IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STATE OF TENNESSEE, ex rel., LESLIE A. NEWMAN, Commissioner for Commerce and Insurance for the State of Tennessee, as Liquidator for Doctors Insurance Reciprocal, Risk Retention Group,	)	
Plaintiff,	)	
vs.	)	**No.** 3 07 1113
GENERAL REINSURANCE CORPORATION, et al.	)	**Removed from Chancery Court of Davidson County, Tennessee (03-294-IV)**
Defendants.	)	

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that pursuant to 9 U.S.C. § 205, Defendant General Reinsurance Corporation ("Gen Re") hereby removes the above-captioned action, which was commenced in the Chancery Court for the State of Tennessee, Twentieth Judicial District, Davidson County and titled *Newman v. General Reinsurance Corporation, et. al*, No. 03-294-IV, to the United States District Court for the Middle District of Tennessee. In support of its Notice of Removal, Gen Re states and/or alleges the following.

By making the statements and allegations contained herein, Defendant Gen Re in no way concedes that Plaintiff is entitled to any recovery. To the contrary, Defendant disputes Plaintiff's claims in their entirety. The following statements and allegations concern the Court's removal jurisdiction only.

I. BACKGROUND

1. This dispute arises from the alleged insolvency of three risk retention groups now controlled by a court-appointed liquidator, the Commissioner of the Department of Commerce and Insurance for the State of Tennessee, Leslie A. Newman, who is the Plaintiff in this action. Those three risk retention groups include: The Reciprocal Alliance, Risk Retention Group ("TRA"); American National Lawyers Insurance Reciprocal, Risk Retention Group ("ANLIR"); and Doctors Insurance Reciprocal, Risk Retention Group ("DIR"). These entities are referred to collectively as "the RRGs," and Plaintiff Newman is referred to as "the RRG Receiver."

2. The RRGs, which offered insurance coverage to their lawyer- and health care provider-policyholders, participated in a reinsurance program that was designed to include three other entities: Reciprocal of America, a Virginia reciprocal insurer ("ROA"); defendant General Reinsurance Corporation ("Gen Re"), a Delaware reinsurance company; and First Virginia Reinsurance, Ltd., a reinsurance entity incorporated in Bermuda ("FVR"). This FVR-Gen Re-ROA-RRG reinsurance relationship is referred to throughout this notice as "the Reinsurance Program."

3. The reinsurance contracts creating the Reinsurance Program contain broad arbitration provisions that require the parties to arbitrate "any unresolved difference of opinion" between them.

4. Notwithstanding these mandatory arbitration provisions, the RRG Receiver filed suit against Gen Re and each of the Defendants named in this action in the United States District Court for the Western District of Tennessee on behalf of each RRG under her control. The RRG Receiver alleged that Defendant Gen Re, along with other Defendants,

engaged in a broad-based conspiracy and fraud through its alleged participation in the Reinsurance Program. The Judicial Panel on Multidistrict Litigation coordinated Plaintiff Newman's action with a number of similar actions in the Western District of Tennessee, including an action brought by the Receiver of ROA, which is also in liquidation. The MDL proceedings were assigned to the Honorable J. Daniel Breen.

5. While proceedings were pending before Judge Breen, Gen Re filed a complaint in the United States District Court for the Western District of Tennessee to compel arbitration of all claims under 9 U.S.C. § 4 against the RRG Receiver and the ROA Receiver. Gen Re alleged that the RRG Receiver was bound to arbitrate under the mandatory arbitration provisions of the reinsurance agreements at issue in her complaint. That complaint and Gen Re's motion to compel arbitration are currently pending before the Western District of Tennessee.

6. After Gen Re filed its complaint to compel arbitration, Judge Breen dismissed the RRG Receiver's sole federal claim and declined to exercise supplemental jurisdiction over her state-law claims. In response, rather than agreeing to arbitration or to await the outcome of Gen Re's complaint to compel arbitration, the RRG Receiver re-filed her state-law causes of action in a petition to the Tennessee state court.

7. In her state court action, like in her federal court action, the RRG Receiver brings claims on behalf of the RRGs and alleges that Defendant Gen Re participated in a purported conspiracy and fraud through its reinsurance contracts, which, she alleges, were designed to falsely appear to transfer risk and to furtively limit Gen Re's liability. The RRG Receiver's petition includes claims against Gen Re for (a) fraud, (b) conspiracy, (c)

unjust enrichment, (d) breach of fiduciary duties, (e) fraudulent transfers and preferences, and (f) misappropriation and/or negligent mishandling of trust funds.

8. State court, however, is not the proper forum for the RRG Receiver's claims. Under the terms of numerous reinsurance agreements, the RRG Receiver is bound to pursue her claims against Gen Re in arbitration, not in court. And the forum for enforcing Gen Re's contractually bargained-for right to arbitrate is federal court.

9. Chapter 2 of the Federal Arbitration Act ("the FAA"), 9 U.S.C. § 201, *et seq* implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and provides federal court jurisdiction over any claim that relates to an arbitration agreement that bears a relationship to a foreign state. The RRG Receiver's petition raises such claims because the arbitration agreements under which she is bound are intimately connected to Bermuda, where FVR, the retrocessionaire, is based. Accordingly, this Court has subject matter jurisdiction over the RRG Receiver's action, and under 9 U.S.C. § 205, Gen Re is entitled to remove the RRG Receiver's action to this Court.

II. JURISDICTION AND VENUE

10. Chapter 2 of the Federal Arbitration Act incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") into U.S. law.

11. The United States ratified that Convention to provide for the enforcement of arbitration agreements that arose in an international context.

12. Chapter 2 of the FAA provides various procedural mechanisms that allow parties to arbitration agreements falling under the Convention to enforce their right to compel arbitration and to enforce arbitration awards coming within the scope of the Convention.

13. Specifically, section 203 of the Act provides federal district courts with jurisdiction over actions that fall under the Convention. That provision states:

> **Jurisdiction; amount in controversy** An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 203.

14. Section 205 explicitly authorizes a defendant named in a state-court suit that relates to the Convention to remove such suit to federal district court. That provision states:

> **Removal of cases from State courts** Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or

> proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

9 U.S.C. § 205.

15. Section 202 of the Act defines the arbitration agreements that fall under the Convention. That provision says:

> **Agreement or award falling under the Convention** An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title [9 U.S.C. § 2] falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202.

16. This Court has jurisdiction over this suit under 9 U.S.C. §§ 203 and 205.

17. Venue is proper in this district under 9 U.S.C. § 205 because this district and division embrace the place where the removed action is pending.

18. The RRGs—and therefore the RRG Receiver who sues on their behalf—are bound to arbitrate their claims against Defendant Gen Re under the terms of a series of arbitration agreements between Gen Re and ROA and among Gen Re, ROA, and the RRGs. Those arbitration agreements fall under the Convention because they arise out of a legal commercial relationship that envisaged performance abroad and that has a reasonable relation with a foreign state.

III. GROUNDS FOR REMOVAL

A. Removal Is Proper Because Arbitration Agreements Involving Gen Re, ROA, and the RRGs Fall Under The Convention.

19. The RRGs are risk retention groups, entities whose primary purpose is to spread the risks of liability exposure among their lawyer- and health care provider- policyholders.

20. The RRGs participated in a comprehensive reinsurance program that involved four different groups of entities: (1) the RRGs themselves; (2) ROA; (3) Gen Re; and (4) FVR.

21. ROA is a reciprocal insurer that provided insurance coverage primarily to hospitals. ROA previously was known as The Virginia Hospital Insurance Reciprocal. ROA operated through its attorney-in-fact, The Reciprocal Group ("TRG").

22. Gen Re is a reinsurance company that reinsures risks accepted by insurance companies such as ROA and the RRGs.

23. FVR is a reinsurance company domiciled in Bermuda. ROA policyholders created FVR to reinsure the risks of its founding company. FVR was managed by many of the same individuals who managed ROA and the RRGs. Specifically, the Presidents of each of the RRGs served on FVR's Board of Directors.

24. To create the FVR-Gen Re-ROA-RRG Reinsurance Program, the entities entered into various sets of written reinsurance contracts. These contracts primarily included the following:

- *First*, the RRGs and ROA entered into reinsurance treaties whereby ROA agreed to reinsure risks assumed by the RRGs. Through these arrangements, the RRGs each ceded over 90% of their risks to ROA. These treaties include reinsurance

agreements A1993 (between ROA and DIR), A1995 (between ROA and TRA), and B1993 (between ROA and ANLIR).

- *Second*, ROA and Gen Re entered into reinsurance treaties whereby Gen Re agreed to reinsure risks that ROA had assumed from its policyholders and from its reinsurance agreements with the RRGs (hereinafter "the Gen Re-ROA Agreements"). These treaties include agreements numbered: A207, A238, A248, A256, A263, A264, A273, A289, A299, A442, A443, A444, A456, A481, A593, 7601, 8581, 8911, 9016, and Retrocession 1962. An exemplar of these Gen Re-ROA Agreements, A456, is attached as Exhibit A to the Declaration of Andrew R. Gifford (hereinafter the "Gifford Declaration"), which has been filed contemporaneously with this Notice of Removal.
- *Third*, Gen Re, ROA, and the RRGs entered into reinsurance agreements whereby Gen Re agreed to reinsure risks of both ROA and the RRGs in a single written contract (hereinafter "the Gen Re-ROA-RRG Agreements"). These treaties include agreements numbered A264 and A444. An exemplar of these agreements, A444, is attached as Ex. B to Gifford Declaration.
- *Fourth*, Gen Re entered into retrocession agreements with FVR. These agreements include agreements numbered Retrocession Agreements 1831, 1832, 1941, 1946, 2081, 2102, and 2147, as well as 8590 and 8773. Gen Re also entered into other agreements with FVR including a Commutation Agreement, a Profit Sharing Agreement, and a Trust Agreement. An exemplar of these agreements, Retrocession 2102, is attached as Ex. C to Gifford Declaration.

25. Each of these sets of reinsurance agreements was designed as part of the overall Reinsurance Program. For example, the attached exemplar agreements attached include a list of "closing documents," which refers to and relies on Gen Re's retrocession agreements with FVR and an ROA agreement with FVR. These documents, entitled "Closing Summary Contract Document List March 27, 2002" lists agreements between Gen Re and ROA as well as agreements reflecting Gen Re's retrocessions to FVR, FVR reinsurance agreements with Gen Re, and an agreement between ROA and FVR.

26. Each of these sets of agreements, including the Gen Re-ROA Agreements and the Gen Re-ROA-RRG Agreements, are commercial in that they involved commercial enterprises agreeing to a transfer of risk for consideration.

27. The Reinsurance Program created by these four sets of agreements was designed to move ROA's and the RRGs' premiums overseas to FVR so that ROA and RRG policyholders would enjoy the favorable tax treatment arising from the accumulation of interest overseas. Pursuant to this international arrangement, policyholders of ROA and the RRGs enjoyed equity distributions from FVR in the millions of dollars.

28. The Reinsurance Program also envisaged that the provision of reinsurance coverage (i.e., the coverage of losses incurred by ROA and the RRGs) would take place abroad because it contemplated that FVR would serve as the ultimate reinsurer of ROA's and the RRGs' risks. *See* Report of Michael D. Thomas, Hearing Examiner, Case No. INS-2003-00092, at 65 (Virginia State Corporation Commission ("SCC") October 12, 2007, excerpt attached as Exhibit D to Gifford Declaration.

29. On information and belief, the RRGs and FVR maintained an integrated financial relationship, as evidenced, for example, by the use of FVR funds to establish TRA.

B. By Plaintiff's Own Allegations, FVR Was an Integral Part of The Reinsurance Program.

30. The RRG Receiver's petition also alleges that FVR was an integral part of the Reinsurance Program.

31. The RRG Receiver's petition claims that ROA and the RRGs had as their objective to move premium payments overseas to FVR in Bermuda, where they would receive favorable tax treatment. She alleges that Gen Re's role in the Reinsurance Program was as an "accommodation"—a "pass through" for ROA's and the RRGs' risks to be transferred to FVR. She further alleges that FVR held funds for the RRGs in various trust accounts.

32. Her petition alleges:

> [] First Virginia Reinsurer ("FVR") was incorporated in Bermuda in 1984. FVR was initially capitalized by issuing stock to approximately 32 Virginia acute care hospitals. On information and belief [Defendant] Crews [General Counsel to ROA, TRG, and FVR] was instrumental in the creation of FVR, which was to serve as a reinsurer of all of ROA's retained share of risk on the physician and lawyer malpractice insurance business. From the inception of FVR until about 1990, ROA ceded premiums directly to FVR. ROA was secured by a trust fund and this was necessary because FVR was an unauthorized insurer. This trust fund was established with Wachovia Bank between FVR and ROA. Around 1990, however, Gen Re offered to be the middle entity whereby ROA would cede the physician and lawyer business to Gen Re and then Gen Re would (retro)cede to FVR. This was done to accommodate ROA because the credit risk of FVR was passed to Gen Re and this arrangement also had the benefit of limiting regulatory oversight. This arrangement existed until late December 2001 when Gen Re became concerned with the volume of business passing through it compounded with the growing dimunition in FVR surplus. FVR's surplus was substantially diminished as a result, in part, of significant underwriting losses experienced by DIR during 2001. Gen Re proposed to execute a loss portfolio transfer (LPT) which will be discussed herein. Upon information and belief, the initial purpose of FVR however was to allow ROA's lawyer and physician insureds to defer the payment

of federal income taxes. Upon information and belief, FVR was considered a non-controlled foreign corporation, i.e., not a U.S. tax payor. This had the effect of limiting regulatory oversight of the various transactions entered into by the Defendants.

[] FVR was referred to by certain of the Defendants by the code name "Gen Re II" or GR2."

[] On information and belief, FVR was originally owned 20% by ROA and 75% by certain Virginia hospitals and health care systems who were direct subscriber/insureds of ROA through the stock issuance discussed above. In early 1989, the 75% owners of FVR purchased ROA's 25% minority interest. On information and belief, this transfer was engineered by [Defendants] Patterson, Crews, Hudgins, Kelley, Bland, and Crews & Hancock, who feared that Virginia insurance regulators might determine that ROA and FVR constituted an insurance holding company system, which would require adherence to additional rigorous regulations and subject the companies to additional regulatory scrutiny.

[] On information and belief, Patterson, Crews, Hudgins, Kelley, Bland, McLean, and Crews & Hancock devised a plan further to remove FVR from potential regulatory scrutiny. Pursuant to this plan, ROA's FVR-reinsured risk would be reinsured first by Gen Re and then be retroceded to FVR. ROA would then report, and would claim a reinsurance credit for, the reinsurance with Gen Re, and thereby be relieved of the requirement to report the reinsurance with FVR, thus distancing it from the scrutiny of the regulators of ROA. This plan had the further effect of passing FVR's credit risk from ROA to Gen Re. On information and belief, this plan was implemented beginning in 1989, when Gen Re began to pass ROA risk, both direct and reinsurance, through to FVR pursuant to retrocession agreements between Gen Re and FVR (the "Gen Re-FVR Retrocession Agreements").

[] FVR and Gen Re were also parties to certain trust agreements for the purpose of holding assets in Bermuda financial institutions as security for the performance of FVR's obligations under the Gen Re-FVR Retrocession Agreements (the "FVR Bermuda Trusts").

[] On information and belief, the Management Defendants asked Gen Re to act as an intermediary between ROA and FVR. This was a condition to Gen Re's continuing to participate in the very profitable supposed reinsurance of ROA's business.

Petition to Recover Damages, *Newman v. Gen Re*, No. 03-294-IV (Tenn. Ch. Ct. Oct. 5, 2007) ¶¶ 26-31 (included in Exhibit 1 to Notice of Removal); *see also id.* ¶ 95 (alleging that Gen Re reinsured the RRGs' "pass-through" business "merely as an accommodation").

33. The RRG Receiver further alleges that Defendants like Gen Re bore duties to the RRGs with respect to the proper handling of the trust funds held by FVR, which she claims were "for the benefit of the RRGs." *Id.* ¶ 286.

C. The RRGs Are Required To Arbitrate Their Claims Against Gen Re.

34. The RRG Receiver is required to arbitrate her claims against Gen Re under the Gen Re-ROA Agreements and the Gen Re-ROA-RRG Agreements.

35. Each of the Gen Re-ROA Agreements and the Gen Re-ROA-RRG Agreements includes a broadly worded arbitration provision stating: "Any unresolved difference of opinion between the parties shall be submitted to arbitration by three arbitrators." *See* Exs. A and B to Gifford Declaration.

36. The other reinsurance treaties making up the Reinsurance Program also include substantially identical mandatory arbitration provisions.[1]

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[1] The agreements between Gen Re and FVR use the words "Retrocessionaire" for FVR and "Reinsurer" for Gen Re in their arbitration clauses. They say: "Any unresolved difference of opinion between the Retrocessionaire and the Reinsurer shall be submitted to arbitration by three arbitrators." Retrocession 2147 states: "Any unresolved difference of opinion between the Retrocessionaire and General Reinsurance Corporation shall be submitted to arbitration by three arbitrators." The Profit Sharing Agreement between Gen Re and FVR contains an arbitration provision that states: "In case of any dispute arising between the parties hereto with respect to this Agreement, any party may request in writing that the dispute be referred to binding arbitration." The Gen Re-FVR Commutation Agreement and Trust Agreement do not contain arbitration provisions.

37. The RRGs—and hence the RRG Receiver on whose behalf she brings claims—are bound by the arbitration agreements between Gen Re and ROA as well as the agreements to which the RRGs are signatories (i.e., the Gen Re-ROA-RRG Agreements).

38. The RRGs seek and received a direct benefit from the Gen Re-ROA Agreements. In her petition, the RRG Receiver seeks as damages the reinsurance proceeds that she claims that Gen Re would owe under the Gen Re-ROA Agreements absent the purportedly fraudulent transactions. *See, e.g.*, Petition at ¶ 49 (included in Exhibit 1 to Notice of Removal).

39. The Gen Re-ROA Agreements directly benefited the RRGs by, among other things, enabling the RRGs to transfer their risks to ROA, which in turn improved the RRGs' financial ratings and the marketability of their policies. The RRG Receiver's petition alleges that the RRGs received a financial reporting credit as a result of their reinsurance treaties with ROA and that the risk ceded to ROA to obtain that credit "was encompassed within [ROA's] reinsurance arrangement with Gen Re." *Id.* ¶ 80; *see also id* ¶ 81.

40. The RRGs' claims also depend on the Gen Re-ROA Agreements. The RRG Receiver alleges that Gen Re injured the RRGs by structuring its reinsurance relationship with ROA by entering into the Gen Re-ROA Agreements and by using them in a fraudulent and deceptive manner. The RRGs' request for relief relies on and arises directly from the Gen Re-ROA Agreements.

41. In addition, in seeking recovery for the RRGs' alleged losses, the RRG Receiver has repeatedly asserted that the RRGs and ROA constituted a single enterprise. For example, her petition alleges that TRG (ROA's attorney-in-fact) "served as the management

company for all of the RRGs and for ROA, performing all the duties and functions normally associated with the business of insurance for each of the three [RRGs], including claims administration. TRG management operated ROA and the RRGs as a totally integrated enterprise. The attorneys-in-fact for the RRGs were mere shells, without offices, employees, or assets, and their functions were wholly delegated to, and controlled by, TRG." *Id.* ¶ 41. The RRG Receiver further alleges that "TRG management controlled ROA and the RRGs through an interlocking network of common officers and directors," *id.* ¶ 43, that "ROA/TRG and their affiliates provided the RRGs with the capital they needed to do business," *id.* ¶ 44, and that "[w]hen convenient, TRG management ignored the corporate form and separateness of ROA and the RRGs," *id.* ¶ 46. The RRG Receiver's petition also alleges that "A.M. Best rated the RRGs on the financial condition and operating performance of ROA due to the common management between the entities." *Id.* ¶ 48. The RRG Receiver also asserted that the RRGs and ROA were a single enterprise in her briefs before the Virginia State Corporation Commission. *See, e.g.*, Ex. F to Gifford Declaration, Special Deputy Receivers' Response to Motion for Summary Judgment, Case No. INS-2003-00092, excerpted at 27-29, 35 (SCC Sept. 30, 2003). Because the RRG Receiver seeks the benefit of single-entity status, she cannot now disavow the obligations that arise from that status.

42. All of the RRG Receiver's claims on behalf of the RRGs asserted against Gen Re in the petition fall within the broad language of the Gen Re-ROA Agreements and the Gen Re-ROA-RRG Agreements, which require the parties to arbitrate without limitation "any unresolved difference of opinion."

43. The RRG Receiver alleges that Gen Re committed various torts by entering into deceptive and illusory reinsurance agreements that falsely appeared to transfer risk and that disguised the allegedly illusory transactions from regulators and the public—all of which ultimately led to the RRGs' asserted injuries. *E.g.*, Petition at ¶¶ 93, 158-67, 177-81, 247 (included in Exhibit 1 to Notice of Removal). Each of the RRG Receiver's claims is based on, relates to, and could not be maintained without reference to the Gen Re-ROA Agreements and the Gen Re-ROA-RRG Agreements.

44. In addition, the RRG Receiver specifically challenges an endorsement to A264 in her petition. *Id* ¶¶ 107-108.

45. All pleadings, process, orders, and other filings served upon Defendants in this action are attached to this notice as required by 28 U.S.C. § 1446(a). (attached as Collective Exhibit 2).

46. Defendant Gen Re will promptly file a copy of this notice of removal with the clerk of the Chancery Court for Davidson County, Tennessee where this action has been filed.

47. All Defendants who have been served have consented to the removal of this action, and such consent is reflected by the attachments in Collective Exhibit 3, or by notices of consent filed with this Court contemporaneous with this Notice of Removal.

48. Prompt written notice of the filing of this petition will be given to adverse parties as required by law.

Date: November 13, 2007

Respectfully submitted,

NEAL & HARWELL, PLC

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CERTIFICATE OF SERVICE

I certify that I have served a true and exact copy of the foregoing by hand-delivery to the following address:

William H. Farmer, Esq.
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This 13th day of November 2007.

s/ James G. Thomas