STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

Case No. 10 CV 1576-I

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

RESPONSE BY ALL STUDENT LOAN AND LLOYDS TSB BANK PLC TO REHABILITATOR'S MOTION TO STRIKE

INTRODUCTION

Access to Loans for Learning Student Loan Corporation and Lloyds TSB Bank plc (together "ALL and Lloyds") submit this response to the Rehabilitator's September 3, 2010 motion to strike reply arguments and affidavits. The motion to strike should be denied as to ALL and Lloyds because, contrary to the Rehabilitator's arguments, first, the reply brief and affidavits directly respond to new arguments and facts presented with the briefs of the Rehabilitator and Ambac and, second, as the Rehabilitator understood, interested parties appropriately would likely submit additional factual information prior to the hearings scheduled for September 9 and 13, 2010.

Moreover, as part of its vigorous opposition to providing discovery to interested parties, the Rehabilitator has acknowledged that the Court might well seek additional factual information, even after the hearings have concluded. All and Lloyds' reply brief and supporting affidavits comply with the letter and spirit of these unique proceedings, and the Rehabilitator is not prejudiced because it can and should have the opportunity, as it has requested in the alternative, to submit any rebuttal evidence or sur-reply briefing

that it concludes is necessary.

ARGUMENT

ALL and Lloyds are two of many interested parties who have been constrained and enjoined by the Court's Order for Temporary Relief issued in response to the Rehabilitator's *ex parte* petition for injunctive relief. Without any advance notice, ALL and Lloyds have been restrained from obtaining benefits to which they are otherwise entitled under their insurance policies with AMBAC. In paragraph 12 of the injunction, the Court gave all interested parties the opportunity to object to the injunction if they contended that any portions of the Order were "unwarranted by the facts and the law." In response, ALL and Lloyds filed timely motions on June 22, 2010, objecting to the Order and asking that it be modified or dissolved.

ALL and Lloyds contend that they are entitled to relief from the injunction as a matter of law and of fact. But, unlike typical procedure in response to injunctions, the enjoined parties in this case have not had the opportunity to take discovery on the factual basis for the injunction. Instead, the Rehabilitator has determined what facts it wants to submit (the four affidavits of Roger Peterson, for example) to the Court and the parties. Not surprisingly, therefore, this Court has been faced with numerous motions and contentions by interested parties regarding discovery.

The Court has concluded that as a result of the unique nature of these proceedings formal discovery is not required, at least at this stage of the proceedings. As the Court said at the July 7, 2010 hearing, for the purpose of discovery, "we're not conducting this as an adversarial proceeding." (Transcript of July 7, 2010 Hearing ("Tr.") at 105.) But,

while the interested parties were not entitled to discovery, the Court and the parties understood that the parties were entitled to submit evidence for consideration at the hearings. Indeed, in response to the request to present testimony at the September 9 and 13 hearings, the Court noted that the parties could present evidence for the hearings in the form of affidavits. As the Court said to one of the parties on July 7, a couple of weeks after interested parties filed their objections and initial briefs, "Why do you need to do an evidentiary hearing when you can do it by affidavit." (Tr. at 103.) By filing affidavits on September 1, 2010, ALL and Lloyds did what the Court suggested it do – submit affidavits in lieu of seeking to present testimony at the September hearings.

The Rehabilitor acknowledged the appropriateness of affidavits and the unusual nature of this case regarding the submission of factual information. Its counsel said, for example, that "it [has] been fully adequate to date on motions to handle it by affidavits and the like," noting that at the time of the hearings, the Court could determine whether it needed additional information. (Tr. at 103-104.) Counsel further suggested that the Court should first get "the full context of what the arguments are" and then consider whether and to what extent discovery might occur. (Tr. at 104.) While such an approach is unusual in normal litigation, it is consistent with the unique nature of this proceeding and the Court's emphasis that the rehabilitation proceeding should not be adversarial.

Nevertheless, the Rehabilitator now wants to prevent the Court from obtaining "the full context" of the arguments, instead trying to rely on typical adversarial tactics to prevent the Court from having the opportunity to fully consider the parties' arguments. In any event, even under the strictest application of litigation rules and procedures, ALL

and Lloyds' reply brief and supporting affidavits were completely proper and appropriate. The key affidavits were by experts challenging the accuracy of legal and factual assertions by the Rehabilitator, not just before but also well after the June 22, 2010 motion deadline.

In the August 17, 2010, submissions by the Rehabilitator and Ambac, ALL and Lloyds learned for the first time the asserted reasons that their insurance policies were placed in the segregated account. (*See*, Second Affidavit of Cathleen J. Matanle, ¶¶ 13-22 and Fourth Affidavit of Roger A. Peterson, ¶¶ 5-6.) Moreover, on the critical issue of the adequacy of the capital and surplus for the segregated account – an issue explicitly identified in the June 22, 2010 brief of ALL and Lloyds – the Rehabilitator made several astonishing assertions, including the statement that the parties with policies in the segregated account had access to all of the general account assets of Ambac except for $100 million "in *pari passu*" with the General Account policyholders." (Rehabilitator's Consolidated Brief at 19.)

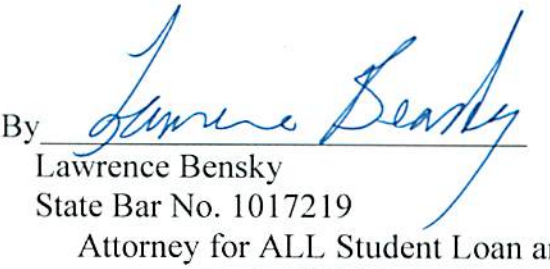
According to Wikipedia, "*pari passu*" is a Latin phrase that means, among other things, "without preference." (http://en.wikipedia.org/wiki/Pari_passu.) In bankruptcy proceedings, according to the Wikipedia article, "where creditors are said to be paid *pari passu*, or each creditor is paid *pro rata* in accordance with the amount of his claim. Here its meaning is 'equally and without preference.'" (*Id.*) With the Rehabilitator's statements that all but 2 percent of Ambac assets were available for claims on policies in the segregated account, that segregated account policyholders were in *pari passu* with general account policyholders, and that segregated account policy holders are not

receiving "subordinated treatment," the Rehabilitator seems to be saying that the segregated account policyholders are in no worse a position than the general account insureds and beneficiaries. In the view of ALL and Lloyds, it is critical to determine whether the underlying grounds for the Rehabilitator's assertions – i.e., the specific security protecting the segregated account – actually put them in equal position with the general account insureds and beneficiaries. Accordingly, in response to the legal and factual assertions made by the Rehabilitator in its August 17, 2010 submissions – and in the face of the refusal of the Rehabilitator to provide any of the information they requested – ALL and Lloyds submitted expert affidavits with their reply brief. Those affidavits and the related arguments in the reply brief were proper under any standard and will help the Court obtain the full context of the issues it must resolve. The Rehabilitator's motion to strike should be denied.

CONCLUSION

For the above reasons, ALL and Lloyds respectfully requests that the Court deny the Rehabilitator's motion; they do not object, however, to the Rehabilitator submitting additional argument or factual information.

September 7, 2010.

By 

Lawrence Bensky
State Bar No. 1017219
Attorney for ALL Student Loan and
Lloyds TSB Bank plc

Law Office of Lawrence Bensky, LLC
10 East Doty Street, Suite 800
Madison, WI 53703
(608) 204-5969
(608) 204-5970
lbensky@benskylaw.com

McCARTHY, LEONARD & KAEMMERER, L.C.
James C. Owen
400 S. Woods Mill Rd.
Chesterfield, MO 63017
(636) 532-7100
(636) 532-0857 (Fax)
jowen@mlklaw.com
Pro Hac Vice Application
Pending