No. 20-249

IN THE
Supreme Court of the United States

DOUG OMMEN, IN HIS CAPACITY AS LIQUIDATOR OF COOPORTUNITY HEALTH, INC., AND DAN WATKINS, IN HIS CAPACITY AS SPECIAL DEPUTY LIQUIDATOR OF COOPORTUNITY HEALTH, INC.,
Petitioners,

v.

MILLIMAN, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* FOR THE INTERNATIONAL ASSOCIATION OF INSURANCE RECEIVERS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* BRIEF FOR THE INTERNATIONAL ASSOCIATION OF INSURANCE RECEIVERS IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 37.2, the International Association of Insurance Receivers ("IAIR") respectfully moves for leave of the Court to file the attached brief as *amicus curiae* in support of Petitioner.

All parties received timely notice of IAIR's intention to file this brief on September 21, 2020. On that same day, Counsel for Petitioners gave consent to file the brief. On September 22, 2020, Counsel for Respondent consented to the filing of the brief. On September 29, 2020, Counsel for Respondent withdrew their consent, making this motion necessary.

Counsel for Respondent withdrew consent after learning that the President of IAIR, Kathleen McCain, Esq., recently became counsel at Dentons US LLP, which represents Respondent in this matter. Counsel for Respondent believes that Ms. McCain "would have a conflict of interest if she were to participate in or support in any way an amicus brief arguing against Milliman's position." Additionally, Counsel for Respondent believes that, due to her position as IAIR President, "there is a substantial danger that she will be perceived as supporting any filing IAIR makes, and thus perceived as engaging in a conflict of interest."

The IAIR Board of Directors met on September 18, 2020 to discuss the approval of this brief. Recognizing the potential conflict of interest, Ms. McCain recused herself before any IAIR Board discussions about the brief took place. As such, Ms. McCain has taken steps to ensure that she has not "participate[d] in or support[ed] in any way" this brief, and, by recusing herself, she will not "be perceived as supporting" this brief.

IAIR express their concern over the Iowa Supreme Court's holding that the Federal Arbitration Act preempts the Iowa statutes granting insurance receiverships the disavowal authority. This holding will frustrate the purpose of insurance receiverships, which is to operate in the interest of the public. IAIR respectfully asserts its legitimate, substantial, and compelling interests in protecting the primacy of state insurance laws.

For these reasons, IAIR respectfully requests that this Court grant this Motion for Leave to File the attached *amicus curiae* brief in support of Petitioners.

Respectfully Submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTERESTS OF AMICUS CURIAE[1]

The International Association of Insurance Receivers ("IAIR") was founded in 1991 to provide persons involved in insurance receiverships and financially stressed or troubled insurers a forum to exchange information, develop best practices, establish and maintain accreditation standards, and educate its members and others concerning the administration and restructuring of such insurers.

IAIR's members include insurance receivers that manage and advise the liquidation, rehabilitation, and/or conservation of financially stressed or troubled insurers. These receivers often rely on the disavowal authority conferred by state statute. The outcome of this case will have a direct impact on IAIR's members, as well as the creditors and policyholders that are affected by their actions.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* affirms that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.2(a), *amicus curiae* have timely notified the counsel of record for all parties of its intention to file an *amicus curiae* brief in support of Petitioners. Petitioners provided consent to file the brief, while Respondent denied consent.

SUMMARY OF THE ARGUMENT

Insurance receiverships are created by state statutes to oversee the winding down of insolvent insurance companies. As such, the primary purpose of the receivership is to act in the interest of the public by maximizing the insurance company estate's assets. The marshalled assets are then disbursed to policyholders, creditors, and others that have claims against the insolvent insurance company. One tool the receiverships utilize to maximize estate value is to exercise the disavowal authority given to them by state law, which allows the receiver to disavow the insurer's improvident contracts.

However, there is a split in authority as to whether the Federal Arbitration Act (FAA) preempts the disavowal authority granted by state statute. This split creates a patchwork approach to insurance receiverships, as the ability to use the disavowal authority varies state-to-state. Additionally, the states that have determined that the FAA does preempt the disavowal authority have created a two-tiered system of contracts—those with arbitration clauses and those without. The result is that contracts with arbitration clauses are more difficult to disavow, in part or in whole. The effect of the patchwork and two-tiered systems is that additional time, money, and other resources are unnecessarily spent on resolving disputes. Consequently, receivers will take longer to distribute the assets to policyholders and creditors, and the receivership's assets will be depleted absent FAA preemption. The effect also means that insurance commissioners, who are acting as statutory receivers,

will also be unable to disavow contracts that they determine as substantially against the public's interest. Forcing a state insurance commissioner, who is acting as statutory receiver, to be a party to such contracts is contrary and inapposite to the role of the insurance commissioner to safeguard the public and protect insurance consumers.

ARGUMENT

I. Insurance Receivers Oversee the Winding Down of Insolvent Insurance Companies.

Domestic insurance companies are expressly excluded from the definition of a debtor under the federal Bankruptcy Code. 11 U.S.C. § 109(b)(2). Instead, states have been left to establish their own complex statutory schemes for the winding down of insurance companies.[2] As part of this process, states have created insurance receiverships that allow receivers to act in the interest of policyholders, creditors, and the public in overseeing the insolvent insurance companies. *Id.* To further the public benefit, states have also granted receivers the authority to disavow the insurer's improvident contracts, which the receivers rely upon as a mechanism to not be bound to contractual arrangements that are substantially contrary to the public's interests, and which they rely upon to maximize the insolvent insurer's estate in the process.

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[2] 9 NEW APPLEMAN ON INSURANCE LAW § 101.01 (2020).

A. Insurance Receivers are a Crucial Part of a Complex Scheme Designed to Protect Policyholders, Creditors, and the Public.

When a state insurance commissioner deems an insurance company insolvent, the commissioner will seek an order from a state court to appoint the commissioner as receiver of the insurer.[3] Receivership proceedings are typically filed in the state of domicile of the insurer. *Id.*

Upon entry of a permanent order appointing the insurance commissioner as receiver, the receiver is vested with total control of the insurer and title to all of its property.[4] The authority of the officers and directors of the insurer is suspended.[5] The receiver is authorized to immediately take possession of the company's property, and the officers, directors, and others are enjoined from disposing of property of the insurer, transacting any business of the insurer, or otherwise interfering with the receiver. *Id.*

The receiver is often given wide discretion over the affairs of the insurer. *Id.* There is no uniform approach to the administration of a receivership, as insolvent insurance companies vary greatly in size

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[3] NAT'L ASS'N OF INS. COMM'N, RECEIVER'S HANDBOOK FOR INSURANCE INSOLVENCIES ii (2018). State statutes often provide several grounds to appoint a receiver, but insolvency is the most frequent basis for proceeding.

[4] 9 NEW APPLEMAN ON INSURANCE LAW § 101.03(1).

[5] NAT'L ASS'N OF INS. COMM'N, RECEIVER'S HANDBOOK FOR INSURANCE INSOLVENCIES ii.

and complexity. *Id.* The receivership process often varies in length, as the process may take a few months or several years to conclude. *Id.* Receiverships may also involve anywhere from one state to all states and territories, depending on the size and reach of the insurer. *Id.* To manage the day-to-day operations of the receivership, the receiver often appoints a special deputy. *Id.* The special deputy is frequently an employee of the state insurance department or independent professional with relevant experience.[6]

There are two primary forms of receivership: rehabilitation and liquidation.[7] If the receiver determines that rehabilitation of the company is likely to be successful, a plan is devised to correct the difficulties that led to the insurer being placed in receivership and to return it to the marketplace. *Id.* If the problems are so severe that liquidation is the more appropriate approach, the receiver will determine the value of the assets and liabilities of the insurer. *Id.*

The primary purpose of a receivership in regard to liquidation is to oversee the insurance company's assets and liabilities, with the goal of maximizing the value of the estate of the defunct insurance company for the benefit of policyholders and creditors.[8] The receiver will oversee the distribution of the assets of the insurance company to those with valid claims against the insurer in accordance with state law

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[6] 9 NEW APPLEMAN ON INSURANCE LAW § 101.03(3)(d).

[7] NAT'L ASS'N OF INS. COMM'N, RECEIVER'S HANDBOOK FOR INSURANCE INSOLVENCIES ii.

[8] 9 NEW APPLEMAN ON INSURANCE LAW § 101.03(3)(c)(i).

payment priorities.[9] In their role, receivers can also bring lawsuits to recover damages to maximize the estate, which will then be distributed to the policyholders and creditors.[10] States also give receivers broad discretion over the insurance company's contracts.

B. Receivers Rely on Disavowal Authority to Maximize the Value of the Estate of the Defunct Insurance Company.

Receivers derive their powers from state laws. While such powers vary from state-to-state, all states have adopted a set of core powers essential to the receiver's important functions to operate the company during liquidation to maximize the company's assets and pay out claims to policyholders, beneficiaries, and creditors.[11] Because this responsibility makes receivers fiduciaries of policyholders, beneficiaries,

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[9] 9 NEW APPLEMAN ON INSURANCE LAW § 101.03(3)(a).

[10] In these lawsuits, receivers sue on behalf of the policyholders and creditors. *See Taylor v. Ernst & Young, LLP*, 130 Ohio St. 3d 411, 419, 2011-Ohio-5262, ¶ 26, 958 N.E.2d 1203, 1212 ("The fact that any judgments in favor of the liquidator accrue to the benefit of the insureds, policyholders, and creditors means that the liquidator's unique role is one of public protection. . . ."). The receiver does not simply step into the shoes of the insurance company. *See id.* at 420 (describing the defendant's attempt to compel arbitration "a garden-variety attempt to enforce an arbitration clause against a nonsignatory").

[11] 9 NEW APPLEMAN ON INSURANCE LAW § 101.03; Insurer Receivership Model Act § 504(A)(6); NAIC Insurers Rehabilitation and Liquidation Model Act § 24(A) (1995).

creditors, and the general public, states have enumerated broad grants of power to receivers.[12]

Included in these grants is the receiver's disavowal authority, which operates in furtherance of the purpose of insurance receiverships—to benefit policyholders, creditors, and the public. If the contract is adopted, it is created as an administrative claim.[13] With the authority to disavow contracts, the receiver may elect to reject contracts to which the insurer is a party. Receivers have broad authority to affirm and disavow these contracts as they see fit, knowing that the purpose of using this authority is to act in the public interest.

There is a strong public policy reason for contract disavowal, which is at the core of insurance regulation to protect consumers; namely, the receiver must not be bound to contracts determined by the commissioner of insurance, as receiver, to be substantially against the public policy of insurance regulation. An example of this strong public policy is when the contract (*i.e.*, to be disallowed) was used by the insurance company and its vendors to further and conceal the insolvency of an insurance company from insurance regulators and the policyholders of the insurance company. This receiver disavowal is what is now at the core of Commissioner Ommen's case, as receiver, against Milliman for its actuarial work before receivership on behalf of CoOpportunity Health, Inc.

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[12] 9 NEW APPLEMAN ON INSURANCE LAW § 101.03(3)(a).
[13] 9 NEW APPLEMAN ON INSURANCE LAW § 101.03(i).

II. FAA Preemption Threatens the Current Insurance Receivership System.

The deference Congress has given to states to enact regulations of the insurance industry has led to greater predictability for the industry. Central to this principle is the McCarran-Ferguson Act. 15 U.S.C. §§ 1011–15. The McCarran-Ferguson Act states: "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 insurances . . . unless such Act specifically relates to the business of insurance." § 1012(b). This Court has held that the primary purpose of the McCarran-Ferguson Act is to "broadly . . . give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). The first way Congress achieved this objective "was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Id.* at 429–30. The second way "was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." *Id.* at 430.

The policy objective of the McCarran-Ferguson Act is frustrated by the unpredictability of state insurance law in relation to the FAA. First, the split in authorities creates a patchwork system of laws that

apply to insurance receivers. Second, jurisdictions that have determined that the FAA preempts state statute have created two separate tiers of contracts that must be treated differently by insurance receivers. Eliminating the patchwork system and separate tiers of contract promotes predictability, which is in the public interest.

A. The Split on FAA Preemption Creates a Patchwork System for Insurance Receiverships.

There is a split in how courts approach the conflict between the McCarran-Ferguson Act and the FAA, creating a patchwork system for insurance receivers. Some jurisdictions take the approach that, due to the McCarran-Ferguson Act, receivers can disavow contracts with arbitration clauses. Other courts, however, have held that the McCarran-Ferguson Act does not reverse preempt the FAA and that receivers may not disavow contract arbitration clauses. First and foremost, the approach of the court will determine whether a claim may be litigated or must go to arbitration.

In *Donelon v. Schilling*, the Louisiana Supreme Court held that, because the FAA did not preempt Louisiana state law, the state Insurance Commissioner was not compelled to arbitrate. 2019-00514 (La. 4/27/20); --- So.3d ---, 2020 WL 2079362. Similar to the case at hand, *Donelon* arose from a dispute in which Milliman attempted to enforce an arbitration provision against the Commissioner rehabilitating an insurance company. *Id.* at *1. The

contract between the insurance company and Milliman included an arbitration clause. *Id.* at *2. The Louisiana Supreme Court held that Louisiana law allows the Commissioner to decline binding arbitration, and the FAA does not preempt the state insurance statutes. *Id.* at *5, *7. The court also noted the Commissioner, serving as the rehabilitator, "'does not stand precisely in the shoes of'" the insurance company. *Id.* at *6 (quoting *Republic of Tex. Sav. Assoc. v. First Republic Life Ins. Co.*, 417 So.2d 1251, 1254 (La. App. 1982)).

On the other hand, in *Milliman, Inc. v. Roof*, the liquidator filed suit in Kentucky state court against Milliman, among other companies, for breach of contract and negligence. 353 F. Supp. 3d 588, 594 (E.D. Ky. 2018). In response, Milliman and other defendants removed the case to federal district court[14] and petitioned to bring the dispute to arbitration, in keeping with a provision of their contract with the insurance company. *Id*. at 595. The district court ruled that the FAA preempts the Kentucky state insurance law when the receiver brings suit against a third-party independent contractor for tort or breach of contract claims. *Id.* at 597. Accordingly, the court

[14] In addition to state courts, federal courts have also contributed to the inconsistent approach to the conflict between the FAA and state insurance law. *Compare Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997) (holding FAA preempted California statutory scheme for resolving claims against insolvent insurers because there was no California law preventing arbitration), *with Stephens v. American Intern. Ins. Co.*, 66 F.3d 41, 46 (2d Cir. 1995) (holding anti-arbitration provision of Kentucky Liquidation Act reverse preempted FAA by McCarran-Ferguson Act).

granted Milliman's petition to compel arbitration. *Id.* at 606.

This patchwork system also creates inconsistencies dependent upon the physical location where adjudication of claims takes place. As an example, the Iowa Liquidation Act provides for the mandatory venue of Polk County, Iowa district court for all claims arising under the Act. IOWA CODE §507C.4(5). If a receiver in Iowa is not permitted to disavow certain contracts, the receiver will have to adjudicate disputes in Polk County for the contracts that may be disavowed and wherever the arbitration clauses have set venue for the contracts that may not be disavowed. Iowa is not the only state with such a provision. Louisiana's statute governing venue in the liquidation of insurance companies was central to the dispute in *Donelon*.[15] Mandatory arbitration clauses directly interfere with the ability of state commissioners to select a forum for litigation, which further adds to the unpredictability of the legal landscape around reverse preemption under the McCarran-Ferguson Act.

The split among several federal and state courts concerning the ability of receivers to avoid arbitration is not sustainable. This split leads to uncertainty and has a disparate impact on policyholders in differing jurisdictions. Without clear resolution, an insurance receiver in Iowa is bound by arbitration clauses despite statutory disavowal authority, but such a

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[15] LA. STAT. ANN. § 22:2004(A).

receiver in Louisiana may not expect to be similarly bound.

B. FAA Preemption Creates Separate Tiers of Contracts.

When courts find that a receiver may not disavow a contract, in part or in whole, because such contract contains an arbitration clause, but does not strip from the receiver of disavowal power for contracts without arbitration clauses, the result is that two tiers of contracts are created. Consequently, contracts with arbitration clauses receive priority above those without such clauses.

This approach is contrary to the policy of the FAA of generally enforcing arbitration agreements only to the extent of valid and enforceable contracts. This Court, in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), held that the FAA does not elevate contracts with arbitration agreements above those without such agreements. "By enacting §2 [of the FAA], we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

Receivers often take over an insolvent insurance company without knowledge of every one of the company's contracts. The role of the receiver in managing the orderly payment of claims is frustrated when the receiver cannot predict whether certain

contracts may be disavowed. The elevation of contracts with arbitration clauses above the disavowal authority of the receiver impairs the state's power to regulate the business of insurance, forcing the receiver to accept improvident contracts that would otherwise be unenforceable.

C. Promoting Predictability for Insurance Receivers is in the Public Interest.

At the heart of this issue is the potential harm to policyholders, creditors, and the public. The McCarran-Ferguson Act explicitly "declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest." § 1011. However, the uncertainty caused by the patchwork system of FAA preemption and the separate tiers of contracts operates contrary to the public interest.

Since the goal of an insurance receivership is to maximize the assets of the insurer's estate for the benefit of policyholders, creditors, and the public, any additional resources spent litigating or arbitrating claims frustrates the purpose of the receivership. Additionally, any delay caused by litigation or arbitration in separate forums only serves to delay the disbursement of funds to those with claims against the insurance company. Both the decrease in assets and delay in disbursements harm the interests of policyholders, creditors, and the public.

In *Covington v. Lucia*, the Ohio Court of Appeals noted that to "permit [the defendant] to have

his action decided privately and separately from his fellow officers when the liquidator has disavowed the contract is contrary to the interests of the insureds, claimants, creditors, and the public generally as well as the interests of the liquidator who in the pursuit of his duties represents them." 151 Ohio App.3d 409, 416, 2003-Ohio-346, ¶ 31, 784 N.E.2d 186, 191. The court continued, stating that "'[e]nhanced efficiency and economy of liquidation' is not served by allowing [the defendant] to have the claims against him heard in a separate forum with different discovery and evidentiary rules." *Id.*

If the FAA preempts the state insurance statutes, receivers cannot expect contracts entered into by the insurer to be treated equally. They will need to determine which contracts must be arbitrated, where the arbitration will occur, and how each arbitration will take place. Such unpredictability adds to the cost of the receivership, which in turn impairs creditors and policyholders. If receivers retain the disavowal authority in full, receivers can settle disputes in a predictable forum, hasten the receivership process, and maximize funds available to creditors and policyholders.

The stability of the insurance industry rests on the faith of policyholders that their claims will be honored; such stability is threatened when the receiver cannot lower the cost of administering to the insurer's estate. However, if the receiver is able to disavow contracts that unnecessarily add to the cost of liquidation or rehabilitation and easily predict the forum for dispute resolution, then policyholders and

creditors will be able to rely on larger portions of their claims being paid out. Importantly, the insurance commissioner, as receiver, should also not be bound to contracts substantially against the public policy of insurance regulation.

The rehabilitation and liquidation of an insolvent insurer is key to the regulation of the business of insurance. Creditors and policyholders depend on an orderly receivership process to recover what they can from an insolvent insurance company. If receivers face an unpredictable legal landscape when executing their duties, the costs of administration rise and the payment of claims is delayed and likely reduced. Such an outcome does not comport with the McCarran-Ferguson Act's delegation of insurance regulation to the states. This Court can resolve this dispute by creating a predictable, uniform law on the arbitration of insurance disputes.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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