STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

BRIEF OF ASSURED GUARANTY RE LTD. AND ASSURED GUARANTY CORP. IN RESPONSE TO REHABILITATOR'S POST-HEARING SUPPLEMENTAL BRIEF

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

Dated June 7, 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 brief in response to the Supplemental Brief in Support of Motion to Enforce Injunction ("Rehab. Supp. Brief") filed on May 27, 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").

ARGUMENT

The Rehabilitator's newly presented facts have no bearing on the Assured Reinsurers' principal argument about the March 24, 2010 Order for Temporary Injunctive Relief (the "Injunction"). The Rehabilitator has offered these facts, belatedly, on the theory that they undercut the reliance element of the Assured Reinsurers' equitable estoppel argument. As shown below, indisputable facts establish that the Assured Reinsurers did rely on the Rehabilitator's unequivocal statement that the Injunction does not affect the contract rights that are now at issue.

I. The Assured Reinsurers' Main Argument on the Injunction Is Based in Part on the June 15, 2010 Email, But Is Not Based on Equitable Estoppel.

The Rehabilitator inaccurately portrays the Assured Reinsurers' argument that they reasonably relied on Kevin P. Fitzgerald's June 15, 2010 email as "the centerpiece of [the Assured Reinsurers'] argument" at the May 25 hearing. Rehab. Supp. Brief at 1. The Assured Reinsurers' reliance is relevant only to equitable estoppel. Far from making equitable estoppel the "centerpiece" of their argument, the Assured Reinsurers barely mentioned it at the May 25 hearing (Transcript of Hearing at 52:16-20), after having devoted two pages to it in their main brief ("Assured Brief"). Assured Brief at 27-29.

The June 15, 2010 email *is* important to the Assured Reinsurers' argument that the Injunction does not prohibit them from arbitrating their contract disputes with Ambac. That argument draws on sources that include (a) the provision that the Injunction "does not apply to policies or other contracts which remain in the Ambac General Account" (Injunction at 1); (b) numerous statements by the Rehabilitator in March 2010 about the purposes for and scope of the Injunction, including his pronouncement of a "bright-line separation" such that "what we're asking [the Court] to do as part of the rehabilitation proceeding" would not be "tainting or affecting or spilling over into the affairs of the general account" (Transcript of Hearing, Mar. 24, 2010, at 9:15-19); and (c) Mr. Fitzgerald's statements of the Rehabilitator's position on June 15 and November 6, 2010.

The Assured Reinsurers' use of the June 15 email to establish that the Injunction has no effect on the Reinsurance Agreements has nothing to do with equitable estoppel or reliance, and it is not affected by the Rehabilitator's post-hearing submission.

II. The Assured Reinsurers Relied on the June 15, 2010 Email.

The Rehabilitator's supplemental submission refers to events beyond the immediately relevant facts that the Assured Reinsurers presented in opposition to this motion. The accompanying affidavits of Michael E. Wiles ("Wiles Aff.") and Wolcott B. Dunham, Jr. ("Dunham Aff.") and supplemental affidavit of James M. Michener ("Michener Supp. Aff.") show that the Assured Reinsurers relied on the June 15 email in deciding not to object to the Injunction before the June 22, 2011 deadline for objections.

A. Discussions Through June 15

After reviewing the Injunction, the Assured Reinsurers' counsel at Debevoise & Plimpton LLP ("Debevoise") emailed Mr. Fitzgerald of Foley & Lardner LLP ("Foley"), asking him to discuss the Injunction in a telephone call. Wiles Aff. ¶ 5. A June 11, 2010 email to Mr. Fitzgerald listed those issues. Wiles Aff. Ex. 6. In the call, which took place on June 14, 2010, Debevoise raised with Foley the issues listed in the June 11 email. Wiles Aff. ¶ 8. Mr. Fitzgerald told Debevoise that the Injunction did not apply to the Reinsurance Agreements because those agreements were in Ambac's General Account, not in the Segregated Account. Wiles Aff. ¶ 8. He said he would discuss with litigators at Foley or his client whether he could confirm that in writing, and he provided such confirmation in the June 15, 2010 email. *Id.* ¶ 10, Ex. C.

The Assured Reinsurers were not successful, however, in having their other concerns resolved through discussion with Mr. Fitzgerald. *Id.*

B. The Draft Objections

After the June 14 call and their receipt of the June 15 email, the Assured Reinsurers had continuing concerns about the Injunction for two reasons:

a. Assured Guaranty had contracts under which it ceded reinsurance to Ambac (the "Ambac Reinsurance Contracts") that were allocated to the Segregated Account. Michener Supp. Aff. ¶ 5. The principal concern involved offset rights under these contracts. Wiles Aff. ¶ 12.

b. The Assured Reinsurers were concerned that the Reinsurance Agreements could become subject to the Injunction if they were later allocated to the Segregated Account. *Id.* ¶ 11; Michener Supp. Aff. ¶ 5. The Assured Reinsurers did not know how those allocation decisions were made. *Id.*; Wiles Aff. ¶ 11.

In light of these ongoing concerns, the Assured Reinsurers had Debevoise prepare, for filing by the deadline of June 22, 2010, objections to the Injunction. Michener Supp. Aff. ¶ 6. The resulting draft Motion and Limited Objection was provided to Foley on June 21. This draft (the "Draft Objections") sought modification of three provisions of the Injunction: (a) the deadline for seeking modifications to the Injunction, (b) the prohibition against set-offs, and (c) the broad limitation of the contract rights of parties with contracts or policies allocated to the Segregated Account. Wiles Aff. ¶ 13; Dunham Aff. Ex. A; *Id.* Ex. B, at 1-2.

The Draft Objections identified the two ways in which the Injunction might affect the Assured Reinsurers: (1) because "the assets and liabilities of the Segregated Account

apparently are subject to change," contracts in the General Account may later be allocated to the Segregated Account, *id.* at 2, and (2) because the Ambac Reinsurance Contracts were allocated to the Segregated Account, "the terms of the Injunction directly affect [them]." *Id.* The Draft Objections added that the Assured Reinsurers "understand that [the Reinsurance Agreements] are not currently part of the [S]egregated [A]ccount," but that they "require confirmation that the exercise of their contractual rights under the reinsurance policies is not enjoined." *Id.*

Debevoise prepared the Draft Objections not because the Assured Reinsurers or Debevoise believed the Injunction applied to the Reinsurance Agreements, but because the Ambac Reinsurance Contracts had been allocated to the Segregated Account and the Reinsurance Agreements might be allocated to that account in the future. Michener Supp. Aff. ¶¶ 5-6; Wiles Aff. ¶ 15; Dunham Aff. ¶ 7. On June 21, 2010, Debevoise sent the Draft Objections to Foley and arranged a call with Foley and Quarles & Brady LLP ("Quarles"), which the Assured Reinsurers had retained, for June 22. Dunham Aff. ¶ 9, Ex. A.

C. Hearing on the Weinstein Commutation

Earlier in June 2010, Assured Guaranty had reached an agreement on the commutation of Ambac's insurance of a film securitization facility for The Weinstein Company LLC ("Weinstein"). Michener Supp. Aff. ¶ 7. On June 11, 2011, the Rehabilitator filed a motion seeking this Court's approval of that commutation, on the ground that it was "in the best interests of policyholders and the Segregated Account."

Motion to Approve Commutation of Policy No. AB0960BE, dated June 11, 2010, ¶ 10. A hearing on that motion was scheduled for June 23.

In the June 22 call, Foley advised Debevoise and Quarles of the upcoming hearing on the Weinstein commutation, and said that if the Assured Reinsurers filed objections to the Injunction, the Rehabilitator would not seek approval of the commutation. Dunham Aff. ¶ 10. (Assured Guaranty, which was not represented by Debevoise or by Quarles in the Weinstein matter, had not discussed the commutation or the June 23 hearing with them. Michener Supp. Aff. ¶ 7.) The Assured Reinsurers did not understand why their objection to the Injunction would cause the Rehabilitator not to proceed with a transaction that he had determined was in the best interests of the policyholders and the Segregated Account. *Id.* ¶ 8; Dunham Aff. ¶ 10.

D. The Extension for the Ambac Reinsurance Contracts

Foley's June 22 ultimatum required the Assured Reinsurers to decide on that day whether to file objections to the Injunction in compliance with the deadline for such objections. Michener Supp. Aff. ¶ 9. They decided not to do so. *Id.* ¶ 10. In making that decision, the Assured Reinsurers relied on two factors. First, on June 22, the Rehabilitator offered to enter into, and did enter into, an agreement with Assured Guaranty extending to September 3, 2010 its time to object to the set-off provision in the Injunction, *but only with respect to reinsurance contracts in the Segregated Account* (the "Extension"). *Id.* ¶ 11. Second, with respect to the Reinsurance Agreements, Ambac relied on Mr. Fitzgerald's June 15 email stating that "the temporary injunction does not apply to enjoin

any actions that Assured Guaranty or its affiliates may take under the reinsurance agreements." *Id.* The Assured Reinsurers reasonably relied on the June 15, 2010 email.

E. The Rehabilitator's Arguments

The Rehabilitator's supplemental presentation is based on the affidavit of Michael B. Van Sicklen ("Van Sicklen Aff.") and three exhibits: the June 21, 2010 email setting up the June 22 call among Foley, Quarles and Debevoise, the Draft Objection, and the Extension. Mr. Van Sicklen's narrative starts and ends on June 22. He was not involved in, and has no comment on, the prior communications with the Assured Reinsurers.[1]

The Rehabilitator asserts that these facts "highlight a number of inaccuracies" in the Assured Reinsurers' position, and he effectively accuses Mr. Cochran of filing a false affidavit without pointing to anything inaccurate in that affidavit. Rehab. Supp. Brief at 3-4. The Rehabilitator's main argument is that the Assured Reinsurers could not have relied on Mr. Fitzgerald's June 15 email because the Draft Objections said that they "require[d] confirmation that the exercise of their contractual rights under the reinsurance policies is not enjoined," Dunham Aff. Ex. B, at 2. That is incorrect. When the June 14 call and June 15 email did not resolve all their concerns, the Assured Reinsurers prepared objections to the Injunction. Wiles Aff. ¶¶ 11-13; Michener Supp. Aff. ¶ 6. In preparing those objections, Debevoise had to decide what to say about the Reinsurance Agreements,

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[1] Mr. Van Sicklen does not say whether he had a role in the communications with the Assured Reinsurers before June 21, including whether he was among the Foley "litigation colleagues" whom Mr. Fitzgerald said on June 14 he would consult about written confirmation of the Rehabilitator's position, as referred to in Mr. Cochran's email. Wiles Aff. Ex. C.

in light of the uncertainty as to whether a later allocation of these agreements to the Segregated Account would make them subject to the Injunction and leave the Assured Reinsurers unable to raise these issues if they did not raise them by the June 22, 2010 deadline. After expressing its concern about a possible re-allocation, Debevoise stated the Assured Reinsurers' understanding that the Reinsurance Agreements were not part of the rehabilitation proceeding and requested confirmation of that. Wiles Aff. ¶ 9.

When the Assured Reinsurers were planning to file objections to the Injunction, there was no reason for them not to object and raise all the issues that concerned them. A few days later, when the Rehabilitator forced the Assured Reinsurers to decide whether to object and offered an extension of time for objecting in connection with contracts in the Segregated Account, they decided not to object. In making that decision, the Assured Reinsurers relied on the June 15 email. Michener Supp. Aff. ¶ 11.

The Rehabilitator maintains that there are two "takeaways from the timing and content" of the Draft Objections. Rehab. Supp. Br. at 4-5. The first is that the Assured Reinsurers' inclusion in the Draft Objections of a request for confirmation of the substance of the June 15 email shows that they "did not attribute the significance or meaning to the June 15 email that they now claim." *Id.* at 4. It does not show that at all. Nothing suggests that the Assured Reinsurers or their counsel have ever thought that the June 15 email means anything other than what it clearly says. As to its "significance," Assured Guaranty and its counsel believed that it represented the Rehabilitator's clear position. Michener Supp. Aff. ¶ 11; Wiles Aff. ¶ 15; Dunham Aff. ¶ 14.

The Rehabilitator's second supposed "takeaway" is that his agreement to the Extension, not the June 15 email, is the reason why the Assured Reinsurers did not file objections. Rehab. Supp. Brief at 5. They relied on the Extension so far as the Ambac Reinsurance Contracts were concerned – but not so far as the Reinsurance Agreements were concerned, since the Extension did not provide any protection with respect to those agreements. Michener Supp. Aff. ¶ 11. They relied on the June 15 email so far as the Reinsurance Agreements were concerned. *Id.*

III. The Rehabilitator's Additional Arguments Are Without Merit.

Having sought and received permission to make a post-hearing submission relating to reliance (Transcript of Hearing, May 25, 2011, at 14:15-24), the Rehabilitator tacks on five additional arguments. Rehab. Supp. Brief at 5-6. Each is without merit.

A. 90-Day Limit on Objection Rights

The Rehabilitator argues that "the [Draft] Objections show that [the Assured Reinsurers] understood that the proper forum in which to seek clarification with respect to the scope of paragraph 1 of the Injunction was this Court." Rehab. Supp. Brief at 5. The Assured Reinsurers are not seeking clarification of the Injunction. The Draft Objections, if filed, would have sought not "clarification," but modifications to the Injunction, which only this Court could make, and to which a 90-day limit applied. If the Rehabilitator is saying that his "clarifications" of the Injunction in June and November 2010 were meaningless, the Assured Reinsurers disagree. The statement of the Rehabilitator's position was sought, and apparently given, in good faith, in an effort – ultimately successful – to obviate the need to file objections to the Injunction. The Rehabilitator's

statement of his position under those circumstance estop him from arguing an inconsistent position.

B. Automatic Stay Analogy

The Rehabilitator asserts that the reference in the Draft Objections to the automatic stay under Section 362 of the U.S. Bankruptcy Code contradicts statements by the Assured Reinsurers at the May 25 hearing that denied there is any analogy between the Injunction and the automatic stay. *Id.* at 6. There is no such contradiction. The automatic stay and the Injunction stem from very different statutory sources of authority, and they differ in many respects. At the same time, they share the purpose of centralizing the filing and prosecution of claims *against the debtor or the delinquent insurer*. The Assured Reinsurers' arbitration demands and petition to compel arbitration do not involve claims against a delinquent insurer.

C. Reverse Preemption

The Rehabilitator tries to infer from the Draft Objections an acknowledgement that Wisconsin law reverse preempts the Federal Arbitration Act. *Id.* at 6. There is no such connection. The Assured Reinsurers' recognition that Wis. Stat § 645.05(1) authorizes injunctions against lawsuits does not mean that the application of the Federal Arbitration Act to enforce the Assured Reinsurers' arbitration agreements *with Ambac*, which is not in rehabilitation, "invalidate[s], impair[s] or supersede[s]" the Wisconsin statute. It does not.

D. Petition to Compel Arbitration

The Rehabilitator asserts that because the Draft Objections recognize "the importance of centralizing challenges to the injunction before this Court," the Assured

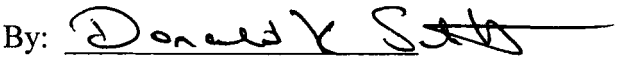
Reinsurers "had no legitimate basis to ignore paragraph 1 of the Injunction and to file a collateral lawsuit in New York state court to force arbitration." *Id.* at 6. The Draft Objections stated that objections and motions to modify the Injunction had to be brought in this Court "now" (*i.e.*, by June 22, 2010). Dunham Aff. Ex. B, at 2. The Assured Reinsurers are not challenging, objecting to or seeking to modify the Injunction. They seek only to exercise their rights under the Reinsurance Agreements, which the Injunction does not affect.

E. Personal Jurisdiction Over AG Re

Since the Draft Objections were not filed, the impact of their filing on personal jurisdiction over AG Re is irrelevant. Rehab. Supp. Brief at 6. AG Re has not asserted a claim, or previously participated in this proceeding, or otherwise invoked the benefits and protections of Wisconsin's laws.

Dated this 7th day of June, 2011

QUARLES & BRADY LLP

By: 

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