**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

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| **IN RE: PROPULSID PRODUCTS LIABILITY LITIGATION** | : | **MDL NO. 1355** |
| | : | **SECTION: L** |
| | : | **JUDGE FALLON** |
| | : | **MAG. JUDGE AFRICK** |
| **THIS DOCUMENT RELATES TO ALL CASES** | : | |

## TENNESSEE PLAINTIFFS' OPPOSITION TO MOTION FOR INJUNCTION

## I. PRELIMINARY STATEMENT

Johnson & Johnson and Janssen Pharmaceutica, Inc. ("Defendants") have moved to enjoin any attorney in any litigation involving Propulsid and any person "nationwide who has purchased and/or used Propulsid" from seeking a determination of class certification before this Court has ruled on class certification issues, from seeking or compelling document production by Defendants except as allowed in the Supplement to Pre-Trial Order No. 2, and from noticing or conducting a deposition of Defendants' past or present employees except as allowed in the Supplement to Pre-Trial Order No. 7. Defendants' Proposed Order, paragraphs 3 and 4.

The instant opposition is filed on behalf of plaintiffs who have actions pending against the Defendants in Tennessee state courts. See, Affidavit of William G. Colvin, attached as Exhibit A. In these cases, plaintiffs are asserting claims against physicians and pharmacists as well as the Defendants. If

Defendants' Motion for an Injunction is granted, the Tennessee plaintiffs will be enjoined from compelling production of documents relevant to the Defendants defenses of comparative fault and learned intermediary. Tennessee plaintiffs will be enjoined from deposing Defendants sales representatives to develop facts relating to the learned intermediary doctrine, and concerning communications to defendant prescribing physicians and dispensing pharmacists who have filed (or will file) Motions for Summary Judgment, on a timely basis. The Tennessee plaintiffs oppose the Defendants' motion because it violates the Anti-Injunction Act, 28 USC § 2283 and the Defendants have not made the necessary showing in equity required for the issuance of an injunction.

**CLASS ACTIONS IN TENNESSEE**

Because Defendants Motion requests relief from certification of state court class actions, and because two class actions were filed in Tennessee (Jackson v. Johnson & Johnson from Shelby County, Tennessee and Berry v. Johnson & Johnson, et. al. from Davidson County, Tennessee, we will address state law issues regarding class certification and management in Tennessee. Class actions in Tennessee are controlled Tenn.R.Civ.P. 23.01, *et seq.* The Tennessee Supreme Court has previously ruled that because Tenn.R.Civ.P. 23 is identical to Fed.R.Civ.P. 23, opinions of federal courts are persuasive authority concerning interpretation of the Rule. See, Bayberry Assoc. v. Jones, 783 S.W.2d 553, 557 (Tenn. 1990); Bowman v. Henard, 547 S.W.2d 527, 530 (Tenn. 1977).

The Advisory Commission comments to the Rules state:

> Rule 23 makes the class action available in all fields of civil litigation. The court is required to make an affirmative determination as to whether or not a class action is proper in any given set of circumstances; this determination is subject to alteration at any time prior to judgment on the merits. Criteria governing the court's determination are spelled out in detail. The Rule seeks to secure to the courts and to litigants the advantages of the class action while clothing the court with power to protect all members of the class against a miscarriage of justice.

Tennessee courts have routinely commented on the appropriateness of class certification and the trial court's continuing authority over class certifications. For example, in Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632 (Tenn. 1996), the court noted - "First, it is properly the trial court's prerogative to make the initial determination of and any subsequent modifications to class certification. The trial court retains significant authority to redefine, modify, or clarify the class." Meighan, 924 S.W.2d at 637. The Court went on to say – "More importantly, if the trial court has properly exercised its discretion in certifying the class initially, modifications to that order remain the trial court's prerogative." Meighan, 924 S.W.2d at 638.

Furthermore, the courts have noted the express language of Tenn.R.Civ.P. 23.03(1) – "First: An order on certifying a class 'may be conditional and may be altered or amended before the decision on the merits.' Tenn.R.Civ.P. 23.03(1)." Bayberry Associates v. Jones, 783 S.W.2d 553, 558 (Tenn. 1990).

Finally, Tennessee courts have long held that "...a decision to certify a class or to deny certification is within the sound discretion of the trial judge. First

American National Bank of Nashville v. Hunter, 581 S.W.2d 655 (Tenn.App.1978)." Warren v. Scott, 845 S.W.2d 780, 782 (Tenn. Ct. App. 1992).

It is apparent from the record in this action (Affidavit of J. Kimbrough Johnson, Exhibit A and Affidavit of William G. Colvin, Exhibits 2-7) that the medical monitoring class conditionally certified in Jackson v. Johnson & Johnson complied with the general procedures for class actions in Tennessee. The Plaintiffs' Motion to Certify Medical Monitoring Class Action was filed some six weeks before it was granted by the court, after three prior, brief hearings. The allegations for a medical monitoring class were in the Complaint that had been filed nearly six months before certification. The Motion had been briefed by all parties except these Defendants. The Court received over 50 affidavits in support of the Motion and heard three hours of argument before conditionally certifying the class. The Court scheduled another hearing on the class certification issue in thirty days, offered to order expedited discovery, and offered to certify an interlocutory appeal to the Tennessee Court of Appeals. The Defendants did not avail themselves of any of these procedural safeguards, choosing instead to attempt to remove the case to Federal Court. Defendants' rights were amply protected by the express language of the applicable rules and Tennessee case law, as applied by the trial court.

## THE NEED FOR DISCOVERY IN TENNESSEE

Tennessee applies a modified form of comparative fault in product liability actions where there may be multiple tortfeasors. "...[W]here the separate independent negligent acts of more than one tortfeasor combined to cause a single indivisible injury, each tortfeasor would be liable only for that proportion of the damages attributable to its fault. As to those tortfeasors, liability is not joint and several but several only, even though two or more tortfeasors are joined in the same action." Owens v. Truck Stops of America, 915 S.W.2d 420, 430 (Tenn. 1996). The calculation becomes more complicated where there are defendants who may be strictly liable for marketing a defective product (such as a drug manufacturer) and defendants who may be merely negligent (such as a prescribing physicians or dispensing pharmacy).

> When comparative fault principles are applied in a strict liability action, the plaintiff's fault is compared with the fault of the strictly liable defendants as a single unit. The fault of these defendants is measured by the injury caused by the defective or unreasonably dangerous product. When liability is found on strict liability and also negligence or other theories, the trier of fact must apportion the fault for the plaintiff's injuries or damages according to the percentage of damages caused by the plaintiff, that caused by the product, and that caused by each tortfeasor acting separately and independently.
>
> 915 S.W.2d at 433.

In every case in state court, Defendants have pled comparative fault as a defense. They have also pled that the prescribing physicians are "learned intermediaries" that would insulate the manufacturing defendant from liability.

Based on existing state law, Plaintiffs in the existing Tennessee state court actions are between the proverbial rock and a hard place if the injunction is granted. On the one hand, they must respond to motions for summary judgment filed by prescribing physicians who contend that they did not violate the standard of care without having access to either the witnesses or the documents under the control of the Defendants, who contend in every case that the physicians are learned intermediaries and may be responsible for damages under comparative fault. It is fundamentally unfair for Defendants to attempt to place Plaintiffs in this position given the factual statements concerning "inappropriate use" in Colvin Affidavit Exhibit 1. This is particularly troublesome since Defendants have yet to make a meaningful response to discovery that has been previously propounded in Tennessee, even in the absence of the injunction they now seek. If the court grants Defendants the relief sought in this motion, Plaintiffs' counsel may not have access to the written records and witnesses to adequately and appropriately depose prescribing physicians and dispensing pharmacists and will not have access to deposing the Defendants's sales representatives who may have called on such prescribing physicians and dispensing pharmacists in Tennessee in order to respond to a Motion for Summary Judgment by the prescribing physicians or dispensing pharmacists in a timely fashion.

## II. DEFENDANTS' REQUESTED INJUNCTION VIOLATES THE ANTI-INJUNCTION ACT

"Through the Anti-Injunction Act, 28 U.S.C. § 2283, the Congress imposed a general prohibition on the federal courts from interfering in state judicial

proceedings." J R Clearwater Inc. v Ashland Chemical Co., 93 F.3d 176, 178 (5th Cir. 1996). Due in no small part to the fundamental constitutional independence of the states, Congress adopted a general policy under which state proceedings "should normally be allowed to continue unimpaired by the intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the United States Supreme Court]." Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146, 108 S. Ct. 1684, 1689, 100 L. Ed. 2d 127 (1998).

The Anti-Injunction Act, 28 USC § 2283, states:

> " A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

While the Anti-Injunction Act does permit federal courts to enjoin state judicial proceedings in three limited situations, these "exceptions are narrow and are not to be enlarged by loose statute construction." Chick Kam Choo, 486 U.S. at 146. "Any doubts as to the propriety of an injunction must be resolved in favor of allowing the state court action to go forward." J R Clearwater Co., 93 F.3d at 179.

The Defendants assert that this Court has the authority to enjoin discovery and other proceedings in State court Propulsid litigation under the "in aid of jurisdiction" exception of the Anti-Injunction statute. The Tennessee plaintiffs disagree.

As this Court properly noted in FBT Bancshares, Inc. v. Mutual Fire, Marine, and Inland Insurance Company, 1995 US. Dist. LEXIS 11490 (E. D. La. October 11, 1995), copy attached, "[C]ourts have interpreted the 'in aid of jurisdiction' exception narrowly, finding a threat to the court's jurisdiction only where a state proceeding threatens to dispose of property that forms the basis for federal in rem jurisdiction or where the state proceeding threatens the continuing superintendence by a federal court, such as in a school desegregation case." citing Royal Ins. Co. of America v. Quinn-L-Capital Corp., 960 F.2d 1286, 1298 (5th Cir. 1992). It is only in these two limited situations that a federal court has authority under the "in aid of jurisdiction" exception to issue an injunction "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." Royal Ins. Co. of America v. Quinn-L-Capital Corp., 960 F.2d at 1298. Neither situation is involved in the case at bar.

Defendants have not demonstrated that the state proceedings involving Propulsid threaten "the continuing superintendence by" this Court. The fact that other cases involving Propulsid claims are pending in state court does not affect the ability of this Court to hear and determine motions which are certain to be filed, including a motion for class certification. Peters v. Brants Grocery, 990 F. Supp 1337, 1342 - 1343 (M.D. Ala. 1997) ("The court knows of no case which holds that an injunction against other litigation may issue because the Defendants will be called upon to defend their conduct in other states where they do business...The

fact other litigation may be filed will not affect the ability of this Court to hear and determine the motions to dismiss which are certain to be filed or the motion for class certification. There is, of course, the possibility that another court could certify a mandatory class. The mere existence of that possibility is not enough to justify or continue the injunction in this case.") The fact that there is a possibility that a state court may make a ruling inconsistent with a ruling made by this Court is no basis for the issuance of an injunction. The United States Court of Appeals for the Fifth Circuit has held that "[i]n no event may the "aid of jurisdiction" exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision. Texas v. United States, 837 F.2d 184, 186, fn4 (5th Cir. 1988).

Similarly, this Court does not have in rem jurisdiction in this matter. In Phillips v. Chas. Shreiner Bank, 894 F.2d 127 (5th Cir. 1990), the United States Court of Appeals for the Fifth Circuit reversed an order prohibiting parties from taking any further action in state or federal court or attempting to foreclose on properties involved in that suit, holding that it violated the Anti-Injunction Act. In rejecting the argument that the "in aid of jurisdiction" exception applied because the federal court had in rem jurisdiction, the Fifth Circuit held that:

> "An in rem action is brought against "property alone, treated as responsible for the claims asserted by the plaintiffs. The property itself...is the defendant and its forfeiture or sale is sought for the wrong..." *Freeman v. Alderson, 119 U.S. 185, 187, 7 S. Ct. 165, 166, 30 L. Ed. 372 (1886).* An in personam action, by contrast, determines a defendant's personal rights and liabilities. Phillips's complaint seeks monetary damages for wrongs

> allegedly committed by Schreiner Bank. This lawsuit is thus an ordinary in personam action, and the mere fact that debts secured by real property are at issue in the dispute does not transform it into an in rem proceeding.
>
> 894 F.2d at 132

Accordingly, the Fifth Circuit appears to follow the recognized rule that the "in aid of jurisdiction" exception does not allow a federal court to enjoin state proceedings merely because they involve issues presented in a federal in personam action. This well recognized rule was concisely stated by the United States Court of Appeals for the Third Circuit in multidistrict litigation, In Re Glenn W. Turner Enterprises Litigation, 521 F.2d 775, 780 (3rd Cir. 1975), as follows:

> "As comprehensively discussed in Jennings v. Boenning & Co., supra, 482 F. 2d at 1131-35, the existence of an action for a personal judgment does not impair or defeat the jurisdiction of the court in which an action for the same cause is pending. Both courts are free to proceed without reference to the action in the other court. Whenever a judgment is rendered in one court, it may be pleaded in the other and the effect of that judgment will be determined by the application of the principles of res judicata by the other court."

Identical considerations apply in the case at bar. The cases before the Court are in personam actions in which a defendants' personal rights and liabilities are to be determined. Plaintiffs are seeking monetary damages for wrongs allegedly committed by the Defendants. Accordingly, the "in aid of jurisdiction" exception to the Anti-Injunction Act has no application in this case. Phillips v. Chas. Schreiner Bank, supra. The relief sought by the Defendants violates the Anti-Injunction Act.

Defendants' argument that since this case involves complex litigation, it should be deemed to constitute a res and fall within the in rem jurisdiction portion of the "in aid of jurisdiction" exception to the Anti-Injunction Act has never been adopted by the United States Court of Appeals for the Fifth Circuit. See, In Re Ford Motor Co. Bronco II Products Litigation, MDL-991 (E.D. La. August 15, 1995), 1995 U.S. Dist LEXIS 12394, copy attached, holding that the Fifth Circuit "has declined to expressly adopt such a broad interpretation of the "in aid of jurisdiction" exception to the Anti-Injunction Act," citing Royal Insurance Co. of America v. Quinn-L Capital Corporation, 960 F.2d 1286, 1299 (5th Cir.1992).

Defendants' argument that an injunction should issue in this case merely because it has to respond to discovery in state cases as well as in this matter and because there is a possibility that some state court somewhere will adjudicate a certification motion before this Court does so has no support in the cases that have construed the Anti-Injunction Act. These cases recognize that "in no event may the "aid of jurisdiction" exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision." Texas v. United States, supra., 837 F.2d at 186, fn4. Moreover, these cases have held that the exceptions to the application of the Anti-Injunction Act "are narrow and are not to be enlarged by loose statutory construction." Chick Kam Choo v. Exxon Corp, supra., 486 U.S. at 146. Defendants' interpretation of the "in aid of jurisdiction" exception to the Anti-Injunction Act creates a large exception to the application of that legislation which

could allow a federal court to enjoin state court proceedings in any federal multidistrict class action litigation.

Defendants assert that they are not requesting this Court to enjoin state court trials or proceedings on the merits. The Anti-Injunction Act is not limited to the prohibition of trials on the merits in state court. It prohibits any "injunction to stay proceedings in a state court..." 28 U.S.C. § 2283. For over 65 years courts have construed the phrase "proceedings in state court" comprehensively to include "all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." Hill v. Martin, 296 U.S. 393, 403, 56 S.Ct. 278, 282, 80 L.Ed 293 (1935). It can not be denied that discovery and motions are an essential part of judicial proceedings in state court litigation. The Anti-Injunction Act precludes this Court from granting an injunction to stay discovery and the adjudication of motions in Propulsid cases pending in state court.

## III. AN INJUNCTION SHOULD NOT BE GRANTED BECAUSE DEFENDANTS HAVE AN ADEQUATE REMEDY AT LAW

Even if this Court was not precluded by the Anti-Injunction Act from issuing an injunction, Defendants have failed to make the necessary showing required for the issuance of a preliminary injunction. "To be entitled to a preliminary injunction, the [movant] must establish four criteria: (1) irreparable injury; (2) substantial likelihood of success on the merits; (3) a favorable balance of hardship and (4) no advance effect on the public interest." FBT Bancshares, Inc. v. Mutual Fire Marine and Inland Insurance Co., supra, citing Black Fire Fighters Association v. Dallas,

905 F.2d 63, 65 (5th Cir.1990). Defendants have not demonstrated that any, let alone all four, of these criteria have been met in this case.

Defendants have an adequate remedy at law. Defendants can request the relief they are seeking in their Motion for an Injunction in the various state courts where Propulsid cases are pending. The state courts are in a far better position to determine the effect of granting this relief to the Defendants in regard to the particular circumstances of the Propulsid case that is before that court. For example, in Tennessee courts the Defendants can seek a protective order limiting discovery under Rule 26.03 of the Tennessee Rules of Civil Procedure on the ground that the proposed discovery is unduly burdensome, unduly expensive or oppressive. Similarly, the Defendants can file a motion in the state court requesting the court to forebear ruling on a class certification motion until this Court resolves such a motion. The important point is that the state court, not this Court, is the proper entity to address the Defendants' requests for relief from state court proceedings. Since the Defendants have an adequate remedy at law in the state courts, they have not demonstrated they will sustain irreparable harm if their motion is denied.

The Defendants do not address the second factor, that there is a substantial likelihood of success on the merits in their Memorandum Brief.

The Defendants do address the issue of the balance of hardships at pp. 26-27 of their Memorandum Brief. However, the Defendants' argument ignores the harm that will result to the Tennessee plaintiffs if they are enjoined from taking

discovery from the Defendants in Tennessee state courts. In the Propulsid litigation pending in Tennessee state courts, the Tennessee plaintiffs have sued physicians and pharmacists, as well as Defendants. In order to establish their case against the physicians and pharmacist defendants, the Tennessee plaintiffs require specific discovery from Defendants that is relevant to the specific physician or pharmacist defendant. While this discovery may or may not be obtained in the MDL litigation, it is essential that this discovery be obtained in the Tennessee state court litigation immediately because the physician defendants and pharmacist defendants have filed motions for summary judgment in one case, and will file similar motions in the other state court cases. Such discovery is essential in order for the Tennessee plaintiffs to resist these motions. Affidavit of William G. Colvin.

The granting of the Defendants' motion will result in a severe hardship to the Tennessee plaintiffs. They will be denied their right to reasonable discovery to support their claims against physician and pharmacist defendants. The Defendants have resisted providing the Tennessee plaintiffs with this discovery. The Defendants' Motion for an Injunction is the latest step in their attempt to thwart the Tennessee plaintiffs' reasonable and necessary discovery requests. Staying discovery in Tennessee state court could result in the Tennessee plaintiffs losing legitimate claims against physicians and pharmacist defendants because the ability of the Tennessee plaintiffs to defeat motions for summary judgment will be impaired. As the Defendants have pointed out in their Memorandum Brief, their motion only seeks to stay motions for class certification and discovery against the

Defendants in state court, not adjudications on the merits. Accordingly, the Tennessee plaintiffs face the very real prospect of having claims against other viable defendants adjudicated on the merits without the opportunity to obtain timely discovery.

Compared to this significant hardship, the Defendants will suffer little, if any, hardship if their motion is denied. They will be obligated to respond to discovery requests like any other party involved in litigation. If the Defendants truly believe that the Tennessee plaintiffs' discovery requests are unduly burdensome or oppressive, they can file a motion for a protective order under Tenn. R. Civ. P. 26 in Tennessee state court. Defendants simply have not demonstrated to the Court that the balance of hardships is in Defendants' favor. It clearly is not.

In regard to the final factor, that the injunction has no adverse effect on the public interest, the Defendants do not address this factor. The issuance of the injunction requested by the Defendants is clearly adverse to the public interest. The issuance of such an injunction will violate all of the policies that led to the promulgation of the Anti-Injunction Act. The decision to stay discovery or the filing of motions should be made by the state court which will be familiar with how that decision will affect the ability of the parties to prosecute or defend their case in that court.

## CONCLUSION

This Court is urged to deny the Defendants' Motion for an Injunction. The relief requested by the Defendants violates the Anti-Injunction Act, 28 USC §

2283. Moreover, even if this Court was not precluded from issuing an injunction by the Anti-Injunction Act, Defendants have failed to establish any of the four criteria required for the issuance of an injunction.

Respectfully submitted,

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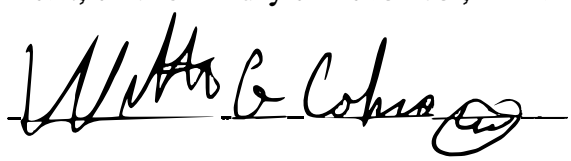
**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing Tennessee Plaintiff's Opposition to Motion for Injunction has been served on Liaison Counsel, James Irwin and Russ Herman, by U. S. Mail and e-mail or by hand delivery and e-mail and upon all parties electronically by uploading the same to Verilaw in accordance with Pre-Trial Order No. 4, on this 2nd day of November, 2001.



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Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.

**FBT BANCSHARES, INC.**
**v.**
**MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY.**

**Civ. A. No. 95-2151.**

Oct. 11, 1995.

*ORDER AND REASONS*

FALLON, District Judge.

***1** Before the Court is 1) defendant's motion to dismiss pursuant to Rule 12(b)(6); and 2) plaintiff's cross motion for summary judgment. For the reasons that follow, defendant's motion is GRANTED, and plaintiff's motion is DENIED.

I. BACKGROUND: This nine-year-old series of lawsuits began on August 19, 1986, when plaintiff FBT Bancshares Inc. filed a direct action suit against defendant Mutual Fire, Marine and Inland Insurance Company in Louisiana state court seeking recovery under a policy issued by defendant, on grounds that the policy covered losses from unauthorized loans. On September 12, 1986, the Insurance Commissioner of Pennsylvania, pursuant to Pennsylvania statute, ordered that all business of defendant be suspended. On December 8, 1986, the Commonwealth Court of Pennsylvania placed defendant in Rehabilitation, appointing the Insurance Commissioner as Rehabilitator. Plaintiff filed a proof of claim in the Pennsylvania rehabilitation on February 28, 1989.

On January 23, 1990, the Commonwealth Court upheld with modifications the Plan of Rehabilitation. *See Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 572 A.2d 798 (Pa.Commw Ct.1990). Certain of defendant's creditors appealed the decision, including Pepsi-Cola Bottling Company of North Carolina, a judgment creditor who appealed the section of the Plan providing that no interest in claims would be paid. The Pennsylvania Supreme Court affirmed, upholding the Rehabilitator's authority to deny all claims for interest, except for interest that had accrued prior to the date on which the Rehabilitation petition was filed. *Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086 (Pa.1992), *cert. denied sub nom., Allstate Ins. Co. v. Maleski*, 113 S.Ct. 1047 (1993), *Rhine Reinsurance Co., Ltd. v. Mutual Fire, Marine & Inland Ins. Co.*, 113 S.Ct. 1051 (1993) and *Republic Ins. Co. v. Maleski*, 113 S.Ct. 1066 (1993).

On June 28, 1990, the Louisiana district court, Parish of St. Tammany, granted summary judgment in favor of plaintiff and entered judgment in favor of plaintiff for $1 million, plus legal interest from date of judicial demand. The Louisiana Court of Appeals affirmed on March 3, 1992, and the Louisiana Supreme Court denied writs on September 4, 1992. Plaintiff sought to enforce the judgment in the Pennsylvania Rehabilitation proceedings. On November 10, 1993, the Pennsylvania Commonwealth Court granted summary judgment in favor of plaintiff, refusing on Full Faith and Credit grounds to confirm the Rehabilitator's lesser assessment of plaintiff's claim, and entered judgment in favor of plaintiff for the full $1 million Louisiana judgment amount, to be paid in accordance with the Rehabilitation Plan. The court, however, relying on *Foster, supra,* denied plaintiff's claim for interest on the judgment, rejecting plaintiff's Full, Faith and Credit argument.

Plaintiff applied for reconsideration of the order, arguing, *inter alia,* that the judgment improperly disallowed the interest altogether and that the judgment should be amended to require payment of interest at such time as the principal on all claims had been paid. On December 2, 1993, the Commonwealth Court denied the application for reconsideration. Plaintiff also filed a Request for Hearing, seeking a hearing in the Commonwealth Court to establish that defendant was no longer insolvent. The Commonwealth Court denied the request on November 23, 1994, rejecting plaintiff's argument that defendant was solvent. On December 13, 1994, the Pennsylvania Supreme Court affirmed the Commonwealth Court's ruling of November 10, 1993, and the Rehabilitator paid plaintiff the $1 million. Plaintiff appealed to the United States Supreme Court, but certiorari was denied on May 15, 1995. On May 31, 1995, plaintiff filed this action in Louisiana state court, Parish of St. Tammany, to "revive" the Louisiana judgment pursuant to article 2031 of the Louisiana Code of Civil Procedure. Plaintiff alleges 1) that the $1 million paid by defendant must be imputed to the payment of interest in accordance with article 1866 of the Louisiana Civil Code; and 2) that after crediting the $1 million, there

remains due and payable $1,238,167, which amount should be reduced to judgment, together with legal interest thereon. Defendant timely removed the action to this Court.

***2** II. ANALYSIS: In determining whether plaintiff has stated a claim upon which relief may be granted, the Court must "accept as true all well-pleaded allegations in the complaint" and must "construe those allegations in the light most favorable to the plaintiff." *Rubinstein v. Collins,* 20 F.3d 160, 166 (5th Cir.1994). Defendant's motion to dismiss pursuant to Rule 12(b)(6) will be granted " 'only if it appears that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp.,* 20 F.3d 1362, 1366 (5th Cir.1994) (quoting *American Waste & Pollution Control Co. v. Browning- Ferris, Inc.,* 949 F.2d 1384, 1386 (5th Cir.1991)). However, "when a successful affirmative defense appears on the face of the pleadings, dismissal under Rule 12(b)(6) may be appropriate." *Id.*

Defendant argues plaintiff's action to "revive" the Louisiana judgment is the subject of a final judgment of the Commonwealth Court and thus, is barred by the doctrine of res judicata. The Court agrees.

"Public policy and the interest of litigants alike require that there be an end to litigation, and the peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject-matter shall not be retried between the same parties in any subsequent suit in any court." *State Hosp. for Criminal Insane v. Con. Water Supply Co.,* 110 A. 281 (Pa.1920).

If the courts of Pennsylvania would find plaintiff's claims precluded by a prior judgment, then the claims are precluded in this Court. *Lewis v. East Feliciana Parish Sch. Bd.,* 820 F.2d 143, 146 (5th Cir.1987). Under Pennsylvania law, an action is precluded by decisions in a previous action if the two actions share the following elements: 1) identity of the thing sued on; 2) identity of the cause of action; 3) identity of the parties to the action; and 4) identity of the quality of capacity of the parties. *Duquesne Slag Products Co. v. Lench,* 415 A.2d 53, 55 (Pa.1980). If " ' "the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights, ... then the matter ought not to be litigated again, nor should the parties, by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule." ' " *Downing v. Halle Bros. Co.,* 150 A.2d 719, 723 (Pa.1959) (quoting *In re Wallace's Estate,* 174 A. 397, 399 (Pa.1934) (quoting *Hochman v. Mortgage Finance Corp.,* 137 A. 252, 253 (1927).

Despite the order of the Commonwealth Court directing that the $1 million judgment be paid "without interest thereon" and despite plaintiff's appealing to the Pennsylvania Supreme Court and the United States Supreme Court arguing that it was owed interest on its judgment, plaintiff now asks this Court to enter judgment "reviving" the Louisiana judgment, changing the amount to $1,238,167 on grounds that the principal amount of the judgment was not paid because plaintiff did not consent to the imputation of the $1 million to principal as required by Civil Code article 1866. Plaintiff's "revival" action is a transparent attempt to circumvent the preclusive effects of the Pennsylvania courts' decisions. It cannot succeed. [FN1] By order of the Commonwealth Court, the $1 million payment was imputed to the principal amount of the judgment. The parties are identical, as are the capacity of the parties and the thing sued on. The issues, although nominally dissimilar, are identical in both substance and effect. Accordingly, plaintiff is precluded from relitigating the issue in this Court.

For the foregoing reasons, IT IS ORDERED that defendant's motion to dismiss is GRANTED, and plaintiff's cross motion for summary judgment is DENIED. Plaintiff's claims against defendant ARE HEREBY DISMISSED.

FN1 Nor is this Court precluded from disposing of plaintiff's claim by plaintiff's failure to make mention in its complaint of the Pennsylvania courts' adjudication of the issues here or even of the Rehabilitation of defendant. While the Court is required to accept all well-pleaded facts as true, the Court is not constrained to ignore the public record. *Cinel v. Connick,* 15 F.3d 1338, 1343 n 6 (5th Cir.1994).

END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.

**In re FORD MOTOR CO. BRONCO II PRODUCTS LITIGATION.**

**MDL-991.**

Aug. 15, 1995.

*MEMORANDUM AND ORDER*

SEAR, Chief Judge.

*Background*

***1** Between June 23 and September 14, 1993, eight consumer class actions were filed asserting claims that 1983-1990 model year Ford Bronco II vehicles have design defects. One of these actions, *Puckett v. Ford Motor Co.*, was filed on August 6, 1993 in the U.S. District Court for the Northern District of Alabama but was voluntarily dismissed on August 24, 1993. Two days later, plaintiffs filed *Rice v. Ford Motor Co.* in the Circuit Court of Greene County, Alabama. The *Rice* case was removed by defendant Ford Motor Co. ("Ford") to the Northern District of Alabama but was remanded on October 7, 1993 to the Alabama court. Another action initiated on September 14, 1993 in Texas state court, *Jordan v. Ford Motor Co.*, was removed to federal court by Ford but subsequently remanded to state court.

Two other actions were also originally filed in state court, *Bates v. Ford Motor Co.* in Louisiana state court and *Luis v. Ford Motor Co.* in Florida state court. These actions were subsequently removed to the Middle District of Louisiana and the Southern District of Florida, respectively. The three remaining actions were initiated in federal court, *Lewis v. Ford Motor Co.* in the Southern District of Mississippi, *Armistead v. Ford Motor Co.* in the Western District of North Carolina, and *Vitrano v. Ford Motor Co.* in the Eastern District of Louisiana. On February 9, 1994, the Judicial Panel on Multidistrict Litigation consolidated and transferred the five pending federal actions to this court for pretrial proceedings pursuant to 28 U.S.C § 1407

On August 1, 1994, class counsel and Ford submitted a proposed settlement of this multidistrict litigation for preliminary approval. An order was issued on August 3, 1994 granting preliminary approval of the settlement, tentative certification of a nationwide class for settlement purposes only pursuant to Fed.R.Civ.P. 23 (b)(3), and authority to disseminate notice of the proposed settlement to the class. A fairness hearing was scheduled for November 8, 1994. Class counsel and Ford also submitted a parallel proposed settlement in the *Rice* case for consideration by the state court in Alabama. The Alabama Court in *Rice* had previously certified a class of Alabama Bronco II owners under Ala.R.Civ.P. 23 (b)(1) (the state's equivalent to Fed.R.Civ.P. 23 (b)(1)), such that putative class members would not receive notice of the settlement nor be afforded an opportunity to opt-out. [FN1] A fairness hearing on the proposed state court settlement was scheduled in the Circuit Court of Greene County, Alabama for November 16, 1994.

On October 17, 1994, certain objecting class members moved for a preliminary injunction of the *Rice* case on the grounds that this court and the Alabama court might issue conflicting orders with respect to the proposed settlement. [FN2] The motion for a preliminary injunction was denied on November 3, 1994 because the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits a federal court from enjoining state proceedings, "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Because no Act of Congress expressly authorizes an injunction in this situation and because no judgment has been rendered in this litigation, the only authority for enjoining the parallel state court proceedings lies in the "necessary in aid of jurisdiction" exception. The "aid of jurisdiction" exception cannot be invoked, however, "merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision." [FN3]

***2** A fairness hearing on the proposed settlement of this multidistrict litigation was held on November 8, 1994. The parties stated at the fairness hearing that the Alabama court had agreed to defer consideration of the proposed settlement until this court had an opportunity to evaluate and rule on the settlement. The proposed settlement was disapproved by order entered March 21, 1995. On March 28, 1995, plaintiffs' counsel in the *Rice* case informed the Alabama court of the court's rejection of the proposed settlement. Plaintiffs' counsel stated that "[i]n light of the ruling by [this court], I have no intention of asking your court to approve the proposed settlement; therefore, I request this case be put on the next trial

docket. I ask for an immediate hearing on all pending motions." [FN4]

Ford now moves this court for an order enjoining the state court proceedings in *Rice* or coordinating all pretrial proceedings in *Rice* with the pretrial proceedings in this multidistrict litigation. Ford submits that an injunction of the state court proceedings is appropriate under the All Writs Act, 28 U.S.C. § 1651 (a), and the Anti Injunction Act because plaintiffs' counsel are attempting to strip this court of its jurisdiction over the nationwide class claims by litigating the same claims before the Alabama court. In addition, Ford contends that an injunction is appropriate because the inherent complexity of this multidistrict litigation creates the equivalent of a res that requires protection by this court. Finally, Ford argues that coordination of the *Rice* case with this multidistrict litigation would minimize duplication of effort and avoid unnecessary delay and expense.

*Analysis*

A federal court may enjoin a pending state court action only "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." [FN5]

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of [the Anti-Injunction Act] itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. [FN6]

The fact that a state court may have concurrent jurisdiction with a federal court over the same claims does not give a federal court the power to prohibit a "party from simultaneously pursuing claims in both courts." [FN7]

Indeed, *in personam* actions in federal and state court should generally be allowed to proceed concurrently, without interference from either court. [FN8] "Whenever a judgment is rendered in one court it may be pleaded in the other and the effect of that judgment will be determined by the application of the principles of res judicata." [FN9] An exception to this general rule arises once judgment, or its virtual equivalent in the form of the approval of a partial or global settlement in a multidistrict class action, is entered. [FN10] An exception may also reasonably be made if the prospect of settlement of complex litigation is imminent. [FN11] The state proceedings enjoined must present a direct and immediate threat to the federal court's ability to manage and effectuate an imminent or final compromise of the claims before the court.

***3** Some courts have held that the general rule of non-interference should also not apply when federal courts have jurisdiction over lengthy, complex litigation. These courts reason that extremely complex litigation is the equivalent of a res because a parallel state court action will necessarily impair the federal court's ability to control and decide the action. [FN12] The Fifth Circuit, however, has declined to expressly adopt such a broad interpretation of the "in aid of jurisdiction" exception to the Anti-Injunction Act. [FN13] The fact that a federal court may lose its ability to decide a case or have its prior orders nullified by contrary state court orders is in itself no grounds for an injunction. [FN14] Further, the threat that a state court might reach a competing judgment first is simply "not sufficient to invoke the 'in aid of jurisdiction' exception." [FN15]

An injunction of the *Rice* case is not necessary to aid this court's jurisdiction and is therefore inappropriate under the Anti-Injunction Act. First, the Alabama court has to date only certified a class of Alabama Bronco II owners. Any decision rendered by the Alabama court will therefore be binding only upon those Bronco II owners residing in Alabama and will in no way affect the claims of the other members of the putative nationwide class pending before this court. Similarly, any judgment rendered by this court with respect to the nationwide class claims will not apply to those Bronco II owners residing in Alabama as the prior judgment of the Alabama court will be res judicata to the Alabama owners' claims. [FN16] Further, even if the Alabama court can exercise jurisdiction over the nationwide class claims, the fact that the Alabama court may reach a judgment on those claims before this court does so is insufficient grounds for issuing an injunction. There is simply no judgment, settlement, or imminent settlement that this court needs to protect from interference by the Alabama court.

Although I agree that coordination of this multidistrict litigation and the *Rice* case would

alleviate duplication of effort and reduce costs and I would encourage the Alabama court to coordinate its pretrial proceedings with the pretrial proceedings before this court, I decline to interfere with the Alabama court's management and direction of the claims pending before it. Plaintiffs are therefore free to pursue their claims in the forum of their choosing until a judgment, or its essential equivalent, is reached in this court.

Accordingly,

IT IS ORDERED that Ford's motion to enjoin, or alternatively, to coordinate the state court proceedings in *Rice v. Motor Co.* is DENIED.

FN1 The named plaintiffs in the *Rice* case brought the action individually and in their representative capacity of all other Bronco II owners in Alabama and the United States. Plaintiffs moved for certification of both a state-wide and nationwide class of Bronco II owners. The Alabama court only certified a state-wide class, although the court specifically stated that plaintiffs' motion for certification of a nationwide class was in no way prejudiced by the court's order. *See* Order Certifying Class in *Rice v. Ford Motor Co.* dated November 15, 1993, attached as Exhibit C to Ford's Memorandum in Support of Motion to Enjoin or, Alternatively, Coordinate State Court Proceedings in *Rice v. Ford Motor Co.* ("Ford's Memorandum").

FN2. Ford opposed the motion, arguing that relevant case law does not support enjoining state proceedings related to "pending, unresolved federal proceedings." *See* Memorandum of Defendant Ford Motor Co. in Opposition to Motion to Enjoin State Court Proceeding at 3, n.7.

FN3. *Texas v. United States,* 837 F.2d 184, 186 n.4 (5th Cir 1988); *see also Carter v. Ogden Corporation* 524 F.2d 74, 76 (5th Cir. 1975)

FN4. *See* Letter to Judge Hardaway, Circuit Court Judge for the Circuit Court of Greene County, Alabama, from J. L. Chestnut, Jr. dated March 28, 1995 attached as Exhibit B to Ford's Memorandum.

FN5. *Atlantic Coastline R.R. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295 (1970).

FN6. *Id.* at 297; *see also In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332, 1334 (5th Cir. 1981).

FN7. *Atlantic,* 398 U.S. at 295.

FN8. *In re Glenn W. Turner Enterprises Litigation* , 521 F.2d 775, 780 (3rd Cir. 1975).

FN9. *Id.*

FN10. *In re Corrugated Container,* 659 F 2d at 1335; *In re Baldwin-United Corporation,* 770 F 2d 328, 336-37 (2nd Cir. 1985).

FN11. *Carlough v. Amchem Products, Inc.,* 10 F 3d 189, 202-03 (3rd Cir. 1993).

FN12. *See, e.g., Battle v. Liberty National Life Insurance Co.,* 877 F.2d 877, 882 (11th Cir. 1989)

FN13 *Royal Insurance Co. of America v. Quinn-L Capital Corporation,* 960 F.2d 1286, 1299 (5th Cir 1992).

FN14. *Id.* at 1298

FN15. *Id.* at 1299.

FN16. *See, e.g., In re Glenn W Turner,* 521 F 2d at 781.

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