

IN THE SUPREME COURT OF THE STATE OF DELAWARE

POLICE AND FIRE RETIREMENT	§	
SYSTEM OF THE CITY OF	§	No. 16, 2012
DETROIT,	§	
	§	Court Below: Court of Chancery of
Plaintiff Below,	§	the State of Delaware
Appellant,	§	
	§	
v.	§	C.A. No. 3521
	§	
MICHAEL A. CALLEN, JILL M.	§	
CONSIDINE, PHILIP N. DUFF,	§	
ROBERT J. GENADER, PHILLIP	§	
B. LASSITER, SEAN T. LEONARD,	§	
WILLIAM T. MCKINNON,	§	
THOMAS C. THEOBALD, LAURA	§	
S. UNGER, HENRY D. G.	§	
WALLACE, DAVID W. WALLIS,	§	
and AMBAC FINANCIAL	§	
GROUP, INC.,	§	
	§	
Defendants Below,	§	
Appellees.	§	

Submitted: May 2, 2012

Decided: May 7, 2012

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices.

ORDER

This 7th day of May 2012, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. The Police and Fire Retirement System of the City of Detroit (“DPFRS”), the plaintiff-below, appeals from a Court of Chancery oral ruling

dismissing DPFRS' derivative action asserting fiduciary duty claims on behalf of Ambac Financial Group, Inc. ("Ambac") against certain of Ambac's current and former directors and officers. We affirm the dismissal on the ground that DPFRS lacks standing to pursue the derivative claim on Ambac's behalf.

2. The relevant procedural facts are as follows: In February 2008, DPFRS filed a complaint in the Court of Chancery (the "Chancery action"), alleging that various Ambac officers and directors had breached their fiduciary duties to Ambac in various respects. The Chancery action was later stayed in favor of a companion derivative action arising out of similar facts pending in the United States District Court for the Southern District of New York (the "federal derivative action"). On November 8, 2010, Ambac filed for Chapter 11 reorganization in the Bankruptcy Court for the Southern District of New York ("the Bankruptcy proceeding"). The following year, Ambac agreed to settle a related federal securities class action. As part of that settlement, the derivative claims in the Chancery and the federal actions would also be released, and those actions (as well as the federal securities action) would be dismissed. The settling parties sought the approval of the Bankruptcy Court in the Bankruptcy proceeding. Although the only parties having

an economic interest were the unsecured creditors,¹ no creditors objected. Only DPFRS—which owned 100 shares of Ambac—objected, together with one plaintiff in the federal derivative action. Over DPFRS’ objection, that settlement was approved by the Bankruptcy Court, whose judgment was subsequently affirmed by the United States District Court for the Southern District of New York (“Southern District”).² Separately, the Southern District in the federal securities class action also approved the settlement, again over DPFRS’ objection.³ DPFRS has appealed both decisions. Those appeals are currently pending in the United States Court of Appeals for the Second Circuit.⁴ In September 2011, pursuant to the (now judicially approved) settlement agreement, Ambac moved in the Court of Chancery to dismiss DPFRS’ derivative action. After a hearing on December 15, 2011, the Vice Chancellor granted that motion in an oral bench ruling.

3. The Vice Chancellor dismissed DPFRS’ derivative complaint on two separate legal grounds. First, “upon the filing of . . . bankruptcy [DPFRS’ claims] became Ambac’s claims,” and as a result DPFRS lost standing to pursue them.

¹ The shareholders had no economic stake, because their entire interest was subordinated to the claims of the unsecured creditors to whom approximately \$1.7 billion is owed. Since Ambac did not have sufficient assets to pay its creditors, the value of the equity was \$0. Accordingly, we are told, the shareholders would recover nothing in the reorganization.

² *In re Ambac Financial Group, Inc.*, 2011 WL 6844533 (S.D.N.Y., Dec. 29, 2011).

³ *Id.* at *1, n. 7.

⁴ *In re Ambac Financial Group, Inc.*, Nos. 11-4643, 12-59 (2nd Cir.).

Second, the Bankruptcy Court’s order approving the securities class action settlement, which released DPFERS’ derivative claims and was affirmed by the District Court, was entitled to “full faith and credit . . . [absent] an authoritative decision” to the contrary by a higher federal court.⁵ Because we affirm the Court of Chancery’s judgment on the first ground—that upon Ambac’s bankruptcy filing, DPFERS lost standing to sue derivatively on Ambac’s behalf—we need not, and do not, reach the second ground.

4. In determining that DPFERS lacked standing, the Court of Chancery relied upon case authority holding that “derivative claims, upon the commencement of the bankruptcy proceeding, [become] the property of the bankruptcy estate and subject to the control of the Bankruptcy Court.”⁶ The Vice Chancellor accurately stated and applied the controlling rule of law. We agree that Ambac’s bankruptcy filing, by operation of law,⁷ divested DPFERS of standing to

⁵ DPFERS contends that this matter should be stayed pending the resolution of its pending appeals to the Second Circuit challenging the approval of that settlement, including the Bankruptcy Court’s constitutional authority to approve it. We disagree. As the Court of Chancery noted, in the circumstances at bar, should there be a reversal by the federal appellate court that impacts this case, DPFERS will have an appropriate procedural remedy under Court of Chancery Rule 60(b) through which it may seek to reopen the judgment. Therefore, we decline to stay our hand.

⁶ *Thornton v. Bernard Technologies, Inc.*, 2009 WL 426179 at *3 (Del. Ch. 2009). *See also, iXL Enterprises, Inc. v. GE Capital Corp.*, 167 Fed. Appx. 824, 826 (2nd Cir. 2006) (“Pursuant to Section 541 of the Bankruptcy Code . . . the corporate debtor in possession is properly substituted for an individual shareholder as the plaintiff in a derivative action because Section 541 renders all of the debtor’s causes of action the exclusive property of the bankruptcy estate.”) (citing *Pepper v. Litton*, 308 U.S. 295, 306-07 (1939)).

⁷ 11 U.S.C. § 541.

pursue Ambac’s claims derivatively, unless and until DPFRS is authorized to do so by the Bankruptcy Court. DPFRS has neither sought nor acquired that authority.⁸ Accordingly, the judgment of the Court of Chancery dismissing the derivative action was correct and must be upheld.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁸ *Thornton*, 2009 WL 426179 at *4 (stating that shareholder standing to pursue derivative claims of company in bankruptcy requires “(1) that the bankruptcy trustee has affirmatively assigned or abandoned the claims to the Plaintiffs and (2) the Bankruptcy Court approved of Plaintiffs’ prosecution of the claims.”) (citations omitted); *iXL Enterprises, Inc.*, 167 Fed. Appx. at 826-27 (“Although the Bankruptcy Code provides that a shareholder may, in limited circumstances, pursue a derivative action on behalf of the bankrupt, ‘some proceeding in the bankruptcy court must take place before a shareholder can assert the right directly.’”) (citation omitted).