacted the McCarran-Ferguson Act in order to specifically delegate the power to manage the insurance business to the individual states.[2] After the McCarran-Ferguson Act became law, individual states enacted statutory regulations regarding the management of the insurance business. These statutory schemes include regulations and powers given to the liquidator of an insolvent insurance company. Although every state's statutes differ, most provide the liquidator with broad power to manage insolvent insurance companies.

In *Benjamin v. Pipoly*, the Court of Appeals of Ohio reviewed whether the liquidator of an insolvent insurance company had the power to avoid the enforcement of arbitration agreements. The court held that the broad statutory power conferred to a liquidator permitted them to affirm or disavow any contracts made by the insolvent insurance companies, including any contractual provisions for the arbitration of disputes. The court also expressly overruled prior Ohio case law regarding the status of arbitration agreements in insurance insolvency.

II. FACTS AND HOLDING

Ann H. Womer Benjamin appealed the decision of the Franklin County Court of Common Pleas to stay her action against the appellees and order that the case proceed to arbitration.[3] Appellant Benjamin is the Superintendent of the Ohio Department of Insurance and acted as the liquidator of two insolvent companies, Credit General Insurance Company (CGIC) and Credit General Indemnity Company (CGIND).[4] Benjamin continued the claims brought by the former Superintendent of the Ohio Department of Insurance, J. Lee Covington II.[5] The appellees, Michael J. Saxon, Laura B. Darcy, John H. Fehler, Richard J. Babel, Bryan K. Griffin, and Ronald E. Pipoly (collectively, Pipoly) served as officers and directors of CGIC and CGIND prior to the institution of liquidation proceedings.[6]

Benjamin's original suits against Pipoly were tort claims for alleged breaches of fiduciary duties, which were realized while Pipoly held positions as officers

1. 800 N.E.2d 50 (Ohio Ct. App. 2003).
2. 15 U.S.C. § 1011 (2004).
3. *Benjamin*, 800 N.E.2d at 52.
4. *Id.*
5. *Id.* at 52-53. Covington brought the claims against the two insolvent insurance companies while acting as the original liquidator of the two companies. *Id.* at 53.
6. *Id.* at 52.

and directors in the two insolvent insurance companies, CGIC and CGIND.[7] The alleged breaches were founded on Pipoly's alleged knowledge and concealment of serious financial and operational problems with CGIC and CGIND and the subsequent failure to correct those problems.[8]

As an officer or director of CGIC and GCIND, Pipoly entered into employment agreements with Phoenix Management Enterprises, Inc., which later became known as PRS Management Group, Inc. (PRS).[9] Each of the employment agreements contained an arbitration provision stating that disputes related to the employment agreement should first be settled between the parties informally. If that failed, disputes would be subjected to binding arbitration in Cleveland, Ohio, subject to the rules of the American Arbitration Association.[10]

In her capacity as the liquidator of the two companies, Benjamin disavowed all agreements to arbitrate and all of Pipoly's employment agreements.[11] The Ohio code permits the liquidator of an insolvent insurance company to enter into new contracts and affirm or disavow contracts made by the insolvent insurance company.[12]

Benjamin challenged each of the findings of the trial court.[13] Benjamin argued that the arbitration clauses contained in the employment agreements were unenforceable against her because she was not a party to the employment agreements and because she expressly disavowed them.[14] Benjamin argued that the strong policies embodied within Ohio's insurance liquidation statutes outweighed the general policy favoring arbitration.[15]

Pipoly argued that Benjamin "stands in the shoes" of the two companies and is, therefore, bound by all provisions in the employment agreements.[16] Appellee contended that Benjamin should be bound by all agreements mandating arbitration.[17] It was further argued by Pipoly that Benjamin should be bound by the terms of the employment agreements and should be estopped from disavowing

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7. *Id.*
8. *Id.*
9. *Id.* at 53.
10. *Id.* The relevant portion of provision 10 of the employment agreement states:
Arbitration. In the event of any claim, dispute or disagreement arising out of, relating to, or concerning the interpretation of, any term, clause or provision of this Agreement, or the relationship, rights and obligations created by this Agreement, and upon written notice by the party asserting any such claim, dispute or disagreement, the parties agree to confer in good faith and attempt to resolve the claim, dispute or disagreement informally, unless equitable relief is sought to enjoin or restrain the violation of sections 5, 6 and/or 7 hereof. If such claim, dispute or disagreement is not resolved within thirty (30) days, the claim, dispute or disagreement shall be finally settled by binding arbitration in Cleveland, Ohio under the rules of the American Arbitration Association.
Id.
11. *Id.* at 54.
12. OHIO REV. CODE ANN. § 3903.21(A)(11) (West 2004). The statute states that a liquidator may "[e]nter into such contracts as are necessary to carry out the order to liquidate, and to affirm or disavow any contracts to which the insurer is a party." *Id.*
13. *Benjamin,* 800 N.E.2d 50, 55 (Ohio Ct. App. 2003).
14. *Id.*
15. *Id.* at 55-56.
16. *Id.* at 54.
17. *Id.*

them.[18] Pipoly stated that Benjamin must enforce the arbitration agreements contained in the employment agreements and other documents.[19]

The trial court agreed with Pipoly and stayed the liquidation proceedings and compelled arbitration.[20] The court found that although section 3903.21 of the Ohio Revised Code[21] authorized the appellant to disavow certain contracts, it relied on *Fabe v. Columbus Ins. Co.*[22] for the proposition that consideration should be given to both the liquidation statutes and the arbitration clause.[23] The trial court found that the companies were bound by the employment agreement and other agreements and were required to send all disputes to arbitration.[24]

On appeal, the Ohio Court of Appeals found that Benjamin's claim should not be forced into arbitration.[25] The appellate court rejected Pipoly's argument that the refusal to compel arbitration violated the Federal Arbitration Act (FAA)[26] because arbitration agreements are unenforceable if there are valid grounds to not enforce an arbitration agreement "at law or in equity for the revocation of any contract."[27] The appellate court relied on the broad power Ohio's legislature had conferred to liquidators to affirm or disavow contracts created by the insolvent company in order to find that failure to compel arbitration was not violative of the FAA.[28]

III. LEGAL BACKGROUND

A. McCarran-Ferguson Act

The McCarran-Ferguson Act reserves the power to regulate and tax the business of insurance to the individual states.[29] The act explains that the public interest is best served when the states regulate their own insurance industry.[30] Follow-

18. *Id.*
19. *Id.*
20. *Id.* at 54-55.
21. OHIO REV. CODE ANN. § 3903.21(A)(11) (West 2004). Appellant may "affirm or disavow any contracts to which the insurer is a party." *Id.*
22. 587 N.E.2d 966 (Ohio Ct. App. 1990).
23. *Benjamin*, 800 N.E.2d 50, 55 (Ohio Ct. App. 2003).
24. *Id.*
25. *Id.* at 63.
26. *Id.*
27. 9 U.S.C. § 2 (2000).
28. *Benjamin*, 800 N.E.2d at 63.
29. 15 U.S.C. §§ 1011-1015 (2000). The McCarran-Ferguson Act was enacted in response to the Supreme Court's decision in *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Congress enacted the Act to restore the supremacy of the states in the realm of insurance regulation after *South-Eastern* determined that insurance was considered part of interstate commerce and therefore subject to federal law. *See* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 498 (1993). The McCarran-Ferguson Act operates as reverse preemption, wherein the power to regulate the insurance industry is reserved to the states rather than deference to federal law. *See* Victoria Holstein-Childress, *The Enforceability of Arbitral Clauses Contained in Marine Insurance Contracts Against Nonsignatory Direct Action Claimants*, 27 TUL. MAR. L.J. 205, 222-23 (2002).
30. 15 U.S.C. § 1011. The statute states, "Congress hereby declares that the continued regulation and taxation by the several [s]tates of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." *Id.*

ing the enactment of the McCarran-Ferguson Act, nearly every state "adopted a comprehensive regulatory scheme with respect to insurance."[31] If the Act applies, federal courts should abstain from hearing insurance issues and leave such issues to the state courts.[32] The McCarran-Ferguson Act has been interpreted to contain an anti-preemption provision, meaning that state law regulates the insurance business and no federal law should impair it.[33] However, debate lingers as to what aspects of insurance transactions are considered "the business of insurance" and, therefore, fall under the coverage of McCarran-Ferguson.[34] There are further disputes regarding the status of arbitration agreements and its application to McCarran-Ferguson.[35]

In the context of insurance insolvency, the individual states, pursuant to the states' public interest in controlling insurance companies, have the power to manage the dissolution and liquidation of insurance companies.[36] Many state insurance laws provide exclusive and specific means of liquidating or rehabilitating an insurance company "while protecting the rights of the insured's, creditors and the general public."[37]

Title 39 of the Ohio Code provides the structure of regulating the insurance business.[38] Chapter 3903 of the Ohio Revised Code regulates the rehabilitation and liquidation of insurance companies.[39] The purpose of the Rehabilitation and Liquidation chapter of Title 39 is to protect "the interests of insured's, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers."[40] The Code vests broad powers in the liquidator of an insolvent insurance company to protect the interests of "insureds, claimants, creditors and the [general] public."[41] The liquidator's broad powers are further secured in section 3903.21(B) of the Ohio Revised Code.[42]

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31. *See* Nichols v. Vesta Fire Ins. Corp., 56 F. Supp. 2d 778, 780 (E.D. Ky. 1999).

32. Gerling-Konzern Globale Rueckversicherungs-Ag v. Selcke, No. 93-C-4439, 1993 WL 443404 (N.D. Ill. 1993) (finding that the exercise of federal jurisdiction would disrupt the administration of Illinois' insurance business regulatory scheme and therefore remanded to state court).

33. Costle v. Fremont Indem. Co., 839 F. Supp. 265, 274 (D. Vt. 1993).

34. Phillips v. Lincoln Nat'l Health & Casualty Ins. Co., 774 F. Supp. 1297, 1299 (D. Colo. 1991).

35. *See* Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Anlaysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act-1941-1993*, 43 CATH. U. L. REV. 399 (1994).

36. 43 AM. JUR. 2D *Insurance* § 93 (2004). *See* Garamendi v. Executive Life Ins. Co., 17 Cal. App. 4th 504, 514 (Cal. Ct. App. 1993).

37. 43 AM. JUR. 2D *Insurance* § 93 (2004). *See* Florida Dept. of Ins. v. Cypress Ins. Co., 660 So. 2d 1177 (Fla. Dist. Ct. App. 1995).

38. OHIO REV. CODE ANN., tit. 39 (West 2002).

39. *Id.* §§ 3903.01-3903.59.

40. *Id.* § 3903.02(D).

41. *Id.* §3903.21. Specifically referring to §3903.21(A)(11) which holds that the liquidator may "[e]nter into such contracts as are necessary to carry out the order to liquidate, and to affirm or disavow any contracts to which the insurer is a party." *Id.*

42. *Id.* §3903.21(B). This section of the Ohio code states:

> The enumeration, in this section, of the powers and authority of the liquidator shall not be construed as a limitation upon [the liquidator], nor shall it exclude in any manner his right to do such other acts not herein specifically enumerated, or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.

Id.

Different states afford liquidators of insurance companies varying degrees of power in the liquidation of insolvent insurance companies. Further, states differ in what issues are included in the business of insurance and covered by McCarran-Ferguson. In Pennsylvania, a court compelled an arbitration agreement when it found that a contract issue involving an unpaid debt was not part of the "complex" realm of insurance regulation.[43] The court found that McCarran-Ferguson did not apply, so federal court was an appropriate venue.[44] The court also looked to Pennsylvania insurance law and determined that a liquidator "stand[s] in the shoes of the insolvent insurer and is bound by the insurer's contractual agreements."[45]

A similar result was reached in Kentucky where a federal court refused to apply McCarran-Ferguson because the case was "no more than a garden variety contract suit which happen[ed] to involve two insurers."[46] The court implicitly found that McCarran-Ferguson did not apply because the dispute was not part of the insurance business, but merely a dispute between two insurance companies.[47] Such an interpretation suggests a narrow scope of a liquidator's power while liquidating an insolvent insurance company.

However, a district court in Kansas found McCarran-Ferguson to apply because the claims brought by the liquidator raised difficult issues which had not been addressed in Kansas and would have a significant impact on the development of Kansas insurance law.[48] The federal court abstained from hearing the case and remanded the issue to the state court.[49]

When deciding if McCarran-Ferguson applies, many courts consider the disputed issue and whether it falls within the state's insurance regulatory scheme.[50] If an insurance issue falls outside the scope of McCarran-Ferguson coverage, then the issue is appropriate for federal court and it appears that the enforcement of arbitration clauses becomes more probable.[51]

B. Arbitration

The Federal Arbitration Act (FAA) was enacted in 1925 in an effort by Congress to decrease the hostility in which the courts viewed arbitration.[52] The goal of the FAA was "to place arbitration agreements [on equal] footing as other contracts."[53] A key provision of the code specifies that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[54]

43. Koken v. Cologne Reinsurance Ltd., 34 F. Supp. 2d 240, 249 (D. Pa. 1999).
44. *Id.* at 256.
45. *Id.* (citing Kelly v. Commonwealth Mutual Ins. Co., 450 Pa. 177 (Pa. 1973)).
46. Nichols v. Vesta Fire Ins. Corp., 56 F. Supp. 2d 778, 781 (E.D. Ky. 1999) (holding that McCarran-Ferguson did not apply, so the court enforced arbitration due to the strong federal policy favoring arbitration).
47. *Id.*
48. Todd v. DSN Dealer Serv. Network, 861 F. Supp. 1531, 1543 (D. Kan. 1994).
49. *Id.* at 1544.
50. *Id.*
51. *Nichols*, 56 F. Supp. 2d at 781.
52. Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1243 (2001).
53. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).
54. 9 U.S.C. § 2 (2000).

The Supreme Court has recognized a general principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[55] The arbitrators "derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."[56]

In the context of insolvent insurance companies, some circuits have held that the liquidator "stands in the shoes" of the insolvent insurance company.[57] Of these circuits, some will compel a liquidator to arbitrate disputes if the insolvent insurance company agreed to do so.[58] In other circuits, courts permit a party to avoid arbitration clauses if it is within the liquidator's power to dismiss such a clause under the regulatory scheme or if staying any arbitration will protect policy holders.[59]

In Ohio, the liquidator of an insurance company is conferred with broad powers.[60] Pursuant to these powers, a liquidator may disavow certain contracts entered into by the insolvent insurance company, including arbitration clauses.[61] Ohio courts have consistently permitted the liquidator of an insurance company to avoid being compelled to arbitration.[62] In a recent Ohio case, the court held that arbitration clauses that affect the priority of creditors or adversely affect any party to the liquidation proceeding do not need to be enforced.[63] The court found that the enforcement of an arbitration provision is within the sound discretion of the trial court.[64]

C. *United States v. Fabe*

In *United States v. Fabe*, the Supreme Court determined whether a statute establishing the priority of creditors in an Ohio statutory procedure for the liquidation of an insolvent insurance company was regulating the business of insurance and covered under McCarran-Ferguson.[65] This decision produced a three-part test for the determination of whether the McCarran-Ferguson Act applies.[66] Part of

55. AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986) (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

56. *Id.* at 648-49.

57. Koken v. Cologne Reinsurance, Ltd., 34 F. Supp. 240, 256 (D. Pa. 1999); Bennett v. Liberty Nat'l Fire Ins. Co., 968 F.2d 969, 972 (9th Cir. 1992); Phillips v. Lincoln Nat'l Health & Casualty Ins. Co., 774 F. Supp. 1297, 1299 (D. Colo. 1991).

58. *Koken*, 34 F. Supp. at 240. *See also* Stephens v. Am. Int'l Ins. Co., No. 91 Civ. 6245, 1994 WL 414374 (S.D.N.Y. 1994).

59. Davister Corp., v. United Republic Life. Ins. Co., 152 F.3d 1277, 1281-82 (10th Cir. 1998). *See also* Ideal Mut. Ins. Co. v. Phoenix Greek Gen. Ins. Co., No. 83 Civ. 4687, 1987 WL 28636 (S.D. N.Y. 1987); 44A AM. JUR. 2D *Insurance* §1827 (2003).

60. Covington v. Lucia, 784 N.E.2d 186, 191 (Ohio Ct. App. 2003).

61. *Id.*

62. *Id. See also* Covington v. Am. Chambers Life Ins. Co., 779 N.E.2d 833, 837-38 (Ohio Ct. App. 2002).

63. *Am. Chambers Life Ins. Co.*, 779 N.E.2d at 838.

64. *Id.* at 837.

65. United States Dep't of Treasury v. Fabe, 508 U.S. 491, 493 (1993).

66. *Id.* at 500-01. The three part test is: (1) whether the federal statute at issue specifically relates to the business of insurance; (2) whether the state statute was enacted for the purpose of regulating the business of insurance; (3) whether application of the federal statue would impair, interfere, or supersede the state statute. *Id.*

this analysis was grounded in the Supreme Court's decision in *Union Labor Life Ins. Co. v. Pireno*, where a three-factor test was created to define what constitutes the business of insurance.[67] In *Fabe*, the court found that the business of insurance was most importantly involved with the performance of an insurance contract.[68] The decision held that the payment of claims made against policies was the primary purpose of the insurance company.[69]

In *Davister Corp., v. United Republic Life Ins. Co.*, the Tenth Circuit relied on the Supreme Court's decision in *Fabe*, finding that under the McCarran-Ferguson Act, the Federal Arbitration Act invalidates, impairs or supersedes the states' ability to regulate the insurance business.[70] The court in *Davister* found that permitting a creditor to remove one issue from the liquidation proceeding for arbitration would "impair the progress" of the resolution of all matters pertaining to the insolvent insurance company.[71] Removing such matters would directly impact the policyholders because such issues deal with the assets of the insolvent insurance company that will be apportioned to policyholders.[72] The court held that "the issue is not whether Utah prohibits arbitration," the issue is whether "enforcing arbitration invalidates, impairs or supersedes the enforcement of the state insurance regulation designed to protect the interests of policyholders."[73] The court in *Davister* buttressed its logic from a Fifth Circuit case that held, "[R]egardless of the nature of the reinsurers' action, ordering it resolved in a forum other than the receivership court nevertheless conflicts with [state] law giving the state court the power to enjoin any action interfering with the delinquency proceedings."[74]

IV. INSTANT DECISION

In *Benjamin v. Pipoly*, the Ohio Court of Appeals had to decide whether it was proper for a liquidator's claims against employees of an insolvent insurance company to be stayed pending arbitration when the liquidator was not a party to the arbitration agreements.[75] The court held that Benjamin's claims against the defendants would not be stayed pending arbitration.[76] The court reasoned that because the liquidator was not a party to the arbitration agreement, she was not bound by any of its provisions.[77] The court further reasoned that Ohio provided liquidators of insurance companies with broad powers to conduct liquidation pro-

67. *See* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) (holding that there are three factors to be considered in determining what constitutes the business of insurance: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is integral to the relationship of the insurer and the insured; (3) whether the practice is limited to entities within the insurance industry).
68. *Fabe*, 508 U.S. at 503-05.
69. *Id.* at 505-06.
70. *Davister Corp.*, 152 F.3d 1277, 1281 (10th Cir. 1998).
71. *Id.*
72. *Id.*
73. *Id.* at 1282.
74. *Id.* (quoting Munich Am. Reinsurance Co. v. Crawford, 141 F.3d 585, 595 (5th Cir. 1998)).
75. *Benjamin*, 800 N.E.2d 50, 52 (Ohio Ct. App. 2003).
76. *Id.*
77. *Id.* at 58-59.

ceedings and that compelling arbitration agreements impinges on these powers and violates public policy.[78]

In order to resolve the issue, the court first recited the broad powers given to liquidators in insurance liquidation proceedings.[79] The court noted that Ohio's insurance-liquidation scheme has many "features designed to vest within the liquidator broad and largely unfettered powers, under the supervision of the courts, to maximize the assets available to her in discharging her duties to claimants, shareholders, and creditors of the insolvent insurance company."[80] The court also noted the code sections that govern arbitration.[81] It then established the basis of its holding that only parties to an arbitration agreement may invoke the arbitration agreement.[82]

The decision recognized that a party can only be required to arbitrate if that party agreed in writing to arbitrate those disputes.[83] Noting that arbitration is a matter of contract, the court stated that a presumption against arbitration arises when a party has not agreed to submit to arbitration.[84]

The decision noted that the appellant never signed either the employment agreement or the mutual agreements to arbitrate raising the presumption against arbitration.[85] The court found that appellees cannot rebut this presumption against arbitration.[86] The court then held that "when a liquidator is appointed by court order . . . she is not automatically bound by the pre-appointment contractual obligations of the insurer."[87] The court held that a liquidator would only be bound if she affirmatively elected to be bound by prior obligations.[88] Because Benjamin was not party to the original agreements, and did not indicate that she wished to be bound by those agreements, the arbitration agreements would not be enforced against her.[89]

Following this holding, the court continued to discuss arbitration agreements in insurance liquidation proceedings and their relationship with prior case law. The court made an effort to expressly overrule *Fabe v. Columbus Ins. Co.*,[90] a case

78. *Id.* at 58.

79. *Id.* at 56. The opinion quotes OHIO REV. CODE ANN. § 3903.18(A) as follows: "The liquidator shall be vested by operation of law with the title to all of the property, contracts, and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the entry of the final order of liquidation." *Id.*

80. *Id.* at 56-57.

81. *Id.* at 57. The opinion quotes OHIO REV. CODE ANN. § 2711.02(B) as follows:
If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending . . . shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.
Id.

82. *Id.* (specifically stating that "prior to making any determination regarding the arbitrability of any issue raised by the parties' claims, a court must first determine whether the written arbitration agreement being invoked is in fact enforceable under basic contract precepts").

83. *Id.* (citing Boedeker v. Rogers, 136 Ohio App. 3d 425, 429 (Ohio Ct. App. 1999)).

84. *Id.* at 58.

85. *Id.*

86. *Id.*

87. *Id.* at 59.

88. *Id.*

89. *Id.*

90. 587 N.E.2d 966 (Ohio Ct. App. 1990).

on which Pipoly heavily relied.[91] The decision held that "where . . . private arbitration impinges upon a broad statutory scheme that invests sweeping powers in a state official, enforcement of arbitration ipso facto violates public policy."[92] The decision focused on the policy that insurance liquidators should be able to act without interference from other agencies.[93] The court found that the public policy regarding a liquidator's broad power "defeats any general attitude of the courts favoring arbitration."[94] The court found that a liquidator should never be compelled to arbitration against her will because that would interfere with the liquidator's powers and would adversely affect the insolvent insurer's assets.[95]

The court also rejected an argument that the liquidator should be estopped from disavowing the arbitration agreements because the disavowal came too late.[96] The decision refused to recognize the argument that a liquidator is subject to temporal limitations as to when she can disavow a contract.[97] The decision also rejected the argument that the liquidator was seeking a declaration of her rights because the claims in Benjamin's lawsuit are not related to failures under the employment contracts, but rather breaches of fiduciary and statutory duties.[98] Finally, the court reasoned that its decision is not violative of the FAA, contrary to the appellees' arguments, because the liquidators possessed the power to disavow any contract.[99]

V. COMMENT

Although the court's decision in *Benjamin* was correct, its holding that private arbitration ipso facto violates public policy is too aggressive a stance against arbitration and was not necessary to reach the holding of the case.[100] The court could have decided this case without taking an affirmative, hostile position against the enforcement of arbitration agreements in insurance liquidation proceedings.

The decision held that when a liquidator of an insolvent insurance company is appointed by the court, that individual is "not bound by pre-appointment contractual obligations . . . ."[101] The court found that a liquidator may affirmatively elect to be bound to any contracts through affirmation.[102] However, baring such action, a liquidator who was not party to the agreement is not bound by the arbitration agreements.[103] The court found that the liquidator did not expressly assume any of the arbitration provisions and was not bound by the agreements.[104] The logic and the opinion should have ceased at this point.

91. *Benjamin*, 800 N.E.2d 50, 60 (Ohio Ct. App. 2003).
92. *Id.* at 59.
93. *Id.*
94. *Id.* at 60.
95. *Id.*
96. *Id.* at 62.
97. *Id.* (distinguishing Covington v. MetroHealth Sys., 782 N.E.2d 624 (Ohio Ct. App. 2002)).
98. *Id.* at 63 (distinguishing Gerig v. Kahn, 769 N.E.2d 381 (Ohio 2002)).
99. *Id.*
100. *Id.* at 59.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*

Following this portion of the decision, the *Benjamin* court took a hostile position against arbitration agreements in the liquidation setting. The court reasoned that Ohio's broad statutory powers provided to the liquidator include a presumption against arbitration agreements if the liquidator was never party to any agreement and did not assume any agreement.[105] This holding expressly rejected the holding in *Fabe v. Columbus Ins. Co.*,[106] which stated that consideration should be given to both the liquidator's powers and arbitration agreements.[107]

Although the court held that "compelling arbitration against the will of the liquidator will always interfere with the liquidator's powers and will always adversely affect the insolvent insurer's assets,"[108] it failed to discuss what happens if roles are reversed and the liquidator seeks to enforce the arbitration agreement. If the enforcement of arbitration agreements is a per se violation of public policy, then liquidators presumptively do not have the ability to affirm certain arbitration agreements. However, this situation represents a violation of the liquidator's broad power to preserve the insolvent insurance company's assets and distribute funds to creditors as deemed necessary.

The decision should have focused on the powers that state legislation provides to liquidators of insurance companies. If a state provides a liquidator with the power to assume or reject any contract, then the courts should respect such a provision. Similarly, if a statute provides that no arbitration agreement should be enforced in liquidation proceedings, then the state has directly addressed the question of arbitration and such legislation should be respected. However, if a state does not have statutes that specifically address the enforcement of arbitration agreements, then courts should look to the statutes to decide what powers a liquidator does possess. State courts have reached disparate conclusions on such issues, but ultimately court decisions are based on the state's insurance statutes.[109]

This conflict is demonstrated by contrasting New York and Pennsylvania case law. In New York, the courts have held that liquidators are not required to arbitrate claims found in insurance companies' contracts.[110] These decisions have interpreted Article 74 of the New York Insurance Law, which regulates the liquidation of domestic insurance companies, as possessing exclusive jurisdiction over the liquidation of insurance companies.[111] Therefore, the New York legislation has adopted the full breadth of the reverse preemption power in insurance proceedings for states to govern the business of insurance in accordance with McCarran-Ferguson.[112] New York courts have consistently held that McCarran-Ferguson preempts the FAA and liquidators can avoid arbitration.[113]

105. *Id.* at 60.
106. *Id.*
107. *Fabe v. Columbus Ins. Co.*, 587 N.E.2d 966, 971-72 (Ohio Ct. App. 1990).
108. *Benjamin*, 800 N.E.2d 50, 60 (Ohio Ct. App. 2003).
109. Rice, *supra* note 35, at 431-40.
110. *See* Corcoran v. Ardra Ins. Co., 567 N.E.2d 969 (N.Y. 1990). *See also* Corcoran v. Universal Reinsurance Corp., 713 F. Supp 77 (S.D.N.Y. 1989); Knickerbocker Agency, Inc. v. Holz, 149 N.E.2d 885 (N.Y. 1958).
111. *See* Washburn v. Corcoran, 643 F. Supp. 554, 556 (S.D.N.Y. 1986) (stating that "[t]he application of the Federal Arbitration Act to require arbitration in spite of the contrary command of Article 74 is therefore barred by McCarran-Ferguson").
112. *Id.*
113. *See In re* Union Indem. Ins. Co., 521 N.Y.S.2d 617 (N.Y. Sup. Ct. 1987); Union Indem. Ins. Co. of New York v. United States of Amer., 216 A.D.2d 48 (N.Y. App. Div. 1995).

In contrast, Pennsylvania courts have never designated the court system as the exclusive forum for disputes involving insolvent insurance companies.[114] Pennsylvania case law has noted that arbitration agreements are valid, enforceable, and irrevocable even in insolvent insurance proceedings.[115] Pennsylvania insurance statutes have not specifically addressed the powers of liquidators and their relationship with arbitration so the Pennsylvania courts are able to enforce arbitration agreements.

To take an affirmatively hostile position against the enforcement of arbitration agreements may violate public policy. As noted in the contrast between New York and Pennsylvania law, the state statutes should dictate the effects of arbitration agreements on insurance liquidators. The court in *Benjamin* stated, "the general policy favoring arbitration must yield to countervailing policies embodied in the liquidation act."[116] This statement would more appropriately read that the powers conferred by state legislatures to liquidators of insolvent insurance companies should be given more deference than contrary federal law, pursuant to the effect of the McCarran-Ferguson Act. However, in Ohio, the statutes do not specifically state that arbitration agreements must always be voided. Rather, the statute allows the liquidator to affirm or disavow any contracts. Therefore, a per se rule against arbitration may impinge on the liquidator's ability to affirm any of the contracts. The court stated:

> To permit the officers and directors of a regulated industry to attempt to defeat the liquidation statutes by privately contracting to resolve allegations of corporate mismanagement in a private forum of their own choosing is contrary to the purposes of the liquidation act and prejudicial to the rights of policyholders and creditors who have been harmed by the insolvency of the corporations.[117]

This statement, rather than attacking the enforcement of all arbitration agreements, could have been written to state that a liquidator of an insolvent insurance company may elect not to enforce contracts entered into by directors and officers of insolvent corporations, including such contracts that contain arbitration agreements. The liquidator may avoid such contracts pursuant to the power granted by the appropriate insurance statutes. In the present case, the liquidator has the power to affirm or disavow contracts to which the insurer is a party.[118] This power is sufficiently strong to avoid any arbitration agreements found in the insurer's employment contracts.

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114. *See* Michael J. Sehr et al., *Excess, Surplus, and Reinsurance: Recent Developments*, 27 TORT & INS. L.J. 227 (1992).
115. Foster v. Philadelphia Mfrs., 592 A.2d 131 (Pa. Commw. Ct. 1991).
116. *Benjamin*, 800 N.E.2d 50, 60-61 (Ohio Ct. App. 2003) (citing Covington v. Lucia, 784 N.E.2d 186 (Ohio. Ct. App. 2003)).
117. *Id.* at 61.
118. *Id.* at 60.

VI. CONCLUSION

Although the court in *Benjamin* reached the correct result, the logic that the court used took an unnecessarily hostile position against the enforcement of arbitration agreements found in insolvent insurance companies. The court could have reached its decision by focusing solely on the broad powers conferred to a liquidator to affirm or disavow contracts. Rejecting the holding in *Fabe v. Columbus Ins. Co.* was unnecessary to reach the correct result. This narrow holding is more appropriate in order to respect the positive position of arbitration and the powers of a liquidator.

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