

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

AFFIDAVIT OF WOLCOTT B. DUNHAM, JR.

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

WOLCOTT B. DUNHAM, JR., having been duly sworn, does hereby depose and say as follows:

1. I am an attorney admitted to practice in New York State. I was from 1977 through the end of 2010 a partner in the law firm of Debevoise & Plimpton LLP (“Debevoise”) in New York City. I currently am Of Counsel to Debevoise. For more than 30 years, almost all of my practice has been in the representation of insurance companies in state, federal and international regulatory matters, corporate governance, mergers and acquisitions, insurance restructuring and insolvency, capital markets, demutualization, and general corporate counseling.

2. I submit this affidavit in response to the supplemental brief in support of the motion 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 Company (“Ambac”) to have the Court enjoin Assured Guaranty Re Ltd.

(“AG Re”) and Assured Guaranty Corp. (“Assured Guaranty”) from pursuing arbitration of disputes with Ambac. Assured Guaranty and AG Re, together, are referred to as the “Assured Reinsurers.” Except where otherwise stated, I have personal knowledge of the facts set forth in this affidavit.

3. Since April 2010, Debevoise has represented Assured Guaranty and AG Re in connection with certain legal issues relating to this rehabilitation proceeding, including their respective contract rights under the Facultative Reinsurance Agreement between AG Re and Ambac, dated as of November 24, 2004 (the “Facultative Agreement”), and under the Second Amended and Restated Surplus Share Reinsurance Agreement between Assured Guaranty and Ambac, dated as of April 1, 2003 (the “Surplus Share Agreement”). I refer to the Facultative Agreement and the Surplus Share Agreement, together, as the “Reinsurance Agreements.”

4. I have been actively involved in the representation of the Assured Reinsurers since its inception. In this affidavit, I describe certain events in that representation that occurred in June 2010.

5. On June 14, 2010, I participated in a telephone conference call with other lawyers at Debevoise and with Kevin G. Fitzgerald of Foley & Lardner LLP (“Foley”), counsel for the Rehabilitator, and other lawyers at Foley. At that time, the Assured Reinsurers were considering whether to file objections and a motion to modify the Order for Temporary Injunctive Relief issued by this Court on March 24, 2010 (the “Injunction”). We sought these discussions with Mr. Fitzgerald to assist the Assured Reinsurers in deciding whether to file objections and seek modifications in the

Injunction. By the terms of the Injunction, such objections had to be filed on or before June 22, 2010.

6. At our request, Mr. Fitzgerald confirmed the Rehabilitator's positions on certain matters in a June 15, 2010 email. Following the receipt of that email, I believed to be resolved the issue of whether the Injunction affected the Assured Reinsurers' contract rights under the Reinsurance Agreements, so long as they remained in Ambac's General Account, since the Rehabilitator's counsel had stated unequivocally that the Injunction, which it would seek to enforce, did not affect those rights.

7. The June 14 discussion with Mr. Fitzgerald and the June 15 email left open other issues relating to the Injunction, and Debevoise proceeded to prepare for filing on June 22, 2010 objections to the Injunction. Insofar as the Reinsurance Agreements were concerned, our concern was not that those agreements were subject to the Injunction, but that they might become subject to the Injunction by a later allocation of them to the Segregated Account.

8. On or about June 15, 2010, the Assured Reinsurers retained Quarles & Brady LLP ("Quarles") to advise them in connection with this rehabilitation proceeding, including the final preparation and filing of any objections to the Injunction.

9. By an email on June 21, 2010, I arranged a conference call among lawyers at Foley, Quarles and Debevoise to advise Foley of the Assured Reinsurers' continuing concerns about the Injunction and intention to file objections and a motion to modify the Injunction. A copy of my email is attached as Exhibit A. With my email, I sent Foley a copy of our most recent draft of objections and motion to modify the Injunction (the

“Draft Objections”). A copy of the Draft Objections that were sent to Foley on June 21 is attached as Exhibit B.

10. The call among Foley, Quarles, and Debevoise lawyers took place on the morning of June 22, 2010. During that call, Foley advised Debevoise and Quarles of an upcoming hearing on June 23 relating to approval by this Court of the commutation of Ambac’s insurance of a film securitization facility for The Weinstein Company LLC (“Weinstein”). Before that, I was not familiar with the details of the Weinstein commutation and was not aware of the scheduled hearing. Foley advised Debevoise and Quarles that if we filed objections to the Injunction, the Rehabilitator would cancel the hearing on the Weinstein commutation and not seek approval of the commutation. Foley did not explain any logical connection between the issues raised by the Weinstein commutation and the objections to the Injunction that we were discussing, and there did not appear to me to be any such connection.

11. Shortly after this June 22 conference call ended, I spoke with representatives of the Assured Reinsurers, who provided me with further information about the Weinstein commutation. I could not see any connection between that transaction and the objections to the Injunction that we had discussed with Foley, except that the Rehabilitator had an opportunity to use the pending motion and upcoming hearing as a means to deter the Assured Reinsurers from objecting to the Injunction.

12. Later on June 22, I received a copy of an email sent earlier in the day by Mr. Van Sicklen to Donald Schott of Quarles, in which Mr. Van Sicklen confirmed the Rehabilitator’s position: “We just made it clear to [counsel for Assured Guaranty and

others in connection with the Weinstein matter] that the Weinstein hearing tomorrow will likely be cancelled if the Assured Objection we discussed this morning gets filed today.” A copy of Mr. Van Sicklen’s June 22, 2010 email is attached as Exhibit C.

13. In light of Foley’s statement about cancelling the Weinstein commutation hearing, on June 22, 2010 Debevoise discussed with Quarles and with the Assured Reinsurers whether to file objections to the Injunction. One of the factors considered in those discussions was Foley’s statement that the Rehabilitator would be willing to enter into an agreement extending to September 3, 2010 the time for Assured Guaranty and its affiliate to object to the set-off provision in the Injunction. Foley, Quarles and Debevoise communicated over the course of several hours about the wording of that agreement, and the Rehabilitator entered such an agreement (the “Extension”) on the afternoon of June 22, 2010.

14. Another factor that we considered and discussed with the Assured Reinsurers was the position on the Reinsurance Agreements that had been set forth by the Rehabilitator’s counsel in the June 15 email. Neither I nor, to the best of my recollection, anyone else I spoke to on that subject expressed any doubt as to the Rehabilitator’s position that the Injunction did not apply to the Reinsurance Agreements so long as they remained in Ambac’s General Account. While the objections to the Injunction that we prepared would have discussed the Reinsurance Agreements, if the Assured Reinsurers did not need to file objections with respect to contracts with Ambac that were in the Segregated Account, there was no need to object with respect to the Reinsurance Agreements. The concern about the Injunction’s effect with respect to the

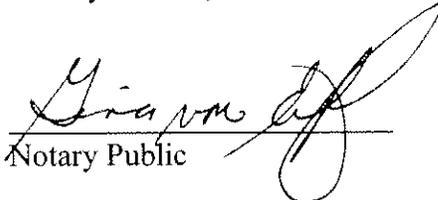
Reinsurance Agreements continued to arise from the possibility that they would be moved to the Segregated Account.

15. On June 22, after discussions with Quarles and Debevoise, the Assured Reinsurers decided not to proceed at that time with objections or a motion to modify the Injunction, even though the Extension covered only those reinsurance contracts that were in the Segregated Account.


WOLCOTT B. DUNHAM, JR.

Sworn to before me this

7th day of June, 2011


Notary Public

GINA YOR EIFF
Notary Public, State of New York
No. 69,462,011
Qualified in Westchester County,
Certificate filed in New York County
Commission Expires 2/28/14

Exhibit A

Dunham, Wolcott B.

From: Dunham, Wolcott B.
Sent: Monday, June 21, 2010 8:55 PM
To: 'Fitzgerald, Kevin G.'
Cc: Wiles, Michael E.; 'Kaas, Brian S.'; 'Oberdeck, Andrew A.'; Cochran, Alexander R.; 'Toman, William J.'; 'Schott, Donald K.'
Subject: Ambac / Assured Guaranty

Follow Up Flag: Email: Saved To Accutrac 06/21/10 - 22632/1002
Flag Status: Completed

Attachments: dpny-23216370-v5-Motion and Limited Objection to Ambac Injunction.DOC



dpny-23216370-v5-
Motion and Li...
evin,

Thank you. For our short call tomorrow (Tuesday) morning at 9 am Central, 10 am Eastern, please use the dial-in number that appears below. The call will include Assured's Wisconsin counsel, Quarles & Brady.

As background for the call, I am attaching the Motion and Limited Objection that Assured plans to file.

Dick

Wolcott B. Dunham, Jr.
Debevoise & Plimpton LLP

Please dial:
1 888 684 9991 (North American toll free)
+1 719 785-4910 (International)
Passcode: 212 909 6595

-----Original Message-----

From: Fitzgerald, Kevin G. [mailto:KFitzgerald@foley.com]
Sent: Monday, June 21, 2010 7:58 PM
To: Dunham, Wolcott B.; Cochran, Alexander R.
Cc: Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Dick

9:00 central works. You can send out a dial in. Thanks.

Kevin G. Fitzgerald
Kfitzgerald@foley.com

Foley & Lardner, LLP

777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 297-5841
(414) 297-4900 (Fax)

-----Original Message-----

From: Dunham, Wolcott B. [mailto:wbdunham@debevoise.com]

Sent: Monday, June 21, 2010 4:11 PM
To: Fitzgerald, Kevin G.; Cochran, Alexander R.
Cc: Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Kevin,

Thanks again for your clarifications.

Could we schedule a 15 minute call with you or, if you prefer, one of your colleagues about Assured Guaranty's planned response? We'd be free tomorrow (Tuesday) from 9 am (Central time).

Dick

Wolcott B. Dunham, Jr.
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
Phone: +1 212 909 6595
Fax: +1 212 521 7595

-----Original Message-----

From: Fitzgerald, Kevin G. [mailto:KFitzgerald@foley.com]
Sent: Tuesday, June 15, 2010 3:28 PM
To: Cochran, Alexander R.
Cc: Dunham, Wolcott B.; Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Alex,

In response to your email below, please note that the reinsurance agreements between Ambac Assurance Corporation, as ceding company and affiliates of Assured Guaranty, as reinsurer, have not been allocated to the Segregated Account and therefore are not subject to the rehabilitation proceeding. Accordingly, the temporary injunction granted by the rehabilitation court does not apply to enjoin any actions that Assured Guaranty or its affiliates may take under the reinsurance agreements (including exercising contractual netting and set-off provisions, or demanding arbitration in accordance with the terms of the agreement).

The rehabilitator is unable to comment on discussions between Ambac Assurance Corporation and its subsidiary, Ambac Assurance UK Limited, concerning business originated by Ambac Assurance UK Limited except to confirm that such discussions are in progress.

Likewise, due to the pending litigation before the rehabilitation court, the rehabilitator is unable to comment on the temporary injunction granted by the rehabilitation court on March 24, 2010.

Kevin G. Fitzgerald
Kfitzgerald@foley.com

Foley & Lardner, LLP

777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 297-5841
(414) 297-4900 (Fax)

-----Original Message-----

From: Cochran, Alexander R. [mailto:arcochra@debevoise.com]
Sent: Monday, June 14, 2010 4:56 PM

To: Fitzgerald, Kevin G.
Cc: Dunham, Wolcott B.; Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Kevin,

Thank you for taking the time to speak with us this afternoon. As discussed, I understand that you were going to follow up with your litigation colleagues and/or client on two points raised on our call this afternoon: (i) the intended meaning of the 90-day objection limit contained in the temporary injunction issued on March 24; and (ii) what the rehabilitator would be willing to do in terms of memorializing the couple of items we discussed relating to the reinsurance agreements between Ambac Assurance Corporation, as ceding company and affiliates of Assured as reinsurer.

If you could get back to us on those two points as soon as possible it would be much appreciated. We are also happy to discuss these or other items further if you think that would be helpful.

Best regards,

- Alex

Alex Cochran
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel: (212) 909-6311

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-----Original Message-----

From: Cochran, Alexander R.
Sent: Friday, June 11, 2010 5:51 PM
To: 'Fitzgerald, Kevin G.'
Cc: Dunham, Wolcott B.; Wiles, Michael E.; 'Kaas, Brian S.'; 'Oberdeck, Andrew A.'
Subject: RE: Ambac Segregated Account Rehabilitation

Kevin,

As promised, below please find an agenda with the topics we would like to discuss with you on Monday.

- 1) The going forward treatment of contractual netting and offset provisions in reinsurance agreements between Ambac, as ceding company, and affiliates of Assured, as reinsurer.
- 2) Arbitration of a current dispute with respect to the calculation of ceding commissions pursuant to some of the Ambac/Assured reinsurance arrangements.
- 3) Current status of business originated by Ambac Assurance UK Limited, ceded to Ambac Assurance Corporation and retroceded to affiliates of

Assured.

4) The interpretation of the 90-day objection limit in the temporary injunction issued by the rehabilitation court.

We look forward to discussing these items with you on Monday.

Best regards,

- Alex

Alex Cochran
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel: (212) 909-6311

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-----Original Message-----

From: Fitzgerald, Kevin G. [mailto:KFitzgerald@foley.com]
Sent: Thursday, June 10, 2010 5:42 PM
To: Cochran, Alexander R.
Cc: Dunham, Wolcott B.; Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Alex

3:00 eastern/2:00 central will work. Please send the Agenda when available.

Kevin G. Fitzgerald
Kfitzgerald@foley.com

Foley & Lardner, LLP

777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 297-5841
(414) 297-4900 (Fax)

-----Original Message-----

From: Cochran, Alexander R. [mailto:arcochra@debevoise.com]
Sent: Thursday, June 10, 2010 4:38 PM
To: Fitzgerald, Kevin G.
Cc: Dunham, Wolcott B.; Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Kevin,

I think there is a chance we may run over 30 minutes, I was thinking we should schedule an hour to be safe. We have a conflict from 2:00 to

3:00 eastern on Monday, but would it work if we planned to speak from 3:00 to 4:00 eastern? If that doesn't work, we can do anytime other than 2:00 to 3:00 eastern.

- Alex

Alex Cochran
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel: (212) 909-6311

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-----Original Message-----

From: Fitzgerald, Kevin G. [mailto:KFitzgerald@foley.com]
Sent: Thursday, June 10, 2010 5:20 PM
To: Cochran, Alexander R.
Cc: Dunham, Wolcott B.; Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Alex

I have a meeting from 11:45 to 1:30 central. If we only need 30 minutes, we could do 1:30 central/2:30 eastern. Let me know.

Kevin G. Fitzgerald
Kfitzgerald@foley.com

Foley & Lardner, LLP

777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 297-5841
(414) 297-4900 (Fax)

-----Original Message-----

From: Cochran, Alexander R. [mailto:arcochra@debevoise.com]
Sent: Thursday, June 10, 2010 3:05 PM
To: Fitzgerald, Kevin G.
Cc: Dunham, Wolcott B.; Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Kevin,

Apologies, but would it be possible to move our call from Friday to Monday? A call between 12:30 and 1:30 NY time would be best for us, but we are free anytime other than between 2:00 and 3:00 NY time.

Let me know if that would be ok from your end.

Thanks.

- Alex

Alex Cochran
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel: (212) 909-6311

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-----Original Message-----

From: Cochran, Alexander R.
Sent: Thursday, June 10, 2010 10:00 AM
To: 'Fitzgerald, Kevin G.'
Cc: Dunham, Wolcott B.; Wiles, Michael E.; 'Kaas, Brian S.'; 'Oberdeck, Andrew A.'
Subject: RE: Ambac Segregated Account Rehabilitation

Thanks Kevin, that timing works from our end and we will circulate an agenda in advance of the call. We can use the following dial-in information:

Dial-in: (888) 684-9991
Passcode: 212 909 6311

- Alex

Alex Cochran
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel: (212) 909-6311

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From: Fitzgerald, Kevin G. [mailto:KFitzgerald@foley.com]
Sent: Thursday, June 10, 2010 8:31 AM
To: Cochran, Alexander R.
Cc: Dunham, Wolcott B.; Wiles, Michael E.; Kaas, Brian S.; Oberdeck, Andrew A.
Subject: RE: Ambac Segregated Account Rehabilitation

Dick

Why don't we do 10 eastern/9 central. Please send around a brief description of the issue(s) you would like to discuss. Thanks.

Kevin G. Fitzgerald
Kfitzgerald@foley.com <mailto:Kfitzgerald@foley.com>

Foley & Lardner, LLP

777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 297-5841
(414) 297-4900 (Fax)

From: Cochran, Alexander R. [mailto:arcochra@debevoise.com]
Sent: Wednesday, June 09, 2010 2:19 PM
To: Fitzgerald, Kevin G.
Cc: Dunham, Wolcott B.; Wiles, Michael E.
Subject: Ambac Segregated Account Rehabilitation

Kevin,

Dick Dunham, Mike Wiles and I are representing Assured Guaranty in connection with a few reinsurance treaties previously entered into with Ambac whereby Ambac ceded business to affiliates of Assured Guaranty. I understand that you are one of the attorneys at Foley serving as counsel to the rehabilitator of Ambac's segregated account and we were hoping to schedule a lawyers call with you this Friday to talk through a couple of issues related to those reinsurance agreements.

We are free between 10:00 am and 12:30 pm New York time on Friday. Let us know if that timing would work from your end.

Best regards,

- Alex

Alex Cochran
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel: (212) 909-6311

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Internal Revenue Service regulations require that certain types of written advice include a disclaimer. To the extent the preceding message contains advice relating to a Federal tax issue, unless expressly stated otherwise the advice is not intended or written to be used, and it cannot be used by the recipient or any other taxpayer, for the purpose of avoiding Federal tax penalties, and was not written to support the promotion or marketing of any transaction or matter discussed herein.

Exhibit B

In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

Segregated Account of Ambac Assurance Corporation

**MOTION AND LIMITED OBJECTION
BY ASSURED GUARANTY CORP.
AND ASSURED GUARANTY RE LTD.
TO ORDER FOR TEMPORARY INJUNCTIVE RELIEF**

Assured Guaranty Corp. and Assured Guaranty Re Ltd. (collectively, the “**Assured Guaranty Entities**”) hereby submit this motion to modify and limited objection to the terms of the “Order for Temporary Injunctive Relief,” dated March 24, 2010 (the “**Injunction**”).

Nature of the Objection

The Assured Guaranty Entities express no opinion as to the authority for the establishment of the segregated account that is the subject of these proceedings or the other issues that have been the focus of most (if not all) of the objections that have been filed. Instead, the Assured Guaranty Entities submit this objection to address certain provisions of the Injunction that are overly broad in scope and that are improper. Those provisions are:

- (a) The 90-day limit on the ability of interested parties to object to any provision of the Injunction or to seek relief from its terms (which is set forth in paragraph 12 of the Injunction);
- (b) The prohibition on the exercise of statutory offset rights (which is set forth in paragraph 7 of the Injunction), which is contrary to the terms of Section 645.56(1) of the Wisconsin Statutes; and

(c) Limitations on the assertion of contractual rights (set forth in paragraph 4 of the Injunction), which go far beyond the stated purpose of preventing “ipso facto” terminations of existing contracts.

The grounds for the Assured Guaranty Entities’ objections to each of these provisions are explained more fully below.

Nature of the Assured Guaranty Entities’ Interests

The Assured Guaranty Entities act as reinsurers under a number of reinsurance agreements with Ambac Assurance Corporation (“**Ambac**”). The Assured Guaranty Entities understand that these reinsurance contracts are not currently part of the segregated account that is the subject of these proceedings (the “**Segregated Account**”). However, some of the policies that the Assured Guaranty Entities have reinsured have been assigned to the Segregated Account. Furthermore, the assets and liabilities of the Segregated Account apparently are subject to change. Since the Segregated Account includes some policies that are reinsured by the Assured Guaranty Entities, the Assured Guaranty Entities require confirmation that the exercise of their contractual rights under the reinsurance policies is not enjoined. To comply with the limited 90-day objection rights set forth in the Injunction, the Assured Guaranty Entities are required to raise these issues now.

In addition, the Assured Guaranty Entities have ceded business to Ambac under reinsurance agreements. The Assured Guaranty Entities understand that all such reinsurance (under which Ambac is reinsurer) has been assigned to the Segregated Account. To the extent that the Assured Guaranty Entities have ceded business to Ambac, the terms of the Injunction directly affect the Assured Guaranty Entities.

The Objections

I. The 90-Day Limit On Interested Parties' Rights to Object And To Seek Relief From The Injunction Is Improper

Section 645.05(1) of the Wisconsin Statutes provides that this Court may issue injunctions and restraining orders to suspend the conduct of further business and the transfer of assets, to stay the continued prosecution of pending actions, and otherwise to prevent interference with the rehabilitator's work. The purpose of any such injunction (like the purpose of the automatic stay in a bankruptcy case) is to centralize, with this Court, the control over the assets of the entity that is the subject of a rehabilitation proceeding, and to centralize the filing and prosecution of claims "to maintain the integrity of the proceedings." *See* Laws of Wis. (1967), ch. 89, p. 235. The statute makes clear that any injunction or restraining order is to be an interim one to preserve the status quo to the extent appropriate, and the issuance of any such order is subject to the provisions of Chapter 813 of the Wisconsin Civil Procedure Code.

In this case, however, the Injunction requested by the Rehabilitator includes a time limit on parties' rights to seek relief from the Injunction. Paragraph 12 of the Injunction provides, in relevant part:

This Order shall remain effective until further order of the Court. If any interested parties believe any portion of this Order is unwarranted by the facts or the law, such parties may seek modification or dissolution of part or all of this Order by filing a written motion with this Court ***no later than 90 days following the issuance of this Order.***

See Injunction, ¶ 12 (emphasis added). Prior to filing this objection, the Assured Guaranty Entities sought confirmation from the Rehabilitator as to whether this provision of the Injunction really is intended to bar future requests by individual parties for relief from the stays and other restraints that are imposed by the Injunction. However, the Assured Guaranty Entities were told that no clarification or further information could be provided.

There exists no provision of the Wisconsin Statutes or the Wisconsin Civil Procedure Code that justifies the imposition of the time limit set forth in the Injunction, which effectively bars enjoined parties from petitioning this Court for relief from the Injunction (or modification of the terms of the Injunction) to the extent that future circumstances warrant that relief. The Assured Guaranty Entities believe that the time limit is contrary to common sense, to due process, and to the terms of the Wisconsin Statutes.

First, if any party is to be subjected to a continuing restraint – particularly one issued on a “preliminary” basis, that does not itself represent a rehabilitation plan or a final order having substantive effect – it is common sense that the party who is restrained should have a continuing right to petition the court for relief from that restraint based on circumstances that warrant such relief. Guidance may be found in Section 362 of the Bankruptcy Code, in which this concept is certainly embedded, as it provides for relief from the automatic stay at any time based on a showing of “cause” for such relief. *See* 11 U.S.C. § 362(d)(1).

Second, the issuance of a preliminary restraint, without permitting applications for modification or relief from its terms, would violate due process. Any continuing injunction is subject to modification as circumstances warrant. *See United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932) (confirming the inherent power of courts to modify injunctions, even when injunctions have been entered on a permanent basis); *see also Dombrowski v. Pfister*, 380 U.S. 479, 492 (1965) (“[D]istrict courts retain power to modify injunctions in light of changed circumstances”); *Ass'n For Retarded Citizens of North Dakota v. Sinner*, 942 F.2d 1235, 1239 (8th Cir. 1991) (“It is well settled that a district court retains authority under Rule 60(b)(5) to modify or terminate a continuing, permanent injunction if the injunction has become illegal or changed circumstances have caused it to operate unjustly”). An order which bars parties from

seeking such relief would deprive parties of their due process rights to petition the court for the exercise of modification powers that the court inherently must retain.

Third, the proposed time limit is not consistent with the Wisconsin Statutes or the Wisconsin Civil Procedure Code, each of which contemplate the issuance of temporary or preliminary restraints. The purpose of a temporary restraint or preliminary injunction, of the kind authorized by the statute, is “merely to preserve the relative positions of the parties until a trial on the merits can be held.” See *Univ. of Tex. v. Camenish*, 451 U.S. 390, 396 (1981); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Grall*, 836 F. Supp. 428, 431 (W.D. Mich. 1993) (same). If parties cannot even seek relief from the Injunction, then the Injunction would not merely be a preliminary restraint at all. Instead, it would be the equivalent of a permanent order that alters substantive rights.

Certainly there can be no harm in permitting parties to make application to this Court for modification of the terms of the Injunction, or for relief from the Injunction to the extent it relates to such parties, based on any circumstances that warrant such modification or relief. Nor should there be any artificial restriction on the nature of the circumstances that warrant such relief. See *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247-49 (1991) (rejecting the argument that special circumstances or grievous harm needed to be shown to obtain modification of injunction, and approving the modification of an injunction based on a finding that the injunction was no longer needed); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 949 F.2d 253, 258 (8th Cir. 1991) (same). The Assured Guaranty Entities therefore request that the Injunction be modified by the addition of the following paragraph and the use of the same general “cause” standard employed in the federal Bankruptcy Code:

Notwithstanding any other provision of this Order, any interested party shall have the right to seek relief from the provisions of this Order, or modification of the terms of this Order insofar as they relate to such interested party, upon a showing of cause.

II. The Proposed Limitation Of Offset Rights Would Violate Wisconsin Law

Section 645.56 of the Wisconsin Statutes provides as follows:

(1) Setoffs allowed in general. Mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this chapter shall be set off and the balance only shall be allowed or paid, except as provided in sub. (2).

The exceptions set forth in Section 645.56(2) are limited:

(2) Exceptions. No setoff or counterclaim may be allowed in favor of any person where:

(a) The obligation of the insurer to the person would not at the date of the filing of a petition for liquidation entitle the person to share as a claimant in the assets of the insurer;

(b) The obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a setoff;

(c) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, or is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution; or

(d) The obligation of the person is to pay premiums, whether earned or unearned, to the insurer.

See Wis. Stat. § 645.56.

Although the statute says clearly that virtually all offsets “shall” be made and that only “the balance” after offset shall be “paid or allowed,” the Injunction nevertheless purports to bar offsets. Paragraph 7 of the Injunction provides:

All persons and entities are enjoined and restrained from withholding or failing to pay or setting-off premiums *or other payments (including without limitation recoveries, reimbursements, interest, deferred interest, and default interest)* owed (or that would have been owed but for the occurrence

of the Events or the financial condition of the Segregated Account, the Allocated Subsidiaries, or the Ambac General Account) to the Segregated Account, any Allocated Subsidiary or the Ambac General Account under or in connection with policies *or contracts* allocated to the Segregated Account, *or contracts with an Allocated Subsidiary or any Transaction Documents associated therewith or related thereto*. . . . A party's withholding or set-off of premiums *or payments owed under or in connection with any of the aforementioned documents* may result in the future disallowance or decrease of such party's claims.

See Injunction, ¶ 7 (emphasis added).

The prohibition on offsets in paragraph 7 is directly contrary to the terms of Section 645.56 and is improper. This Court has authority under Section 645.05(1) to enjoin actions that could “prejudice” the Segregated Account, but by definition the assertion of offset rights that are explicitly granted and confirmed by Section 645.56 cannot be “prejudicial.” The Assured Guaranty Entities therefore request that the Injunction be modified by the addition of the following language at the end of paragraph 7:

Notwithstanding the provisions of this paragraph 7, nothing in this Order shall be construed to interfere with the exercise of statutory offset rights in accordance with Wis. Stat. § 645.56(1).

III. The Limitations On The Assertion Of Contract Rights Is Overly Broad

Paragraph 4 of the Injunction enjoins certain assertions of rights by policyholders and by counterparties to transactions or contracts. The motion in support of the Injunction explained that the purpose of this restriction is to mirror the provisions of the Bankruptcy Code that prohibit the enforcement of so-called “ipso facto” clauses: *i.e.*, provisions that purport to terminate or modify contract rights based solely on the fact that an insolvency proceeding has been commenced or based solely on the financial condition of the Segregated Account. See the “Brief in Support of Motion for Temporary Injunctive Relief” at 2, 9-11. However, the language

included in the Injunction goes far beyond the assertion of rights under “ipso facto” clauses.

Paragraph 4 provides:

All policyholders and/or counterparties whose policies or contracts have been allocated to the Segregated Account, or who are counterparties to contracts with an Allocated Subsidiary (including without limitation, in each case noteholders and any other persons claiming by or through such policyholders and/or counterparties), are enjoined and restrained from terminating, ***collecting on, or claiming against*** -- or attempting to terminate, ***collect on, or claim against*** – such policies or contracts, or the transaction documents executed in connection with the issuance of such policies or contracts or related to such policies or contracts, on the basis of the Events (as defined below), or the financial condition of the Segregated Account, the Allocated Subsidiaries, or the Ambac General Account, regardless of the existence of any language in those policies, contracts or any other agreements that would otherwise require early termination. . . . As used herein, the term “Events” refers to the Proceedings ***and any acts taken or not taken or authorized to be taken pursuant thereto, including without limitation the failure of the Segregated Account, the Allocated Subsidiaries, or Ambac to pay amounts due under any policies, contracts, or other obligations that have been allocated to the Segregated Account or to which any of the Allocated Subsidiaries is a party.***

See Injunction, ¶ 4. By its terms, the foregoing language would permit the Rehabilitator to breach outstanding contracts with impunity. So long as the Rehabilitator’s acts were “taken pursuant to” these Proceedings (as would be the case for any “act” by the Rehabilitator), policyholders and other contracting parties could do nothing.

The Assured Guaranty Entities do not object to temporary limits on the enforcement of true “ipso facto” clauses – though any such restraint should be temporary and, as noted above, should be subject to motions by affected parties seeking relief from the restraint, particularly since the Wisconsin Statutes do not bar such provisions. However, there is no justification for restraining the exercise of other contractual rights that parties may have. The Assured Guaranty Entities respectfully submit that paragraph 4 should be re-worded to delete all of the language that is highlighted in the foregoing excerpt.

Conclusion

The Assured Guaranty Entities respectfully request that the terms of the Injunction be modified in each of the ways set forth above, and that this Court grant such other and further relief as may be just and proper.

Dated: June __, 2010

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Exhibit C

Dunham, Wolcott B.

From: Schott, Donald K. [don.schott@quarles.com]
Sent: Tuesday, June 22, 2010 11:52 AM
To: Toman, William J.; Dunham, Wolcott B.
Subject: FW: OCI Letter.DOC
Attachments: OCI Letter.DOC

This was on my computer when I got back to the office. Haven't looked at it yet.

From: Van Sicklen, Michael B. [mailto:MVanSicklen@foley.com]
Sent: Tuesday, June 22, 2010 10:31 AM
To: Schott, Donald K.
Cc: Fitzgerald, Kevin G.
Subject: FW: OCI Letter.DOC

From the Desk of: Michael B. Van Sicklen



[My Location](#) [My V-card](#) [My Bio](#)

Don---The attached template is per your request.

Note that each of the several letter agreements worked out to date contain an identification of the policy or policies at issue and some particularized description in numbered paragraph 2 about the point of disagreement to be addressed during the period of the extension. Some of the extensions are a couple of weeks shorter or longer than the Sept. 3 date cited in the attached.

In the attached template, I stripped out the identification in para. #2 of the point of dispute, because that wording varies depending on the situation and counterparty.

We just made clear to Akin Gump that the Weinstein hearing tomorrow will likely be cancelled if the Assured Objection we discussed this morning gets filed today.



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