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

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

The MHPI Projects[1] seek reconsideration of this Court's February 7, 2018 injunction order (the "February 7 Injunction") pursuant to Wis. Stat. § 805.17(3), because the order infringes on the MHPI Projects' Constitutional rights to argue the extraterritorial effect of this Court's (and a Maryland court's) orders in out-of-state disputes, where other state courts have exclusive jurisdiction to make those determinations.

Counsel for the MHPI Projects (or "Projects") recognize that it is rare for any court to grant a motion for reconsideration of its prior rulings. It is even rarer when, as in this specialized statutory court-supervised rehabilitation proceeding, there has been ongoing Court review since 2010, multiple interested party filings and determinations, and two prior appellate rulings (including the *Nickel* decision, which was heavily relied on by this Court in issuing the February 7 Injunction). It is therefore only after careful consideration and with the utmost respect

[1] The "MHPI Projects" (MHPI being the Military Housing Privatization Initiative) are joint ventures between the US Army and a private developer and are responsible for the construction and maintenance of on-base housing for soldiers and their families at Army bases around the United States. Collectively, the MHPI Projects include: Monterey Bay Military Housing, LLC and Monterey Bay Land, LLC, Carlisle/Picatinny Family Housing LP, Fort Bliss/White Sands Missile Range Housing LP, Meade Communities LLC, Riley Communities, LLC, Fort Lee Commonwealth Communities, Fort Leavenworth Frontier Heritage Communities, II, LLC; Bragg Communities LLC; Fort Detrick/Walter Reed Army Medical Center Housing LLC; Polk Communities LLC; Rucker Communities LLC; and Stewart Hunter Housing LLC.

for this Court's orders, that the MHPI Projects submit that reconsideration and modification of the February 7 Injunction is appropriate here.

The February 7 Injunction was interpreted by this Court on the record on February 15, in response to the Projects' counsel's question concerning whether the Projects could argue about the full faith and credit that should be given to this Court's order and/or an order from a Maryland state court, in foreign courts[2]:

> MR. KRAVIT: I have one question, Your Honor, on the injunction you're talking about. I'm a little confused on your full faith and credit discussion and injunction. Does the injunction that is in effect today prevent the MHPI Projects from arguing full faith and credit of anything?
>
> THE COURT: The injunction – I thought you said that the injunction was clear.
>
> MR. KRAVIT: Well it's clear. It seems to proscribe, to be honest, the MHPI Projects from claiming that the Maryland decision is entitled to full faith and credit over the Wisconsin decision.
>
> THE COURT: What it is intended to do is to prevent the MHPI parties from arguing anything to the contrary that I have declared.
>
> MR. KRAVIT: So that would be on the Ambac default idea. I'm only talking about full faith and credit of your judgment versus Maryland or versus any other Court's judgment.
>
> THE COURT: If you want – I don't have a motion for clarification, as far as I know, on that injunction. I'm not even sure exactly what you're looking for other than an advisory opinion at this point.
>
> MR. KRAVIT: You're right. It's in another place.
>
> THE COURT: If you have something you want addressed, you can do it, but I'm not going to do it on the fly.

[2] The February 7 Injunction at issue on this motion for reconsideration, which is against all the MHPI Projects, was filed by the Rehabilitator and granted *ex parte* by this Court shortly after it was filed. At the same time, the Rehabilitator filed a motion for contempt of the Confirmation Order against the Fort Bliss MHPI Project. That motion for contempt was the subject of the hearing on February 15. At that time, the issue of the propriety of the February 7 Injunction was the subject of a pending Writ of Prohibition before the Wisconsin Court of Appeals (filed February 12, denied February 16). The February 15 contempt hearing was not a hearing on the February 7 Injunction, although this Court made the comments and interpretation of the February 7 Injunction referenced herein.

MR. KRAVIT: Fair enough, Your Honor.

THE COURT: I'm telling you that this claim that there is a credit enhancer default, a default that is an affirmative defense anywhere in this country is not to be argued by the parties that are subject to the jurisdiction of this Court.

MR. KRAVIT: That is crystal clear.

MR. FINERTY: I think I can clarify what Mr. Kravit is asking because I know where this is going, which will bring us back to court, so maybe we can head that off at the pass. They want to be able to argue that Ambac's in default and they can't do that.

THE COURT: Right.

MR. FINERTY: Instead, they're going to take the Maryland case, the Maryland decision to other courts and say, you have to follow the Maryland conclusion. It's res judicata or it's collateral estoppel. And they're going to throw up their hands and say, we're not arguing Ambac's in default. All we're doing is arguing as a matter of constitutional full faith and credit you have to follow what Maryland did.

THE COURT: Is that what MHPI has in mind, Mr. Kravit?

MR. KRAVIT: It's not a secret. That's what they've claimed.

THE COURT: That's exactly the subterfuge that they're doing throughout this. It's not allowed.

MR. FINERTY: That was exactly my point. They're arguing with the Maryland decision what they've been precluded from doing directly.

THE COURT: I agree with that. There's no direct or indirect argument to be made to any court that there is a default by Ambac or has the effect of finding a default by Ambac in any other court.

MR. KRAVIT: Even if another court has found that and it's a final judgment?

THE COURT: I'm telling you what my ruling is. I'm not going to argue with you.

(Ex. 1, 2/15/18 Hr'g Tr. at 37:7-40:3.)

The Court's first instinct – to suggest a motion for clarification on the full faith and credit issue raised by the Projects – was correct. The Court's oral ruling that the February 7 Injunction acts as a wholesale prohibition on any full faith and credit argument that the Projects

might make was issued without the benefit of briefing, and thus without the Court's ability to consider well-settled law on this issue.

This Court should reconsider the February 7 Injunction because it violates constitutional full faith and credit, and by its terms violates due process and the First Amendment rights of the Projects. The Full Faith and Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). State courts are not allowed to dictate to their sister courts in other states whether, and to what extent, their orders should be given full faith and credit, because to "vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980). This applies not only to orders directed at other state courts themselves, but also to orders directed at parties which seek to have the same effect. *See James v. Grand Trunk W. R. Co.*, 14 Ill.2d 356, 372 (1958) (holding that an out of state injunction directed at parties enjoining them from arguing the merits of the case based on full faith and credit improperly deprives the court of its jurisdiction just as much as an injunction directed to the court itself).

Despite this well-settled authority, under the express terms of the February 7 Injunction, the MHPI Projects are enjoined from defending against Ambac's claims in the other pending cases by asserting or arguing that the Maryland court's judgment is entitled to full faith and credit or that this Court's Confirmation Order is not. The MHPI Projects' rights to make these arguments are constitutionally recognized and, as a result, the February 7 Injunction should

be reconsidered, rescinded, or modified to allow the Projects to argue full faith and credit issues without fear of contempt.

BACKGROUND FACTS

A. Ambac Initiates Litigation Against the MHPI Projects

As part of their financing transactions, the MHPI Projects were required to obtain credit enhancement – generally in the form of bond insurance and a surety bond guaranteeing one year's worth of loan payments – which the MHPI Projects purchased from Ambac. As part of those credit enhancement transactions, Ambac was granted a limited assignment of lender's rights, which entitled it to enforce certain conditions of the loan. In late 2008, Ambac's credit rating was downgraded and, as a result, the surety bonds which the MHPI Projects had purchased from Ambac no longer satisfied the ratings requirements in the loan transaction documents. (*See*, *e.g.*, Ex. 2, Meade Servicing Ag. at § 4.15.) Approximately seven years later, in late 2015, Ambac issued demands to the MHPI Projects, based on the assignment of lender's rights Ambac had received as part of the credit enhancement transactions, claiming that they must either replace the surety bonds they had purchased or cash fund debt service reserve funds likely equal to one year's worth of debt payments. (*E.g.* Ex. 3, U.S. Bank Ltrs. to Meade Project.) When the MHPI Projects refused, Ambac filed lawsuits against them alleging breach of contract and seeking specific performance.

In response to the Ambac lawsuits, the MHPI Projects, with approval of the Army, formed a joint-defense group and developed a litigation strategy. They asserted several affirmative defenses to Ambac's claims, including that they were time-barred by the statute of limitations, and that Ambac lacked standing to enforce the contracts at issue as a result of the triggering of an "Ambac Default" or "Credit Enhancer Default" as specifically defined in the MHPI contracts. (*E.g.* Ex. 4, Meade Grantor Trust Ag. at § 1.01(c)(i)-(ii).) The Army approved

of the strategy - including the affirmative defenses - and of the legal expenses associated with the pending state court cases. (Ex. 5, P. Cramer Aff. at ¶ 3.)

B. The Maryland Court's Summary Judgment Ruling

The first of the state court cases concerned the Meade Project and was filed in Maryland in 2015.[3] After extensive discovery in the Maryland case, both parties cross-moved for summary judgment. After multiple rounds of briefing, the Maryland court conducted a full hearing on the merits. The facts on summary judgment were developed through the discovery process, including by expert testimony presented by the MHPI Projects from Bruce Deal (a highly-respected economist). (Ex. 6, Meade Interrog. Resp. (containing expert report of B. Deal); Ex. 7, Meade Interrog. Resp. (containing expert report of E. Csiszar).) Ambac was given the opportunity to cross-examine the experts and to present their own expert rebuttal testimony. (Ex. 8, Ambac Interrog. Resp. (containing expert report of D. Jones); Ex. 9, Ambac Interrog. Resp. (containing expert report of S. Prowse).) Ambac argued vigorously that the Maryland court should base its decision on the fact that the Wisconsin Rehabilitator did not *intend* for a default to occur. At the summary judgment hearing, both parties offered record evidence and legal argument on whether the necessary factual preconditions of an Ambac Default under the Meade Project's specific contracts had occurred. (*See generally* Ex. 10, 9/1/17 Meade Hr'g Tr.)

On January 18, 2018, the Maryland court entered summary judgment based on the MHPI Projects' argument that Ambac lacked standing to demand the Meade Project cash fund the debt service reserve fund because an Ambac Default had in fact occurred under the terms of

[3] This suit was first filed in federal court against the Meade Project. *See Ambac Assurance Corp v. Meade Cmtys. LLC*, Case No. 15-cv-03130 (D. Md.) (dismissed January 14, 2016.) The federal lawsuit against the Meade Project, along with five other federal lawsuits filed by Ambac against the MHPI Projects, was later dismissed because federal subject matter jurisdiction did not exist. These lawsuits (as well as an additional declaratory judgment action by the Monterey Project located in California) have been subsequently litigated in state courts where the MHPI Projects are located.

the Meade Project policies. (Ex. 11, 1/18/18 Am. Op. & Order on Summ. J.)[4] This ruling was based on the record presented by both sides. The Meade Project did not argue that Ambac itself had been placed in rehabilitation, or misrepresent the nature of the Rehabilitation Proceedings in any way - nor did Ambac argue that any such misrepresentations were being made. Ambac urged the Maryland Court to defer to the statements made in this Court's Confirmation Order regarding what the Rehabilitator had intended to do. (Ex. 10, 9/1/17 Meade Hr'g Tr. at 37:1-40:6.) But Ambac conceded that "when claims were paid and money was transferred, it was pursuant to the note. It was pursuant to the reinsurance agreement." (*Id.* at 39:15-17), which is the basis on which the Maryland Court ultimately ruled on the Meade Project's affirmative defense. (Ex. 11, 1/18/18 Am. Op. & Order on Summ. J.)

The Maryland Court rejected Ambac's argument that the 2016 Clarification Order was entitled to full faith and credit, that it must be deferred to out of comity, and/or that it was dispositive of the Meade Project's affirmative defense. The Maryland Court instead found that under the unambiguous terms of the Meade Project documents and the undisputed facts, the Rehabilitator had in fact been authorized to take, and had taken, a material portion of Ambac's property, and thus an Ambac Default had occurred. (*Id.* at 5.) ("In that Court's Order which confirmed said rehabilitation plan, a 'segregated account' was established and capitalized to assure payment of certain critical obligations of Ambac. The value of Ambac assets impaired by the control of the Rehabilitator included a secured note for $2 Billion, and an Excess of Loss Reinsurance Agreement that impaired all of the rest of Ambac's assets, save a minimum of $100 Million.") Under Maryland law, this order, which resolved all claims between the parties, is a

[4] This Maryland Order was signed on January 18, 2018, but was not entered on the docket on until January 22, 2018.

final judgment. *See Campbell v. Lake Hallowell Homeowners Ass'n,* 157 Md. App. 504, 524, 852 A.2d 1029, 1040 (2004)[5].

C. This Court's February 7 Injunction

On February 7, 2018, the Rehabilitator sought entry of an injunction against the MHPI Projects. The order was entered by the Court that same day, and expressly prohibits the MHPI Projects from, *inter alia*, "asserting or continuing to assert, in any court or otherwise, that an Ambac Default or Credit Enhancer Default occurred as a result of or in connection with the proceedings in this Court" or "asserting that any Ambac Default or Credit Enhancer Default that was or is ruled to have occurred by any other court or other tribunal was not cured by the Confirmation Order." (Ex. 12, 2/7/18 Injunction Order.)

It further provides:

> a. The MHPI Projects shall immediately send a copy of this Order and the Confirmation Order and further advise all other courts in which one or more of them are parties to a case where an Ambac Default and/or a Credit Enhancer Default issue is pending that a finding of an Ambac Default or a Credit Enhancer Default on the basis of the Rehabilitation of the Segregated Account is contrary to Wisconsin law, the Confirmation Order, and the policy of the Office of the Commissioner of Insurance; and
>
> b. The MHPI Projects shall immediately advise all other such courts that, pursuant to Wisconsin law, the Confirmation Order, and the Plan, any alleged Ambac Default or Credit Enhancer Default has not occurred based on the Rehabilitation of the Segregated Account or, in the event a court has made a finding of such a default, such default is deemed cured.

(*Id.*)

The Court then confirmed at the February 15 hearing in its remarks quoted above (Ex. 1. 2/15/18 Hr'g Tr. at 39:1-24) that this Injunction Order also bars the MHPI Projects from

[5] The Projects are providing this underlying detail about the Maryland case in response to this Court's remarks on Ex. 1, 2/15/18 Hr'g Tr. at 26:24-27:12, where the Court says how the Maryland court found "that a default occurred is beyond me" and concludes "So it's just not true what was – what has been concluded by the Maryland court."

arguing to other state courts whether, and to what extent, they must give full faith and credit to this Court's orders (or to other state court orders). On February 11 and 12, the MHPI Projects complied with the mandatory terms of the Injunction and filed with each of the respective state courts a copy of the Injunction as well as a copy of the Court's Confirmation Order (Ex. 13, Compiled Notices to State Courts.) On February 12, the MHPI Projects filed a petition for supervisory writ against the February 7 Injunction. On February 16, the Wisconsin Court of Appeals denied the MHPI Projects' petition for supervisory writ of prohibition "on the grounds that an appeal is an available alternate mechanism for seeking relief." (Ex. 14, 2/16/18 Order at 4.)

D. Upcoming Deadlines in the Pending Out-Of-State Cases Affected By the Injunction

There are numerous upcoming deadlines in the other out-of-state cases that are directly impacted by the February 7 Injunction Order. For example, Ambac's motion for reconsideration of the Maryland Court's summary judgment order is pending, and the Meade Project's response is due on March 17. The February 7 Injunction Order appears to prevent the Meade Project from filing a response or otherwise participating in the resolution of that motion, and to require the Meade Project to stand silent on that motion under a threat of contempt in this Court. (Ex. 15, S. Oberg Aff.) Similarly, on April 27, 2018 the Texas Court has scheduled a hearing on the parties' motions for summary judgment, but if the February 7 Injunction remains in effect, the Bliss Project will be unable to participate in that hearing (even to argue full faith and credit) without subjecting itself to contempt. (Ex. 16, M. Osborn Aff.) In the Riley Project litigation, Ambac has filed a supplemental brief arguing that this Court's Confirmation Order is entitled to full faith and credit and is thus dispositive of the parties' fully briefed summary judgment motions. (Ex. 17, P. Riordan Aff.) Under the February 7 Injunction, the Riley Project

cannot respond to this motion and risks the Court deciding the issue without giving the Riley Project an opportunity to be heard on that constitutional question. (*Id.*) Finally, the Leavenworth Project has its motion for summary judgment due on April 10, 2018. With the February 7 Injunction in place, the Leavenworth Project cannot move for summary judgment or defend against Ambac's anticipated summary judgment motion on this issue. (*Id.*)

In sum, the February 7 Injunction prohibits the MHPI Projects from defending against claims initiated by Ambac, including by asserting their constitutional right to explain their position and be heard on whether those courts are required to give this Court's orders (or the Maryland order) full faith and credit. The MHPI Projects acknowledge that the statutes governing Rehabilitation provide this Court with substantial discretion. But that discretion is not unlimited. For the same reasons this Court does not have the right to dictate how other state courts must rule, it cannot enter an order directed at the MHPI Projects that has that same effect – which is to prohibit the exercise of jurisdiction of other state courts to determine issues of full faith and credit. By law, that is an issue that must be left to those other state courts, and the MHPI Projects (just as much as Ambac) have the right to be heard in those courts.

LEGAL STANDARD

A circuit court may "upon its own motion or the motion of a party" reconsider or amend "its findings or conclusions" and "may amend the judgment accordingly." Wis. Stat. § 805.17(3). "A movant may prevail on a motion for reconsideration by establishing a manifest error of law. "To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853. A manifest error "is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Id.* (citation omitted); *Delsart v. Albany Felt Co.*, 2012 WI

App 132, ¶ 11, 345 Wis. 2d 61, 823 N.W.2d 840 (unpublished). Such reconsideration is proper while the MHPI Projects' appeal of the February 7 Injunction and other orders are pending. Wis. Stat. § 808.07(2)(a)(1) ("During the pendency of an appeal, a trial court . . . may . . . [s]uspend [or] modify . . . an injunction.").

ARGUMENT

I. RECONSIDERATION OF THE FEBRUARY 7 INJUNCTION IS WARRANTED.

The MHPI Projects respectfully request that this Court reconsider its February 7 Injunction Order, based on controlling law that holds that issues of full faith and credit are to be determined in the court where an order is being sought to be enforced (or not enforced). *See Magnolia Petroleum v. Hunt*, 320 U.S. 430, 439-442 (1943) (holding state courts may not ignore the commands of full faith and credit); *Grand Trunk W. R. Co.*, 14 Ill.2d at 372. By prohibiting the MHPI Projects from using the Maryland Court's Order as collateral estoppel and/or arguing that this Court's orders are not entitled to full faith and credit in other jurisdictions, the injunction improperly interferes with the jurisdiction of other courts. Such a result is contrary to settled law, regardless of the fact that this Court believes the Maryland Court got its ruling wrong. *Milliken v. Meyer*, 311 U.S. 457, 462 (1940). The Injunction should also be reconsidered because the MHPI Projects did not have an opportunity to be heard before it was entered, and because it imposes an improper restriction on the MHPI Projects' First Amendment rights by restricting their speech before other courts in cases where this Court does not have jurisdiction.

A. The Injunction Improperly Seeks to Impose the Extraterritorial Effect of this Court's Orders in Violation of the Full Faith and Credit Clause of the United States Constitution

1. This Court's Order Improperly Seeks to Prevent Argument Regarding the Operation of the Maryland Final Judgment

The United States Supreme Court has held that "by virtue of the full faith and credit obligations of the several States, a State is permitted to determine the extraterritorial effect of its judgment; ***but it may only do so indirectly by prescribing the effect of its judgments within the State***."). *Thomas*, 448 U.S. at 270 (1980) (emphasis added). Indeed, "[t]o vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Id*. "Full faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pac. Employers Ins. Co. v. Indus. Accident Comm'n of State of California*, 306 U.S. 493, 504–05 (1939).

Here, prior to this Court's January 22 Confirmation Order, the Maryland Court issued a final judgment, after full briefing and a contested hearing. (Ex. 11, 1/18/18 Am. Op. & Order on Summ. J.) Under Maryland law, this is a final judgment. *Campbell*, 157 Md. App. 504, 524, 852 A.2d 1029, 1040 (2004) ("Nonetheless, a broad consensus has emerged that the pendency of an appeal should not suspend the operation of a judgment for purposes of res judicata or collateral estoppel."). Likewise, under Maryland law, this decision is able to be used for defensive non-mutual collateral estoppel. *Pat Perusse Realty Co. v. Lingo*, 249 Md. 33, 45, 238 A.2d 100, 107 (1968) ("'It would seem to this court that as long as the party against whom the judgment was sought to be used had a full and fair opportunity to be heard on the issue

there would be no constitutional impediment to the application of the doctrine of collateral estoppel where there was no mutuality.") Accordingly, the MHPI Projects are entitled to argue that other state courts must accord this judgment the same preclusive effect as this judgment has under Maryland law. *See Durfee v. Duke*, 375 U.S. 106, 109 (1963) (holding that the Full Faith and Credit Clause of United States Constitution requires a state enforcing foreign judgment to apply rendering state's law if more preclusive than that of enforcing state).

Whether, and to what extent, the Maryland Court's order is entitled to collateral estoppel is not for this Court, a court in Wisconsin, to decide, except to the extent it is being used to argue for collateral estoppel to be applied *in Wisconsin*. That is not being argued here and, accordingly, the MHPI Projects should not be enjoined from making arguments to other state courts that, under their jurisdiction, the Maryland order is entitled to full faith and credit.

2. This Court's Disagreement with the Maryland Court's Judgment Does Not Constitute Sufficient Grounds for Issuing the Injunction

The MHPI Projects must be allowed to argue that the Maryland court's judgment was correct, and that it is entitled to full faith and credit, regardless of whether this Court believes it is better situated to decide the issue, whether it believes the Maryland court's judgement is wrong, or whether it believes the Maryland court was misled, which, as explained below, it was not. The full faith and credit command is "exacting, if not inexorable," *Estin v. Estin*, 334 U.S. 541, 546 (1948), and "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the [other state's] judgment is based." *Milliken*, 311 U.S. at 462. A state court is not "free to ignore rights and obligations . . . established by the judicial proceedings of others," and instead must treat another state's judgments as "conclusive." *Magnolia Petroleum*, 320 U.S. at 439.

Though the Court expressed its belief that the Maryland court was misled as to the structure of the Rehabilitation, the record shows that is not the case.[6] To the contrary, the Meade Project, through its retained expert witnesses and in all briefing, accurately described the structure of the Rehabilitation, including the General and Segregated Accounts and the economic consequences of this structure and capitalization of the Segregated Account to the Maryland court. (Ex. 18, Meade Mot. for Summ. J.; Ex. 6, Meade Interrog. Resp. (containing expert report of B. Deal) at 2 ("[I]t is Mr. Deal's opinion that from an economic perspective, the Rehabilitator has been *appointed custodian for* or *authorized to take possession of a material portion* of all of Ambac's property across many independent measures [including the Secured Note and Reinsurance Agreement)"); Ex. 7, Meade Interrog. Resp. (containing expert report of E. Csiszar)). These are the same facts and arguments made by the MHPI Projects before the other state courts where this issue is pending.[7]

[6] This Court stated "[p]reviously, Kirkland & Ellis apparently convinced a Maryland court that the assets of Ambac had been placed in rehabilitation. The Court of Appeals in this state has held that that did not occur. I don't know how that got to the conclusion of the Maryland court." (Ex. 1, 2/15/18 Hr'g Tr. at 26:9-14) and later, "[f]or some reason the Maryland court thinks that because Ambac general account remained financially at risk because of these toxic assets that were now segregated that that somehow was a qualitative change in Ambac such that a default occurred is beyond me." (*Id.* at 26:20-25)

[7] Ambac was not a potted plant during the Maryland case. Ambac was represented by experienced, reputable counsel who vigorously contested the Ambac Default issue in Maryland, and lost. To the extent this Court believes certain arguments were not appropriately made or considered in Maryland, it is not the result of *any* attempt to mislead by counsel for the Meade Project. This was a legitimate, fully contested issue.

3. This Court's Injunction Imposes Its Legal Conclusions On Other States

By enjoining the MHPI Projects from arguing (and thus other state courts from effectively considering) the extent to which full faith and credit should be given (or not given) to the Wisconsin and Maryland orders, the February 7 Injunction imposes this Court's rulings of Wisconsin law upon numerous other state courts which are deciding issues under contracts explicitly governed by *their own state laws*. This is contrary to constitutional principles. *Pac. Employers Ins. Co.*, 306 U.S. at 503-505 (holding that one state may not "legislate for [another]" or "project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."). To the best of counsel's knowledge, no court in U.S. jurisprudence has ever previously issued such an order, enjoining a party in another case from arguing whether the Constitution's Full Faith and Credit Clause applied to a court order from another state. This Court, through its February 7 Injunction, ordered the MHPI Projects to argue to other state courts that Wisconsin law controls the outcomes of cases initiated by Ambac in those other state courts where the dispute is governed by laws of those states and not Wisconsin law.

It is one thing for this Court to express its strong opinion on the record about what it believes is correct under the law. That record was made, and can be used by Ambac in the litigation it brought. But this Court cannot take the further step of prohibiting the MHPI Projects from responding, by enjoining them from even arguing to those other courts that they are not required under full faith and credit to automatically adopt this Court's rulings on issues of their state law. Nor can it require the MHPI Projects to sponsor Ambac's argument in other courts.

4. The February 7 Injunction is an Impermissible Antisuit Injunction

Wisconsin recognizes that the circumstances justifying entry of an antisuit injunction enjoining someone from conducting litigation in another forum is a rare and drastic

remedy. *Chicago, M. & St. P. Ry. Co. v. McGinley*, 175 Wis. 565, 185 N.W. 218, 220 (1921) (holding purpose of antisuit Injunction is to "to regulate the conduct of its own citizens over whom it has jurisdiction, in such a way as to prevent hardship, oppression, or fraud."). "[T]he power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised." *Id.* at 223. "Each case must be ruled by its own facts." *Id.* at 222 (citation omitted).

While allowed under extraordinary circumstances, such injunctions are rare and not without limit. "[T]he courts of the several states are without authority or jurisdiction to curtail or prohibit in any form the exercise of rights and privileges conferred by [other states]" *Union Pac. R. Co. v. Rule*, 155 Minn. 302, 305 193 N.W. 161, 162 (1923). Where the intended effect of an antisuit injunction, though in name only applicable to parties, is to interfere with the jurisdiction of another state court, it is improper on its face. *Grand Trunk W. R. Co.*, 152 N.E.2d at 865 ("[T]he intended effect of the Michigan injunction, though directed at the parties and not at this court, is to prevent the Illinois court from adjudicating a cause of action of which it had proper jurisdiction."). "It is familiar law that, where the jurisdiction of a court and the right of a party to prosecute the proceedings therein have once attached, that right cannot be arrested or taken away by proceedings in another court." *State ex rel. New York, C. & St. L. R. Co. v. Nortoni*, 331 Mo. 764, 771, 55 S.W.2d 272, 275 (1932). That is the case even where, as here, one court thinks another court is wrong. An antisuit injunction "[cannot] be properly based upon any theory that this court knows better how to do justice than the court of [another state]; that it can weigh evidence better or more justly apply to the facts any general principle of law or of equity, nor upon the ground that this court recognizes different rules of law or of equity . . ." *McGinley*, 175 Wis. 565, 185 N.W. at 223 (citation omitted).

The proper place for the issue of full faith and credit to be decided is the court in which it is asserted, by either side, which is why courts routinely decline to afford full faith and credit to anti-suit injunctions. *Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835 (9th Cir. 2005) (refusing to abstain, grant full faith and credit, or pay comity to a Pennsylvania rehabilitation court's stay of all litigation against insurer, even after finding that Pennsylvania would qualify as a reciprocal state under California law); *Love v. Frontier Ins. Co.*, 526 F.Supp.2d 859 (N.D. Ill. 2007) (holding that direct action against insurer in Illinois was not precluded by an antisuit injunction issued by a rehabilitation court in New York); *Hare v. Starr Commonwealth Corp.*, 813 N.W.2d 752, 760 (Mich. Ct. App. 2011) ("[T]he Full Faith and Credit Clause did not require the circuit court to recognize or enforce that portion of the New York order of rehabilitation [that] . . . effectively operated as an antisuit injunction [because] it fell 'outside the full faith and credit ambit.'"); *Mahan v. Gunther*, 278 Ill. App. 3d 1108, 663 N.E.2d 1139 (1996) (similar); *Fuhrman v. United Am. Insurers*, 269 N.W.2d 842, 847 (Minn. 1978) (similar). On its face and as interpreted by this Court on February 15, the February 7 Injunction forbids the MHPI Projects from even asking these other courts to consider the issue of full faith and credit. It should therefore be reconsidered and dismissed, or modified to allow the Projects to fully and freely argue full faith and credit in all foreign courts.

B. The Injunction Operates as an Unconstitutional Restraint on The MHPI Project's First Amendment Rights.

The U.S. Supreme Court has held that injunctions involving speech are subject to "rigorous" constitutional scrutiny. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). They must satisfy "general principles" of the First Amendment as well as "the general rule, quite apart from First Amendment considerations," that an injunction should be "no broader than necessary to achieve its desired goals." *Id.*

By barring the MHPI Projects from making arguments they are constitutionally entitled to make, and by requiring them to advocate for a certain position in other state courts, the February 7 Injunction is overbroad. An Injunction which prohibits speech, including based on the Full Faith and Credit Clause of the Constitution, violates the longstanding First Amendment principle that the government may not require a party "to express a message [it] disagrees with." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005); *see also W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

"The term prior restraint" describes "judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984)). And "[a]ny prior restraint on expression" carries "a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Thus, because the February 7 Injunction forbids the MPHI Projects from advancing legal arguments in the future, in litigation pending in other courts, it becomes an "order[] that actually forbid[s] speech activities," which is a "classic example[] of [a] prior restraint[]." *Alexander*, 509 U.S. at 550; *see also McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015). Because the Injunction prohibits the MHPI Projects from arguing going forward that this Court's legal conclusions should not be given full faith and credit, it is an unconstitutional prior restraint.

The purpose of the Injunction Order was accomplished when the MHPI Projects were required to inform other state courts of this Court's ruling on Ambac's default. That is done. Every court now knows exactly what this Court found and why. Ambac and its very competent counsel can use that to argue whatever it wants – including, that this Court's orders

should be given full faith and credit. But to the extent this Court enjoined the MHPI Projects from responding to those arguments, the February 7 Injunction is an impermissible restraint under the First Amendment.

C. The Court of Appeals' Prior Decision Does Not Dictate the Full Faith and Credit Issue.

At the hearing on the motion for contempt, this Court stated that: "The Court of Appeals' decision in *Nickel* has already held that there are no credit enhancer defaults as alleged by MHPI. They held that, as I said in the last hearing, in multiple areas of -- multiple passages from *Nickel*." (Ex. 1, 2/15/18 Hr'g Tr. at 33:10-14.)

Respectfully, the MHPI Projects note that the Court of Appeals has not at any time (either in *Nickel* or elsewhere) made any findings regarding "whether the structure of the rehabilitation plan triggers any specific default language in a policy in the general account." *In re Ambac v. Carlisle/Picatinny Family Housing L.P., et al*, No. 2016AP2169, 2017 WL 6398530, at *4 (Wis. Ct. App., Dec. 14, 2017). The citation to *Nickel* referenced by the Court approved an injunction over certain policies in the Segregated Account, but it did not make specific findings regarding the status of general account policies. *In re Ambac Assur Corp*., 2013 WI App. 129, 351 Wis. 539, 841 N.W.2d 482 ("*Nickel*"). The *Nickel* court did address arguments made by several segregated account policyholders that the rehabilitation impermissibly transferred assets to the segregated account, and correctly ruled that, upon the commencement of the rehabilitation, "all assets remain in the general account because transferring the assets to the segregated account would have triggered acceleration and early termination provisions." *Id.* As a result, the Court of Appeals held that at the time of the rehabilitation the assets remained in the General Account, but that holding did not specifically address the court-appointed Rehabilitator's ability or authorization to take assets as part of

administering the Segregated Account, which is what the MHPI Projects have argued and the Maryland court found under the (c)(i) and (c)(ii) triggers. Notably, the Court of Appeals' decision in *Nickel* did not address or decide the issue of whether an injunction barring parties from arguing full faith and credit is permissible.

The MHPI Projects understand that this Court may not read the *Nickel* opinion the same way. But even if that is the case, the answer is not to restrain the Projects from making that argument in other state courts. Again, the objective can be (and has been) accomplished by informing those courts of exactly what this Wisconsin Court's view is on this issue and the reasons why it views the issue that way under Wisconsin law. If, with that full information, other state courts decide differently, the MHPI Projects should not be subject to contempt. Likewise, they should not be enjoined from making the argument to those courts.[8]

There is binding appellate law of this case holding that parties including the Projects are entitled to litigate their general account policies in other states. *See In re Ambac Assur. Corp.*, 2013 WI App 138, ¶ 16 ("If 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

[8] The MHPI Parties have never misrepresented the *Nickel* holding, and have not urged any courts to reject it. Nor have the MHPI Projects made any misrepresentations to the Maryland Court (or to the Courts in California, Texas and Kansas where this issue has been briefed) regarding the factual basis for concluding that an Ambac Default has occurred as a result of how the Segregated Account was structured and capitalized. Rather, the MHPI Projects argued that, under the unique default triggers in their contracts with Ambac, there is a default because the orders of this Court "authoriz[ed] the taking of possession by a custodian. . . [of] any material portion of Ambac's property" through the Secured Note and Reinsurance Agreement. (Ex. 4, Meade Grantor Trust Ag. at § 1.01.) This defense was based on facts from the record that Ambac did not dispute and on the expert declaration of Bruce Deal, which fully disclosed the general account/segregated account structure and explained in great detail why this structure met the unique triggers in the MHPI policies. (Ex. 6, 2/2/17 Meade Interrog. Resp. (containing expert report of B. Deal).) The Maryland Court issued its ruling after a full adversarial proceeding, including full discovery, briefing, and argument by all interested parties. The court considered the voluminous briefing and argument for five months before issuing its opinion. These are the same facts and expert testimony relied on by the MHPI Projects in the California, Texas and Kansas cases.

clauses, the injunction, or the rehabilitation statutes that would bar arbitration of the dispute in New York."). Nothing in *Nickel* prevents that or prevents the MHPI Projects from arguing full faith and credit to other state courts.

The Court of Appeals held it was proper to enjoin future action with respect to those policies in the Segregated Account and under the Commissioner's ***exclusive jurisdiction***—because the reserved control rights were being placed under the control of the Commissioner, not Ambac itself. *Nickel*, 2013 WI 129, ¶ 141 ("The trustee banks do not take into account that it is the commissioner who has control rights, not Ambac."). There was a statutory basis for recognizing the Commissioner's "full power to direct and manage…the property and business of the insurer," during the rehabilitation. *Id.* In contrast, the February 7 Injunction was entered ***after*** Ambac's exit from rehabilitation had been approved, pertains to policies in the General Account over which this Court lacks exclusive jurisdiction and over which other state courts are currently exercising jurisdiction, and it is not the Commissioner, but rather, Ambac itself that is being given this court-granted power to exercise control rights after it emerges from rehabilitation.

Thus, the injunction at issue in *Nickel* enjoined policy holders that were in the Segregated Account that was subject of the exclusive jurisdiction of the circuit court from exercising future rights with respect to their policies. By contrast, the February 7 Injunction here seeks to void a final judgment that was already entered by the Maryland Court, and compel the MHPI Projects to make statements to all other state courts that they do not believe are legally correct, involving policies that are subject to the ongoing jurisdiction of other courts. This is inconsistent with the mandate of full faith and credit and is not what *Nickel* held.

D. The MHPI Projects Are Entitled to an Opportunity to be Heard On the Injunction.

The Wisconsin Supreme Court has stated "[d]ue process is an exact synonym for fundamental fairness," *D.M.D. v. State,* 54 Wis. 2d 313, 318, 195 N.W.2d 594, 597 (1972). The cornerstone of due process in judicial and quasi-judicial administrative proceedings is that a party is entitled to receive notice and an opportunity to be heard: "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fully judged." *Old Tuckway Associates Ltd. P'ship v. City of Greenfield,* 180 Wis. 2d 254, 270, 509 N.W.2d 323, 329 (Ct. App. 1993) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)). "The ultimate test is the presence or absence of fair play in the procedures." *Aurora Consol. Health Care v. LIRC,* 2010 WI App 173, ¶ 29, 330 Wis. 2d 804, 794 N.W.2d 520 (citation omitted).

The February 7 Injunction was entered without providing the MHPI Projects an opportunity to be heard, which creates a due process problem. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citation omitted); *see also* Restatement (Second) of Conflict of Laws § 104 ("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states."). In reconsidering the February 7 Injunction, the MHPI Projects respectfully ask that they be allowed to be heard on this important issue.

II. THE MHPI PROJECTS WILL SUFFER IRREPARABLE HARM IF THE COURT'S FEBRUARY 7 INJUNCTION IS NOT RECONSIDERED.

The MHPI Projects face imminent irreparable harm if the February 7 Injunction remains in place. In the Meade Project litigation, the Meade Project's response to Ambac's motion for reconsideration is due on March 17. (Ex. 19, 2/9/18 Emergency Mot. for Extension;

Ex. 20, 2/12/18 Opp'n to Emergency Mot. for Extension.) Absent reconsideration or a stay, the Meade Project will be unable to respond substantively to Ambac's motion for reconsideration. (Ex. 15, S. Oberg Aff.) This effectively requires the Meade Project to forfeit an argument it won on summary judgment.

In the Bliss Project litigation, the parties have fully briefed their respective cross motions for summary judgment and the Bliss Project has secured (over Ambac's objection) a temporary abatement of the hearing to April 27, 2018. (Ex. 21, 2/1/18 Order Setting Hr'g.) And while this hearing has been temporarily rescheduled, it will not be delayed long enough for a decision on a full appeal in Wisconsin. Thus, at the April 27 summary judgment hearing, the Bliss Project will be in the same situation it was on February 1, 2018, when the Texas court granted the motion to abate the hearing. (Ex. 16, M. Osborn Aff.) If the February 7 Injunction remains in place, the Bliss Project cannot argue in favor of its affirmative defense at the hearing or oppose Ambac's motion for summary judgment, which will effectively force it to concede.

In Riley, summary judgment motions have been filed by both the Riley Project and Ambac. Likewise, Ambac has filed a supplemental brief in the Kansas court, arguing that the Confirmation Order is entitled to full faith and credit and that it "supersedes" the decision of the Maryland court. (Ex. 22, Riley Suppl. Br.) While no hearing is presently scheduled on the parties' cross motions for summary judgment, a decision, based upon Ambac's representations in their supplemental brief (to which the Riley Project is presently enjoined from opposing) could be entered, resolving that case in favor of Ambac. And with the February 7 Injunction in place, the Riley Project would be unable to even appeal such a decision to the Kansas Court of Appeals. (Ex. 17, P. Riordan Aff.)

Finally, the Leavenworth Project litigation, under the schedule sought by Ambac (but not yet approved by the court there), summary judgment will be due on April 10, 2018. If the February 7 Injunction remains in place, the Leavenworth Project will be unable to move for summary judgment on its affirmative defenses and will be unable to respond to Ambac's presumptive motion for summary judgment. This will result in waiver and effectively a forced concession by Ambac in an out of state court. (*Id.*)

CONCLUSION

On February 15, in this Court's remarks before it was directly presented with the full faith and credit question by counsel for the Projects, the Court stated: "There is nothing that I have done that transgresses the authority of other courts. I have declared the law of Wisconsin on this rehabilitation. I have enjoined the parties before this Court. I have not ordered or stuck my nose into anything that is going on in the other courts." (Ex. 1, 2/15/18 Hr'g Tr. at 30:6-12.) The Court later stated: "Full faith and credit is not the issue here on my injunction." (*Id.* at 35:13-14.) The Projects are asking this Court to reconsider the February 7 Injunction and give meaning to the Court's statements quoted above, rather than the opposite meaning that came from the Court's subsequent remarks, which has now resulted in a complete ban on any constitutional argument to out of state courts.

For the foregoing reasons, the MHPI Projects request expedited reconsideration of this Court's February 7, 2018 Injunction.

Dated this 26th day of February, 2018.

KRAVIT, HOVEL & KRAWCZYK S.C.

/s/ Stephen E. Kravit

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