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**

One State Street LLC Case No. 10 CV 1576-F

REHABILITATOR'S BRIEF IN OPPOSITION TO MOTION FILED BY ONE STATE STREET LLC SCHEDULED FOR HEARING ON SEPTEMBER 13, 2010

Wisconsin Office of the Commissioner of Insurance and
Sean Dilweg, Commissioner of Insurance of the State of Wisconsin,
as Court-Appointed Rehabilitator of the
Segregated Account of Ambac Assurance Corporation

Dated this 17th day of August, 2010.

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 4

A. The Secured Note And The Reinsurance Agreement Provide Adequate Capital Support For All Lawful Liabilities Of The Segregated Account Including, If Allowed By The Court, The Disputed Lease Liability. 4

B. Allocating The Lease Liability To The Segregated Account Is Legally Permitted And Was Intended By OCI And Ambac. 5

1. The segregated account statute permits Ambac and OCI to allocate the Lease Liability to the Segregated Account. 5

2. OCI clearly identified the allocation of the Lease Liability in its Petition for Order of Rehabilitation. 6

3. OCI and Ambac are not impermissibly severing the Lease liabilities and benefits. 7

C. Allocation Of The Lease Liability To The Segregated Account Is Not A Fraudulent Transfer. 8

1. One State Street does not have standing to seek avoidance of a purported fraudulent transfer to an insurer in rehabilitation. 8

a. Wis. Stat. § 645.52 controls alleged fraudulent transfers made within one year prior to a petition for rehabilitation. 8

b. One State Street does not have standing to avoid a fraudulent transfer under § 645.52. 9

2. The allocation of the Lease Liability does not meet the elements of a fraudulent transfer. 10

a. The allocation was made for fair consideration. 11

b. The allocation was made to protect policyholders, not to hinder, delay or defraud creditors. 11

D. Allocation Of The Lease Liability Is Not Unconstitutional 13

1. There is no equal protection violation. 13

2. There has been no unconstitutional "taking." 14

III. CONCLUSION 16

I. INTRODUCTION

The brief of One State Street LLC ("One State Street") fails to give the Court a full picture of the underlying dispute giving rise to the Rehabilitator's allocation decision. In 2002, One State Street agreed in writing to the assignment of a commercial real estate lease pertaining to office space in New York City (the "Lease") from Ambac Assurance Corporation ("Ambac") to Ambac's parent corporation, Ambac Financial Group, Inc. ("AFG").[1] One State Street and AFG subsequently amended the Lease to materially lengthen its term, expand the amount of office space it covers, and increase the total rent by approximately $18.5 million. Ambac was not a party to the Lease amendment and believes it has no further liability to One State Street.

AFG continues to occupy the leased property and has continued to make all Lease payments during the course of this rehabilitation. However, One State Street fears that AFG may file for bankruptcy and is scrambling for a way to retain as much as $94 million[2] of future Lease payments in New York City's depressed commercial rental market. So, in the months before the formation of the Segregated Account of Ambac (the "Segregated Account"), One State Street began asserting that it would look to Ambac for those Lease payments if AFG files for bankruptcy, rejects the lease, and fails to pay damages. In that event, One State Street would

[1] The Wisconsin Office of the Commissioner of Insurance and the Commissioner, as the Court-appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation (collectively "OCI" or the "Rehabilitator") incorporate by reference the facts and supporting evidence contained in Ambac Assurance Corporation's Third Brief In Opposition To Various Motions, filed concurrently with this brief. Additional relevant facts are contained in the Fourth Affidavit of Roger A. Peterson ("Fourth Peterson Aff.") and the Affidavit of Diana Adams, both filed today.

[2] The total amount due is not at issue for purposes of the present motion. OCI reserves the Segregated Account's right to assert that it owes nothing under the Lease, and further reserves all defenses, offsets, and other legally available reductions to any amount claimed by One State Street.

seek to accelerate the future Lease payments and demand immediate payment of up to $94 million in damages from Ambac.

OCI disputes One State Street's interpretation of the Lease, but the issue now before the Court is whether the up to $94 million contingent, disputed lease liability (the "Lease Liability") was properly allocated to the Segregated Account. OCI approved that allocation to protect Ambac's policyholders, creditors, and the public from the possibility that One State Street would succeed in holding Ambac liable for AFG's obligations on the Lease, accelerate the collection of future rent, and unjustly deplete Ambac of up to $94 million that should be equitably distributed pursuant to Wisconsin's insurance statutes. By allocating the Lease Liability to the Segregated Account, OCI and Ambac treated One State Street exactly the same as the holders of all of Ambac's other large, Class 5 contractual liabilities. *See* Wis. Stat. § 645.68(5).

One State Street's legal arguments for dissolution or modification of the temporary injunction rest on fundamental misunderstandings about the Segregated Account, the Plan of Operation, and the Wisconsin statutes governing the Segregated Account's creation and rehabilitation. Contrary to One State Street's assertion, the Secured Note and the Reinsurance Agreement both provide financial support for payment of any allowed claim arising from the disputed Lease Liability. Indeed, the Plan of Operation approved by this Court requires that the Secured Note and Reinsurance Agreement provide those protections.

Similarly, there is no merit to One State Street's assertion that Wisconsin law does not permit allocation of the Lease Liability to the Segregated Account. One State Street provides no legal support for that argument because none exists; Wis. Stat. § 611.24(2) permits the allocation of "any part" of an insurer's business to a segregated account. If, as One State

Street contends, Ambac has liability under the Lease, then it unquestionably arises from Ambac's insurance business and was properly allocated to the Segregated Account.

Because allocation of the potential Lease Liability was approved by OCI pursuant to express provisions of Wisconsin law, and the Segregated Account received fair consideration for that allocation in the form of the Secured Note and the Reinsurance Agreement, the allocation cannot violate Wisconsin's fraudulent transfer statute. Moreover, One State Street does not have standing to assert a fraudulent transfer because, under Wis. Stat. § 645.52(1), only the court-appointed Rehabilitator can seek to avoid an alleged fraudulent transfer by the Segregated Account.

Finally, there is no merit to One State Street's constitutional challenges. One State Street was not singled out for negative treatment. One State Street is being treated like the other material, contract-based liabilities, all of which were allocated to the Segregated Account. Thus, One State Street's equal protection argument fails. Nor has there been an unconstitutional "taking." Because One State Street knowingly contracted with an insurer, its property rights in the Lease Liability from their inception were subject to Wisconsin's insurance statutes. Moreover, nothing has been "taken" from One State Street. It continues to receive rent payments from AFG and, should AFG file bankruptcy and reject the Lease, One State Street's rights under the Lease will be handled in accordance with the applicable claims law—including the Bankruptcy Code as to claims against the tenant (AFG), and Chapter 645 as to secondary contingent claims against the Segregated Account.

II. ARGUMENT

A. The Secured Note And The Reinsurance Agreement Provide Adequate Capital Support For All Lawful Liabilities Of The Segregated Account Including, If Allowed By The Court, The Disputed Lease Liability.

One State Street erroneously asserts that the Secured Note and the Reinsurance Agreement cannot be used to pay the Lease Liability. One State Street has misread those documents. Contrary to One State Street's assertions, neither of those contracts is limited to only making payments associated with "Covered Policies."

The Plan of Operation approved by this Court describes the terms of the Secured Note and states:

> Under the terms of the Secured Note, the Segregated Account will be permitted to demand payment of note principal to satisfy liabilities of the Segregated Account due and payable in respect of cash claim payments, [and] payments on ***other liabilities*** allocated to the Segregated Account.

(Verified Pet., Tab 1 at 3 (emphasis added).) Consistent with that statement, the Secured Note expressly provides that the Segregated Account may demand payment in order to pay "the cash portion of claim liabilities due and payable by [the Segregated Account] under Covered Policies, [and] amounts due and payable by the [Segregated Account] arising from ***other liabilities*** allocated to the [Segregated Account]." (Verified Pet., Tab 1, Ex. G at § 1(a) (emphasis added).) The Lease Liability is one of the "other liabilities" protected by the Secured Note. In its brief, One State Street omits the crucial "other liabilities" provision from its quotation of the relevant portion of the Secured Note. (*See* State Street Br. at 10.) When that provision is read in its entirety, there is no question but that the Secured Note applies to the Lease Liability.

The Plan of Operation also makes clear that the Reinsurance Agreement covers other liabilities such as the Lease Liability. The Reinsurance Agreement states that it applies to "Covered Policies." (Verified Pet., Tab 1, Ex. H at § 1.01.) However, § 11.07 of the

Reinsurance Agreement states that the "entire agreement" consists of both the Reinsurance Agreement itself and "the other documents referred to" by the Reinsurance Agreement. (*See id.* § 11.07.) Those "other documents" include the Plan of Operation. (*See id.* at Recitals, ¶ 1.) The Plan of Operation states that the terms of the Reinsurance Agreement provide excess loss coverage for "any other amounts directed or ordered to be paid by the rehabilitation court in conjunction with the rehabilitation proceeding." (Verified Pet., Tab 1, Ex. H at 3.) Thus, if this Court were ever to allow any portion of the disputed Lease Liability as a valid claim against the Segregated Account, the Reinsurance Agreement will be available, along with the Secured Note, to fund that obligation.[3]

In sum, there is no factual basis for One State Street's contention that the Secured Note and Reinsurance Agreement do not provide capital support for the Lease Liability. As a result, One State Street's assertions that the Segregated Account is inadequately capitalized as to the Lease Liability (State Street Br. at 9-10) and that the Segregated Account did not receive fair consideration for the Lease Liability (*id.* at 15) fail, as do the legal arguments that rest on those erroneous assumptions.

B. Allocating The Lease Liability To The Segregated Account Is Legally Permitted And Was Intended By OCI And Ambac.

1. The segregated account statute permits Ambac and OCI to allocate the Lease Liability to the Segregated Account.

At page 6 of its brief, One State Street baldly asserts that the segregated account statute "neither allows for, nor has the intent of permitting, an obligor's transfer of a particular overhead liability to a segregated account." (State Street Br. at 6.) One State Street provides no statutory or other legal support for that statement, because none exists. In fact, the plain

[3] For a more extended discussion of the "capital support" issue, *see* Part II.B.i(1) of the Rehabilitator's Consolidated Brief In Opposition To All Motions Scheduled For September 9, 2010, filed today.

language of the statute indicates the opposite. Section 611.24(2) states: "With the approval of the commissioner, a corporation may establish a segregated account ***for any part of its business***." (Emphasis added.) The Official Comments to the statute make clear that this provision is to be liberally construed, stating: "Sub. (2) provides for optional segregated accounts ***under any circumstances the corporation wishes***, if the separation meets the commissioner's approval." Wis. Stat. Ann. § 611.24 cmt. L. 1971 (West 2006) (emphasis added).

Allocation of the Lease Liability to the Segregated Account meets that straightforward statutory requirement. The Lease Liability – if it exists at all – is indisputably part of Ambac's business. At the risk of stating the obvious, a company needs a location from which to conduct its business. One State Street admits that Ambac conducts its insurance business out of the property that is the subject of the Lease (State Street Br. at 2) and that Ambac continues to provide management services to the Segregated Account from that same location. (*Id.* at 9.) Thus, there is no basis for One State Street's assertion that the Lease Liability is "not part of any currently conducted business being transferred to the Segregated Account." (*Id.* at 4.)

2. OCI clearly identified the allocation of the Lease Liability in its Petition for Order of Rehabilitation.

There is no merit to One State Street's suggestion that OCI attempted to conceal the allocation of the Lease Liability in its initial filings with this Court. OCI's Verified Petition for Rehabilitation made clear that the items allocated to the Segregated Account included more than just insurance policies. The first page of the Petition states that it pertains to "policies, contracts, rights, assets, equity ownership interests, ***and liabilities*** specifically allocated to the Segregated Account." (Verified Pet. at 1 (emphasis added).) The Plan of Operation for the Segregated Account, which was attached as Tab 1 to the Petition, lists the various categories of

items that were allocated to the Segregated Account, and specifically identifies the Lease Liability as one of them. In fact, the Plan of Operation describes the Lease Liability in a separate subsection devoted solely to it, which states:

> *Lease with One State Street, LLC.* The Company is allocating to the Segregated Account its disputed contingent liability, if any, under the long-term lease with One State Street, LLC, effective January 1, 1992 and amended as of August 1, 1997.

(Verified Pet., Tab 1 at 2.) If anything, the Plan of Operation highlights, rather than conceals, the allocation of the Lease Liability to the Segregated Account. While much of the motion practice and briefing to date has focused on the insurance policies allocated to the Segregated Account, that is simply a reflection of the nature of Ambac's business, rather than some sort of implicit concession that only policy liabilities were allocated to the Segregated Account.

3. OCI and Ambac are not impermissibly severing the Lease liabilities and benefits.

At page 9 of its brief, One State Street asserts that "[t]hat the Wisconsin statute simply does not allow for the liabilities of a contract to be transferred to a segregated account, while leaving behind the benefits." (One State Street Br. at 9.) Again, One State Street provides no legal citation for that assertion because none exists. Nothing in the segregated account statute addresses "separating benefits from liabilities." *See generally* Wis. Stat. § 611.24.

Even putting aside the lack of legal support, One State Street's argument remains difficult to understand. One State Street argues: "It is fundamental to the law of executory contracts that a contract must either be assumed or rejected in whole, and that benefits cannot be assumed while the liabilities are rejected." (One State Street Br. at 7.) But the Segregated Account is not assuming or rejecting the Lease. Here, Ambac, with One State Street's written consent, assigned the Lease to AFG more than nine years ago and, thus, Ambac is no longer a party to that contract. As a result, there is no benefit for Ambac to assume. However, if Ambac

is somehow found to be liable under the Lease, then that liability is properly allocated to the Segregated Account so that it can be fairly addressed in accordance with Wisconsin's insurance rehabilitation statutes and the claims priority rules in Wis. Stat. § 645.68.

C. Allocation Of The Lease Liability To The Segregated Account Is Not A Fraudulent Transfer.

One State Street's argument that the allocation of the Lease Liability to the Segregated Account is somehow a fraudulent transfer also fails for a variety of reasons. First, because the Segregated Account is in rehabilitation, only the Rehabilitator has standing to seek avoidance of a fraudulent transfer. Second, the allocation was made for fair consideration, in the form of the capital support afforded to the Segregated Account by the $2 billion Secured Note and the Reinsurance Agreement. Third, the allocation was made for the purpose of protecting Ambac's policyholders, not to hinder, delay or defraud One State Street. Simply put, an allocation of a liability, approved by a state regulatory agency pursuant to state statute, made for the purposes of protecting insurance policyholders, is not a fraudulent transfer.

1. One State Street does not have standing to seek avoidance of a purported fraudulent transfer to an insurer in rehabilitation.

a. Wis. Stat. § 645.52 controls alleged fraudulent transfers made within one year prior to a petition for rehabilitation.

As an initial matter, One State Street's fraudulent transfer argument rests on the wrong statute. One State Street contends that the allocation of the Lease Liability to the Segregated Account violates Wisconsin's Uniform Fraudulent Transfer Act ("Fraudulent Transfer Act"), Wis. Stat. ch. 242. Wisconsin's Insurer Rehabilitation and Liquidation Act ("Rehabilitation Act"), however, contains its own provisions regulating fraudulent transfers when insurers are in rehabilitation. Section 645.52 specifically governs fraudulent transfers and obligations incurred within one year of filing a petition for rehabilitation.

It is well-established in Wisconsin that "[w]hen two statutes relate to the same subject matter, the specific statute controls over the general statute." *Wisconsin Ins. Sec. Fund v. Labor and Ind. Rev. Comm'n*, 2005 WI App 242, ¶ 31, 288 Wis. 2d 206, 707 N.W.2d 293 (specific Wisconsin insurance statute controlled over workers compensation statutes); *see also Marder v. Bd. of Regents*, 2005 WI 159, ¶¶ 21-23, 286 Wis. 2d 252, 706 N.W.2d 110 (specific statute governing Board of Regents procedures controlled over general statute governing administrative hearings); *Clean Wis., Inc. v. Pub. Serv. Comm'n.*, 2005 WI 93, ¶ 175, 282 Wis. 2d 250, 700 N.W.2d 768 (specific statute governing Public Service Commission controlled over general statute regarding economic competition). Because § 645.52 specifically regulates fraudulent transfers in the context of insurer rehabilitation proceedings, the more general Fraudulent Transfer Act does not apply.

b. One State Street does not have standing to avoid a fraudulent transfer under § 645.52.

Under § 645.52, only the Rehabilitator has standing to avoid a fraudulent transfer or incurred obligation. Section 645.52(1) provides: "A transfer made or an obligation incurred by an insurer ordered to be rehabilitated or liquidated under this chapter, which is fraudulent under this section, may be avoided ***by the receiver*** . . . ." (Emphasis added.) Section 645.02(1)(h) defines "receiver" as "receiver, liquidator, rehabilitator or conservator, as the context requires." In this case, the context requires that "receiver" means the Commissioner as the court-appointed Rehabilitator.

Where a claim is created by statute, only those persons identified in the statute have standing to bring that claim. *See Konkel v. Acuity*, 2009 WI App 132, ¶¶ 20-20, 321 Wis. 2d 306, 775 N.W.2d 258 (subrogee and tortfeasor lacked standing to bring malpractice claim under ch. 655 because statute limited claims to "patients" and "patients' representatives");

Dairyland Harvestore, Inc. v. Wis. Dep't. of Revenue, 151 Wis. 2d 799, 806, 447 N.W.2d 56, 59 (Ct. App. 1989) ("Tax refunds are statutory. . . . Appellants' lack of standing to file a refund claim . . . flows from a legislative decision as to who may and who may not obtain a sales tax refund."); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2000) (holding only bankruptcy trustee has standing to recover under 11 U.S.C. § 506(c) because trustee is only person named in that statute).

The plain language of § 645.52 dictates that only the Rehabilitator, and not private, self-interested entities such as One State Street, have standing to avoid a fraudulent transfer or incurred obligation (particularly their own) once an insurer enters rehabilitation. That limitation is logical, because it is the Rehabilitator's duty to ensure that the insurer's assets are preserved for the benefit of policyholders and other creditors as whole. *See Hartford Underwriters*, 530 U.S. at 7 ("[T]he fact that the sole party named—the trustee—has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others.").

2. The allocation of the Lease Liability does not meet the elements of a fraudulent transfer.

Even if One State Street had standing to bring a claim of fraudulent transfer, it would still fail because the allocation of the Lease Liability does not meet the required elements. Under § 645.52(1), a transfer is fraudulent if it is made "without fair consideration" or "with actual intent to hinder, delay or defraud either existing or future creditors." Neither is true here. Indeed, in its May 27, 2010 Findings of Fact and Conclusions of Law regarding similar challenges to allocations to the Segregated Account ("Findings" and "Conclusions," respectively), this Court ruled that there was "strong factual" support for finding that the

allocations did not meet the requirements of a fraudulent conveyance under both § 645.52(1) and the Wisconsin Fraudulent Transfers Act. (Findings ¶ 26.)

a. The allocation was made for fair consideration.

One State Street contends that the Segregated Account did not receive fair consideration for the allocation of the Lease Liability, based on its incorrect opinion that the Secured Note and the Reinsurance Agreement do not apply to that liability. As discussed above, One State Street is wrong. The Secured Note and the Reinsurance Agreement both apply to all allowed claims against the Segregated Account and provide it with adequate capital support in exchange for receiving such liabilities. In its May 27 Findings and Conclusions, this Court found "strong factual support" for the conclusion that "the Allocation is fairly balanced by AAC's issuance of the Secured Note and Excess of Loss Reinsurance Agreement to the Segregated Account" (Findings ¶ 26)—in other words, there was fair consideration for the allocation of liabilities to the Segregated Account. One State Street has failed to present any evidence or argument that would alter that conclusion.

b. The allocation was made to protect policyholders, not to hinder, delay or defraud creditors.

Nor is there any evidence that the Lease Liability was allocated with "the actual intent to hinder, delay or defraud" One State Street or any other creditors. The allocation of the Lease Liability, like the allocation of the many other liabilities to the Segregated Account, was made for the purpose of protecting Ambac's policyholders, Ambac's creditors and the general public, collectively, from the spiraling financial harm that would otherwise result from Ambac's mounting losses and the threat of parties such as One State Street accelerating the collection of liabilities. (*See* Findings ¶ 19; Verified Pet. ¶¶ 5, 8.) As One State Street admits in its brief, OCI

and Ambac were attempting to avoid a proverbial "run on the bank" by establishing an arrangement that would allow for the fair and orderly payment of liabilities. (Verified Pet. ¶ 8.)

With regard to One State Street in particular, allocating the Lease Liability to the Segregated Account was intended to protect Ambac policyholders by preventing One State Street from unfairly attempting to collect on the Lease Liability ahead of more senior policyholder loss claims. (Fourth Peterson Aff. ¶ 4.) Section 645.68 of the Wisconsin Statutes establishes the priority of claims in delinquency proceedings. Under the statute, Class 3 loss claims by policyholders are to be paid before Class 5 "residual claims" such as One State Street's contract-based Lease Liability. *See* Wis. Stat. § 645.68(3) & (5). Had the Lease Liability remained in Ambac's General Account and AFG filed for bankruptcy, One State Street (under its disputed interpretation of the Lease) would likely attempt to accelerate and pursue the up to $94 million in future rent payments from Ambac,[4] thus reducing the funds available to pay Ambac's policyholders and destabilizing the general account – precisely the downward spiral OCI is trying to prevent. Plainly, OCI's intent was to advance its statutory mission "[t]o ensure that policyholders, claimants and insurers are treated fairly and equitably," Wis. Stat. § 601.01, and the express purpose of the rehabilitation statutes to protect "the interests of insureds, creditors,

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[4] In its brief, One State Street repeatedly suggests that any possibility of acceleration is due to OCI and Ambac allocating the Lease Liability to the Segregated Account. (*See* State Street Br. at 7-8, 12, 14 and n.8, 20.) It even goes so far as to suggest that OCI and Ambac allocated the Lease Liability to the Segregated Account to intentionally trigger a default. (*See id* .at 12-13.) Those assertions are disingenuous and nonsensical. First, One State Street never cites to a provision of the Lease suggesting that allocation to the Segregated Account creates an event of default. Second, it is the possibility of AFG filing for bankruptcy that poses the real threat of a default trigger and acceleration, something One State Street hints at in its brief. (*See* One State Street Br. at 2 & n.2 ("[P]ursuant to the terms of the Headquarters Lease, AAC remains the primary obligor and AAC will be responsible for damages and payments due. . . . AFG is in its own very serious financial difficulty. Its stock trades well below $1/share . . . and its debt rating has fallen from investment grade to junk."); *id.* at 8 ("Although AFG is currently an assignee Tenant under the Headquarters Lease, AFG is in serious financial difficulty itself, and may very well breach the Headquarters Lease (including the possibility of rejection of that lease in any AFG bankruptcy case . . . .").)

and the public generally" through '[e]quitable apportionment of any unavoidable losses." Wis. Stat. § 645.01(4)(d).

As noted above, this Court has found that there is "strong factual support" for the conclusion that "the creation of the Segregated Account and [the allocation of liabilities to it] was not done with the intent to hinder, delay, or defraud present or future creditors of AAC, but rather to provide claims-paying resources for the benefit of all policyholders." (Findings ¶ 26.) Again, One State Street has offered no evidence that would alter that conclusion.

D. Allocation Of The Lease Liability Is Not Unconstitutional.

1. There is no equal protection violation.

One State Street contends that the allocation of the Lease Liability violates the equal protection clauses of both the United States and Wisconsin Constitutions because "there is no basis for discriminating between the treatment of [One State Street] and of other similarly-situated creditors." Again, One State Street is wrong on the facts, because it is being treated the same as other similarly-situated creditors. (State Street Br. at 19.)

If the Lease Liability exists at all, it is a contract-based liability. Under the Plan of Operations, all material contract-based liabilities are allocated to the Segregated Account. (Fourth Peterson Aff. ¶ 4.) The vast majority of those contract liabilities are reinsurance agreements. (*See id.*; *see also* Verified Pet., Tab 1 at 3.) Another is a guarantee on another office lease for one of Ambac's sibling companies (*see id.*), where the contingent liability is less than the approximately $94 million exposure associated with the Lease Liability.

One State Street also argues that it is not being treated equally because it believes the Lease Liability is the only item in the Segregated Account that is excluded from the financial protections provided by the Secured Note and the Reinsurance Agreement. As previously

discussed, that is not true. The Secured Note and the Reinsurance Agreement apply to the Lease Liability, just like all of the other liabilities allocated to the Segregated Account.

Finally, One State Street argues that OCI has no rational basis for approving the allocation of the Lease Liability to the Segregated Account. Under the Equal Protection Clause, a rational basis exists if "under any state of facts that can be reasonably conceived, the classification advances a legitimate governmental purpose." *Nw. Airlines, Inc. v. Wis. Dep't. of Revenue*, 2006 WI 88, ¶ 55, 293 Wis. 2d 202, 717 N.W.2d 280. Here, including the Lease Liability in the class of items allocated to the Segregated Account advances the legitimate government interest of protecting Ambac's policyholders, other creditors, and the general public, from the significant financial harm that would result if creditors such as One State Street were permitted to accelerate and collect large liabilities; *i.e.*, to prevent a proverbial "run on the bank." *See Nat'l Motorists Ass'n. v. Office of the Comm'r of Ins.*, 2002 WI App 308, ¶ 27, 259 Wis. 2d 240, 655 N.W.2d 179 (rejecting equal protection challenge against OCI because agency's decision advanced its statutory mission "to ensure that policy holders, claimants, and insurers are treated fairly and equitably").

2. There has been no unconstitutional "taking."

Finally, One State Street contends that the allocation of the Lease Liability is an unconstitutional taking because "OCI's actions caused One State Street to forfeit its rights to payment and its interest in all of AAC's property without just compensation." (State Street Br. at 20.) One State Street's takings argument fails for a number of reasons.

First, regulatory measures taken in insurance rehabilitation proceedings are a valid exercise of the government's police power, rather than a taking of property for public use. *Ky. Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 587 (Ky. 1995) (in rehabilitation proceeding, "policyholders' contracts as well as others with interest in the company, are subject

to a reasonable exercise of state police power"); *Carpenter v. Pac. Mut. Life Ins. Co.*, 74 P.2d 761, 774-75 (Cal. 1937) (In a rehabilitation proceeding, "[t]he contract of the policyholder is subject to the reasonable exercise of the state's police power. The only restriction on the exercise of this power is that the state's action shall be reasonably related to the public interest and shall not be arbitrary or improperly discriminatory.") *aff'd*, 305 U.S. 297 (1938); *see also E. Appraisal Servs., Inc. v. State*, 457 S.E.2d 312, 315 (N.C. Ct. App. 1995) (insurance commissioner's seizure of appraiser's files for purposes of liquidation proceeding was reasonable exercise of police power, not a taking).

Second, because One State Street knowingly contracted with an insurance company, its contractual rights were always subject to Wisconsin's insurance laws. *See Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 60, 295 Wis. 2d 1, 719 N.W.2d 408 ("[L]aws in existence at the time of the contract are incorporated into that contract[.]"); *Louisiana v. All Prop. & Cas. Ins. Carriers*, 937 So. 2d 313, 324 (La. 2006) ("[W]here a complaining party enters a contractual relationship in a heavily regulated industry, expectations of further regulation of that industry may lessen the severity of a subsequent impairment of that party's contractual rights and obligations."). Nothing has been taken from One State Street because its contract rights were always subject to OCI's authority to fully exercise its regulatory powers pursuant to Wisconsin's insurance statutes.

Third, the limited restrictions imposed by the Court's injunction are not a "taking." Government restrictions on property rights do not constitute a taking unless they deny the owner of "all or substantially all practical uses of a property." *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374, 548 N.W.2d 528, 531 (1996). One State Street has not lost all or substantially all of its rights under the Lease. One State Street admits that AFG is continuing to

make all payments due under the Lease. (*See* State Street Br. at 12.) What One State Street is complaining about is a temporary restriction on its ability to enforce a contractual provision that is contingent on events that have not occurred, and may never occur. Moreover, even if AFG defaults on the Lease at some point in the future, One State Street would be entitled to pursue its Lease Liability against the primary obligor, AFG, in accordance with the Bankruptcy Code, and its secondary claim against the Segregated Account in accordance with Chapter 645. One State Street has presented no law suggesting that such a limited, contingent restriction is a "taking" for purposes of the Constitution.

III. CONCLUSION

For the reasons discussed above and determined by the Court in the prior proceedings in this rehabilitation proceeding, One State Street LLC's Motion for Dissolution or Modification of the Temporary Injunction should be denied.

Dated this 17th day of August, 2010.

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