STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:	)	
Local Government Center, Inc., *et al*	)	Case No: C-2011000036

RESPONDENTS' MOTION TO STAY FINAL ORDER

Respondents Local Government Center, Inc. and affiliated entities (collectively "LGC") hereby move pursuant to RSA 421-B:26-a, XXVIII to stay the Hearing Officer's Final Order of August 16, 2012 (the "Order").

I. Introduction.

This is a case of firsts. The Bureau of Securities Regulation (the "Bureau") only gained authority to investigate and bring administrative actions to enforce RSA 5-B in 2010. The Bureau's Staff Petition, and its Amended Petition, were the first ever such petitions brought against any of New Hampshire's RSA 5-B entities. The hearing in this case was the first of its kind. Consequently, this case has raised issues that must be considered for the first time, including questions regarding the interpretation of RSA 5-B, the due process rights of LGC, and the New Hampshire and Federal constitutional limitations on the hearing process and the Order itself.

These novel questions are very much in dispute. LGC has filed a Motion for Reconsideration of the Order addressing them. The questions are critical to LGC, and therefore, LGC will pursue the questions on appeal to the New Hampshire Supreme Court, if necessary.

Until the appellate process is properly completed, the requirements of RSA 5-B, and the authority of the Bureau and the Hearing Officer under RSA 421-B:26-a, cannot be finally determined. The Order should be stayed so as to avoid imposing irreparable harm, hardship, and inequity upon LGC.

Because of the pending Motion for Reconsideration; the novel issues of law—constitutional and otherwise—raised by this enforcement action, hearing, and resulting Order; the imminent appellate process; and the irreparable harm which Respondents would suffer if the Order were enforced prematurely; Respondents move pursuant to RSA 421-B:26-a, XXVIII to stay the Order in its entirety.

II. LGC's Motion for Reconsideration presents significant novel and constitutional issues regarding an untested statutory scheme and process.

The Hearing Officer issued the Order on August 16, 2012. The Order discussed Respondents' alleged violations of RSA 5-B and RSA 421-B as identified in the Bureau's amended petition of February 17, 2012 (the "Amended Petition"). The Order contains twenty-one distinct commands, including, but not limited to: (1) directing Respondents to reorganize its two pooled risk management programs within 90 days of the date of the order or lose its RSA 5-B exemption from state insurance laws and state taxation; (2) compelling LGC to confer with the Bureau within 30 days from the date of the order to develop a plan for the return of $33,200,000.00 to the members of HealthTrust risk pool management program; (3) compelling LGC to confer with the Bureau within 30 days from the date of the order to develop a plan for the return of $3,100,000.00 to the members of Property-Liability Trust risk pool management program; (4) requiring LGC HealthTrust to immediately purchase reinsurance; (5) imposing a ceiling on reserves held by HealthTrust at the lower of fifteen percent (15%) of claims or an RBC of 3.0; (4) directing the reorganization and distribution of the assets of Local Government

Center Real Estate Inc. ("LGC Real Estate") within 90 days of the date of the order; and (5) making the Secretary of State's September 2, 2011 Cease and Desist Order permanent.

In response, LGC argues in its Motion for Reconsideration that the Hearing Officer should reconsider: (1) his decision not to withdraw from this case because of the improper pecuniary incentives created by his financial arrangement with the Secretary; (2) his disregard for the violation of LGC's right to fair notice and due process caused by the Bureau's failure to publish their novel interpretations of the requirements of RSA 5-B prior to the Staff Petition charging LGC with statutory violations; (3) his determination that LGC's reserve-setting methods or reserve levels violated RSA 5-B; (4) his disregard of the exercise by LGC's Board of Directors of its sound business judgment in setting reserves and operating the risk pools; (5) his determination that LGC's corporate structure or conduct violated RSA 5-B; (6) his violation of the New Hampshire Constitution's rule against retrospective legislation, caused by the portion of the Order purporting to undo transfers between LGC entities executed before the Secretary obtained regulatory authority in June 2010; and (7) other specific rulings and findings the Hearing Officer made that constitute errors of law, errors of reasoning, or erroneous conclusions.

The breadth and scope of these issues, in interpreting RSA 5-B, is unprecedented.

III. The Hearing Officer has broad power to stay his own order or decision.

RSA 421-B:26-a permits the Hearing Officer to stay any order or decision, provided the motion to stay is premised upon a motion for reconsideration. RSA 421-B:26-a, XXVIII. Furthermore, the Supreme Court has stated that "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Hewlett-Packard Co., Inc. v. Berg*, 61 F.3d 101, 105 (1st Cir. 1995); *see generally*, Gordon J. MacDonald, Wiebusch on New Hampshire

Civil Practice and Procedure § 57.17 (Matthew Bender & Co.) ("the trial court may enter an order staying enforcement of its order or execution in order to allow the parties to present further motions or arguments, to permit appellate review on an extraordinary writ, or to permit the conclusion of another related proceeding.").

IV. The instant case is a novel prosecution which tests the meaning and constitutionality of RSA 5-B.

RSA 5-B was amended only in 2010 to provide the Secretary of State, for the first time, with authority to investigate violations of 5-B and to bring administrative actions to enforce the chapter. The instant case is the first petition filed by the Bureau against any of New Hampshire's pooled risk management programs. The resulting hearing was an entirely new adjudicative process. In fact, the entire process has been an exercise in trail blazing both substantive and procedural ground.

As befits such a previously unused and unchallenged process, there have been many questions raised prior to, during, and after the hearing regarding the specific requirements of RSA 5-B and the procedural requirements and limitations of RSA 421-B:26-a. As LGC argues in its Motion for Reconsideration, the Bureau's investigation and prosecution of this case violated LGC's rights to fair notice and due process; the hearing was procedurally improper because the Hearing Officer ought to have withdrawn; and, additionally, the Order's interpretation of RSA 5-B impermissibly extends beyond the clear language of the statute. Without a stay, enforcement of the Order would proceed without final resolution of the questions raised in the course of this novel and inaugural process, and without resolving legal questions fundamental to the Order itself. This imposes potentially irreparable harm on LGC, and should be avoided. For these reasons, the Order should be stayed pending the completion of the appellate process.

V. The Hearing Officer should issue a stay in the face of novel questions of law, to preserve the status-quo until the completion of appellate review.

The New Hampshire Supreme Court has recognized that stays may be imposed where novel questions regarding an untested statute are raised, and the consequences of the challenged order are significant. *See State v. Campbell*, 110 N.H. 238, 242 (1970). Furthermore, LGC is entitled by statute to have its case independently reviewed by an appellate tribunal. RSA 541:6. The right to "[m]eaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable." *Providence Journal Co. v. FBI*, 595 F.2d 889, 889 (1st Cir. 1979) (imposing a stay to preserve the status-quo for the reviewing court). In the instant case, imposition of the Order would destroy the status quo, and LGC's right to an appeal would become meaningless unless a stay is imposed, pending determination of the appeal. *See Id.*

Until the questions raised by LGC regarding the hearing process and the requirements of RSA 5-B have been finally answered, the Order should be stayed. If the Order is enforced, the decisions of the Hearing Officer will become irrevocable, and LGC's right to appellate review would be meaningless.

VI. If LGC succeeds on its Motion for Reconsideration or on appeal, then the extensive requirements of the order will be reversed.

If the Order is immediately enforced, LGC will suffer a clear case of irreparable harm and inequity, thereby rendering LGC's pursuit of its arguments for reconsideration or on appeal a meaningless gesture. Enforcement of the order would subject LGC and its risk pools to enormous disruption and expense caused by requiring LGC to completely restructure its operations and its finances, including the payment of more than $50 million. Specifically, among other commands, the Order requires: that LGC engage in a near-total corporate

restructuring of its risk pool programs; that it return over $33 million to its members through a process to be approved by BSR; that it revamp its business model by immediately purchasing reinsurance; that it reorganize and distribute the assets of Local Government Center Real Estate; and that it adopt a new reserve calculation method. If LGC is later successful in its challenges to the Order, then it will have already unnecessarily restructured its entire governing structure and operations at considerable expense; and divested itself of more than $33 million of LGC HealthTrust assets that should have appropriately been retained as reserves to protect its members from future uncertainty and unexpected losses.

VII. The balance of competing interests weighs strongly in favor of a stay.

A court considering a motion to stay must weigh "competing interests and maintain an even balance;" accordingly, the party requesting the stay must "make out a clear case of hardship or inequity." *Landis v. North American Co,* 299 U.S. at 255. In these circumstances, LGC has demonstrated an overwhelming case of hardship if the Order is implemented before meaningful appellate review. The First Circuit has held that where "the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay." *Providence Journal Co. v. FBI*, 595 F.2d at 889.

In the instant case, granting the stay will preserve LGC's rights to meaningful review of the serious legal questions at issue and will cause no harm to either the Bureau or the public. Granting the stay will only postpone the imposition of the Order by whatever period of time is necessary to hear and decide the appeal. "Weighing this latter hardship against the total and immediate divestiture of [LGC's] rights to have effective review in [court], [tilts] the balance of hardship to favor the issuance of a stay." *Id.*

VIII. Conclusion.

The Order imposes burdensome requirements on LGC to the extent that LGC must dramatically alter the manner in which it does business if the Order becomes final. Upon the completion of the reconsideration and appellate process, the standing questions regarding RSA 5-B and 421-B:26-a will be resolved. If the questions are answered consistent with the Order, LGC will promptly comply with its terms. But before that point, when the requirements of the Order could still be overturned, modified, or reversed, denying a stay and forcing LGC to acquiesce to the requirements of the Order poses a great risk of irreparable harm to LGC, to its constitutional rights, and to the members whose interests LGC represents. For that reason the Order should be stayed until completion of the reconsideration and appellate process.

Counsel for the Bureau was contacted. The Bureau opposes the request for a stay.

WHEREFORE, LGC respectfully requests that the Hearing Officer:

A. Stay his Final Order of August 16, 2012 until the appellate process in this case is completed; and

B. Grant any other such relief as may be necessary and proper.

Respectfully submitted,
LOCAL GOVERNMENT CENTER, INC., *et al*

By Their Attorneys:

Dated: September 14, 2012

By: /s/ William C. Saturley

William C. Saturley (NH Bar #2256)
Brian M. Quirk (NH Bar #12526)
PRETI FLAHERTY, PLLP
PO Box 1318
Concord, NH 03302-1318
Tel: 603-410-1500
Fax: 603-410-1501
wsaturley@preti.com

_/s/ David I. Frydman_____
David I. Frydman (NH Bar # 9314)
LOCAL GOVERNMENT CENTER, INC.
25 Triangle Park Drive
Concord, NH 03301
Tel: (603) 224-7447
Fax: (603) 224-5406
dfrydman@nhlgc.org

_/s/ Michael D. Ramsdell_____
Michael D. Ramsdell (NH Bar #2096)
RAMSDELL LAW FIRM, P.L.L.C.
69 Bay Street
Manchester, NH 03104
Tel: (603) 606-1766
Fax: (603) 669-6574
mramsdell@ramsdelllawfirm.com

CERTIFICATE OF SERVICE

I certify that on the 14th day of September, 2012, I filed two printed copies with the Office of the Secretary of State, and forwarded copies of this pleading *via* e-mail to all counsel of record.

_____/s/ William C. Saturley_____

HEWLETT-PACKARD COMPANY, INC., Plaintiff, Appellant, v. HELGE BERG, ETC., ET AL. Defendants, Appellees.

No. 94-2251

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

61 F.3d 101*; *1995 U.S. App. LEXIS 20524

August 3, 1995, Decided

PRIOR HISTORY: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Joseph L. Tauro, U.S. District Judge.

COUNSEL: Richard Allan Horning with whom Horning, Janin & Harvey, Kevin P. Light, Choate, Hall & Stewart and Robert W. Sutis were on brief for appellant.

David A. Burman for appellees.

JUDGES: Before Boudin, Circuit Judge, Bownes, Senior Circuit Judge, and Stahl, Circuit Judge.

OPINION BY: BOUDIN

OPINION

[*102] BOUDIN, *Circuit Judge*. Hewlett-Packard appeals from an order of the district court confirming an arbitration award rendered in a business dispute with appellees Helge Berg and Lars Skoog and rejecting Hewlett-Packard's requests for a stay of the confirmation proceeding or a declaration that it is entitled to a set-off for the award. The case presents several difficult legal issues which can be understood only after a brief description of the facts and prior proceedings.

I. BACKGROUND In March 1982, Apollo Computer, now owned by Hewlett-Packard, entered into a two-year distributorship contract with a **[*103]** Swedish company called Dicoscan Distributed Computer Scandinavia to sell Hewlett-Packard products in several Nordic countries. The 1982 contract **[**2]** included an agreement to submit any dispute under the contract to binding arbitration. In March 1984, the parties executed a new distributorship contract, which also contained an arbitration clause.

In the meantime, during 1983 and 1984, Dicoscan experienced financial problems. In mid-1984, Apollo claimed that Dicoscan was far behind in its payments. In September, Apollo terminated the 1984 agreement. The following month, Dicoscan filed for bankruptcy. The bankruptcy court assigned to Berg and Skoog, directors and officers of Dicoscan, the right to bring claims against Apollo based on the contracts.

Berg and Skoog filed a request for arbitration with the International Chamber of Commerce Court of Arbitration, claiming millions of dollars of damages arising out of Apollo's unilateral termination of the 1984 agreement. Apollo counterclaimed in the arbitration by asserting that the Swedish company had failed to pay about $ 10,000 due on the 1984 contract and about $ 207,000 due under the 1982 contract. After a dispute about Berg and Skoog's right to invoke arbitration, *see Apollo Computer, Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989)*, an arbitration proceeding was begun.

[3]** The arbitrators were required by the parties'

contracts to apply Massachusetts law. Ultimately, the arbitrators awarded around $ 700,000 plus interest to Berg and Skoog, but allowed a set-off for the $ 10,000 that Dicoscan still owed Apollo under the 1984 contract. To both parties' surprise, the tribunal held that it was without jurisdiction to decide Apollo's more substantial claim based on the 1982 contract, ruling that the 1982 contract was not within the Terms of Reference issued by the arbitrators at the beginning of the proceeding.

As a result, Apollo was left with a sizable obligation to Berg and Skoog on the 1984 contract without a determination of its claim for more than $ 207,000 on the 1982 contract. Apollo unilaterally decided to pay the arbitration award amount but subtracted the $ 207,000 plus interest (together, about $ 300,000) as a "setoff in recoupment," which, it said, is a time-honored common law doctrine embraced in Massachusetts courts. Apollo also filed a request with the tribunal for a second arbitration regarding the 1982 contract. That tribunal has indicated that it will hear the arbitration.

In January 1993, Apollo (later succeeded as the plaintiff by **[**4]** Hewlett-Packard) filed the complaint in this action with the Massachusetts district court. Hewlett-Packard requested that the district court (1) declare that Hewlett-Packard was entitled to the $ 207,000 set-off and that the arbitration award is fully satisfied, and (2) vacate the tribunal's award and correct it. Hewlett-Packard later withdrew its second claim for relief.

Berg and Skoog moved to dismiss the complaint, arguing that such declaratory relief is unavailable as to foreign arbitration awards. Later, Berg and Skoog moved for confirmation of the arbitration award. Hewlett-Packard opposed confirmation of the award on the ground that, by failing to include its 1982 set-off, the award was contrary to public policy. In the alternative, Hewlett-Packard moved to stay confirmation, pending the outcome of the second arbitration. Hewlett-Packard also asked the court to compel arbitration as to its 1982 claim.

On November 7, 1994, the district judge filed a memorandum, together with a separate order, disposing of all of these motions. The court's order compelled arbitration under the 1982 contract but it confirmed the award previously made by the tribunal on the 1984 contract. The **[**5]** court said that it was without power to stay the confirmation proceeding, as Hewlett-Packard had requested, and that the request for a set-off was an improper attempt to modify the tribunal's award.

Apparently ready to enforce the now-confirmed arbitration award, Berg and Skoog moved the court for entry of final judgment, and proffered a detailed judgment specifying the award, interest and attorney's fees. Four days later, Hewlett-Packard filed its notice of appeal and thereafter filed a response **[*104]** disputing certain aspects of the proposed judgment. The district court has not acted on the motion for entry of final judgment; and no such judgment has been entered.

II. DISCUSSION

Hewlett-Packard purports to appeal all three of the district court's adverse actions: the confirmation of the arbitration award, the refusal to stay that confirmation proceeding pending the outcome of the second arbitration; and the rejection of Hewlett-Packard's set-off claim declaration. Commendably, Hewlett-Packard has alerted us to a possible jurisdiction problem, which this court is obliged to consider. We do so but caution future panels that the jurisdictional problems have not been briefed **[**6]** in this case.

Nothing in the record in this case purports to be a "final judgment," set forth in a separate document as required by *Fed. R. Civ. P. 58*, disposing of all claims. Thus, in formal terms there is no basis for appeal of a "final decision" under *28 U.S.C. § 1291*, even if the court actually resolved all of the claims before it. Indeed, as already noted, the defendants have pending a motion that requests entry of a "final judgment."

Nevertheless, the November 7 order, insofar as it confirms the arbitration award, is appealable now because Congress directed in the statute governing arbitration-related appeals that such an "order" confirming an award should be immediately appealable. *9 U.S.C. § 16(a)(1)(D)*. The reason is a pro-arbitration policy designed to expedite confirmation of arbitration awards. This is clear from precedent and scholarly commentary. *See, e.g.*, 15B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3914.17, at 9-12, 32-34 (2d ed. 1992).

There is one technical hitch. Seemingly, the order confirming the award is not itself a judgment that can be collected through court processes until it is entered on the docket as a judgment. **[**7]** *See 9 U.S.C. § 13*. This has nothing to do with the final judgment rule; rather, the

statute that governs confirmations provides that after a confirmation is ordered, a separate "entry of judgment" must be made pursuant to that order, and it is only at that stage that "the judgment so entered . . . may be enforced as if it had been rendered in an action in the court in which it is entered." *Id.*

Nevertheless, the Federal Rules of Civil Procedure do not say that appeals can only be taken from judgments; on the contrary, they contemplate that, subject to the complex rules that determine what is immediately appealable, there may be such a thing as an "appealable order" that is not a judgment. *Fed. R. Civ. P. 79(b)*. And, as already noted, Congress has designated as immediately appealable "an order . . . confirming . . . an [arbitration] award." *9 U.S.C. § 16(a)(1)(D)*.

Our position is not at odds with Middleby Corp. v. *Hussman Corp., 962 F.2d 614 (7th Cir. 1992)*. *Middleby* held that no immediate appeal could be taken where the district court issued an order of confirmation but declined to enter judgment after making a specific determination to delay giving effect **[**8]** to the confirmation order until further proceedings were concluded. Here, by contrast, the district court denied the requested stay, and the confirmation order is immediately effective, requiring only the filing of specified papers with the clerk to permit "the entry of judgment thereon." *9 U.S.C. § 13*.

Because the confirmation order is appealable, we think that there is also before us Hewlett-Packard's claim that the confirmation proceeding should have been stayed. The reason is simply that the underlying argument for a stay is also an objection to the confirmation order itself. To this extent, it is effectively an interlocutory ruling made in the process of approving the confirmation request and like any other such interlocutory ruling it is reviewable at the time that the confirmation order itself is brought up on appeal. *Cf. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375, 94 L. Ed. 2d 389, 107 S. Ct. 1177 (1987)*; 15A Wright, Miller & Cooper, *supra*, § 3905.1, at 249-63.

A similar argument might also be made to justify an appeal now based on the district court's refusal to declare Hewlett-Packard's right to the set-off it asserted. **[*105]** The problem is complicated, but we see no need to **[**9]** resolve the complexities. Whether or not the refusal to allow the set-off is an appealable issue, the refusal at this time turns out not to be a legal error, so the jurisdictional issue need not be decided. *See Norton v. Mathews, 427 U.S. 524, 530-32, 49 L. Ed. 2d 672, 96 S. Ct. 2771 (1976)*; *In re Pioneer Ford Sales, 729 F.2d 27, 31 (1st Cir. 1984)*.

We turn now to the merits. Hewlett-Packard does not object to the confirmation of the award in all respects; it says it has paid the award except the disputed amount including interest. But Hewlett-Packard says that the district court erred by confirming the award in full instead of either allowing a set-off or granting a stay of the confirmation pending the results of the new arbitration.

We agree with the district court's rejection at this time of the first alternative. Whether Hewlett-Packard has a valid claim under the 1982 contract is subject to arbitration; we agree with the district court--and Hewlett-Packard--that the tribunal has never resolved the merits of that claim. Whatever the Massachusetts law on set-offs, the district court could not allow the set-off at present without determining that Hewlett-Packard had a valid claim, which is the **[**10]** very subject of the arbitration.

It is hard to imagine a step that would be more offensive to the pro-arbitration policies reflected in Congress' endorsement of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, often called the New York Convention. The New York Convention was approved by Congress, and implementing legislation was codified at *9 U.S.C. §§ 201-08*. The statute enlists the aid of federal courts to compel arbitration. *9 U.S.C. § 206*. By contrast, the judicial set-off requested here would circumvent the 1982 contract to arbitrate and the now-pending arbitration under that contract.

The request to defer confirmation of the award under the 1984 contract stands on a different footing. However the case might stand absent the bankruptcy, Dicoscan's bankruptcy gives Hewlett-Packard a very substantial prudential argument. If the existing award were confirmed in full and reduced to judgment, Hewlett-Packard would have to pay the full award to the defendants as successors-in-interest of an insolvent company. If in due course Hewlett-Packard then prevailed on its claims against the insolvent company on a closely related transaction, it would have **[**11]** no assurance of collecting anything.

Further, Hewlett-Packard cannot be blamed for the

discrepant timing in the resolution of its claim, or at least no argument to that effect has been made. After it was told that the defendants did have arbitration rights despite an anti-assignment clause in the contracts, Hewlett-Packard apparently made a reasonable effort to have both the defendants' claim and its own counterclaim resolved in one proceeding at the same time. Only the arbitrators' surprising interpretation of their mandate frustrated this attempt.

Under these circumstances, the seemingly fair solution would be to confirm the award in its uncontested part, reserving confirmation of the balance until the 1982 contract dispute is arbitrated. The district court refused to consider a stay of confirmation on the ground that it was without power to do so. We fully understand the basis for the district court's doubt about its authority, but we conclude that it does have the power to issue a stay in the peculiar circumstances of this case.

Ordinarily there could be no doubt that a court, although obliged to decide a claim, would retain discretion to defer proceedings for prudential reasons. **[**12]** Indeed, a typical reason is the pendency of a related proceeding in another tribunal. "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Amer. Co., 299 U.S. 248, 254, 81 L. Ed. 153, 57 S. Ct. 163 (1936).*

The question here is whether this traditional authority is curtailed by the New York Convention and its implementing legislation. The statute provides that, upon a petition for **[*106]** confirmation, a district court "*shall* confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." *9 U.S.C. § 207* (emphasis added). Article VI of the Convention is the only provision that deals with staying confirmation. Article VI states:

> If an application for the setting aside or suspension of the award has been made to a competent authority [in the country where the award has been made], the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award [and require **[**13]** a security].

The circumstances outlined in Article VI do not appear to exist in this case. The question is whether a district court may grant a stay in circumstances other than those authorized in Article VI.

The fact that *section 207* uses the word "shall" is not decisive, because a stay is a deferral rather than refusal. But the fact that the statute refers to the Convention and the Convention lists a single ground for a stay could be taken to exclude all other grounds under the principle of *expressio unius est exclusio alterius*. That was, in substance, the reasoning of the district court. However, *expressio unius* is an aid to construction and not an inflexible rule. *See, e.g., United States v. Massachusetts Bay Transport. Auth., 614 F.2d 27, 28 (1st Cir. 1980)*. Whatever we might think if the question were entirely open, precedent informs our decision in this case. Domestic arbitrations are governed by the United States Arbitration Act (chapter 1 of Title 9) but not by the Convention (chapter 2 of Title 9). The Act states that, upon application, "the court *must* grant [a confirmation] order unless the award is vacated, modified, or corrected as prescribed **[**14]** in *sections 10* and *11* of this title." *9 U.S.C. § 9* (emphasis added). But courts routinely grant stays in such cases for prudential reasons not listed in *sections 10* and *11*. *E.g., Middleby, 962 F.2d at 615-16*.

Similarly, this court has held that district courts have discretion to stay an action to *compel* arbitration pending the outcome of related litigation, even though the Act states that on a motion to compel the court "shall hear the parties" and "shall proceed summarily to trial." *9 U.S.C. § 4*; *see Acton Corp. v. Borden, Inc., 670 F.2d 377, 383 (1st Cir. 1982)*. In *Acton*, then-Judge Breyer held that, in drafting the statute, Congress did not "intend[] a major departure from the ordinary rule allowing one federal court to stay litigation when another federal court is on the process of deciding the same issue." We take the same view of Congress' intentions in implementing the Convention.

Of course, a stay of confirmation should not be lightly granted. A central purpose of the Convention--an international agreement to which the United States is only one of approximately one hundred signatories--was to expedite the recognition of foreign arbitral awards **[**15]** with a minimum of judicial interference. But the risk that the power to stay could be abused by disgruntled

litigants--real though that risk is, *see Spier v. Calzaturificio, 663 F. Supp. 871, 875 (S.D.N.Y. 1987)*--argues more for a cautious and prudent exercise of the power than for its elimination.

Because the district court acted under a misapprehension of its authority, we vacate the confirmation order and remand for further proceedings. Whether confirmation or collection of the award should be partially deferred pending the resolution of the 1982 contract arbitration is a matter for the district court to determine in the first instance. Still, we think it would require some explanation if, in the face of the equities of this case, the district court concluded that the full award should be confirmed and collected now.

The confirmation order is *vacated* and the matter is *remanded* to the district court for further proceedings consistent with this opinion.

LANDIS ET AL. v. NORTH AMERICAN CO. *

* Together with No. 222, Landis et al. v. American Water Works & Electric Co., Inc. Certiorari to the United States Court of Appeals for the District of Columbia.

No. 221

SUPREME COURT OF THE UNITED STATES

299 U.S. 248*; *57 S. Ct. 163*; *81 L. Ed. 153*; *1936 U.S. LEXIS 25*; *1 SEC Jud. Dec. 283

November 9, 1936, Argued
December 7, 1936, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

CERTIORARI * to review a decision on special appeal which reversed orders of the District Court of the United States for the District of Columbia granting a stay of proceedings in two cases.

* See Table of Cases Reported in this volume.

DISPOSITION: *66 App. D. C. 141*; *85 F.2d 398*, reversed.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**

ACTION, §45

stay -- conditions of power to grant. --

Headnote:[1]

A court's inherent power to stay proceedings in a cause on its docket to abide the proceedings in another is not conditioned on identity of parties and issues in the two causes.

[*LEdHN2]**

ACTION, §45

stay -- burden on suppliant. --

Headnote:[2]

The suppliant for a stay of proceedings in one cause to abide the outcome of another must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.

[*LEdHN3]**

ACTION, §45

stay -- power to be exercised sparingly. --

Headnote:[3]

Only in rare cases will a court stay proceedings in a cause on its docket while a litigant in another settles the rule of law that will define the rights of both.

[*LEdHN4]**

ACTION, §45

stay in case involving issues of public moment,

where public welfare and convenience will be promoted. --

Headnote:[4]

Especially in cases of extraordinary public moment, a litigant may, where the public welfare and convenience will be promoted thereby, be required to submit to a stay of proceedings to abide the result in another cause, provided such stay is not immoderate in extent nor oppressive in its consequences.

[*LEdHN5]**

ACTION, §45

stay -- must not be immoderate. --

Headnote:[5]

The discretionary power of a court to stay proceedings in a cause on its docket to abide the outcome of other litigation is abused if the stay is not kept within the bounds of moderation.

[*LEdHN6]**

ACTION, §45

stay -- excessiveness. --

Headnote:[6]

The limits of a fair discretion are exceeded in staying a suit to enjoin the enforcement of the Public Utility Holding Company Act of 1935 as unconstitutional, to abide the outcome of a suit by the Federal Securities and Exchange Commission to compel certain other holding companies to register with the Commission in accordance with the statute, in which the issue of constitutionality has been raised, in so far as the stay is to continue in effect after the trial court's decision and until the determination by the Supreme Court of the United States of any appeal therefrom; and this notwithstanding that after a decision in the trial court the stay may be vacated if the court is satisfied that its restraints are then oppressive.

[*LEdHN7]**

APPEAL, §1692

judgment on -- remand for reconsideration in light of changed situation. --

Headnote:[7]

The Supreme Court of the United States will not undertake to pass on the fairness of a stay of further proceedings in a cause to abide the outcome of another suit which may settle or narrow the issues, where since the stay was granted the facts in the test suit have been settled by stipulation, the briefs have been prepared, the case has been argued on the merits and a decision may be expected within a reasonable time, but instead will vacate the stay order and remand the cause for reconsideration by the trial court in the light of the situation existing and developed at the time of such reconsideration.

SYLLABUS

1. The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. P. 254.

2. There is power, applicable especially in cases of extraordinary public interest, to stay one suit to abide proceedings in another, although in the two the parties are not the same and the issues not identical; the burden of making out the wisdom and justice of a stay in such cases lies heavily on him who seeks the stay, and discretion is abused if the stay is not kept within the bounds of moderation. P. 254.

3. Suits brought in the District of Columbia by two holding companies, to restrain the Securities & Exchange Commission and other officials from enforcing the Holding Company Act, were stayed to await decision of a like suit brought by the Commission and still pending in another District Court. *Held*:

(1) That to grant the stay until decision of the other case by this Court on appeal, was abuse of discretion. P. 256.

(2) The question whether the stay would have been proper under the conditions which existed when it was granted, had it been granted to continue only until decision of the other case by the District Court, is a question which this Court will not decide, because the

conditions have changed. P. 258.

(3) The cause is remanded to the court which granted the stay for a rehearing, at which it will determine, in the light of the situation then existing and developed, and of the principles laid down in this opinion, what, if any, stay should be ordered, not to extend beyond the time when the other case shall be decided by the other District Court. P. 258.

COUNSEL: Solicitor General Reed and Assistant Attorney General Jackson, with whom Attorney General Cummings, Mr. John J. Burns, General Counsel, Securities & Exchange Commission, and Messrs. Benjamin V. Cohen and Thomas G. Corcoran were on the brief, for petitioners.

Mr. John C. Higgins, with whom Messrs. John S. Flannery and Joseph P. Tumulty were on the brief, for respondents.

JUDGES: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts, Cardozo; Stone took no part in the consideration or decision of this case.

OPINION BY: CARDOZO

OPINION

[*249] [163] [***155]** MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy hinges upon the power of a court to stay proceedings in one suit until the decision of another, and upon the propriety of using such a power in a given situation.

Respondents, non-registered holding companies brought suit in the District Court **[**164]** for the District of Columbia to enjoin enforcement of the Public Utility Holding Company Act of 1935 (c. 687, 49 Stat. 803) on the ground that the Act in its entirety is unconstitutional and **[***156]** void. The complaint in No. 221 (the suit by the North American Company) was filed November 26, 1935; the complaint in No. 222 (the suit by the American Water Works & Electric Company) was filed the next day. By concession the two plaintiffs are holding companies within the meaning of the Act, and must register thereunder if the Act is valid as to them. One plaintiff, the North American Company, is at the apex of a pyramid which includes subsidiary holding companies as well as **[*250]** subsidiary operating companies, these last being engaged as public utilities in supplying gas and electricity to consumers in different States. The other plaintiff, American Water Works & Electric Company, is at the apex of another pyramid including like subsidiaries. The defendants in both suits (petitioners in this court) are the members of the Securities and Exchange Commission, the Attorney General of the United States, and the Postmaster General.

On November 26, 1935, the Commission filed a bill of complaint in the District Court of the United States for the Southern District of New York to compel other holding companies, members of a different public utility system, to register with the Commission in accordance with the statute. At the beginning, the defendants were the Electric Bond & Share Company, the parent holding company, and five intermediate holding company subsidiaries. Sixteen other holding company subsidiaries were later added as defendants with the Government's consent. All the twenty-two defendants, parties to that suit, appeared and answered the complaint. All joined in a cross-bill contesting the validity of the Act and praying a decree restraining its enforcement. To give opportunity for full relief, the present petitioners appeared as cross-defendants, answering the cross-bill and opposing an injunction.

On December 7, 1935, the Attorney General filed a notice of motion in behalf of the petitioners for a stay of proceedings in Nos. 221 and 222, pending at that time in the District of Columbia. The petitioners had not yet submitted their answer to the bills, but their position as supporters of the statute in its application to respondents was made abundantly apparent. By the notice of motion it was shown that other suits to restrain the enforcement of the Act had been filed by other plaintiffs in the District of Columbia, and many more in other districts. The Government professed its anxiety to secure an early **[*251]** determination of its rights, and to that end pledged itself to proceed with all due diligence to prosecute the suit which it had chosen as a test. There were representations that the trial of a multitude of suits would have a tendency "to clog the courts, overtax the facilities of the Government, and make against that orderly and economical disposition of the controversy that is the Government's aim." Accordingly the court was asked to stay proceedings in the suits at bar "until the validity of said Act has been determined by the Supreme Court of the United States" in the Electric Bond and

Share case, "or until that case is otherwise terminated." To that motion the plaintiffs filed an answer on December 12, 1935, contesting the power of the court to grant the requested stay, asserting that the questions to be passed upon in their suits were not identical with the questions presented in the test one, pointing out that the Act, even if valid as applied to some companies, might be invalid as applied to others, and dwelling upon the loss that they were suffering day by day while the menace of the Act obstructed their business and cast a cloud on its legality.

Upon the argument of the motion the Attorney General and the Securities and Exchange Commission announced that until the validity of the Act had been determined by this court in a civil suit which would be diligently prosecuted, neither the Attorney General nor the Commission would seek to enforce the criminal **[***157]** penalties of the Act, and that even after such determination they would not seek to exact penalties for earlier offenses. Written notice to that effect was given to all prosecuting officers. At the same time the Postmaster General announced that even if he had authority, he would not exclude any company from using the mails because of any violation of the Act pending the judicial determination of its validity by this court. Also, the Commission issued **[**165]** a regulation permitting a holding company, when registering, **[*252]** to reserve any legal or constitutional right and to stipulate that its registration should be void and of no effect in the event that such a reservation should be adjudged invalid or ineffective. Finally, the Attorney General offered to submit to a temporary injunction restraining the enforcement of the Act until the Electric Bond and Share case should be determined by this court. On the other side, the plaintiffs offered to consolidate their cases and thus dispose of them as one. They also offered, as we were informed upon the argument, to select a group of suits, not more than three or four, to be tried at the same time, with the understanding that any others would then be held in abeyance. These offers were rejected, and the Government stood upon its motion.

How many suits for like relief were pending in the same and other districts was the subject of oral representations when the motion was submitted. By consent, however, an affidavit by the Attorney General was afterwards supplied with a stipulation of counsel supplementary thereto. The affidavit and stipulation were accepted by the Court, and give precision to representations that would otherwise be vague. From the affidavit it appeared that, in addition to the suits at bar, forty-seven suits had been brought in thirteen districts, five of them, afterwards reduced to four, in the District of Columbia, the others elsewhere. From the stipulation it appeared, however, that none of the cases in other districts would be heard or determined on the merits. The bills were to be dismissed or process was to be quashed in so far as relief was demanded against any officials who are parties to the present suits, and this for the reason that as to all such defendants the venue was improper. In a few suits there were to be decrees *pro confesso* against local officials who had been instructed by the Attorney General not to offer a defense. The number of pending suits was thus reduced to those in the District of Columbia, though there **[*253]** was a possibility, more or less uncertain, that there would be a renewal in that district of the suits begun elsewhere and discontinued or dismissed. Along with the affidavit and stipulation the Government submitted a copy of the complaint and the cross-bill in the suit against the Bond and Share Company.

Upon this showing the District Judge reached the conclusion that the motion should be granted, stating his reasons in an opinion. "A decision," he said, "by the Supreme Court in the Electric Bond and Share case, even if it should not dispose of all the questions involved, would certainly narrow the issues in the pending cases and assist in the determination of the questions of law involved." However, the granting of the motion would be conditioned upon diligent and active prosecution of the Government's suit. An order was made on January 9, 1936, staying all proceedings upon the terms and conditions stated in the opinion. From that order the Court of Appeals for the District of Columbia allowed a special appeal, which was heard in April, 1936 (four judges sitting), and decided in June. There were three opinions: an opinion by Mr. Justice Van Orsdel, concurred in by the Chief Justice; a separate opinion by Mr. Justice Groner; and a dissenting opinion by Mr. Justice Stephens. *85 F.2d 398*. The first opinion states the question before the court to be whether or not the District Court **[***158]** had "abused its discretionary power in the control of its docket." Standing alone, this statement would seem to concede that there was power, the inquiry being merely whether the power had been discreetly exercised. The concession, if made, was speedily withdrawn. A few sentences later we are told that the power is confined to cases where the issues and

the parties are the same. The separate opinion of Groner, J., treats the subject with greater flexibility. He suggests that after joinder of issue there may be a postponement of the trial if the court **[*254]** in the control of its own docket shall find that course expedient. He couples this with a statement that a stay so indefinite as the one before him would be too broad in any case. None the less, much latitude of judgment would have been left to the trial judge if the standards of that opinion had been adopted as a guide. But plainly they were not. The order of the Court of Appeals in each of the two suits reverses the stay order and remands the cause "for further proceedings not inconsistent with the opinion of this court." Evidently the trial judge was expected to **[**166]** conform to doctrine expounded for his instruction in the course of an opinion, yet he would have difficulty in knowing which opinion to select. He might believe that comity or deference constrained him to submit to the opinion approved by two members of the reviewing court, since none had been accepted by the vote of a majority. At the very least there was a likelihood, and indeed almost a certainty, of confusion and embarrassment. In such circumstances the call is plain for a decision that will mark with greater clearness the bounds of power and discretion. We granted certiorari that this result might be attained.

[*LEdHR1]** [1] **[***LEdHR2]** [2] **[***LEdHR3]** [3]Viewing the problem as one of power, and of power only, we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical. Indeed, counsel for the respondents, if we understand his argument aright, is at one with us in that regard, whatever may have been his attitude at the hearing in the courts below. Apart, however, from any concession, the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must **[*255]** weigh competing interests and maintain an even balance. *Kansas City Southern Ry.* v. *United States, 282 U.S. 760, 763*; *Enelow v. New York Life Ins. Co., 293 U.S. 379, 382*. True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. Considerations such as these, however, are counsels of moderation rather than limitations upon power. There are indeed opinions, though none of them in this court, that give color to a stricter rule. Impressed with the likelihood or danger of abuse, some courts have stated broadly that, irrespective of particular conditions, there is no power by a stay to compel an unwilling litigant to wait upon the outcome of a controversy to which he is a stranger. *Dolbeer v. Stout, 139 N. Y. 486, 489*; *34 N. E. 1102*; *Rosenberg v. Slotchin, 181 App. Div. 137, 138*; *168 N. Y. S. 101*; cf. *Wadleigh* v. *Veazie*, Fed. Cas. No. **[***159]** 17,031; *Checker Cab Mfg. Co.* v. *Checker Taxi Co., 26 F.2d 752*; *Jefferson Standard Life Ins. Co.* v. *Keeton, 292 Fed. 53*. Such a formula, as we view it, is too mechanical and narrow. *Kansas City Southern Ry.* v. *United States, supra; Friedman v. Harrington, 56 Fed. 860*; *Amos* v. *Chadwick*, L. R. 9 Ch. Div. 459; 4 *id*. 869, 872. All the cases advancing it could have been adequately disposed of on the ground that discretion was abused by a stay of indefinite duration in the absence of a pressing need. If they stand for more than this, we are unwilling to accept them. Occasions may arise when it would be "a scandal to the administration of justice" in the phrase of Jessel, M. R. (*Amos* v. *Chadwick*, L. R. 9 Ch. Div. 459, 462), if power to coordinate the business of the court efficiently and sensibly were lacking altogether.

[*256] **[***LEdHR4]** [4] **[***LEdHR5]** [5] We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted. In these Holding Company Act cases great issues are involved, great in their complexity, great in their significance. On the facts there will be need for the minute investigation of intercorporate relations, linked in a web of baffling intricacy. On the law there will be novel problems of far-reaching importance to the parties and the public. An application for a stay in suits so weighty and unusual will not always fit within the mould appropriate to an application for such relief in a suit upon a bill of goods. True, a decision in the cause then pending in New York may not settle every question of fact and law in suits by other companies, but in all likelihood it will settle many and simplify them all. Even

so, the burden of making out the **[**167]** justice and wisdom of a departure from the beaten track lay heavily on the petitioners, suppliants for relief, and discretion was abused if the stay was not kept within the bounds of moderation.

[*LEdHR6]** [6]We are satisfied that the limits of a fair discretion are exceeded in so far as the stay is to continue in effect after the decision by the District Court in the suit against the Bond and Share Company, and until the determination by this court of any appeal therefrom. Already the proceedings in the District Court have continued more than a year. With the possibility of an intermediate appeal to the Circuit Court of Appeals, a second year or even more may go by before this court will be able to pass upon the Act. Whether the stay would have been proper if more narrowly confined will be considered later on. For the moment we fix the uttermost limit as the date of the first **[*257]** decision in the suit selected as a test, laying to one side the question whether it should even go so far. How the District Court in New York will decide the issues in that case is not to be predicted now. The Act may be held valid altogether, or valid in parts and invalid in others, or void in its entirety. Whatever the decision, the respondents are to be stayed by the terms of the challenged order until this court has had its say. They are not even at liberty, in case of an adjudication of partial invalidity, to bring themselves within the class adjudged to be exempt, though their membership in such a class may be uncertain or contested. Relief so drastic and unusual overpasses the limits of any reasonable need, at least upon the showing made when the motion was submitted.

We think the answer is inadequate that in the contingencies suggested the respondents will be at liberty to move to vacate the stay, and will prevail upon that motion if they **[***160]** can satisfy the court that its restraints are then oppressive. To drive them to that course is to make them shoulder a burden that should be carried by the Government. The stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description. When once those limits have been reached, the fetters should fall off. To put the thought in other words, an order which is to continue by its terms for an immoderate stretch of time is not to be upheld as moderate because conceivably the court that made it may be persuaded at a later time to undo what it has done. Disapproval of the very terms that have already been approved as reasonable is at best a doubtful outcome of an application for revision. If a second stay is necessary during the course of an appeal, the petitioners must bear the burden, when that stage shall have arrived, of making obvious the need. Enough for present purposes that they have not done so yet.

[*258] **[***LEdHR7]** [7]From the stay in its operation during the course of an appeal, we pass to the stay in its operation while the test suit is undetermined. That aspect of the order is subject to separate considerations and calls for separate treatment. The Government contends that a stay thus limited in duration is not unreasonably long, and that the respondents have been sufficiently protected against substantial loss or prejudice. The respondents deny that this is so, and insist that loss or prejudice, substantial in degree, is possible and even probable. We do not find it necessary to determine whether a stay to continue until the decision by the District Judge, and then ending automatically, would be moderate or excessive if viewed as of the time when the order differently conditioned was placed upon the files. Almost a year has gone by since the entry of that order, and in the intervening months many things have happened. All the parties have united in bringing these happenings to our notice and in inviting us to consider them. In the suit against the Bond and Share Company the facts have now been settled by stipulation; the briefs have been prepared; the case has been argued on the merits; and a decision may be expected within a reasonable time. With these happenings disclosed, a decision by this court, if directed to the fairness of the stay order as of the date of its entry and if based upon a record made up substantially a year ago, would have little relation to present day realities. "This court is a court of review and limits the exercise of its jurisdiction in accordance with its function." *Aero Transit Co.* v. *Georgia Public Service Comm'n, 295 U.S. 285, 294*. To bring about a fitting correspondence **[**168]** between rulings and realities, there must be a new appraisal of the facts by the court whose function it is to exercise discretion, and an appraisal in the light of the situation existing and developed at the time of the rehearing. *Patterson v. Alabama, 294 U.S. 600, 607*; *Watts, Watts* **[*259]** *& Co.* v. *Unione Austriaca, 248 U.S. 9, 21*. Benefit and hardship will be set off, the one against the other, and upon an ascertainment of the balance discretionary judgment will be exercised anew.

In each suit, the decree of the Court of Appeals is reversed, the order of the District Court vacated, and the cause remanded to the District Court to determine the motion for a stay in accordance with the principles laid down in this opinion.

Reversed.

MR. JUSTICE McREYNOLDS concurs in the result.

MR. JUSTICE STONE took no part in the consideration or decision of these cases.

PROVIDENCE JOURNAL COMPANY, PLAINTIFF, APPELLEE, v. FEDERAL BUREAU OF INVESTIGATION, DEFENDANT, APPELLEE, v. RAYMOND L. S. PATRIARCA, INTERVENOR, APPELLEE, UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANT, APPELLANT; PROVIDENCE JOURNAL COMPANY, PLAINTIFF, APPELLEE, v. FEDERAL BUREAU OF INVESTIGATION, ET AL., DEFENDANTS, APPELLEES, and RAYMOND L. S. PATRIARCA, INTERVENOR, APPELLANT.

Nos. 79-1056, 79-1067

UNITED STATES COURT OF APPEALS, FIRST CIRCUIT

595 F.2d 889*; *1979 U.S. App. LEXIS 16800*; *4 Media L. Rep. 2343

February 16, 1979, Submitted
February 20, 1979, Decided

PRIOR HISTORY: **[**1]** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. RAYMOND J. PETTINE, U.S. District Judge]

COUNSEL: Leonard Schaitman and Michael Jay Singer, Attys. Dept. of Justice, Washington, D. C., on motion for stay pending appeal for Federal Bureau of Investigation, et al.

William M. Kunstler, New York City, and Harris L. Berson, Providence, R. I., on motion for stay pending appeal for Raymond L. S. Patriarca.

Matthew F. Medeiros, Joseph V. Cavanagh, Jr., and Edwards & Angell, Providence, R. I., on memorandum in opposition to the motions for stay for Providence Journal Co.

JUDGES: Before COFFIN, Chief Judge, and CAMPBELL, Circuit Judge.

OPINION BY: CAMPBELL

OPINION

[*889] Defendants, Federal Bureau of Investigation and others, and Intervenor, Raymond L. S. Patriarca, have requested stays pending their appeals of the district court's order that certain FBI documents be forthwith disclosed to the plaintiff, Providence Journal Company. These documents reflect the results of an unauthorized and illegal wiretap which the FBI maintained at Patriarca's place of business in 1962-65. Defendants and the Intervenor appeal from the district court's **[**2]** ruling that, with certain exceptions, all this material be made available to the Journal.

[*890] The district court, while issuing a stay of several days in order to permit this court to orient itself and, if so inclined, grant a further stay, declined to do more. The court pointed out that, in effect, it had analyzed the case fully, that its order reflected its considered judgment, and that it would be "expecting too much to have it critically determine, as would be done through the mind of a stranger," whether appellants had made a strong showing of likely success on appeal. In view of the decision it had reached in the case, the district court thought that more than a brief stay would be a "prior restraint" on the Journal's publication rights as it

had found them to be.

This court necessarily approaches the matter from a different perspective. While we give weight to the views of the district court, the Constitution and laws entitle litigants to have their cases independently reviewed by an appellate tribunal. Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. Appellants' right of **[**3]** appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored.

Appellants are not, of course, entitled to a stay pending appeal without showing that their appeals have potential merit. We believe that they have made a sufficient showing on this score. Where, as here, the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay. See *Washington Metropolitan Area Transit Commission v. Holiday Tours, 182 U.S.App.D.C. 220, 559 F.2d 841 (1977)*. Our reading of the district court's opinions and of the briefs indicates that there are serious legal questions presented. The district court itself stated,

> "(T)his is a case of initial impression wherein respectable minds might differ and (embodies) a strong public policy . . .."

Failure to grant a stay will entirely destroy appellants' **[**4]** rights to secure meaningful review. On the other hand, the granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure assuming the Journal prevails by whatever period of time may be required for us to hear and decide the appeals. Weighing this latter hardship against the total and immediate divestiture of appellants' rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay.

The motions for stay pending appeal are allowed. All materials which are the subject matter of these appeals, now in possession of the district court, are to remain impounded until further order of this court.

State v. James Campbell

No. 5941

SUPREME COURT OF NEW HAMPSHIRE

110 N.H. 238*; *265 A.2d 11*; *1970 N.H. LEXIS 141

April 30, 1970

PRIOR HISTORY: **[***1]** Appeal from Rockingham County.

DISPOSITION: *Exceptions overruled*.

HEADNOTES

1. The affirmative defense of entrapment lies where upon all the evidence there exists a substantial risk that an honest man would respond to the inducement offered, or opportunity afforded, by a law enforcement official or by a person acting in cooperation with a law enforcement official for the purpose of obtaining evidence against him, by committing an offense he would not otherwise be disposed to commit.

2. Neither the motive of the officer to test the honesty of the defendant nor the opportunity to commit the offense, without more, is entrapment.

3. Entrapment is a question of fact for the jury, except where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take.

4. A reconsideration by the trial court, under *State v. Thomson, 110 N.H. 190*, and under the rationale of *State v. Berge, 109 N.H. 570*, of the mandatory sentence imposed in this case, may render moot the question of the constitutionality of RSA 318-A:21.

COUNSEL: *William F. Cann*, Deputy Attorney General, *Thomas B. Wingate*, Assistant Attorney General, *Donald Stever*, Attorney (*Mr. Stever* orally), for the State.

Harkaway, Gall & Shapiro (*Mr. Aaron A. Harkaway* orally), for the defendant.

JUDGES: Griffith, J. All concurred.

OPINION BY: GRIFFITH

OPINION

[*238] **[**12]** The defendant in this case was convicted of four separate sales of narcotic drugs. A sale of marijuana and one of LSD on November 7, 1968, and sales of marijuana on November 16, 1968 and November 23, 1968. Defendant's exceptions were reserved and transferred by the Trial Court (*Keller*, J.).

The defendant relies upon two exceptions here. First, he argues that he was entitled to an acquittal because it must be found as a matter of law that he was entrapped and second that RSA 318-A:21 is unconstitutional in that it provides for a mandatory sentence and forbids the trial court to suspend any part of the sentence.

Two state troopers, who were acting as undercover agents, **[*239]** testified that they first went to the trailer of the defendant in Salem on the night of November 6, 1968. **[***2]** The troopers were dressed in dungarees

and shirts and both had long hair and beards. They stated that they approached the defendant on information from the Salem police that he was suspected of selling narcotics. Upon admission to the trailer they told the defendant that they had been told by a man named Silver in Lowell that they could obtain marijuana from the defendant. The defendant stated that he did not have any but offered to take them to Lowell where he said they could obtain some. When they told him that they preferred to take delivery in New Hampshire he agreed to get some and to also attempt to get some LSD. Because they were unknown to the defendant, it was finally agreed that they would make a deposit of ten dollars on the purchase. The next night they returned and the defendant sold them two ounces of marijuana and four LSD tablets for a total purchase price of fifty-two dollars.

The troopers testified that the defendant gave them his telephone number so that they could call in future orders and that the deliveries of November 16 and **[**13]** November 23 were as a result of telephone orders. They further testified that they were in the trailer some fifteen **[***3]** or twenty minutes the first visit, that on the second visit the defendant gave them some amphetamine tablets to try, and that on the final delivery of November 23 he produced double the amount of marijuana they had ordered and suggested they take the excess amount to sell. The defendant was arrested at the time of the delivery of the final order on November 23. The troopers testified that they did not know whether or not the defendant made any profit on the sales.

The defendant's wife was present during each visit of the officers to the trailer. Her testimony and that of the defendant differed from the officers in some respects. Defendant and his wife testified that the officers were at the trailer about an hour on the first visit and that they appealed to the defendant to obtain drugs on the basis of their mutual friendship with Silver. That the defendant offered to tell them where to go in Lowell but they expressed fear of the Lowell police and the defendant reluctantly and after considerable urging agreed to obtain the drugs for them as a favor to his friend Silver. The defendant stated that he made no profit on any of the sales. He further testified that he did **[*240]** **[***4]** not give them the amphetamine pills but that they took them without his knowledge. He testified that the pills were diet pills he took and had obtained from a doctor.

The trial court without objection by the defendant submitted the issue of entrapment to the jury. The defendant does not object to the instructions as given but claims that on these facts the trial court should have dismissed the prosecution.

The defense of entrapment is a twentieth century American doctrine which probably evolved as a result of the increasing use of informers and undercover agents in the detection of crimes particularly in the liquor and narcotics field. *See* Annot., *55 A.L.R.2d 1322*; Annot., *33 A.L.R.2d 883*. Courts were shocked by cases in which the crime appeared to be created by the very officers charged with preventing crime. *See Woo Wai v. United States, 223 F. 412*; *State v. Neely, 90 Mont. 199, 300 P. 561*. The rule was judicially created to prevent the conviction of innocent persons enticed by government agents to commit a crime for the agents to prosecute. Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245. Various reasons have been assigned **[***5]** for the defense. *Sorrells v. United States, 287 U.S. 435, 77 L. Ed. 413, 53 S. Ct. 210*; *Sherman v. United States, 356 U.S. 369, 2 L. Ed. 2d 848, 78 S. Ct. 819*. Learned Hand expressed it thus: "The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist." *United States v. Becker, 62 F.2d 1007, 1009*.

Whatever the basis for the rule it has been almost universally accepted and it appears that except for Tennessee all states have now adopted it either by court decision or by statute. *See* 45 Texas. L. Rev. 578; Annot., *55 A.L.R.2d 1322*; Annot., *33 A.L.R.2d 883, supra*. The possibility that denial of the defense might constitute denial of due process has not been foreclosed. *See United States ex rel Hall v. Illinois, 329 F.2d 354*; Comment 1964 U. of Ill. L. Forum 821.

The defense of entrapment was first recognized in this state in *State v. Del Bianco, 96 N.H. 436, 78 A.2d 519* and is referred to as "well-recognized" in *State v. Groulx, 106 N.H. 44, 46, 203 A.2d 641, 642*. The later case points out that **[***6]** the doctrine "has been the subject of much confusion and that the **[*241]** definition, formulation and application of the doctrine may not be completely settled at this date." Chief Justice Kenison authored both of the above opinions and was Chairman of the Commission for the Revision of the Criminal Laws. Their report filed in April 1969 recommended **[**14]** the following statutory provision:

"571:5 Entrapment. It is an affirmative defense that the actor committed the offense because he was induced or encouraged to do so by a law enforcement official or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence against him and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. However, conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." Report of Commission to Recommend Codification of Criminal Laws, April 1969, at 14.

The comment on this proposed section states that it codifies existing law on the subject. It points out that neither the motive of the officer **[***7]** to test the honesty of the defendant nor opportunity to commit the offense, without more, is entrapment. "What has been troublesome is the question of how to measure the extra ingredient that does give rise to entrapment. This section proposes that the test be the risk that an honest man would respond to the inducement or opportunity by committing the offense. This is not an easy to apply mechanical rule but it does serve to identify the issue that is involved." *Id.* Comment.

Ordinarily, if the evidence presents an issue of entrapment it is a question of fact for the jury to determine. 1 Wharton, Criminal Law and Procedure *s.* 132 (supp.); *United States v. Baker, 373 F.2d 28*; *Rush v. United States, 370 F.2d 520*; *United States v. Landry, 257 F.2d 425*. The court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take. *Cline v. United States, 20 F.2d 494*; *Morei v. United States, 127 F.2d 827*; *Sherman v. United States, 356 U.S. 369, 2 L. Ed. 2d 848, 78 S. Ct. 819*. The evidence in **[***8]** this case did not compel such a finding and would support a finding that the defendant was ready to commit the crime and that the troopers only furnished him the opportunity. *State v. Groulx, supra at 48*.

[*242] In oral argument counsel for the defendant suggested that the issue of entrapment should never be submitted to a jury but always be determined by the trial court, since a jury would be prejudiced by the defendant's necessary admission of the crime when the defense is raised. This in essence was the position of the minority of the Supreme Court in both *Sorrells v. United States, 287 U.S. 435, 77 L. Ed. 413, 53 S. Ct. 210*, and *Sherman v. United States, 356 U.S. 367, 378, 2 L. Ed. 2d 848, 854, 78 S. Ct. 819, 823*. We agree with Chief Justice Warren's statement in the *Sherman* case that adoption of this rule might create more problems than it would solve. Refusal to submit this issue to the jury poses some constitutional problems due to the defendant's right to trial by jury on all issues. 74 Yale L.J. 942, 953.

The defendant challenges the constitutionality of RSA 318-A:21 which established a mandatory minimum sentence of five years for the **[***9]** offense charged and prohibited any suspension of the sentence by the trial court. In *State v. Berge et al, 109 N.H. 570, 258 A.2d 489* involving a similar challenge to this statute we held the question moot since Laws 1969, ch. 421 repealed the mandatory requirements of RSA 318-A:21 and made it applicable to any offense committed before the repeal if sentence were pronounced after the repeal. *See also State v. Schena, 110 N.H. 73, 260 A.2d 93.*

In the *Berge* case imposition of the sentence had been stayed pending the appeal and in the present case the mandatory sentence was imposed with its execution stayed. The recent case of *State v. Thomson, 110 N.H. 190, 263 A.2d 675* permits the trial court to reconsider the sentence in the present case. Accordingly **[**15]** we decline to consider the constitutional question here presented since further action of the trial court may render the question moot.

Exceptions overruled.