

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

<b>CONTINENTAL CASUALTY COMPANY,</b>	)	
	)	
<b>Plaintiff,</b>	)	No. 4:09-cv-00335-FJG
	)	
<b>v.</b>	)	
	)	
<b>AXA GLOBAL RISKS (UK) LIMITED</b>	)	
<b>and ASSICURAZIONI GENERALI</b>	)	
<b>S.p.A.,</b>	)	
	)	
<b>Defendants.</b>	)	

**JOINT MEMORANDUM IN SUPPORT OF MOTION TO STAY**

COME NOW Plaintiff Continental Casualty Company (“CCC”), and Defendants AXA Global Risks (UK) Limited (“AXA”) and Assicurazioni Generali S.p.A. (“Generali”) (collectively “Defendants”) and file their Joint Memorandum in Support of Motion for Stay.

**FACTS**

CCC filed its Complaint in this action on May 1, 2009. In that Complaint, CCC alleges that, beginning in 1998, Defendants, CCC, and other insurers were directly involved in the negotiation of a “Global Master Builders Risk Policy Wording” (the “Master Wording”) with Black & Veatch Construction, Inc. (“Black & Veatch”) in connection with the creation of a “Global Builders Risk Facility” for Black & Veatch. CCC further alleges that it, together with Defendants and other insurers, were members of a “Global Builders Risk Facility” designed to provide builder’s risk insurance to Black & Veatch on a worldwide basis.

In connection with the Global Builders Risk Facility, CCC issued Master Builders Risk Policy, No. 1M2 10720658 (the “Policy”) through Willis Corroon Corporation of Missouri (“Willis St. Louis”) to Black & Veatch, effective September 27, 1999 through February 1, 2002.

The Policy provided Builders' Risk/Delay in Startup insurance for construction of a power plant by Black & Veatch located at Pleasant Hill, Missouri (the "Project"). CCC accepted 75% of the risk insured under the Policy.

CCC further alleges that it acted as a "front" on the Policy for Defendants who participated on the Policy as reinsurers of CCC in form only, rather than as direct insurers of Black & Veatch. In connection with CCC's and Defendants' alleged "fronting" arrangement, CCC reinsured two-thirds of its 75% participation in the Policy with AXA and Generali pursuant to a quota share reinsurance contract known as the Builders Risk and Delay in Start Up Reinsurance Slip No. TD 7113W, effective September 27, 1999 through February 1, 2002 (the "Slip"). Pursuant to the Slip, AXA and Generali each accepted 25% of the original risk insured under the Policy, and CCC retained 25% of the original risk insured under the Policy.

The Defendants do not accept that they were involved, directly or indirectly, with the negotiation of the Master Policy, nor do they accept that they were members of a "Global Builder's Risk Facility" for Black & Veatch. Furthermore, the Defendants deny that CCC acted as a "front" on the Policy for them, or that any fronting arrangement existed in connection with the insurance of Black & Veatch. Defendants allege that the contract between the Defendants and CCC was in the form of a reinsurance slip; that it was presented to the Defendants in London by CCC's broker, Willis, through their London office and was subscribed by the Defendants in London; and that the Slip is in a London market form, refers to and incorporates London market clauses and was placed through the London Insurance and Reinsurance Market Association (LIRMA).

On or about July 21, 2000, Black & Veatch allegedly suffered a loss in connection with the Project, and thereafter submitted a claim to CCC for coverage of the alleged loss under the Policy (the "Claim"). CCC thereafter refused to pay the Claim and denied coverage to Black & Veatch under the Policy. Black & Veatch then commenced an action against CCC (and a co-insurer) in the Circuit Court of Johnson County, Missouri for money damages and declaratory relief based on CCC's denial of coverage for the Claim under the Policy (the "DJ Action"), in which action CCC answered and denied the allegations against it.

On November 21, 2007, following a trial by jury, judgment was entered against CCC (and a co-insurer) in the amount of \$23,072,979 in the DJ Action (the "Judgment"). CCC has appealed the Judgment, which appeal is now pending in the Missouri Court of Appeals, Western District as Case No. WD69286 (the "Appeal"). CCC as appellant filed its brief on April 8, 2009, and Black & Veatch must file its brief by June 22, 2009. CCC's reply will then be due on July 1, 2009.

Pursuant to the Slip, CCC has billed Defendants \$2,451,467.54 for their share of expenses incurred in connection with its adjustment and defense of the Claim, and its defense of the DJ Action (the "Expenses"). Defendants have refused to pay the Expenses and have denied any liability for indemnity or expenses under the Slip. CCC expects to incur additional expenses, inter alia, in connection with the Claim and the Appeal and will seek recovery from Defendants of their respective shares of such expenses pursuant to the Slip.

If the Appeal is successful and CCC has no liability to Black & Veatch under the Policy, CCC will continue to seek recovery of the Expenses under the Slip. If the Appeal is unsuccessful, CCC will be required to satisfy its share of the Judgment, and will seek to recover

from Defendants their respective shares of CCC's share of the judgment, the Expenses, interest, costs, and any additional expenses CCC incurs in addition to the Expenses. Thus, if CCC's appeal is unsuccessful, Defendants' alleged liability under the Slip will be in excess of \$13,987,956, a substantially larger sum than if the Appeal is successful and CCC has no liability to Black & Veatch under the Policy.

Based on the foregoing, the parties have agreed to jointly request that this Court issue an Order staying this action pending the outcome of the Appeal. In addition, the parties note that Defendants have commenced a separate action -- involving the Slip, the Claim, and the Policy -- against CCC in the U.K. Commercial Court, styled as *Assicurazioni Generali S.p.A. and AXA Global Risks (UK) Limited v. Continental Casualty Company* (the "U.K. Action"). The only activity to date in both the U.K. Action and this case has been the filing of papers commencing each action. Hence, each action is at an identical stage of the proceeding. The parties agree that the *status quo* in both actions should be maintained while the Appeal is pending. Thus, as they have done here, the parties are simultaneously requesting that the U.K. Commercial Court agree to stay the U.K. Action pending the outcome of the Appeal. The parties have further agreed that, should the U.K. Commercial Court deny their joint request for a stay, or grant it on grounds substantially different from those described herein, they will jointly request that this Court lift or modify whatever stay it imposes so that the two matters proceed apace.

### **ARGUMENT**

As this Court recently held, a District Court "may, in its discretion, grant a stay when it serves the interest of judicial economy and efficiency." *Buie v. Blue Cross & Blue Shield of Kansas Cit, Inc.*, 2005 U.S. Dist. LEXIS 35783, \*4 (W.D. Mo. Sep. 13, 2005). Courts consider a variety of factors in examining whether to grant or deny a motion to stay, including: (1) whether

a stay will simplify the issues and promote judicial economy; (2) the balance of harm to the parties; (3) the length of the requested stay; (4) whether discovery is complete and a trial date has been set; (5) the interests of persons not parties to the litigation; and (6) the public interest. *See, e.g., Watlow Electrical Mfrg. Co. v. Ogden Mfrg. Co.*, 2006 U.S. Dist. LEXIS 46431, \*3 (E.D. Mo. July 10, 2006); *Vutek, Inc. v. Leggett & Platt, Inc.*, 2008 WL 697512, \*1 (E.D. Mo. Mar. 6, 2008); *Turley v. U.S.*, 2002 U.S. Dist. LEXIS 16964, \*6 (W.D. Mo. Aug. 22, 2002). As we explain below, the facts underlying the present motion fully satisfy all of these factors.

First, a stay will simplify the issues and promote judicial economy inasmuch as the full amount and nature of CCC's claim against Defendants under the Slip will not be fully and finally determined until the Appeal is decided by the Missouri Court of Appeals, which is likely to occur in late 2009 or early 2010. Proceeding with this action while the Appeal is pending will undoubtedly require the parties to litigate issues regarding the Defendants' liability for their share of the underlying judgment that would become moot were the Appeal to be successful.

Indeed, if the Appeal is successful, the sum of money in dispute will be much smaller than if the Appeal is unsuccessful and, as a consequence, there will be fewer issues that would require discovery, briefing, and testimony at trial. If this action proceeds while the Appeal is pending, there would necessarily be depositions of key witnesses, including possible expert witnesses, many of whom are not under the control of any of the parties, regarding issues that could be rendered moot by the Missouri Court of Appeals. Thus, if this Court denies the requested stay, it is likely that the parties would be compelled to devote months to costly discovery in order to explore and brief issues that will be rendered moot if the Appeal is, in fact, successful.

In sum, awaiting the outcome of the Appeal would simplify and perhaps even shorten the proceedings in this litigation. *See Watlow*, 2006 U.S. Dist. LEXIS 46431, \*5 (“By granting a stay at this juncture, the parties will save the expense of litigating issues that the [Patent Trademark Office’s] experts may render moot”).

Second, the “balance of harm to the parties” factor is moot inasmuch as CCC and both Defendants join in the present request for a stay. Indeed, a stay pending the outcome of the Appeal will not adversely affect Defendants any more or less than it will affect CCC but will, in fact, benefit all parties.

Third, the parties are in agreement that the stay should remain in place only until the underlying claim against CCC is fully and finally determined and the Appeal is resolved. As stated above, the parties are hopeful that the Missouri Court of Appeals will render a decision prior to the end of this year, or early next year at the latest. While there is a chance that one of the litigants in that action could seek transfer to the Missouri Supreme Court, that court does not take many cases and the chance of that happening is slight.<sup>1</sup> In any event, the fact that the stay which the parties are seeking is limited in duration weighs heavily in favor of this Court granting the parties’ joint request.

Fourth, besides the Complaint, no pleadings or discovery have been filed in this matter. Thus, inasmuch as this action is still in its inception, this factor also weighs in favor of this Court granting the parties’ joint request. The parties anticipate that this matter would proceed with responsive pleadings by Defendants once the Appeal is decided and the stay is lifted.

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<sup>1</sup> If the Supreme Court should take the case, it would become even more important to hold this case in abeyance. However, that issue can be reviewed in the future, if and when it becomes necessary to do so.

Fifth, there are no non-parties to this litigation whose interests would be affected by a stay. Thus, this factor weighs heavily in favor of a stay.

Finally, granting the parties' joint request will serve the public interest by not wasting judicial resources. Specifically, in the event a stay is granted, this Court would not be placed in the position of having to render decisions and/or resolve discovery disputes pertaining to information and claims for relief that are still under review by the Missouri Court of Appeals. Simply holding this entire matter in abeyance pending the outcome of that Appeal will preserve the resources of both this Court and the parties to the greatest extent possible -- which is why this motion is joined by CCC and both Defendants.

This Court addressed a similar situation in *Buie*, in which the Court granted a motion to stay all proceedings filed by various defendants pending a final ruling by a Judicial Panel on Multidistrict Litigation on those same defendants' request for a transfer. Based upon the facts of that case, this Court held that "the interests of justice and efficiency would be served by a stay," inasmuch as (i) "if a stay is not entered, the defendants will be forced to simultaneously litigate the same issues that are now before [another court]"; (ii) "[t]he potential prejudice to plaintiffs is minimal, especially considering that plaintiffs' counsel will be arguing substantially the same issues" in another proceeding; and (iii) "when the jurisdictional issue[s] in question [are] easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation, having the transferee judge decide those issues promotes judicial economy." *Buie*, 2005 U.S. Dist. LEXIS 35783, \*5-6 (citation and internal quotation marks omitted).

As we explained above, all of the factors used by courts in determining whether a stay is appropriate -- including those applied by this Court in *Buie* -- are satisfied here. Here, as in *Buie*,

(i) if a stay is not entered, the parties will be “forced to simultaneously litigate issues” pertaining to a reinsurance claim that may be significantly reduced if CCC’s Appeal is successful; (ii) there is no “potential prejudice” to either CCC or the Defendants, all of whom are, in fact, joining in the present motion; and (iii) waiting for the Missouri Court of Appeals to decide the Appeal “promotes judicial economy” inasmuch as this Court will not be called upon to issue rulings on issues that may be rendered moot by the outcome of the Appeal.<sup>2</sup>

Under these circumstances, the parties respectfully request that the Court grant their joint request for a stay pending resolution of the Appeal.

### **CONCLUSION**

WHEREFORE, for all the reasons stated herein, the parties pray that his court grant their motion to stay this action until the Missouri Court of Appeals has issued a decision in WD69286.

Respectfully Submitted,

**COOLING & HERBERS, P.C.**

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<sup>2</sup> Indeed, the only noteworthy difference between *Buie* and the present case is that the plaintiff in *Buie* apparently did not join in the various defendants’ motion to stay all proceedings. Here, conversely, all parties agree that a stay pending the outcome of the Appeal is appropriate to conserve their own resources as well as the resources of the Court.

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