

IN THE SUPREME COURT OF OHIO

Mary Jo Hudson, Superintendent of the	:	
Ohio Department of Insurance, in her	:	On Appeal from the
capacity as Liquidator of the American	:	Franklin County Court of
Chambers Life Insurance Company,	:	Appeals, Tenth Appellate District
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	Court of Appeals
	:	Case No. 09AP-949
Ernst & Young LLP,	:	
	:	
Defendant-Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF DEFENDANT-APPELLANT ERNST & YOUNG LLP**

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**EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

The Superintendent of Insurance, in her capacity as Liquidator of a failed insurer, American Chambers Life Insurance Company (“ACLIC”), is suing Ernst & Young LLP (“E&Y”) for an allegedly negligent audit of ACLIC’s financial statements that occurred before ACLIC’s insolvency. In its decision (“Op.”), the court of appeals held that the Liquidator—who stands in ACLIC’s shoes and took over claims owed by ACLIC—is not bound by the arbitration provision in the signed engagement letter binding E&Y and ACLIC. In fact, the court ruled, the Liquidator will *never* be bound by a pre-existing arbitration clause unless she affirmatively elects to arbitrate—even when, as here, the Liquidator has *not* disavowed the agreement containing the arbitration provision. Thus, the court held that there is “a presumption against arbitration” in cases involving the Liquidator. Op. ¶ 16. Moreover, the court ruled, it does not matter that the Liquidator has not disavowed the agreement at issue; she can simply ignore one provision in that agreement—here, the arbitration clause. At bottom, the court’s decision rests on its view that compelling arbitration under the Arbitration Act (R.C. Chapter 2711) *always* interferes with the Liquidator’s powers under the Liquidation Act (R.C. Chapter 3903) and that the public policy of the Liquidation Act “defeats any general attitude of the courts favoring arbitration.” Op. ¶ 19.

The court’s ruling raises important questions of public or great general interest:

I. This Court has held repeatedly, in decisions stretching back for decades, that arbitration is strongly favored in Ohio. Arbitration provides a means to resolve disputes quickly and economically; this benefits the parties and decreases the burden on the judicial system. Yet the court of appeals has taken it upon itself to create an exception to the legislature’s statutory enactments and this Court’s longstanding policy favoring arbitration—indeed, it has created a presumption *against* arbitration—that has no basis in the pertinent statutes: the Arbitration Act

does not exempt claims by the Liquidator, and the Liquidation Act has no provision stating that the Liquidator is not bound by arbitration clauses in contracts that insurers signed before insolvency. (The Liquidation Act mentions arbitration only once, in R.C. § 3903.41(A)(2), which *endorses* arbitration to determine a security's value.) The court of appeals' ruling usurps the legislature's power and rests on an inherent hostility to arbitration squarely at odds with this Court's pro-arbitration jurisprudence, which will cause confusion with litigants and lower courts unless overturned by this Court. The court of appeals' approach is especially unfair to parties, like E&Y, that would not have signed the agreements at issue without an arbitration clause.

Furthermore, in holding that the Liquidator may walk away from *part* of a contract, while leaving the rest of the contract in place, the court of appeals has dramatically expanded the Liquidator's power; the statute allows a Liquidator only to "disavow any *contracts* to which the insurer is a party," not parts of contracts. R.C. § 3903.21(A)(11) (emphasis added). If left undisturbed, this vast increase in the Liquidator's power will have pernicious consequences. Under the court's rationale, the Liquidator could disavow the obligation to pay for goods and services the insurer received but did not pay for before going under. She could disavow policy limits in a reinsurance contract and compel a reinsurer to bear unlimited liability. Or she could disavow specific provisions in the contracts of the insurer's policyholders. This Court should make clear that the statute means what it says: the Liquidator may disavow entire contracts, but not individual contractual provisions. What is particularly disturbing about the decision below is that the court of appeals is making policy in an area where the legislature has already acted. The legislature has given the Liquidator the power to avoid a contract. That power—confirmed in the Final Order of Liquidation—gives the Liquidator the power to avoid onerous contracts, including those with arbitration clauses. It does not, however, give her the power to pick and chose which individual provisions she will be bound by, as the court of appeals' decision permits.

II. The court of appeals' decision also causes serious problems for anyone signing a tolling agreement. The Liquidator and E&Y entered into a Tolling Agreement that gave the Liquidator extra time to bring suit. But E&Y would not have done so if it thought it might lose an arbitration forum. Accordingly, the agreement was worded broadly to preserve E&Y's ability to assert "all defenses that E&Y has as of the Effective Date" of the agreement, May 2, 2002. (In May 2002, arbitration was clearly a defense to a suit by the Liquidator: *Fabe v. Columbus Ins.* (1990), 68 Ohio App. 3d 226, 587 N.E.2d 966, held that the Liquidator was bound by an arbitration clause in an insurer's pre-insolvency agreements, and *Fabe* remained the law until the court of appeals overruled it in October 2003.) The court of appeals, however, held that the Tolling Agreement's preservation of "all defenses" did not include the defense of arbitration because "the 'right to arbitration' is not an *affirmative* defense." Op. ¶ 38 (emphasis added).

Potential litigants routinely enter into tolling agreements with language similar to the agreement here. The meaning of those agreements is now cast into doubt as a result of the court of appeals' ruling. Formerly, parties could feel comfortable that "all defenses" meant "all defenses." Not any more. Under the court of appeals' decision, a tolling agreement that preserves "all defenses" really only preserves "affirmative defenses," and if the defense at issue is not an affirmative defense the defendant is out of luck. Unless this Court accepts jurisdiction and reverses, tolling agreements entered into before the court of appeals' decision no longer mean what the parties thought they meant at the time. And parties entering into future tolling agreements will wonder how to word them in order to preserve all possible defenses. Using the broad phrase "all defenses" will no longer suffice.

STATEMENT OF THE CASE AND FACTS

A. Background.

The relevant facts are straightforward and undisputed. E&Y, an accounting firm, audited

the financial statements of ACLIC for the year ending December 31, 1998. In February 1999, E&Y provided an audit report, which stated that E&Y had performed its audit in accordance with generally accepted auditing standards and that ACLIC's financial statements were presented in material conformity with generally accepted accounting principles. The complaint alleges that around this period of time, ACLIC was experiencing undisclosed financial problems.

E&Y "provided its auditing services pursuant to an engagement letter," which bound both E&Y and ACLIC. Op. ¶ 3 & n.1. The engagement letter included an arbitration clause, which stated that "[a]ny controversy or claim arising out of or relating to the services covered by this letter" must be submitted first to mediation and then, if mediation is not successful, to binding arbitration conducted in accordance with the rules of the American Arbitration Association ("AAA"). The Liquidator never disavowed the engagement letter.

In March 2000, the Superintendent of Insurance filed suit in the Franklin County Court of Common Pleas, seeking to place ACLIC in rehabilitation. In May 2000, the court issued a Final Order of Liquidation, finding that ACLIC was insolvent and appointing the Superintendent as ACLIC's Liquidator. The Final Order provided that "[t]he Liquidator is vested by operation of law with the title to all assets of [ACLIC], including...all property, ... contracts, rights of action, ... and is authorized to deal with same in his own name as Liquidator"; granted the Liquidator the power to "[c]ontinue to prosecute and to commence in the name of [ACLIC] or in his own name any and all suits and other legal proceedings"; and empowered the Liquidator "to affirm or disavow any contract to which [ACLIC] is a party." Final Order, ¶¶ 4, 7(l), 7(m).

Two years later, the Liquidator and E&Y entered into a Tolling Agreement with an express "Effective Date" of May 2, 2002. The parties agreed that the Liquidator could postpone suing E&Y for one year after that date and that claims filed within that one-year period would not be deemed time barred if they were not time barred as of the Effective Date. In addition, the

Liquidator and E&Y agreed that “E&Y may otherwise assert, as defenses to any lawsuit or claim the Liquidator may file against E&Y, *all defenses that E&Y has as of the Effective Date*, including but not limited to the statute of limitations.” Tolling Agreement ¶ 5 (emphasis added).

B. The Litigation.

Just under a year after signing the Tolling Agreement, on April 30, 2003, the Liquidator filed this case against E&Y and ACLIC’s lawyers, who are no longer in the case. The claims against E&Y were for professional negligence arising out of the auditing services provided under the engagement letter, and for recovery of fees that ACLIC paid to E&Y. In July 2003, E&Y moved to dismiss or stay and compel arbitration pursuant to the arbitration provision in the engagement letter. At the time, the controlling decision on the issue was *Fabe v. Columbus Ins.* (1990), 68 Ohio App. 3d 226, 587 N.E.2d 966, which held that because the Liquidator stood in the shoes of an insolvent insurer, she was bound by arbitration clauses in the insurer’s pre-insolvency agreements. The parties later submitted additional briefs discussing two subsequent decisions: *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 2003-Ohio-566, 800 N.E.2d 50, which overruled *Fabe* in October 2003, and *Hudson v. John Hancock Fin. Servs.*, 10th Dist. No. 06AP-1284, 2007-Ohio-6997, 2007 WL 4532704, which reaffirmed *Pipoly*. This Court denied review in *John Hancock* by a 4-3 vote. 118 Ohio St. 3d 1462, 2008-Ohio-2823, 888 N.E.2d 1114.

In September 2009, the Court of Common Pleas denied E&Y’s motion, holding simply that under *Pipoly* and *Hancock*, the Liquidator “cannot be compelled to arbitrate.”

C. The Court of Appeals’ Decision.

The court of appeals upheld the trial court’s ruling, and reaffirmed its own decisions in *Pipoly* and *John Hancock*. The court held that the Liquidator was not bound by an insurer’s agreement to arbitrate unless she “‘affirmatively indicate[d] her election’” to arbitrate. Op. ¶¶ 16-17, 33 (quoting *Pipoly*). Reasoning that the “‘structure’” of the Liquidation Act reflected a

“‘strong interest in centralizing’” claims involving insolvent insurers, the court ruled that “[a]bsent express statutory authorization for private arbitration to proceed despite the [Liquidator’s] lack of assent,” the “‘public policy expressed throughout’” the Liquidation Act “‘defeats any general attitude of the courts favoring arbitration.’” *Id.* ¶ 19 (quoting *Pipoly*). Thus, the court concluded, “[i]n our view, 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.” *Id.* ¶ 20 (quoting *Pipoly*). The court also decided that the Liquidator could walk away from a single provision within a contract (here, the arbitration clause). *Id.* ¶¶ 24-25.

In addition, the court ruled that the Tolling Agreement—which preserved “‘all defenses that [E&Y] has of the Effective Date’”—did not preserve the defense of arbitration as it existed on that date (May 2, 2002), when “*Fabe* was the controlling law.” *Id.* ¶ 26. The court thought that because “the ‘right to arbitration’ is not an *affirmative* defense,” it was “not among the ‘*defenses*’ preserved by the Tolling Agreement.” *Id.* ¶ 38 (emphasis added).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: An insurance liquidator that does not disavow a contract entered into by an insurer is bound by an arbitration provision in that contract, which must be enforced pursuant to Ohio’s strong policy favoring arbitration.

A. The Liquidator Stands In The Shoes Of The Insolvent Insurer And Is Bound By An Arbitration Clause In A Contract The Liquidator Does Not Disavow.

It is well settled that “the liquidator stands in the shoes of the insolvent insurer.” *Benjamin v. Ernst & Young*, 167 Ohio App. 3d 350, 2006-Ohio-2739, 855 N.E.2d 128, at ¶ 18. Thus, the liquidator “‘succeeds to all of [the insurer’s] rights and remedies, and is subject to all defenses that could be raised against the company.’” *Id.* at ¶ 14 (quoting *Williams v. Continental Stock Trans. & Trust* (N.D. Ill. 1998), 1 F. Supp. 2d 836, 843, which applied New York law).

Because a liquidator stands in the shoes of the insolvent insurer, other courts have held

that “she is bound by [the insolvent insurer’s] pre-insolvency [arbitration] agreements.” *Quakenbush v. Allstate Ins.* (9th Cir. 1997), 121 F.3d 1372, 1380 (brackets added by court). Accord, e.g., *Costle v. Fremont Indem.* (D. Vt. 1993), 839 F. Supp. 265, 272 (the liquidator “stands in the shoes of Ambassador and is thus bound by Ambassador’s pre-insolvency contracts, including arbitration provisions”). Moreover, even if this were not the rule, there is a general principle that a third party whose claims are based on a contract is bound by an arbitration clause within that contract. *Gerig v. Kahn*, 95 Ohio St. 3d 478, 2002-Ohio-2581, 769 N.E.2d 381, at ¶¶ 18-19. In *Gerig*, this Court enforced an arbitration provision, explaining that when nonsignatory litigants “derive their interest in the agreement” through a signatory to that agreement, “they can have no greater right than [the signatory] to a judicial interpretation of that agreement.” *Id.* at ¶ 18. Not only was enforcement of the arbitration provision there “in keeping with this court’s long history of favoring and encouraging arbitration,” but “it would be inequitable to allow an interested nonsignatory to determine the forum in which an agreement is to be interpreted when the signatories previously agreed in writing to arbitrate.” *Id.* at ¶¶ 19-20. See also *Milo Corp. v. Carlson-Miller*, 8th Dist. No. 78420, 2001 WL 824260, at *3 (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act”).¹

¹ The Liquidator has argued that the arbitration provision does not apply because the claims against E&Y are unrelated to the engagement letter and arose as a matter of law. The court of appeals did not accept that argument. That is understandable: the complaint alleged the contractual nature of ACLIC’s relationship with E&Y (Compl. 18-19, 50-51), and a negligence claim, unlike a negligent misrepresentation claim, requires privity. See *Bily v. Arthur Young & Co.* (Cal. 1992), 834 P.2d 745, 760-73. Moreover, the broad language in the arbitration provision here, which applies to “[a]ny controversy or claim arising out of or relating to the services covered by this letter,” clearly covers the Liquidator’s claims; E&Y’s auditing services were provided “pursuant to [the] engagement letter.” Op. ¶ 3. And “[a]n arbitration clause that contains the phrase ‘any claim or controversy arising out of or relating to the agreement’ is considered ‘the paradigm of a broad clause.’” *Academy of Medicine v. Aetna Health*, 108 Ohio St. 3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶¶ 18-19 (noting that “creative pleading of claims

The court of appeals did not follow these cases. Instead, it held that the Liquidator is not bound by an arbitration provision unless she “affirmatively indicate[s]...her election to be responsible for those prior obligations.” Op. ¶¶ 17, 33. Moreover, the court ruled, it is irrelevant that the Liquidator did not disavow the engagement letter that ACLIC and E&Y signed; she may simply walk away from a single provision in that letter—the arbitration clause. *Id.* ¶¶ 24-25, 33.

There is no legal basis for these rulings. The Liquidator’s power to act comes from the liquidation order: “Without the liquidation order, the superintendent is unable to use any of these powers because they rest with the insurer.” *Benjamin*, 167 Ohio App. 3d 350, at ¶ 13. The liquidation order, in turn, is derived from the powers set forth in the Liquidation Act. And neither the statute nor the Final Order of Liquidation here permits the Liquidator to disavow a single clause within a contract—rather, the Liquidator may only “disavow any *contracts* to which the insurer is a party.” R.C. § 3903.21(A)(11) (emphasis added); see Final Order ¶ 7(l) (the Liquidator may “disavow any contract to which [ACLIC] is a party”). Nor do the statute and the Final Order provide that individual contractual provisions are void unless the Liquidator affirmatively elects to be bound by them. Again, in order to avoid an insurer’s pre-existing contractual obligations, the Liquidator’s must “disavow [the] contract[.]” R.C. § 3903.21(A)(11).

In holding that the Liquidator may just ignore *part* of an agreement, the court violated this Court’s maxim that courts “cannot extend the statute beyond that which is written, for ‘[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.’ To do so would enlarge the scope of the statute beyond that which the General Assembly enacted.” *Sarmiento v. Grange Mut. Cas.*, 106 Ohio St. 3d 403, 2005-Ohio-5410, 835 N.E.2d 692, ¶ 29 (citations omitted; brackets added by Court). In fact, the Liquidator has taken for herself (with the approval of the court of appeals) a power that may be granted only as something other than contractual cannot overcome a broad arbitration provision”).

by the General Assembly. The Liquidation Act means what it says: the Liquidator may “disavow any *contracts*,” R.C. § 3903.21(A)(11), not “provisions in contracts,” or “parts of contracts.” See *FDIC v. Ernst & Young, LLP* (N.D. Ill. 2003), 256 F. Supp. 2d 798, 805 (the FDIC “purportedly repudiated the arbitration provision in [the] engagement letter,” but “[t]he plain text of [the statute] provides for the repudiation of ‘a contract,’ rather than a provision thereof. The statute does not permit the FDIC to repudiate only those provisions of a contract with which it is dissatisfied”), *aff’d* (7th Cir. 2004), 374 F.3d 579; *Real Estate Marketers v. Wheeler* (Fla. App. 1974), 298 So. 2d 481, 483-84 (a receiver has “the option of either accepting or rejecting executory contracts,” but “having elected to accept a contract, he is bound thereby. While he may pick which contracts he will honor, he may not pick which Parts of a contract he will honor”).

Indeed, if the Liquidator had the power to walk away from part of a contract, all sorts of mischief might ensue. As the Seventh Circuit said in affirming *FDIC*, a case involving an insolvent bank, the ability to repudiate selected provisions could allow the FDIC to

walk away from the obligation to pay for goods and services that the bank had received before its failure. Or maybe the FDIC could claim a right to repudiate words (such as “not”) or to repudiate the decimal point out of a figure (turning a borrower’s promise to pay “10.9% interest” into “109% interest”). ... Cherry picking is not allowed by the rejection power in bankruptcy; why should it be permitted under § 1821(e)?

374 F.3d at 584 (citations omitted). The same is true in the insurance context. For example, under the court of appeals’ decision, the Liquidator would have the power to reject the policy limits in a reinsurance contract, transforming a reinsurer’s limited obligation into a limitless one. The legislature wisely did not grant liquidators that power. The statute should be enforced as written—the Liquidator may only disavow a “contract[,]” not a provision within a contract.

B. The Arbitration Act Does Not Conflict With The Liquidation Act.

The court of appeals also thought that the Liquidation Act (R.C. Chapter 3903) conflicts

with the Arbitration Act (R.C. Chapter 2711). The court did not point to any specific statute providing that the Liquidator cannot be bound by an arbitration clause in a contract that an insurer agreed to before becoming insolvent. There is no such statute. Indeed, the Liquidation Act mentions “arbitration” only once, and then favorably: the Act *approves* of arbitration as a means for determining the disputed value of a security. R.C. § 3903.41(A)(2).

Instead, the court relied on the supposedly “strong policy considerations embodied within Chapter 3903...that vest broad powers both in the liquidator and in the courts.” Op. ¶ 16 (quoting *Pipoly*). Because, the court stated, the Liquidator “must have freedom of action...it would be inconsistent to compel arbitration against her.” *Id.* The court thought it “clear” from the Liquidation Act’s general “statutory scheme” that “the General Assembly did not contemplate turning over the administration of liquidation proceedings and incidental actions to private arbitrators”—the Act’s “structure” indicated a “strong interest in centralizing claims and defenses raised against an insolvent insurer into a single forum.” *Id.* ¶¶ 18-19 (quoting *Pipoly*). Thus, “[a]bsent express statutory authorization for private arbitration to proceed” without the Liquidator’s consent, the court concluded that “the public policy expressed throughout” Chapter 3903 “defeats any general attitude of the courts favoring arbitration”—“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.” *Id.* ¶¶ 19-20 (quoting *Pipoly*). All of this is contrary to that court’s view in 1990: “there is nothing in R.C. Chapter 3903 governing liquidation proceedings that either expressly or impliedly prohibits arbitration in such proceedings.” *Fabe*, 68 Ohio App. 3d at 232-33.

There were no changes in statutory language that caused the court of appeals to reverse course. Indeed, the failure of the legislature—the “final arbiter of public policy,” *State v. Smorgala* (1990), 50 Ohio St. 3d 222, 224, 553 N.E.2d 672—to take any action in the 13 years

between *Fabe* and *Pipoly* suggests that it did not disagree with *Fabe*. Nor has the Superintendent of Insurance promulgated any regulations to try to avoid *Fabe*. Rather, the court of appeals decided on its own that public policy on arbitration had somehow changed between 1990 and 2003, and it adopted what it later admitted was a “minority” position on “the interplay between contractual obligations to arbitrate and the statutory rights of an insurance liquidator.” *John Hancock*, 2007 WL 4532704, at ¶ 13 (citing cases). See also *Suter v. Munich Reins.* (3d Cir. 2000), 223 F.3d 150, 160-61; *Koken v. Cologne Reins.* (M.D. Pa. 1999), 34 F. Supp. 2d 240, 253; cf. 12 C.F.R. § 363.5(c)(2) (2009) (the FDIC, which oversees insolvent banks, permits arbitration provisions in engagement letters between auditors and banks).

The Arbitration Act—which enforces arbitration provisions “in any written contract” save for five inapplicable exceptions, R.C. § 2711.01(A), (B)(1)—cannot be tossed aside on the basis of the Liquidation Act’s general “statutory scheme,” “structure,” and “public policy.” Op. ¶¶ 18-19. Statutes must be harmonized if at all possible; unless there is “an irreconcilable conflict” between two statutory schemes, courts are “require[d]...to give effect to *both*.” *Board of Educ. v. Zaino*, 93 Ohio St. 3d 231, 235, 2001-Ohio-1335, 754 N.E.2d 789.

There is no conflict here, irreconcilable or otherwise. The Liquidation Act does not have any provision exempting the Liquidator from an arbitration provision the insurer agreed to in a contract that the Liquidator did not disavow. On the contrary, the Liquidation Act permits the Liquidator to bring not only “suits,” but also “other legal proceedings, in this state or elsewhere,” R.C. § 3903.21(A)(12)—which certainly includes arbitrations. *Fabe*, 68 Ohio App. 3d at 233-34. Arbitration provisions must be enforced when, as here, the statute “does not preclude a waiver of judicial remedies.” *Academy of Music*, 108 Ohio St. 3d 185, at ¶ 17 (holding that the Valentine Act does not preclude arbitration). Nor does the Arbitration Act exempt actions involving the Liquidator. See *Sasaki v. McKinnon* (1997), 124 Ohio App. 3d 613, 617, 707 N.E.2d 9

(“Reviewing the precepts of R.C. 2711.01 et seq., which are stated in mandatory terms that favor the application of arbitration, we cannot divine an intention to exempt shareholders’ derivative actions from application of that chapter”). The court of appeals was wrong in thinking that the Liquidation Act “‘defeats any general attitude of the courts favoring arbitration.’” Op. ¶ 19.²

C. This Court Has Long Held That Ohio Has A Strong Policy Favoring Arbitration And That Arbitration Agreements Must Be Enforced.

Even though (1) the Liquidation Act has no provision stating that the Liquidator cannot be bound by an arbitration clause agreed to by an insurer, and (2) the Arbitration Act does not exempt the Liquidator from its broad scope, the court of appeals held that there is a “presumption against arbitration” in cases involving the Liquidator. Op. ¶ 16. Indeed, its decision is based on a scarcely disguised hostility to arbitration. See *id.* ¶¶ 16-20, 25, 33; see also *Hudson*, 2007 WL 4532704, at ¶¶ 11-12; *Pipoly*, 155 Ohio App. 3d 171, at ¶¶ 39-45.

A presumption against arbitration is flatly inconsistent with this Court’s “long history of favoring and encouraging arbitration,” *Gerig*, 95 Ohio St. 3d 478, at ¶ 20, and “this state’s strong public policy in favor of arbitration,” *Ignazio v. Clear Channel*, 113 Ohio St. 3d 276, 2007-Ohio-1947, 865 N.E.2d 18, at ¶ 18. See also *Fabe*, 68 Ohio App. 3d at 232 (“as early as 1835 the Ohio Supreme Court recognized the benefits of arbitration,” in 1920 the Ohio Supreme Court held “that contracts for arbitration are binding,” “statutory provisions for arbitration” have existed for “well over one hundred years and the present statute, R.C. Chapter 2711, was enacted in 1931”).

Arbitration “provides the parties with a relatively speedy and inexpensive method of

² The Arbitration Act provides that arbitration clauses “shall be” enforced, “except upon grounds that exist at law or in equity for the revocation of any contract.” R.C. § 2711.01(A). No such grounds exist here. The Supreme Court has held that nearly identical language in the analogous federal statute means that “[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [Federal Arbitration] Act makes any such state policy unlawful.” *Allied-Bruce Terminix Cos. v. Dobson* (1995), 513 U.S. 265, 281.

conflict resolution and has the additional advantage of unburdening crowded court dockets.” *Mahoning County Bd. v. Mahoning County TMR* (1986), 22 Ohio St. 3d 80, 83, 488 N.E.2d 872. “Arbitration is favored because its purpose is to avoid needless and expensive litigation.” *Harsco Corp. v. Crane Carrier* (1997), 122 Ohio App. 3d 406, 412, 701 N.E.2d 1040. The AAA, the arbitrator designated in the engagement letter here, is the leading arbitration organization in the country, and it routinely resolves disputes in much less time than litigation would take—within 9-1/2 months on average. S. Partridge, *Commercial Leasing Finance Disputes Recommended Rules and Sample Clauses*, 560 PLI/Real 373, 382 (2008). This case, in contrast, has been pending since 2003, and the parties are nowhere near even beginning to litigate the merits. If the Liquidator had not objected to arbitration, this dispute would have been over years ago.

Moreover, disputes involving accounting issues are particularly well suited to arbitration. In *Sasaki*, where the Eighth District held that claims involving alleged accounting improprieties must be arbitrated under the arbitration clause there, the court rejected the argument that a “trial court or a jury would do a better job at evaluating the evidence and applicable law,” explaining:

To the contrary, it would appear that in matters of complex litigation involving securities and investments, a panel of arbitrators versed in the issues common to that industry is better suited to review the litigation than a general jurisdiction trial court or a jury panel drawn from the general population, which is, more likely than not, untrained in the intricacies of the financial markets, sophisticated corporate accounting and their governing regulations.

124 Ohio App. 3d at 617. This is precisely why E&Y’s engagement letters require arbitration.

The Liquidator is supposed to be interested in “[e]nhanced efficiency and economy of liquidation.” R.C. § 3903.02(D)(3). Efficiency and economy would be far better served by enforcing arbitration clauses against the Liquidator rather than giving her a blanket exemption from them, which is contrary to decades of this Court’s precedent holding that arbitration is strongly favored in Ohio and that arbitration provisions must be enforced.

Proposition of Law No. II: A tolling agreement that preserves “all defenses” as of its effective date preserves an arbitration defense that existed on the effective date.

The court of appeals was so eager to protect the Liquidator from arbitration that it badly misread the Tolling Agreement that the Liquidator herself signed in 2002. In exchange for tolling the statute of limitations on any claims that the Liquidator might assert, the Liquidator agreed that “E&Y may otherwise assert, as defenses to any lawsuit or claim the Liquidator may file against E&Y, *all defenses that E&Y has as of the Effective Date*” of the agreement, May 2, 2002. Tolling Agreement ¶ 5 (emphasis added). The court of appeals held that “all defenses” did not include the defense of arbitration, on the curious rationale—not even advanced by the Liquidator—that because “the ‘right to arbitration’ is not an *affirmative* defense,” it was “not among the ‘*defenses*’ preserved by the Tolling Agreement.” Op. ¶ 38 (emphasis added).

This makes no sense. The Tolling Agreement covers “all defenses,” not just “affirmative defenses.” Whether arbitration is an affirmative defense—an issue on which the lower courts are divided, although the court of appeals did not note the split³—is irrelevant: it is clearly a defense, and the Tolling Agreement explicitly applies to “all defenses.” See *Albright v. W.L. Gore & Assocs.* (D. Del. July 31, 2002), 2002 WL 1765340, at *2, 4 (a tolling agreement that preserved “defenses” “preserved any and all defenses...that [defendant] might later wish to assert”).

A defense of arbitration existed as of May 2, 2002. At that time, the Liquidator had to arbitrate when she did not disavow a contract containing an arbitration clause. *Fabe*, 68 Ohio App. 3d at 232-36. Not until October 2003 did the court of appeals overrule *Fabe* in *Pipoly*.

Because *Fabe* was the governing law as of May 2002, E&Y has a right to arbitrate, as the

³ Compare *Church v. Fleishour Homes*, 172 Ohio App. 3d 205, 2007-Ohio-1806, 874 N.E.2d 795, at ¶ 82; *Harsco*, 122 Ohio App. 3d at 414; *Atkinson v. Dick Masheter Leasing*, 10th Dist. No. 01AP-1016, 2002-Ohio-4299, 2002 WL 1934743, at ¶ 23 (arbitration is an affirmative defense), with *Garvin v. Independence Place Condo. Ass’n*, 11th Dist. No. 2001-L-055, 2002-Ohio-1472, 2002 WL 479992, at *1-2; *Mabrey v. Victory Basement Waterproofing* (1993), 92 Ohio App. 3d 8, 14, 633 N.E.2d 1205 (arbitration is not an affirmative defense).

engagement letter provided, all claims “arising out of or relating to the services covered by this letter.” It does not matter that *Pipoly* later changed the law. “Contracts incorporate the law applicable at the time of their creation.” *Erie Metroparks Bd. v. Key Trust Co.*, 145 Ohio App. 3d 782, 789, 2001-Ohio-2888, 764 N.E.2d 509 (determining whether there was a breach of contract by applying “[t]he common law of Ohio at the time the 1881 lease was executed”). Moreover, contractual rights are “vested at the time the contractual obligations of the contract [a]re fulfilled.” *Clark v. Bureau of Workers’ Comp.*, 10th Dist. No. 02AP-743, 2003-Ohio-2193, 2003 WL 1995716, at ¶ 12 (holding that a later Supreme Court decision does not apply to a settlement agreement executed before that ruling). Even when a decision of this Court has been overruled, it still applies “where contractual rights have arisen or vested rights have been acquired under the prior decision.” *Peerless Elec. v. Bowers* (1955), 164 Ohio St. 2d 209, 210, 129 N.E.2d 467.

E&Y has a contractual right to assert “all defenses”—including arbitration—that existed as of May 2, 2002. E&Y would not have signed the Tolling Agreement—and thus the Liquidator would not have had an extra year to bring suit—if it thought it might lose its arbitration defense. It is fundamentally unfair to permit the Liquidator to take advantage of the benefit conferred upon her by the agreement (extra time) and to deny E&Y the principal benefit it obtained from the agreement (the ability to assert the arbitration defense that existed on May 2, 2002).

Courts cannot “rewrite the parties’ contract,” *Foster Wheeler Enviresponse v. Franklin County* (1997), 78 Ohio St. 3d 353, 362, 678 N.E.2d 519, or issue “interpretations that render portions meaningless or unnecessary,” *Wohl v. Swinney*, 118 Ohio St. 3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, at ¶ 22. The court of appeals violated these basic precepts in holding that a Tolling Agreement that preserved “all defenses” did not apply to the defense of arbitration.

CONCLUSION

E&Y respectfully urges the Court to accept jurisdiction of this appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction has been served upon the following by U.S. Mail, postage prepaid, this 29th day of July, 2010:

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