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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE CITY AND COUNTY OF SAN FRANCISCO
13 UNLIMITED CIVIL JURISDICTION

14 INTERNATIONAL PAPER COMPANY and)
MASONITE CORPORATION,)

15 Plaintiffs,)

16 v.)

17 AFFILIATED FM INSURANCE CO., et al.,)

18 Defendants.)

) Case No. 97 43 50

) Hon. Alexander E. Saldamando

) [FILED BY FACSIMILE]

) **PLAINTIFFS' OPPOSITION TO THE**
) **HOME INSURANCE COMPANY'S**
) **MOTION TO IMPLEMENT A NINETY-**
) **DAY STAY OF THE ENTIRE ACTION;**
) **AND MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT THEREOF**

) Hearing Date: April 3, 2003

) Hearing Time: 9:30 a.m.

) Dept.: 318

) Trial Date: April 7, 2003

) Complaint Filed: November 30, 1995

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 Two weeks before the trial of a case that has been pending for over seven years, Defendant The
4 Home Insurance Company (“Home”), has moved the Court to stay this action for 90 days, ostensibly to
5 enable Home to “implement the stay provision in Home’s order of rehabilitation . . . which was issued
6 on March 5, 2003 by the Superior Court for the State of New Hampshire, County of Merrimack.”

7 Home’s motion, which will be heard four days before trial, should be denied for the following reasons:

8 ▪ A motion to stay is not properly before this court. Home’s Rehabilitation Order, when read
9 in conjunction with the New Hampshire Revised Statute 402-C:18, exclusively limits a stay to
10 litigation pending in New Hampshire. *See* N.H. RSA 402-C:18. As to out-of-state
11 jurisdictions, the statute plainly contemplates another proceeding in each jurisdiction if the
12 Rehabilitator makes a determination that a stay should be imposed. *Id.* And, the burden is on
13 the Rehabilitator to seek and justify the request for a stay in each instance. *Id.* Therefore, the
14 New Hampshire statute sets up a procedure that the Rehabilitator must follow if it decides to go
15 outside New Hampshire to seek discretionary stays of cases in out-of-state jurisdictions.

16 Without a doubt, this procedure was not followed when Home, unilaterally, filed its Motion to
17 Stay;

18 ▪ Even if the Rehabilitation Order could be read as applying to out-of state litigation, Home
19 has no standing to seek the enforcement of a stay in the Rehabilitation Order. To the contrary,
20 Section 402-C:18 of the New Hampshire Revised Statutes provides that only the Rehabilitator,
21 not the insurer, has the authority to seek to enforce a stay. Furthermore, paragraph (c) of the
22 Rehabilitation Order provides that the “Rehabilitator shall have all the powers of the officers
23 and managers of The Home, whose authority shall be suspended, except as they are specifically
24 re-delegated by the Rehabilitator.” Therefore, all of Home’s authority has been suspended, and
25 Home offers no evidence that the Rehabilitator has “specifically re-delegated” any powers to
26 Home, much less the power to enforce a stay of this entire action;

27 ▪ Even if the Rehabilitation Order could be read as applying to out-of state litigation, this
28 Court should not give full faith and credit to the New Hampshire Rehabilitation Order because

1 it is not a final order. Paragraph (g)(1) of the Rehabilitation Order purports to stay proceedings
2 as against the Home *“except as may be modified by further order of the Court.”* Case law
3 establishes that if a state court order is interlocutory or subject to modification under the law of
4 the rendering state, then the state’s order is not entitled to full faith and credit. *See Barber v.*
5 *Barber*, 323 U.S. 77, 81 (1944). Home’s Rehabilitation Order is interlocutory and subject to
6 modification. Therefore, full faith and credit should not be applied by the California court;

7 ▪ Even if the Rehabilitation Order could be read as applying to out-of state litigation, the
8 Rehabilitation Order by a Superior Court in New Hampshire is not entitled to full faith and
9 credit by this Court because the New Hampshire court did not obtain personal jurisdiction over
10 the relevant parties to the California action. Furthermore, the parties to this California action
11 received neither notice nor an opportunity to be heard before the New Hampshire court issued
12 its Rehabilitation Order. Therefore, this Court should exercise its discretion in favor of *not*
13 staying this action against Home, and certainly not staying the action as to Plaintiffs and the
14 remaining 20 Defendants, who were denied due process;

15 ▪ The principles of comity do not justify staying this action. Indeed, courts in California and
16 sister states across the country have exercised their discretion in favor of not staying
17 unconstitutionally overbroad insurance “rehabilitation” or liquidation orders that, like Home’s
18 Rehabilitation Order, purport to bind nonparties outside the jurisdiction;

19 ▪ Enforcement of a 90-day stay will cause severe prejudice to Plaintiffs. This is an enormous
20 case, with more than 20 parties and 20 different law firms involved, and numerous witnesses,
21 including experts, whose schedules all must be coordinated for what is expected to be a very
22 lengthy trial. The jury pool has been called, and the San Francisco Superior Court has gone to
23 great lengths to prepare the large amount of trial space needed. All parties are scheduled and
24 prepared to proceed to trial within a matter of days. The logistics of this coordination have
25 been challenging and costly, including the scheduling itself as well as the provision of travel
26 and hotel accommodations. In the event of a stay, significant additional amounts would
27 undoubtedly be incurred to restructure trial arrangements. The inconvenience to the Superior
28 Court and the prejudice to the parties that would result from a stay are self-evident;

1 ▪ A stay of this action is unnecessary. As Home even state in its Motion, it estimates a four-
2 month trial. In light of this trial estimate, there is no chance that a judgment will be entered
3 against Home in this action within the 90-day period for which Home seeks a stay. Indeed,
4 even after the jury reaches its verdict in this action, there will be further proceedings
5 concerning allocation and possibly other issues before any judgment would be entered. Then,
6 presumably appeals and cross-appeals would be filed by the parties. Therefore, the
7 Rehabilitator will have well in excess of 90 days to “assess fully Home’s condition, develop
8 and implement a plan or rehabilitation and protect Home’s estate in the interim.” See Home’s
9 Motion at 2:9-11. Thus, this action does not jeopardize Home’s estate in the next 90 days and
10 Home’s motion should be denied; and

11 ▪ Even if the Court believes that it should exercise its discretion and give some deference to
12 the New Hampshire court (which Plaintiffs believe is not warranted), the Rehabilitation Order
13 does not suggest that the entire action be stayed, but that at most the action be stayed as to
14 Home, with Home severed from the case. Indeed, paragraph (g)(1) of the Order provides that
15 only those actions “against The Home” should be stayed. Certainly, the Rehabilitator does not
16 have jurisdiction over the parties in this case to impede the ability of these parties to proceed to
17 trial without Home.

18 STATEMENT OF FACTS

19 In the current phase of this insurance recovery action, Plaintiffs seek indemnity from about 20
20 of its insurers, including Home, for *Naef v. Masonite Corp.*, No. CV-94-4033 (Ala. Cir. Ct.), a
21 nationwide product liability class action that involved approximately four million potential class
22 members who sought some \$40 billion in damages. The declaratory judgment action was initially filed
23 by Plaintiffs against the Defendants in November 1996, almost seven years ago. Since that time,
24 Plaintiffs and Defendants have conducted enormous amounts of written discovery. Scores of witnesses
25 have been deposed by the parties. Numerous motions have been brought by the parties in connection
26 with this written and oral discovery. Similarly, the parties have conducted extensive expert discovery.
27 More than forty experts have been designated and deposed by the parties.
28

1 In addition, in preparing for trial, the parties have submitted numerous legal issues briefs
2 involving complex coverage issues, briefs regarding trial phasing, motions *in limine*, proposed jury
3 instructions, and other substantive and procedural issues. Furthermore, in connection with preparing
4 for the April 7, 2003 trial, schedules of countless individuals have been carefully organized. The Court
5 has already called the jury pool and extensive efforts to prepare sufficient courtroom space are well
6 underway. More than 20 parties and 20 different law firms are involved, as well as numerous
7 witnesses, including experts, whose schedules all must be coordinated for what is expected to be a very
8 lengthy trial. In the event of a stay, significant additional costs would undoubtedly be incurred to
9 restructure trial arrangements.

10 Home is one of approximately 20 Defendants from which Plaintiffs seek recovery. Home
11 issued two excess general liability policies to Masonite. The first Home policy was issued from
12 September 1, 1985 through September 1, 1986, with a limit of liability of \$20 million, excess of \$45
13 million. The second Home policy was issued from September 1, 1986 through September 1, 1987,
14 with a limit of liability of \$5 million, excess of \$15 million. Therefore, Home's potential liability to
15 Masonite totals \$25 million. A copy of Plaintiffs' Coverage Chart is attached to this Opposition for the
16 Court's convenience.

17 On March 5, 2003, over three weeks ago, the New Hampshire Superior Court granted a Petition
18 filed that day by the New Hampshire Commissioner of Insurance for an Order placing Home in
19 voluntary rehabilitation. *See* Home's Motion at 1:10-12. The Rehabilitation Order was entered
20 pursuant to New Hampshire's Insurers Rehabilitation and Liquidation Act, RSA 402-C:1, *et seq.*,
21 which authorizes only the Rehabilitator to seek to enforce stays in out-of-state jurisdictions. While
22 Home has not established its standing to bring its Motion; there is no reason to stay this case on the eve
23 of trial in any event. The New Hampshire order is legally insufficient to delay or derail this case.

24 ARGUMENT

25 I. **A MOTION TO STAY IS NOT PROPERLY BEFORE THIS COURT BECAUSE 26 HOME'S MOTION IS PROCEDURALLY DEFECTIVE AND HOME LACKS STANDING TO SEEK A MOTION TO STAY OF THIS ACTION.**

27 After a Rehabilitator has been appointed for an insurer in New Hampshire, Section 402-C:18 of
28 the New Hampshire Revised Statutes exclusively limits a stay of any litigation to litigation pending in

1 New Hampshire. See N.H. RSA 402-C:18. As to out-of-state jurisdictions, it is the Rehabilitator's
2 responsibility, not the insurer's, to "immediately consider all litigation pending outside this state" and
3 "petition the courts having jurisdiction over that litigation for stays whenever necessary to protect the
4 estate of the insurer." N.H. RSA 402-C:18(I). Therefore, the New Hampshire statute clearly
5 established a procedure that the Rehabilitator must follow if it decides to go outside New Hampshire to
6 seek discretionary stays of cases in out-of-state jurisdictions. This procedure was not followed when
7 Home, unilaterally, filed its Motion to Stay three weeks after the Rehabilitation Order was entered.
8 When read in conjunction with RSA 402-C:18, the stay in the Rehabilitation Order does not apply to
9 this out-of-state action.¹

10 Furthermore, Home lacks authority to bring its Motion, because its authority was suspended in
11 favor of the Rehabilitator by the Rehabilitation Order. Paragraph (c) of the Order provides that the
12 "Rehabilitator shall have all the powers of the officers and managers of The Home, whose authority
13 shall be suspended, except as they are specifically re-delegated by the Rehabilitator." Therefore, all of
14 Home's authority has been suspended, and Home offers no evidence that the Rehabilitator has
15 "specifically re-delegated" any powers to Home, much less the power to enforce a stay of this entire
16 action. Home lacks standing to bring this Motion because it fails to satisfy the following necessary
17 requirements: (a) a petition and appearance by the Rehabilitator who has the authority to seek a
18 discretionary stay;² (b) evidence that the Rehabilitator made a determination that a stay of this action is
19 necessary to protect Home's estate; and (c) evidence that the Rehabilitator has "specifically re-
20 delegated" sufficient power to Home to petition this Court to enforce a stay.

21
22
23
24
25 ¹ The language of RSA 402-C:18 should be contrasted to the language of RSA 402-C:28, which provides in an insolvency
26 situation that "...upon issuance of any order appointing the commissioner liquidator of a domestic insurer..., all actions and
all proceedings against the insurer *whether in this state or elsewhere* shall be abated and the liquidator shall not intervene in
them, except as provided in this section. ..." N.H. RSA 402-C:28 (emphasis added).

27 ² Indeed, Home's Motion, brought without the involvement of the Rehabilitator, is suspect in light of the recent
28 Rehabilitation Order. The necessity of the Order essentially demonstrates that Home needs the assistance of a Rehabilitator
to protect its own policyholders, contract holders, and the public.

1 **II. THE REHABILITATION ORDER IS NOT ENTITLED TO FULL FAITH AND**
2 **CREDIT BECAUSE IT IS NOT A FINAL ORDER.**

3 Assuming *arguendo* that the stay in the Rehabilitation Order could be read as applying to this
4 case, this Court also should not give full faith and credit to the Order because it is not a final order.
5 Paragraph (g)(1) of the Rehabilitation Order purports to stay proceedings as against the Home “*except*
6 *as may be modified by further order of the Court.*” Therefore, the order is interlocutory or subject to
7 modifications of the rendering state, New Hampshire.

8 It is a long established principle that full faith and credit is not required when a decree is
9 interlocutory or subject to modification under the law of the rendering state. *See Barber*, 323 U.S. at
10 81; *see also Cutler v. Cutler*, 543 S.W.2d 1, 2 (Tex. Civ. App.- Dallas 1976) (party requesting full faith
11 and credit from a foreign jurisdiction is required to show that order is final and not subject to
12 modification). Indeed, this principle is discussed in *Bard v. Charles R. Myers Insurance Agency, Inc.*,
13 839 S.W.2d 791, 795 (Tex. 1992), a Texas Supreme Court case cited by Home in its Motion at 2:27-
14 28. While in *Bard*, the order at issue was a final liquidation order (which is not the case here), the
15 court recognized the fact that orders subject to modification are not entitled to full faith and credit. 839
16 S.W.2d at 794.

17 The New Hampshire order before this Court contemplates that it “may be modified by further
18 order of the Court.” As such, the New Hampshire court’s stay order clearly is interlocutory or subject
19 to modification. This fact confirms that the stay order is not entitled to full faith and credit by the
20 California court.

21 **III. THE NEW HAMPSHIRE’S REHABILITATION ORDER IS NOT ENTITLED TO**
22 **FULL FAITH AND CREDIT.**

23 **A. The New Hampshire Court Did Not Obtain Jurisdiction Over the Nonparties.**

24 Assuming *arguendo* that the stay in the Rehabilitation Order could be read as applying to this
25 case, the New Hampshire court did not have jurisdiction over Plaintiffs, and, therefore, its stay order is
26 not entitled to full faith and credit. The United States Supreme Court has “consistently recognized”
27 that jurisdiction over the relevant parties is a “basic limitation[]” on the concept of full faith and credit.
28 *Underwriters Nat’l Assurance Co. v. N. C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691,
704 (1982):

1 To be sure, the structure of our Nation as a union of States, each
2 possessing equal sovereign powers, dictates some basic limitations on
3 the full-faith-and-credit principles enumerated above. Chief among
4 these limitations is the caveat, consistently recognized by this Court, that
5 “a judgment of a court in one State is conclusive upon the merits in a
6 court in another State only if the court in the first State had power to pass
7 on the merits – had jurisdiction, that is, to render the judgment.”
8 Consequently, before a court is bound by the judgment rendered in
9 another State, it may inquire into the jurisdictional basis of the foreign
10 court’s decree. ***If that court did not have jurisdiction over the subject
11 matter or the relevant parties, full faith and credit need not be given.***

12 *Id.* at 704-05 (emphasis added) (citations omitted). *See also Id.* at 704 n.10 (“It is axiomatic that a
13 judgment must be supported by a proper showing of jurisdiction over the subject matter and over the
14 relevant parties.”).

15 In *Eastern Indemnity Co. of Maryland v. Hirschler, Fleischer, Weinberg, Cox & Allen*, 235 Va.
16 9 (Va. 1988), the Supreme Court of Virginia held that Maryland court orders staying actions against an
17 insolvent insurance company were not entitled to full faith and credit in an action brought in Virginia
18 by a Virginia law firm seeking to recover legal fees from the company because the law firm was “not a
19 party to the original proceeding” in Maryland. The reasoning of the Virginia court is particularly apt in
20 our case:

21 Here, it is undisputed that the Hirschler firm was not made a party to the Maryland
22 proceeding or otherwise given notice of its pendency or the issuance of the orders.
23 Furthermore, there is no suggestion that the question of the Maryland court’s
24 jurisdiction over the Hirschler firm was ever litigated or decided in that proceeding.
25 Under these circumstances, the holding is compelled that the orders in question did not
26 bind the Hirschler firm and that they were not entitled to full faith and credit in the
27 present proceeding.

28 235 Va. at 13. *See also Furhman v. United Am. Insurors*, 269 N.W.2d 842, 848 (Minn. 1978) (order of
Iowa receivership court enjoining all actions against insurance company placed in receivership not
entitled to full faith and credit in declaratory judgment action when “the Iowa court plainly did not
have personal jurisdiction over [plaintiff] Fuhrman when the injunctive order was entered.”); *Robbins*
v. Reliance Ins. Co., No. 13-00-645-CV, 2001 WL 1346410 (Tex. App.-- Corpus Christi Nov. 1, 2001)
(Pennsylvania court’s stay order not entitled to full faith and credit in Texas declaratory judgment
action when Pennsylvania court did not fully litigate jurisdictional issue and “did not have adjudicatory
authority over the subject matter or the appellant who was not a Pennsylvania resident and was not a
party to the Pennsylvania rehabilitation proceedings.”); *Ins. Affiliates, Inc., v. O’Connor*, 522 F. Supp.

1 703, 705 (D. Colo. 1981) (In declaratory judgment action by insurance agent concerning his obligation
2 to remit unearned premiums to insolvent insurer, court held that Illinois state court injunction in
3 liquidation proceedings was not entitled to full faith and credit when neither property at issue nor
4 parties were subject to jurisdiction of Illinois court.).

5 Similarly, in *Mahan v. Gunther*, 278 Ill. App. 3d 1108 (1996), an Illinois court rejected an
6 Indiana court's effort to stay an Illinois action against the insured of an insurer that had gone into
7 rehabilitation. The *Mahan* court held that the Indiana court's order was not just voidable, but void
8 from its very inception and a nullity to the extent that it attempted to act upon the Illinois case. 278 Ill.
9 App. 3d at 1116. The court further held that the Indiana court could not require the Illinois plaintiff to
10 do anything, because it had not provided her with notice or an opportunity to be heard prior to
11 enjoining her. *Id.* In addition, the *Mahan* court held that even if the Indiana court had personal
12 jurisdiction over the parties in the Illinois case, there was no constitutional requirement to give full
13 faith and credit or extend comity to stays from foreign courts. *Id.*; see also *State ex rel. Human Servs.*
14 *Dep't v. McDermott*, 121 N.M. 609, 621 (1996) ("neither the full-faith-and-credit principle nor the
15 concept of comity requires recognition of an attempt by one court to abate or stay proceedings in a
16 different court"); *James v. Grand T. W. R.R.*, 14 Ill. 2d 356, 362-63 (1958) (Illinois court not required
17 by comity or full faith and credit to recognize out-of-state injunction purporting to enjoin litigants from
18 pursuing Illinois action). Thus, when a court in one state institutes a stay without providing nonparties
19 notice and an opportunity to be heard, it is not entitled to full faith and credit by a court in another
20 state.

21 In our case, the Rehabilitation Order by a Superior Court in New Hampshire is not entitled to
22 full faith and credit by this Court. The New Hampshire court did not seek to obtain jurisdiction over
23 the parties, and the parties to this California action were never given notice or an opportunity to be
24 heard before Home's Rehabilitation Order was issued. Therefore, this Court should exercise its
25 discretion in favor of *not* staying this action against the approximately 20 parties to this action, all of
26 which were denied due process.

1 **B. The Cases Cited By Home Do Not Support Enforcing the New Hampshire Court's**
2 **Stay Order To This Action.**

3 Contrary to what Home attempts to accomplish in its Motion, the cases cited by Home actually
4 demonstrate why this Court should *not* give the New Hampshire Rehabilitation Order and purported
5 stay full faith and credit. For example, Home cites to *Underwriters National Assurance Co. v. North*
6 *Carolina Life & Accident & Health Guaranty Ass'n*, 455 U.S. 691 (1982). However, as stated above,
7 in *Underwriters*, the United States Supreme Court clearly recognizes that full faith and credit need not
8 be given by one court if the foreign court did not have jurisdiction over the subject matter or the
9 relevant parties in the first instance. *Id.* at 705. And, in *Underwriters*, unlike this case, the plaintiff in
10 the North Carolina action had notice of the Indiana rehabilitation proceedings that sought to then stay
11 the North Carolina action. Indeed, in stark contrast to the present case, the plaintiff in the North
12 Carolina action even intervened in the Indiana rehabilitation proceedings. *Id.* at 698.

13 In the present case, the New Hampshire Court did not have personal jurisdiction over the
14 Plaintiffs in this declaratory judgment action. Nor does this action involve the rights to a purported
15 "asset" of an insolvent insurance company, as in *Underwriters*.³ Moreover, unlike *Underwriters*,
16 Plaintiffs did not receive notice of the New Hampshire Court's proceedings and had no opportunity to
17 intervene prior to the entry of the court's stay order. "The fundamental requisite of due process of law
18 is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *accord, In re Morrill*,
19 147 N.H. 116, 118-19 (2001).

20 Furthermore, Home's case authority either fails to provide any detailed analysis of the full faith
21 and credit issue or is distinguishable and, therefore, provides no support for Home's claim that a stay is
22 appropriate here. For example, in *Nasef v. U&I Investments, Inc.*, 91 Or. App. 344, 348 n2 (1988), the
23 Oregon appellate court expressly stated that it did "not reach Allied's argument based on the Full Faith
24

25 _____
26 ³ For this reason, the Colorado Court of Appeals' decision in *Herstam v. Board of Directors of Silvercreek Water &*
27 *Sanitation District*, 895 P.2d 1131 (Colo. Ct. App. 1995), cited by Home in its motion also is distinguishable. *See* Home's
28 Motion at 3:1-2. In *Herstam*, the Colorado action concerned the insurer's interest, pursuant to a deed of trust, in property
located in Colorado. An Arizona court, in a receivership proceeding, determined that the insurer's interest in this property
was an "asset" of the estate. Thus, in the Colorado action, the Colorado water and sanitation district sought to recover
overdue payments for "water taps associated with the property." 895 P.2d at 1133.

1 and Credit Clause.” Similarly, *Integrity Insurance Co. v. Martin-Harris Construction Co.*, 105 Nev.
2 16, 19 n.1 (1989), relegates this constitutional issue to a perfunctory footnote.

3 As to the cases cited by Home that actually address full faith and credit, they are easily
4 distinguishable from the situation before this Court and, therefore, are inapplicable. In *Janak v.*
5 *Allstate Insurance Co.*, 319 F. Supp. 215, 218 (W.D. Wis. 1970), the plaintiffs brought a lawsuit
6 against an insolvent company *after* an out-of-state liquidation decree had been entered. Therefore, the
7 court enjoined plaintiffs’ ability to pursue the insolvent company. And, in *State ex rel. Low v. Imperial*
8 *Insurance Co.*, 140 Ariz. 426, 429-30 (1984), the plaintiffs (unlike Plaintiffs here) had already filed
9 claims in the out-of-state liquidation proceeding, thus submitting to the out-of-state court’s authority.
10 As a result, the *Low* court held that the plaintiff was required to proceed in the out-of-state liquidation
11 proceeding. *Id.* at 433. There are no similar liquidation proceedings pending in New Hampshire
12 involving Home, and Plaintiffs never even had the opportunity to appear before the New Hampshire
13 court before the Home’s Rehabilitation Order and stay was issued.

14 Finally, two cases cited by Home do not involve injunctive orders by a different state, but
15 instead address the issue (not present here) of the effect of injunctive orders issued within the same
16 state. See *Maryland Cas. Co. v. Marquette Cas. Co.*, 173 So.2d 868 (La. App. 1965) (Louisiana stay
17 order resulting from Louisiana rehabilitation proceeding enforced by Louisiana court); *Powell v. All*
18 *City Ins. Co.*, 74 A.D.2d 942 (1980) (stay order by one New York Supreme Court (New York County)
19 held to apply in proceeding in another New York Supreme Court (Columbia County).

20 **IV. THIS COURT SHOULD NOT ENFORCE THE NEW HAMPSHIRE COURT’S STAY**
21 **ORDER UNDER PRINCIPLES OF COMITY.**

22 **A. California Courts Have Discretion and May Exercise It In Favor of Not Enforcing**
23 **An Order From A Foreign Jurisdiction.**

24 The principles of comity also do not justify staying this action. Indeed, courts in California and
25 other states across the country have exercised their discretion in favor of not staying unconstitutionally
26 overbroad insurance “rehabilitation” or liquidation orders that, like the New Hampshire Rehabilitation
27 Order, purport to bind nonparties outside the jurisdiction.

28 The California Supreme Court in *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697 (2002), explained the principle of “comity” as follows:

1 Comity is based on the belief that the laws of a state have no force,
2 *proprio vigore*, beyond its territorial limits, but the laws of one state are
3 frequently permitted by the courtesy of another to operate in the latter for
4 the promotion of justice, **where neither that state nor its citizens will**
5 **suffer any inconvenience from the application of the foreign law.**

6 *Id.* at 707 (emphasis added and internal quotation marks omitted). Applying these principles to
7 whether one state court should enjoin prosecution of an action in another state, the California Supreme
8 Court stated that such an injunction “involves delicate questions of comity and therefore ‘requires that
9 such action be taken only with care and great restraint.’” *Id.* (quoting *Compagnie des Bauxites de*
10 *Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 887 n.10 (3d Cir. 1981), *aff’d*, 456 U.S. 694 (1982)).
11 Reasoning that “enjoining proceedings in another state requires an *exceptional circumstance* that
12 outweighs the threat to judicial restraint and comity principles,” the California Supreme Court held
13 that the trial court erred when it issued an injunction that prohibited plaintiffs from prosecuting their
14 action in a Minnesota state court. *Id.* at 708 (emphasis added); *see also Webster v. Superior Court*, 46
15 Cal. 3d 338, 350 (1988) (California courts “have discretion to determine whether to stay an action
16 against the insolvent insurer and, if so, under what terms and conditions.”).

17 These principles, as expressed by the *Advanced Bionics* court, should be applied by this Court
18 in determining whether the New Hampshire stay order should be enforced under principles of comity.
19 In particular, this Court has discretion and should consider whether the state or “its citizens will suffer
20 any inconvenience from the application of the foreign law.” 29 Cal. 4th at 707. Such discretion is
21 afforded California courts in determining whether to stay proceedings against an insolvent insurer
22 under California’s insurance laws. Here, as demonstrated in Section B below, the state and its citizens
23 will suffer extreme inconvenience and prejudice from the application of the New Hampshire court’s
24 Rehabilitation Order.

25 **B. The Principles of Comity Weigh in Favor of Denying the Stay Because a Stay Will**
26 **Cause Severe Disruption To Ongoing Trial Preparation Efforts.**

27 Enforcement of a 90-day stay will cause significant disruptions to this Court’s efforts to prepare
28 for a trial of this magnitude, as well as to the trial planning work of the parties. This is a very large
case, with more than 20 parties and 20 different law firms involved, and numerous witnesses, including
experts, a number of whom are California citizens, whose schedules all must be coordinated for a trial
that is expected to last for months. The San Francisco jury pool has been called, and this Court is

1 literally “breaking down walls” to prepare the large amount of trial space that will be needed. All
2 parties are scheduled and prepared to proceed to trial within a matter of days. The logistics of this
3 coordination have been challenging and costly, including the scheduling itself as well as the provision
4 of travel and hotel accommodations. In the event of a stay, significant additional amounts would
5 undoubtedly be incurred to restructure trial arrangements. The inconvenience to the Superior Court
6 and the witnesses the prejudice to the parties that would result from a stay are self-evident.

7 Furthermore, despite Home’s unsubstantiated claim that it will suffer “insurmountable
8 hardship” if this action is not stayed, Home actually will benefit if it is required to proceed to trial with
9 the other Defendants. It has been Plaintiffs’ experience that Home has been minimally involved in the
10 Joint Defense Group’s preparations for trial. In most instances, Home has taken a secondary role and
11 relied on the work product of other Defendants in this action. It is clear that Home’s trial presentation
12 will necessarily rely on work performed by other members of the Joint Defense Group that have been
13 more active in the litigation. In essence, Home’s trial preparation has largely been completed by other
14 Defendants. Accordingly, a stay of the litigation as to Home is not warranted.

15 Recent case law also supports this Court exercising its discretion in favor of denying the stay.
16 In *Reliance Insurance Co. v. Plum Creek Timber Co.*, No. 99C-19-263, 2001 WL 1222090 (Del.
17 Super. Ct. Sept. 26, 2001), the court denied the insolvent insurance company’s motion for a stay based
18 on a Pennsylvania court’s order in light of the “rapidly approaching” trial date and the resulting
19 prejudice to plaintiff:

20 Plum Creek counter argues that comity should not permit a stay of the
21 proceedings, as this case has been ongoing for about a year and a half,
22 discovery has been conducted, trial is rapidly approaching and prejudice
23 will result if it is not allowed to reduce its claim to a judgment. The
24 court agrees with Plum Creek that the principles of comity should not
25 allow a stay of these proceedings. Prejudice will result to Plum Creek in
26 delaying this action. Trial is scheduled in January and discovery has
27 already been taken, at this point there is no persuasive reason for
28 granting a stay of proceedings under the principles of comity.

25 *Id.* at *2. In so holding, the Delaware court rejected the insolvent insurer’s arguments (similar to those
26 made by Home), that Pennsylvania, which like New Hampshire, has not adopted the Uniform Insurers
27 Liquidation Act, should be considered a “reciprocal state” whose injunctive orders were entitled to
28 enforcement under principles of comity. *Id.* at *1.

1 Similarly, in *Shepard v. Reinoehl*, No. 99C-060303, 2001 WL 884162 (Del. Super. Ct. June 4,
2 2001), the court declined to enforce a Pennsylvania court's stay order because it would disrupt the
3 discovery schedule in the multi-party case and likely delay the trial date, all of which would result in
4 substantial prejudice to the plaintiff:

5 This case involves approximately nine attorneys of record and thirteen
6 parties. The record of the case indicates that there may be numerous trial
7 witnesses. Trial is estimated to require fifteen trial days. A stay of 60
8 days will disrupt a discovery schedule which has been carefully
9 organized to accommodate the schedules of all attorneys. Disruption of
10 that schedule will, in turn, jeopardize the February trial date. If a new
trial date had to be scheduled, the case would be delayed for months, at
best. The prejudice to the plaintiffs in setting into motion a chain of
events which will likely result in continuance of the trial outweighs any
potential prejudice to the moving defendants from denial of a 60-day
stay.

11 *Id.* at *2.

12 The resulting prejudice and harm to Plaintiffs of a 90-day stay is insurmountable when weighed
13 against enforcement of the New Hampshire stay order.

14 **V. A NINETY-DAY STAY IN THIS CASE IS UNNECESSARY FOR THE
15 REHABILITATOR TO PROTECT HOME'S ESTATE BEFORE A JUDGMENT
16 COULD BE ENTERED AGAINST HOME.**

17 Home argues in its Motion that the purpose of the stay it seeks is to allow the Rehabilitator 90
18 days to "assess fully Home's condition, develop and implement a plan or rehabilitation and protect
19 Home's estate in the interim." See Home's Motion at 2:9-11. However, proceeding to trial on April 7,
20 2003 will not inhibit the Rehabilitator's ability to assess Home's condition or protect Home's estate.
21 As Home even states in its Motion, it estimates the trial to last at least four months. This four-month
22 trial estimate contemplates that after the jury reaches its verdict, there will be further proceedings
23 concerning allocation, and possibly other issues, including post-trial motions, before any judgment
24 would be entered. Then, presumably appeals and cross-appeals would be filed by the parties. Based
25 upon this schedule, there is no chance that a judgment would be entered against Home in the next 90
26 days.⁴ Thus, proceeding to trial on April 7, 2003 does not jeopardize Home's estate in the next 90
27

28 ⁴ In fact, even if a judgment somehow were entered against Home within the next 90 days, Plaintiffs would agree that they would not execute on any such judgment during the 90-day period during which Home seeks a stay of the action.

1 days, as there is no chance that a judgment will be entered against Home within the 90-day time period
2 for which Home seeks a stay. A stay is unnecessary.

3 **VI. EVEN IF THIS COURT CHOOSES TO GIVE DEFERENCE TO THE NEW**
4 **HAMPSHIRE COURT, ONLY THE CLAIMS AGAINST HOME SHOULD BE**
5 **STAYED.**

6 Even if the Court believes it should exercise its discretion and give some deference to the New
7 Hampshire court, the Rehabilitation Order does not mandate staying the entire action, but rather
8 staying the claims against Home only. Indeed, paragraph (g)(1) of the Order specifically provides that
9 only those actions “against The Home” should be stayed. Indeed, many of the cases relied on by
10 Home have limited enforcement of the stay only to claims against the insolvent insurer. *See State ex*
11 *rel. Guste v. Alic Corp.*, 595 So. 2d 797 (La. App. 1992); *Brown v. Link Belt Division*, 666 F.2d 110
12 (5th Cir. 1982) (claims against two other defendants proceeded to trial).

13 Furthermore, this court has discretion to sever the claims against Home. *See Cal. Code Civ.*
14 *Proc. § 1048; see also Howe v. Key Sys. Transit Co.*, 198 Cal. 525, 529 (1926) (“Separate parties, if the
15 court in its discretion so directs, may litigate their controversies separately, and may proceed to
16 judgment without waiting for judgments as to other parties.”); *City of Sacramento v. Superior Court*,
17 205 Cal. App. 2d 398, 403 (1962) (“the power exists in the trial court to sever an action where the
18 interests of justice require.”). In *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*,
19 672 F. Supp. 1 (D.D.C. 1986), the court specifically contemplated the continuance of the action against
20 other defendants not subject to the out-of-state stay orders by providing that the insolvent insurers
21 “continue to be served with all pleadings, discovery and correspondence, and shall be allowed to
22 continue to attend hearings, pretrial proceedings, and depositions.” *Id.* at 6-7.

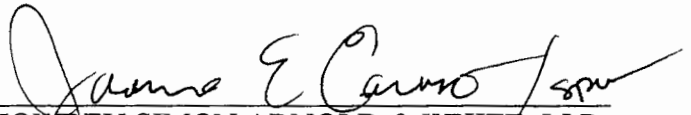
23 If, however, Home is severed from the case, it will, at a later date, still need to go to trial on the
24 coverage issue. At that point, all of the expense of the trial will be borne by Home alone. Home could
25 be adversely affected by decisions issued in the case against the other Defendants in which Home did
26 not participate. Therefore, Plaintiffs assert that it is more economical and efficient for Home to go to
27 trial now as a member of the Joint Defense Group rather than litigate this case alone in the future.
28

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Home's Motion to Implement a Ninety-Day Stay be denied.

DATED: March 28, 2003

Respectfully submitted,



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