New York's Highest Court Reinstates $5 Billion Lawsuit By Big Banks Against MBIA

By**: Michael C. Hefter and Seth M. Cohen**

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New York's highest court yesterday reinstated a $5 billion lawsuit brought by a group of banks, including Bank of America and Wells Fargo, against insurance giant MBIA. *ABN AMRO Bank*, *et al. v. MBIA Inc., et al.*, — N.E. 2d –, 2011 WL 2534059, slip op. (June 28, 2011). The Plaintiffs-banks sought to annul MBIA's 2009 restructuring, which separated the insurer's municipal bond business from its troubled structured finance unit, on the grounds that the transactions left the insurer incapable of paying insurance claims in violation of New York's Debtor and Creditor Law. The Superintendent of Insurance in New York approved the transactions that effectuated the split of MBIA's business in 2009.

The Court of Appeals' decision represents a victory for Wall Street banks in one of the many battles being fought in connection with the collapse of the financial markets. Those banks saw their fraudulent transfer claims against MBIA dismissed earlier this year by the Appellate Division, First Department. The intermediate appellate court determined that the banks' fraudulent transfer claims were a "collateral attack" on the Superintendent's authorization of the restructuring and that an Article 78 proceeding challenging that authorization was the sole remedy available to the Plaintiffs. The banks' remedies under Article 78 – a procedure entitling aggrieved parties to challenge agency decisions – would be limited compared to those remedies available in state or federal court under a fraudulent transfer theory.

At issue for the Court of Appeals was whether the Plaintiffs-banks had the right to challenge the restructuring plan in light of the Superintendent's approval. Plaintiffs argued that the restructuring was a fraudulent conveyance because MBIA Insurance siphoned approximately $5 billion in cash and securities to a subsidiary for no consideration, thereby leaving the insurer undercapitalized, insolvent and incapable of meeting its obligations under the terms of the respective insurance policies. MBIA countered that, as held by the First Department, Plaintiffs' claims were impermissible "collateral attacks" on the Superintendant's approval of the restructuring.

In a 5-2 decision, the Court of Appeals modified the First Department's decision and reinstated the Plaintiffs' breach of contract, common law, and creditor claims. In an opinion authored by Judge Carmen Beauchamp Ciparick, the Court held that NY Insurance Law does not vest the Superintendent with "broad preemptive power" to block the banks' claims. *MBIA Inc.*, 2011 WL 2534059, slip op. at 16. "If the Legislature actually intended the Superintendent to extinguish the historic rights of policyholders to attack fraudulent transactions under the Debtor and Creditor Law or the common law, we would expect to see evidence of such intent within the statute. Here, we find no such intent in the statute." *Id.*

Critical to the Court's holding was that Plaintiffs had no notice or input into the Insurance Department's decision to approve MBIA's restructuring. "That the Superintendent complied with lawful administrative procedure, in that the Insurance Law did not impose a requirement that he provide plaintiffs notice before issuing his determination, does not alter our analysis," Judge Ciparick wrote. "To hold otherwise would infringe upon plaintiffs' constitutional right to due process." *MBIA Inc.*, 2011 WL 2534059, slip op. at 21. Moreover, the Court noted that Plaintiffs' claims could not be properly raised and adjudicated in an Article 78 proceeding. *Id.*

The Court's decision re-opens claims by multiple financial institutions that MBIA instituted the restructuring in order to leave policyholders without financial recourse.

The case is ABN AMRO BANK NV. et al., v. MBIA Inc., et al, 601475-2009 (N.Y. State Supreme Court, New York County.)