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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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Dr. KIRSTEN KNUDSEN, D.C.,	)	
	)	
Plaintiff-Respondent	)	
	)	
and	)	Appeal from the United States
	)	District Court for the Northern
	)	District of Illinois
CHRIS BAKER and VIKKI BAKER	)	
	)	No. 05-CV-05924
Plaintiffs/Intervenors-Respondents	)	
	)	Judge Ruben Castillo
v.	)	
	)	
LIBERTY MUTUAL INSURANCE	)	
COMPANY,	)	
	)	
Defendant-Petitioner.	)	

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**LIBERTY MUTUAL INSURANCE COMPANY'S  
EMERGENCY MOTION TO STAY THE DISTRICT COURT'S ORDER  
GRANTING PLAINTIFFS' MOTION TO REMAND**

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Pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, Liberty Mutual Insurance Company (“Liberty”) respectfully requests that the Court stay the district court’s order remanding this action to state court pending resolution of Liberty’s contemporaneously filed petition for permission to appeal (“Petition”). This is an emergency motion because Liberty anticipates that the district court clerk will send the certified copy of the remand order to the state court on or about December 29, 2005. Indeed, Plaintiffs have already filed a motion in state court that is set for hearing on January 4, 2006, and seeks “a deadline for oral and written discovery,” as well as “a schedule for approval of notice, notice, and proof of damages per the ordered default judgment.”

## **INTRODUCTION**

This case exemplifies the abuses that led Congress to enact the Class Action Fairness Act (“CAFA”). Plaintiff Kirsten Knudsen filed a purported nationwide class action against Liberty in state court, alleging that Liberty used a medical cost and utilization database to restrict payment under a workers’ compensation policy. Although Illinois law bars medical providers from suing workers’ compensation carriers—and although individuals who may sue workers’ compensation carriers generally must do so in the Illinois Industrial Commission—the state court nonetheless denied Liberty’s motion to dismiss.

Knudsen and intervenors Chris and Vikki Baker (together, “Plaintiffs”) subsequently realized that Liberty Fire—not Liberty—issued the policies underlying their claims. But rather than file a new action against Liberty Fire and risk losing the judge who denied Liberty’s motion to dismiss, Plaintiffs filed a motion to default Liberty for supposedly “hiding” Liberty Fire’s identity as the issuer of the relevant policies in an attempt to run out the limitations period on a claim against Liberty Fire. Although the policies clearly name Liberty Fire as the issuer,

although Liberty repeatedly told Plaintiffs that they sued the wrong defendant, and although Liberty Fire offered to waive a limitations defense if Plaintiffs named the correct defendant, the state court nevertheless sanctioned Liberty by striking its answer and affirmative defenses.

During the ensuing briefing on Plaintiffs' motion for class certification, Liberty noted yet another problem with Plaintiffs' case: Plaintiffs are inadequate representatives of the purported class of Liberty insureds because Liberty Fire issued the policies underlying Plaintiffs' claims. In late February 2005—shortly after Congress enacted CAFA—Plaintiffs attempted to rectify this problem by proposing to add Liberty Fire's insureds to the class. Liberty then removed, arguing that CAFA applied because Plaintiffs' proposed amendment commenced a new action.

In *Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805, 808 (7th Cir. 2005) ("*Knudsen I*"), this Court disagreed, stating that Liberty could not remove "just because a nonparty corporate sibling has been mentioned in plaintiffs latest papers." The Court noted, however, that "a new claim for relief (a new 'cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation" under CAFA. *Id.* at 807. The Court stated that "[m]aybe" the addition of a new claim or defendant "lies in store," explaining that Plaintiffs may not hold Liberty Fire liable without naming it as a defendant, and that if Plaintiffs did so, then Liberty Fire "could enjoy a right to remove." *Id.* at 807-08.

Back in state court, Plaintiffs attempted to evade removal under *Knudsen I* by sneaking through the back door what they clearly could not get through the front. Thus, instead of naming Liberty Fire as a defendant—which *Knudsen I* expressly stated could permit removal—Plaintiffs reiterated their request to add Liberty Fire's insureds to the class. In addition, Plaintiffs for the first time asked the state court to add the insureds of more than thirty of Liberty's affiliates and

subsidiaries to the class, without naming any of those entities as defendants. In other words, instead of adding any of Liberty's affiliates or subsidiaries as defendants, Plaintiffs simply asked the state court to allow them to sue Liberty for the conduct of those entities.

The state court complied, certifying a nationwide class of individuals insured by Liberty and more than thirty of its affiliates and subsidiaries. To make matters worse, the state court then expanded its prior sanctions order by holding Liberty liable to the entire nationwide class on all claims. The state court thus parlayed its sanctions order in favor of an individual litigant against Liberty alone into a nationwide class action default judgment holding Liberty liable for its own conduct and the conduct of more than thirty of Liberty's affiliates and subsidiaries, leaving only the amount of alleged damages for resolution.

Now that the state court had acted, Liberty removed to federal court again. Liberty argued that, in attempting to evade removal under *Knudsen I* by refusing to add new defendants, Plaintiffs' state court maneuvers resulted in the addition of new claims and thus provided two independent bases for removal. First, the state court's class certification order commenced a new action under CAFA by adding new claims that do not relate back to Plaintiffs' pre-CAFA pleadings. Second, the class certification order added claims that are completely preempted by ERISA. The district court rejected both arguments, granted Plaintiffs' motion to remand, and denied Liberty's motion to stay.

This Court should stay the remand order pending resolution of the Petition. First, Liberty will likely succeed on the merits because: (a) Plaintiffs' pre-CAFA pleadings did not provide notice that Plaintiffs would later seek to hold Liberty liable for different conduct based on different policies issued by different entities during different timeframes; and (b) ERISA completely preempts claims added by the class certification order that are based on group-health

policies issued by two Liberty affiliates. Second, denial of a stay would irreparably injure Liberty through massive and improper nationwide class notifications, thereby harming Liberty's customer relationships while burdening the state courts with unnecessary procedural controversies. Third, the brief period necessary to resolve Liberty's petition will not prejudice Plaintiffs in any meaningful way. Finally, the public interest in having federal courts resolve nationwide class actions—together with concerns of efficiency, comity, and federalism—weigh in favor of resolving Liberty's petition once and for all before deciding whether to remand this case to state court.

### **STATEMENT OF FACTS**

The Petition contains a complete statement of the facts at pages 4-10. In sum, Kirsten Knudsen filed a pre-CAFA class action lawsuit against Liberty in state court based on Liberty's use of medical cost and utilization databases to adjust workers' compensation claims brought under Liberty policies. App., Tab 1. In February 2005, Liberty removed this case pursuant to CAFA after Plaintiffs proposed amending the class definition to add Liberty Fire's insureds to the class. App., Tab 2, at 2. This Court held, *inter alia*, that Liberty could not remove "just because a nonparty corporate sibling has been mentioned in plaintiffs' latest papers," but noted that "a new claim for relief . . . could well commence a new piece of litigation" under CAFA. *Knudsen I*, 411 F.3d at 807-08.

After remand, Plaintiffs sought certification of a class expanded to include the insureds of Liberty, Liberty Fire, and more than thirty other Liberty affiliates and subsidiaries. App., Tab 3 at 12-13; *see also* App., Tab 4 at 1 & Ex. 2. On September 29, 2005, the state court certified the nationwide class proposed by Plaintiffs. App., Tab 5 (the "September 29 Order"). For the reasons set forth below and in Liberty's Petition, the September 29 Order made this case subject

to removal and prompted Liberty to effect such a removal. On December 15, the district court granted Plaintiffs' motion to remand, and on December 21, denied Liberty's motion to stay the remand order pending appeal. App., Tabs 6-7. On December 27, together with this motion, Liberty filed a Petition For Permission To Appeal Under 28 U.S.C. § 1453(c).

## **ARGUMENT**

This Court has looked to the following factors in deciding whether to grant a motion for a stay pending appeal: (1) whether the movant has shown a likelihood of success; (2) whether the movant has shown a likelihood of irreparable injury absent a stay; (3) whether a stay would substantially harm other parties to the litigation; and (4) the public interest. *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985); *accord Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Materials Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *see also Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984) ("The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor . . ."). As demonstrated below, all four factors weigh in favor of a stay.

### **I. Liberty Will Likely Succeed On The Merits Of Its Appeal.**

As the Petition sets forth in greater detail, Liberty should succeed on the merits of its appeal because Liberty properly removed this case under CAFA. *See* Petition at 11-18. In *Knudsen I*, this Court stated that the post-CAFA addition of a new claim that does not relate back to pre-CAFA pleadings could commence a new action under CAFA. 411 F.3d at 807. There are four ways in which the September 29 Order added the type of new claims contemplated by *Knudsen I* and thus commenced a new action.

First, Plaintiffs’ pre-CAFA pleadings—which were limited to Liberty’s adjustment of claims under “policies written by Liberty”—provided no indication that the state court would later hold Liberty liable based on adjustment services provided by either Liberty or third parties under policies issued by Liberty’s more than thirty affiliates and subsidiaries. Second, Plaintiffs’ pre-CAFA pleadings—which did not so much as mention any of Liberty’s affiliates or subsidiaries—failed to provide notice that the state court would hold Liberty liable as the alter ego of its affiliates and subsidiaries. *See Knudsen*, 411 F.3d at 807 (“Plaintiffs do not contend that Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company are alter egos.”). Third, Plaintiffs limited their pre-CAFA pleadings to Liberty’s use of medical cost and utilization databases, which Liberty first employed in 1994. Plaintiffs thus did not provide notice that they would expand the timeframe in which Liberty may be held liable based on the conduct of Liberty’s affiliates and subsidiaries, some of which began using medical cost and utilization databases in the mid 1980s.

In sum, Liberty could not possibly have prepared a defense to the new claims added by the September 29 Order based on the information furnished by Plaintiffs’ pre-CAFA pleadings. *See Schorsch v. Hewlett-Packard*, 417 F.3d 748, 751 (7th Cir. 2005) (“An amendment relates back in Illinois when the original complaint ‘furnished to the defendant all the information necessary . . . to prepare a defense to the claim subsequently asserted in the amended complaint.’”). Accordingly, the September 29 Order added the type of “new claim[s]” contemplated by *Knudsen I* and thus commenced a new action under CAFA.

In addition to commencing a new action under CAFA, the September 29 Order provides a second and independent basis for federal jurisdiction: complete preemption under ERISA. *See* Petition at 18-20. The September 29 Order added claims based on group health policies issued

as part of employee benefit plans by Employers Insurance Company of Wausau and Liberty Life Assurance Company of Boston. Because those claims fall with the civil enforcement provisions of § 502(a) and are thus completely preempted by ERISA, Liberty properly removed this case. *See, e.g., Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2502 (2004) (defendant properly removed state court action alleging that defendants breached a state statute by failing to pay for certain medical services because plaintiff’s claim was completely preempted under § 502(a)(1)(B)); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) (defendant properly removed state court action for breach of contract, retaliatory discharge, and wrongful termination of disability benefits because plaintiff’s disability benefits claim fell “within the scope of § 502(a)”).

## **II. Liberty Will Be Irreparably Injured Without A Stay.**

On December 16, 2005—the day after the district court entered its remand order—Plaintiffs filed a motion in state court that is noticed for hearing on January 4, 2006. App., Tab 8. Plaintiffs’ motion seeks “a deadline for oral and written discovery,” as well as “a schedule for approval of notice, notice, and proof of damages per the ordered default judgment.” *Id.* Thus, without a stay, the state court will likely allow Plaintiffs to disseminate a class notice to Liberty’s customers indicating that Liberty has acted wrongfully in adjusting medical claims. Such a notice would undoubtedly cause “the loss of customers and goodwill,” which numerous courts have held to constitute irreparable injury. *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005); *accord Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994); *see also Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (recognizing that class communications can cause irreparable harm to a corporation’s reputation).

Indeed, a Tennessee district court recently stayed its decision to remand a case removed pursuant to CAFA pending appellate resolution for similar reasons. *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Group, Inc.*, 2005 WL 2237598, at \*1 (M.D. Tenn. Sept. 12, 2005). The court reasoned that although CAFA “does not provide for a stay of this court’s remand order, it does allow for an appeal of that order. If the case is actually remanded, and the state court proceeds to move it forward, the appellate right would be an empty one.” *Id.*; see also *Spurgeon v. Pac. Life Ins. Co.*, No. 04 C 355 (7th Cir. Oct. 26, 2004) (granting defendant’s motion to stay the district court’s remand of a case removed under SLUSA pending appellate resolution) (App., Tab 9). Similarly, Liberty’s right to appeal the district court’s order would be impaired if the state court were allowed to disseminate class notice and thereby harm Liberty’s relationship with its customers. Accordingly, the irreparable injury factor weighs in favor of a stay.

### **III. A Stay Would Not Substantially Harm Plaintiffs.**

The only conceivable harm to Plaintiffs from a stay is that there will be a very brief delay while the Court resolves Liberty’s appeal. But delay by itself “does not constitute substantial harm. Some delay would be occasioned by almost all interlocutory appeals.” *United States v. Philip Morris Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003). Moreover, CAFA requires this Court to render a decision on any appeal resulting from the Petition within sixty days. 28 U.S.C. § 1453(c). Therefore, any delay would be minimal and certainly would not “substantially harm” Plaintiffs. See *Philip Morris Inc.*, 314 F.3d at 622 (“any delay will be minimized by our expedition in hearing [defendant’s] appeal”); *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 6 (D.D.C. 2002) (“any inherent delay stemming from an approximately two-month

stay, when juxtaposed to the potential magnitude of a decision by the Court of Appeals on the issues before it, is simply *de minimis*").

During the hearing on Liberty's motion to stay the remand order pending resolution of the Petition, however, Plaintiffs' counsel insisted that a delay would cause them substantial harm because Judge Nowicki plans to retire from the bench in May 2006.<sup>1</sup> That is a meritless contention, and only confirms the concerns that led Congress to pass CAFA. Although it is easy to see why Plaintiffs would like Judge Nowicki to see this case through to the end—given her acquiescence in their most unreasonable demands—Plaintiffs do not have a right to any particular judge and their preference for Judge Nowicki is legally irrelevant. If this case is ultimately remanded to state court and does not reach a resolution by the time Judge Nowicki retires, other circuit judges are entirely capable of resolving Plaintiffs' claims.

#### **IV. The Public Interest Favors A Stay.**

This case raises several principal public policy concerns, all of which weigh in favor of a stay. First, in enacting CAFA, Congress recognized that “[a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction.” Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4). Congress sought to prevent state courts from committing such abuses as “keeping cases of national importance out of Federal court,” “acting in ways that demonstrate bias against out-of-State defendants,” and “making judgments that impose their view of the law on other States.” *Id.* Congress thus recognized a public interest in “restor[ing] the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.” *Id.* § 2(b)(2).

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<sup>1</sup> A transcript of the hearing on Liberty's motion for a stay in the district court is not yet available, but will be provided to the Court when it becomes available.

This case is a glaring example of the abuses that led to the passage of CAFA. The state court parlayed a sanctions order involving only one litigant against Liberty alone into a massive default judgment finding Liberty liable to a nationwide class based on policies issued by more than thirty Liberty affiliates and subsidiaries. In short, this is precisely the type of case that Congress had in mind when it enacted CAFA—a nationwide class action requiring the application of numerous states’ laws to a high stakes lawsuit against an out-of-state defendant.

Second, courts have consistently recognized a public interest in promoting judicial economy and avoiding the unnecessary expenditure of judicial resources. *E.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. at 5 (granting stay because “any discovery and ongoing litigation before this Court conducted between now and then would be a waste of all parties’ and the Court’s resources”); *Dababnah v. W. Va. Bd. of Med.*, 57 F. Supp. 2d 355, 356 (S.D. W. Va. 1999) (granting stay because it “would promote judicial economy and avoid waste of resources in the event that the court of appeals does not uphold this court’s ruling”); *Stadler v. McCulloch*, 882 F. Supp. 1524, 1527 (E.D. Pa. 1995) (granting stay because “any appellate ruling reversing our decision would dramatically impact the size of the class and the scope of the litigation,” and “could render meaningless much of the work completed in the interim”); *Alliance to End Repression v. Rochford*, 75 F.R.D. 441, 447 (N.D. Ill. 1977) (granting stay due to “possibility that needless discovery might occur if the Circuit Court were to decide to modify the class”). In this case, Plaintiffs have already announced their intention to pursue extensive discovery in state court while this Court considers the Petition. App., Tab 8. But if this Court reverses the remand order, then the state court’s efforts would be for naught because, as demonstrated by Liberty’s motion for reconsideration of the September 29 Order, this case could not possibly proceed as a nationwide class action in federal court under Rule 23. App., Tab 10;

*see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407 (7th Cir. 1984).

Finally, the public interest in promoting judicial economy and avoiding the unnecessary expenditure of judicial resources is particularly strong here because of the federalism interests at stake. There is a “longstanding national public policy, based on principles of comity and federalism, of allowing state courts to try cases—already pending in state court—free from federal court interference.” *Butler v. Ala. Judicial Inquiry Comm’n*, 245 F.3d 1257, 1261 (11th Cir. 2001). Yet if this Court decides that the district court erred in granting Plaintiffs’ motion to remand, then it will become necessary to void any actions taken by the state court in the interim. A stay would thus advance the public interest by preventing unnecessary federal interference with state courts. Accordingly, the public interest factor weighs strongly in favor of a short stay that would avoid treating this case like a game of shuttlecock and reduce unnecessary friction in our federal system.

\* \* \* \* \*

In sum, there is a strong likelihood that the Court will reverse the district court’s remand order and hold that Liberty properly removed this action under CAFA and/or ERISA preemption. The balance of harms weighs in favor of a stay because dissemination of class notice will irreparably harm Liberty’s relationship with at least some of its customers and any inconvenience to Plaintiffs from a brief stay is *de minimis*. Finally, the public interests at stake—providing a federal forum for this nationwide class action, maximizing judicial economy, and minimizing interference with the state courts—weigh strongly in favor of a stay.

## CONCLUSION

Liberty Mutual Insurance Company respectfully requests that the Court grant its emergency motion to stay the district court's remand order pending this Court's resolution of Liberty's petition for permission to appeal.

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## CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant, LIBERTY MUTUAL INSURANCE COMPANY, certifies that he caused the foregoing Emergency Motion To Stay The District Court's Order Granting Plaintiffs' Motion To Remand to be served by overnight mail (UPS) upon the following counsel of record for Plaintiffs on this 27th day of December, 2005:

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