STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT IV

IN THE MATTER OF THE REHABILITATION OF:
SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION:

TED NICKEL AND OFFICE OF THE COMMISSIONER OF INSURANCE,

Petitioners-Respondents,

AMBAC ASSURANCE, **Appeal No. 2011 AP 000561**

Interested Party-Respondent,

DEPFA BANK, PLC, **Circ. Court No. 10-CV-1576**

Interested Party-Appellant,

ACCESS TO LOANS FOR LEARNING STUDENT LOAN CORPORATION, AURELIS CAPITAL MANAGEMENT LP, BANK OF AMERICA, N.A., CUSTOMER ASSET PROTECTION COMPANY ("CAPCO"), DEUTSCHE BANK NATIONAL TRUST COMPANY, A DEUTSCHE BANK TRUST COMPANY AMERICAS, EATON VANCE, FEDERAL HOME LOAN MORTGAGE CORPORATION ("FREDDIE MAC"), FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), FIR TREE INC., KING STREET CAPITAL MASTER FUND, LTD., KING STREET CAPITAL, L.P., LLOYDS TSB BANK PLC, MONARCH ALTERNATIVE CAPITAL LP, ONE STATE STREET LLC, STONEHILL CAPITAL MANAGEMENT LLC, U.S. BANK NATIONAL ASSOCIATION, WELLS FARGO BANK, N.A., WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR THE LVM BONDHOLDERS, WILMINGTON TRUST COMPANY AND WILMINGTON TRUST FSB,

Interested Parties-Co-Appellants,

ASSURED GUARANTY CORPORATION, BANK OF NEW YORK MELLON, COUNTRYWIDE HOME LOANS SERVICING L.P., GOLDMAN SACHS & CO., INC., HSBC BANK USA, NATIONAL ASSOCIATION, KNOWLEDGEWORKS FOUNDATION, NUVEEN ASSET MANAGEMENT, PNC BANK, RESTORATION CAPITAL MANAGEMENT LLC, STONE LION CAPITAL PARTNERS LP AND TREASURER OF THE STATE OF OHIO, UNITED STATES OF AMERICA,

Interested Parties.

ON APPEAL FROM THE CIRCUIT COURT OF
DANE COUNTY, CIRCUIT COURT CASE NO. 10-CV-1576
THE HONORABLE WILLIAM D. JOHNSTON, PRESIDING

BRIEF OF INTERESTED PARTY-CO-APPELLANT, CUSTOMER ASSET PROTECTION COMPANY ("CAPCO")

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July 5, 2011

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INTRODUCTION

CAPCO's appeal has been consolidated with numerous other appeals challenging the procedures and results of the rehabilitation of the Segregated Account of Ambac Assurance Corporation. In its appeal, CAPCO presents a narrow legal issue that stands apart from many of the broad issues raised by other parties: Under the priority scheme established by Wis. Stat. § 645.68, is a claim under a reinsurance agreement a "Loss Claim"?

CAPCO does share in one of the more global concerns set forth in the Consolidated Opening Brief filed by several appellants, that is, the objection to the circuit court's mechanical adoption of the findings and conclusions urged by the Commissioner of Insurance. As to CAPCO's objection, the Commissioner simply asserted that the treatment of reinsurance in his Rehabilitation Plan was consistent with the case decisions in other states, and the circuit court, as though the principles of statutory construction did not exist, perfunctorily repeated that phrase. The circuit court declined to acknowledge CAPCO's argument that a question of statutory interpretation turns on the intent of the legislature and begins with the language of the statute.

It violates the most fundamental rules of statutory interpretation to look for guidance elsewhere when the meaning of a statute is quite clearly established here at home. The legislative intent on this question can be determined by the words of the statute and, if necessary, from the detailed legislative history regarding the creation of Chapter 645. There is no need

to consider what legislatures in Ohio or Illinois or any other state might have intended in enacting similar – but not at all identical – statutes.

STATEMENT OF THE ISSUE

Did the circuit court err in approving that part of the Rehabilitation Plan that treats a claim under a reinsurance agreement as a "General Claim" rather than as a "Policy Claim"?

In approving the Plan's application to claims under reinsurance contract, the circuit court summarily found that the Plan's treatment of reinsurance agreements was "consistent with the established precedent of other jurisdictions" and "consistent with OCI's past practices." *Rec556, ¶ 94*. In doing so, the court implicitly adopted the Commissioner's position that a reinsurance claim is a "Residual Classification" and not a "Loss Claim" under the priority scheme established by Wis. Stat. § 645.68.

STATEMENT REGARDING ORAL ARGUMENT and PUBLICATION

Unless the Court perceives a need for oral argument, CAPCO does not request it. This appeal raises a purely legal issue based on undisputed facts. CAPCO does request a published decision. The Wisconsin appellate courts have not addressed this important issue, and there is no indication that the Commissioner of Insurance has ever addressed the issue in a material or substantive fashion.

STATEMENT OF THE CASE

CAPCO has no objection to the Statement of the Case set forth in the "Consolidated Brief of Appellants," filed on June 17, 2011.

CAPCO did not participate in the rehabilitation proceedings until the Commissioner of Insurance submitted the proposed Plan of Rehabilitation. CAPCO then filed an objection to the manner in which the Plan treated reinsurance claims. *Rec412.* On January 24, 2011, the circuit court issued its written decision approving the Plan in all material respects, including the Plan's treatment of reinsurance claims. *Rec556.*

STATEMENT OF FACTS

CAPCO has no objection to the Statement of Facts set forth in the consolidated brief of certain appellants.

CAPCO's connection to this Rehabilitation proceeding stems from a reinsurance contract between it and Ambac, a contract that was included in the Segregated Account.[1] The following undisputed facts are pertinent to that contract and the particular issue raised by that contract.

The Customer Asset Protection Company, or CAPCO, was formed by various securities firms for the sole purpose of providing protection to firm clients for losses in the event that one of the member firms should fail. *Rec413, ¶ 2.* Such clients were already provided coverage for certain losses by the Securities Investor Protection Corporation ("SIPC"); CAPCO was created to provide supplemental protection. *Id.* This coverage was

[1] A copy of this contract is found at *Rec413, Exh 1.*

accomplished by the issuance of various bonds to the member firms that provided for the payment of claims by clients who suffered losses exceeding amounts covered by SIPC. *Id.*, ¶ 4.

CAPCO's contract with Ambac provides that Ambac will cover some of the losses that CAPCO would incur if claims under the bonds exceeded certain amounts. *Id.*, ¶ 5.

All of the outstanding bonds issued by CAPCO expired by the end of February 2009. *Id.*, ¶ 6. No claims have been made against CAPCO, and none can be made except possibly under bonds issued to Lehman Brothers Inc. and Lehman Brothers International (Europe). *Id.* Because insolvency proceedings were commenced against these two entities prior to the expiration of the relevant bonds, one or more customers of those firms may have a claim as a beneficiary under the bonds. *Id.* It is likely to be at least several years before the bankruptcy proceedings for the various Lehman Brothers entities have proceeded to the point where CAPCO can determine whether it has any claim against Ambac under the terms of its reinsurance contract. *Id.*, ¶ 7.

When the Segregated Account was created in connection with this rehabilitation proceeding, CAPCO's contract with Ambac was placed in that account, along with eight other reinsurance agreements in which Ambac had agreed to insure certain risks ceded by six different companies. *Rec1, Exhibit F.* The reinsurance contracts involve substantial potential claims, but represent less than 1% of the potential liabilities assigned to the Segregated Account. *Rec372 at 60.* In contrast, 63% of the potential

liability assigned to the Segregated Account is attributed to the Residential Mortgage Backed Securities insured by Ambac. *Id.*

The Rehabilitation Plan establishes three classes of claims. In order of priority these are administrative claims, policy claims and general claims. The Plan defines "general claims" to include any claim under a reinsurance agreement. The applicable Plan definitions are as follows:

> **1.04 Administrative Claims.** Claims for fees, costs and expenses of the administration of the Segregated Account . . .
>
> * * * * *
>
> **1.28 General Claims.** All Claims which are not Administrative Claims or Policy Claims, and are not otherwise entitled to priority under the Act or an order of the Court, including, but not limited to, . . . (ii) any Claim submitted under a reinsurance agreement allocated to the Segregated Account, as identified in Exhibit F to the Plan of Operation.
>
> * * * * *
>
> **1.48 Policy.** Any financial guaranty insurance policy, surety bond or other similar guarantee allocated to the Segregated Account pursuant to the Plan of Operation.
>
> **1.49 Policy Claim.** A Claim under a Policy or Policies.

Rec567 at 6-13.

The provisions for payment of such claims establish that General Claims will not be paid until Policy Claims have been paid in full. The Segregated Account will pay 25% of an approved *policy claim* in cash and the remaining 75% with a "Surplus Note." *Rec567, §§ 1.08, 1.62 and 2.02; JA, at 592, 600-01.* Approved *general claims* receive no cash; they are paid

entirely with "Junior Surplus Notes." *Rec567, § 2.03.* Junior Surplus Notes will not be paid until all Policy Claims have been satisfied. *Rec567 at 134-35.*

STANDARD OF REVIEW

The interpretation of a statute presents a question of law, and a circuit court's decision on a question of law is reviewed *de novo*. *Awve v. Physicians Ins. Co. of Wis., Inc.*, 181 Wis. 2d 815, 821, 512 N.W.2d 216 (Ct. App. 1994).

With respect to the judicial review of the Commissioner's interpretations of law, no deference is to be accorded to the Commissioner's requested interpretation of the statute in this case. Our supreme court has recently reminded the lower courts that "the interpretation and application of a statute is a question of law to be determined by a court," and has detailed the considerations necessary to the determination of whether some deference is appropriate. *Racine Harley-Davidson, Inc. v. Division of Hearings and Appeals*, 2006 WI 86, ¶¶ 14-18, 292 Wis. 2d 549, 717 N.W.2d 184. In the rehabilitation proceeding now on appeal, the circuit court gave no indication that such deference was due and made none of the findings necessary to justify such deference.

The proceedings here are not typical of administrative agency proceedings where the agency or Division of Hearings and Appeals has the authority to make findings of fact and issue written decisions that reflect conclusions of law. In an insurance rehabilitation proceeding, the Commissioner of Insurance is authorized to initiate a petition seeking court

approval of a plan of rehabilitation, a proceeding in which the court makes findings of fact and reaches conclusions of law, rather than reviewing the findings of an agency.

In this case, the Commissioner offered testimony from Roger Peterson that the Plan's treatment of reinsurance contracts was "consistent with OCI's past practices." *Rec556, ¶ 94.* There was no citation to prior "decisions" and no evidence as to what was meant by "past practice." While the circuit court recited this testimony as a "finding of fact," such "evidence" does not allow the court to even begin the analysis required by *Racine Harley-Davidson, supra, Id.*, ¶¶ 14-19; *see also* ¶¶ 26-31, 55-56, and the specific agency decisions referenced in footnote 74.

ARGUMENT

SUMMARY OF ARGUMENT

Under the plain language of Wis. Stat. § 645.68, a claim based on a reinsurance contract is a "Loss Claim" as described in subsection (3). Therefore, under the terms of the Rehabilitation Plan such a claim must be treated as a "policy claim." Should the Court find any ambiguity in the statutory terms, the legislative history of the statute clearly establishes a legislative intent that a reinsurance claim be treated as a "Loss Claim."

The circuit court's finding that the subordination of a reinsurance agreement was consistent with foreign precedent is immaterial to the proper determination of legislative intent. It is also wrong because these cases address statutory language that is different than the words of the Wisconsin

statute and apply legislative history and case law that cannot shed light on the intent of the Wisconsin legislature.

Other arguments advanced by the Commissioner were neither adopted nor discussed by the circuit court, but will be addressed below.

I. THE PLAIN LANGUAGE OF WIS. STAT. § 645.68 REQUIRES THAT A REINSURANCE CONTRACT CLAIM BE TREATED AS A "LOSS CLAIM" UNDER THE STATUTE AND THEREFORE A "POLICY CLAIM" UNDER THE REHABILITATION PLAN.

A. When Interpreting a Statute, the Court Must First Look to the Language of the Statute.

The goal of statutory interpretation is to discern the intent of the legislature. The first step in statutory interpretation, and usually the last, is to look to the words of the statute. Wisconsin courts have stated these principles many times, including the following summary in *Cesare Bosco v. Labor & Industry Review Comm'n*, set forth here with the numerous citations omitted:

> When interpreting statutes, our goal is to give effect to the language in the statute. We begin by looking to the language of the statute because we "assume that the legislature's intent is expressed in the statutory language." Technical terms or legal terms of art appearing in the statute are given their accepted technical or legal definitions while nontechnical words and phrases are given their common, everyday meaning. Terms that are specifically defined in a statute are accorded the definition the legislature has provided. In addition, we read the language of a specific statutory section in the context of the entire statute. Thus, we interpret a statute in light of its textually manifest scope, context, and purpose.

> If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity and the statute is applied according to this ascertainment of its meaning. If the statute is unambiguous, there is no need to resort to extrinsic sources such as legislative history; we simply apply the language of an unambiguous statute to the facts before us. A statute is not ambiguous merely because the parties disagree as to its meaning or because different courts have reached different conclusions. A statute is ambiguous if it is "readily susceptible to two or more meanings by reasonably well-informed individuals."

2004 WI 77, ¶¶ 23-24; 272 Wis. 2d 586, 681 N.W.2d 157.

B. A Claim Under a Reinsurance Contract is a "Loss Claim" Covered by Subsection (3) of the Statute.

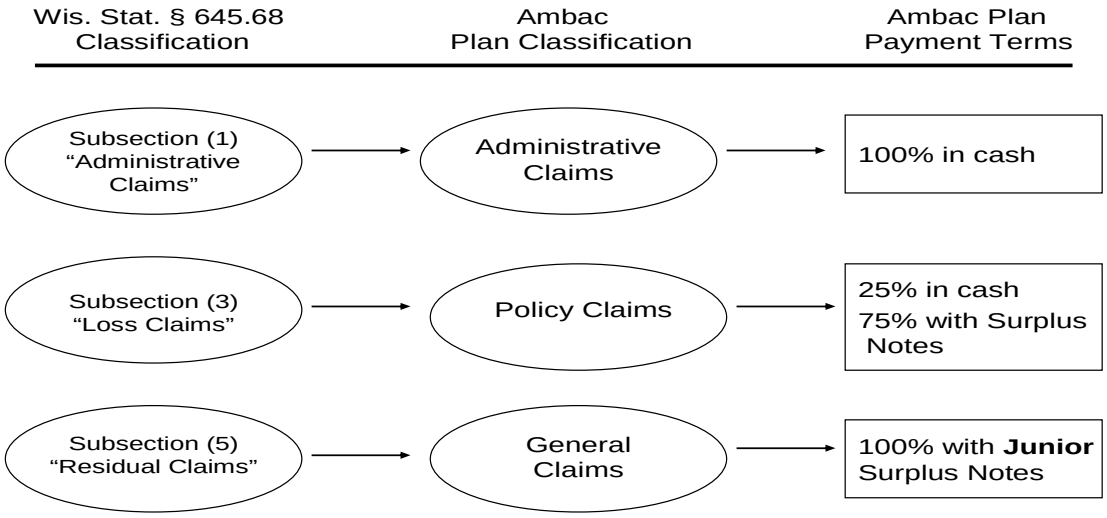
Wisconsin Statute § 645.68 sets the priority for the satisfaction of claims during the rehabilitation or liquidation of an insurance company. In order of priority, the first seven classification titles are:

(1) ADMINISTRATION COSTS.
(3) LOSS CLAIMS
(3c) FEDERAL GOVERNMENT CLAIMS AND INTEREST
(3m) CERTAIN INJURY CLAIMS
(3r) WAGES
(4) UNEARNED PREMIUMS AND SMALL LOSS CLAIMS
(5) RESIDUAL CLASSIFICATION.[2]

At issue here is whether a reinsurance contract claim is a Loss Claim under (3) or part of the Residual Classification under (5).

[2] There is no subsection (2) at this time, although there was in the original list of classifications. The current additional classifications are (6) JUDGMENTS; (7) INTEREST ON CLAIMS ALREADY PAID; (8) MISCELLANEOUS SUBORDINATED CLAIMS; (9) BONDS; (10) CONTRIBUTION NOTES; (11) PROPRIETARY CLAIMS.

The following chart shows the relationship between the statutory classes and the Plan classifications, along with the manner in which the Plan provides for the payment of claims:



The pertinent portions of subsections (3) and (5) are:

> **(3)** LOSS CLAIMS. All claims under policies for losses incurred, including 3rd-party claims and federal, state, and local government claims, except the first $200 of losses otherwise payable to any claimant under this subsection other than the federal government. . . .
>
> **(5)** RESIDUAL CLASSIFICATION. All other claims, including claims of any state or local government, not falling within other classes under this section and claims described in s. 645.69. Claims, including those of any state or local governmental body, for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under sub. (8).

The description of "Loss Claims" begins by including "All claims under policies for losses incurred . . ." CAPCO's claims against Ambac will be for losses it incurs by having to pay client claims under the terms of its bonds. Thus, the only question is whether a reinsurance contract is a "policy" as that term is used in this very simple phrase.

Wis. Stat. § 600.03 provides a long list of definitions applicable to Chapter 645, and includes this definition of "policy":

> (35) "Policy" means any document other than a group certificate used to prescribe in writing the terms of an insurance contract, including endorsements and riders and service contracts issued by motor clubs.

Section 600.03 does not define "insurance contract," but it seems beyond dispute that a reinsurance contract is a type of insurance contract and that the CAPCO contract with Ambac is a "document used to prescribe in writing the terms of an insurance contract." Thus, the plain language of subsection (3) clearly includes reinsurance contract claims within the scope of "Loss Claims."

In contrast, there is nothing in the language of subsection (5) to suggest that reinsurance claims belong in that category. The examples given – claims of state or federal governments, penalties and forfeitures, or health care cost claims under § 645.69 – have nothing in common with reinsurance claims.

C. Wisconsin Statute § 600.01(1)(b) Provides No Guidance as to Whether a Claim Under a Reinsurance Contract is a Loss Claim or a Residual Claim.

The Commissioner attempted to finesse the plain language of the statute by citing Wis. Stat. § 600.01(1)(b)1, which reads:

> (b) Unless otherwise expressly provided, chs. 600 to 646 do not apply to:
>
> 1. Reinsurance.

This statute was not cited in the briefs filed by the Commissioner, but was first mentioned in oral argument to the Court. *Rec613 at 152-153.* In its written decision, the circuit court did not reference this statute. This provision of the insurance code does indeed raise questions, but not questions the Commissioner has chosen to address.

The Commissioner has sought to substantially regulate CAPCO's reinsurance agreement with Ambac based on the authority of several statutes, none of which expressly reference reinsurance. These include the segregated account statute, Wis. Stat. § 611.24; the statute assigning powers and duties to the rehabilitator, Wis. Stat. § 645.33; and the liquidation priority statute, Wis. Stat. § 645.68. The Commissioner has proceeded as though these statutes do in fact apply to reinsurance. The Commissioner has required Ambac to create a segregated account into which *reinsurance contracts* have been placed; he has sought and obtained an injunction against parties *to reinsurance contracts* along with parties to other insurance policies, he has submitted a plan under Chapter 645 that will govern *reinsurance contracts* in many significant respects.

If the Commissioner wishes to take the position that Chapter 645 cannot be applied to a reinsurance contract except where expressly provided, CAPCO will agree that it cannot be subject to these rehabilitation proceedings, that its contract must be removed from the Segregated Account, and that it may pursue any future claims with the Ambac General Account. The Commissioner can persuasively argue that this would be an absurd result. But the Commissioner cannot persuasively argue that subsection (3) of Wis. Stat. § 645.68 does not apply to reinsurance contracts while, miraculously, subsection (5) of that same statute does apply.

At most, § 600.01(1)(b)1 creates an ambiguity as to *whether* Chapter 645 can be applied to insurance companies that issue reinsurance contracts or to claims made under reinsurance contracts. If this Court resolves that ambiguity, as the Commissioner obviously has, by finding that Chapter 645 must be read to allow for the inclusion of reinsurance contracts in the rehabilitation or liquidation of an insurance company, then § 600.01(1)(b)1 provides no guidance and creates no ambiguity has to *how* it applies. It simply does not assist in answering the question of whether a reinsurance claim is a Loss Claim or a Residual Claim.

D. The Wisconsin Case Law Definition of "Insurance" Includes a Reinsurance Agreement.

Wisconsin case law has not defined "insurance policy," but has repeatedly endorsed a broad definition of "insurance," and there is nothing to suggest that insurance does not include reinsurance. In *Shakman v.*

United States Credit System, 66 N.W. 528 (1896), the court concluded that a contract whereby the defendant company guaranteed a merchant against losses resulting from the insolvency of its customers was an insurance contract:

> An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss of damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent.

66 N.W. at 531.

This definition was cited favorably in *Sims v. Manson*, 25 Wis. 2d 110, 114, 130 N.W.2d 200 (1964), just three years before the legislature enacted Chapter 645, along with a similar definition from the federal court of appeals:

> . . . insurance involves essentially a contractual security against anticipated loss. The risk of loss on the part of the insured is occasioned by some future or contingent event, and is shifted to or assumed by the insurer. There is also a distribution of the risk of loss by the payment of a premium or other assessment into a general fund.

[citing Metropolitan Policy Retiring Assoc., Inc. v. Tobriner, 306 F.2d 775, 777 (D.C. Cir. 1962)]. The CAPCO contract with Ambac indisputably satisfies this concept of insurance. There is no reason to look elsewhere in the statute for an appropriate classification and no reason to relegate such claims to the "Residual Classification."

II. IF THE COURT FINDS AN AMBIGUITY, THE LEGISLATIVE HISTORY DEMONSTRATES A LEGISLATIVE INTENT THAT REINSURANCE CLAIMS BE INCLUDED AS LOSS CLAIMS.

For reasons discussed above, there is no ambiguity in Wis. Stat. § 645.68 that requires resort to extrinsic evidence of legislative intent. Should the court find that the plain language and definitions discussed above are not sufficiently clear, or that § 600.01(1)(b)1 creates some ambiguity as to the intended priority of claims, the court must then look to the legislative history for guidance as to the intent of the legislature.

A. Chapter 645 Has Significant Legislative History.

Chapter 645 was created as a part of Act 89 of 1967. In an unusual step, the legislature included the extensive and detailed comments of the Insurance Laws Revision Committee within the Act itself, effectively making the comments part of the law passed by both houses of the legislature. The pertinent portions of the Act are included as CAPCOAPP.[3]

While the original classifications in the statute differ somewhat from the current list, for purposes of the issue before this Court, the classifications and order of priority were the same. The first five classification titles in the initial version of Chapter 645 were as follows:

(1) ADMINISTRATION COSTS.

(2) WAGES

(3) LOSS CLAIMS

[3] *See Rec413 at 14-30.* CAPCO's Appendix, CAPCOAPP, includes the list of all sections of the initial version of Chapter 645, the Preliminary Comment for the entire chapter, and the particular statutory language and comments for § 645.68. As noted, the full history is contained in 1967Act 89; it was also included in *Rec441 at 20-87*.

(4) UNEARNED PREMIUMS AND SMALL LOSS CLAIMS

(5) RESIDUAL CLASSIFICATION.

Although the comments do not mention reinsurance contracts, they clearly establish three relevant and indisputable conclusions with respect to the legislative intent regarding reinsurance claims:

- reinsurance claims do not belong in subsection (5);
- such claims logically belong above the claims placed in subsection (4);
- nothing suggests a legislative intent to remove or exclude such claims from subsection (3).

These conclusions compel a finding that the legislature intended that reinsurance claims be treated as Loss Claims under subsection (3).

In determining whether a reinsurance contract claim falls within the Loss Claim category or the Residual Classification, the comments with respect to subsections (3), (4) and (5) are very instructive. The "Introductory Comment" to § 645.68 includes a brief description of these three categories, with more detailed comments following the statutory language for each of the categories. The "Introductory Comment" includes:

> (3) *Loss claims.* This is limited to large claims, the cases where the most hardship will result if full payment is not made reasonably promptly.
>
> (4) *Unearned premium reserve and small loss claims.* If this priority can be reached and these claims paid in full, the enterprise will have carried out the social function of insurance in a reasonably adequate way.
>
> (5) *Residual classification.* This includes ordinary commercial debts and debts owing to governments, such as taxes. It is likely to be small in amount relative to the total of all claims.

CAPCOAPP.007. The additional comments that follow these subsections are discussed below.

B. Subsection (5): Residual Classification.

The introductory comment cited above indicates that this category includes "ordinary commercial debts" and debts to government, such as taxes. The more detailed comment following the statutory language of subsection (5) begins:

> *Comment on sub. (5):* This is the residual classification, and includes a great variety of claims, though in aggregate amount, it will usually be unimportant. This priority and all below it are of relatively lesser social importance. They are just debts, having no significant relationship to the important role insurance plays in our society.

CAPCOAPP.010. These comments demonstrate that this category was not intended to include reinsurance claims. Such claims are likely to be large, not small. They are not "just debts," nor are they "unimportant." Rather, they are directly related to the role that insurance plays in our society, namely, allowing one person or entity to shift risk to an entity that is in a better position to handle that risk. Reinsurance claims obviously have no business being placed in this category.

C. Subsection (4): Unearned Premiums and Small Loss Claims.

This subsection is important because it defines a category of claims that are clearly intended to be subordinate to a reinsurance claim. The introductory comment cited above indicates that the "social function of insurance" is accomplished by the higher priority claims. The full comment following the statutory language of subsection (4) then adds:

> *Comment on sub. (4):* Unearned premium claimants are placed in line after loss claimants, to help ensure the continuity of insurance protection, and the performance of insurer functions. The holders of assessable policies are not granted any such priority since traditionally their payments are regarded as partially in the nature of capital contributions. With unearned premiums is included the "deductible" portion of loss claims from sub. (3).

CAPCOAPP010. Thus, the liquidated company is expected to perform its

essential insurance function, that is, to cover the risks it had agreed to cover, *before* reimbursing claimants whose payments to the company "are regarded as partially in the nature of capital contributions." If reinsurance claims must wait until after claims under subsection (4), the introductory comment makes no sense. Until reinsurance claims are paid, the enterprise has not "carried out the social function of insurance in a reasonably adequate way."

D. Subsection (3): Loss Claims.

The introductory comment cited above establishes that this is where large claims belong, large in the sense of exceeding the $200 "deductible" which is deferred until subsection (8). While accounting for only 1% of the total potential liability of the Segregated Account, potential claims under reinsurance contracts in this case are measured in the hundreds of millions of dollars. *Rec372 at 60.* The more specific comment following the statutory language of subsection (3) begins:

> *Comment on sub. (3):* This class contains the claims central to the social role of insurance. The typical policy is not an ordinary mercantile contract, but one of great public importance. In the usual case, if a policyholder loses a premium, he is not seriously harmed, but if a loss goes unpaid, or even unpaid in substantial measure, great harm is likely to be done. Large claims deserve a higher priority than unearned premiums, and this system has so provided.
>
> Small loss claims are subordinated to large claims and put on a par with unearned premiums, in order to increase the likelihood of full payment of disaster-type claims. This is the point of the $200 deduction. In the usual case, a small loss may be absorbed by the claimant without serious hardship, and therefore does not deserve or need priority above unearned premiums. The larger the claim the more likely it is that substantial payment to the claimant is urgently needed.

CAPCOAPP009.

As the litigation in this case demonstrates, insurance takes many different forms and covers many different types of risk. Nothing about the

other "policies" placed in the Segregated Account makes them any more "central to the social role of insurance" than is CAPCO's contract with Ambac. In fact, the Ambac contracts that insured Credit Default Swap agreements and Residential Mortgage Backed Securities are far less a part of the traditional social role of insurance than is CAPCO's effort to protect the customers of participating securities firms. CAPCO is simply a group of brokerage firms that pooled their resources to provide additional protection to clients and then paid Ambac to assume a considerable part of that risk. The many investment firms and financial institutions that make up a large part of the Ambac "policyholders" are no more in need of protection during a rehabilitation proceeding than are the brokerage firms that formed CAPCO.[4]

III. THE CASES FROM OTHER JURISDICTIONS RELIED ON BY THE CIRCUIT COURT DO NOT GOVERN THE INTERPRETATION OF THIS WISCONSIN STATUTE.

In his initial defense of the subordination of reinsurance agreements, the Commissioner contended only that such treatment "follows the well-established principle that reinsurance claimants are subordinate in priority to direct policy holders." *Rec392 at 19.* In support of this "principle," the

[4] The Commissioner described insured policyholders of the complex "collateralized debt obligations" and "credit default swap" instruments as 14 banks that "are among the largest financial institutions in the world." *Rec72 at 2-4.* The "RMBS Policyholders" participating in this case include six "owners or managers of funds that own approximately $1 billion face amount of RMBS Policies." *Rec38 at 1, fn1.* Freddie Mac participated as the alleged "owner of approximately $2 billion in residential mortgage-backed securities insured ... by Ambac Assurance Corporation." *Rec98 at 1.* A group of companies claiming ownership "of a majority of the outstanding Las Vegas Monorail Project Revenue Bonds" participated as the "LVM Bondholders." *Rec146 at 4.*

Commissioner cited *Covington v. Ohio General Ins. Co.*, 789 N.E.2d 213 (Ohio 2003); *In re Liquidations of Reserve Ins. Co., et al.*, 524 N.E.2d 538 (Ill. 1988); *Foremost Life Ins. Co. v. Department of Ins.*, 409 N.E.2d 1092 (Ind. 1980); *Long v. Beacon Ins. Co.*, 359 S.E.2d 508 (N.C. 1987); and *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1 (Tenn. 1986). This is the only argument that the circuit court accepted in approving the subordination of reinsurance claims.

This argument fails for two reasons. First, the issue before the Court is a matter of statutory interpretation that must begin with an analysis of the statutory language, not with an analysis of cases from foreign jurisdictions.

Second, the cited cases do not enunciate a "principle of law," rather they interpret the *different* language of other statutes, using the *different* statutory definitions, caselaw and legislative history applicable to those in those respective jurisdictions. In promoting this disingenuous argument, the Commissioner highlighted the holding of *Long v. Beacon Ins. Co.* but ignored the fact that the North Carolina description of Class 3 claims "under policies for losses incurred" specifically adds "but excluding claims of ... reinsurers." *See* N.C.G.S.A. G.S. § 58-155.15 (a) (3) (1985). The other cases also turn on factors that do not apply to the Wisconsin statute. The Indiana and Illinois cases relied on a statutory definition of reinsurance; the Tennessee case relied on unique Tennessee caselaw; the Ohio case relied on a detailed analysis of other Ohio statutes using the word policy. None of these cases reference a statutory definition of "policy" and none reference legislative history remotely similar to the Wisconsin legislative history.

IV. *PEERLESS INS. CO.* DOES NOT SUPPORT THE COMMISSIONER'S INTERPRETATION OF THE STATUTE.

In his reply brief to the circuit court, the Commissioner relied on *Peerless Ins. Co. v. Manson*, 27 Wis. 2d 601, 135 N.W.2d 258 (1965), which held only that Chapter 201 of the 1957 Wisconsin statutes intended to treat reinsurance differently than insurance. The circuit court did not reference this case or argument. *Peerless* must be read along with *Pella Farmers Mut. Ins. Co. v. Hartland Richmond Town Ins. Co.*, 26 Wis. 2d 29, 35, 132 N.W.2d 225 (1965), a case decided just a few months earlier, which reached the opposite conclusion in the context of Chapter 202.

In *Pella* the court addressed an issue that arose between two insurance companies under Chapter 202 of the 1957 statutes, a chapter that governed town mutual insurance companies. The defendant insurance company contended that because its contract with Pella Farmers Mutual was a reinsurance contract it was not a "member" subject to an assessment by Pella under the Chapter. Under the applicable statutes, one must be a "policyholder" to be a member, and so the court considered whether a company that had provided a reinsurance contract was such a "policyholder." The court concluded that in this setting a reinsurance contract was an insurance policy and that a reinsurance company was a policyholder:

> It seems to us most logical and most in accord with the framework of ch. 202, Stats., that *each reinsurance contract should be treated as an additional policy of insurance* issued by the reinsurer Town Mutual, and the reinsured company as a member of the reinsurer, subject to assessment.

Id., at 35, *emphasis added*.

In *Peerless,* the court faced a similar question under Chapter 201, and reached a different result, but clearly limited its conclusions to that specific chapter:

> It is unnecessary for the decision in this case for us to rule on these opposing contentions as to the similarity or differences of 'reinsurance' and 'insurance.' We need only conclude that as far as ch. 201 is concerned, the legislature treated reinsurance differently from insurance.

Id. at 607-08. The court found numerous reasons within the design of that particular chapter to conclude that the legislature did not intend a reinsured stock company to be a policyholder-member *for purposes of that Chapter*:

> Peerless was not regarded as a policyholder-member, received no statements, reports or notices of any kind from Federal; Peerless was unrepresented on any meetings, never received proxy authorizations, never cast a vote, and never received any distribution or dividend from Federal.

Id. at 608, *footnotes omitted*.

Read together, these cases reflect the court's conclusion that, *where an insurance statute is ambiguous, insurance includes reinsurance unless the immediate context clearly demonstrates otherwise*. In contrast to the statutes under review in *Peerless,* Chapter 645 provides no similar indication that the priority scheme of Wis. Stat. § 645.68 intended to differentiate between reinsurance contracts and other insurance policies.

CONCLUSION

For all of the reasons set forth above, CAPCO respectfully requests that this Court reverse the January 24, 2011 Decision and Order of the

circuit court to the extent that Order approves the manner in which the Plan of Rehabilitation treats claims under reinsurance agreements, and remand that aspect of the case to the circuit court with instructions to approve a Plan that treats a possible claim under a reinsurance agreement as a Policy Claim as that term is presently defined in the Plan.

Dated this 5th day of July, 2011.

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STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT III

IN THE MATTER OF THE REHABILITATION OF:
SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION:

TED NICKEL AND OFFICE OF THE COMMISSIONER OF INSURANCE,

Petitioners-Respondents,

AMBAC ASSURANCE, **Appeal No. 2011 AP 000561**

Interested Party-Respondent,

DEPFA BANK, PLC, **Circ. Court No. 10-CV-1576**

Interested Party-Appellant,

ACCESS TO LOANS FOR LEARNING STUDENT LOAN CORPORATION, *ET AL.*,

Interested Parties-Co-Appellants,

ASSURED GUARANTY CORPORATION, *ET AL.*,

Interested Parties.

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief of Interested Party-Co-Appellant conforms to the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 5,489 words.

Dated this 5th day of July, 2011

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 809(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: July 5, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2011, I filed with the Court by Messenger and served copies of Interested Party-Appellant and separate Appendix upon counsel for the parties by first class mail:

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