

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

FILED

DEC - 6 2016

DANE COUNTY CIRCUIT COURT

**RESPONSE OF THE OFFICE OF THE COMMISSIONER OF INSURANCE TO
MONTEREY BAY MILITARY HOUSING, LLC AND MONTEREY BAY LAND, LLC'S
MOTION FOR RECONSIDERATION**

The Wisconsin Commissioner of Insurance sought relief from this Court to quash a foreign Subpoena served by Monterey Bay Military Housing, LLC and Monterey Bay Land, LLC ("Monterey Bay"), on two grounds: to protect the integrity of the rehabilitation process and enforce the regulatory privilege of Chapter 601; and because the Subpoena was unauthorized under this Court's April 5, 2016 Order and violated the injunctive order of March 24, 2010. By serving the Subpoena, Monterey Bay ignored the privilege, this Court's prior orders, and the exclusive jurisdiction of the Rehabilitation Court over matters affecting rehabilitation proceedings. The Court therefore properly, and immediately, granted the Commissioner's motion and awarded fees.

Monterey Bay has now compounded the problem that the Court's November 23, 2016 Order sought to remedy by moving for reconsideration. Monterey Bay's argument is that it is merely attempting to obtain discovery in a different case. That argument is a fraud: the Subpoena is a direct attack on the rehabilitation proceedings and the decision-making process of the Commissioner as the Rehabilitator. The information sought could only be used to challenge the decisions of the Rehabilitator in the rehabilitation process, in an attempt to impose significant liability on Ambac in collateral litigation.

The Rehabilitator reasserts the arguments and authorities that supported its motion; whether the Court addresses this issue de novo or with a standard deferential to its previous ruling, the end result is the Subpoena should be quashed. Monterey Bay's motion for reconsideration fails to articulate a valid reason for the Court to reverse its decision and further fails to identify any basis for the Court to reconsider its legally and factually sound decision. A court's decision on a motion for reconsideration is discretionary. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 6, 275 Wis. 2d 397, 685 N.W.2d 853. To prevail on its motion for reconsideration, Monterey Bay must establish a *manifest error of law*, which is a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* at ¶ 27. Monterey Bay's motion cannot meet this formidable standard. The motion should be denied with additional costs and fees awarded to the Rehabilitator.

ARGUMENTS

I. The Subpoena is an Unauthorized Attempt to Take Discovery in This Rehabilitation, Under the Guise of a Foreign Case Caption.

The stated purpose of Chapter 645 is to protect "the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors." WIS. STAT. § 645.01(4)(c). Protecting those interests is accomplished by "enhanced efficiency and economy of liquidation, through clarification and specification of the law, to *minimize* legal uncertainty and litigation." *Id.* (emphasis added). To effectuate the statute's purpose, the rehabilitation court has exclusive jurisdiction to hear any request for relief "preliminary to, incidental to or relating to [rehabilitation] proceedings," and to issue any order necessary to protect "the administration of the [rehabilitation] proceeding." WIS. STAT. §§ 645.04(3) and 645.05(1)(k). Pursuant to this statutory authority, this Court entered an Order for Temporary

Injunctive Relief on March 24, 2010, stating in its opening paragraph, “this Court has exclusive jurisdiction over matters relating to this rehabilitation proceeding.”

Further, Paragraph 1 of the March 24, 2010 Order enjoined all persons and entities from commencing or prosecuting “any actions, claims, lawsuits or other formal proceedings” in any tribunal “against the Commissioner,” declaring, “[t]his Court has exclusive jurisdiction over any such actions, claims or lawsuits.” This injunctive relief was made permanent by this Court’s Order, filed on January 24, 2011, confirming the Rehabilitator’s Plan of Rehabilitation. In affirming the appropriateness of this injunctive relief, the Court of Appeals held:

We are satisfied that the court properly exercised its discretion in determining that the injunction is not overly broad and that the March 2010 temporary injunction should remain in effect throughout the administration of the plan. *The circuit court has the power to take action to prevent persons or entities from jeopardizing the success of the insurance rehabilitation.* For example, the court may grant a permanent injunction, as it did here, to prevent, among other things: (1) interference with the rehabilitation proceedings; (2) waste of the insurer's assets; (3) the institution of actions or proceedings; and (4) "threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors, or shareholders, or the administration of the proceeding." WIS. STAT. § 645.05(1)(c), (d), (f), and (k). We conclude that the circuit court properly issued an injunction that is "necessary and proper" to prevent the institution of proceedings that may interfere with the insurance rehabilitation and waste or lessen the value of Ambac's assets, to the detriment of policyholders, creditors, and shareholders alike.

In the Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation, 2013 WI App 129, ¶ 103 (emphasis added). Quite simply, litigation and discovery during the rehabilitation process runs contrary to the purpose of rehabilitation, and the Rehabilitation Court’s role, which is to protect the regulatory process of rehabilitating insurance companies from collateral attacks that threaten to interfere with the rehabilitation process. Monterey Bay’s Subpoena is precisely that type of prohibited collateral attack.

The Subpoena seeks testimony about the Rehabilitator’s decision-making process *in this proceeding* to discover how and why it allocated particular policies to the Segregated Account. In essence, Monterey Bay disagrees with the statutory characterization of the rehabilitation proceedings and is trying to prove in a different forum that despite the Rehabilitator’s decision to place the Segregated Account and not Ambac itself in Rehabilitation, Ambac should nonetheless be considered to have been placed in Rehabilitation. Monterey Bay is therefore attacking the Rehabilitator’s decision through the use of foreign state litigation.

The very words of the Subpoena demonstrate this attack: three of the requests seek all “documents,” “communications,” and “analysis performed”

relating to any consideration or analysis of the default language found in the definition of “Ambac Default” . . . in connection with *structuring* the WISCONSIN REHABILITATION PROCEEDINGS, including but not limited to *the decision to include* only the SEGREGATED ACCOUNT in the WISCONSIN REHABILITATION PROCEEDINGS and the decision of *how to capitalize* the SEGREGATED ACCOUNT.

(Wicka Aff., Ex. A, at ¶¶ 1-3 (emphasis added).)¹ This information is clearly privileged as provided in WIS. STAT. § 601.465 and this Court’s March 24, 2010 Order. The Subpoena is thus a blatant challenge to the integrity and on-going administration of this rehabilitation, that is prohibited by § 601.465 and this Court’s prior orders.

Monterey Bay also seeks information on all Ambac Assurance Corporation policies or contracts that the Rehabilitator obtained and reviewed during its decision to place the Segregated Account into rehabilitation and the extent to which the Rehabilitator considered Monterey Bay’s policies or contracts for inclusion in the Segregated Account. These requests make clear that Monterey Bay is seeking to argue to another court that unless the Rehabilitator expressly considered the military housing policies, such other courts may make findings that there has been

¹ The Affidavit of Richard B. Wicka, Deputy Chief Legal Counsel for the Office of the Wisconsin Insurance Commissioner, is dated November 21, 2016 and was filed with the Brief of the Office of the Commissioner of Insurance in Support of its Motion to Quash.

an Ambac Default – contrary to this Court’s orders. (Wicka Aff., Ex. A, at ¶¶ 4-7.) The Subpoena goes so far as to seek the *justification* behind the Commissioner’s testimony on November 16, 2010 and the Court’s January 24, 2011 Decision and Final Order Confirming the Rehabilitator’s Plan of Rehabilitation. (Wicka Aff., Ex. A, at ¶¶ 10-11.) In other words, Monterey Bay wants the Commissioner to *explain* the very regulatory decisions that underlie these proceedings. It cannot be disputed reasonably that allowing this discovery would interfere with the rehabilitation process if every decision of the Rehabilitator is subject to discovery and a court challenge.

This requested discovery is privileged under Chapter 601 and is subject to this Court’s April 5, 2016 and March 24, 2010 Orders. Simply disguising unauthorized discovery with the caption of a foreign case does not change the fact that the Subpoena is a direct attack on the rehabilitation proceedings and the regulatory decision-making of the Commissioner; the discovery sought falls squarely under chapter 645, and is unauthorized under this Court April 5, 2016 Order. As an interested party before this Court, Monterey Bay is knowledgeable of and subject to the Court’s discovery order of April 5; it knew or should have known it would have to answer to the Rehabilitation Court. Merely re-captioning the Subpoena as discovery in a foreign-state proceeding does not alter the objective of this Subpoena — to obtain discovery about how the Rehabilitator carried out its statutory duty in this rehabilitation proceeding. The Subpoena was appropriately quashed. Monterey Bay’s motion should be denied.

II. REHABILITATION PROCEEDINGS ARE NOT GOVERNED BY THE RULES OF CIVIL PROCEDURE.

Wisconsin’s rules of civil procedure do not apply to rehabilitation proceedings. The Wisconsin Court of Appeals explained this in a previous appeal in this very case:

Generally, the rules of civil procedure “govern procedure and practice in circuit courts of this state in all civil actions and special proceedings . . . *except where different procedure is prescribed by statute or rule.*” WIS. STAT. § 801.01(2) (emphasis added). The rules of civil procedure, including the rules pertaining to discovery, do not apply to rehabilitation proceedings because ch. 645 prescribes its own rules of procedure in insurer delinquency proceedings.

Nickel v. Wells Fargo Bank, 2013 WI App 129, ¶ 113, 351 Wis. 2d 539, 841 N.W.2d 482. As described above, the Subpoena, though labeled with a different caption, demands testimony about and documents from the rehabilitation proceeding. As such, it falls within the exclusive jurisdiction of this Court.

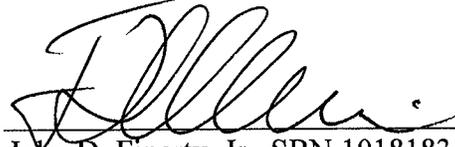
Not deterred, Monterey Bay argues WIS. STAT. §§ 805.07(3) and 887.24(6)(a) (the Uniform Interstate Depositions and Discovery Act), control here. A request for issuance of a subpoena and the process by which a foreign subpoena is quashed would normally result in a “special proceeding” under WIS. STAT. § 887.24(6). However, “a different procedure is prescribed” under chapter 645, which necessitates that all requested relief affecting or relating to the rehabilitation be brought before the Rehabilitation Court. *See* WIS. STAT. §§ 645.04(3) and 645.05(1)(k). Thus, the rules of civil procedure cited by Monterey Bay do not apply. But even if they did, the subpoena would be “unreasonable and oppressive” because it is an attempted end-run around this Court’s exclusive jurisdiction and prior orders regarding discovery.

CONCLUSION

For the above reasons, and as previously stated in the Rehabilitator’s Brief in Support of its Motion to Quash, the Court properly granted the Rehabilitator’s Motion to Quash. Monterey Bay’s Motion for Reconsideration should therefore be denied. The Rehabilitator further requests leave to submit a supplemental verified summary of fees and costs associated with this response and the hearing scheduled for December 22, 2016.

Dated this 6th day of December, 2016.

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