

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case Nos. 10 CV 1576-B
10 CV 1576-G
10 CV 1576-H
10 CV 1576-I

OCI'S MOTION TO STRIKE IMPROPER REPLY ARGUMENTS AND AFFIDAVITS

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

The Commissioner of Insurance of the State of Wisconsin, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation (the “Rehabilitator”), moves pursuant to Wis. Stat. § 802.10 and this Court’s inherent authority to strike the affidavits and portions of the reply briefs submitted by Depfa Bank, plc (“Depfa”), Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (“Deutsche Bank”), U.S. Bank National Association (“U.S. Bank”), Access to Loans for Learning Student Loan Corporation (“ALL”), and Lloyds TSB Bank, plc (“Lloyds”) (collectively, “Movants”) pertaining to their June 22 objections to the Court’s Order for Temporary Injunctive Relief (the “Injunction Order”). The arguments and affidavits at issue could have—and should have—been raised and submitted to this Court by the June 22 deadline for objecting to the Injunction Order, not in reply briefs filed shortly before the Court’s hearings and without giving the Rehabilitator an opportunity to respond in opposition briefing. Because these new arguments and submissions unjustifiably violate the Court’s Injunction Order and Scheduling Order, and unfairly prejudice the Rehabilitator in its response, the Rehabilitator requests that they either be stricken from the

record or expressly disregarded by this Court (and not included in the record in any subsequent appeal).

BACKGROUND

Paragraph 12 of the Court's March 24th Order for Temporary Injunctive Relief in this matter (the "Injunction Order") allowed all parties-in-interest 90 days to seek modification or dissolution of any portion of the Injunction Order. In professed reliance on paragraph 12 (ALL/Lloyds Reply at 6.-7, Deutsche Bank/U.S. Bank Reply at 8, 16; Depfa Reply at 11-12), Movants took the full 90 days to file motions seeking modification or dissolution of the Injunction Order (the "Motions"), all with supporting briefs of 20 pages or more and some with supporting affidavits. None of the Movants sought any extension of the Injunction Order's 90-day deadline for raising objections.

As contemplated by the Injunction Order, the Court thereafter issued a Scheduling Order for Briefing and Hearings on the Motions (the "Scheduling Order"). (Dkt. 309.) The Scheduling Order required the Rehabilitator to file "[a]ll briefs, affidavits or other submissions in opposition" to the Motions by August 17, 2010, and permitted Movants to file "reply briefs" by September 1, 2010. (Scheduling Order at 2.) The Scheduling Order did not authorize the filing of new affidavits and evidence in reply. Although the Scheduling Order expressly permitted parties to move to amend it, Movants did not make such a motion. (Scheduling Order at 4-5.)

They instead filed their reply briefs on September 1, 2010, all of which exceeded Dane County page limitations,¹ and all of which raise new objections to the Injunction Order that

¹ The Rehabilitator does not object to Depfa's filing of a brief in excess of the ten-page reply brief limitation imposed by Dane County rules. As Depfa noted in footnote 1 to its brief, the Rehabilitator agreed in advance to Depfa filing a reply of 15 pages. The Rehabilitator did not *(continued on following page)*

were not raised by the 90-day deadline. In addition, the replies attached affidavits pertaining to arguments raised by the Motions, including affidavits purporting to include expert opinions.

Specifically, Movants raised the following new objections and arguments for the first time in reply:

- Objections that the failure to provide more thorough financial information with the first-day filings in this matter was a due process violation (ALL/Lloyds Reply at 10-11);
- Objections that the Injunction Order enjoins parties from bringing lawsuits in respect of the Segregated Account or policies, contracts, or liabilities allocated to the Segregated Account in courts outside Wisconsin (Deutsche Bank/U.S. Bank Reply at 9-11), and against Ambac (Depfa Reply at 9-10); and
- Almost 16 pages of argument based on newly filed affidavits (ALL/Lloyds Reply at 9-25), relating to industry “custom and practice” and the Plan of Operation, which has been on file in this case since March 24, 2010.

Movants also filed several new affidavits, some with voluminous exhibits. (ALL/Lloyds: Affidavits of William C. Barbagallo, Frederick J. Bingham, Andrew Stuehrk, Thea Watkins, and Lawrence Bensky; Deutsche Bank/U.S. Bank: Affidavits of James H. Byrnes (with 287 pages of exhibits) and David Co (with 234 pages of exhibits).)²

Movants offer no reason why these arguments and affidavits could not have been included in the Motions filed on the 90-day deadline for filing challenges to the Injunction Order, which would have provided the Rehabilitator a fair opportunity to respond. Moreover, they present no justification for ignoring the Scheduling Order’s limitation on their reply submissions

stipulate to Depfa using those 15 pages to raise any new issues, however, as discussed more fully herein.

² The Rehabilitator does not object to the filing of the Affidavit of Paul A. Lucey, which relates to arguments raised in opposition and pertains to a publicly available document that was not filed until after the deadline for objections to the Injunction Order.

to “briefs,” not untimely evidentiary submissions that handcuff the Rehabilitator’s ability to respond and muddy the record should these motions give rise to more appeals.

ARGUMENT

“It is a well-established rule that [courts in Wisconsin] do not consider arguments raised for the first time in a reply brief.” *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶ 30 n.6, 305 Wis. 2d 658, 678, 741 N.W.2d 256, 266 (quoting *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶ 20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (citing *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995))). “The grounds for such a rule are fundamental fairness. It is inherently unfair for a[] [party] to withhold an argument from its main brief and argue it in its reply brief because such conduct would prevent any response from the opposing party.” *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285, 292 (Ct. App. 1998).

Movants have been on notice since the Injunction Order was issued and served on them in March that they were required to submit their arguments in opposition to the Injunction Order by June 22, 2010. Many or all of them attended hearings in Darlington and all were fully aware of the proceedings prior to June 22nd. There is no excuse for their decision to wait until the reply brief to raise new arguments and new evidence in the form of lengthy expert and lay affidavits. By doing so, Movants have unfairly deprived the Rehabilitator from having an opportunity to respond to those arguments in writing. Therefore, Movants’ new arguments and evidence should be stricken and not considered as part of the record in this proceeding or as part of the record in any subsequent appeal. *See Roy*, 2007 WI App 218, ¶ 30 n.6 (“To the extent that

Roy raised new arguments in her reply brief, *we have no need for supplemental briefing to reject them and do not address them here.*”) (emphasis added).³

CONCLUSION

For the foregoing reasons, the Rehabilitator requests that this Court to strike the following arguments and affidavits as untimely and improperly raised in a reply brief: (1) arguments objecting to the Injunction Order insofar as it enjoins parties from bringing lawsuits in respect of the Segregated Account or policies, contracts, or liabilities allocated to the Segregated Account in courts outside Wisconsin and against Ambac, raised by Deutsche Bank and U.S. Bank at pages 9-11 of their Reply and by Depfa at pages 9-10 of its Reply; (2) arguments objecting that the failure to provide more thorough financial information with the first-day filings in this matter was a due process violation, raised by ALL and Lloyds at pages 10-11 of their Reply; (3) arguments based on newly filed affidavits, raised by ALL and Lloyds at pages 9-25 of their Reply; (4) the Affidavits of William C. Barbagallo, Frederick J. Bingham, Andrew Stuehrk, Thea Watkins, and Lawrence Bensky, filed by ALL and Lloyds; and (5) the Affidavits of Affidavits of James H. Byrnes and David Co, filed by Deutsche Bank and U.S. Bank.

³ Alternatively, if the Court is nonetheless inclined to consider Movants’ arguments and evidence introduced for the first time in reply, the Rehabilitator respectfully requests a fair opportunity to submit rebuttal evidence and sur-reply briefing to fairly and effectively respond to Movants’ belated arguments and evidence. *See Bilda*, 2006 WI App 57, ¶ 20 n.7 (“The County and the board [sh]ould have moved to strike portions of Bilda’s reply brief, indicating that if we were inclined to address Bilda’s new arguments, we should grant the opportunity for a sur-reply, thus avoiding the effort and expense of actually preparing and tendering sur-reply briefs.”). This is a disfavored alternative because it would require additional later hearings and would unfairly delay progress with the rehabilitation.

Dated this 3rd day of September, 2010.

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ORDER GRANTING MOTION TO STRIKE

Based upon the Rehabilitator's Motion to Strike Improper Reply Arguments and Affidavits, the orders and other filings on record, and for other good cause shown,

IT IS HEREBY ORDERED THAT the Rehabilitator's Motion to Strike Improper Reply Arguments and Affidavits is granted. The improper arguments and affidavits specified in the Rehabilitator's Motion are hereby stricken from the record in this matter and shall not be considered by this Court.

Dated: _____

BY THE COURT

Honorable William D. Johnston
Lafayette County Circuit Court Judge
Presiding by Judicial Appointment