

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

677 Broadway - 9th Floor, Albany, New York 12207-2996 Tel: (518) 449-8893 Fax: (518) 449-8927

Albany • Baltimore • Boston • Chicago • Dallas • Garden City • Houston • Las Vegas • London • Los Angeles • McLean
Miami • Newark • New York • Orlando • Philadelphia • San Diego • San Francisco • Stamford • Washington, DC • White Plains
Affiliates: Berlin • Cologne • Frankfurt • Munich • Paris

www.wilsonelser.com

MEMORANDUM IN OPPOSITION

June 23, 2011

A. 7967-A Simotas (Assembly Ways & Means Committee)

AN ACT to amend the general obligations law, in relation to certain provisions of contracts governing debt obligations of foreign states

This memorandum in *opposition* is written on behalf of our client, the New York Bankers Association. The Association is comprised of the community, regional and money center commercial banks and thrift institutions doing business in New York State. In aggregate, members of the Association employ approximately 250,000 New Yorkers and hold more than \$9 trillion in assets.

The New York Bankers Association opposes this legislation that would amend the common law merger doctrine by mandating that the provisions of a contract governing the debt obligations of a foreign state survive the entry of final judgment to the extent that they are not directly addressed in the judgment. This legislation would adversely affect the international competitiveness of New York securities markets and we urge that it be held.

The common law merger doctrine was designed to increase the efficiency of the judicial process, resolving in a single court decision all issues involving liability for contract obligations pertaining to the parties before the court. At the same time, long-standing exceptions to the merger doctrine ensure that the rights of parties to contracts who are not before the court are protected and, in certain circumstances, even disputes involving the same contracting parties can be reopened. The merger doctrine is intended to bring finality to litigation, preserve judicial resources and encourage parties to litigate all appropriate claims and arguments in the same forum.

This legislation would overturn a key aspect of the merger doctrine, and permit the survival of any claims not directly addressed in a final judgment in litigation involving contracts for debt involving foreign sovereign nations. Our Association is concerned that the proposal would have materially adverse consequences on the ability of New York commercial banks and investment houses to compete for business as underwriters, custodians and trustees of issues of foreign sovereign debt. This legislation will be disturbing to potential debt issuers for a number of reasons:

- o Enacting legislation targeted only at foreign sovereigns, at a time when the issue is the subject of litigation in New York, eliminates the reliance on settled law and precedence that is the basis of all effective commercial systems of law.

o Applying this change in the merger doctrine solely to foreign sovereign debt issuers appears to be an unconstitutional denial of the equal protection of the law, as well as interference with the exclusive authority of Congress under Article I, section 8, of the United States Constitution to “regulate Commerce with foreign Nations.”

o Repealing this significant provision of the merger doctrine will waste the resources of the courts at a time that the New York State Unified Court System is already struggling with severe budget cuts. It will also force parties to litigation and judges themselves to seek to individually identify in decisions every potential claim and defense that could have been offered as part of the litigation.

o Foreign sovereign debt issuers will no longer have any certainty of the validity of the contracts governing their debt, causing them to seek an alternative situs for their debt issuance.

For these reasons, the New York Bankers Association **opposes** this legislation and urges that it be **held**.

Respectfully Submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP