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DISTRICT IV

March 13, 2018

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You are hereby notified that the Court has entered the following order:

2018AP425 MHPI Projects v. Sean Dilweg (L.C. # 2010CV1576)

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

The appellants, collectively known as the Military Housing Privatization Initiative (MHPI) Projects, move for relief pending appeal from an order entered on January 22, 2018 which confirmed an amendment to the Rehabilitation Plan for the Segregated Account of Ambac Insurance Corporation, and from an injunction issued by the circuit court on February 7, 2018, which prohibits the MHPI Projects from asserting certain legal positions in courts in other states. MHPI Projects ask this court to stay enforcement of both orders pending their appeals of those orders. Both Ambac and the Wisconsin Insurance Commissioner, who is acting as the

Rehabilitator for the Segregated Account, object to the request for a stay. In the alternative, the Insurance Commissioner and Ambac ask this court to impose a bond.

This court has the power to stay an injunction or enter other orders to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered. WIS. STAT. § 808.07(2)(a). However, a party must first either seek relief in the circuit court or demonstrate that it would be impractical to do so. WIS. STAT. RULE 809.12. Here, the MHPI Projects filed a motion for relief pending appeal in the circuit court, but the circuit court has stated that it does not intend to address the stay request of MHPI Projects until after briefing and a hearing on a motion for reconsideration. Because the MHPI Projects face imminent filing deadlines regarding motions pending in courts in other states, and because the circuit court's injunction prohibits the MHPI Projects from making what they contend are relevant arguments regarding those pending motions, we are satisfied that it would be impractical for the MHPI Projects to wait for a decision from the circuit court, and we will address the question of a stay de novo.

The criteria for staying an order during the pendency of an appeal are that: (1) the moving party is likely to succeed on the merits; (2) the moving party will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to the other interested parties if the stay is granted; and (4) the stay would not harm the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). These factors are interrelated and must be balanced on a case-by-case basis. *Id.* "[T]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay," but must at the least be more than a mere possibility. *Id.* at 441. Any potential harm to the movant, other parties, or the public must be evaluated in terms of its substantiality, the

likelihood of its occurrence, and the proof provided to the court. *Id.* at 442. Having reviewed the materials presented, we conclude that the MHPI Projects have satisfied the criteria for relief pending appeal.

As background, we observe that the MHPI Projects consist of public-private partnerships for military housing developments at thirteen U.S. Army bases across the country, which purchased various bond insurance and surety bonds from Ambac. In 2010, the Wisconsin Insurance Commissioner created a Segregated Account for Ambac's greatest liabilities, and initiated a rehabilitation proceeding for the Segregated Account. *See generally Nickel v. Wells Fargo Bank et al.*, 2013 WI App 129, ¶¶2-9 and 36-40, 351 Wis. 2d 539, 841 N.W.2d 482. The MHPI Project's policies remained in Ambac's General Account, and thus were not directly subject to the rehabilitation plan—although the rehabilitation plan itself allowed the Insurance Commissioner access to assets in the General Account to pay claims arising from the Segregated Account. *Id.* [see also 1011:8]

As a consequence of Ambac's distress, Ambac's credit rating declined below the levels that the MHPI Projects were required to maintain on their surety bonds by the MHPI Projects' construction loan documents. Eventually, in 2015, Ambac demanded that the MHPI Projects pay over $200 million cash into debt service reserve accounts to replace the surety bonds that had been adversely affected by Ambac's downgraded credit. The MHPI Projects objected to the demands, leading to ongoing contract dispute litigation in six different states related to the debt service reserve accounts and specific terms of contracts involving the MHPI Projects and Ambac. [1017:5]

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Among the arguments advanced by the MHPI Projects in the litigation in various states over the debt service reserve accounts is that certain provisions in the rehabilitation plan for the Segregated Account, including the fact that the Insurance Commissioner is allowed access to assets in the General Account, triggered "credit enhancer defaults" under the various MHPI Projects' policy and surety documents. In response to that litigation, the Insurance Commissioner sought an order from the circuit court clarifying that the rehabilitation plan for the Segregated Account was structured with the intent of avoiding certain default and acceleration clauses contained in many of the policies in Ambac's portfolio. The circuit court granted the Insurance Commisoner's request and the MHPI Projects appealed that order. In affirming that "clarification order," this court emphasized that the circuit court had taken care *not* to rule on the primary legal question pending in the contract litigation in other states—namely, whether the structure of the rehabilitation plan, including the Insurance Commissioner's ability to use assets from Ambac's General Account to pay the debts of the Segregated Account, triggered any credit enhancer defaults in the specific contracts at issue in the other states. That distinction was integral to this court's conclusion that the clarification order was not an impermissible advisory opinion. ***Dilweg v. Carlisle/Picatinny Family Housing L.P. et al.***, No. 16AP2169, unpublished slip op. ¶14 (WI App Dec. 14, 2017).

On January 18, 2018, the Circuit Court of Anne Arundel County, Maryland, issued a decision determining that a credit enhancer default had, in fact, been triggered in one of the MHPI Project policies, according to that court's interpretation of the contract under Maryland law. See Jan. 18, 2018 Amended Opinion and Order in ***Meade v. Ambac***, Case No. C-02-CV-15-003745.

On January 22, 2018, the circuit court issued an order confirming an amended rehabilitation plan. That amendment, among other things, stated in section 6.13 that "any default...relating to the Segregated Account, AAC [General Account] or any subsidiary thereof, under any agreement will be deemed not to have occurred or existed, and as to Policies and Transaction Documents will be deemed to be cured...." This provision appears to do precisely what the circuit court's "clarification order" (mentioned above) stopped short of doing—that is, ruling on the interpretation of contract language in policies that are not included in the Segregated Account, are not subject to the rehabilitation plan, and are currently under review by courts in other jurisdictions.

On February 7, 2018, approximately one hour after being requested to do so by the Insurance Commissioner, the circuit court issued an ex parte injunction permanently enjoining the MHPI Projects from taking any further actions or making any further arguments in any court "in contravention of the amended plan," including asserting or continuing to assert in any court in any jurisdiction that a credit enhancer default had occurred as a result of, or in connection with, the rehabilitation proceeding. The MHPI Projects have now appealed both the amendment to the rehabilitation plan and the injunction.

Turning to the criteria for a stay, we first note that a significant aspect of the first factor—the likelihood of success on appeal—is the standard of review. *See Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120 ¶¶18-23, 237 Wis. 2d 498, 614 N.W.2d 565. Challenges to purely legal rulings—particularly those of first impression—have a greater chance of success on appeal. The MHPI Projects raise purely legal issues involving, among other arguments, antisuit injunctions, the full faith and credit clause, and their right to assert arguments in litigation in other states. Therefore, while we draw no conclusion as to the ultimate merits of this appeal, we

are satisfied that the MHPI Projects have shown more than a mere possibility of success on appeal.

As to the second factor, the MHPI Projects allege that, in the absence of a stay, they will suffer irreparable harm that could not be adequately compensated by money damages if they are not allowed to assert legal positions in the pending litigation in other states, as well as substantial injury to their commercial reputation, good will, and competitive position in the military housing market. The counterarguments of the Insurance Commissioner and Ambac (that the MHPI Projects could seek extensions or reconsideration from, or file appeals in, the courts in other states) are not persuasive because there is no guarantee that the courts in other states will grant those requests. We conclude this factor weighs in favor of a stay.

As to the third factor, the MHPI Projects allege that neither Ambac nor the Insurance Commissioner would be harmed by a stay because they would not be barred from asserting their own positions in other state courts, and the MHPI Projects' accounts are not part of the Segregated Account. The Insurance Commissioner and Ambac respond that they will be harmed by allowing the MHPI Projects to continue to assert what the Insurance Commisioner and Ambac view to be frivolous claims in other states and requiring the Insurance Commissioner to file responses and use assets that could be otherwise directed. However, the fact that a Maryland court has found in favor of the MHPI Projects on the contractual issues undermines the assertion that the MHPI Projects' asserted interpretation of the contract language is frivolous. We conclude this factor also weighs in favor of a stay.

As to the fourth factor, the MHPI Projects allege that the public interest favors a stay because the doctrine of comity would be undermined by allowing the injunction to stand. We

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agree that there is a public interest in having our state courts refrain from intruding upon the process of legal or factual determinations of courts in other states, and conclude that this factor also favors a stay.

Finally, as to filing a bond for appeal, we note that WIS. STAT. § 808.07(2m) authorizes the imposition of an undertaking during "the pendency of an appeal of a judgment in any civil action." However, this is an appeal from orders in a rehabilitation proceeding, not a "civil action." *Nickel*, 351 Wis. 2d 539, ¶114. In addition, while there may be money at stake in the litigation between parties in other states, there are no monetary damages at issue in the present appeal. Therefore, there is no basis to impose a bond.

Therefore,

IT IS ORDERED that the appellants' motion for relief pending appeal is granted. Enforcement of the injunction issued on February 7, 2018, and enforcement of Sections 6.8 and 6.13 of the Second Amended Rehabilitation Plan, including but not limited to the extent that those sections affect arguments that the appellants may make in any court, shall be stayed with respect to the MHPI Projects until further order of this court.

IT IS FURTHER ORDERED that Ambac's cross-motion to require the MHPI Projects to file a bond is denied.

Sheila T. Reiff
Clerk of Court of Appeals