

1 insurance rehabilitation, but this rehabilitation complies  
2 with that statute because for purposes of this  
3 rehabilitation and for purposes of compliance with the  
4 requirement that there not be subclasses, the only insurer  
5 in rehabilitation is the Segregated Account, and when you  
6 look at the Segregated Account there's only one class 3 of  
7 policyholders so there has been literal compliance with that  
8 statute.

9 But the objectors go on and say but there's a  
10 broader requirement and they argue that there has to be  
11 equitable apportionment of any unavoidable loss and, of  
12 course, cite the more general requirement that  
13 policyholders, claimants and insurers are treated fairly and  
14 equitably, and certainly those requirements are important.  
15 But I reiterate the point Mr. Van Sicklen made, the  
16 requirement in the statutes that policyholders be treated  
17 equitably does not mean they be treated equally.

18 I'll mention a famous case from the Great  
19 Depression era that had a similar issue. It was called In  
20 re National Surety Co. and this decision -- this was from  
21 New York. The decision is cited at 268 NYS 88 and it was a  
22 decision of the Appellate Division, First Department,  
23 upholding a rehabilitation plan in which a new company was  
24 formed to run the profitable business, which was a title  
25 insurance business, to divorce it from the risks and hazards

1 of other businesses, namely mortgage guarantees and mortgage  
2 certificate, so I suppose mortgages were causing problems  
3 back then just like they are now and a separation of the  
4 problematic mortgage business from other healthy businesses  
5 was achieved and was upheld by the appellate court in New  
6 York. Now, I should say in the end the plan didn't work out  
7 and that company had to go into liquidation, but the concept  
8 was upheld, and -- and that's the important point.

9                   Now, going to this question of whether the  
10 requirement of equitable treatment means that everyone has  
11 to be treated equally, there are other contexts in which the  
12 Wisconsin Supreme Court has noted that equal and equitable  
13 don't mean the same thing, that these are not insurance  
14 rehabilitation cases, but I'd cite just as an example as a  
15 matter of general construction for why those terms don't  
16 mean the same thing the case of Kind, K-i-n-d, vs. Vilas  
17 County at 56 Wis. 2d 269 where the context was, you know,  
18 how to resolve conflicting claims of landowners where there  
19 was a discrepancy between survey and what the actual  
20 shoreline said, and the holding was that disputed parcel  
21 needed to be apportioned, quote, "on an equitable but not  
22 necessarily equal basis."

23                   A different context, but it illustrates the  
24 point that equitable and equal are not necessarily the same  
25 thing. And time is short so I won't cite these other

1 decisions, but certainty in the family law context when  
2 there's a divorce, there needs to be an equitable division  
3 of marital property. No one suggests that that has to be  
4 completely equal.

5 Now let me move to the question of whether  
6 there is a requirement, a Constitutional requirement that an  
7 opt-out right be provided. Well, first I'll start with  
8 Mr. Peterson's testimony, and he certainly is someone who  
9 has a great deal of experience with these things in the  
10 state of Wisconsin. He testified on November 17th at 11-13  
11 that he's just never seen that in his extensive experience  
12 in Wisconsin.

13 Furthermore, for those who think this opt-out  
14 right is so terrific, I'll refer them to what actually  
15 happened in the Pacific Mutual case, which was the  
16 rehabilitation that led to the famous Carpenter decisions in  
17 1937 and 1938. In the 1943 decision, they were litigating  
18 this issue of what the recovery would be, a decision called  
19 Caminetti vs. Pacific Mutual, and the wrangling over what  
20 the opt-out recovery would be actually continued into 1962,  
21 apparently.

22 THE COURT: Spell Caminetti.

23 MR. RICARDO: C-a-m-i-n-e-t-t-i, Caminetti  
24 vs. Pacific Mutual, and that decision is reported at 142 P  
25 2d 7341. That was the 1943 decision, but it wasn't over.

1 They were still litigating the issue of payments to opt out  
2 policyholders in 1962 in a decision called McConnell vs.  
3 Pacific Mutual, and that's recorded at 24 California  
4 Reporter 5.

5 I think what we learn from looking at the  
6 Pacific Mutual decision is that it would be impossible to  
7 calculate liquidation value with certainty to the penny  
8 today, that it's just not a possibility, but that does not  
9 mean that the Commissioner cannot reasonably come to the  
10 judgment that a liquidation recovery would be inferior to  
11 what the plan offers and we submit that the Commissioner's  
12 determination in that regard is accurate and is entitled to  
13 certain deference.

14 I think what some of the claimants here are  
15 really asking for -- and I started out by saying I haven't  
16 heard anyone -- I haven't heard any policyholder take the  
17 position that there ought to be a liquidation. I haven't  
18 heard any policyholder take the position that there ought to  
19 be a full rehabilitation. I actually thought One State  
20 Street was advocating for a liquidation, but they corrected  
21 me and assured me today that they are not.

22 Well, none of the various objectors are  
23 willing to go so far as to say yes, we believe these  
24 alternatives, a full rehabilitation or liquidation, would  
25 have been better. What they want is something illusory.

1 What they want, what they really seem to be asking for, is a  
2 payout based on an unrealistic set of assumptions of what  
3 would happen in a liquidation, and I submit that that's what  
4 they are really seeking when they talk about the need to opt  
5 out and obtain liquidation value.

6 So let me now turn to liquidation. First I  
7 would submit that it cannot be the case that a plan is  
8 incapable of being confirmed unless we know what the  
9 liquidation recovery would be for every policyholder to the  
10 penny. That's simply unrealistic and I'm sure this court  
11 has supervised liquidations and knows how long it takes.  
12 Actual liquidation takes many, many years, as illustrated by  
13 the Pacific Mutual case, and I think in assessing, you know,  
14 assuming -- assuming for the sake of this discussion that  
15 it's necessary for OCI to put forward a liquidation  
16 analysis, and I know Mr. Van Sicklen has argued that it's  
17 not, but even if we assume that, the standard for reviewing  
18 that has to be that OCI's assumptions have to be reasonable,  
19 that they not constitute an abuse of discretion, and that's  
20 important because there are not clear rules on how one  
21 conducts a liquidation analysis.

22 I think some of the objectors have cited one  
23 case in California and some bankruptcy decisions and based  
24 on that authority have come here to assert that OCI got it  
25 all wrong and their liquidation analysis has to be

1 discarded. Well, I'll address the strength of that legal  
2 authority later, but I want to say a few words about why the  
3 standard in this case ought to be judged as of the time that  
4 this rehabilitation proceeding commenced and I'll start with  
5 the following point.

6           The liquidation analysis is being offered as  
7 a test of the Commissioner's exercise in discretion in  
8 choosing the path that he did. That decision was made at a  
9 particular point in time and we argue it needs to be weighed  
10 against the options that were available at that time.

11 Conducting a liquidation analysis at the time the  
12 rehabilitation is commenced is also consistent with another  
13 general principle, and that's that the rights of claimants  
14 are fixed at the time that the proceeding commences.

15           Next it's important to understand that we're  
16 only talking about a hypothetical liquidation calculation  
17 here. There's no actual payout. It's just for the sake of  
18 comparison, and given the role that a liquidation analysis  
19 plays in this procedural posture, it's important to note  
20 some unique facts about the Bank Group settlement that I  
21 think have gotten lost.

22           And I found it a bit amusing that some of the  
23 very same parties who were in this courtroom in May talking  
24 about what a terrible deal the bankruptcy settlement was and  
25 seeking to enjoin it are now singing its praises because of

1 all the liabilities that it took off the balance sheet and  
2 are explaining why they ought to get the benefit of it when  
3 it comes to running a liquidation analysis.

4 But I think we have to start with the clear  
5 fact that the claims of the Bank Group, whether they are a  
6 13 billion dollar claim or a nine billion dollar claim or  
7 the 800-pound gorilla of this process, and if I can refer  
8 the court to the forbearance agreement that was signed at  
9 the time, and it's in evidence, it's in the record, it's  
10 Exhibit 9, which is the first Peterson affidavit and Exhibit  
11 3 thereto, what that forbearance signed between Ambac and  
12 the Bank Group and -- shows that it was not indifferent as  
13 to which options OCI picked.

14 That's an understatement. The Bank Group had  
15 a very clear view of what they would consider an acceptable  
16 result for the settlement and what they wouldn't, and to --  
17 to give some more detail on this, at page 3 of the  
18 forbearance agreement, one of the defined termination events  
19 of this forbearance agreement was an insolvency proceeding  
20 other than the Segregated Account rehabilitation proceeding,  
21 which was a defined term that described this proceeding.

22 So if ever -- if before the deal was  
23 signed -- and recall, Your Honor, when this proceeding was  
24 started, there was no signed settlement agreement. There  
25 was just this forbearance agreement. Had there been a full

1 rehabilitation, that forbearance agreement terminates, so  
2 the Bank Group claims 13 billion dollars come live and are  
3 immediately assertable.

4           Additionally, on page 7 of the forbearance  
5 agreement, Section 4 little I, there were two conditions to  
6 the agreement becoming effective. One was execution of the  
7 agreement, which one would expect, and the second was the  
8 establishment of the Segregated Account and the commencement  
9 of the Segregated Account rehabilitation proceeding  
10 specifically by the end of the day on March 24th, 2010.

11           So if this proceeding had not commenced,  
12 there would be no Bank Group settlement, so it seems a  
13 little strange to us, when weighing the alternatives, that  
14 the Commissioner had to choose between conducting a  
15 liquidation analysis to choose among them to act as if we  
16 could have proceeded on some other path and just assumed  
17 away the Bank Group liability. Given the actual record in  
18 this case, there is no basis in the record to assume that a  
19 Bank Group settlement could have happened, particularly not  
20 on those terms, in the context of a full rehabilitation or a  
21 liquidation.

22           There was only a deal on the table if the  
23 Commissioner chose the Segregated Account rehabilitation  
24 path that we are here now talking about. And in any other  
25 scenario, you would have an angry Bank Group with claims of

1 13 billion dollars immediately payable. So now let's look  
2 at the authority that's cited for the proposition that you  
3 have to conduct the -- the -- sorry, liquidation analysis  
4 later in time.

5 They cite one California case which arrives  
6 from the Executive Life rehabilitation, a 1993 decision, but  
7 there was an important difference in that case. That case  
8 involved an actual opt-out provision. Policyholders there  
9 had the ability to opt out, so there was an actual payout  
10 that had to be conducted. It wasn't an analysis conducted  
11 for purposes of judging the reasonability of the  
12 Commissioner's decision so there was a need for precise  
13 calculations in that case, a need that I've argued we don't  
14 have here.

15 The other authority that's cited are a series  
16 of bankruptcy cases, and my response to that is sometimes  
17 bankruptcy court cases are analogous to insurance  
18 rehabilitation proceedings, but sometimes they are not, and  
19 this is one of the areas in which they are not and here is  
20 why. It's clear in the Carpenter case and the standard set  
21 by that case that their outcomes of insurance rehabilitation  
22 proceedings such as the unequal treatment that we know  
23 occurred in the Carpenter case that wouldn't be permitted  
24 under the federal bankruptcy law, so when conducting this  
25 type of equitable and fairness analysis, we submit that the

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1 bankruptcy court precedents are actually not so relevant.

2           But getting back to the Executive Life  
3 Insurance rehabilitation, which is really the only  
4 rehabilitation case authority that is cited for the  
5 proposition that a liquidation analysis has to be done later  
6 in time rather than at the commencement of the  
7 rehabilitation proceeding, the objectors cite the 1993  
8 decision in that proceeding, but they don't cite the 1995  
9 decision in that proceeding, which is reported at 32  
10 California Appellate Fourth 344.

11           And there are actually a couple of important  
12 ways in which the court in 1995 said that people were  
13 reading too much into its 1993 decision, including some of  
14 the ways that people are today. First, in calculating the  
15 liquidation value in 19 -- or the claim, the Rehabilitator  
16 was allowed to use discount rate existing at the time the  
17 rehabilitation was commenced so the 1995 decision backed off  
18 a little bit on what one might have concluded from the 1993  
19 decision.

20           And perhaps more importantly for purposes of  
21 considering the role of the Bank Group settlement, there was  
22 some additional consideration that came into the insurers'  
23 estate in that in that rehabilitation, a company named  
24 Aurora was the successor company, took over a number of the  
25 assets, and the dissenters said wait a minute, you've got to

1 include the value that was added from this third party from  
2 the arrangements that you reached with them in the  
3 liquidation analysis.

4 But the court in Executive Life in a 1995  
5 decision said no, you don't consider that additional value.  
6 It was provided by a third party. It shouldn't be  
7 considered in calculate -- calculating liquidation value.  
8 And we submit that the lesson to be learned from that  
9 decision, to the extent one can generalize about these  
10 decisions at all, is -- is that benefits achieved in the  
11 course of rehabilitation shouldn't be considered in the  
12 hypothetical liquidation analysis.

13 Now, Mr. Van Sicklen already addressed the  
14 critiques that were made. You know, we're criticized for  
15 not counting 2 billion here, 1 billion here, but if you are  
16 going to count it in the liquidation analysis, you have to  
17 count it in the surplus notes because that's what you are  
18 weighing it against. You have to compare apples and apples  
19 and oranges and oranges, and I think the problem is in  
20 arguing for a distorted high liquidation value, the  
21 objectors are trying to compare apples and oranges. They  
22 are not conducting a fair comparison.

23 But you know what? Even if they are right,  
24 even if these recoveries come in, even if there really is a  
25 billion dollars at AUK, which obviously Mr. Van Sicklen gave

1 reason to doubt, in the recent, if those recoveries come in,  
2 they come into Ambac to pay the surplus notes so we either  
3 have those assets or we don't, but you have got to commit --  
4 you have got to have an apples-to-apples comparison.

5                   And then finally, I think Mr. Van Sicklen  
6 already addressed why One State Street's assumptions were  
7 not realistic, but I was surprised to hear counsel for  
8 Freddie Mac latch onto One State Street's evidence. I think  
9 at the beginning of this hearing I said no policyholder has  
10 submitted any evidence that they'd be better off -- that  
11 they'd be better off in a liquidation or a rehabilitation  
12 and I was chided because I didn't consider the  
13 cross-examination that One State Street had conducted of  
14 Mr. Peterson.

15                   Well, I did have that in mind. That's why I  
16 said to policyholder. But it was very surprising to me that  
17 Freddie Mac would adopt the analysis of One State Street in  
18 which policyholders get zero after March 24th. I don't  
19 think that Freddie Mac is seriously advocating for that  
20 result for policyholders.

21                   I'll change --

22                   THE COURT: How much longer are you going to  
23 be?

24                   (An off-the-record discussion was held.)

25                   (Court in recess at 5:00 p.m.)

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(Court in session at 5:14 p.m.)

THE COURT: Court is in session.

Mr. Ricardo, we were with you.

MR. RICARDO: Thank you, Your Honor. During the break, my older and wiser colleagues have prevailed on me and I have concluded my remarks. With that I will conclude my argument. Thank you. I thank the court for its patience, and I thank the court reporter and the clerk and the court officer for their patience as well.

THE COURT: All right. That will complete argument. I realize that Mr. Greenwald had mentioned something about reserving the right to be -- to reargue, but --

MR. GREENWALD: Your Honor, if you will, I will withdraw that and not urge you even to listen to me except for one 30-second comment that does not relate to question or argument.

THE COURT: One 30-second?

MR. GREENWALD: If you give me 30 seconds, but I can't talk too fast for your reporter. The only thing we would say, Your Honor, and we wanted to put on the record and ask the court's indulgence, if the court is inclined to adopt the plan, we would ask that the court voluntarily stay the effective date of that order for seven days to enable us to get to Your Honor a motion to stay pending appeal.

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That's the only thing I wanted to ask of the court, and with that I'm done, and my voice is about gone so I thank you.

THE COURT: Mr. Van Sicklen, Mr. Ricardo, I assume you would want to see the motions.

MR. VAN SICKLEN: We would, Your Honor. I guess we'd like to see the order. It seems premature to put the cart before the horse.

THE COURT: Yeah. It will be several days before I get that out. Not too long, but I'll get it out as quick as I can. I want to finish reviewing the materials that were submitted and review the arguments made today, but it will be coming as quick as I can get it. I guarantee you it's going to be a lot quicker than the Court of Appeals will get your next decision out.

All right. We're in recess.

(Court in recess at 5:17 p.m.)

