
New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, NA, WILMINGTON TRUST, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees, Indenture Trustees, Securities Administrators, Paying Agents, and/or Calculation Agents of Certain Residential Mortgage-Backed Securitization Trusts),

**Appellate
Case No.:
2020-02716**

Petitioners,

For Judicial Instructions under CPLR Article 77
on the Distribution of a Settlement Payment

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR AMBAC ASSURANCE CORPORATION

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Appellants-Respondents

AEGON USA INVESTMENT MANAGEMENT, LLC, BLACKROCK FINANCIAL MANAGEMENT, INC., CASCADE INVESTMENT, LLC, FEDERAL HOME LOAN BANK OF ATLANTA, FEDERAL HOME LOAN MORTGAGE CORP., FEDERAL NATIONAL MORTGAGE ASSOCIATION, GOLDMAN SACHS ASSET MGMT L.P., VOYA INVESTMENT MGMT LLC, INVESCO ADVISERS, INC., KORE ADVISORS, L.P., METROPOLITAN LIFE INS. CO., PACIFIC INVESTMENT MGMT COMPANY LLC, TEACHERS INS. AND ANNUITY ASSOC. OF AMERICA, TCW GROUP, INC., THRIVENT FINANCIAL FOR LUTHERANS and WESTERN ASSET MGMT. CO.
(the “Institutional Investors”)

– and –

Appellants-Respondents

AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK and THE VARIABLE ANNUITY LIFE INSURANCE COMPANY
(the “AIG Parties”)

– and –

Appellants-Respondents

ELLINGTON MANAGEMENT GROUP, L.L.C. and DW PARTNERS LP
(the “Ellington and DW Parties”)

– and –

Appellants-Respondents

TILDEN PARK INVESTMENT MASTER FUND LP on behalf of itself and its advisory clients, TILDEN PARK MANAGEMENT I LLC on behalf of itself and its advisory clients and TILDEN PARK CAPITAL MANAGEMENT LP on behalf of itself and its advisory clients
(the “Tilden Park Parties”)

– and –

Appellants-Respondents

PROPHET MORTGAGE OPPORTUNITIES LP, POETIC HOLDINGS VI LLC, POETIC HOLDINGS VII LLC and U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Indenture Trustee for the Prophet and Poetic Trusts
(the “Prophet and Poetic Parties”)

– and –

Appellant-Respondent

AMBAC ASSURANCE CORPORATION
(“Ambac”)

– and –

Appellants-Respondents

U.S. BANK NATIONAL ASSOCIATION, as NIM Trustee, U.S. Bank, solely in
its capacity as Indenture Trustee for the HBK Trusts
(the “HBK Parties”)

– against –

Respondent

NOVER VENTURES, LLC
 (“Nover”)

– and –

Respondent

D.E. SHAW REFRACTION PORTFOLIOS, L.L.C.
 (“D.E. Shaw”)

– and –

Respondent

STRATEGOS CAPITAL MANAGEMENT, LLC
 (“Strategos”)

– and –

Respondents

OLIFANT FUND, LTD., FFI FUND LTD. and FYI LTD.
 (the “Olifant Parties”)

– and –

Respondents

GMO OPPORTUNISTIC INCOME FUND
 and GMO GLOBAL REAL RETURN
 (the “GMO Parties”)

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PRELIMINARY STATEMENT¹

Ambac has a first priority contractual right to receive the 2006 Trusts' Allocable Shares as reimbursement for its more than \$150 million in claims payments to those trusts. Section 6.02 of the 2006 Trusts' PSAs states that "any Subsequent Recoveries" will be deposited into the Custodial Account and will be used to reimburse Ambac for its claims payments "*first,*" before any such funds are transferred to the separate Distribution Account that funds payments under the Section 6.01 distribution waterfall. Both the Institutional Investors and Nover Ventures, LLC ("Nover") (together, the "Ambac Respondents")² contend that Ambac has no greater rights in the 2006 Trusts than it does in the 2005 Trust that it insured, and that Ambac only has a right to subrogation—*i.e.*, a right to "stand in the shoes" of the holders of insured certificates and receive the distributions that those holders would otherwise receive under the Section 6.01 waterfall. The Ambac Respondents argue that Ambac's rights under the waterfall are the "exclusive" means through which Ambac may receive any Subsequent Recoveries (including the Allocable Shares), despite the existence of Section 6.02, which expressly provides otherwise.

¹ Capitalized terms not defined herein have the meanings given to them in Ambac's opening brief, which was filed with this Court on November 2, 2020.

² The Institutional Investors and Nover are the only respondents with respect to Ambac's appeal of the IAS Court's order.

This Court should reject the Ambac Respondents’ attempt to read Section 6.02 out of the PSAs entirely. Their characterization of Section 6.02 as a mere subrogation provision disregards that section’s plain language stating that any Subsequent Recoveries must be paid to Ambac “first”—*i.e.*, before all other parties, not just the insured certificateholders—and that Ambac must be paid directly from the Custodial Account. The Ambac Respondents also ignore the fact that an entirely *different* section of the PSAs, Section 4.07(d), already grants Ambac subrogation rights. The Ambac Respondents’ argument that Section 6.02 merely “confirms” the subrogation rights that are provided to Ambac elsewhere in the contract violates the cardinal rule of contract interpretation that no provision should be rendered superfluous. The Court should reject the Ambac Respondents’ arguments and give effect to the distinct priority right in Section 6.02 for which Ambac bargained. Because Ambac’s prior unreimbursed claims payments to the 2006 Trusts far exceed the \$31 million Allocable Shares due to those trusts under the Settlement Agreement, Ambac is entitled to receive the entire Allocable Shares for the 2006 Trusts.

In addition, the Court should hold with respect to the 2005 Trust that the balances of all classes of certificates must be written up on account of Subsequent Recoveries, including senior certificates.³

ARGUMENT

I. THE 2006 TRUSTS' PSAs PROVIDE AMBAC WITH A PRIORITY RIGHT TO RECEIVE ANY SUBSEQUENT RECOVERIES

PSA Section 6.02 unambiguously provides Ambac with a priority right to receive any Subsequent Recoveries “first,” directly from the Custodial Account, *before* any such funds are distributed in accordance with the Section 6.01 waterfall. The Ambac Respondents’ argument that Section 6.02 is merely a subrogation provision disregards the clear terms of that provision and other related PSA provisions, and it would render Section 6.02 entirely superfluous. The Court should reject the Ambac Respondents’ arguments and give effect to the plain language of Section 6.02. *See Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002) (“[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.”).⁴

³ As explained in Ambac’s opening brief, this contractual interpretation issue applies equally to the 2006 Trusts. However, the Court need not reach this issue if it accepts Ambac’s argument that it has a priority right to receive the entire Allocable Shares for the 2006 Trusts.

⁴ Because Nover’s briefing on this issue was fairly abbreviated, Ambac’s brief for the most part responds to the arguments made by the Institutional Investors.

A. Section 6.02 Is Not a Superfluous Subrogation Provision

The Institutional Investors contend that Ambac has “no greater rights” in the 2006 Trusts than it does in the 2005 Trust, and that Section 6.02 is merely a subrogation provision. (Inst. Inv. Br.⁵ at 35.) However, the Institutional Investors’ interpretation would render Section 6.02 wholly redundant of the *separate* subrogation provision that is included in the PSAs for both the 2006 Trusts and the 2005 Trust. The Court should decline the Institutional Investors’ invitation to render Ambac’s distinct contractual rights under Section 6.02 “entirely meaningless.” *Corhill Corp. v. S.D. Plants, Inc.*, 9 N.Y.2d 595, 599 (1961).

As the Institutional Investors concede, the PSAs for both the 2005 Trust and the 2006 Trusts provide Ambac with subrogation rights. (Inst. Inv. Br. at 26, 35.) For the 2005 Trust, PSA Section 4.10(d) provides that to the extent Ambac pays any “Insured Amount” to any holder of insured certificates, Ambac will be “subrogated to any rights of such Holder to receive the amounts for which such Insured Amount was paid” and “will be entitled to receive the Reimbursement Amount *as set forth in Section 6.01.*” (R.4389 (emphasis added).) The 2006 Trusts’ PSAs contain a substantially similar provision in Section 4.07(d). (R.3694.) It is pursuant to these subrogation provisions that Ambac is entitled to

⁵ “Inst. Inv. Br.” refers to the Joint Responsive Brief for the Institutional Investors and AIG Parties, which was filed with this Court on December 2, 2020.

stand in the shoes of its insureds and receive funds distributed through the Section 6.01 waterfall to which the insured certificateholders would otherwise have been entitled.

For the 2006 Trusts, Ambac bargained for an *additional* priority right that it does not have with respect to the 2005 Trust. Section 6.02 of the 2006 Trusts' PSAs provides that "any Subsequent Recoveries" received by the trust will be deposited into the Custodial Account and will "first" be used to reimburse Ambac. Section 6.02(b) states:

[I]n the event that the Servicer receives any Subsequent Recoveries, the Servicer shall deposit such funds into the Custodial Account pursuant to Section 4.01(a)(ii). Subsequent Recover[ie]s will first [be] used to pay any amounts owed to the Certificate Insurer as set for[th] in Section 6.02(c).

(R.3708.) Section 6.02(c), in turn, states that "Subsequent Recoveries will be allocated *first* to the Certificate Insurer for payment on any Reimbursement Amounts" (*Id.* (emphasis added).) This distinct provision granting Ambac a priority right to receive Subsequent Recoveries "first"—before all other parties—must be given force and effect. *See Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221-22 (2002) (contract must be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect") (citations omitted).

In attempting to characterize Section 6.02 as merely a “confirmatory” subrogation provision, the Institutional Investors read into that section limitations that do not exist. (Inst. Inv. Br. at 30.) They contend that Section 6.02 provides that “any Subsequent Recoveries *payable to the A-2 certificates* must be allocated first to [Ambac].” (*Id.* at 27 (emphasis added).) But, as noted above, that is not what the contract says. Section 6.02 states that “*any* Subsequent Recoveries” must be allocated first to Ambac, without limiting such amounts to those payable to the insured A-2 certificates under the Section 6.01 waterfall. (R.3708 (emphasis added).) By contrast, the subrogation provision in Section 4.07(d) does refer to the rights of the insured certificateholders under the waterfall. (R.3694; *supra* at 4.)

Thus, the different text of these two provisions make clear that they have distinct functions. Section 6.02 does not merely “confirm” Ambac’s subrogation rights under Section 4.07(d); it grants Ambac a separate priority right to receive Subsequent Recoveries.

B. The Plain Terms of Section 6.02 Authorize Ambac to Receive Subsequent Recoveries Directly from the Custodial Account

The Institutional Investors’ arguments also disregard the plain terms of Section 6.02 and other related PSA provisions which authorize Ambac to receive Subsequent Recoveries directly from the Custodial Account. Ambac’s right to recover from this account, as opposed to the downstream Distribution Account,

forecloses any argument that Section 6.02 merely provides Ambac with a right to stand in the shoes of the insured holders under the Section 6.01 waterfall.

Section 6.02 states that in the event the trust receives any Subsequent Recoveries, the Servicer “shall deposit such funds into the Custodial Account,” and those funds “will first [be] used to pay any amounts owed to the Certificate Insurer.” (R.3708.) As the Institutional Investors explain, funds received by the trust generally flow into the Custodial Account that is managed by the Servicer and later flow into the separate Distribution Account that is managed by the Trustee.⁶ (Inst. Inv. Br. at 32-33.) Any funds that are in the Distribution Account as of a specified date each month are then distributed through the Section 6.01 waterfall. (See R.3705 (PSA Section 6.01) (“On each Distribution Date, an amount equal to the Interest Funds and Principal Funds for such Distribution Date shall be withdrawn by the Trustee *from the Distribution Account to the extent of funds on deposit therein* and distributed for such Distribution Date, in the following order of priority”) (emphasis added).)

This distinction between the Custodial Account and the Distribution Account is critical. Section 6.02’s unequivocal statement that Ambac is entitled to receive Subsequent Recoveries directly from the Custodial Account is wholly

⁶ As explained below, there are certain funds that are withdrawn directly from the Custodial Account and, thus, do not flow to the Distribution Account.

incompatible with the Institutional Investors' argument that this provision merely "confirms" Ambac's subrogation rights under the Section 6.01 waterfall. (Inst. Inv. Br. at 30.) If Section 6.02 were merely intended to reference Ambac's subrogation rights under the Section 6.01 waterfall, it would have referred to the *Distribution Account* that feeds the waterfall. Section 6.02's clear reference to the upstream *Custodial Account* thus refutes the Institutional Investors' argument that Ambac's subrogation rights and its Section 6.02 rights are one and the same. By Section 6.02's plain terms, Ambac has a separate contractual right to receive Subsequent Recoveries "first," as soon as they are deposited in the Custodial Account. This provision must be given force and effect. *See Consol. Edison*, 98 N.Y.2d at 221-22.

The Institutional Investors argue that Ambac may not receive funds directly from the Custodial Account because "all Subsequent Recoveries" must flow through the Custodial Account to the Distribution Account to be distributed pursuant to the Section 6.01 waterfall, "without exception." (Inst. Inv. Br. at 31-33 (citing PSA Sections 4.01, 4.02, 4.03, 4.04).) However, in the same breath, the Institutional Investors concede that this is not actually the case; they acknowledge that the PSAs permit many different types of withdrawals from the Custodial Account, some of which are identified in Section 4.02. (*Id.* at 33.) Thus, the PSAs plainly do not require that "all" Subsequent Recoveries must be transferred from

the Custodial Account to the Distribution Account; they merely require that any funds *remaining* “on deposit” in the Custodial Account, not used to pay certain obligations, as of a specified date each month must be “transfer[red] . . . to the Trustee for deposit in the Distribution Account.” (R.3691 (PSA Section 4.02(d)).) Section 6.01 then provides that principal funds “shall be withdrawn by the Trustee from the Distribution Account *to the extent of funds on deposit therein*” and distributed in accordance with the waterfall.⁷ (R.3705 (emphasis added).) The PSA provisions cited by the Institutional Investors expressly recognize that certain Subsequent Recoveries may not be transferred to the Distribution Account and distributed pursuant to the waterfall.

Contrary to the Institutional Investors’ claim, Section 4.02 does not enumerate the “only” permissible withdrawals from the Custodial Account. (Inst. Inv. Br. at 33.) The Institutional Investors again read into the contract limitations that do not exist. Section 4.02 merely provides that certain withdrawals from the Custodial Account are “permitted,” including those “the Servicer has designated . . . pursuant to this Agreement” (R.3691); it does not purport to be an exhaustive list. The PSAs separately state in Section 6.02 that *another* type of withdrawal from the Custodial Account is permitted with respect to Subsequent Recoveries, in

⁷ The Institutional Investors conspicuously omit this key language from the excerpt of Section 6.01 cited in their brief. (Inst. Inv. Br. at 28.)

particular: such funds “will *first* [be] used to pay any amounts owed to the Certificate Insurer.” (R.3708 (PSA Section 6.02(b)) (emphasis added).)

The Institutional Investors claim that Section 6.02(b) merely confirms that Subsequent Recoveries must be “deposited” in the Custodial Account and that it “says nothing about *withdrawals* from the Custodial Account.” (Inst. Inv. Br. at 34 (emphasis added).) But Section 6.02(b) could not be clearer on this score. It states that Subsequent Recoveries will be deposited into the Custodial Account and “will first [be] used to pay any amounts owed to the Certificate Insurer.” (R.3708.) This language authorizing “pay[ment]” of Subsequent Recoveries to Ambac plainly allows the withdrawal of such funds. The Institutional Investors accuse Ambac of trying to “bypass” the Section 6.01 waterfall (Inst. Inv. Br. at 24), but it is actually the Institutional Investors that are attempting to skip an entire payment step set forth in the PSAs.

The Institutional Investors also contend that “a general section like Section 6.02” cannot control over the supposedly more “specific” provision in Section 4.02 concerning “permitted withdrawals and transfers from the Custodial Account.” (*Id.* at 34-35 (citing *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956)) (alterations omitted).) However, this contractual interpretation principle actually favors *Ambac*’s position. It is Section 6.02 that is the more specific provision concerning the withdrawal of Subsequent Recoveries, in particular, while Section

4.02 concerns other withdrawals from the general “pot” of funds in the Custodial Account. Because Ambac only has a priority right to Subsequent Recoveries—not all *other* funds on deposit in the Custodial Account—Ambac’s priority right is described in Section 6.02, the provision that specifically relates to the “Allocation of . . . Subsequent Recoveries.” (R.3708.) As shown in the PSA excerpt above, Section 6.02 also refers back to Section 4.01 concerning the Custodial Account in order to make clear that these provisions work together. (*Id.*; *supra* at 5.)

The Institutional Investors also ignore Ambac’s argument in its opening brief that the PSAs’ definition of “Principal Funds” supports Ambac’s interpretation of the PSAs. Instead, they argue that all Principal Funds (including all Subsequent Recoveries) must be transferred from the Custodial Account to the Distribution Account for distribution under the Section 6.01 waterfall, and that “[t]here is no carve-out for any Subsequent Recoveries.” (Inst. Inv. Br. at 32.) However, as Ambac explained, the PSAs’ definition of Principal Funds contains precisely such a carve-out: it only includes Subsequent Recoveries “*to the extent remitted by the Servicer to the Distribution Account pursuant to this Agreement.*” (Ambac Br.⁸ at 13 (citing R.3658-3659).)⁹ Thus, the Principal Funds that are

⁸ “Ambac Br.” refers to Ambac’s opening brief.

⁹ The PSA’s definition of Principal Funds is as follows:

Principal Funds: With respect to each Loan Group and each Distribution Date . . . (g) all Liquidation Proceeds collected during

distributed pursuant to Section 6.01 do *not* include any Subsequent Recoveries that have not been “remitted . . . to the Distribution Account” because they were withdrawn directly from the Custodial Account—including any Subsequent Recoveries paid to Ambac pursuant to Section 6.02.

Rather than grapple with the full definition of Principal Funds, the Institutional Investors attempt to sidestep this issue. They omit the critical carve-out language from the definition of Principal Funds set forth in their brief and then baldly claim that no such carve-out exists. (Inst. Inv. Br. at 29 n.20, 32.) Plainly, the Institutional Investors have no answer to Ambac’s argument concerning the significance of this carve-out language. The PSAs clearly contemplate that certain Subsequent Recoveries will be distributed directly from the Custodial Account—namely, those paid to Ambac pursuant to Section 6.02—and that only the remaining Subsequent Recoveries will flow to the Distribution Account to become part of the Principal Funds that are distributed under the Section 6.01 waterfall.

Finally, the Institutional Investors disingenuously claim that the definition of “Reimbursement Amount” set forth in Ambac’s insurance policies provides that

the related Prepayment Period (or, in the case of *Subsequent Recoveries*, during the related Due Period) on the Mortgage Loans in the related Loan Group, to the extent such Liquidation Proceeds relate to principal, *in each case to the extent remitted by the Servicer to the Distribution Account pursuant to this Agreement*

(R.3658-3659 (emphasis added).)

“Section 6.01 is the *only* source of funds which are used to pay the Reimbursement Amounts owing to Ambac.” (*Id.* at 36 (emphasis added).) But the Institutional Investors again distort the contract language. The “Reimbursement Amount” that Ambac is entitled to receive under Section 6.02 is defined as “the sum of (i) all Insured Payments paid by the Certificate Insurer, *but for which the Certificate Insurer has not been reimbursed prior to such Distribution Date pursuant to Section 6.01 of the Agreement*, plus (ii) interest accrued thereon” (R.4611 (emphasis added).) The caveat in this definition which limits the Reimbursement Amount to those amounts that “ha[ve] not been reimbursed . . . pursuant to Section 6.01” merely clarifies that any funds that Ambac has already received under the waterfall must be subtracted out of the calculation of the Reimbursement Amount so that Ambac does not receive a double recovery. Contrary to the Institutional Investors’ claim, this definition does not state that Section 6.01 is Ambac’s “only” basis for recovery, and Section 6.02 clearly provides otherwise.

Accordingly, this Court should reverse the IAS Court’s decision insofar as it held that Section 6.02 does not provide Ambac with a priority right to receive Subsequent Recoveries as reimbursement for its prior claims payments to the 2006 Trusts. Because Ambac’s over \$150 million in claims payments to the 2006 Trusts greatly exceed the Allocable Shares due to those trusts under the Settlement Agreement, Ambac is entitled to the entire Allocable Shares for the 2006 Trusts.

II. THE 2005 TRUST'S PSA ALLOWS SENIOR CERTIFICATES TO BE WRITTEN UP ON ACCOUNT OF SUBSEQUENT RECOVERIES

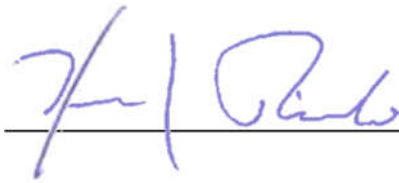
With respect to the 2005 Trust, this Court should hold that the balances of *all* classes of certificates may be written up on account of Subsequent Recoveries, including senior certificates. In order to avoid duplicative briefing, Ambac rests on the arguments made in its opening brief. (Ambac Br. at 17-19.)

CONCLUSION

For the reasons stated above, this Court should reverse the IAS Court's ruling insofar as it held (1) that Ambac is not entitled to receive the entire Allocable Shares for the 2006 Trusts, and (2) that the balances of the senior certificates issued by the 2005 Trust may not be written up on account of its Allocable Share.

Dated: New York, New York
December 18, 2020

Respectfully submitted,



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I hereby certify pursuant to 22 N.Y.C.R.R. § 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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