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 Hon. Richard G. Niess

SUR-REPLY IN SUPPORT OF MHPI PROJECTS' OBJECTION TO THE REHABILITATOR'S PROPOSED SECOND AMENDED PLAN

The Rehabilitator's response to the MHPI Projects' Objections continues to urge this Court to invade the jurisdiction of courts presiding over litigation in other states. After making the affirmative decision to limit the Rehabilitation Proceedings to the Segregated Account, the Rehabilitator now asks this Court to greatly expand this proceeding and purportedly exercise jurisdiction over cases that (1) have been pending for nearly two years in other jurisdictions, and (2) concern policies in the General Account. In Article 6.13 of the Second Amended Plan, the Rehabilitator asks this Court to rule that "any default, event of default, or other event or circumstance relating to [Ambac], the Segregated Account, or any subsidiary thereof, then existing or alleged to exist (or that would exist with the passing of time or the giving of notice or both), under any agreement ***will be deemed to be cured and not to have occurred or existed, now, in the past or in the future*** . . ." (Sec. Am. Plan of Rehab., Art. 6.13.) (Emphasis added.) Rather than clarify these proceedings, the Rehabilitator now seeks to "wipe the slate clean" (Ex. A, 12/14/17 Hr'g Tr. at 36:19-22) and "eliminate the legal dispute over the issue" (Id. at 42:3-5) of an Ambac/Credit Enhancer Default in seven pending actions in state courts across the country.

The Rehabilitator and Ambac ask this Court to do what this Court previously stated it could not and would not do—address the ultimate legal question in controversy in other jurisdictions. (Dkt. No. 1289, Clarification Order, at 1) ("This Court does not seek to decide the merits of disputes involving the General Account that are pending in other courts."); (Ex. B, Ct.

of Appeal Op., ¶ 14) ("Second, the circuit court's order expressly declines to address the ultimate legal question in controversy in other jurisdictions – namely, whether the rehabilitation plan for Ambac's segregated account triggered 'credit enhancer default[s]' under the language of various MHPI projects' policy and surety documents."). This Court is correct to be troubled by the ramifications of the Rehabilitator's request (Ex. A, at 37:6–12) ("Now what your saying is I -- not only is this the -- what the plan is all about but any contrary interpretation that preceded this that is already in litigation in seven other courts is void, it should be given no effect. . . . I'm troubled by the ramifications of that."), and it should reject the Rehabilitator's invitation to step outside its jurisdiction and issue an order contrary to the principles of comity and Due Process.

The Rehabilitator's Motion should be denied for the reasons explained in the MHPI Projects' Objection to the Second Amended Plan, and the following four distinct reasons, which respond to arguments raised in opposition to the MHPI Projects' Objection: (1) Article 6.13 stretches far beyond this Court's prior orders by affirmatively deciding the merits of disputes pending in other courts; (2) the operative Wisconsin statutes and case law do not give this Court exclusive jurisdiction over the dispute between the MHPI Projects and Ambac; (3) because the dispute over whether an Ambac Default has occurred was first raised in other state courts, this Court should cede to the jurisdiction of those courts; and (4) neither the Rehabilitator nor Ambac present any evidence supporting the claimed necessity of including Article 6.13 in the Second Amended Plan.

I. ARTICLE 6.13 GOES FAR BEYOND THE SCOPE OF THE COURT'S PRIOR ORDERS.

The Rehabilitator argues that Article 6.13 is a proper exercise of the Court's authority because it is nothing more than a restatement of the Court's prior orders, which "form[] the basis for Article 6.13," and that the MHPI Projects are improperly re-asserting the same arguments

that were raised in response to the Rehabilitator's Motion to Confirm And Declare the Nature of Proceedings (the "Clarification Motion"). (Dkt. No. 1450, 12/11/17 Rehab. Resp. Br., at 34.) Indeed, the Rehabilitator goes so far as to claim that Article 6.13 "simply makes the injunctive effect of those Orders permanent." (Id., at 35.)

This argument is a mischaracterization of the 2016 Clarification Proceedings, which concerned clarification of the nature of the rehabilitation proceedings based on this Court's prior orders, and is directly contrary to the position the Rehabilitator took in seeking the Clarification Order from this Court. According to the Clarification Motion, the Rehabilitator was "not asking this Court to construe this contractual language or to adjudicate whether there has been an 'Ambac Default' or 'Credit Enhancer Default' within the meaning of these agreements." (Dkt. No. 1266, 7/15/16 Clarification Motion, ¶ 12.) This Court found it had jurisdiction to issue the Clarification Order, largely based on the premise that it was ***not*** declaring the impact of the Rehabilitation on General Account contracts.

The Clarification Order was clear: "This Court ***does not seek to decide the merits of disputes involving the General Account*** that are pending in other courts. As the Rehabilitation Order explains, '[t]his proceeding pertains solely to the Segregated Account . . . and does not pertain to policies, contracts, assets, equity ownership interests, and liabilities remaining in Ambac's General Account." (Dkt. No. 1289, Clarification Order, at 1) (Emphasis added.) This Court expressly ***avoided*** making any ruling about how the proceedings in this Court should be interpreted or applied in the other state court proceedings. (Ex. C, 10/11/16 Hr'g Tr., at 52:10-14) ("I'd like to [phrase the Clarification Order] in a way that I don't inadvertently blunder into another court's business. I just want to make sure that what has been done here is made clear to those other courts.").

The recent Wisconsin Court of Appeals decision affirming this Court's Clarification Order likewise recognized that this Court was not attempting to decide the issue pending in other courts. The Court of Appeals noted that the Clarification Order "***expressly declines to address the ultimate legal question in controversy in other jurisdictions***." (Ex. B, ¶ 14.) (Emphasis added.) The Court held that "[t]he circuit court ***did not*** make any finding or proffer any opinion as to [whether the structure of the rehabilitation plan triggers any specific default language in a policy in the general account]." (Id., ¶ 17.) (Emphasis added.) Therefore, the Court's Clarification Order, as both this Court and the Court of Appeals recognized, ***did not*** purport to make any ruling as to what impact the structure of the rehabilitation proceedings would have in other proceedings or otherwise prevent the MHPI Projects from prosecuting the breach claims in other proceedings.

Article 6.13 does exactly the opposite. It purports to make an affirmative ruling on the legal issues currently pending before the other state courts, *i.e.*, whether the Rehabilitation Proceedings have caused an Ambac Default. Article 6.13 deems any default "cured and not to have occurred or existed, now, in the past, or in the future." (Sec. Am. Plan of Rehab., Art. 6.13.) Article 6.13 thus goes ***far beyond*** the findings in the Clarification Order and the reasoning of the Court of Appeals.[1]

Likewise, the 2012 Injunction, which the Rehabilitator also cites as support for Article 6.13, does not extend so far. As the Court of Appeals has recognized, the 2012 injunction was limited to restraining claims against the ***Segregated Account***: "If Assured were seeking a ruling on its obligations under the reinsurance contracts to reimburse Ambac for claims arising from

[1] Given the breadth of Article 6.13, there is substantial risk that it may itself amount to an independent Ambac Default as an "Order for relief entered against [Ambac] under any federal or state law related to insolvency, bankruptcy, rehabilitation, liquidation, or reorganization that is final and nonappealable." (*E.g.*, Monterey Project Loan Agreement defining "Ambac Default").

policies *other* than those in the segregated account, we would agree that there was nothing in the arbitration exclusion clauses, ***the injunction, or the rehabilitation statutes*** that would bar arbitration of the dispute in New York." *In re Ambac Assur. Corp.*, 2013 WI App 138, ¶ 16, 351 Wis. 2d 681, 840 N.W.2d 137 (emphasis added). Article 6.13 would extend even further than the broadest reading of the 2012 injunction. Article 6.13 would affirmatively decide the merits of claims against policies in the General Account by asserting that any defaults under the various policies are deemed cured. (Sec. Am. Plan of Rehab., Art. 6.13.) Thus, contrary to the Rehabilitator's argument, there is no prior order from this Court that supports Article 6.13.

II. THIS COURT DOES NOT HAVE EXCLUSIVE JURISDICTION OVER THE ISSUE OF WHETHER THERE HAS BEEN AN AMBAC DEFAULT UNDER CONTRACTS IN THE GENERAL ACCOUNT.

At the Pretrial Conference, counsel for the Rehabilitator asserted that Article 6.13 is appropriate because "this Court has exclusive jurisdiction over the rehabilitation and therefore has exclusive authority to declare what a default is or is not as a result of the rehabilitation." (Ex. A, at 44:23-45:3.) Not only was this assertion not in any filings of the Rehabilitator, but it is incorrect and contrary to (1) Wisconsin statutes, (2) this Court's prior orders, and (3) appellate rulings construing the scope of these proceedings.

A. The Statutory Provision For Exclusive Jurisdiction Is Not Applicable.

The Rehabilitator's claim that the Court may exercise "exclusive jurisdiction" over policies in the ***General*** Account is wrong. The Rehabilitator relies on Wis. Stat. Ann. § 645.04(1), which does not confer exclusive jurisdiction on this Court under the circumstances here. (Dkt. No. 1450, 12/11/17 Rehab. Resp. Br., at 38.) Section 645.04(1) simply states that only the commissioner may bring a "delinquency proceeding," and that no court may hear such proceedings brought by someone other than the commissioner. A "delinquency proceeding" is defined as "any proceeding commenced against an insurer for the purpose of liquidating,

rehabilitating, reorganizing or conserving such insurer." Wis. Stat. § 645.03(b). This provision simply means that any proceeding to rehabilitate a Wisconsin insurer must be brought in Wisconsin. Thus, the Rehabilitator's reliance on this statutory section to establish exclusive jurisdiction over ***non-rehabilitation*** cases that are pending in other courts, and to which the Rehabilitator is not a party, (like the currently pending breach of contract cases between the MHPI Projects and Ambac) is not supported by the text of the statute. Here, the seven out-of-state cases between Ambac and the MHPI Projects arose because Ambac affirmatively ***invoked*** the jurisdiction of several out of state courts by suing the MHPI Projects and claiming standing as lender, which directly implicates the Ambac Default provision.[2] A contractual dispute between the MHPI Projects and Ambac is not a proceeding that would implicate § 645.04(1).

Wisconsin statutory law is clear that the "exclusive jurisdiction" this Court has is only exclusive with respect to ***other Wisconsin courts***. Section 645.04(3) is entitled "Exclusiveness of Proceedings" and details the precise scope of the exclusive jurisdiction. Specifically, Section 645.04(3) deals with the proper venue and jurisdiction for courts to consider matters that are "incidental to or relating to" proceedings for "the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer." Wis. Stat. § 645.04(3). Because the MHPI Project policies are all in the General Account, the pending cases involving Ambac Default are not "incidental to or related to" the Rehabilitation Proceedings. But even if they were, Section 645.04(3) only provides that no ***Wisconsin court*** may entertain such an action; the provision says ***nothing*** about jurisdiction related to an action in another state. *Id*. ("No court ***of this state*** has jurisdiction to entertain, hear, or determine any complaint . . .") (emphasis added).

[2] Under the MHPI Project Agreements, Ambac's right to act as the Lender is contingent on an Ambac Default not having occurred. (Ex. F, 12/2/15 Fort Meade Compl.) Said another way, Ambac is only entitled to exercise these rights if there is not an Ambac Default. (Id.)

There is nothing in the relevant Wisconsin statutory scheme that divests out-of-state courts of jurisdiction over Ambac.

B. Modification Of The MHPI Project Policies In The General Account Is Beyond The Scope Of This Proceeding.

In prior orders, this Court has repeatedly recognized that it does not have jurisdiction over policies in the General Account. (Dkt. No. 1289, Clarification Order, at 1) ("As the Rehabilitation Order explains, '[t]his proceeding pertains solely to the Segregated Account . . . and does not pertain to policies, contracts, assets, equity ownership interests, and liabilities remaining in Ambac's General Account.'") In that same order, the Court appropriately declined to assert jurisdiction over issues pending elsewhere, making clear that it was ***not*** seeking to "decide the merits of disputes involving the General Account that are pending in other courts." (Id.) Although the Rehabilitator now urges the Court to reverse its earlier position, he fails to address this Court's orders to the contrary.

The Court of Appeals' recent order affirming the Clarification Order is likewise instructive. The appellate court specifically noted that this Court "did not make any finding or proffer any opinion as to . . . ***whether the structure of the rehabilitation plan triggers any specific default language in a policy in the general account***" in its prior rulings. (Ex. B, ¶ 17.) (Emphasis added.) The Clarification Order was thus affirmed in large part because this Court refrained from deciding an issue about the MHPI Project policies in the General Account. (Id.) (rejecting argument that Clarification Order was an improper advisory opinion because "the circuit court's order expressly declines to address the ultimate legal question in controversy in other jurisdictions" and therefore "the clarification order would [not] have any greater effect on the litigation in other jurisdictions than the prior decisions that it seeks to clarify").

The position of the Rehabilitator is also inconsistent with the holdings of the Court of Appeals, which has consistently recognized the limited scope of these proceedings in seeking to rehabilitate the ***Segregated Account***. *See, e.g.*, *In re Ambac Assur. Corp*., 2013 WI App 138, 351 Wis. 2d 681, 840 N.W.2d 137 (2013). In *Assured*, a party to a reinsurance contract with Ambac sought to compel arbitration under the reinsurance contract. *Id*. at *2. Although the reinsurance agreement between Ambac and Assured was not in the Segregated Account, the underlying policies that were reinsured were put in the Segregated Account. *Id*. at *1. Assured argued that because its own contracts with Ambac were not in the Segregated Account, it was entitled to enforce an arbitration clause in the contracts. *Id*. This arbitration clause was voided if Ambac was subject to rehabilitation proceedings. *Id*. at *4.

The Wisconsin Court of Appeals held that because the reinsurance agreement related to policies in the Segregated Account, the injunctions barred Assured's claims. *Id*. ("[T]he specific dispute Assured sought to have arbitrated in this case was the application of certain loss clauses in its reinsurance contracts ***to demands for reimbursement for surplus notes provided by the segregated account to holders of Ambac policies that had been assigned to the segregated account . . . as provided in the rehabilitation plan***.") (Emphasis in original.) The court was careful to explain, however, that this rationale ***only*** applied because the underlying policies were in the Segregated Account: "[i]f Assured were seeking a ruling on its obligations under the reinsurance contracts to reimburse Ambac for claims arising from policies other than those in the segregated account, we would agree that there was nothing in the arbitration exclusion clauses, ***the injunction, or the rehabilitation statutes*** that would bar arbitration of the dispute in New York." *Id*. (Emphasis added.) Here, there is nothing that gives this Court the authority to declare whether there has been a default in contracts in the General Account.

Both this Court and the Court of Appeals have expressly acknowledged that this Court's exclusive jurisdiction does not extend beyond policies in the Segregated Account and certainly does not extend to deciding the merits of contractual disputes that are pending in other courts around the country. The Rehabilitator itself took this same position until making this motion, stating that policies that "have not been allocated to the Segregated Account ***[are] therefore not subject to the rehabilitation proceeding*** [and] the temporary injunction granted by the rehabilitation court does not apply to enjoin any actions" related to the policies in the General Account. (*See* Ex. D.) This is underscored by the fact that Ambac—with no objection from the Rehabilitator—filed 5 cases around the country, invoking the jurisdiction of those respective state courts in seeking to enforce the financial contracts between Ambac and the MHPI Projects, which is only possible if an Ambac Default has not occurred. (*See e.g.*, Ex. E, 1/8/16 Ambac Compl. Against Fort Bliss, at 3, 10-12) (stating that "[t]his Court has jurisdiction over this matter because the subject matter in controversy is within the jurisdictional limits of this Court" and seeking specific performance of contracts in the role as Lender).

Even if the Second Amended Plan is confirmed as submitted, it would not grant this Court exclusive jurisdiction over claims at issue in those MHPI Cases. Under the Second Amended Plan, the Court would retain "exclusive jurisdiction . . . (b) to hear, determine, and enforce Causes of Action that may exist by or against the Segregated Account or by or against the General Account or AAC or the Management Services Provider ***in regards to the Segregated Account***." (Sec. Am. Plan. of Rehab., Art. 7.1.) Thus, even under this language, this Court's jurisdiction over the General Account only extends to matters, "in regards to the Segregated Account." (Id.) The MHPI Cases do not meet this description as they are breach of contract cases arising out of policies in the General Account.

III. EVEN IF THIS COURT HAS CONCURRENT JURISDICTION, IT SHOULD DEFER TO THE OTHER STATE COURTS WHERE THESE ACTIONS ARE PENDING.

Even if this Court did have jurisdiction over some portion of the dispute between the MHPI Projects and Ambac—and it does not—under the rules of comity set forth by the Wisconsin Supreme Court, ***this*** Court should cede jurisdiction over the issue to the state courts in which the disputes between Ambac and the MHPI Projects are currently pending.

It is black letter law that where courts of concurrent jurisdiction (like sister state courts) are equally entitled to jurisdiction over a dispute, the court that first acquired jurisdiction ***over that dispute*** has the right to proceed. Wisconsin courts recognize the general rule "that a court may not enjoin or otherwise interfere with proceedings of a judicial nature in another court of coordinate jurisdiction." 1 Wis. Pl. & Pr. Forms § 2:71 (5th ed.) (citing *In re Clark*, 135 Wis. 437, 115 N.W. 387 (1908); *Frederickson v. Schaumburger*, 210 Wis. 127, 245 N.W. 206 (1932); *Orient Ins. Co. v. Sloan*, 70 Wis. 611, 36 N.W. 388 (1888)); *see also Syver v. Hahn*, 6 Wis. 2d 154, 159–60, 94 N.W.2d 161, 164 (1959) ("Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court ***which first acquires jurisdiction, its power being adequate to the administration of complete justice***, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action.") (emphasis added).

This rule is especially applicable when the court of coordinate jurisdiction is a foreign court. "The orderly administration of justice requires that there be some rule for avoiding the conflicting exercise of jurisdiction by two courts both of which are competent to decide the issues. Ordinarily, a court should not exercise jurisdiction over subject matter over which another court of competent jurisdiction has commenced to exercise it." *Brazy v. Brazy*, 5 Wis. 2d 352,

361, 92 N.W.2d 738 (1958) (holding Wisconsin court erred in entertaining application to modify child custody provisions after California court had already begun proceedings).

The law is the same in each of the states where these disputes are pending. *Schaefer v. Milner*, 156 Kan. 768, 137 P.2d 156 (1943) ("The rule that the court first acquiring jurisdiction shall proceed without interference from a court of concurrent jurisdiction rests upon 'comity', and the necessity of avoiding conflicts in the execution of judgments by independent courts. The rule that the court first acquiring jurisdiction shall proceed without interference from a court of concurrent jurisdiction is applicable not only as between courts within the same state, but between federal courts and state courts, and between state courts of different states."); *Mears v. Jeffry*, 80 Cal. App. 2d 610, 613 182 P.2d 294 (1947) ("[T]he rule is that where two courts are equally entitled to jurisdiction over the subject matter the court first acquiring jurisdiction has the right to proceed."); *State v. 91st St. Joint Venture*, 330 Md. 620, 628, 625 A.2d 953 (1992) ("[O]nce a court takes jurisdiction over a particular subject matter, another court of concurrent jurisdiction generally should abstain from interfering with the first proceeding."); *Wenz v. Earl Wenz, Inc.*, 400 Pa. 397, 399–400, 162 A.2d 376 (1960) ("The court first acquiring jurisdiction of a case will protect that jurisdiction by enjoining an action by the same parties on the same subject-matter in another court, even though that other court may also have equity jurisdiction.") (citation omitted); *Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001) ("As a rule, when cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other cases should abate."); *Craig v. Hoge*, 95 Va. 275, 28 S.E. 317 (1897) ("In cases of conflict of jurisdiction, it is well settled, as the general rule, that between two courts of concurrent jurisdiction, the court which first acquires

cognizance of the controversy or obtains possession of the property in dispute is entitled to dispose of it without interference or interruption from the co–ordinate court.").

The first-filed MHPI case involved the Fort Meade Project in Maryland; Ambac initially filed this case in Maryland federal court in late 2015.[3] After that suit was dismissed for a lack of diversity jurisdiction, the Meade Project filed a claim in Maryland State Court. In its Complaint, the Meade Project expressly raised its argument that Ambac could not demand cash funding because an Ambac Default had occurred. (Ex. F, 12/2/15 Fort Meade Compl. at 12-13.) In the two years that the case has been pending in front of the Maryland Court, there has been substantial discovery and motion practice, including the production and review of documents and depositions of key witnesses relating to the question of whether an Ambac Default has occurred, which provided both parties and that court with the evidence necessary to resolve this dispute.[4] Currently, both Fort Meade and Ambac have fully briefed summary judgment motions on the issue of whether an Ambac Default has occurred. Despite the fact that Ambac raised a *pro forma* affirmative defense in its Answer contesting the Maryland Court's jurisdiction to rule on the Ambac Default issue, Ambac has ***never*** put forward a substantive argument that the Maryland court must cede to this Court because this Court has exclusive jurisdiction over the matter, but has instead submitted the issue for the Maryland Court's resolution. (Ex. G, 2/16/16 Ambac Answer at 13-14.)

This issue was first raised by the Rehabilitator in this Court in connection with its Clarification Motion in ***July 2016***. Here, the Rehabilitator has failed to provide this Court with

[3] At the same time, Ambac filed cases against five other MHPI Projects in federal court. These cases were all either dismissed for lack of jurisdiction or voluntarily dismissed by Ambac.

[4] There has likewise been substantial discovery in the six other MHPI actions, which all similarly raise the issue of whether an Ambac Default has occurred.

the evidence necessary to make a determination of whether an Ambac Default has occurred under the terms of the MHPI policies. Thus, to the extent that this Court has any jurisdiction over the dispute between Ambac and the MHPI Projects, under well-established Wisconsin law, it should and must cede that jurisdiction to the other state courts where litigation is pending given that this dispute was first raised in those courts, and given that those courts have had substantially more exposure to the evidence underlying these specific contractual disputes and are considering the actual contracts between Ambac and the MHPI Projects at issue.[5]

IV. THE REHABILITATOR PROVIDES NO EVIDENCE THAT ARTICLE 6.13 IS NECESSARY OR APPROPRIATE.

In attempting to invoke the jurisdiction of this Court, the Rehabilitator argues that it is necessary for the Court to extend its jurisdiction and decide this legal issue because "[i]f this structure were not protected, and if the Rehabilitation were to cause defaults under [Ambac]'s General Account contracts . . . the successful conclusion of this rehabilitation case would be jeopardized." (Dkt. No. 1450, 12/11/17 Rehab. Resp. Br., at 35.) The Rehabilitator does not cite any evidence in support of its claim that a finding of default by the other courts in which the MHPI Project cases are pending would in any way jeopardize the successful resolution of this Rehabilitation. The Court cannot rely on this type of blanket assertion to usurp the authority of other state courts, particularly in the absence of any evidence supporting it.[6] As the Court of

[5] This is the central point of the MHPI Projects' Due Process argument, which the Rehabilitator cannot rebut. The MHPI Projects are ***not*** claiming that they are entitled to a specific contractual remedy or finding here. Instead, they are simply arguing that they are entitled to their respective days in court in the state courts around the country where these contractual claims are proceeding.

[6] Because the Rehabilitator does not provide any evidence on this point, its appeal to "deference" in its interpretation of the Wisconsin statute is misplaced. (Rehab. Resp. at 35.) Without such evidence, the Court must look at the Rehabilitator's determinations with a "critical eye," particularly as that deference related to statutory interpretation. *Volvo Trucks N. Am. v. Dep't of Transp*., 2010 WI 15, ¶ 12, 323 Wis. 2d 294, 779 N.W.2d 423 ("Deference to an agency's determination of law recognizes the comparative institutional qualifications and capabilities of the courts and the agency. Granting deference to an agency's statutory interpretation does not abdicate the court's own authority and responsibility to interpret statutes. Even when granting deference to an agency's statutory interpretation, the court does not accept the agency's interpretation without a critical eye. The court itself must

Appeals recognized, "the circuit court did ***not make a finding*** that enforcing any credit enhancer default provisions at stake in the MHPI projects' outside litigation would result in collateral damage today." (Ex. B, ¶ 18.) And the Rehabilitator made clear at the Pretrial Conference that it has no intention of offering any factual support for the claimed importance of Article 6.13 at the hearing on the Second Amended Plan. (Ex. A, at 44:13–22.) ("The testimony on 6.13, really -- I don't want to mislead anybody. All the testimony's going to be from Mr. McGettigan is he's relied on that being in the plan and enforceable . . . . He has no factual testimony to offer on 6.13. . . We would have very limited testimony on 6.13.") In fact, as discussed below, the undisputed evidence (as it comes directly from Ambac's witness testifying as a company representative) shows that there would be no meaningful collateral damage if there were a finding of an Ambac Default. (*See infra*, Section V.)

The Rehabilitator relies upon *Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 605 N.W.2d 210 (Ct. App. 1999). But *Isermann* involved a foreign court's order retaining jurisdiction over "all disputes that might arise" between the rehabilitated insurer and a claim holder. *Id*. at 144. Here, in contrast, this Court's order retaining exclusive jurisdiction over the Rehabilitation proceedings expressly, and by design, extended only to policies in the Segregated Account. This Court has purposefully not, and cannot, retained exclusive jurisdiction over the General Account or over the litigation pending in other states. Thus, *Isermann* does not speak to the facts of this case, where the Rehabilitator made an express decision to limit the policies over which it had oversight, and insisted on maintaining such limited jurisdiction even while Ambac and the MHPI plaintiffs invoked the jurisdiction of other state courts to hear the issue.

---

always interpret the statute to determine the reasonableness of the agency interpretation; only reasonable agency interpretations are given any deference.") (footnotes omitted).

V. AMBAC'S RESPONSE TO THE MHPI PROJECTS' OBJECTION LACKS MERIT.

Ambac's arguments provide even less support for Section 6.13. Ambac argues—with zero factual support—that Ambac's General Account will be better off if all existing defaults are cured and deemed to never have existed. (Dkt. No. 1442, Ambac Resp., at 5.) ("If confirmation of the Second Amended Plan were to jeopardize [Ambac]'s ability to utilize control rights, i.e., if Article 6.13 were not included, the effect would be detrimental to the amounts available to pay all policyholders, including those whose policies were allocated to the Segregated Account.") But Ambac does not provide any legal authority that would permit this Court to usurp the jurisdiction of other Courts where not only are these actions already pending, ***but where Ambac itself affirmatively filed the lawsuits***. (*See e.g.*, Ex. E.) Further, ***while the Second Amended Plan was pending***, Ambac affirmatively moved for summary judgment on the issue of whether there has been an Ambac Default in front of the Texas State court presiding over the Fort Bliss Action. (Ex. H, 12/13/17 Ambac Consolidated Opp'n to Mot. for Summ. J. and Mot. for Summ. J., at 46–47) (moving for summary judgment on claim that there has been a Credit Enhancer Default). These actions by Ambac, in conjunction with Ambac's complete failure to put forward authority supporting its position, completely undercut Ambac's arguments.

Ambac claims that if Article 6.13 is removed, "the entire purpose of the Segregated Account rehabilitation structure would be defeated." (Dkt. No. 1442, Ambac Resp., at 6.) Once again, Ambac fails to support this incredibly broad and incredulous claim. The only evidence that Ambac cites in support of this assertion is the conclusory declaration of David Barranco. (Id.) Ambac makes no attempt to demonstrate the number of policies that could be implicated if Article 6.13 is not included. Indeed, when Ambac presented a corporate representative to testify

on this topic in the Monterey Litigation,[7] Ambac's corporate representative could not identify a single other policy that has a default provision similar to those found in the MHPI Project documents, and that may therefore be at risk of a default finding if Article 6.13 is not included. (Ex. I, 9/23/16 C. Matanle Dep. Tr. at 88:8–90:9.) As of the time of that deposition, Ambac had not performed any analysis of that fact (Id., at 93:6–10), and there is no evidence that Ambac has done so in connection with its filing in support of the Second Amended Plan. Critically, neither Ambac nor the Rehabilitator offer any such factual support to this Court now.

Ambac asserts that Article 6.13 is supported by decisions "that recognize rehabilitation courts' authority to protect a rehabilitation insurer by enjoining third-party actions against the insurers' affiliates." (Dkt. No. 1442, Ambac Resp., at 11.) As an initial matter, Ambac's position that its relationship with the Segregated Account is so intertwined that they should benefit from the Rehabilitation Court's protection stands in stark contrast to the number of times in the related MHPI Cases that Ambac has drawn a sharp line between the Segregated Account and the General Account for purposes of Rehabilitation. (*See, e.g.*, Ex. J, 3/11/16 Ambac's Resp. to Monterey Pls.' Second Set of Interrogs., at 2.) ("[T]he Segregated Account, not Ambac, was the subject of the rehabilitation action commenced by the Commissioner of Insurance of the State of Wisconsin.")

Further, the cases cited by Ambac do not support its position. In each of the cited cases, the Court enjoined a third-party that shared ownership of certain assets with the entity ***in rehabilitation*** (for instance where the insurer owned a portion of a partnership that owned the relevant assets). *See, e.g.*, *Garamendi v. Exec. Life Ins. Co.*, 17 Cal. App. 4th 504, 21 Cal. Rptr. 2d 578 (Ct. App. 2d Dist. 1993) (allowing injunction of claims against partnership where

[7] The litigation between the Monterey Project and Ambac that was then pending in Monterey Superior Court in California.

rehabilitated party owned interest in that partnership). Here, the Court is not being asked to enjoin actions against a third party, it is being asked to ***affirmatively decide the merits*** of those claims in an account for which it had no prior jurisdiction, ***by design***, both retrospectively and prospectively. None of the cases cited by Ambac go so far. In addition, because the Segregated Account does not have any ownership interest in the policies in the General Account, case law relying on "identity of interest" between a third party and the rehabilitated party is inapposite. If the Court were to follow Ambac's argument to its logical conclusion, then ***any*** dispute involving Ambac could be subject to this Court's jurisdiction because a judgment in favor of or against Ambac could always have an indirect impact on the Segregated Account. For these reasons, Ambac's cited authority cannot support the drastic result the Rehabilitator seeks.

Ambac also cites to the rehabilitation proceedings of Financial Guaranty Insurance Corp. ("FGIC"), claiming the court in that case entered a plan of rehabilitation containing terms "similar to the provisions at issue in the Second Amended Plan." (Dkt. No. 1442, Ambac Resp., at 9-10.) But Ambac does not provide any indication that the Rehabilitation Court in the FGIC case included such language to specifically target already-filed litigation in other state courts. Again, Ambac cannot identify ***any*** precedent for the drastic steps it is asking the Court to take.

CONCLUSION

For these reasons, the Court does not have exclusive jurisdiction over the dispute between the MHPI Projects and Ambac and should not include Article 6.13 in the Second Amended Plan of Rehabilitation, as it would be an unwarranted interference with the jurisdiction of other state courts in which these claims are pending.

Dated this 22nd day of December, 2017.

KRAVIT, HOVEL & KRAWCZYK S.C.

/s/ Stephen E. Kravit

Stephen E. Kravit (State Bar No. 1016306)
Benjamin R. Prinsen (State Bar No. 1074311)
Leila Nadim Sahar (State Bar No. 1090093)
825 North Jefferson - Fifth Floor
Milwaukee, WI 53202
(414) 271-7100 - Telephone
(414) 271-8135 - Facsimile
kravit@kravitlaw.com
brp@kravitlaw.com
lns@kravitlaw.com

Attorneys for MHPI Projects