
In the Matter of the Rehabilitation of:
SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

Case No. 10 CV 1576-G

Case No. 10 CV 1576-H

RESPONSE BY DEUTSCHE BANK NATIONAL TRUST COMPANY, DEUTSCHE BANK TRUST COMPANY AMERICAS, AND U.S. BANK NATIONAL ASSOCIATION, EACH ACTING SOLELY IN ITS CAPACITY AS TRUSTEE FOR CERTAIN SECURITIZATION TRUSTS, TO REHABILITATOR'S MOTION TO STRIKE

Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (collectively, "Deutsche Bank") and U.S. Bank National Association ("U.S. Bank", and together with Deutsche Bank, the "Trustees"), each acting solely in its capacity as trustee for certain residential mortgage-backed securities ("RMBS"), other asset-backed securities, collateralized loan obligation and/or collateralized debt obligation trusts (collectively, the "Trusts") insured by Ambac Assurance Corporation and/or its affiliates ("Ambac"), respectfully submit this response to the September 3, 2010 Motion to Strike Improper Reply Arguments and Affidavits ("Motion to Strike") filed by the Commissioner of Insurance of the State of Wisconsin, as Rehabilitator of the Segregated Account ("OCI").

I. PRELIMINARY STATEMENT

On September 3, 2010, OCI filed a Motion to Strike, in part, a portion of the Trustees' reply memorandum filed on September 1, 2010 in further support of their motions to intervene and to modify the Court's Order for Temporary Injunctive Relief ("Injunction Order") and two accompanying affidavits. For reasons set forth below, OCI's motion is baseless and should be denied.

OCI's motion seeks to strike two aspects of the Trustees' filings. First, OCI moves to strike as untimely the Trustees' "objections 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" purportedly because the Trustees did not raise it in the moving memorandum that they filed on June 22, 2010. Motion to Strike at 3. OCI's argument is fatally flawed as a matter of law because the Trustees' argument calls into question the Court's jurisdiction to issue the Injunction Order in its present form; such challenges to a court's jurisdiction can be raised at any time and cannot be waived.

Second, OCI moves to strike the affidavits of U.S. Bank Vice President James H. Byrnes and Deutsche Bank Director David Co (the "Byrnes Affidavit" and "Co Affidavit," respectively) that accompanied the Trustees' reply memorandum because they purportedly introduce new arguments and/or evidence. To the contrary, the Byrnes and Co Affidavits specifically relate to arguments first raised by Deutsche Bank on May 21, 2010, and subsequently reasserted by Deutsche Bank and adopted by U.S. Bank on June 22, 2010. Moreover, the Trustees filed these affidavits and appended exhibits in direct response to: (i) a statement in Ambac's August 17, 2010 opposition memorandum calling for the Trustees to file an affidavit that attached the policies and (ii) the Court's statement during a July 7, 2010 hearing that movants should submit affidavits rather than wait for an evidentiary hearing. Lastly, the affidavits, which were filed more than one week before September 9, 2010 hearing, introduced only four documents, all of which either are publicly available agreements or insurance policies that were issued by Ambac. Accordingly, no prejudice could possibly flow from their submission.

OCI's Motion to Strike is an aggressive litigation tactic that seeks to prevent the Trustees and other movants from presenting arguments and evidence to enable the Court's fair

adjudication of this proceeding. OCI completely undercuts its efforts to persuade the Court that this case substantially differs from traditional litigation and that OCI is representing the interests of Segregated Account policyholders. OCI's motion to strike reflects further compelling evidence that the Trustees must be permitted to intervene to protect their interests in this Segregated Account rehabilitation proceeding because OCI is not protecting them.

II. ARGUMENT

1. The Trustees' Are Entitled to Raise the Issue of this Court's Subject Matter Jurisdiction at any Time

OCI has moved to strike the Trustees' argument in their reply memorandum objecting to the Injunction Order to the extent that 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." Motion to Strike at 3. Yet, as explained on page 9 of the Trustees' reply memorandum, such challenges to a court's subject matter jurisdiction may be raised *at any time* and cannot be waived by the parties. *See Mayer v. Mayer*, 91 Wis. 2d 342, 349, 283 N.W.2d 591, 595 n.9 (Wis. Ct. App. 1979); *see also Kohler Co. v. Wixon*, 204 Wis. 2d 327, 336, 555 N.W.2d 640, 644 (Wis. Ct. App. 1996). OCI's Motion to Strike did not even attempt to rebut this well-established legal principle. Thus, OCI's contention fails as a matter of law, and the Court should not strike the Trustees' arguments concerning the scope of the Court's jurisdiction to issue the Injunction Order in its present form.

2. The Co and Byrnes Affidavits Were Properly Submitted.

OCI's Motion to Strike the Co and Byrnes Affidavits also should be denied for several reasons.

First, OCI's assertion that the Byrnes and Co Affidavits present new arguments and evidence is patently untrue. These affidavits merely contain a representative insurance policy

and the related pooling and servicing agreement in support of the Trustees' position – first raised by Deutsche Bank on May 21, 2010 and later reasserted by Deutsche Bank and adopted by U.S. Bank on June 22, 2010 – that New York law governs construction of the parties' contracts. Indeed, Ambac called for the submission of this evidence in its August 17, 2010 Second Brief in Opposition. (Ambac 2d Br. at 8.) Even more significantly, at the July 7, 2010 hearing, *the Court* invited movants to present evidence for the September 9, 2010 hearing in the form of affidavits. *See* September 9, 2010 Transcript at 103. Given that this hearing took place *after* the June 22, 2010 submissions, this invitation necessarily invited subsequent affidavits.

Second, contrary to OCI's unsupported assertions, the Co and Byrnes Affidavits present no possible threat of prejudice to OCI or Ambac General. Two of the documents, the pooling service agreements, have been publicly available for years. The remaining two documents, representative insurance policies, were issued by Ambac and were allocated to the Segregated Account; thus, Ambac has possessed these documents for years, and OCI has possessed them for many months. Under the circumstances, OCI's claim of prejudice is not credible.

Third, OCI asserts that the Scheduling Order for Briefing and Hearing on the Motions (the "Scheduling Order") did not authorize the filing of new affidavits and evidence in reply. Motion to Strike at 2. OCI asserts that it had the authority to present evidence with its opposition memorandum, but movants were powerless to rebut that evidence through their reply submissions. Besides the fact that OCI's reading of the Scheduling Order would unfairly block a fair opportunity for movants to rebut arguments raised in OCI's opposition memorandum, OCI's position here is internally inconsistent. OCI expressly carved out of its Motion to Strike the Affidavit of Paul A. Lucey ("Lucey Affidavit") and its related exhibits, which accompanied the

Trustees' reply memorandum.¹ This concession by OCI refutes OCI's attempt to interpret the Scheduling Order as barring any reply affidavits.

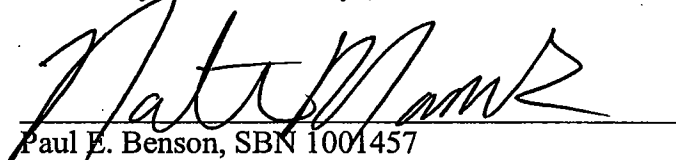
III. CONCLUSION

Based on the foregoing and the arguments, the Trustees respectfully request that the Court deny that portion of OCI's Motion to Strike related to the Trustees' reply memorandum and supporting affidavits.

Respectfully submitted,

DEUTSCHE BANK NATIONAL TRUST
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AMERICAS, solely in its capacity as Trustee, and
U.S. BANK NATIONAL ASSOCIATION, solely
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¹ Similarly, OCI did not move to strike the Affidavit of Attorney Gregory W. Lyons filed with movant Depfa Bank, plc's Combined Reply Brief.

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