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No. 124
ABN AMRO Bank, N.V. et al.,
 Appellants,
Barclays Bank PLC, et al.
 Plaintiffs,
 v.
MBIA Inc., et al.,
 Respondents.

 Robert J. Giuffra, Jr., for appellants.
 Marc E. Kasowitz, for respondents.
 Superintendent of Insurance; New York Civil Liberties
Union et al.; Patrick J. Borchers et al.; Aurelius Capital Master
Ltd. et al., amici curiae.

CIPARICK, J.:

 In this dispute between MBIA Insurance Corporation
(MBIA Insurance) and certain of its policyholders, the principal
question presented is whether the 2009 restructuring of MBIA
Insurance and its related subsidiaries and affiliates authorized
by the Superintendent of the New York State Insurance Department

(the Superintendent) precludes these policyholders from asserting claims against MBIA Insurance under the Debtor and Creditor Law and the common law. We hold that the Superintendent's approval of such restructuring pursuant to its authority under the Insurance Law does not bar the policyholders from bringing these claims.

I.

This appeal has its origins in the unraveling of the world's financial markets that began in 2007. As described in the complaint, plaintiffs are a group of unrelated banking and financial services institutions that hold financial guarantee insurance policies issued by defendant MBIA Insurance on their structured-finance products. In May 2009, they commenced this action against defendants MBIA Insurance, MBIA Inc., and MBIA Insurance Corp. of Illinois (MBIA Illinois) following the Superintendent's February 2009 approval of their application for restructuring. Plaintiffs contend that the restructuring constituted a fraudulent conveyance, which left MBIA Insurance undercapitalized and unable to meet its obligations under the terms of their policies.

Prior to the restructuring, MBIA Inc., a publicly traded Connecticut based corporation, provided financial guarantee insurance and other forms of credit protection to its customers worldwide. It conducted this business through its wholly-owned subsidiary, MBIA Insurance, a New York based

corporation. MBIA Illinois, an essentially dormant, Illinois-domiciled corporation, was a wholly-owned subsidiary of MBIA Insurance.

As a monoline insurer, MBIA Insurance "exclusively wrote financial guarantee insurance policies and did not offer property, casualty, life, disability or other forms of insurance." Under the terms of its policies, MBIA Insurance promised to pay its policyholders if an obligor on a covered instrument defaulted. Historically, MBIA Insurance had underwritten policies that covered municipal bonds and other types of securities issued by governmental entities. However, in response to market trends, MBIA started offering guarantee insurance related to structured-finance products. Structured-finance products, which include mortgage-backed securities, are "obligations payable from or tied to the performance of pools of assets." Notably, by the end of 2008, MBIA Insurance had a portfolio of policies with a face amount of \$786.7 billion. Approximately one-third of MBIA Insurance's portfolio consisted of structured-finance policies (\$233 billion in face amount); the remaining two-thirds consisted of municipal bond policies (\$553.7 billion in face amount).

Beginning in 2007 and continuing through 2008, the health of the real estate market deteriorated. In turn, the risks associated with certain financial products tied to real estate, such as structured-finance products, increased

concomitantly. Not surprisingly, MBIA Insurance's exposure to liability with respect to its structured-finance policy portfolio grew exponentially as the real estate market crumbled during this period.

In 2008, MBIA Inc. responded to this crisis in a number of ways. On February 25, 2008, it publicly "announc[ed] that it would establish 'separate legal operating entities for MBIA's public, structured, and asset management businesses' within five years." At the same time, MBIA Inc. suspended the issuance of new structured-finance guaranty policies. In May 2008, MBIA Inc. also considered infusing \$900 million of its own cash into its subsidiaries "in order to 'support MBIA Insurance['s] triple-A ratings and existing and future policyholders.'" Despite these efforts to curb the negative effects of the downturn in the real estate market, in early June 2008, both Moody's Investors Service, Inc. (Moody's) and Standard & Poor's Rating Services downgraded MBIA Insurance's credit worthiness. MBIA Inc., as a result, opted not to invest its own cash into its subsidiaries, but instead decided to pursue its plan to segregate its municipal bond portfolio from its structured-finance portfolio, which it feared was turning toxic.

Under the Insurance Law, many aspects of this plan required approval or non-disapproval by the Superintendent. To that end, on December 5, 2008, MBIA Insurance, on behalf of itself and the other defendants, submitted an ex parte

application to the Superintendent, detailing a series of proposed transactions that would effectuate their desired goals. MBIA Insurance supplemented and amended its application several times in the ensuing two months. Defendants requested approval of the following transactions in order to separate their two sets of portfolios. First, MBIA Insurance would declare and distribute a \$1.147 billion dividend to MBIA Inc. Second, MBIA Insurance would redeem and retire roughly one-third of its capital stock from MBIA Inc. and in exchange would give MBIA Inc. approximately \$938 million more in cash and securities, as well as all of the issued and outstanding stock of MBIA Illinois. Third, MBIA Inc. would transfer the cash it received from the dividend distribution and the cash, securities and MBIA Illinois stock it received in connection with the stock redemption to MuniCo Holdings Inc. (MuniCo), a wholly-owned subsidiary of MBIA Inc. Fourth, MuniCo would capitalize MBIA Illinois, no longer a subsidiary of MBIA Insurance, by contributing \$2.085 billion it received in these asset transfers.

Finally, following the capitalization of MBIA Illinois, MBIA Insurance further proposed that it and MBIA Illinois would enter into a series of transactions pursuant to which MBIA Illinois would "reinsure, on a cut-through basis, those financial guaranty insurance policies sold or reinsured by MBIA [Insurance]." Such an arrangement would allow the municipal bond policyholders to submit claims directly to MBIA Illinois as well

as MBIA Insurance. In exchange, MBIA Insurance would remit about \$3.66 billion to MBIA Illinois, most of which represented "the net unearned premium reserve . . . associated with" the municipal bond policies.

By letter dated February 17, 2009, the Superintendent granted each of the approvals requested by MBIA Insurance (the Transformation). The approval letter stated that the Transformation was fair to structured-finance policyholders, noting that MBIA Insurance would "continue to pay all valid claims in a timely fashion." No notice nor opportunity to be heard was given to the policyholders.

Specifically, the Superintendent approved the proposed dividend payment made by MBIA Insurance to MBIA Inc. under Insurance Law § 4105, which requires a determination that MBIA Insurance would "retain sufficient surplus to support its obligations and writings." Next, the Superintendent approved the proposed stock redemption, concluding under Insurance Law § 1411 that it was "reasonable and equitable." Finally, with respect to the proposed reinsurance transaction, the Superintendent did not disapprove, concluding that it comported with statutory factors enunciated in Insurance Law §§ 1308, 1505, and 6906. In his letter, the Superintendent stressed a number of times that his approvals and non-disapprovals were based on "the representations made in the [a]pplication [by MBIA Insurance] and its supporting submissions, and in reliance on the truth of those

representations and submissions."

Following the Superintendent's issuance of its approval/non-disapproval letter, defendants consummated the Transformation, which was given retroactive effect to January 1, 2009. The very next day, MBIA Inc. publicly announced that it had succeeded in segregating its municipal bond policy portfolio from its structured-finance policy portfolio by restructuring its principal insurance subsidiary, MBIA Insurance. MBIA Inc.'s Chief Executive Officer emphasized in a letter to shareholders that the Transformation provided the holding company "with much needed clean capacity for new municipal bond business."

On February 18, 2009, the Superintendent issued his own public statement, announcing that he had overseen "a transformation of [MBIA Insurance] that effectively splits that company in two, dividing its assets and liabilities between two highly capitalized insurance companies." Despite the Superintendent's public endorsement of the restructuring, Moody's further downgraded MBIA Insurance's credit rating to B3, six steps below investment grade and three steps above "junk." One of the primary reasons Moody's cited for its downgrade of MBIA Insurance was the "substantial reduction in claims-paying resources relative to the higher-risk exposures in its insured portfolio, given the removal of capital, and the transfer of unearned premium reserves associated with the ceding of its municipal portfolio to MBIA Illinois."

In May 2009, plaintiffs commenced this action in Supreme Court alleging fraudulent conveyances under New York's Debtor and Creditor Law, breach of contract, abuse of the corporate form, and unjust enrichment. "[A]midst an ongoing financial crisis," plaintiffs allege that "[i]n an unlawful attempt to escape MBIA Insurance's coverage obligations to [p]laintiffs and other policyholders, [d]efendants executed a series of bad faith fraudulent conveyances, in breach of MBIA Insurance's contracts, to transfer MBIA Insurance assets into MBIA Illinois -- an entity that [d]efendants structured to be free from liabilities or other obligations to [p]laintiffs." Plaintiffs specifically allege that "[d]efendants [fraudulently] stripped approximately \$5 billion in cash and securities out of MBIA Insurance" and that MBIA Insurance received no consideration for the assets it transferred. They further allege that the fraudulent conveyances have exposed them to potentially billions of dollars in losses since MBIA Insurance is now woefully undercapitalized and insolvent. Moreover, plaintiffs allege that MBIA Inc. abused the corporate form by causing MBIA Insurance to engage in these unfair transactions in order to shield assets away from plaintiffs. Plaintiffs seek to set aside the allegedly fraudulent transfer or, in the alternative, a declaration that defendants shall be jointly and severally liable to plaintiffs under plaintiffs' insurance policies, or an award of damages.

Defendants moved to dismiss the complaint on June 9,

2009. Their principal basis for dismissal is that plaintiffs' claims in this plenary proceeding are impermissible "collateral attacks" on the Superintendent's approval of the Transformation, which can only be challenged in an article 78 proceeding. Defendants also contend that the complaint fails to state cognizable causes of action.

On June 15, 2009 -- six days after defendants moved to dismiss the complaint and within the four month statute of limitations period -- plaintiffs separately filed an article 78 proceeding in Supreme Court, assigned to the same Justice handling the plenary action, challenging the Superintendent's 2009 approval/non-disapproval of the Transformation. Plaintiffs assert in that proceeding that the Superintendent acted arbitrarily and capriciously and abused his discretion. For relief, plaintiffs seek an annulment of the Superintendent's determination and a declaration that the transactions approved by the Superintendent in connection with the Transformation are null and void. The article 78 proceeding remains pending while the parties conduct discovery.

In a written decision, Supreme Court denied defendants' motion seeking dismissal of the complaint (ABN AMRO Bank, N.V. v MBIA Inc., 26 Misc 3d 1223[A], 2010 NY Slip Op 50238[U] [Sup Ct, NY County 2010]). The court rejected defendants' "collateral attack" argument, noting that plaintiffs were not seeking a determination from the court that the Superintendent incorrectly

applied New York Insurance Law (id. at *16). Rather, Supreme Court held, the "mere fact that there was earlier approval of the . . . restructuring by the Insurance Department does not immunize defendants from subsequent statutory and common law claims" (id. at *13). In so holding, the court observed that "[t]he Superintendent was not called upon to examine whether defendants intended to defraud policyholders" (id. at *15). Supreme Court then evaluated the legal sufficiency of the complaint and found that plaintiffs adequately pleaded causes of action under the Debtor and Creditor Law (see id. at *18). It also concluded that plaintiffs adequately stated claims for breach of contract premised on a breach of the implied covenant of good faith and fair dealing, abuse of the corporate form allowing for a declaratory judgment piercing the corporate veil of MBIA Insurance, and unjust enrichment (see id. at *18-*19).

The Appellate Division, with two Justices dissenting, reversed and granted defendants' motion to dismiss the complaint (ABN AMRO Bank, N.V. v MBIA Inc., 81 AD3d 237, 248 [1st Dept 2011]). The majority construed plaintiffs' complaint as a "collateral attack" on the Superintendent's authorization of the Transformation. Citing its decision in Fiala v Metropolitan Life Ins. Co. (6 AD3d 320 [1st Dept 2004]), the majority held that "[a] plenary action that seeks the overturn of the Superintendent's determination, or challenges matters that the determination necessarily encompasses, constitutes an

impermissible indirect challenge to that determination" (ABN AMRO Bank, 81 AD3d at 246 [internal quotation marks omitted]). As a result, the majority opined that an article 78 proceeding challenging the Superintendent's determination is the only remedy available to the plaintiffs (see id. at 246).

The majority also held that, in any event, plaintiffs three common law claims failed to state causes of action. Specifically, the majority noted that plaintiffs' breach of contract and piercing of the corporate veil claims should have been dismissed on the ground that plaintiffs fail to allege a default on payments owed to them under their policies (see id. at 244-245). The majority found that "[p]laintiffs also fail to allege particularized statements detailing fraud or other corporate misconduct that would warrant piercing the corporate veil" (id. at 245). Finally, the majority concluded that plaintiffs failed to state a cause of action for unjust enrichment because they did not allege that "MBIA Insurance has conferred some benefit upon MBIA Inc. and MBIA Illinois at plaintiffs' expense" (id. at 246).

The two dissenting Justices agreed with the majority that plaintiffs' unjust enrichment cause of action should have been dismissed, but would have otherwise affirmed the order of Supreme Court (see id. at 253 [Abdus-Salaam, J. dissenting in part]). The dissent rejected the notion that an article 78 proceeding is the sole remedy available to plaintiffs here (see

id. at 252-253). The dissenting Justices reasoned that the Superintendent's decision did not have a preclusive effect on plaintiffs' right to assert claims against defendants because, unlike the plaintiffs in Fiala and the other cases cited by the majority, plaintiffs here had no "opportunity to be heard or otherwise provide input regarding the determination" (id. at 253).

Furthermore, the dissent concluded that plaintiffs sufficiently pleaded a cause of action for breach of contract, under a theory that defendants breached an implied covenant of good faith, where they allege that defendants "substantially reduc[ed] the likelihood that MBIA Insurance [would] be able to pay its policyholders," thereby "injuring the right of plaintiffs to receive the fruits of the contract" (id. at 254 [internal quotation marks and brackets omitted]). Finally, the dissent concluded that plaintiffs sufficiently pleaded their claim for a declaratory judgment and piercing of the corporate veil, observing that plaintiffs allege that MBIA Inc. abused the privilege of doing business in the corporate form by causing MBIA Insurance to make fraudulent conveyances for no value (see id. at 254-255).

Plaintiffs appeal as of right pursuant to CPLR 5601 (a) and we now modify.

II.

Defendants have consistently maintained that plaintiffs' plenary claims under the Debtor and Creditor Law and the common law constitute "impermissible collateral attacks" on the Superintendent's approval of the Transformation. To support their position, defendants do not argue that plaintiffs are collaterally estopped from commencing a proceeding in Supreme Court following the Superintendent's determination. Rather, defendants contend on this appeal that the Insurance Law vests the Superintendent with "exclusive original jurisdiction" to adjudicate plaintiffs' claims that may only be challenged through an article 78 proceeding. For the reasons that follow, we reject this argument.

It is fundamental that "Article VI, § 7 of the NY Constitution establishes the Supreme Court as a court of 'general original jurisdiction in law and equity'" (Sohn v Calderon, 78 NY2d 755, 766 [1991], quoting NY Const, art VI, § 7 [a]). "Under this grant of authority, the Supreme Court 'is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed" (id., quoting Thrasher v United States Liab. Ins. Co., 19 NY2d 159, 166 [1967]). Indeed, "it has never been suggested that every claim or dispute arising under a legislatively created scheme may be brought to the Supreme Court for original adjudication" (id.). Thus, "the constitutionally protected jurisdiction of the Supreme Court does not prohibit the Legislature from conferring exclusive original jurisdiction upon

an agency in connection with the administration of a statutory regulatory program" (id. at 767).

We applied these principles in Sohn and held the agency in question there, the Division of Housing and Community Renewal (DHCR), had exclusive original jurisdiction to resolve a dispute concerning a landlord's entitlement to demolish a rent regulated building (see id. at 767-768). In analyzing the statute governing DHCR's authority, the Administrative Code of City of New York § 26-408, we observed that it was "beyond question that the Legislature intended" such disputes "to be adjudicated by the DHCR" (id. at 765-766). Thus, we concluded that the statutory scheme proscribed the landlord in that case from circumventing DHCR's authority and commencing an action in Supreme Court seeking a declaration that was within DHCR's exclusive purview (see id. at 767-768). We noted that the landlord, of course, could later challenge a determination made by DHCR by way of an article 78 proceeding (see id. at 767).

On the other hand, in Richards v Kaskel (32 NY2d 524 [1973]), we held that section 352-e of the General Business Law, which vests the Attorney General with exclusive jurisdiction to approve a cooperative building conversion plan, did not preclude the plaintiffs, tenants of a rent stabilized apartment complex, from commencing a private lawsuit alleging that their landlord engaged in fraudulent misconduct in connection with such a plan (see id. at 535). There, we observed that section 352-e

authorized the Attorney General "to consider the sufficiency of the language and content of the [cooperative conversion] and [to determine] that the plan . . . complied with the disclosure requirements of the statute" (id. at 535 n 5). Given the limited scope of the Attorney General's adjudicatory authority under this section of the General Business Law, we concluded that the Legislature did not "intend[] to deprive the court of its traditional equitable jurisdiction to consider claims of illegality on the part of the sponsor apart from noncompliance with that provision" (id.; see also McGee v Lepow, 82 AD2d 746, 747 [1st Dept 1981], appeal dismissed, 54 NY2d 1027 [1981]).

In this case, defendants essentially ask us to construe the Superintendent's exclusive original jurisdiction to approve the Transformation under the relevant provisions of the Insurance Law to mean that he is also the exclusive arbiter of all private claims that may arise in connection with the Transformation -- including claims that the restructuring rendered MBIA Insurance insolvent and was unfair to its policyholders. Defendant's contention, taken to its logical conclusion, would preempt plaintiffs' Debtor and Creditor Law and common law claims. We reject this argument and conclude that there is no indication from the statutory language and structure of the Insurance Law or its legislative history that the Legislature intended to give the Superintendent such broad preemptive power (see Matter of Zuckerman v Board of Educ. of City School Dist. of N.Y., 44 NY2d

336, 342-343 [1978] ["Although (Public Employment Relations Board [PERB]) has exclusive jurisdiction of labor disputes between public employers and public employees involving the right to organize and the right to negotiate in good faith, this jurisdiction does not mean that any and all disputes between such parties fall exclusively to PERB. PERB's jurisdiction encompasses only those matters specifically covered by the Taylor Law."]).

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. Moreover, we would expect that, in such a situation, affected policyholders, such as plaintiffs, would have notice and an opportunity to be heard before the Superintendent made his determinations. Here, we find no such intent in the statute.¹ Nor do we see a provision that required the Superintendent to provide notice and an opportunity to be heard to plaintiffs before he approved the Transformation (cf. *Shah v Metropolitan Life Ins. Co.*, 2003 NY Slip Op 50591[U] *12 [Sup Ct,

¹ We agree with the dissent that "intent may be implied from the nature of the subject matter being regulated" and that "[a] comprehensive and detailed statutory scheme may be evidence of the Legislature's intent to preempt" (dissenting op at 4-5, quoting Matter of Cohn v Board of Appeals of Vil. of Saddle Rock, 100 NY2d 395, 400 [2003]). We disagree, however, that the Insurance Law implies such an intent here.

NY County, 2003], affd in part Fiala, 6 AD3d at 321-322 [in the context of an article 73 demutualization, following the required statutory notice and an opportunity to be heard by the policyholders, "[t]he [L]egislature expressly placed the determination as to whether a plan of reorganization complied with the statute and was fair and equitable to policyholders in the (exclusive jurisdiction) of the Superintendent"]).

Defendants nonetheless look to Insurance Law § 326 (a) as a provision conferring exclusive authority on the Superintendent to adjudicate plaintiffs' private claims. Defendant's reliance on such provision, however, is entirely misplaced. That statute, as pertinent here states that "any order, regulation or decision of the [S]uperintendent is declared to be subject to judicial review in a proceeding under article [78] of the civil practice law and rules." A cursory reading of the plain language reveals that it does not vest the Superintendent with the power to consider causes of action, such as plaintiffs'. Rather, the statute merely provides that the Superintendent's decisions -- which derive from legislatively designated authority under the Insurance Law -- are subject to review in an article 78 proceeding (see Travelers Indem. Co. v State of New York, 33 AD2d 127, 128 [3d Dept 1969], affd 28 NY2d 561 [1971] ["it is clear from the legislative history that (Insurance Law § 326) was written in its present form to insure that all and not just some determinations" made by the

(Superintendent) were reviewable by an article 78 proceeding"]. The Superintendent's determinations, however, have never included the adjudication of claims like those plaintiffs have put forward in this action. Nor can these claims be properly raised and adjudicated in an article 78 proceeding.

III.

Because we perceive no basis to conclude that the Legislature divested Supreme Court of its general jurisdiction to adjudicate plaintiffs' Debtor and Creditor Law and common law claims, explicitly through the Insurance Law or otherwise, we next turn to the preclusive effect, if any, of the Superintendent's approval of the Transformation on this plenary action. Such an inquiry requires an analysis of administrative collateral estoppel principles. At the outset, however, we observe that defendants correctly concede that collateral estoppel does not apply here. While our inquiry would normally end with such a concession, a discussion is necessary here as the so-called "collateral attack doctrine" does not exist apart from the doctrines of exclusive original jurisdiction and administrative collateral estoppel principles. And there is good reason for this. The recognized doctrines, as they exist in New York, build in protections of notice and opportunity to be heard for affected constituencies.

The doctrine of collateral estoppel (or issue preclusion) is rooted in principles of fairness. It is well

settled that the doctrine "may be invoked in a subsequent action or proceeding to prevent a party from relitigating an [identical] issue decided against that party in a prior adjudication" (Staatsburg Water Co. v Staatsburg Fire Dist., 72 NY2d 147, 152-153 [1988]). In Capital Tel. Co. v Pattersonville Tel. Co. (56 NY2d 11 [1982]), we reaffirmed the principle that collateral estoppel applies to an administrative proceeding (id. at 17). In the context of administrative agency determinations, we have recognized that the doctrine of collateral estoppel "is applied more flexibly, and additional factors must be considered by the court" (Allied Chem. v Niagara Mohawk Power Corp., 72 NY2d 271, 276 [1988]). "These additional requirements are often summed up in the beguilingly simple prerequisite that the administrative decision be 'quasi-judicial' in character" (id., quoting Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]).

An administrative decision is quasi-judicial in character when it is "'rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law'" (Matter of Jason B. v Novello, 12 NY3d 107, 113 [2009], quoting Ryan, 62 NY2d at 499). Thus, for collateral estoppel to be triggered, not only must the identity of the issue decided in the prior action or proceeding have been the same, but also "there must have been a full and fair opportunity to contest the decision now said to be controlling"

(Gilberg v Barbieri, 53 NY2d 285, 291 [1981], quoting Schwartz v Public Adm'r of County of Bronx, 24 NY2d 65, 71 [1969]; see also Capital Tel. Co., 56 NY2d at 17).

Here, even assuming the issues considered by the Superintendent in approving the Transformation are identical to the issues raised by plaintiffs in their plenary action (which they are not), plaintiffs had no opportunity to contest the Superintendent's determination or, more importantly, challenge the validity of the financial information provided to him by defendants which formed the basis of the Superintendent's approval. The record is indisputable on this point. MBIA Insurance submitted a private application to the Superintendent. The Superintendent did not conduct public hearings or provide public notice before rendering his determination. Crucially, the Superintendent accepted the truth of defendants' submissions (cf. Shah, 2003 NY Slip Op 50591[U] at *12-13, affd in part Fiala, 6 AD3d at 321 [plenary lawsuit dismissed as a collateral attack on the Superintendent's decision to approve a demutualization of an insurance company where public hearings were held and plaintiff had notice and opportunity to be heard]). Simply put, there was nothing "quasi-judicial" about the Superintendent's approval process that ought to be binding on plaintiffs in this case (see Staatsburg Water Co., 72 NY2d at 154 [even where party had an opportunity to participate in a prior proceeding, such proceeding is not quasi-judicial, and therefore not binding, where party's

participation "did not necessarily amount to a full and fair opportunity to contest the determination"]).

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. To hold otherwise would infringe upon plaintiffs' constitutional right to due process. Indeed, as we stated in Gilberg, "[d]ue process, of course, would not permit a litigant to be bound by an adverse determination made in a prior proceeding to which he was not a party or in privity with a party" (53 NY2d at 291; see also Phillips Petroleum Co. v Shutts, 472 US 797, 811-812 [1985] [a party cannot be bound by a prior proceeding without "minimum procedural due process protection," including "notice plus an opportunity to be heard and participate in the litigation"])). Clearly plaintiffs here were not in privity with the Superintendent.

IV.

Satisfied that the Superintendent's approval of the Transformation does not bar plaintiffs' independent plenary action, we address the sufficiency of the pleadings. Our standard of review is well-familiar: "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87 [1994]; see CPLR 3026). Courts must "accept the facts as alleged in the complaint

as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon, 84 NY2d at 87-88).

We conclude that plaintiffs adequately pleaded causes of actions under the Debtor and Creditor Law. Plaintiffs premise their first claim on Debtor and Creditor Law § 273, which requires them to allege that MBIA Insurance fraudulently made "conveyance[s]" that rendered it "insolvent" because it did not receive "fair consideration" for such conveyances. They base their second claim on Debtor and Creditor Law § 274, which similarly requires plaintiffs to allege that MBIA Insurance fraudulently made "conveyance[s] . . . without fair consideration," which left it with "unreasonably small capital." Debtor and Creditor Law § 276 forms the basis of plaintiffs' third cause of action. That statute requires plaintiffs to allege that defendants made conveyances and incurred obligations with the intent "to hinder, delay, or defraud either present or future creditors."

Plaintiffs, who are undoubtedly creditors of MBIA Insurance, support all of these claims by describing a series of allegedly fraudulent transactions made in bad faith by defendants after the Superintendent's approval of the Transformation, in which they ultimately assert "stripped approximately \$5 billion in cash and securities out of MBIA Insurance." Further,

plaintiffs allege that MBIA Insurance received no consideration for the assets it transferred to MBIA Inc. As a result, plaintiffs allege that MBIA Insurance is insolvent and unable to meet its obligations under the terms of their policies. These allegations clearly support causes of action under sections 273 and 274 of the Debtor and Creditor Law. Moreover, these allegations, taken together and drawing all reasonable inferences in favor of plaintiffs, as we must at this stage of the litigation, sufficiently allege an intent on the part of defendants to defraud plaintiffs under section 276 (see Dempster v Overview Equities, 4 AD3d 495, 498 [2d Dept 2004]).

Turning to plaintiffs' common law claims, we likewise conclude that plaintiffs pleaded a viable cause of action for breach of contract based upon a breach of the implied covenant of good faith. Of course, the implied covenant of good faith and fair dealing "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995] [internal quotation marks omitted]). Here, plaintiffs sufficiently allege that MBIA Insurance, by fraudulently transferring billions of dollars of its assets to MBIA Inc. for no consideration, "violated the covenant by substantially reducing the likelihood that [it] will be able" to meet its obligations under the terms of the insurance policies (ABN AMRO

Bank, N.V., 81 AD3d at 254 [Abdus-Salaam, J. dissenting]; see also MBIA Ins. Corp. v Countrywide Home Loans, Inc., 2009 NY Slip Op 31527[U], *19 [Sup Ct, NY County 2009] [MBIA Insurance itself successfully pleaded a breach of contract cause of action premised on breach of implied covenant by alleging that defendant "unfairly shifted the risks of default and delinquencies" to it]).²

We further conclude that the complaint adequately states a claim for abuse of the corporate form that may support a declaration piercing the corporate veil of MBIA Insurance. As the Appellate Division dissent appropriately observed, "[t]he party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 142 [1993]). In that regard, plaintiffs' allegations that MBIA Inc. abused its control of its wholly-owned subsidiary, MBIA Insurance, by causing it to engage in harmful transactions that now shield billions of dollars in assets from plaintiffs and expose them to significant liability meets this

² Contrary to the dissent, plaintiffs' assertions that the allegedly fraudulent transactions rendered MBIA Insurance insolvent and unable to meet payments under the terms of the policies, as pleaded in their complaint, can very well be considered "objectively measurable deviations from specific contract provisions" (dissenting op at 9).

test (cf. East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 16 NY3d 775, 776 [2011] [piercing the corporate veil claim properly dismissed where plaintiff failed to allege any harm purportedly resulting from an abuse or perversion of the corporate form]).

Finally, we agree with the Appellate Division that plaintiffs' cause of action for unjust enrichment should be dismissed.

Accordingly, the order of the Appellate Division should be modified, without costs, in accordance with this opinion and as so modified, affirmed.

ABN AMRO Bank, N.V. v MBIA, Inc.

No. 124

READ, J. (DISSENTING):

Plaintiffs seek relief in this plenary action brought pursuant to the Debtor and Creditor Law and common law that, if granted, would annul the decision made by the Superintendent of Insurance on February 17, 2009 to approve the restructuring of MBIA Insurance Corporation (MBIA Insurance) and related subsidiaries and affiliates by unwinding the underlying transactions. Whether or not this lawsuit is called, in the coinage of the First Department, a "collateral attack" on the Superintendent's approval, the fact remains that the Legislature has confined any challenge to the propriety of the restructuring to a CPLR article 78 proceeding. This is so because the Insurance Law has preempted plaintiffs' statutory and common law causes of action, which are all grounded in the notion that the restructuring sanctioned by the Superintendent caused MBIA Insurance to be insufficiently capitalized to the detriment of its structured-finance policyholders. Accordingly, I respectfully dissent.

I.

New York law has historically vested the Superintendent

with broad authority to regulate the insurance industry (see Insurance Law § 201 ["The superintendent shall possess the rights, powers, and duties, in connection with the business of insurance in this state, expressed or reasonably implied by this chapter or any other applicable law of this state"])). As particularly relevant to this lawsuit, he is responsible for making sure that insurance companies possess sufficient reserves to pay all their claims (see Insurance Law § 1303), even in the face of "excessive losses occurring during adverse economic cycles" (see id. § 6903 [a] [1]).

The regulatory regime in the Insurance Law embraces both advance approval of certain transactions that may affect an insurer's viability, and post-transaction supervision of the insurer's financial condition. Further, most significant transactions between insurers in a holding company system (as happened with the restructuring) require the Superintendent's prior approval that the terms of the transaction are "fair and equitable," and his consideration of whether the transaction may "adversely affect the interests of policyholders" (see id. § 1505 [a] [1],[e]). Thus, the Superintendent reviews any proposed dividend distribution exceeding certain thresholds to make certain that paying it will leave the insurer with sufficient assets to satisfy all outstanding claims (see id. § 4105 [a]). Similarly, he reviews proposed stock redemption plans in advance to ensure that they are "reasonable and equitable" (see id. §

1411 [d]).

In addition to his prior approval of insurance transactions, the Superintendent also continually monitors domestic insurers' financial health through periodic examinations (see id. §§ 309-310), and reviews of insurers' annually filed financial statements and reports (see id. § 307). If as part of his review the Superintendent determines that an insurer lacks sufficient reserves -- i.e., if it "is unable to pay its outstanding lawful obligations as they mature in the regular course of business" (see id. § 1309 [a]) -- the Superintendent has the exclusive authority to place the insurer into specialized liquidation or rehabilitation proceedings under article 74 of the Insurance Law (see id. § 7402 [a], [e]). Article 74 authorizes him to avoid "[a]ny transfer of . . . the property of an insurer . . . with the intent of giving to any creditor or enabling him to obtain a greater percentage of his debt than any other creditor of the same class" (see id. § 7425 [a]).

The Superintendent acted to carry out his responsibilities under the Insurance Law's comprehensive regulatory regime when he approved the dividend payment and stock redemption, and did not disapprove the reinsurance transaction, the individual components of the restructuring proposed by MBIA Insurance. Although the majority notes that the Superintendent "stressed a number of times that his approvals and non-disapproval[] were based on 'the representations made in the

[a]pplication [by MBIA Insurance] and its supporting submissions, and in reliance on the truth of those representations and submissions'" (majority op at 6-7), he equally emphasized that his decisionmaking was informed by "the Department's examination of the MBIA Entities' financial condition prior to" the restructuring, and "the Department's analysis of the MBIA Entities' financial condition after the effectuation of" the restructuring. The approval, a complex 10-page document, also imposed various conditions on MBIA Insurance and/or its related affiliates and subsidiaries. In short, the Superintendent issued the approval only after a multi-month investigation of MBIA Insurance's finances, which encompassed the review of voluminous raw financial data and the running of "super-stressed or break-the-bank" tests by experts within the Department. He was not simply a passive recipient of information from MBIA Insurance, powerless to verify that company's representations and dependent on its good graces, as the majority implies.¹

"The Legislature may expressly state its intent to preempt, or that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme . . . A comprehensive and detailed statutory scheme may be evidence of the Legislature's

¹Of course, if plaintiffs believe that the Superintendent relied on inaccurate or unreliable data, they may pursue this tack in their CPLR article 78 proceeding.

intent to preempt" (Matter of Cohn v Board of Appeals of Vil. of Saddle Rock, 100 NY2d 395, 400 [2003] [state law governing review of area variances preempted contrary local law] [emphases added]). As already noted, the Insurance Law vests broad powers in the Superintendent to regulate New York's insurance industry. More to the point, he is directed to ensure that precisely the kinds of transactions at issue in this case are carried out fairly and equitably, and leave the affected insurers with sufficient assets to satisfy their obligations to policyholders. The particular provisions of the "legislative scheme" relevant here, briefly described earlier, could hardly be more "comprehensive and detailed."

Concomitantly, the Superintendent considered the precise issues disputed by plaintiffs in this lawsuit when he approved the restructuring. In other words, plaintiffs' plenary action not only expressly seeks to undo the restructuring, but does so by contesting the findings underpinning the Superintendent's approval. There is essentially no daylight between the causes of action asserted by plaintiffs and the substance of the Superintendent's review.

For example, just as Debtor and Creditor Law § 274's prohibition on transfers that leave companies with "unreasonably small capital" is intended to keep companies sufficiently capitalized to "sustain operations" (Moody v Securities Pac. Bus. Credit Inc., 971 F2d 1056, 1069, 1070 [3d Cir 1992]), so the

Superintendent's supervision of reserves is intended to ensure that insurance companies can continue to operate by maintaining their ability to pay claims (see Insurance Law § 1309 [a]). Similarly, Debtor and Creditor Law § 276's prohibition on transfers that may "hinder or delay . . . either present or future" policyholders is essentially equivalent to the requirement that the Superintendent must determine that a transaction is "reasonable and equitable" (Insurance Law § 1411 [d]).

And in any event, the critical question is whether "the thrust of [plaintiffs'] complaint" goes to matters already determined by an expert agency that has been delegated the primary authority to resolve such issues (Whitney Nat'l Bank in Jefferson Parish v Bank of New Orleans & Trust Co., 379 US 411, 417 [1965] [emphasis added]). There need not be exact correspondence. And here, "the thrust" of plaintiffs' complaint is that the restructuring caused MBIA Insurance to be insufficiently capitalized to the detriment of its structured-finance policyholders. The Superintendent's approval of the restructuring was premised on his determination that this was not the case. Put another way, plaintiffs assert that the restructuring stripped MBIA Insurance of needed reserves whereas the Superintendent concluded that the restructuring left the insurer in sound financial condition, a prerequisite to his

approval.¹

The majority seems to suggest that 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"; and "we would expect that . . . affected policyholders . . . would have notice and an opportunity to be heard before the Superintendent made his determinations" (majority op at 16). As for the first proposition, we have, as already discussed, long held that preemption need not be express where the legislative regime is comprehensive and detailed. Most recently, for example, we held in People v Grasso (11 NY3d 64 [2008]) that the Not-for-Profit Corporation Law preempted certain common law claims pressed by the Attorney General. There was no express language in the statute to this effect. And I am not aware that we have ever considered the scope of an agency's notice-and-hearing provisions to be relevant to preemption.

¹The majority compares this case to Richards v Kaskel (32 NY2d 524, 535, n 5 [1973]); however, in Richards, the administrative action -- the Attorney General's acceptance of a sponsor's co-operative offering plan -- "[did] not constitute approval" of the plan by him (see General Business Law § 352-e [4]; Charles H. Greenthal & Co. v Lefkowitz, 32 NY2d 457, 462 [1973] [noting that an offering plan is "filed simply for informational purposes" to enable prospective buyers to decide whether to purchase an interest]). Moreover, the plaintiffs in Richards alleged specific oral misrepresentations to tenants apart from the offering plan (see Richards v Kaskel, 69 Misc 2d 435, 443 [Sup Ct NY County 1972]).

II.

In my view, plaintiffs' common-law causes of action are also preempted because they are simply artfully repackaged versions of the Debtor and Creditor Law claims. In any event, these causes of action are deficient on the merits, as the Appellate Division majority correctly concluded.

The majority reinstates plaintiffs' breach of contract claim, locating the breach within the implied covenant of good faith and fair dealing because "plaintiffs sufficiently allege that MBIA Insurance, by fraudulently transferring billions of dollars in assets to MBIA Inc. for no consideration, violated the covenant by substantially reducing the likelihood that [it] will be able to meet its obligations under the terms of the insurance policies" (majority op at 23 [internal quotation marks omitted]). For support, the majority cites MBIA Ins. Co. v Countrywide Home Loans, Inc. (2009 NY Slip Op 31527U [Sup Ct, NY County 2009]).

Countrywide underwrote and sold residential mortgage-backed securities and obtained financial guarantee insurance on those securities from MBIA Insurance. To get MBIA Insurance to sign on, Countrywide represented that if there was "a breach of any representation or warranty related to a mortgage loan (a 'Defective Loan'), it would either cure the breach or repurchase or substitute eligible mortgage loans for the Defective Loan." The ultimate insurance between Countrywide and MBIA Insurance, in contrast to this case, "incorporated the representations and

warranties . . . and gave MBIA [Insurance] the right to rely on these representations and warranties, to enforce their terms, and to exercise remedies for any breach."

Supreme Court rejected MBIA Insurance's generalized claims that the parties' insurance agreement included an implied promise that Countrywide would tell MBIA Insurance all about different special kinds of risk and use underwriting standards of a certain quality. But the court upheld one narrow aspect of MBIA Insurance's breach of contract claim: "the claim survives to the limited extent that it asserts that corrective action -- such as investigating loans which became over 30-days delinquent -- would have preserved MBIA [Insurance]'s benefits under the bargain, but that Countrywide Home deliberately refused to take such action in order to collect more late payment fees and service charges." In other words, Countrywide allegedly frustrated specific objectives in the parties' contract.

Here, by contrast, plaintiffs have not alleged any objectively measurable deviations from specific contract provisions. And it is undisputed that, as part of the restructuring, MBIA Illinois agreed to reinsure the \$554 billion in outstanding municipal bonds issued by MBIA Insurance. As plaintiffs themselves explain, the "reinsurance gives policyholders direct claims against both the original insurer (MBIA Insurance) and the reinsurer (MBIA Illinois)." One can hardly say that MBIA Insurance derives no benefit whatsoever from

the fact that one of its sister companies is now jointly liable for its entire municipal bond portfolio.

Plaintiffs also allege that the parent company abused MBIA Insurance's corporate form by shifting assets to cause insolvency and lack of present ability to meet its obligations to policyholders (although the company has, in fact, paid all claims that have become due since the restructuring). To pierce the corporate veil, plaintiff must show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) . . . such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]). We have held that "[t]hose seeking to pierce a corporate veil . . . bear a heavy burden" (TNS v Holdings v MKI Sec. Corp., 92 NY2d 335, 339 [1998]).

In the majority's view, plaintiffs can apparently show domination of MBIA Insurance by virtue of its status as a wholly-owned subsidiary of MBIA Inc. (majority op at 24); however, "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries" (United States v Bestfoods, 524 US 51, 61 [1998]). Further, the majority grounds the requisite abuse of the corporate form on the allegation that MBIA Inc. "caus[ed]" MBIA Insurance to undertake "transactions

that now shield" assets from plaintiffs -- in other words MBIA Inc. purportedly drained capital from its subsidiary (id.). As the Second Circuit Court of Appeals has pointed out, though, "no New York authority . . . disregards corporate form solely because of inadequate capitalization" (Gartner v Snyder, 607 F2d 582, 588 [2d Cir. 1979]).

III.

The Superintendent approved MBIA Insurance's restructuring after finding that it was fair and equitable and would leave the affected insurers with sufficient assets to satisfy their obligations to policyholders, including, of course, these plaintiffs, who have persuaded the majority that the courts may nonetheless review the restructuring de novo. Having recently merged the Departments of Insurance and Banking to create a new Department of Financial Services to provide the "responsive, effective, innovative, state banking and insurance regulation . . . necessary to operate in a global, evolving and competitive market place" (L 2011 ch 62, § 101-a), the Legislature may wish to consider if, as a result of today's decision, further legislation is now necessary to address the new Department's envisioned role as the arbiter of major financial transactions in these industries. Critically, it does not enhance New York's reputation as a major financial center for insurers to be put in a position where they survive our State's daunting regulatory gauntlet and gain approval for a financial

transaction under the Insurance Law, yet remain vulnerable to multiple lawsuits brought in state and federal court² by disaffected policyholders who claim that the same transaction is fraudulent under other state statutes and common law. The regulatory agency would not be a party in these lawsuits and, after today's decision, there is no reason for such plaintiffs to bring a CPLR article 78 proceeding in addition to their plenary actions.³ It surely behooves the Legislature to make clear that for which the majority discerns inadequate support in current law: the State's comprehensive financial regulatory regime preempts lawsuits under the Debtor and Creditor Law and common law seeking to upset transactions approved or directed by the

²MBIA Insurance has also been sued in the United States District Court for the Southern District of New York, and in the Delaware Court of Chancery (see Aurelius Capital Master, LTF v MBIA Ins. Corp., 695 F Supp 2d 68 [SD NY 2010] [suit by a putative class of structured-finance policyholders]; Third Avenue Trust v MBIA, 2009 Del Ch LEXIS 186 [Del Ch 2009] [suit by noteholders]). The plaintiffs in these two cases press the same state statutory and common law claims advanced by plaintiffs in this lawsuit. Multiple lawsuits in multiple jurisdictions present the obvious risk of conflicting or at least inconsistent outcomes for different policyholders of the same insurer, further undermining the certainty and stability of the Superintendent's approval.

³Plaintiffs here did not commence their CPLR article 78 proceeding until shortly after MBIA Insurance filed its motion to dismiss. In the motion, MBIA Insurance argued that plaintiffs' action was barred as a collateral attack on the Superintendent's approval, which apparently alerted plaintiffs to the advisability of initiating a CPLR article 78 proceeding before the four-month statute of limitations expired. Other policyholders who have sued MBIA Insurance (see n 1, supra) did not commence CPLR article 78 proceedings against the Superintendent.

Superintendent (now, the Superintendent of Financial Services),
which may only be challenged in a CPLR article 78 proceeding.

* * * * *

Order modified, without costs, in accordance with the opinion
herein and, as so modified, affirmed. Opinion by Judge Ciparick.
Chief Judge Lippman and Judges Smith, Pigott and Jones concur.
Judge Read dissents in an opinion in which Judge Graffeo concurs.

Decided June 28, 2011