

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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Gregory V. Serio, Superintendent of Insurance :  
of the State of New York, as Rehabilitator of : 05 Civ. 00015 (MHD)  
FRONTIER INSURANCE COMPANY, :  
 :  
Plaintiff, :  
 :  
-against- :  
 :  
BLACK, DAVIS & SHUE AGENCY, INC., :  
 :  
Defendant. :  
-----X

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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
PLAINTIFF'S MOTION FOR A PARTIAL STAY OR,  
ALTERNATIVELY, PARTIAL DISMISSAL OF THE COUNTERCLAIM**

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## PRELIMINARY STATEMENT

Gregory V. Serio, Superintendent of Insurance of the State of New York, as Rehabilitator of Frontier Insurance Company ("FIC"), respectfully submits this reply memorandum of law in further support of his motion for a stay of all proceedings relating to the Counterclaim of defendant Black, Davis & Shue Agency, Inc. ("B,D&S") or, alternatively, for the partial dismissal of that Counterclaim.

The opposition brief is remarkably short on any meaningful analysis of the abstention issue raised on this motion and regrettably long on such irrelevancies as B,D&S's revisionist account of the underlying insurance program, a broadside attack on the competence of FIC's managers and a self-serving description of its purported expertise in matters of workers' compensation insurance and offshore captive reinsurance arrangements. B,D&S, it appears, is hell-bent on vindicating itself with respect to the disastrous insurance program at the heart of this dispute. The exercise no doubt was cathartic for B,D&S but it is entirely irrelevant at this juncture. This motion is not directed at the merits of the parties' conflicting claims. It is directed at the threshold question of whether the Court should abstain from even considering the raft of affirmative claims B,D&S has asserted against FIC.

Stripped of its irrelevances, only a few pages of the opposition brief are devoted to the core question of whether abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943), and its progeny is appropriate here. None of B,D&S's arguments in opposition to abstention passes muster. B,D&S disputes none of the authorities cited in the Superintendent's moving papers; instead, it reaches far beyond the Second Circuit and relies principally upon a Northern District of Illinois decision. It cites this decision despite knowing that the court subsequently modified that opinion and entered a stay of all claims asserted against FIC -- just as scores of courts throughout the country have done in other litigations involving FIC since it was placed

into rehabilitation. As if its reliance on bad law were not enough, B,D&S also neglects to mention a recent decision in a closely related litigation involving the America's PEO Program in which the District of Massachusetts -- again, consistent with the decisions of scores of courts throughout the country -- stayed all claims against FIC.

Scrambling to avoid a stay, B,D&S distorts the nature of the Counterclaim.

Although the Counterclaim includes claims ranging from breach of contract to negligence to defamation, in its brief B,D&S strains to characterize its Counterclaim as a mere offset that is immune from the anti-suit injunction incorporated as part of the Order of Rehabilitation.

B,D&S's argument reflects a fundamental misunderstanding of the right of offset under New York law. It is well settled that only a narrow category of claims falls within the provision of the New York Insurance Law upon which B,D&S relies. The Counterclaim -- even after undergoing what amounts to an extreme makeover in the opposition brief -- falls well outside of this narrow category. It should be stayed as would any other affirmative claim asserted against FIC while it is undergoing rehabilitation.

In the end, B,D&S advances no reason based in law, logic or public policy why the Court should disregard the request of the one person responsible under New York law for overseeing FIC's rehabilitation -- i.e., the Superintendent, who favors a stay here -- and instead defer to a party whose conduct contributed to the America's PEO Program debacle and greatly compounded the financial difficulties from which FIC to this day is still struggling to emerge.







































