

**TOWN OF PRESCOTT VALLEY  
REQUEST FOR COUNCIL ACTION  
Date: September 18, 2014**

**SUBJECT:** Settlement Outline Event Center Case

**SUBMITTING DEPARTMENT:** Legal

**PREPARED BY:** Ivan Legler, Town Attorney

**AGENDA LOCATION:** Comments/Communications , Consent , Work/Study ,  
New Business , Public Hearing , Second Reading

---

**ATTACHMENTS:** a) Settlement Outline

---

**SUMMARY/BACKGROUND:** The Event Center case has finally been settled by all parties involved. The above Settlement Outline sets forth the provisions of the settlement in which the Town participated (along with certain Fain entities). Back in Nov 2013, the Town had received favorable rulings and stipulations which had essentially taken it out of the case. But, it had filed counterclaims against the plaintiffs and those counterclaims still had to be proven at trial. And, there was the potential for plaintiffs to appeal the favorable rulings the Town had received to the 9<sup>th</sup> Circuit Court of Appeals (after the trial). As other defendants reached individual settlements with the plaintiffs, the Town eventually participated in the final settlement in order to ensure that there would be no appeal and to help ensure the future viability of the Event Center. The resulting settlement means the trial scheduled to begin on Tues, Sep 16 in Phoenix has been vacated. And, the case is essentially over.

**CASE HISTORY:** On Sep 18, 2009, Allstate insurance company filed a securities fraud suit in Arizona Federal District Court against a number of defendants, including the Town. Other defendants were bond underwriters (Robert W. Baird & Co., M.L. Stern & Co. LLC, and Edward Jones LP), bond underwriter's counsel (Stinson Morrison & Hecker LLP), bond issuer (IDA), borrower (PVEC LLC, the Fains and Global Entertainment Co.), borrower's financial advisor (TL Hocking & Associates, LLC), bond counsel (Kutak Rock LLP), and individuals Thomas L. Hocking, W. James Treliving, and Richard Kozuback. Allstate had purchased about \$28 Million of the \$35 Million in bonds that were issued. It alleged that all the defendants (collectively) had misrepresented or failed to disclose material facts in the bond documents that showed the Event Center couldn't generate enough revenues sufficient (along with Town's TPT revenues) to repay the bonds (in violation of federal securities laws), and alleged that terms for the security for the bonds were defectively drafted. It also asserted claims for negligence, aiding and abetting, and fraud.

This suit was subsequently consolidated with a suit filed in the same court on Sep 30, 2009 by individual bondholders Ronald Covin, Bernard Patterson, Allen Patzke, Walter Krause, and (later) Larry Verhulst. They too filed a securities fraud suit against all the same defendants. [3:09 cv 08174-GMS] They indicated an intention to certify a class of all bondholders except Allstate. They also sought damages of approximately \$7 Million. That same day, the bond trustee (Wells Fargo Bank) filed on behalf of the above individual bondholders (and Allstate with regard to one count) a securities fraud suit under Arizona securities law in Maricopa County Superior Court against the same defendants. The trustee also alleged negligent misrepresentation by all defendants and breach of contract by the Town. The trustee sought damages of approximately \$7 Million. On Dec 7, 2009, the Fains filed a motion to stay this state case

pending the outcome of the consolidated federal court cases. On Apr 5, 2010, the Court re-issued an earlier Mar 11, 2010 stay of the state action per stipulation of the parties.

Early on, plaintiffs dismissed the IDA and its two officers from the case. All of the defendants then filed motions to dismiss plaintiffs' complaints on the grounds they didn't state valid claims. Plaintiffs responded by essentially amending their complaints (which required the process to start over again). In the meantime, the Town filed its own claims against plaintiffs, including a counterclaim against the trustee. Back in Oct 2007, the trustee had invoiced the Town for approximately \$1.2 Million to make bond payments without giving any advanced notice that such a payment would be needed. The Town responded that it couldn't make a payment until the next budget cycle based on state law. Therefore, the trustee had to make that payment using the bond reserve. The trustee declared that this was a default under the bond documents. The Town subsequently made payments each Apr and Oct in response to the trustee's invoices (and even made catch up payments for a period of time to cover what it had not paid for Oct 2007). Unfortunately, beginning in Oct 2009 the trustee began using the money to cover its own legal costs (and those of Allstate and the other listed bondholders) instead of paying it to bondholders. It did this at Allstate's request. The result was that the bonds lost their investment rating and much of their value. Thus, among other things, the Town alleged that the trustee was responsible for any resulting damages the Town might be held responsible for.

On Jun 9, 2010, the Court declined the Town's request to let the Town make its semi-annual payments directly to the Court (for it to decide who to distribute it to) under a concept known as "Interpleader". But, the Court agreed that the trustee had to defend against the Town's claim that the trustee was responsible (at least in part) for any resulting damages the Town was responsible for.

On Nov 4, 2010, the Court ruled on all the defendants' motions to dismiss. With regard to the Town, the Court agreed that some state law claims hadn't complied with Arizona's notice of claim statute. But, for the time being, the Court allowed the other claims to go forward. With regard to the other defendants, the Court dismissed the federal securities law claims against the underwriters and their attorneys. But, the Court left most of the other claims against the other defendants intact. This led to all of the defendants filing answers to the amended complaints. In the Town's answer, it added another counterclaim...this time against Allstate...for having "tortiously" interfered with the Town's contractual relationship with the trustee by directing the trustee not to distribute Town payments to bondholders. The counterclaim also sought contribution from Allstate in the event of any Town obligation to bondholders.

After a scheduling conference on Feb 4, 2011, the parties started the discovery process. As interrogatories and requests for admission were exchanged, the parties obtained new information which led to various motions to amend (or further amend) their respective complaints and counterclaims.

In the meantime, the Town filed a second motion to dismiss all the claims against it. It argued that the plaintiffs lacked "standing" to bring their lawsuits the way they had under the bond documents. This would mean that there was no jurisdiction for the Court to consider the lawsuit. In response, the Court issued an order stopping all proceedings in the case until the motion was considered and ruled on. Unfortunately, on Oct 21, 2011 the Court denied the motion and the case continued. On Nov 1, 2011, the Court ruled that the Town could not bring a contribution claim against Allstate. But, the Town's tortious interference claim against Allstate could go forward. On Nov 18, 2011, the Court also said the Town had not stated a claim against the Trustee for contribution, but it had stated a claim for indemnification by the trustee based on its non-payments to bondholders (and for declaratory relief regarding the disbursement of future payments).

On Dec 2, 2011 the Court declined to certify a class of bondholders for a class action lawsuit. This left just the claims by the listed bondholders and the state law claims asserted by the trustee on behalf of all bondholders besides Allstate.

On Dec 21, 2011, the Town (and other defendants) asked the Court to reconsider the earlier ruling on the federal securities law claims. The Court had invited such a request based on a new case that had recently come down from the U.S. Supreme Court [*Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296, 2302 (2011) (limiting liability under Rule 10b-5 to persons with authority and control over statements made in connection with sale of securities)]. After briefing, the Court ruled on May 24, 2012 that all federal securities law claims against the Town were dismissed. He agreed that the Town was not responsible for (and, therefore, did not "make") any of the statements that plaintiffs had complained about in the bond official statement (OS).

On Feb 8, 2012, the trustee filed a new complaint against the Town. This time it alleged that the Town had breached its obligation under the development agreement to make the full debt service payment back in Apr 2011. This occurred when the Town had finished making catch up payments and was simply remitting what it collected from designated business areas (per the development agreement). The Town explained to the trustee that it was fully complying with the development agreement. Nevertheless, the trustee insisted that the Town should pay whatever was invoiced to cover bond payments (regardless of what was actually collected from the designated areas). The Town, of course, objected.

Depositions began in Mar 2012. Between then and Jan 2013 some 72 depositions were conducted of persons representing Allstate, the trustee, the Town, the bond underwriters, the law firms, Fain, and Global. Persons representing nonparties like ERA, Fitch, and Stone & Youngberg were also deposed (as were several experts and Tom Hocking). In the meantime, the Town filed a motion for summary judgment on Oct 19, 2012 on all remaining claims against it based on plaintiffs' failure to timely comply with the Arizona notice of claim statute. The Court ruled against this motion on Jun 4, 2013. When asked to clarify the ruling, the Court acknowledged that the trustee had admitted to filing an untimely claim notice (and, as a result, all of its state law securities and common law claims against the Town on behalf of bondholders other than Allstate were dismissed). But, the Court ruled that Allstate hadn't known for sure who might be responsible for certain alleged nondisclosures regarding the projections and bond document defects until later in the case (even though it did know about the alleged defects themselves). Therefore, Allstate's claim notice was not untimely.

A mediation effort was made on Nov 19 and 20, 2012. The substance of that mediation is confidential. But, in the end, it was not successful.

On Mar 15, 2013, all parties filed their remaining pre-trial motions. The Court heard oral argument on Sep 4, 2013, and subsequently issued its rulings on Sep 13, 2013. With regard to the complaints against the Town, the Court: (a) dismissed the claim that the Town had violated the development agreement by not making full payments invoiced by the trustee from April 2011 on. The Court agreed that the development agreement only required the Town to remit TPT revenues it actually collects from designated areas, (b) dismissed the state law securities claims alleging Town participation in the bond offering or inducement of bond purchases. The Town had made clear it was not responsible for financing the PVCEC and had consistently refused to review bond documents. It wasn't involved with PVCEC or TPT revenue projections in the OS and did not certify any facts in the OS. Pledging TPT revenues in the development agreement was not enough participation (nor was any incidental staff communication with a rating agency), (c) dismissed the common law claims for fraud and "aiding and abetting" based on lack of any duty, no affirmative misrepresentations or concealment, and no substantial assistance of others involved. In particular, the Court noted that the Town had not attempted to minimize the ERA Report. In fact, it had presented the Report in a public meeting and had posted it on its website, but (d) allowed a

narrow claim for common law negligent misrepresentation to continue against the Town (related to the allegation that the development agreement should have been clear that state budget laws might result in procedural impediments if the Town were required to pay TPT revenues). The Court said this claim wasn't untimely and wasn't covered by immunity. An argument might be made that the Town had no duty to Allstate or the other investors to make sure this was in the agreement (nor was it clear that failure to have it in the agreement resulted in any damages). But, the Court did not feel the Town had adequately raised these arguments in its pre-trial motions. As for the Town's counterclaims, the Court: (1) dismissed the claim against the trustee that it indemnify the Town. The trustee had now conceded it was no longer saying the Town had not paid all TPT revenues due under the development agreement (and both Allstate and the trustee had conceded they were not seeking damages against the Town based on nonpayment of TPT revenues), but (2) allowed to go forward the claim against Allstate for tortious interference with the Town's right under the development agreement to have TPT revenues used only for debt service. The Town's request for declaratory relief could also go forward. The Court expressly found that the first bond downgrade had not been caused by the Town's October 2007 non-payment. Indeed, that was not a default. The second ratings downgrade had been caused by Allstate's instruction to the trustee not to pay available funds to bondholders. Thus, the plaintiffs would be barred from recovering any portion of their losses based on that second downgrade. The bond documents provided the trustee with adequate access to financial information about the PVCEC and there was nothing wrong with the requirement that the trustee give the Town adequate notice before expecting TPT payments. The Town's non-payment in Oct 2007 was based on the trustee's untimely request, and state securities statutes did not require the bond documents to discuss the potential complications of budgeting laws.

The defendants and plaintiffs responded with numerous filings requesting clarification or reconsideration of these rulings. The Court held a phone conference on Sep 30, 2013 and indicated it would only permit a 3-week trial in the case. It gave the parties until Oct 10, 2013 to confer and prepare a joint statement identifying (a) all remaining claims, counterclaims and/or cross-claims to be asserted at trial, (b) witnesses to support each claim, (c) specific bondholders the trustee planned to seek recovery for, (d) any additional discovery required with regard to such bondholders, and (e) which of the motions for reconsideration the Court would still need to address. When this joint statement was filed on Oct 10, 2014, it specified that issues of Negligent Misrepresentation would not be asserted at trial. Therefore, on Nov 1, 2013 the Court formally entered judgment for the Town on the final Negligent Misrepresentation claim. This meant the Town was formally out of the case as a defendant (although still a counter-plaintiff).

On Dec 3, 2013, the Town submitted a term sheet to Allstate/Wells Fargo for a settlement that would (a) ensure no appeal against the Town's favorable rulings, and (b) provide some additional revenues for the Event Center to help ensure its on-going viability. Unfortunately, Allstate/Wells Fargo did not respond. At the Dec 13, 2013 pre-trial conference, Judge Snow ordered Allstate to elect its remedies by December 27, and Allstate complied by issuing a notice electing the remedies of rescission or rescissionary damages. On Jan 17, 2014, another hearing was held to discuss parties, remedies, and jury vs court trial. At that hearing, Judge Snow set the case for a 14 day trial starting Sep 10, 2014. Most parties agreed (and the judge later confirmed) that the trial would be to the court, not to a jury. The judge also provided guidance on the issue of proving loss-causation at trial. And, a stipulation was reached that claims of non-Allstate bondholders would be resolved based upon the findings-of-fact at trial relating to the Allstate claims.

On Feb 28, 2014, Kutak and Allstate/Wells Fargo filed a settlement agreement for Kutak to pay \$600,000. There was then a lull in the case until a status conference was held on Jul 11, 2014 to discuss approx 45 Motions in limine that had been filed in preparation for trial. The Judge ruled on all those motions on Jul 14, 2014. On Aug 15, 2014, the Town determined to dismiss its remaining counterclaims. It had concluded that the potential damages that could be recovered were too small to justify the cost of trial.

Judge Snow granted the motion at his final Pretrial Conference on Aug 22, 2014. That morning, Treiving and Kozuback had announced their settlement of the case for \$3.9 Million. This was followed by an announcement by Stinson that it had settled for \$500,000, and then an announcement by the underwriters on Aug 29, 2014 that they had settled for \$2.75 Million. This left the Fains, Global, and Hocking. Progress in settlement discussions between those parties and Allstate/Wells Fargo (and a need to finalize the earlier settlements) led Allstate/Wells Fargo to seek a postponement of the trial to Sep 16, 2014.

Allstate/Wells Fargo continued to indicate to the Town that it would not consider settlement with the Town until it had reached settlement with the remaining defendants. This eventually resulted in the Town participating in the settlement discussions between Allstate/Wells Fargo and those defendants. In the end, Global did not agree to settle. But, on Sep 15, 2014 Judge Snow held a phone conference and approved a Settlement Outline involving provisions that affected the Fains, Hocking and the Town. He also approved Allstate/Wells Fargo's motion to dismiss Global from the case. On this basis, he vacated the trial.

**SETTLEMENT OUTLINE:** Under the attached Settlement Outline, the Town's insurer will make a payment of \$250,000 to guarantee no appeal by Allstate/Wells Fargo. The Town's deductible will be \$10,000. The Town also confirms that it will continue to make any payments under the development agreement over the remaining term of that agreement, even if for some reason the Event Center closes its doors at different points in time during that term. In return, Allstate/Wells Fargo will allow the money the Town pays each year to use the Event Center (currently approx \$116,000) to go towards the Event Center needs instead of bondholders. The Fains will pay Allstate/Wells Fargo \$750,000 and commit to make reasonable efforts to cause hockey to be back in the Event Center by 2015 and to keep the Center open and operating (with or without Global). As a separate matter, Allstate/Wells Fargo will not raise any legal issues if the Fains eventually get Town approval to put a residential apt complex in the downtown. In that case, Allstate/Wells Fargo will also not raise legal issues if the Town applies a 2% surcharge against rents from that complex and applies them to the Event Center.

**PROCEDURE:** Although the final settlement documents may take a few weeks to finalize, the Settlement Outline reflects the essence of the settlement. In order for Judge Snow to agree to vacate the trial, it was necessary for legal counsel representing each of the participants to commit to the provisions of the Outline. The Town's outside counsel (Arnold & Porter), at the direction of the Town Attorney, gave that commitment on Sep 15. When the final settlement documents are ready, they will be placed on a future Council agenda to authorize the Mayor to sign them.

---

**OPTIONS ANALYSIS:** N/A

---

**ACTION OPTION:** N/A

---

**RECOMMENDATION:** Staff recommends authorizing the Mayor to sign the documents of the final settlement agreement when they are finalized and placed on a future agenda.

---

**FISCAL ANALYSIS:** The only direct cost of the Settlement is the Town's \$10,000 deductible per settlement. As for the commitment regarding contingent payments under the development agreement, the Town had previously anticipated the possibility of making those payments throughout the term of the agreement. This commitment simply removes the potential for arguing in the future that the payments should cease in the event the facility is closed for periods of time during the term. Staff believes the agreement by Allstate and Wells Fargo to allow the Town's annual rent payments for public use of the Center to go towards the needs of the Center (instead of bond payments) will help the ongoing operational

needs of the Center. It believes the same for any surcharges that may be applied to rents in any new apartment complexes downtown. Finally, staff believes the renewed commitments by the operators of the Center to continue operations are beneficial for the downtown and for the public at large.

---

**REVIEWED BY:**

Management Services Director \_\_\_\_\_

Town Clerk \_\_\_\_\_

Town Attorney \_\_\_\_\_

Town Manager \_\_\_\_\_

---

**COUNCIL ACTION:**

Approved    Denied    Tabled/Deferred    Assigned to \_\_\_\_\_