

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

AMERICAN NATIONAL INSURANCE §  
COMPANY; AMERICAN NATIONAL §  
INVESTMENT ACCOUNTS, INC.; §  
SM&R INVESTMENTS, INC.; §  
AMERICAN NATIONAL PROPERTY §  
AND CASUALTY COMPANY; §  
STANDARD LIFE AND ACCIDENT §  
INSURANCE COMPANY; §  
FARM FAMILY LIFE INSURANCE §  
COMPANY; FARM FAMILY §  
CASUALTY INSURANCE COMPANY; §  
and NATIONAL WESTERN LIFE §  
INSURANCE COMPANY §

Plaintiffs

v.

ARTHUR ANDERSEN, L.L.P., §  
D. STEPHEN GODDARD, JR. ;DAVID §  
DUNCAN; KENNETH L. LAY; §  
JEFFREY K. SKILLING; ANDREW S. §  
FASTOW; RICHARD A. CAUSEY; §  
RICHARD B. BUY; MICHAEL J. §  
KOPPER; ROBERT K. §  
JAEDICKE; RONNIE C. CHAN; §  
JOE C. FOY; JOHN WAKEMAN; §  
WENDY L. GRAMM; BRUCE G. §  
WILSON; JOHN MENDELSON; §  
PAULO V. FERRAZ PEREIRA; §  
ROBERT A. BELFER; NORMAN P. §  
BLAKE, JR.; JOHN H. DUNCAN; §  
CHARLES A. LEMAISTRE; FRANK §  
SAVAGE; HERBERT S. WINOKUR, JR.; §  
KEN L. HARRISON; REBECCA §  
MARK-JUSBASCHE; JEROME J. §  
MEYER; JOHN A. URQUHART; and §  
CHARLES E. WALKER §

Defendants

United States Courts  
Southern District of Texas  
FILED  
8 MAR 29 2002  
Michael M. Mulby, Clerk

CIVIL ACTION NO. G-02-0084  
CONDOLIDATED WITH H-01-3624

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY INJUNCTION AND  
REQUEST FOR HEARING

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Plaintiffs, American National Insurance Company, et al. (“American National”), subject to and without waiving their Motion to Remand, move for a temporary injunction against Defendant Arthur Andersen (“Andersen”) and request a hearing on their motion. Immediate temporary injunctive relief is necessary to prevent imminent and irreversible harm to American National.

### FACTS

American National brought state law claims against Arthur Andersen, L.L.P., and certain individual Defendants in the 56<sup>th</sup> Judicial District Court of Galveston County, Texas. The case was removed to the Galveston Division of the Southern District of Texas and thereafter transferred to the Houston Division for consolidation with the *Newby* cases. American National timely filed a motion to remand, which is still pending.

Recent, well-publicized events concerning Arthur Andersen establish that Andersen’s conduct, both ongoing and contemplated, threaten serious and irreparable harm to American National. There is little question that Andersen’s long-term survival is in question – in fact, there seems to little dispute that Andersen’s survival as an independent accounting firm is highly unlikely. *See, e.g., Exhibit A* (news article March 20, 2002: “Andersen Could Fold Before May Trial”); *Exhibit B* (news article March 20, 2002: “Andersen to Merge, Creating ‘Big Four’”).<sup>1</sup>

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<sup>1</sup> American National asks the Court to take judicial notice of the new articles attached as Exhibits to this Motion.

Recent revelations demonstrate that Andersen is in the process of “parting ways” with its overseas affiliates. *See Exhibit B; Exhibit C* (news article March 21, 2002: “Andersen Units in Hong Kong, China Join Pricewaterhouse Coopers); *Exhibit D* (news article March 25, 2002: “Andersen and KPMG End Australian Merger Talks). It has been widely reported that Andersen’s overseas affiliates are, and have been, in merger talks with other accounting firms. *See, e.g., Exhibit B* (citing Wall Street Journal report of possible Asia Pacific affiliate merger with KPMG); *Exhibit C* (reporting that Arthur Andersen affiliates in Hong Kong and China said they would merge with Pricewaterhouse Coopers); *Exhibit D* (reporting on merger talks between Andersen’s Australian affiliate and KPMG). Andersen, the American accounting firm, moreover, may be attempting to change its contractual relationship with these subsidiaries/affiliates as a means of positioning assets outside of this Court’s jurisdiction. *See Exhibit E* (news article: “Arthur Andersen Noteholders Organize”). Such conduct may seriously and detrimentally impact Andersen’s ability to satisfy any future award entered by the Court. Assets released, assigned or otherwise transferred to overseas affiliates, including goodwill, are outside the jurisdictional reach of the Court for the purpose of post-judgment collection. Without injunctive relief to maintain these assets within the jurisdiction of this Court, American National is threatened with acute harmed.

It is also undisputed that many of Andersen’s partners are leaving the accounting firm. There are several reasons for this exodus. As Eugene Frauenheim, managing partner of

Andersen's Houston office was quoted as saying "our clients are nervous, [our] people are nervous..." *Exhibit A* at 1. The loss of clients is one reason for downsizing. Further, Robert Bricker of the Weatherhead School of Management at Case Western University noted that Andersen partners at local offices already are talking with rival firms about wholesale defections of auditors and the clients they serve. *Id.* at 2.

Such defections may constitute a rape of Andersen's goodwill and client base – important assets of Andersen upon which potential recovery in this action may depend. As a rule, Andersen partners have non-compete agreements with Andersen, L.L.P. *See, e.g., Exhibit F* at 3 (news article March 16, 2002: The Washington Post reporting on developments concerning Andersen) The contracts with non-compete provisions comprise a valuable asset of the accounting firm. By releasing partners from obligations under the non-compete provisions, the accounting firm would transfer valuable firm assets to these individuals. Once the individual partners are released from their obligations under the non-compete provisions, however, it would be impossible for the Court to "undo" these releases and marshal the assets back into the firm to satisfy any judgment. The only means available to prevent such dissipation of the accounting firm's assets to individual partners is an injunction preventing Andersen from releasing its partners from their non-compete obligations.

American National does not seek a broad injunction which would have the effect of interfering with Andersen's normal business practices. Rather, the injunctive relief would

only make such potentially harmful conduct subject to Court review and have the effect of protecting the Court's jurisdiction.

#### LEGAL STANDARD FOR GRANTING INJUNCTIVE RELIEF

A temporary restraining order or preliminary injunction is an extraordinary equitable remedy that may be granted only if the plaintiff establishes: (1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damages that the injunction might cause defendants; and (4) that the injunction will not disserve the public trust. *Newby v. Enron Corp.*, 2002 U.S Dist. Lexis 486 at \*54 (Memorandum Opinion and Order, January 8, 2002) (citing *Sugar Busters, Inc. v. Brennan*, 177 F.3d 258, 265 (5<sup>th</sup> Cir. 1999)); *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5<sup>th</sup> Cir. 1974).

Courts have allowed pre-judgment asset-freezing injunctions when presented with allegations and evidence showing that the defendants were concealing assets, were transferring them so as to place them out of the reach of post-judgment collection, or were dissipating the assets. *Id.* at \*54-55. As noted by this Court, such cases included *Rahman v. Oncology Associates, P.C.*, 198 F.3d 489, 493 (4<sup>th</sup> Cir. 1999) (uncontradicted allegations that defendants had transferred assets to Caribbean Island and were selling main assets of the corporation); *Deckert v. Independence Shares, Corp.*, 311 U.S. 282, 291 (1940) (defendant insolvent and giving preference to foreign creditors seeking payment); *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F.Supp. 669 (S.D. Fla. 1988) (defendants attempting

to transfer assets of national airline to illegitimate government of Panama, putting assets outside the reach of the court); *Republic of the Philippines v. Marcos*, 862 F.2d 11355 (9<sup>th</sup> Cir. 1988) (upholding asset freeze based on allegations that defendants had intentionally transferred personal assets and had used false identities to transfer assets to a Liechtenstein trust, using Swiss banks, for their benefit).

Injunctive relief, though not common when only monetary damages are sought, may be granted -- particularly where, as here, all of Andersen's assets can be considered related to Andersen's fraudulent method of doing business. *See, e.g., United States v. First National City Bank*, 379 U.S. 378, 384-85 (preliminary injunction freezing assets was upheld to protect an eventual money judgment); *Green v. Drexler*, 760 F.2d 406, 416 (2d Cir. 1985) ("Even where the ultimate relief sought is money damages, federal court have found preliminary injunction appropriate where it has been shown that the defendant intended to frustrate any judgment on the merits by transferring its assets out of the jurisdiction . . . . this is an appropriate case for the issuance of injunctive relief to prevent [the defendant] from making uncollectible any judgment"); *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10<sup>th</sup> Cir. 1986) (preliminary injunction warranted where irreparable harm would result from inability to collect money judgment). *See also Productos Carnic v. Central American Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5<sup>th</sup> Cir. 1980) ("even were [the] remedy limited to damages, an injunction may issue to protect that remedy.").

In any event, American National has pleaded generally for all relief available. Moreover, after a decision on its motion to remand, American National anticipates amending its petition to seek equitable relief. The conduct American National seeks to prohibit is expressly subject to injunctive relief under the Uniform Fraudulent Transfer Act. Tex. Bus. & Com. Code § 24.001, *et seq.* Because the motion to remand is still pending, American National naturally wishes to minimize its activity in the federal forum. American National's request for injunctive relief, which would benefit not only American National but all plaintiffs seeking relief from Andersen, in this Court and in other forums, should not be delayed merely because American National's motion to remand is still pending.

#### DISCUSSION

American National by this Motion does not seek affirmative relief but merely asks the Court to maintain the status quo. American National asks the Court to enjoin the transfer, release or assignment of Andersen assets to foreign Andersen affiliates and enjoin Andersen's release of any its partners from obligations under non-compete agreements, without express Court approval. A temporary injunction should be granted because there is a substantial likelihood that American National will prevail in this action, there is a substantial threat that American National will be harmed without the injunction, the threatened injury to American National far outweighs any possible harm to Andersen, and an injunction is not adverse to the public interest. *See Callaway*, 489 F.2d at 572.

There is a Substantial Likelihood that American National will Prevail on the Merits

There seems little doubt that American National will prevail on the merits -- the question is not so much whether American National is entitled to relief, but rather, how much? The entire country is bombarded, on almost a daily basis, with revelations and admissions of improper conduct on the part of Andersen. *See Exhibits A-K*. This Court probably is privy to more of the intimate details of Andersen's conduct than American National or the general public. Nonetheless, the well-publicized admissions of Andersen force the conclusion that American National will prevail on the merits in its action against Andersen. American National claims include various Texas state law claims against Andersen for blue sky law violations and statutory fraud.

There is a Substantial Threat that American National Will Suffer Substantial Injury Without an Injunction

Andersen's dissipation and/or concealment of assets, in favor of individuals and entities which may not be subject to the jurisdiction of this Court, threatens substantial injury to American National. Already, Andersen debtors are organizing to protect their interests because of the anticipated or proposed mergers or sales of foreign subsidiaries. *See Exhibit E*. *See also Exhibits B, C and D*. Only an injunction can protect American National and other plaintiffs and/or creditors of Andersen.

Andersen also threatens to dissipate assets by eliminating the accounting firms non-compete agreements. *See Exhibit G* (news article March 22, 2002: "Andersen Begins to Disintegrate") ("partners at the US Andersen offices were debating whether to eliminate the

firm's non-compete agreements, which ban employees from working with old Andersen audit clients if they move to another firm.”). *See also Exhibit H* (news article March 25, 2002: “Clients Abandon Ship, Rival Circle Sinking Andersen”); *Exhibit I* (news article March 25, 2002: “Nightly Business Report” transcript, Community Television Foundation of South Florida, Inc.). This threatened loss of assets has so spooked former Andersen employees and retired Andersen pensioners that a lawsuit has been filed against Andersen “accusing it of seeking to abandon the company’s longstanding policy prohibiting partners from leaving the firm and taking clients with them.” *Exhibit J* (news article March 25, 2002: USA Today report “Andersen Executives Consider Proposal”). “The lawsuit, filed in federal court in Chicago, says that abandoning the non-compete policy would result in the ‘effective dissolution’ of the firm.” *Id.* *See also Exhibit K* (news article March 23, 2002: Chicago Tribune reports “Volcker Plans ‘New Andersen’”).

Breach of a non-compete covenant has been called “the epitome of irreparable injury.” *A&A Global Industries, Inc. v. Wofle*, 2001 U.S. Dist. Lexis 18142 at \*13-14 (N.D. Tex. 2001) (citing *American Express Fin. V. Scott*, 955 F.Supp. 688, 693 (N.D. Tex. 1996)). As a rule, courts have no choice but to enforce a non-compete covenant if the promisee seeks reasonable enforcement. *Id.* *See also, e.g., Wolf and Co. v. Waldron*, 51 Ill App. 3d 239, 366 N.E.2d 603 (Ill. Ct. App. 1977)

In the instant case, it is the fraudulent conduct of Andersen through the conduct of its partners in refusing to enforce the non-compete agreements that may harm the accounting

firm itself and, as a result, harm American National. Notwithstanding that enforcement of the non-compete contracts is sought by American National rather than Arthur Andersen L.L.P., plainly an injunction against Andersen is the only means to prevent such fraudulent transfer of assets to Andersen's individual partners.

The Threatened Injury to American National Outweighs Any Harm to Andersen

The temporary injunction sought by American National will not harm Andersen. Rather, the injunction is aimed at protecting the accounting firm from the self-dealing conduct of its partners for the protection of parties harmed by the firm's wrongful conduct. Andersen cannot genuinely argue that the accounting firm, as opposed to the individual partners and employees, will be harmed by the injunction sought by American National.

In any event, American National is not requesting that Andersen be banned from activities that may not harm the accounting firm or harm American National. The temporary injunction requested by American National would only require that Andersen obtain Court approval before engaging in the enumerated activities.

Granting the Injunction is Not Adverse to the Public Interest

Granting the temporary injunction sought by American National will not adversely affect the public interest. To the contrary, in light of the public outcry for reform that has followed the collapse of Enron and the ongoing revelations about Andersen's conduct, the public interest and the public's trust in the judicial system will be enhanced by decisive action preventing the dissipation of Andersen's assets. The suit brought by Andersen's

pensioners to prevent Andersen's abandonment of non-compete covenant also favors a finding that granting American National's injunction would be in the public interest. *See Exhibits J and K.*

### CONCLUSION AND PRAYER

American National has demonstrated (1) its likely success on the merits of its claims; (2) that without the injunction it is threatened with irreparable harm; (3) that the threatened harm to American Nation if the injunction is not granted is much greater than the potential harm to Andersen; and (4) the public trust will not be harmed by the issuance of the injunction. The injunctive relief sought by American National only requires that Andersen obtain Court approval prior to engaging in the specified conduct. The injunctive relief will benefit all plaintiffs/parties seeking relief from Andersen, whether in the consolidated *Newby* action or in some other action, whether in state court or federal court.

American National, accordingly, subject to and without waiving its Motion to Remand, prays that the Court enter an order granting a temporary injunction enjoining Andersen from (1) transferring any assets to foreign subsidiaries or affiliates; (2) releasing any foreign subsidiaries or affiliates from any obligations to Arthur Andersen, L.L.P.; and (3) releasing from non-compete agreements any partners, employees, or any other agents subject to non-compete agreements with Andersen, without the express permission of the Court.

Respectfully submitted,



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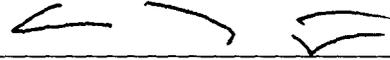
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CERTIFICATE OF SERVICE

I certify that a copy of this motion was served on counsel for each party as listed on the attached service list on March 28, 2002.



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Andrew J. Mytelka