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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 91-6063

APPALACHIAN REGIONAL HEALTHCARE, INC.

PETITIONER-APPELLANT

VS.

THE BEYT, RISH, ROBBINS GROUP
ARCHITECTS (formerly known as
Segura, Beyt and Associates)
a Louisiana Professional
Architectural Corporation

RESPONDENT-APPELLEE

* * * * *

ON APPEAL FROM
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CIVIL ACTION NO. 91-129
HON. G. WIX UNTHANK, JUDGE

* * * * *

BRIEF OF RESPONDENT-APPELLEE

* * * * *

CERTIFICATION

I hereby certify that copies of the foregoing were mailed to Judge G. Wix Unthank, District Judge, United States District Court, Limestone and Barr Streets, Lexington, Kentucky 40507; United States District Court Clerk, United States District Court, Limestone and Barr Streets, Lexington, Kentucky 40507; and David T. Enlow, Esq. and Lynn R. Schrader, Esq., Murphy & Enlow, 1850 Lexington Financial Center, 250 West Main Street, Lexington, KY 40507, Attorneys for Appellant, on this 27th day of November, 1991.



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* * * * *

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, The Beyt, Rish, Robbins Group,
Architects, by counsel, make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

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TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

ARGUMENT 12

 I. ABSTENTION OR STAY OF THE FEDERAL ACTION WAS PROPER
 UNDER RELEVANT DECISIONS OF THE UNITED STATES SUPREME
 COURT 12

 II. THERE ARE NO FEDERAL LAW ISSUES TO BE DECIDED BY
 A FEDERAL COURT 24

CONCLUSION 27

At. Motors, Inc. v. Chevrolet Motors Corp., 183 F.Supp. 86 (S.D. N.Y. 1960) 13

Butford v. Sun Oil Company, 319 U.S. 215, 63 S.Ct. 1038, 87 L.Ed. 1014 (1943) 14, 15

Chaplin v. Mann, 608 F.Supp. 1460, 1462 (D.C. N.Y. 1985) 14

City of Birmingham v. Cochrane Roofing, 347 So.2d 1159, 1168 (Ala. 1978) 17

Deussen v. Ardra Ins. Co., Ltd., 597 F.Supp. 1223, 1230 (S.D. N.Y. 1987) 20

Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 811, 94 S.Ct. 1236, 1244, 47 L.Ed.2d 483, 495 (1976) 15, 21, 22

Harbor Industries v. Warner Communications, 487 F.Supp. 45, 48 (C.D. Cal. 1980) 27

Federal Exp. Corp. v. Tennessee Public Service Com'n., 738 F.Supp. 1140, 1142 (M.D. Tenn. 1990) 23

TABLE OF AUTHORITIES

K.R.S. Section 413.135 16, 22

K.R.S. Section 413.245 2, 16

K.R.S. Section 417 7

K.R.S. Section 417.045 3

K.R.S. Section 417.130 3

K.R.S. Section 417.160 3

K.R.S. Section 417.245 16

K.R.S. Section 418 7

9 U.S.C. Section 1 5

9 U.S.C. Section 9 4

9 U.S.C. Section 10 4

AFL Motors, Inc. v. Chrysler Motors Corp., 183 F.Supp. 56 (E.D. Wis. 1960) 19

Burford v. Sun Oil Company, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) 14, 15

Canady v. Koch, 608 F.Supp. 1460, 1468 (D.C. N.Y. 1985) 14

City of Birmingham v. Cochrane Roofing, 547 So.2d 1159, 1168 (Ala. 1989) 17

Corcoran v. Ardra Ins. Co., Ltd., 657 F.Supp. 1223, 1230 (S.D. N.Y. 1987) 20

Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483, 496 (1976) . . . 15, 21, 22

Entex Industries v. Warner Communications, 487 F.Supp. 46, 48 (C.D. Cal. 1980) 27

Federal Exp. Corp. v. Tennessee Public Service Com'n., 738 F.Supp. 1140, 1144 (M.D. Tenn. 1990) 23

<u>Fite & Warmath Construction Co., Inc. v. MYS Corp.</u> , 559 S.W.2d 729 (1977)	25
<u>Gill v. Warren</u> , 751 S.W.2d 33 (Ky. 1988)	17
<u>J.V. Peters v. Hazardous Waste Fac. App. Bd.</u> , 596 F.Supp. 1556 (S.D. Ohio E.D. 1974)	18
<u>Jones v. Jones</u> , 116 S.W.2d 503 (Ky. 1929)	25
<u>Kaiser Steel Corp v. W.S. Ranch Co.</u> , 391 U.S. 593, 594, 88 S.Ct. 1753, 1754, 20 L.Ed.2d 835 (1968)	15
<u>Kelly v. Lopeman</u> , 680 F.Supp. 1101, 1107 (S.D. Ohio 1987)	19
<u>Kodak Mining Co. v. Carrs Fork Corp.</u> , 669 S.W.2d 917 (Ky. 1984)	26
<u>Louisiana Power & Light Co. v. City of Thibodaux</u> , 360 U.S. 525, 70 S.Ct. 1070, 3 L.Ed.2d 1058 (1959)	18
<u>Middlesex Ethics Comm'n v. Garden State Bar Assn.</u> , 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116, 124 (1982)	22
<u>Moses H. Cone Hosp. v. Mercury Construction Corp.</u> , 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)	21
<u>Naylor v. Case & McGrath, Inc.</u> , 585 F.2d 557 (2nd Cir. 1978)	19
<u>New Orleans Public Service, Inc. v. Council of City of New Orleans</u> , 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989)	18
<u>Perkins v. Northeastern Log Homes</u> , 808 S.W.2d 809 (Ky. 1991)	13
<u>Railroad Comm'n. of Texas v. Pullman</u> , 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)	12, 17
<u>Richey v. Sumoge</u> , 257 F.Supp. 32 (D.C. Ore. 1966)	19
<u>Scott v. Germano</u> , 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965)	19
<u>Smith v. Metropolitan Prop. & Liab. Ins.</u> , 629 F.2d 757 (2nd Cir. 1980)	19
<u>Strauss v. Drew</u> , 739 F.Supp. 1231, 1233 (N.D. Il. 1990)	12, 13, 18
<u>Volt Information Services v. Stanford University</u> , 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)	24
<u>White v. Husky Oil Co.</u> , 255 F.Supp. 239 (D.C. Mont. 1967)	19
<u>Wisconsin v. Constantineau</u> , 400 U.S. 433, 438-39, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971)	18

STATEMENT OF ISSUE PRESENTED

Whether the District Court properly abstained from exercising jurisdiction in an action filed by Appellant to confirm an arbitration award where there was an appeal pending before the Kentucky Court of Appeals and an action pending before the Fayette Circuit Court involving the same parties and important unresolved issues of state law.

Regional Healthcare, Inc. (hereinafter "ARH") to confirm an arbitration award in its favor against Hoyt Rish. The arbitration proceeding addressed the issue of alleged negligent design of ARH's hospital in Hazard, and the arbitrators found in favor of ARH.

Nearly a year prior to ARH's petition, and also prior to arbitration, ARH initiated an action in Fayette Circuit Court for a declaratory judgment ordering that the arbitration of its claim against Hoyt Rish be consolidated with a separate arbitration proceeding ARH had commenced against a construction manager. Hoyt Rish moved to dismiss, asserting that the arbitration was barred by the statute of limitations, Ky. Rev. Stat. Ann. Section 413.245 (hereinafter "K.R.S."). The Fayette Circuit Court, specifically finding that it had jurisdiction under the provisions of Kentucky's Arbitration statute, K.R.S. Section 417.045, concluded that ARH was not entitled to consolidate the arbitration proceedings. The Circuit Court declined to rule on Hoyt Rish's claim that the arbitration proceeding was barred by the applicable one year statute of limitations. The Circuit Court also declined to stay the arbitration. These decisions are now on appeal before

STATEMENT OF THE CASE

This appeal arises from an Order and Memorandum Opinion entered August 7, 1991 by the United States District Court for the Eastern District of Kentucky granting the motion of Respondent, The Beyt, Rish, Robbins Group, Architects (hereinafter "Beyt Rish") to abstain, and dismissing the action. The petition was filed by Appalachian Regional Healthcare, Inc. (hereinafter "ARH") to confirm an arbitration award in its favor against Beyt Rish. The arbitration proceeding addressed the issue of alleged negligent design of ARH's hospital in Hazard, and the arbitrators found in favor of ARH.

Nearly a year prior to ARH's petition, and also prior to arbitration, ARH initiated an action in Fayette Circuit Court for a declaratory judgment ordering that the arbitration of its claim against Beyt Rish be consolidated with a separate arbitration proceeding ARH had commenced against a construction manager. Beyt Rish moved to dismiss, asserting that the arbitration was barred by the statute of limitations, Ky. Rev. Stat. Ann. Section 413.245 (hereinafter "K.R.S."). The Fayette Circuit Court, specifically finding that it had jurisdiction under the provisions of Kentucky's Arbitration statute, K.R.S. Section 417.045, concluded that ARH was not entitled to consolidate the arbitration proceedings. The Circuit Court declined to rule on Beyt Rish's claim that the arbitration proceeding was barred by the applicable one year statute of limitations. The Circuit Court also declined to stay the arbitration. These decisions are now on appeal before

the Kentucky Court of Appeals. The issues pending in that appeal are:

Is the applicable statute of limitations for actions against licensed architects contained in K.R.S. Section 413.245 or K.R.S. Section 413.135? If the applicable statute is K.R.S. Section 413.135, what limitations period governs in light of the Kentucky Supreme Court's recent decision in Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (Ky. 1991) declaring the statute unconstitutional? If K.R.S. Section 413.245 applies, the Court is faced with an issue of first impression as to whether the "continuing treatment doctrine" asserted by ARH applies to architects and design professionals. And finally, did the circuit court err when it declined to stay the arbitration and rule on the limitations issue?

The appeal of these issues was filed December 5, 1990 and is currently pending before the Kentucky Court of Appeals.

As arbitration proceeded, Beyt Rish again requested that the claim asserted by ARH be dismissed as time-barred under K.R.S. Section 413.245. On February 16, 1991, the arbitrators, without specifying which statute was applicable, entered an award in favor of ARH. Following a request by Beyt Rish pursuant to K.R.S. Section 417.130, the arbitrators modified the award to reflect a claim-by-claim itemization of the award.

On March 20, 1991, ARH initiated this action in United States District Court to have the award confirmed, pursuant to 9 U.S.C. § 9. On May 20, 1991, Beyt Rish filed a petition to vacate the arbitration award in the Fayette Circuit Court pursuant to K.R.S. Section 417.160 and a motion in United States District Court pursuant to 9 U.S.C. Section 10. Beyt Rish maintained in its petition and motion that the Kentucky arbitration statute applied,

but as a precaution sought to protect its rights under either statute.

The Fayette Circuit Court, learning of the intention of Beyt Rish to file a motion to abstain in federal court, declined to dismiss and instead abated the proceedings pending a ruling on the abstention motion. On August 7, 1991, the District Court sustained the motion to abstain filed by Beyt Rish and further dismissed ARH's petition. The District Court abstained on the ground that important and complex issues concerning the limitations policy of Kentucky are presented by this action which will affect other parties subject to Kentucky law. The District Court concluded these issues should be addressed by the pending actions in the Kentucky courts. ARH appealed.

STATEMENT OF FACTS

This appeal arises out of a construction dispute from which Appellant, Appalachian Regional Healthcare, Inc. ("ARH"), obtained a \$623,319.95 arbitration award. ARH initiated this action in federal district court to confirm the award, asserting that the court had authority to confirm by virtue of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"). Appellee, The Beyt, Rish, Robbins Group, Architects, ("Beyt Rish"), contends the FAA is not applicable because the parties have twice chosen to apply the arbitration laws of Kentucky to their dispute - once when the contract was executed through a choice of law clause and the second time in prior state court litigation that preceded the arbitration. Beyt Rish contends the Kentucky Uniform Arbitration Act, K.R.S. § 417.045, et seq. ("K.R.S. 417" or the "KAA") applies to this dispute.

ARH owns and operates a hospital facility ("Hospital") in Hazard, Kentucky. Beyt Rish is a Louisiana Professional Architect Corporation. On August 3, 1983, the parties executed a written contract ("Contract") whereby Beyt Rish agreed to render architectural services in connection with the construction of the hospital (R.1, Ex. A: Agreement Between Owner and Architect). ARH entered into a separate contract on February 21, 1985, with McCarthy Brothers Company ("McCarthy") to secure McCarthy's services as construction manager of the Hazard project. Construction of the Hospital began in 1985 and was substantially completed by April 1987 when ARH occupied the building.

In November 1986, cracks were detected at exterior masonry walls near the Hospital's southeast corner, where the boiler room is located. The cause was not specifically determined but settlement of the structure was mentioned as a possibility. The wall was repaired in April 1987. During the following summer, the masonry walls and concrete floor again showed signs of stress. As cracks appeared and gradually increased in size and number, it became apparent that the southeast corner of the boilerroom was settling. From 1987 through 1989, causes of settlement were investigated and the parties exchanged correspondence expressing their views as to responsibility for the settlement (R.5, Ex's. B, C, D, E, F, and G). ARH laid the blame with various parties, including Beyt Rish. Throughout the period, Beyt Rish and its consulting structural engineer maintained that the settlement was not caused by defective foundation design. While Beyt Rish conveyed to ARH its willingness to assist ARH with resolution of the problem, Beyt Rish also emphasized that their services should be compensable since they were not at fault.

Despite the written exchange of views and a meeting of all concerned on March 9, 1989, the parties were unable to agree on the cause for settlement. Several suggestions were made to ARH for remedial work, but ARH took no corrective action. On March 29, 1990, pursuant to Article 8 of the Contract, ARH demanded arbitration (R.1, Ex A: Agreement Between Owner and Architect). Article 10 of the Contract provided that, "This Agreement shall be governed by the law of the State of Kentucky." (R.1, Ex. A: Agreement Between Owner and Architect).

Accordingly, ARH petitioned the Fayette Circuit Court for a declaratory judgment ordering that the arbitration with Beyt Rish be consolidated with a separate arbitration proceeding that ARH had initiated against McCarthy.

ARH subsequently filed a motion for summary judgment and Beyt Rish and McCarthy moved to dismiss. Beyt Rish relied on three grounds for its motion to dismiss: (1) the arbitration was barred by the applicable statute of limitations, K.R.S. Section 417.245, (2) the petition failed to state a claim on which relief could be granted, and (3) the trial court did not have jurisdiction to render a declaratory judgment under K.R.S. Section 418, et seq. because there was no actual controversy. (R. 13: Memorandum in Support of Respondent's Motion to Abstain, p. 4).

When briefing these motions all parties acknowledged that ARH's demands for arbitration were made in reliance upon Kentucky's Uniform Arbitration Act, K.R.S. 417.

(1) ARH's Memorandum in Support of its Motion for Declaratory Judgment, Summary Judgment, Mandatory Restraining Order and Motion to Advance, served on June 8, 1990, specifically referred to the Uniform Act. At page 11, ARH stated:

This case is brought pursuant to CR 65, K.R.S. Chapter 418 and by virtue of K.R.S. Chapter 417, Kentucky's Arbitration Statute and 9 USC § 2, the Federal Arbitration Act.

Earlier in ARH's Memorandum, at page 2, ARH's counsel referred to the action being brought, inter alia, "by virtue of K.R.S. Chapter 417"

(2) Beyt Rish's Memorandum in Support of Motion to Dismiss and In Opposition to ARH's Motion for Summary Judgment, served on June 27, 1990, specifically referred to the Uniform Act. On pages 4 and 5 of its Memorandum, Beyt Rish noted the Contract's choice of law provision which selected Kentucky law as the applicable law. Further, Beyt Rish noted that K.R.S. 417, the applicable Kentucky law, mandated the enforcement of arbitration agreements such as the parties' Contract.

(3) McCarthy's Motion to Dismiss and Response to Plaintiff's Motion For A Declaratory Judgment, Summary Judgment, Mandatory Restraining Order, and To Advance, served on July 12, 1990, also referred to K.R.S. Chapter 417 as being the governing applicable law. On pages 6-8 of its Motion, McCarthy set out, at length, provisions of the Uniform Act and reasons for its governance.

(R. 13: Memorandum in Support of Respondent's Motion to Abstain, p. 5)

In replying to the Beyt Rish and McCarthy briefs, ARH did not renounce the relevance of K.R.S. 417. Thus in the prior litigation, unlike the situation now facing this Court, the application of K.R.S. 417 was acknowledged, not disputed.

The motions for summary judgment and to dismiss were heard by Hon. George Barker of the Fayette Circuit Court on July 18, 1990. Having read the record, Judge Barker stated:

It occurs to me as against the argument of the Defendants that the court has no jurisdiction, and probably there is a controversy, justiciable controversy under

indicate the declaratory judgment act, but in addition
to that, the court would have jurisdiction
initiated under 417.045

On August 29, 1990, the Fayette Circuit Court filed its formal
Opinion and Order and, on page two, stated:

The Court also finds that it would have
jurisdiction of the issues presented by
(R. 1: Request for Declaratory Judgment) virtue of K.R.S. 417.045, which is the
Kentucky version of the Uniform Arbitration
Act.

This Fayette Circuit Court action, initially filed nearly a year
prior to the action filed in Federal District Court, and filed by
the party now contesting the applicability of the Kentucky
Arbitration Act, is currently pending before the Kentucky Court of
Appeals.

The Circuit Court determined that ARH was not entitled to
consolidate the arbitrations under its agreements, and thus ARH
and Beyt Rish submitted their dispute to arbitration. The
arbitration hearing occurred over a period of fifteen days from
September through December of 1990. Throughout these proceedings,
the arbitrators manifested unusual hostility toward Beyt Rish as
well as a blatant disregard for the evidence and the law.

On February 16, 1991, the arbitrators entered an award in
favor of ARH (R. 1, Ex. C: Arbitration Award). Pursuant to
K.R.S. Section 417.130, Beyt Rish filed a Request for Change in
Award with the American Arbitration Association on March 11, 1991.
(R. 5: Motion of Respondent to Vacate Arbitration Award, Ex. K)
In response, ARH asserted for the first time that the Kentucky
Uniform Act did not apply. (R. 13: Memorandum in Support of
Motion to Abstain, p. 7) The arbitrators modified their award to

indicate a claim-by-claim itemization of the total award. ARH initiated its action in the United States District Court for the Eastern District of Kentucky, Lexington Division, to have the arbitration award confirmed, although the arbitrator's reply to the Request for Change was not received until April 1, 1991.

(R.1: Petition to Confirm Arbitration Award; Ex. C)

On May 3, 1991, Beyt Rish filed its Motion to Vacate the Arbitration Award with the Federal District Court. (R.5: Motion of Respondent to Vacate Arbitration on Award) Beyt Rish also asked the Fayette Circuit Court to vacate the award. (R. 13: Memorandum in Support of Motion to Abstain, p. 7) ARH moved to dismiss Beyt Rish's state court petition or to have the proceedings held in abeyance pending resolution of the Federal District Court action. At a hearing on June 21, 1991, Judge Robert Spragens of the Fayette Circuit Court ruled that Beyt Rish's petition stated a cause of action and overruled ARH's motion to dismiss. (R. 13: Memorandum in Support of Motion to Abstain, p. 8) Judge Spragens further ruled that this case should be abated "until further order of this Court." (R. 13: Memorandum in Support of Motion to Abstain, p. 8)

The parties then focused their attention on the Federal District Court case. Beyt Rish asked the Federal District Court to abstain from deciding the competing motions to vacate and affirm on the grounds that issues of state law made the Kentucky state courts the more appropriate forum for deciding the validity of the award. (R. 12: Motion of Respondent to Abstain from further proceedings in this case.)

The Federal District Court filed an Order and Memorandum Opinion on August 9, 1991 (R. 19 and 20: Memorandum Opinion and Order, respectively). The District Court found that the case presented an important issue of state law and that a decision "will affect the rights of other parties subject to Kentucky law" (R. 19: Memorandum Opinion at p. 8). The Court sustained a motion to abstain, passed the motions to vacate and affirm as moot, and dismissed the federal case from the active docket. (R. 20: Order). From this Order, ARH appeals.

I. ABSTENTION OR STAY OF THE FEDERAL ACTION WAS PROPER UNDER RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT

Abstention is a judge-made doctrine, founded in principles of equitable restraint, which precludes a federal court from exercising jurisdiction. Federalism and comity principles require a federal court to abstain from exercising jurisdiction in circumstances that would unduly interfere with state activities and thereby disrupt the balance between the federal and state systems. *Stinson v. Drew*, 739 F.Supp. 1231, 1233 (N.D. Ill. 1990). The principle was initially enunciated in *Railroad Comm'n. of Miss. v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), wherein the Supreme Court recognized that concerns of judicial economy, as well as comity, indicated that a federal court "exercising wise discretion" should avoid deciding a federal question where the case could be disposed of on state law grounds.

ARGUMENT

The District Court properly abstained from exercising federal jurisdiction because 1) there are two pending state court actions involving the same issues; 2) the principles underlying Burford abstention support abstention by a federal court where important and unsettled state law issues are at stake; and 3) wise judicial administration mandates a stay or dismissal where maintaining federal jurisdiction would result in condoned forum-shopping and unnecessarily duplicative litigation. For these reasons, more fully explained below, the District Court's decision should be affirmed.

I. ABSTENTION OR STAY OF THE FEDERAL ACTION WAS PROPER UNDER RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT

Abstention is a judge-made doctrine, founded in principles of equitable restraint, which precludes a federal court from exercising jurisdiction. Federalism and comity principles require a federal court to abstain from exercising jurisdiction in circumstances that would unduly interfere with state activities and thereby disrupt the balance between the federal and state system. Strauss v. Drew, 739 F.Supp. 1231, 1233 (N.D. Ill. 1990). The principle was initially enunciated in Railroad Comm'n. of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), wherein the Supreme Court recognized that concerns of judicial economy, as well as comity, indicated that a federal court "exercising wise discretion" should avoid deciding a federal question where the case could be disposed of on state law grounds.

Since Pullman, various other theories of abstention by a federal court have gained recognition, including doctrines which (1) preclude federal courts from exercising their equitable jurisdiction to enjoin ongoing state prosecutions (Younger Abstention); (2) avoid needless conflict with a state's policy and affairs (Burford Abstention); and (3) avoid duplicative litigation (Colorado River Abstention) Strauss, 739 F.Supp. at 1234 (citing C.A. Wright, Law of Federal Courts Sec. 52 at 303).

The Federal District Court below concluded that this case presents a "difficult question of state law . . . which should be decided by Kentucky state courts." (R. 19: Memorandum Opinion at p. 8). While there is a dispute between the parties as to whether the Kentucky Arbitration Act or the FAA apply, the "threshold matter", held the Court, is the problem of the applicable statute of limitations. The issue involved concerns whether the demand for arbitration was made within the applicable statute of limitations period.

The statute upon which ARH relies, K.R.S. Section 413.135, has recently been declared unconstitutional in Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (Ky. 1991). The Kentucky Supreme Court found that this statute of repose was constitutionally defective as special legislation violating Sections 14, 54 and 241 of the Kentucky Constitution. Thus, as stated by Judge Unthank in his Opinion below, "the status of Kentucky law concerning this issue is unclear in the extreme at the current time." (R. 19: Memorandum Opinion at p. 8).

The Court below properly abstained from exercising jurisdiction in this case due to concerns of disrupting state policy, principles of comity, wise judicial administration and avoidance of duplicative litigation. These grounds for the District Court's decision are well established as Colorado River Abstention and Burford Abstention and support the District Court's exercise of discretion to abstain.

A. Burford Abstention Doctrine

Burford Abstention arises from Burford v. Sun Oil Company, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), which held that where issues of important state law and policy are uncertain, "a sound respect for the independence of state action requires the federal equity court to stay its hand." Burford, 319 U.S. at 334, 63 S.Ct. at 87, L.Ed. at 1435. This doctrine is a consequence of the federalist principle of comity between state and federal sovereignties. Simply stated, this brand of abstention permits federal courts to exercise their discretion to refrain from policymaking and enforcement efforts in complex areas which are primarily of state concern and prerogative. Canady v. Koch, 608 F.Supp. 1460, 1468 (D.C. N.Y. 1985).

[Burford a]bstention is . . . appropriate where there have been presented difficult questions of state law bearing on problems of substantial import whose importance transcends the result in the case then at bar. (Citations omitted). In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern Burford v.

Sun Oil Co., 319 U.S. 315 [63 S.Ct. 1098, 87 L.Ed. 1424] (1943)

Colorado River Water Cons. Dist v. United States, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483, 496 (1976).

Particularly in cases where a ruling would have a wide ranging effect on what are essentially state and local affairs, federal judiciary intervention would be disruptive to harmonious federalism. See Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594, 88 S.Ct. 1753, 1754, 20 L.Ed.2d 835 (1968).

As noted by the District Court, the Perkins decision has left the statute of limitations issue a complex and difficult question of law. It is vitally important that each state tailor policies protecting its constituents against stale claims. Any judicially constructed remedy will affect the rights of all parties similarly situated who are subject to Kentucky law. A federal court's determination of such an important limitations policy would be disruptive to the state effort to fashion a coherent policy with respect to this area of the law. Colorado River, 424 U.S. at 815, 96 S.Ct. at 1244, 47 L.Ed.2d at 497.

The United States District Court for the Western District of Kentucky also recognized that the limitations issue was one to be considered by the state court. In Perkins, the Federal District Court certified the issue to the Kentucky Supreme Court for determination. Likewise, the District Court here was correct when it abstained and allowed the Kentucky state courts to go forward and design their remedy to the problems concerning the limitations

policy created when K.R.S. Section 413.135 was declared unconstitutional.

However, the demise of K.R.S. Section 413.135 is not the only complex issue of state law facing the federal court. Beyt Rish asked the Fayette Circuit Court to decide whether K.R.S. Section 413.245, the one-year malpractice statute applicable to architects, or the seven-year statute of repose, K.R.S. Section 413.135 governs. The Fayette Circuit Court declined to decide, leaving the decision to the arbitrators. The arbitrators refused to recognize K.R.S. 413.245, stating:

The demand for arbitration was made within a reasonable time after the alleged defects were noticed. Therefore, the demand for arbitration was made within the applicable statute of limitations.

(R. 1: Ex. C: Award of Arbitrators) Since the arbitrators disregarded K.R.S. Section 413.245, and made no effort to discern the law, the statute of limitations issue must be judicially decided.

During the Fayette Circuit Court litigation, after being confronted with the argument that K.R.S. Section 413.135 was a statute of repose, not of limitation, ARH began to argue that even if K.R.S. Section 413.245 applies, the "continuing treatment doctrine" tolls the running of the statute. This doctrine is an estoppel theory that suspends the statute from running when a doctor or lawyer fraudulently assures a patient or client that there is no reason to file suit. This doctrine has been applied to lawyers and doctors in Kentucky, but never to architects or engineers. See, e.g., Gill v. Warren, 751 S.W.2d 33 (Ky. 1988)

("continuous representation rule" applies to legal malpractice actions). Thus, the question of whether this doctrine should apply to Beyt Rish would be an issue of first impression for Kentucky courts. There is authority in other jurisdictions indicating that there are state policy reasons for not applying this theory to design professionals or the construction industry in general. See, e.g., City of Birmingham v. Cochrane Roofing, 547 So.2d 1159, 1168 (Ala. 1989) (public policy concerns prevent court from applying continuing treatment doctrine to architects and engineers). These considerations call for a policy determination of state law and should therefore come from the state court system.

This decision may be outcome determinative in this case, but it will also affect all parties subject to Kentucky law. A decision may extend or cut off possible suits by a multitude of parties subject to Kentucky law. Furthermore, while a state law decision by a federal court would certainly command authority, only the state court system may decide the issue once and for all. As noted in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), there is no reason for a federal court to waste its valuable time forecasting state law only to be contradicted by a state supreme court in the future. Any decision by the District Court on state law issues could be subsequently disregarded or questioned by a Kentucky court. Only by adjudicating this case in the state court system may the question of the state limitations policy be answered. Therefore, federal courts should avoid such needless potential conflicts.

See J.V. Peters v. Hazardous Waste Fac. App. Bd., 596 F.Supp. 1556 (S.D. Ohio E.D. 1974) (abstention is an appropriate means of avoiding needless conflict in the federal-state relationship and to avoid making tentative decisions on issues of state law.)

Thus, it is clear from the issues at stake that the District Court properly decided that Burford abstention is mandated in this case. It is apparent that the questions of state law bear on policy issues of substantial public import and that their importance transcend the result in this case. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 525, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959); see also, Wisconsin v. Constantineau, 400 U.S. 433, 438-39, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971) (abstention is proper where state issues are uncertain and ambiguous).

ARH argues that Burford abstention is narrowly defined as a doctrine protecting only state administrative agencies from interference by a federal court. See e.g. New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). While Beyt Rish acknowledges that the Burford doctrine is often applied to administrative or regulated areas of the law, the theory is not confined to such a constrained application.

As in Strauss, 739 F.Supp. at 1235, where the plaintiffs argued that Burford was inapplicable because the law in question did not constitute an extensive regulatory system, the Northern District of Illinois noted this argument is "irrelevant". Burford does not require that a complex regulatory scheme be at issue.

Rather, Burford stands for the proposition that the state court is the more appropriate body to review a state law implicating important state concerns. Id.

Contrary to the argument of ARH, Burford is not applied exclusively in the area of administrative agencies or regulatory schemes; it has also been applied in cases where important, unclear state law issues are in question. See e.g., Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965) (state has important interest in its reapportionment law); Smith v. Metropolitan Prop. & Liab. Ins., 629 F.2d 757 (2nd Cir. 1980) (abstention proper where validity of Connecticut law of auto policy uninsured motorist clause was uncertain and state had a vital interest in the doctrinal integrity of the law); Naylor v. Case & McGrath, Inc., 585 F.2d 557 (2nd Cir. 1978) (abstention proper where state law questions were difficult and bore importantly on new and recently amended Unfair Trade Practices Act); White v. Husky Oil Co., 266 F.Supp. 239 (D.C. Mont. 1967) (personal injury state law issues decided in state court); Richey v. Sumoge, 257 F.Supp. 32 (D.C. Ore. 1966) (federal court stayed action to afford defendant opportunity to obtain determination of legality of service of process under Oregon Declaratory Judgment Act from state court); AFL Motors, Inc. v. Chrysler Motors Corp., 183 F.Supp. 56 (E.D. Wis. 1960) (abstention ordered in diversity case where state law question was difficult). The key to Burford abstention is an overriding state interest in the subject matter. Kelly v. Lopeman, 680 F.Supp. 1101, 1107 (S.D. Ohio 1987). While this state interest is often demonstrated by a complex state

regulatory scheme, it is not so narrowly defined to preclude abstention in the absence of a regulatory scheme.

Three factors indicate when Burford abstention should be exercised. Corcoran v. Ardra Ins. Co., Ltd., 657 F.Supp. 1223, 1230 (S.D. N.Y. 1987). One factor is the complexity and uncertainty of state law relevant to the dispute. Id. There can be no question that the Kentucky statute of limitations issue is unclear. "[U]nclear state law . . . is a compelling factor in favor of abstention" Id. (citations omitted).

The second factor which must be considered is the impact the federal court's decision would have on state policy. Id. Undoubtedly, a federal decision concerning the statute of limitations recently declared unconstitutional would impact all claimants under Kentucky law. Further, any decision by the federal court regarding the continuing treatment doctrine would formulate state policy on an issue the state courts have not yet had the opportunity to address. Because other jurisdictions have determined that this doctrine should not be applicable to the construction industry, this issue is not easily resolved. If the state courts decide these issues in a way contradicting the federal court decision, this federal court decision would only serve to confuse litigants subject to Kentucky law. Thus, the impact on Kentucky limitations policies would be substantial.

The third factor is the significance of the state's interest in the subject matter underlying the litigation. Kentucky's interest in the outcome of this litigation is strong. Each state carefully guards its constituents against the threat of stale

claims. The states determine and develop policies for protecting their citizens as well as policies for affording their claimants ample opportunity to assert causes of action against potential defendants. These decisions are within the province of the state court system and an attempt by a federal court to interpret and formulate these policies would cause needless disruption within the state. These considerations favor abstention and emphasize the nation's interest in allowing states and localities to develop and enforce their own policies, especially in areas traditionally relegated to the province of the state. Id.

B. Colorado River Abstention

The Supreme Court in Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), acknowledged the three established abstention theories (Younger, Pullman and Burford), and held that abstention is also proper in a fourth category of cases. This "Colorado River Doctrine" governs in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. Colorado River, 424 U.S. at 817, 96 S.Ct. at 1246, 47 L.Ed.2d at 498. The principles underlying this doctrine rest on consideration of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Id. (citations omitted). While, as ARH noted, the Colorado River decision states that the federal courts have an "unflagging obligation" to exercise the jurisdiction given them, there are situations in which a federal court must abstain. Id. To determine whether to abstain, the District Court must exercise

its discretion under the relevant standard prescribed by the Supreme Court in Colorado River. Moses H. Cone Hosp. v. Mercury Constr., 460 U.S. 1, 19, 103 S.Ct. 927, 74 L.Ed.2d 765, 782 (1983). The relevant standard of review is Colorado River's "exceptional-circumstances test," as elucidated by the following factors: (1) the inconvenience of the federal forum; (2) the desirability of avoiding piecemeal litigation; (3) the order in which jurisdiction was obtained; (4) the identity of issues in the two forums; and (5) the existence of a federal policy militating in favor or against abstention. Colorado River at 424 U.S. at 818, 96 S.Ct. at 1247, 47 L.Ed. at 499.

Beyt Rish acknowledges that there is no inconvenience caused by litigating in federal court. Both the Fayette Circuit Court action and the federal action are in Lexington, Kentucky. However, the second factor weighs heavily in favor of abstention. Piecemeal litigation will undoubtedly result if the federal action proceeds on the motions to confirm and vacate the awards and the appeal pending at the Kentucky Court of Appeals proceeds simultaneously. Conceivably the federal court could confirm an arbitration award that the Kentucky Court of Appeals determines is time-barred.

There exists an identity of parties and issues between the two forums. Ultimately, both forums will have to decide which statute of limitations applies; and, if K.R.S. Section 413.135 applies, the federal and state courts will both be forced to structure a new limitations policy in light of Perkins. With no guidance from the state courts, the federal court would be

substituting its judgment in fashioning a policy inherently within the province of the state. Moreover, conflicting decisions undermine the state's effort to construct a cohesive limitations policy where Perkins left the matter uncertain. There is a federal comity policy militating in favor of a federal stay, in that state courts should decide wholly state law issues.

Middlesex Ethics Comm'n. v. Garden State Bar Assn., 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116, 124 (1982).

Lastly, ARH's contention that the federal court obtained jurisdiction first ignores the case initially filed by ARH nearly a year prior to the federal court action and now pending before the Kentucky Court of Appeals. Clearly, the state court had jurisdiction first and has progressed further than the federal proceeding. The state court action has proceeded to Kentucky Court of Appeals, while the federal action was extensively briefed with abstention memoranda. The District Court never reached the threshold state limitations issues and should therefore stay its hand and let the state courts complete their undertaking.

Permitting a plaintiff to initiate the federal process while state proceedings are ongoing encourages undue forum shopping based upon last minute assessments of the federal and state proceedings, and frustrates this concern for judicial economy. Furthermore, if the state proceedings turn on questions of federal law, plaintiff may ultimately appeal to the United States Supreme Court. Thus, requiring a plaintiff under the circumstances presented to remain in state court preserves both judicial resources and plaintiff's right to present federal claims in a federal forum.

Federal Exp. Corp. v. Tennessee Public Service Com'n., 738 F.Supp. 1140, 1144 (M.D. Tenn. 1990).

ARH must have at one time believed the state courts would afford it an adequate remedy when it filed the declaratory judgment action in Fayette Circuit Court. However, frustrated by its failure to get the relief it wanted from the Fayette Circuit Court, ARH has changed its mind and now chooses to pursue its objectives in the federal court system. The District Court decision reflects that this type of duplicative litigation and forum shopping must be circumscribed and properly abstained to allow the state court to proceed.

II. THERE ARE NO FEDERAL LAW ISSUES TO BE DECIDED BY
A FEDERAL COURT

ARH cites numerous cases and authority for the proposition that "procedural" issues should be left to the discretion of the arbitrator and that the Sixth Circuit applies a very narrow standard of review to arbitration awards. However, these cases do not address the issues on appeal. The issue presented is whether the District Court properly abstained from exercising jurisdiction in a case containing important and complex issues of state law. The standard of review of arbitration awards was not at issue in the District Court's Memorandum Opinion, nor is it an issue here.

There are no federal law issues present in this case. More specifically, no issues arise from the FAA. Although ARH contended in the Fayette Circuit Court action that the FAA applied, ARH acknowledged that the Contract was also subject to the Kentucky Act. Beyt Rish agreed that the Kentucky Act applied but disputed that the FAA applied. ARH's new contention that only the FAA applies disregards the Contract's choice of law clause,

which provides that "This Agreement shall be governed by the law of the State of Kentucky." Any argument that the FAA preempts the Kentucky Arbitration Act is without merit. The United States Supreme Court has held that the FAA does not preclude the application of state arbitration law, chosen by the parties, to a construction contract that would otherwise be subject to the FAA. Volt Information Services v. Stanford University, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

[I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself. Indeed such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the [FAA] is a matter of consent not coercion, and parties are generally free to structure their arbitration agreements as they see fit.

* * * * *

Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward.

Id. Just as the parties in Volt exercised their choice of state law, ARH and Beyt Rish chose to apply Kentucky law to their Contract. Their choice preempts the FAA.

ARH has argued that under Fite & Warmath Const. Co., Inc. v. MYS Corp, 559 S.W.2d 729 (Ky. 1977), the FAA applies to arbitration agreements evidencing a transaction in interstate commerce. The primary holding in Fite & Warmath was that state courts could enforce arbitration agreements subject to the FAA.

Fite & Warmath was decided prior to Volt at a time when Kentucky common law was offensive to the spirit of the FAA. Kentucky common law permitted arbitration agreements to be abrogated at will and such agreements were deemed unenforceable. See, e.g., Jones v. Jones, 116 S.W.2d 503 (Ky. 1929) (arbitration agreement is revocable prior to final award). Volt affirms the principle that the FAA preempts laws that are offensive to the Act. However, current Kentucky law and the Kentucky Arbitration Act closely parallel the purposes of the federal legislation. Under this set of circumstances, Volt would uphold the decision of the parties to the Contract and mandates that the contract be governed by Kentucky law. Such a result would not violate Volt because current Kentucky common law supports the enforceability of arbitration agreements. See, e.g., Kodak Mining Co. v. Carrs Fork Corp., 669 S.W.2d 917 (Ky. 1984).

However, even if the FAA did apply to these parties, ARH at one time believed Kentucky's state courts could adequately decide state law issues under the FAA. ARH initially chose the state court as its forum. Apparently unsatisfied with the results, ARH now seeks relief from the federal court. Interestingly, Fite & Warmath, the authority cited by ARH, was a state court action construing state claims under the federal act. The state court systems are clearly equipped to handle this case involving unsettled state issues even if the FAA applies.

Duplicative litigation results in inconsistent outcomes and wastes valuable judicial resources. When the District Court deferred to the Kentucky Supreme Court in Perkins, the District

Court acknowledged the important state interests at stake in development of a cohesive state limitations policy. The District Court in this case likewise observed the importance of allowing one of two pending state court actions to resolve these state law issues. The District Court properly invoked abstention to dismiss the Federal action because of a pending state action. Such dismissal will avoid duplicative litigation, promote sound and economical allocation of judicial resources, and remove any need for a federal court to resolve issues of state law. Entex Industries v. Warner Communications, 487 F. Supp. 46, 48 (C.D. Cal. 1980).

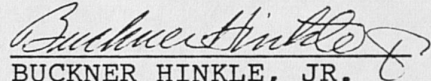
CONCLUSION

The District Court exercised "wise [judicial] discretion" to abstain from jurisdiction of this matter where important state issues of law and policy are at stake. The principles underlying Burford abstention support the District Court's decision where the state law issues are unsettled and uncertain. The outcome of this litigation transcends the importance of this case and will affect future litigants subject to Kentucky law.

The District Court also properly recognized that there are two pending state court actions, one of which was initiated prior to the federal court action by the same party that initiated the federal court action. One of the Fayette Circuit Court actions has proceeded to the Kentucky Court of Appeals. Wise judicial administration under the Colorado River doctrine mandates a stay or dismissal where maintaining federal jurisdiction would result in forum shopping and duplicative litigation. Thus, in the

absence of any federal law issues at stake, the decision of the District Court to abstain and dismiss this action should be affirmed.

Respectfully Submitted,



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