

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ABN AMRO BANK N.V.; BARCLAYS :
BANK PLC; BNP PARIBAS; CALYON; :
CANADIAN IMPERIAL BANK OF :
COMMERCE; CITIBANK, N.A.; HSBC :
BANK USA, N.A.; JPMORGAN CHASE :
BANK, N.A.; KBC INVESTMENTS :
CAYMAN ISLANDS V LTD.; MERRILL :
LYNCH INTERNATIONAL; BANK OF :
AMERICA, N.A.; MORGAN STANLEY :
CAPITAL SERVICES INC.; NATIXIS; :
NATIXIS FINANCIAL PRODUCTS INC.; :
COÖPERATIEVE CENTRALE :
RAIFFEISEN-BOERENLEENBANK B.A., :
NEW YORK BRANCH; ROYAL BANK OF :
CANADA; THE ROYAL BANK OF :
SCOTLAND PLC; SMBC CAPITAL :
MARKETS LIMITED; SOCIÉTÉ :
GÉNÉRALE; UBS AG, LONDON :
BRANCH; and WACHOVIA BANK, N.A., :

Index No.: 601475/09

Hon. James A. Yates

Plaintiffs,

- against -

MBIA INC., MBIA INSURANCE :
CORPORATION, and MBIA INSURANCE :
CORP. OF ILLINOIS, :

Defendants.

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**PLAINTIFFS' SUPPLEMENTAL REPLY MEMORANDUM OF LAW IN
FURTHER OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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January 12, 2010

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PRELIMINARY STATEMENT

The letter briefs submitted on December 30, 2009 by MBIA (the "MBIA Letter Brief") and the NYID (the "NYID Letter Brief") each confirm that Plaintiffs' claims in this action are not preempted by the Insurance Law or by anything that the NYID said or did in the course of its review of MBIA's "Transformation."¹ These submissions likewise confirm that there is no basis to deprive Plaintiffs of their rights under the New York Debtor & Creditor Law ("DCL") and common law through some form of collateral estoppel or issue preclusion based upon conclusions reached by the NYID in a non-adversarial administrative process that was conducted without giving Plaintiffs any notice or opportunity to be heard. For these reasons, among others, Defendants' motion to dismiss this action should be denied.

I. ALL PARTIES AGREE THAT PLAINTIFFS' CLAIMS ARE NOT PREEMPTED.

MBIA concedes, as did the NYID (NYID Mem., at 38), that "preemption in the traditional sense . . . is not at issue here." (MBIA Letter Brief, at 6.) The sole purpose of these supplemental submissions was for the parties to present their arguments as to whether the Insurance Law reflects some "legislative intent to preempt an independent right of action" under the DCL or the common law. (DiBlasi Aff. Ex. 3 (12/4/09 Tr.), at 46.) All agree that there is no such legislative intent, and no preemption of Plaintiffs' claims. Accordingly, the Court should adhere to its October 2, 2009 decision to deny MBIA's motion to dismiss.

II. PLAINTIFFS' CLAIMS ARE NOT PRECLUDED.

Lacking any basis to assert that Plaintiffs' claims are preempted, MBIA and the NYID instead argue that these claims are "in effect 'preempted'" (MBIA Letter Brief, at 7) under principles of administrative collateral estoppel. See *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798

¹ Capitalized terms not otherwise defined herein have the same meaning as set forth in Plaintiffs' Supplemental Memorandum of Law in Further Opposition to Defendants' Motion to Dismiss, dated December 30, 2009 ("Pl. Supp. Mem.").

(1986) (binding effect of agency action is premised on common law collateral estoppel). MBIA and the NYID refer repeatedly to Plaintiffs' claims as a "collateral attack" on some conclusion by the NYID, but they nowhere even argue that the essential elements of collateral estoppel have been met.²

Required for application of the doctrine in either type proceeding are that [A] the issue as to which preclusion is sought be identical with the issue decided in the prior proceeding, [B] that the issue have been necessarily decided in the prior proceeding, and [C] that the litigant who will be held precluded in the present proceeding have had a full and fair opportunity to litigate the issue in the prior proceeding

Capital Tel. Co., Inc. v. Pattersonville Tel. Co., Inc., 56 N.Y.2d 11, 17 (1982). Not one of these prerequisites to application of collateral estoppel is present here.

A. Plaintiffs' Claims Admittedly Are Not Identical to the Insurance Department Matters Considered by the NYID.

For collateral estoppel to apply, it is "critical that the issues are *identical*." *People v. Roselle*, 84 N.Y.2d 350, 357 (1994) (emphasis added). Here, they are not. MBIA and the NYID fail even to proffer the necessary element-by-element analysis of Plaintiffs' DCL and common law claims in order to demonstrate that the issues presented here are identical to the Insurance Law findings made by the NYID. "Care must be taken in identifying the precise issue necessarily decided in the first proceeding and comparing it to the issue involved in the second proceeding." *Engel v. Calgon Corp.*, 114 A.D.2d 108, 110, 498 N.Y.S.2d 877, 878 (3d Dep't 1986), *aff'd* 69 N.Y.2d 753 (1987). "Whether the issues in the two proceedings are identical depends, however, not upon how one or all of the parties characterize them, but on what facts are determinative of each proceeding in light of the substantive law principles, common law or statutory, governing each." *Capital Tel.*, 436 N.Y.2d at 14 (regulatory approval of utility rates

² See, e.g., *Abiele Contracting, Inc. v. New York City Sch. Constr. Auth.*, 91 N.Y.2d 1, 7 (1997) (rejecting argument that claim was a "collateral attack" because collateral estoppel did not apply); *Van Wie v. Kirk*, 244 A.D.2d 13, 26 (4th Dep't 1998) (claim was not an "impermissible collateral attack" where "the doctrine of collateral estoppel [wa]s inapplicable").

did not immunize rates from private antitrust claim). Where, as here, the claims present issues “under independent bodies of law, there is no identity of issue.” *Engel*, 114 A.D.2d at 110, 498 N.Y.S.2d at 880.

There is no dispute that Plaintiffs’ DCL and common law claims arise under independent bodies of law, and those claims “are generally subject to different criteria and standards of review,” and impose “inconsistent standards” on MBIA because, among other things, “the Insurance Law definition of solvency” differs from the DCL standards. (NYID Mem., at 39, 41.) In fact, the centerpiece of the NYID’s argument is precisely that the DCL and the Insurance Law are so different that subjecting an insurer to different “insolvency standards other than those set forth in the Insurance Law . . . would breed confusion.”³ (NYID Letter Brief, at 2.)

There also is no dispute that the NYID determinations rest on principles of statutory insurance accounting that have no application to Plaintiffs’ claims, and all agree that any evaluation of solvency would be different under the fair value approach under the DCL as compared to the statutory accounting methods applied under the Insurance Law. (MBIA Letter Brief, at 4-5; NYID Mem., at 41; Pl. Supp. Mem., at 7-10.)

The MBIA Letter Brief never addresses the elements of Plaintiffs’ DCL and common law claims, or offers any argument that the elements of those claims are identical to the conclusions reached in the NYID Letter. Indeed, for the most part MBIA does not even reference the NYID Letter, but instead quotes from various utterly irrelevant statements in NYID press releases or court filings. (MBIA Letter Brief, at 5-6.) As more fully described in Plaintiffs’ Supplemental Memorandum, the facts that will demonstrate MBIA’s violations of the DCL and common law are not remotely identical to the Insurance Law conclusions in the NYID Letter. (Pl. Supp.

³ The NYID also concedes that the issues here are not identical by arguing that the Court “need not consider any arguments regarding the intersection of the Insurance Law and the DCL” or “divine which body of law applies,” based on the circular assertion that “plaintiffs’ claims can only be raised in an Article 78 proceeding.” (NYID Letter Brief, at 2.)

Mem., at 7-22.) MBIA's feeble attempt to show some overlap between the DCL and the Insurance Law is both irrelevant, *Capital Tel.*, 56 N.Y.2d at 14, and wrong.

DCL § 273. MBIA's entire argument in support of the notion that Plaintiffs' DCL § 273 claim was "necessarily determined" by the NYID Letter is its unsupported assertion that "[t]he Insurance Law solvency tests are *more stringent* than the DCL § 271 solvency test," supposedly because the Insurance Laws "take into account only an insurer's 'admitted assets'—(*i.e., only* those assets that are readily available for the payment of claims), and DCL § 271 considers the value of *all* assets." (MBIA Letter Brief, at 5 (emphases in original).) Apart from the fact that this statement (a) confirms that the issues here are *not identical*, and (b) is, to say the least, a disputed fact, it is incorrect on its face. DCL § 271 does not consider "all assets" but only those assets with a "present fair salable value." *Chase Nat'l Bank v. U.S. Trust Co.*, 236 A.D. 500, 503, 260 N.Y.S. 40, 44 (1st Dep't 1932) ("Not every asset, but only such as are salable enter the equation."). On the other hand, "admitted assets" under the Insurance Law include various "assets," such as "[g]ross deferred tax assets" and "[p]ositive goodwill" (Ins. Law §§ 1301(a)(14), (16), (17)), that would not qualify as a "salable asset" under the DCL solvency test.

Moreover, tacitly recognizing that the Insurance Law is *not* more stringent than the DCL, MBIA ignores entirely its massive *liabilities*, which are at the heart of its insolvency here.⁴ As described in Plaintiffs' Supplemental Memorandum, while statutory accounting essentially ignores MBIA's enormous looming liabilities until actual defaults occur, the DCL test focuses on "probable liability," and therefore includes contingent future liabilities. (Pl. Supp. Mem., at 7-9.) For this reason, any solvency analysis of MBIA under the Insurance Law and statutory accounting is significantly different from the analysis required by the DCL, and, regardless of the

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See Buchmiller Att. ¶¶ 22-55.)

accuracy of the NYID's Insurance Law conclusions, MBIA will be shown to be deeply insolvent under the standards imposed by the DCL.

DCL §§ 274 & 276. MBIA lumps together Plaintiffs' two very different claims under DCL §§ 274 and 276, and simply asserts that the claims "are belied by" the NYID's conclusions. Notably, MBIA does *not* rely on conclusions in the NYID Letter, but cites to four quotations from a press release and court filing. (MBIA Letter Brief, at 5-6.) The *only* citation to the NYID Letter itself is the conclusion that MBIA Insurance purportedly would "retain sufficient surplus to support its obligations and writing"—which was limited solely to the \$1.147 billion dividend, and not the entire \$5 billion fraudulent restructuring. MBIA never argues—nor could it—that any essential element of Plaintiffs' DCL §§ 274 and 276 claims is foreclosed by an identical determination in the NYID Letter. (Pl. Supp. Mem., at 16-20.)

Common Law Claims. Without citing a single element of any one of Plaintiffs' common law claims, MBIA devotes a mere two sentences to its assertion that Plaintiffs' separate claims for breach of contract, veil-piercing, and unjust enrichment are supposedly precluded. (MBIA Letter Brief, at 6.) MBIA nowhere even argues that the essential elements of any one of Plaintiffs' common law claims were at issue and decided adversely to Plaintiffs in any NYID proceeding. (Pl. Supp. Mem., at 20-22.)

B. The NYID Letter Did Not "Necessarily Determine" Any of Plaintiffs' Claims.

MBIA agrees that Plaintiffs' claims are not precluded unless MBIA demonstrates that Plaintiffs' claims were "necessarily determined" by the NYID Letter. (MBIA Letter Brief, at 4.)⁵ No fact essential to any of Plaintiffs' claims was "necessarily determined" by the NYID Letter.

⁵ MBIA dilutes even this standard, at times claiming that Plaintiffs' claims are precluded if they are "belied by," "fly in the face of," or "contradict" the NYID. (See MBIA Letter Brief, at 5-6.)

First, MBIA does not even argue that some actual fact determinations in the NYID Letter foreclose Plaintiffs' claims. Instead, asserting that the NYID Letter is only a "summary statement" of its "determinations on the proposals before it" (MBIA Letter Brief, at 2 (quoting NYID Mem., at 38 n.8)), MBIA argues that statements in an NYID press release and the NYID's litigation filings in the Article 78 proceeding overlap with Plaintiffs' DCL and common law claims. (MBIA Letter Brief, at 2, 5-6 (quoting NYID press release and court filings).) Such extraneous statements from an agency are not part of, or necessary to, the agency decision. *Scanlan v. Buffalo Pub. Sch. Sys.*, 90 N.Y.2d 662, 678 (1997).

Second, MBIA argues repeatedly that Plaintiffs' claims are foreclosed by various vague conclusions made by the NYID—such as the purported determination that the "Transformation was 'fair'" or "equitable" (MBIA Letter Brief, at 5)—even though the NYID itself says those conclusions are the product of the Superintendent's "broad authority and discretion" and not based on any "specific criteria that the Superintendent must apply." (NYID Mem., at 20.) MBIA is wrong.

The discretionary conclusions of an administrative agency are not necessary to any administrative determination and do not preclude further litigation on the same issue. "A finding of fact in an earlier proceeding, even though put in issue by the pleadings, is not binding in a later proceeding, if the finding of fact was not essential to the determination of the earlier proceeding." *Menna v. Joy*, 86 A.D.2d 138, 141, 449 N.Y.S.2d 48, 49 (1st Dep't 1982). In *Engel*, 114 A.D.2d at 110-11, 498 N.Y.S.2d at 879, for example, the court held that one agency's determination was not binding in a subsequent agency proceeding because the critical "term is not defined identically under each statute and each agency may determine which factors it considers most appropriate." "[S]ince the issue . . . is an ultimate fact, the resolution of which is committed to the discretion of the [two separate agencies] under independent bodies of law, there

is no identity of issue and [one agency's] finding of employment does not automatically mandate a similar finding by [a separate agency]." *Id.* at 112; 880.

Third, administrative legal conclusions, or conclusions of ultimate fact, also have no preclusive effect. "[A]n administrative agency's final conclusion, characterized as an ultimate fact or a mixed question of fact and law, is not entitled to preclusive effect." *O'Gorman v. Journal News Westchester*, 2 A.D.3d 815, 817, 770 N.Y.S.2d 121, 124 (2d Dep't 2003); *In the Matter of Bartenders Unlimited, Inc.*, 289 A.D.2d 785, 786-87, 736 N.Y.S.2d 119, 120-21 (3d Dep't 2001) (same). Preclusion applies to the underlying "evidentiary facts," but not the "mixed questions of fact and law" involved in the application of the facts to the statute. *Engel*, 114 A.D.2d at 110, 498 N.Y.S.2d at 878-79. For this reason, the "findings" in the NYID Letter, which do little more than recite the words of the Insurance Laws (*see* MBIA Letter Brief, at 3), could never preclude Plaintiffs' non-Insurance Law claims.

C. The NYID Made No Quasi-Judicial Findings.

MBIA does not dispute that rulings of administrative agencies may be binding only if they are "'quasi-judicial' in character." *Abiele Contracting*, 91 N.Y.2d at 12. A litigant is not bound by prior agency action that did not afford it "a full and fair opportunity to contest the [determination] now said to be controlling." *Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 71 (1969); *see Jason B. v. Novello*, 12 N.Y.3d 107, 113 (2009) (*res judicata* inapplicable when conclusion "was not based upon a practice and procedure of an administrative tribunal that is comparable to that of a court of law"). Unless such procedures are followed, the agency is "not empowered to issue a final and binding determination . . . reviewable only in an Article 78 proceeding." *Abiele Contracting*, 91 N.Y.2d at 5, 7 (rejecting lower court's holding that parties "could not attempt a collateral attack . . . by instituting a plenary action").

“Executive acts have never been regarded as” preclusive. *Venes v. Comm. Sch. Bd. of Dist.* 26, 43 N.Y.2d 520, 525 (1978).

Neither MBIA nor the NYID anywhere address this fundamental defect in their collateral estoppel arguments. Plaintiffs are not bound by the conclusions reached by the NYID without proper notice and a hearing. *Marine Midland Bank v. Home Ins. Co.*, 263 A.D.2d 374, 374 (1st Dep’t 1999) (New Hampshire Insurance Department finding did not preclude DCL claim against insurer due to inadequate notice of hearing and no identity of issues). The NYID findings relied on by MBIA were not “rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a court of law, and there was no “full and fair opportunity to contest the decision now said to be controlling.” *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 152-53 (1988). Indeed, the NYID admits that it conducted its review privately with MBIA and invited no input from interested parties.⁶ (NYID Mem., at 42 (acknowledging that the NYID did not “publicly announce the proposed transaction, hold a hearing or provide a comment period”).) Whatever conclusions the NYID may have reached, they do not preclude Plaintiffs’ separate claims.

III. AS THE NYID ADMITS, ANY APPROVAL PROCURED BY MBIA ON THE BASIS OF INACCURATE OR INCOMPLETE INFORMATION HAS NO PRECLUSIVE EFFECT.

Notably, MBIA contradicts the NYID by arguing that this Court is bound by the NYID Letter even if that approval was procured fraudulently by MBIA. (MBIA Letter Brief, at 7-8.) MBIA is incorrect. As the NYID observed (NYID Mem., at 36), in *Fiala v. Metro. Life Ins. Co.*, 6 A.D.3d 320, 776 N.Y.S.2d 29 (1st Dep’t 2004), the “First Department carved out” as an

⁶ Indeed, the non-adversarial relationship between MBIA and the NYID in jointly developing the “Transformation” alone deprives any conclusions reached by the NYID of preclusive effect. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456-57 (1985) (“An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation.”).

exception to collateral attack “allegations that the Department had not been aware of certain facts underlying plaintiffs’ claims.”⁷ While the NYID assumed the accuracy of MBIA’s financials (Pl. Supp. Mem., at 12-13), Plaintiffs vigorously dispute the accuracy of that information. Plaintiffs have alleged and expect to demonstrate at trial that MBIA has grossly misrepresented its financial condition (including to the NYID) by overstating assets and severely understating its loss reserves on structured finance insurance policies. (See, e.g., Complaint ¶ 69 (“MBIA Insurance will be required to pay billions of dollars in claims to its structured-finance policyholders . . . yet MBIA Insurance strains to maintain the fiction that it remains solvent.”).)

MBIA’s reliance on *Minehane v. Weissman*, 226 A.D.2d 152, 640 N.Y.S.2d 102 (1st Dep’t 1996), and the lower court decision in that same case, *In re Empire Blue Cross & Blue Shield Customer Litig.*, 164 Misc. 2d 350, 355, 622 N.Y.S.2d 843, 846 (Sup. Ct. N.Y. Co. 1994), as support for the notion that a fraudulently procured agency approval nevertheless might bind third parties is severely flawed. The decision in *Minehane* rested only on the so-called “filed rate doctrine,” which holds that utility rates set by an administrative agency are within the exclusive jurisdiction of the agency and certain challenges to their fairness are preempted. *Minehane*, 226 A.D.2d at 152, 640 N.Y.S.2d at 103 (some but not all civil challenges to filed rates barred); see *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760-61 (9th Cir. 2004) (challenges to filed rates were “preempted” and the “exclusive domain” of the agency that propounded them). These cases are inapposite because all agree that Plaintiffs’ DCL and common law claims here are not preempted, and that the NYID has no jurisdiction over Plaintiffs’ DCL claims.

⁷ In any event, collateral estoppel does not apply where there is “new evidence, not available at the time of the prior proceeding, which would certainly have changed the prior result.” *Sucher v. Kuischer’s Country Club*, 113 A.D.2d 928, 931, 493 N.Y.S.2d 829, 833 (2d Dep’t 1985).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants'

Motion to Dismiss.

Dated: January 12, 2010
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