

**McCarter & English, LLP v National Coll. Student  
Loan Trust I**

2020 NY Slip Op 30018(U)

January 2, 2020

Supreme Court, New York County

Docket Number: 654144/2018

Judge: Saliann Scarpulla

Cases posted with a "30000" identifier, i.e., 2013 NY Slip  
Op 30001(U), are republished from various New York  
State and local government sources, including the New  
York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

-----X

MCCARTER & ENGLISH, LLP,  
  
Plaintiff,

INDEX NO. 654144/2018

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 007, 008

THE NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST I, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2003-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-4, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4,

**DECISION + ORDER ON MOTION**

Defendants.

-----X

SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for breach of contract, U.S. Bank National Association (“U.S. Bank”) moves to intervene (motion seq. no. 007), and Ambac Assurance Corporation (“Ambac”) moves to intervene (motion seq. no. 008).

Each of the defendant Trusts was created between 2001-2007 to attain pools of student loans and sell notes secured by those assets. The Trusts entered into Indentures with Indenture Trustee U.S. Bank, and the Indentures created a security interest in the Trusts’ assets. The Trusts had an owner trustee - Wilmington Trust Company (“WTC”) – which was permitted to act on behalf of the Trust and “subject to direction by the

Owners.” The owner trustee allegedly had authority to engage the services of professionals, including lawyers, to assist in the administration of the trust.

Plaintiff McCarter & English, LLP (“McCarter”) commenced this action alleging that in 2015, the owner trustee hired the law firm Chaitman LLP to manage the increasing amount of litigation involving the Trusts. As part of its responsibilities, Chaitman was able to choose and manage other law firms to assist the Trusts with the litigation. Pursuant to a March 2016 Retention Agreement, Chaitman hired McCarter to represent the Trusts in certain litigation in New Jersey, Pennsylvania and New York. According to the Retention Agreement, McCarter would bill hourly, and payment would be due monthly. McCarter provided legal services and provided monthly statements to Chaitman, which were not disputed.

According to the allegations of the complaint, through late 2016, the Trusts were told by the owners to serve Issuer Orders, via the owner trustee, to the Trusts’ administrator directing it to send McCarter’s statements to the Indenture Trustee for payment. The Indenture Trustee allegedly had the primary role in processing the distributions. McCarter’s statements for March 2016 through May 2016 were paid in full, and in part thereafter.

The majority of the legal services provided by McCarter were related to litigation involving the Pennsylvania Higher Education Assistance Authority (“PHEAA”), the Trusts’ primary student loan servicer, and the Consumer Financial Protection Bureau (“CFPB”). An issue relating to ownership of the Trusts arose and whether the owner was

authorized to issue instructions on behalf of the Trusts, including those about payment. Allegedly, because of this dispute and other reasons, the owner trustee and administrator stopped paying McCarter's fees.

In November 2017, the ownership issue was allegedly resolved by a Delaware court. The order confirmed ownership, which according to McCarter, meant that the owner was authorized to direct the Trusts to make payments to it again. However, the owner trustee would not resume payment because, *inter alia*, it believed that decisions were not being made in the best interests of the Trusts. The owner trustee then resigned. No successor owner trustee was appointed, and WTC remains owner trustee on an interim basis.

McCarter commenced this action, claiming that it is owed more than a million dollars in legal fees and costs for its representation of the Trusts in the various lawsuits. It asserted causes of action for breach of contract, unjust enrichment, and account stated.

U.S Bank now seeks to intervene in its role as Indenture Trustee, and if permitted to intervene, would move to dismiss the action, or in the alternative, to stay the action. It first argues that all of the Trusts' interests in the loans were assigned to the Indenture Trustee and therefore, any judgment entered against the Trusts could only be collected from the Indenture Trust Estate and processed by the Indenture Trustee. A judgment entered could "force improper payments from the Indenture Trust Estates, at the expense of noteholders and the note issuer, and undermine the Indenture Trustee's first priority lien thereon."

It next argues that it is questionable whether Chaitman has the authority to represent the Trusts in this action, and even if it did have the authority, it would represent the Trusts in a way that would not properly advance the interests of the Trusts or Indenture Trustee. Specifically, it maintains that Chaitman has a conflict of interest and is simply interested in advancing its own interests and the owner's interests at the expense of the Trusts and the Indenture Trustee. Chaitman is aware that the work performed by McCarter was just to benefit the owners and not for the benefit of the Trusts or Indenture Trustee.

Further, it claims that, because Chaitman is still seeking to obtain payment of its own fees, it has a vested interest in this action and would want the Trusts to be held liable as support for its own case seeking fees. If it asserted any viable defenses in this action, it would potentially undermine its own ability to pursue its owed fees. In fact, in the answer, it admits most of the allegations and does not assert any significant defenses, only stating that the Trusts have been unable to pay because the owner trustee and administrator would not allow the funds to be released.

Ambac also moves to intervene in this action in order to seek dismissal of the action, or in the alternative, to stay the action. Ambac is an insurance company that has provided financial guarantee insurance to securities in nine of the trusts. Therefore, it alleges, it has an interest in preventing the wrongful distribution of the funds. According to Ambac, there were significant losses on the student loans, and noteholders were not going to be able to recover. Instead, Ambac was going to have to cover losses by paying

the noteholders. It maintains that any wrongful distribution of the Trust funds, for example, to pay McCarter's fees, could increase Ambac's payment obligations and would reduce the amounts available for its reimbursement.

Ambac echoes U.S. Bank's contentions regarding the impropriety of Chaitman's representation of the Trusts in this action, arguing that Chaitman has a conflict of interest, is merely acting to advance the owner's interests at the expense of the Trusts and Ambac, and has not raised viable defenses available to the Trusts in this action.

In opposition, McCarter argues that neither U.S. Bank nor Ambac has the right or authority to direct or control the litigation positions taken by the Trust. Rather, the owners have that authority. It maintains that U.S. Bank and Ambac have no basis for intervention because they do not have any interests that would not adequately be represented by the Trusts, they would not be bound by a judgment in McCarter's favor, and they would not be adversely affected by a judgment here.

### **Discussion**

Intervention is "liberally allowed by courts" wherever an individual has a "bona fide interest in an issue involved in that action." *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 201 (1<sup>st</sup> Dept. 2010). Both motions to intervene are seeking intervention for the purpose of filing a motion to dismiss or, in the alternative, obtaining an order staying the action while certain Delaware lawsuits are resolved. As I stated at oral argument, staying this action while waiting for a determination from the Delaware courts would not be appropriate because McCarter is not a party to any of the Delaware actions mentioned.

In support of their motions, both parties contend, *inter alia*, that they should be permitted to intervene to move to dismiss this action, arguing that Chaitman is not properly representing the interests of the Trusts because it has a conflict of interest, is only seeking to advance its own interests, has not set forth adequate defenses in the answer, and is not authorized to appear here by the owner trustee.

At oral argument, counsel for U.S. Bank maintained that the owner trustee is the only party with the right to appoint counsel for the Trusts, and the owner trustee refused to appoint Chaitman to represent the Trusts in this action. Counsel for the Trusts, an attorney from Chaitman, stated that he asked the owner trustee if he should appear in this action, and the owner trustee refused to give guidance. The owner, who Chaitman maintains also has authority to appoint counsel for the Trusts, then informed him that he should appear. While McCarter notes that the proposed intervenors have no authority to control any litigation positions taken by the Trust, I find that they have set forth sufficient evidence to support their position that they should be permitted to intervene here to argue that Chaitman is not properly representing the Trusts in this action.

However, only Ambac's motion to intervene will be granted. Ambac, which has previously been found to be a third-party beneficiary, which might be bound by a judgment, can intervene to move to dismiss only on the ground stated above. U.S. Bank, the Indenture Trustee, is merely tasked with processing distributions from the Trusts. As such, it has no standing to intervene in this action.

In accordance with the foregoing, it is hereby

ORDERED that U.S. Bank National Association’s motion to intervene is denied (motion seq. no. 007); and it is hereby

ORDERED that Ambac Assurance Corporation’s motion to intervene is granted to the extent that it is permitted to intervene to move to dismiss this action on the ground set forth above within thirty (30) days of the date of this order (motion seq. no. 008).

This constitutes the decision and order of the court.

1/2/2020  
DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE