

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

FILED

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DANE COUNTY CIRCUIT COURT

BRIEF OF THE OFFICE OF THE COMMISSIONER OF INSURANCE IN SUPPORT OF ITS MOTION TO QUASH A FOREIGN SUBPOENA SERVED BY MONTEREY BAY MILITARY HOUSING, LLC AND MONTEREY BAY LAND, LLC

INTRODUCTION

The Office of the Commissioner of Insurance of Wisconsin (“OCI”) was served with a foreign subpoena *duces tecum* on November 7, 2016, seeking to depose the Commissioner and further demanding the production of documents in the rehabilitation of the Segregated Account of Ambac Assurance Corporation (“Segregated Account”). The subpoena was served by Monterey Bay Military Housing LLC and Monterey Bay Land, LLC (collectively “Monterey Bay”) – two parties previously before the Rehabilitation Court on October 11, 2016, opposing the Rehabilitator’s Motion to Confirm and Declare the Nature of These Proceedings. There is no indication on the Court docket however that this Court approved the issuance of this subpoena. The subpoena thus directly contradicts the Court’s April 5, 2016 Order that required all proposed discovery related to the rehabilitation proceeding be approved by the Rehabilitation Court.¹

The Rehabilitator is cognizant of the Court’s April 5, 2016 order that stated it does not need to respond to unauthorized discovery. Rather than ignore the subpoena however, OCI wrote to Monterey Bay’s counsel before filing this motion and requested that they withdraw the subpoena in a letter dated November 16, 2016. (Wicka Aff., Ex. B). They did not respond. OCI

¹ A copy of the Foreign Subpoena is attached as Exhibit A to the Affidavit of Richard B. Wicka, Deputy Chief Legal Counsel for the Office of the Wisconsin Insurance Commissioner (“Wicka Aff.”).

does not want to default on the Subpoena as it was served under a caption of a different case and given a separate Group File case number by the Dane County Circuit Court clerk; doing so would risk OCI becoming further involved in collateral litigation. Instead, the Rehabilitator requests an Order that the Rehabilitation Court may assert jurisdiction over the Subpoena, finds it does not comply with the Court's prior order, seeks privileged information and testimony and thus the Subpoena – and any other non-compliant discovery, whether specifically captioned in the Rehabilitation proceedings or not, shall be quashed.

The Rehabilitator therefore respectfully requests that this Court issue a protective order to quash the foreign subpoena and award the Rehabilitator's fees and costs incurred in this motion.

FACTS

According to the subpoena, the Monterey Bay entities are parties to a case in California against Ambac Assurance Corporation.² (Wicka Aff., ¶ 2; Ex. A.) Monterey Bay caused a foreign subpoena dated November 7, 2016, to be issued in the Circuit Court for Dane County (the “foreign subpoena” or “Subpoena”). OCI also received service of the Subpoena on November 7, 2016. (Wicka Aff., ¶ 2; Ex. A.)

The Subpoena requests the production of documents and a deposition of the “Wisconsin Commissioner of Insurance” on December 2, 2016 at 10:00 a.m., on the following topics:

1. “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

² As this Court is aware, from the proceedings that lead to the Court's October 24, 2016 Order, the Monterey Bay Parties are obligors with certain debt service obligations insured under policies that are in the General Account. The Monterey Bay parties were 2 of 13 parties that appeared before the Rehabilitation Court on October 11, 2016 to oppose the Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings. They have since appealed the Order that resulted from that hearing. *See Sean Dilweg and Office of the Commissioner of Insurance v. Carlisle/Picatinny Family Housing L.P., et al.*, Appeal No. 2016-AP-002169 LV. The Court may take judicial notice of these facts to the extent they are not already in the record. *See* WIS. STAT. § 902.01(2)(a).

REHABILITATION PROCEEDINGS and the decision of how to capitalize the SEGREGATED ACCOUNT.”

2. “[T]he number of AMBAC policies or contracts that existed at the time of the WISCONSIN REHABILITATION PROCEEDINGS and that contained the default language found in the definition of ‘Ambac Default’ of the MONTEREY GRANTOR TRUST AGREEMENT” and whether those policies “were placed in the SEGREGATED ACCOUNT or in the GENERAL ACCOUNT.”
3. “[T]he number of AMBAC policies or contracts that exist and are in force today and that contained the default language found in the definition of ‘Ambac Default’ of the MONTEREY GRANTOR TRUST AGREEMENT” and whether those policies “were placed in the SEGREGATED ACCOUNT or in the GENERAL ACCOUNT.”
4. “[A]ctions taken by AMBAC to prevent a counterparty to a policy or contract in the GENERAL ACCOUNT from claiming or declaring that AMBAC was in default”
5. “[W]hether Ambac was in default as a result of the WISCONSIN REHABILITATION PROCEEDINGS.”
6. “[T]estimony of the Wisconsin Commissioners of Insurance on November 16, 2010 that ‘it became clear to me that it would be difficult to craft [an injunction] that would affect and adjoin all of those covenants and triggers.’”
7. “Wisconsin Court’s factual finding in its January 24, 2011 Decision and Final Order Confirming the Rehabilitator’s Plan of Rehabilitation, With Findings of Fact and Conclusions of Law that ‘it may not have been possible to effectively enjoin the exercise of all such triggers.’”

(Wicka Aff. Ex. A.) After service, the Commissioner’s office requested that Monterey Bay withdraw the subpoena. (Wicka Aff. Ex. B.) They did not respond.

LEGAL STANDARD

The Rehabilitation Court has exclusive jurisdiction “to entertain, hear or determine any complaint praying for . . . relief preliminary to, incidental to or relating to [rehabilitation] proceedings” *See* WIS. STAT. § 645.04(3). In keeping with this statutory mandate, this Court issued an order on March 24, 2010, stating that “[a]ll persons and entities are enjoined and restrained from commencing or prosecuting any actions, claims, lawsuits or other formal legal proceedings in any state, federal or foreign court, administrative body or other tribunal against:

the Segregated Account” (See Order, ¶ 1, Mar. 24, 2010.)

Further to this statutory mandate, this Court issued an order dated April 5, 2016, directing that all discovery requests first be submitted to the Rehabilitation Court before the Rehabilitator would be required to respond. The Order states the following:

An interested party that wishes to take discovery may seek leave to do so by filing a motion with the Court, stating the basis for the request, together with supporting information. Upon receiving a request for leave to take discovery, the Court will either deny leave or request a response from the Rehabilitation, Ambac or other respondent. The Rehabilitator, Ambac or other respondent shall not respond to a request for leave to take discovery unless so ordered by the Court.

(April 5, 2016 Order at ¶ 3.) Underlying this Court’s April 5, 2016 Order were two legal standards.

First, as the Court noted in its Order, “interested parties are not entitled to discovery in this rehabilitation proceeding.” *Nickel v. Wells Fargo Bank*, 2013 WI App. 129, ¶ 113, 351 Wis. 2d 539, 841 N.W.2d 482. Second, Chapter 601 prevents the “testimony” or disclosure of “reports, records and information” related to the Commissioner’s regulatory decision making without the “written and specific consent of the Commissioner.” See WIS. STAT. § 601.465(1m)(a) and (2m)(a); see also Order, ¶ 8 (May 27, 2010). The subpoena served on the Commission defies these legal standards.

ARGUMENT

I. The Court Should Quash the Foreign Subpoena, Pursuant to Prior Court Orders and the Statutes Regulating the Rehabilitation Proceeding.

A. The Court’s April 5, 2016 Order Bars Monterey Bay’s Subpoena.

Monterey Bay’s foreign subpoena does not comply with this Court’s April 5, 2016 Order. The Court ordered that Interested Parties must seek leave of Court *before* service of discovery requests with regard to the Segregated Account, and specifically required “filing a motion with the Court, stating the basis for the request, together with supporting information.” (Order, ¶ 3

(Apr. 5, 2016)) The Monterey Bay parties did not file such a motion and, thus, did not obtain leave of Court to serve the subpoena. For that reason alone, this Court may quash the subpoena and reaffirm that discovery requests related to this proceeding are barred without permission, in advance, from this Court.

B. The Subpoena is Barred by WIS. STAT. § 601.465(1m)(a) and (2m)(a).

To be clear: the Commissioner has *not* consented to being deposed or producing records in the Rehabilitation. The foreign subpoena seeks information protected from disclosure by statutory privilege and the Commissioner has not waived the privilege.³ See WIS. STAT. § 601.465(1m) (a) and (2m)(a). Pursuant to the privilege, the Commissioner may prevent the disclosure of the topics of information requested in the subpoena. WIS. STAT. § 601.465(1m)(a) and (2m)(a). The statute specifically provides that “[t]he office may refuse to disclose and may prevent any other person from disclosing . . . [t]estimony, reports, records and information that are obtained, produced or created in the course of an inquiry under s. 601.42.” WIS. STAT. § 601.465(1m)(a). This Court explained the meaning of this privilege in its May 27, 2010 Order by stating: “documents relating to [the Office of the Commissioner of Insurance]’s regulatory decision-making are statutory[il]ly privileged under Wisconsin law.” See Order at ¶ 8 (May 27, 2010); see also WIS. STAT. §§ 601.465(1m)(a), (2m)(a). The Rehabilitator therefore is privileged to refuse to respond to the Subpoena and this Court may quash it pursuant to its exclusive jurisdiction over Rehabilitation proceedings.

C. This Court has Exclusive Jurisdiction to Control Discovery Requests Affecting the Segregated Account.

This Court has the exclusive jurisdiction to issue any order to prevent any testimony or request for documents that might prejudice the administration of these proceedings. One

³ “The privilege may be waived only by the affirmative written and specific consent of the commissioner.” WIS. STAT. § 601.465(2m)(a).

possible threat to these proceedings is discovery subpoenas issued in one of the numerous collateral cases, especially given Wisconsin law that “discovery” is not available in rehabilitation proceedings. *See Nickel v. Wells Fargo Bank* at ¶ 113; *see also* Order for Temporary Injunctive Relief (Mar. 24, 2010) (“This court has exclusive jurisdictions over matters relating to this rehabilitation proceeding.”) The foreign subpoena here — seeking a deposition prohibited in rehabilitation proceedings and clearly subject to the OCI privilege — if allowed to stand, would have a substantial negative impact on the administration of this proceeding and threaten to divert resources to matters other than the Rehabilitation. Quashing the Subpoena is thus well within this Court’s discretion. The Court should therefore issue a protective order, pursuant to Wis. STAT. §645.05(1)(k), to prevent any prejudice to the administration of this proceeding.

II. The Court Should Award Costs, Expenses, and Fees, Pursuant to Wis. Stat. § 645.06 Payable to the General Account.

Monterey Bay should be ordered to reimburse the Administrative Expenses of attorneys’ fees and costs the Rehabilitator incurred to bring the instant motion. The Monterey Bay entities are interested parties to these proceedings represented by Wisconsin counsel; they are responsible for knowing the docket and complying with the Court’s prior orders. *See Parsons v. Associated Banc-Corp.*, 2016 WI App 44, ¶ 25, 370 Wis. 2d 112, 881 N.W.2d 793 (“Attorneys are presumed to know the law”); *see also Tri-State Mech., Inc. v. Northland College*, 2004 WI app 100, ¶ 10, 273 Wis. 2d 471, 681 N.W.2d 302 (“every person, sophisticated or otherwise, is presumed to know the law.”). Nevertheless, they issued the foreign subpoena in clear contradiction to this Court’s April 5, 2016 Order and attempted to command the production of privileged information and testimony. Further, Monterey Bay ignored this Court’s April 5 Order even after OCI requested in its November 16, 2016 letter that they withdraw the Subpoena, leaving the Rehabilitator little choice but to seek Court relief. The resources available to conduct

these Rehabilitation proceedings should not be diminished as a result.

An award of attorneys' fees and costs is within this Court's discretion in a Rehabilitation proceeding. Chapter 645 provides that "the court may award such costs and other expenses of litigation to the commissioner or receiver as justice requires, without regard to the limitations otherwise prescribed by law." *See* Wis. Stat. § 645.06. Awarding these expenses will allow the Rehabilitator to replenish funds that should instead be devoted to the rehabilitation, not discovery disputes, and further deter other interested parties involved in collateral litigation from serving unauthorized discovery requests that violate the Court's April 5, 2016 Order, that seek privileged information or testimony, or that otherwise threaten to interfere with these proceedings.

CONCLUSION

For the foregoing reasons, the Rehabilitator respectfully requests that its motion for a protective order be granted, that the foreign subpoena of Monterey Bay be quashed, and that the Court award the Rehabilitator its costs, expenses, and attorneys' fees incurred in objecting to this foreign subpoena.

Dated this 21st day of November, 2016.

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