

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

Segregated Account of Ambac Assurance Corporation

**SUPPLEMENTAL BRIEF OF ASSURED GUARANTY RE LTD. AND
ASSURED GUARANTY CORP. IN OPPOSITION TO
REHABILITATOR'S MOTION TO ENFORCE INJUNCTION**

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Note: Assured Guaranty Re Ltd. appears without
waiving its right to object to personal jurisdiction.

Dated May 20, 2011

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Assured Guaranty Re Ltd. ("AG Re") and Assured Guaranty Corp. ("Assured Guaranty" and, together with AG Re, the "Assured Reinsurers") file this supplemental brief to respond to certain arguments made for the first time in the reply briefs filed on May 16, 2011 by the Wisconsin Commissioner of Insurance, Theodore K. Nickel, as court-appointed rehabilitator (the "Rehabilitator") of the Segregated Account (the "Segregated Account") of Ambac Assurance Corporation ("Ambac"), and by Ambac, in support of the Rehabilitator's motion to have the Court enjoin AG Re and Assured Guaranty from pursuing arbitration of a dispute with Ambac, and seeking other relief.

ARGUMENT

1. No Personal Jurisdiction Over AG Re

One reason why this Court has no personal jurisdiction over AG Re is that it has not been properly served. In its reply brief ("Rehab. Reply"), the Rehabilitator argues that (a) it repaired this defect by serving a summons on AG Re (Rehab. Reply at 21) and (b) he is not required to serve AG Re. *Id.* at 20. Both arguments are wrong.

The Rehabilitator's process server delivered a summons to William Duffy on May 13, 2011. Mr. Duffy is an in-house attorney for Assured Guaranty and its New York affiliate, Assured Guaranty Municipal Corp. Affidavit of Eric A. James ("James Aff.") ¶ 5; Affidavit of William Duffy ("Duffy Aff.") ¶ 2. Mr. Duffy has never worked for AG Re, is not authorized to accept service on behalf of AG Re or any of its officers or directors, and did not tell the process server otherwise. Duffy Aff. ¶¶ 3, 8; *see also* James Aff. ¶ 5 (asserting that "Mr. Duffy stated that he was authorized to accept service," without specifying the entity on whose behalf Mr. Duffy said he had authority). The process server delivered the summons to Mr. Duffy in the lobby of a New York City office building that houses Assured Guaranty's and Assured Guaranty Municipal Corp.'s offices but contains no offices of AG Re, a Bermuda corporation. James Aff. ¶ 2; Duffy Aff. ¶¶ 4, 7. Delivery of a summons to Mr. Duffy in New York did not constitute personal service on an officer, director, or managing agent of AG Re; on someone apparently in charge of the office of one of those persons; or on AG Re's "agent" as defined in Wis. Stat. § 628.02. It was not effective service under Wis. Stat. § 801.11(5).

In addition, there are two fatal technical defects in the summons that was delivered to Mr. Duffy. It bears a time stamp, but because it has no "filing stamp indicating the case number," it was not authenticated under Wis. Stat. § 801.09(4). That defect precludes personal jurisdiction "regardless of the presence or absence of prejudice." *Am. Family Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis. 2d 524, 534, 481 N.W.2d 629 (1992). In addition, the summons fails to comply with the requirement in Wis. Stat. § 801.09 that a summons be paired with a complaint initiating an action against

the person on whom it is served, state “the names and addresses of the parties to the action, plaintiff and defendant,” direct the defendant to serve “an answer . . . if a copy of the complaint is served with the summons or a demand for a copy of the complaint,” and notify the defendant that failure to act timely could result in a default judgment.

Even though the Rehabilitator relies on Wis. Stat. § 645.04(5) to establish personal jurisdiction over AG Re, he also maintains that he is not obligated to comply with its express requirement that a summons be served. Rehab. Reply at 20. The Rehabilitator seems to argue that § 645.04(5) does not apply because he has not brought “an action” against AG Re. *Id.* It is true that he has not done that – and, as a result, § 645.04(5) cannot provide a basis for personal jurisdiction over AG Re.

The Rehabilitator also contends that the Court should devise for him an alternative procedure under § 645.04(5), modeled on the federal Bankruptcy Code’s provisions for a motion to enforce the automatic stay, even though § 645.04(5) explicitly contemplates an action initiated by summons under the rules of civil procedure. Rehab. Reply at 20-21. It is not this Court’s proper function to rewrite the statute to suit the Rehabilitator’s convenience or its own sense of what the Legislature should have done. The Rehabilitator could have proceeded with a summons and complaint, in accordance with § 645.04(5), as the liquidator did in *In re All-Star Insurance Corp.*, 110 Wis. 2d 72, 76-77, 327 N.W.2d 648 (1983).¹ Finally, the Rehabilitator’s motion is not fairly

¹ See *All-Star Ins.*, 110 Wis. 2d at 74 (liquidator commenced two actions against the defendants to recover money due under two separate contracts); App. to Appellant’s Br. at 1-4 and App. of Def.-App. Lee M. Scarborough & Co. at i & 101-13, *All-Star Ins.*, 110 Wis. 2d 72, found in 4127 *Appendices and Briefs*, 110 Wis. 2d 58-118, at

analogous to a motion to enforce an automatic bankruptcy stay, because the Assured Reinsurers are not creditors of the debtor. The Rehabilitator is trying to recover money allegedly owed to *Ambac* – not to the Segregated Account. If *Ambac* were in rehabilitation, an adversary proceeding under the Bankruptcy Code would provide a closer analogue. Such a proceeding is commenced by a summons and complaint. *See* Fed. R. Bankr. P. 7004.

Ambac – the party with which the Assured Reinsurers have the contract disputes at issue here – does not purport to have served AG Re with a summons in connection with those disputes.

2. Assured Guaranty’s Payment of Cash

Ambac tries to seize on Assured Guaranty’s payment in March 2011 of the cash portion of its quota share of the cash paid in a commutation agreement as a “gotcha” that bears on the meaning of “the Company” under the Surplus Share Agreement. *Ambac* Reply at 5-6. It is nothing of the kind. Assured Guaranty had been informed by counsel for the Rehabilitator that, because the Surplus Share Agreement remained in *Ambac*’s General Account, Assured Guaranty’s contractual rights against and obligations to *Ambac* remained in effect, and Assured Guaranty understood that to be the case. Supplemental Affidavit of Philip R. Kastellec (“Kastellec Aff.”) ¶ 4.

Assured Guaranty received a demand for a Special Remittance dated March 18, 2011 from its contract party, *Ambac*, advising it of a payment under a commutation of a

tab 2 (Wis. State Law Library) (summonses and complaints served on the defendants).

policy covered by the Surplus Share Agreement. *Id.* ¶ 5. In deciding how to respond, it made no difference to Assured Guaranty which entity made the payment. *Id.* ¶ 6. That demand came from Ambac, not from the Rehabilitator or the Segregated Account, and directed that Assured Guaranty pay its quota share to “our account” – that is, Ambac’s account – not to the Segregated Account, confirming Assured Guaranty’s understanding that its reinsurance relationship, including its payment obligations, remained with Ambac’s general account, and were not allocated to the Segregated Account.

While it believed it had defenses to Ambac’s demand for payment under the Surplus Share Agreement, Assured Guaranty decided it would be reasonable to pay its quota share of the cash portion of the commutation. *Id.* ¶¶ 7-8. As a reinsurer whose contract rights and obligations were not affected by the rehabilitation of the Segregated Account, Assured Guaranty responded just as it would have responded to any claim under a reinsurance agreement. That is what Assured Guaranty did in a letter to Ambac dated March 22, 2011, in which it reserved its rights to assert defenses and raise grounds for declining to make future payments, and stated its position that the insolvency clause was not in effect. *Id.* ¶ 8; Affidavit of Mathew R. Lynch, Ex. 5. On March 23, 2011, Assured Guaranty paid to an Ambac bank account in New York its quota share of the cash paid in that commutation. *Kastellec Aff.* ¶ 9. That payment has no bearing on the definition of “Company” in the Surplus Share Agreement.

3. Absence of Customary Litigation Procedures

Ambac says that its contract disputes with the Assured Reinsurers are “precisely the type of controversy that should be heard in the rehabilitation court,” and that the

motion papers are sufficient to give the Assured Reinsurers their “day in Court” on these multimillion dollar disputes. Ambac Reply at 10, 16.

The submission of a brief in opposition to the Rehabilitator’s motion is not an adequate substitute for a vigorous adversarial process between Ambac and the Assured Reinsurers, in an appropriate forum with the usual arbitration or litigation procedures available to the parties, that would “sharpen[] the presentation of issues upon which the court so largely depends for illumination.” *Baker v. Carr*, 369 U.S. 186, 204 (1962). In the absence of arbitration, the Assured Reinsurers are entitled to a complaint from a specified entity or entities – not a two-headed Rehabilitator/Ambac movant – that they can test legally through motions and factually through discovery.² It is not up to Ambac or the Rehabilitator to determine, subject to the Court’s “liberal” supervision of this proceeding (July 16, 2010 Order at 7), what constitutes an adversary’s “day in Court.”


² While it is not incumbent on the Assured Reinsurers to formulate discovery requests before an action has even been commenced, they might seek discovery about, *inter alia*, (a) commutations, including the determination of the cash portion of the commutations, (b) the value of the surplus notes, (c) the positions taken by Ambac and the Rehabilitator on contractual “triggers” similar to “rehabilitation proceedings against Ambac,” and (d) statements by the Rehabilitator’s counsel to counsel for the Assured Reinsurers (and to others) about the maintenance of their contract rights.

CONCLUSION

For the reasons stated above and in the Assured Reinsurers' main brief, the Rehabilitator's Motion should be denied.

Dated this 20th day of May, 2011.

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