

Bond Case Briefs

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BONDS - ARIZONA

In re Allstate Life Ins. Co. Litigation

United States District Court, D. Arizona - September 13, 2013 - Not Reported in F.Supp.2d - 2013 WL 5161688

This lawsuit stems from the offer and sale of \$35 million in revenue Bonds used to finance the construction of a 5,000-seat Event Center in the Town of Prescott Valley. The underlying facts of the case have been covered previously in this publication. In this stage of the ongoing litigation, the court ruled on multiple motions for summary judgment.

Although there were a great number of rulings, we will focus on those concerning the claims brought against issuer's bond counsel – Kutak Rock.

The court found that plaintiffs failed to show that Kutak's drafting of the Bond Documents resulted in a flawed lien over the NOI in favor of the Bondholders. Thus, Plaintiffs had not demonstrated a genuine issue of material fact that the OS was misleading or omitted material information on this ground and summary judgment was granted.

The court found that Kutak was entitled to summary judgment on Plaintiffs' claims that Kutak failed to ensure the Trustee would have a method of obtaining information on whether NOI would be sufficient to pay debt service, due to the inclusion in the Loan Agreement of a provision giving the Issuer and Trustee the right at all reasonable times to examine and copy the Borrower's books and records regarding the financial performance of the Event Center.

Kutak was not entitled to summary judgment on claims that the Bond Documents were defective for reasons relating to an Escrow Account, which the Development Agreement stated was to be held in the name of the Town and the Indenture stated was to be held by the Trustee. Plaintiffs submitted evidence that this inconsistency caused concrete problems for the Bondholders when the Town refused to turn over the Escrow proceeds. At a minimum, there existed a genuine issue of fact as to whether the failure of the OS to disclose this inconsistency and any subsequent problems that arose with payment of the Escrow proceeds constituted a misstatement or omission under § 44-1991(A)(2).

Kutak was entitled to summary judgment on Plaintiffs' claims that no mechanism addressed Fitch's concern that sales taxes from the Event Center be remitted directly to the Trustee from the Town with no intercept from the Borrower, as a Fitch analyst had testified that adequate legal provisions in place.

Kutak was entitled to summary judgment on Plaintiffs' claim that the TPT Revenues from the Event Center were not required to be deposited in the Revenue Account, as the Indenture requires the Trustee to immediately deposit into the Revenue Fund all TPT Revenues, as well as "any other payments or amounts required or otherwise specified."

Kutak was granted summary judgment was on Plaintiffs' claims based on Kutak's alleged failure to disclose or implement the Town's budgetary process and procedure. A major point of contention for the Plaintiffs was the fact that the Bond Documents failed to provide a mechanism by which the

Trustee could ensure that the Town would pay the pledged TPT Revenues while still complying with its annual budgetary requirements. According to the Plaintiffs, the OS was misleading in this regard because it simply stated that the Town would pay any deficiencies in debt service with TPT Revenues, without disclosing that the pledge was subject to compliance with the Town's state-mandated budget requirements and procedure. Kutak asserted that, as a matter of law, it was not required to disclose state statutes, and thus it could not be held liable for its failure to discuss the Arizona state budgetary law in drafting the Bond Documents and the court agreed.

Kutak was granted summary judgment on Plaintiffs' claims that the Bond Documents were defective because the Trustee's remedies were available only upon accelerating the Bonds, but the Indenture prohibits the Trustee from acceleration. Kutak cited to the language of the Indenture, which in fact gives the Trustee broad permission to exercise remedies in the event of a default and does not require acceleration for those remedies to be available.

Kutak's motion for summary judgment on Plaintiffs' claim that Kutak failed to create a Lockbox Account was denied. Under the Development Agreement, the Town was required to pay certain amounts into a Lockbox Account. Kutak asserted that the obligation to create a Lockbox Account was imposed by the Development Agreement, which predated Kutak's involvement in the Bond financing. In response, Plaintiffs pointed to evidence tending to show that, in fact, it was Kutak's responsibility to ensure that the Development Agreement cohered with the other Bond Documents. The court concluded that Plaintiffs had set forth sufficient evidence to create a genuine issue of material fact that it was Kutak's responsibility to ensure that the Development Agreement worked with the rest of the Bond Documents, including ensuring that a Lockbox Account was created.

Kutak contended that it did not know, and could not reasonably have known, of the misstatements or omissions in the OS regarding projections or nondisclosure of demographic facts and thus is entitled to the affirmative defense provided by A.R.S. § 44-2001(B). The court agreed, granting summary judgment on these claims.

The court found that Plaintiffs had shown a genuine issue of material fact as to whether a Fitch downgrade of the bonds was caused by risks concealed or misstated in the OS rather than by Prescott Valley's economic downturn. Consequently, Kutak's motion for summary judgment was denied on its affirmative defense argument to the extent it pertained to loss correlating to the Fitch downgrade.

Kutak contended that it was entitled to summary judgment on Plaintiffs' negligent misrepresentation because Plaintiffs failed to submit any evidence linking their loss to those misstatements in the OS regarding defects in the lien or security for the Bonds. The court agreed, granting summary judgment on these claims.