No. 07-5050

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Mid-Continent Casualty Company,

Plaintiff-Appellee,

v.

General Reinsurance Corporation,

Defendant-Appellant.

On Appeal from the United States District Court
Northern District of Oklahoma
CASE 06CV 475 CVE-PJC
The Honorable Claire V. Eagen, District Judge

BRIEF OF AMICUS CURIAE REINSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF DEFENDANT – APPELLANT

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AMICUS CURIAE REINSURANCE ASSOCIATION OF AMERICA'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Reinsurance Association of America ("RAA") hereby certifies that the RAA is a non-profit corporation that does not have any parent companies. A Board of Directors of its fifteen member companies governs the RAA. The RAA also has twenty non-voting affiliate companies. General Reinsurance Corporation is a member of the RAA's Board of Directors.

I. PRELIMINARY STATEMENT

The Reinsurance Association of America ("RAA") files this *amicus curiae* brief pursuant to the Federal Rules of Appellate Procedure 29, in support of Defendant-Appellant, General Reinsurance Corporation, and urges the reversal of the order of the United States District Court for the Northern District of Oklahoma denying arbitration. The RAA hereby adopts the Statement of the Issues, Statement of the Case, and Statement of the Facts presented in the Brief of Appellant.

As set forth in its Motion For Leave To File a Brief of *Amicus Curiae*, the RAA is a non-profit trade association that represents the interests of the U.S domestic reinsurance industry. Its fifteen underwriting members are reinsurers principally engaged in the business of assuming property and casualty reinsurance. The RAA also has twenty affiliate companies, some of which are reinsurance intermediaries and life and health reinsurers. Together, RAA members write nearly 2/3 of the gross reinsurance coverage provided by U.S. property and casualty reinsurers and affiliates. The RAA's life and health reinsurers are among the top twenty leading life reinsurers in North America based on their in-force assumed reinsurance.

The RAA's members, and insurers and reinsurers generally, enter into reinsurance contracts each day, both as reinsurers and as ceding companies (*i.e.*,

insurance companies who "cede" to assuming insurers, or reinsurers, a portion of the premium and corresponding losses on direct policies of insurance).[1] Those contracts frequently contain arbitration clauses. Accordingly, the RAA offers this Court a broad, knowledgeable perspective on the arbitration questions at issue in this appeal to advise this Court about relevant reinsurance law and the custom and practice of the industry.

It is critical that the law interpreting arbitration provisions be predictable and consistent and that it reflect how disputes are resolved in the industry. The RAA's members have a vital interest in the enforcement of their arbitration agreements. Voluntary agreements entered into by commercial parties to resolve disputes arising in relation to their reinsurance agreements allow the parties to avoid the costliness and delays of litigation and enable them to utilize experienced individuals from the industry to resolve their disputes. The district court's opinion raises serious questions about the enforcement of the important contractual right of arbitration. The economic and public policy reality is that the marketplace demands certainty in the negotiation, implementation, and expectations relating to commercial relationships.

[1] In this way, the RAA's members, as a collective, distinguish their position from that of any single company whose book of business may be weighted heavily in favor of ceded business.

The issue on appeal involves the enforcement of certain reinsurance agreements (the "Reinsurance Agreements"), each of which contains a valid and enforceable arbitration provision requiring the parties to arbitrate any dispute concerning the agreement. The arbitration provisions are governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* (2007), because the Arbitration Agreements involve interstate commerce and are not subject to reverse preemption under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (2007), and *Mutual Reinsurance Bureau v. Great Plains Mutual Insurance Co., Inc.*, 969 F.2d 931 (10th Cir. 1992).

II. THE PURPOSE OF REINSURANCE

Reinsurance is a transaction whereby the reinsurer, in consideration of premium paid, agrees to indemnify the ceding insurer against all or part of the loss that the latter may sustain under the underlying policy or policies it has issued.[2] In essence, reinsurance is insurance for insurance companies.[3] Reinsurance (1) allows insurers to shift their risk of economic loss to a company willing to undertake that risk, (2) increases an insurance company's capacity to accept new risks and allows it to write risks that might otherwise be beyond its capacity; (3) spreads large risks throughout the global reinsurance market, (4) enables risks which are large and

[2] Reinsurance Association of America, *Glossary of Reinsurance Terms* 47 (2007), *available at* http://www.reinsurance.org/i4a/pages/index.cfm?pageid=3309.

[3] *See generally* Kenneth R. Thompson, *Reinsurance* 5, 9, 24-25 (4th ed. 1966).

difficult to place to be covered, and (5) permits small insurers to compete on a level playing field with large competitors. Reinsurance can also minimize the potentially devastating effect of an unexpected catastrophic loss, which might otherwise deplete an insurance company's resources.[4] In these ways, reinsurance is intended to benefit insurance companies and the public interest.[5]

III. ARBITRATION IS IMPORTANT TO REINSURANCE

Arbitration has long been the dispute resolution mechanism of choice for the reinsurance industry, which has its roots in Europe.[6] The reinsurance industry has utilized the arbitration process since at least the early 19th century when arbitration clauses were commonly used in English marine reinsurance contracts.[7] Such clauses were gradually introduced in other classes of reinsurance and eventually became customary in the United States.[8]

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[4] Kenneth Black, Jr. & Harold Skipper, Jr., *Life Insurance* 431 (12th ed. 1994).

[5] *See Fontenot v. Marquette Cas. Co.*, 247 So. 2d 572, 575-76 (La. 1971); James R. Olson, *Reinsurer's Liability to the Insolvent Reinsured*, 41 Notre Dame L. Rev. 13, 15-16 (1965); *see generally* Thompson, *supra*, at 9, 24-25.

[6] John S. Butler & Robert M. Merkin, *Reinsurance Law* C.5.1-01 (Rev. ed. 1993); R.L. Carter, *Reinsurance* 146 (1st ed. 1979); Thompson, *supra*, at 43-46.

[7] Klaus Gerathewohl et al., *Reinsurance Principles and Practice, Vol. I* 716 (1980); Jonathan F. Bank & Patricia Winters, *Reinsurance Arbitration: A U.S. Perspective,* 7 J. Ins. Reg. 323, 324 n.1 (1989).

[8] An 1895 reinsurance agreement involving Munich Re-insurance Company Limited contained a clause that read:

> "In the event of any difference hereafter arising between the contracting parties with reference to any transaction under this treaty

Arbitration in reinsurance disputes has traditionally been preferred over litigation. The relative advantages of arbitration over litigation include: (1) the expertise of the decision-maker; (2) the confidentiality of the proceedings; (3) the procedural informality; (4) the relatively lower cost and more streamlined process; and (5) and the finality of the decision. As noted by one author:

> The modern judicial process is characterized by high cost, excessive formality, and long delays. Having gone to the time and trouble of bringing a case through interminable pretrial motion practice, attempting to educate the decision-maker while observing the intricacies of the trial procedure, and waiting out a lengthy appeal, even a "victorious" litigant may well question whether justice has been served.[9]

Arbitration is the preferred method of resolving reinsurance disputes because it is a process that seeks a business resolution between companies that often have an ongoing and long-term business relationship. Reinsurance arbitrations also rely heavily on the arbitrators' knowledge of and experience with the customs and

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> the same shall be referred to two Arbitrators . . . who shall interpret the present contract rather as an honourable engagement than as a merely legal obligation, and their award shall be final and binding on both parties."

Reinsurance Association of America, *Manual for the Resolution of Reinsurance Disputes* 8 (2006). *See MacDonald v. Aetna Indemnity*, 92 A. 154, 154-155 (Conn. 1914).

[9] Aaron J. Polak, *Punitive Damages in Commercial Contract Arbitration - Still an Issue After All These Years,* 10 Ohio St. J. on Disp. Resol. 46 n.28 (1994), *citing* Stephen Goldberg et al., *Dispute Resolution* 199 (2d ed. 1992) (noting that arbitration was used before the 14th century and in North America, predates the American Revolution).

practices of the reinsurance industry.[10] Although there are no conclusive studies measuring the utilization of arbitration as compared to litigation to resolve reinsurance disputes, it has been suggested that roughly 75-90 percent of U.S. reinsurance disputes are submitted to arbitration.[11] One commentator has noted:

> Reinsurance treaties are not typical of most commercial contracts, which are usually drafted by knowledgeable lawyers and cover numerous contingencies. Were reinsurance treaties drafted with the same care as most other commercial agreements involving comparable sums, they would be longer and more complex. Since the realities of the reinsurance trade make it impractical to negotiate and draft such complex documents, the parties expect that in the event of disputes, expert arbitrators will fill in the unavoidable blanks using

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[10] *See* Reinsurance Association of America, *Manual for the Resolution of Reinsurance Disputes* 9 (2006); John J. McDonald Jr., *Reinsurance Arbitration 2001: Will the New Ways Cripple "Arbitration Clause"?*, 68 Def. Couns. J. 328, 330 (2001) ("Arbitrations are far less adversarial and confrontational than litigation, which is an important consideration when the parties are in an ongoing relationship despite the current dispute."); Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act,* 11 Conn. Ins. L.J. 253, 292 n.5 (2004/2005) ("In such [reinsurance] disputes, the parties are all part of the insurance industry. The goal of maintaining interdependent business relationships among direct and reinsurers, based on common industry practices and customs, is paramount. Accordingly, arbitration is unquestionably appropriate.").

[11] Vincent J. Vitkowsky, *The Reinsurance Wars: A Report from the Front, reprinted in Reinsurance Law, Litigation and Arbitration in the United States: Articles, Papers & Speeches* 1983-1991 69, 69 (Buchalter, Nemer, Fields & Younger, 1992)(originally published in *Reinsurance Digest*, November/December 1989). *See* Michael J. Sehr et al., *Excess, Surplus Lines, and Reinsurance: Recent Developments*, Tort & Ins. Law J. 227, § II.A. (1992) ("Most reinsurance contracts contain a provision requiring that disputes between reinsurer and reinsured be settled by arbitration.").

'custom and practice,' 'intent of the parties' and 'honorable undertaking' as guidelines for decision. [12]

Further evidence that parties to a reinsurance agreement have recognized the advantages of arbitration in this highly specialized industry is found in the traditional practice of including arbitration clauses in the agreements. An arbitration clause in a reinsurance agreement typically states that the parties agree to mandatory, binding arbitration for the resolution of disputes arising under that agreement. The clause will likely set forth various aspects of the arbitration proceeding, including acceptable qualifications of the arbitrators and the steps for selecting an arbitrator or panel of arbitrators.

Arbitration permits the parties to take advantage of having knowledgeable industry people resolve their disputes confidentially on a more expedited basis.[13] These advantages are especially important in light of the international aspects of reinsurance and the complexities of international litigation. Today, U.S. insurers

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[12] John J. McDonald Jr., *Reinsurance Arbitration 2001: Will the New Ways Cripple "Arbitration Clause"?*, 68 Def. Couns. J. 328, 330 (2001).

[13] *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983). For example, compare the almost eight years of litigation the liquidator of the Union Indemnity Insurance Company endured before being able to start the collection process against creditors, with the four months it took Transit Insurance Company's liquidator to obtain a ruling and take an appeal in an arbitration with one of Transit's alien reinsurers. *In the Matter of the Liquidation of Union Indemnity Ins. Co. v. American Centennial Ins. Co.*, 521 N.Y.S.2d 617 (N.Y. Sup. Ct. 1987); *Transit Casualty Co. v. Trenwick Reinsurance Co.*, 659 F. Supp. 1346 (S.D.N.Y. 1987), *aff'd*, 841 F.2d 1117 (2d Cir. 1988).

cede reinsurance risks to more than 4,000 reinsurers in 105 jurisdictions outside the United States.[14] Non-U.S. reinsurers account for approximately 52% of the reinsurance written in the United States.[15]

Because of the importance of arbitration to complex business arrangements in international reinsurance transactions, as well as the need to confidently rely upon arbitration agreements, this Court should reverse the decision of the district court and compel the parties to arbitrate.

IV. OPERATION OF OKLAHOMA'S REVISED UNIFORM ARBITRATION ACT SHOULD NOT INVALIDATE ARBITRATION BETWEEN INSURERS AND REINSURERS

The Uniform Arbitration Act ("UAA"), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws (the "Conference"). Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14, including Oklahoma, have adopted substantially similar legislation. A primary purpose of the 1955 Act was to ensure the enforceability of agreements to arbitrate in the face of often hostile state law.

In 1996, the Conference appointed a Drafting Committee to consider revising the UAA. The Conference noted that "[t]he primary purpose of the act is

[14] Reinsurance Association of America, *Alien Reinsurance in the U.S. Market: 2005 Data* 2 (2006).

[15] *Id.* at 13.

to advance arbitration as a desirable alternative to litigation. A revision is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area."[16] The subsequent revisions to the UAA in the Revised Uniform Arbitration Act (the "RUAA") specifically addressed issues of fundamental fairness to the parties, particularly where one party may have significantly less bargaining power.[17]

The 2005 revision to the Oklahoma Uniform Arbitration Act (the "Oklahoma Revised Act")[18] making it non-applicable to insurance, should be viewed in this context of protecting consumers in direct insurance transactions. The Oklahoma Revised Act is substantially similar to the RUAA in that it recognizes the enforceability of arbitration provisions between contracting parties. Unlike the RUAA, however, it exempts from its purview arbitration clauses in

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[16] Uniform Law Commissioners, *A Few Facts About The Uniform Arbitration Act (2000)*, National Conference of Commissioners on Uniform State Laws (2002), *available at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp.

[17] Revised Uniform Arbitration Act (2000), Prefatory Note 1, National Conference Of Commissioners On Uniform State Laws, *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm ("RUAA"). The UAA was amended to provide guidance on, among other matters, "which sections of the UAA would not be waivable, an important matter to insure fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another."

[18] 12 Okl. St. §§ 1851 *et seq.* (2006).

collective bargaining agreements and contracts "which reference insurance."[19] There is no published legislative history concerning the Oklahoma Uniform Arbitration Act or the 2005 revisions following the completion of the RUAA, but the drafters of the RUAA expressed concern over contracts of adhesion.[20]

Reinsurance contracts are very different types of contracts, however, and should not be treated like insurance contracts for purposes of interpreting the Oklahoma Revised Act. Unlike primary insurance contracts, reinsurance contracts are not contracts of adhesion, so there are no consumer protection concerns. Rather, "reinsurance involves two sophisticated business entities familiar with the business of reinsurance who bargain at arms-length for the terms in their contract."[21] Further, as one court noted:

> This contract, as heretofore stated, was not a contract of insurance but a contract of reinsurance. There is a well defined distinction which has been recognized by the courts. A contract of reinsurance is really not a contract of insurance as much as it is a contract of indemnity. The same rules of construction do not apply. Certainly there is no reason for applying the rules regarding forfeitures to a reinsurance contract,

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[19] 12 Okl. St. § 1855(D). The Oklahoma Revised Act retained the Oklahoma Uniform Arbitration Act's insurance exclusion, but omitted the "insurance companies" exception to the exclusion.

[20] See, e.g., Uniform Law Commissioners, NCCUSL Drafts and Final Acts, *Adhesion Arbitration Agreements and the RUAA*, The National Conference of Commissioners on Uniform State Laws (2002), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbr0500.htm.

[21] *Stonewall Ins. Co. v. Argonaut Ins. Co.*, 75 F. Supp. 2d 893, 909 (N.D. Ill. 1999) (citing Steven W. Thomas, *Utmost Good Faith in Reinsurance: A Tradition in Need of Adjustment*, 41 Duke L.J. 1548, 1554 (June 1992).

nor the rule that insurance policies should be construed more strictly against the insurance company.[22]

While sophistication varies among insurance companies, they certainly bear little resemblance to the vast majority of policyholders, who often receive additional consumer protections. Insurance companies cannot be licensed in a state without demonstrating that they are staffed by insurance professionals. State insurance departments require extensive questionnaires and affidavits, as well as detailed plans of operation as part of any insurance license application.[23] Many states also have seasoning requirements before authority to transact business is granted. The purpose of these requirements is to establish that new companies are capable of operating a sound insurance operation. All these requirements are designed, in part, to ensure that insurance companies employ skilled and qualified individuals. Moreover, these professionals have access to reinsurance experts, such as intermediaries, to assist in negotiating and drafting reinsurance contracts. Given this level of sophistication and the absence of unequal bargaining power, arbitration clauses in reinsurance contracts do not raise the same public policy concerns as direct insurance contracts and should remain enforceable.

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[22] *Vera Democrazia Soc. v. Bankers Nat'l Life Ins. Co.*, 160 A. 767, 768 (Dist. Ct. N.J. 1932); *see Stonewall Ins.*, 75 F. Supp. 2d at 909.

[23] NAIC Uniform Certificate of Authority Application, National Association of Insurance Commissioners, *available at* http://www.naic.org/industry_ucaa.htm#charts (last visited June 20, 2007).

V. THE DISTRICT COURT'S DECISION IGNORES REINSURERS' FEDERALLY PROTECTED RIGHT TO ARBITRATION

A. Denial of Arbitration Rights is Contrary to Important Federal Interests

The FAA was enacted in 1925 specifically to overcome a historic judicial hostility to the enforcement of private arbitration agreements.[24] Congress viewed enactment of the FAA, in part, as crucial to the smooth operation of domestic commerce, and appreciated "not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into."[25] The federal policy strongly favoring arbitration stems in part from the conclusion that arbitration is a "socially desirable instrumentality for the settlement of disputes outside the . . . beleaguered courts." The FAA's central and overriding mandate is that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with the rules applicable to other contracts.[26] The Supreme Court has subsequently held that "state courts cannot apply state statutes that invalidate arbitration agreements."[27]

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[24] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995).

[25] S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924).

[26] *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 474 (1989); 9 U.S.C. § 2 (2007).

[27] *Allied-Bruce Terminix*, 513 U.S. at 272.

Courts representing what is now the majority view favoring arbitration have repeatedly held that:

- The FAA requires rigorous enforcement of arbitration provisions and leaves little to no discretion to a federal court;
- Reinsurance agreements are within the scope of the FAA;
- A state has no power, direct or indirect, to restrict the unfettered exercise of the right to remove an action to federal court. The right of removal given by a Constitutional act of Congress can not be taken away, restricted or abridged by state statute;
- Courts have no discretion to consider state public policy arguments in deciding whether to compel arbitration under the FAA. Federal policy requires the resolution of all ambiguities in favor of arbitration;
- Courts are required to determine only whether a valid arbitration agreement exists covering the disputed claims and, if so, enforce the agreement.

This view extends to international agreements. The United States negotiated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") in 1970.[28] Under the Convention, any signatory country that

[28] *See generally*, John P. McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Award in the United States*, 2 J. Mar. L & Com. 735 (1971); Stanley L. Levine, Comment, *United Nations Foreign Arbitral Awards*

previously had refused to enforce or recognize arbitral awards issued in another signatory country was now required to recognize such awards as valid and binding, and all signatory countries were required to use the same, summary enforcement procedures for arbitration agreements that were found in the Convention. Consequently, businesses from signatory countries, including the U.S., have foreknowledge of procedures and certainty that foreign courts will enforce their arbitration agreements. All these benefits result in smoother dispute resolution in international commerce, as businesses have more certainty in their foreign transactions.[29] As explained by the United States Supreme Court, the goal of the Convention is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify standards by which agreements to arbitrate are observed . . . in signatory countries."[30] Courts may effectuate the goals of the Convention and Congress' long standing support of arbitration only through the broad application of arbitration laws. Although the Convention doesn't apply directly to this case, the Convention's important goals should still be considered.

Convention: United States Accession, 2 Cal. W. Int'l L.J. 67 (1971); Leonard V. Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A. J. 821 (1972).

[29] Levine, *supra* at 80-81.

[30] *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)) (internal quotations omitted).

In this case, the Oklahoma Revised Act was used to invalidate the Defendant-Appellant's arbitration agreements in contravention of the FAA and the principles of the Convention. Adoption of the Plaintiff-Appellee's position in this case will directly undermine the "substantial federal concern for the enforcement of arbitration agreements."[31] Because various state laws may contain provisions similar to those at issue in this case, if the Plaintiff-Appellee's position is accepted, it will detrimentally affect domestic and international reinsurance transactions.

Arbitration clauses are almost universally included in reinsurance contracts to reduce the costs, hostilities, and delays engendered by litigation, and to permit resolution of controversies by industry experts.[32] In light of the number of insurance and reinsurance disputes that have occurred in recent years, support of the Plaintiff-Appellee's position threatens to discourage the use of arbitration and increase significantly contract uncertainty and the cost of resolving reinsurance disputes. As the Supreme Court has recognized, a "contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[33]

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[31] *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728-29 (1996).

[32] *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983); *See* R.L. Carter, *Reinsurance* 146 (1st ed. 1979).

[33] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

Thus, the "parochial refusal by the courts of one country [or, as here, one state] to enforce an international arbitration agreement . . . [may] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."[34]

The Reinsurance Agreements are business-to-business transactions that require no heightened scrutiny to protect consumers. Accordingly, enforcing the arbitration clauses in the Reinsurance Agreements would not conflict with Oklahoma public policy. To the contrary, a failure to enforce the arbitration provisions in these Agreements clearly conflicts with the strong federal (and international) policy favoring arbitration. If courts were to refuse to enforce domestic and international commercial arbitration agreements, the purposes of the FAA and Convention would be thwarted.[35] Thus, like all other federal and state courts, the courts of Oklahoma are duty bound to honor and enforce valid commercial arbitration agreements, such as the arbitration agreements in the present case.

B. There is No "Reverse Preemption" Under the McCarran-Ferguson Act

The RUAA provides that due to several U.S. Supreme Court decisions concerning the FAA, any revisions to the UAA needed to take into account the

[34] *Id*. at 516-17.

[35] *See id*. at 519.

doctrine of preemption. Under the doctrine of preemption, "FAA standards and the emphatically pro-arbitration perspective of the FAA control." The doctrine applies in both federal and state courts.[36]

The U.S. Supreme Court opinions have focused on two key issues that arise early in the arbitration process— enforcement of the agreement to arbitrate and substantive issues of arbitrability.[37] These cases establish that "state law of any ilk, including adaptations of the RUAA, mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in sections 2, 3, and 4 of the FAA."[38]

The FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with rules applicable to other contracts, and grants federal courts the power to enforce arbitration agreements by compelling arbitration, staying proceedings pending arbitration, and affirming arbitral awards.[39]

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[36] Revised Uniform Arbitration Act (2000), Prefatory Note 2, National Conference Of Commissioners On Uniform State Laws, *available at* http://www.law.upen.edu/bll/archives/ulc/uarba/arbitrat1213.htm.

[37] *Id.*; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 35 (1967); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 2 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Assocs. v. Cassarotto*, 517 U.S. 681 (1996).

[38] Revised Uniform Arbitration Act (2000), Prefatory Note 2, National Conference Of Commissioners On Uniform State Laws, *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm.

[39] 9 U.S.C. §§ 2, 3, 4, 9.

While the FAA is limited, in some circumstances, by the McCarran-Ferguson Act, those limitations are inapplicable in the instant case.

Section 2(b) of the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[40]

The McCarran-Ferguson Act does not proscribe application of the FAA to the arbitration provisions in the Reinsurance Agreements because Oklahoma has "enacted" no "law" that will be "invalidated, impaired, or superseded" by enforcement of the FAA in this case. The Oklahoma Revised Act is not a "law enacted for the purpose of regulating insurance". The Act is very broad, extending to nearly all types of agreements, except for "contracts which reference insurance". The Act's exclusion of "contracts which reference insurance" does not invalidate the arbitration provisions in the Reinsurance Agreements, but merely provides that the procedures of the Oklahoma Revised Act do not apply to those contracts. Accordingly, procedures related to arbitration provisions in insurance contracts are governed by other applicable law. As Oklahoma has enacted no other applicable statute or regulation, the common law applies.[41] Oklahoma's common law on

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[40] 15 U.S.C. § 1012(b).

[41] *See Rollings v. Thermodyne Indus., Inc.*, 910 P.2d 1030, 1036 (Okla. 1996) (citing *Cannon v. Lane*, 867 P.2d 1235 (Okla. 1993)).

arbitration is not a law enacted for the purpose of regulating insurance, and thus is preempted by the FAA. In contrast to the language of the Oklahoma Revised Act, the Kansas arbitration act at issue in *Mutual Reinsurance Bureau v. Great Plains Mutual Ins. Co.*, 969 F.2d 931 (10th Cir. 1992), a case on which the district court relied, explicitly invalidated arbitration clauses in insurance contracts and did not merely exclude them from the state's arbitration act as the Oklahoma Revised Act does. Consequently, the court held that the law was enacted for the purpose of regulating insurance pursuant to the McCarran-Ferguson Act.

In a case concerning a statute with an arbitration statute similar to Oklahoma's, the Supreme Court of Vermont held that the FAA preempted the Vermont Arbitration Act ("VAA").[42] The VAA excluded from its coverage "arbitration agreements contained in a contract of insurance."[43] The court determined that "[a]ll the insurance contract exclusion from the VAA has done is to allow insurance arbitration agreements to continue to be governed by the common law."[44] The court concluded that because the legislature had not specifically acted to make insurance arbitration agreements revocable, which were revocable under Vermont common law, and instead chose not to regulate insurance arbitration agreements at all by excluding them from the VAA, the VAA was not

[42] *Little v. Allstate Ins. Co.*, 705 A.2d 538 (Vt. 1997).

[43] *Id.* at 539-40.

[44] *Id.* at 541.

enacted for the purpose of regulating the business of insurance, and thus the FAA was not preempted.[45] The court distinguished *Mutual Reinsurance Bureau*, noting that the "provision of [the] Kansas Arbitration Act that made arbitration agreements irrevocable, but specifically excluded provisions in insurance contracts, is law enacted for [the] purpose of regulating [the] business of insurance."[46]

Moreover, the Oklahoma Supreme Court's decision in *Rollings v. Thermodyne Industries* affirms that even if Oklahoma's common law was subject to McCarran-Ferguson reverse preemption, Oklahoma common law no longer disfavors arbitration as being against public policy.[47]

The arbitration provisions of the Reinsurance Agreements are enforceable under the FAA, which is not reverse preempted by the McCarran-Ferguson Act in this case. The Oklahoma Revised Act declines to govern arbitration provisions in contracts which reference insurance; it does not prohibit them. Accordingly, it is not a law enacted for the purpose of regulating insurance pursuant to the McCarran-Ferguson Act. The FAA therefore governs the Reinsurance Agreements, and preempts any Oklahoma law, including the common law, that restricts arbitration. The arbitration clauses in the Reinsurance Agreements are

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[45] *Id.*

[46] *Id.* at 540-541.

[47] *Rollings*, 910 P.2d at 1036.

valid and enforceable under the FAA. Moreover, even if Oklahoma's common law preempted the FAA, because Oklahoma's common law favors arbitration, the Reinsurance Agreements would be enforceable under the common law. This result also supports the important federal public policy favoring predictability and enforceability of contracts, including reinsurance contracts.

VI. CONCLUSION

Based on the foregoing, the RAA respectfully requests this Court reverse the district court's decision.

Respectfully submitted,

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Kimberly M. Welsh, Esq.

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(1) all required privacy redactions have been made, and that every document submitted in Digital Form format is an exact copy of the written document that will be filed with the Clerk; and,

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Kimberly M. Welsh, Esq.

June 22, 2007
Date

Certification Of Filing and Service

I hereby certify that on this 22nd day of June, 2007**,** I caused a digital version of the Motion For Leave To File and a digital version of the Brief of *Amicus Curiae* to be filed with the United States Court of Appeals for the Tenth Circuit, in PDF format (native, not scanned), addressed to the Clerk via e-mail at: esubmission@ca10.uscourts.gov

On this date, I also caused an identical digital version of the Motion For Leave To File and Brief of *Amicus Curiae* to be served upon each of the counsel listed below, in PDF format (native, not scanned), addressed to each via e-mail as noted below:

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