COURT OF APPEALS OF WISCONSIN
DISTRICT IV

In the Matter of the Rehabilitation of:

Segregated Account of
Ambac Assurance Corporation,

Appeal No.
2011AP000561

TED NICKEL and OFFICE OF THE
COMMISSIONER OF INSURANCE,

Petitioners-Respondents,

AMBAC ASSURANCE,

Interested Party-Respondent,

DEPFA BANK, PLC,

Interested Party-Appellant,

ACCESS TO LOANS FOR LEARNING
STUDENT LOAN CORPORATION,
AURELIUS CAPITAL MANAGEMENT
LP, BANK OF AMERICA, N.A.,
CUSTOMER ASSET PROTECTION
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LVM Bondholders, WILMINGTON

TRUST COMPANY, WILMINGTON TRUST FSB,

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Interested Parties.

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

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Dated: September 8, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATUTES

As already demonstrated in the opening briefs, the Segregated Account is unlawful—and the Injunction enforcing it should be dissolved in its entirety. At a minimum, the Injunction should be modified to provide set-offs for payments—amounting to millions of dollars monthly—to which OCI does not dispute that the Trustee is entitled, and to restore bargained-for control rights that have been forfeited by Ambac and returned to the Trustee pursuant to the parties' contracts.

Nor can OCI avoid discovery and then declare that the Circuit Court had an adequate basis to affirm its Plan. Although OCI makes much of the deference due the Circuit Court's findings of facts and conclusions of law, OCI fails to acknowledge that the Circuit Court simply rubberstamped OCI's own findings and conclusions by adopting them wholesale. In those circumstances, the absence of discovery is particularly egregious. For those reasons and others in the opening briefs, the Circuit Court's Order should be reversed.[1]

[1] U.S. Bank National Association, acting solely in its capacity as trustee for certain residential mortgage-backed securities, other asset-backed securities, collateralized loan obligation, or collateralized debt obligation trusts (the "Trustee"), also joins in the reply brief submitted by Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas.

ARGUMENT

I. The Circuit Court's Injunction Should Be Dissolved Or Modified

As demonstrated in the opening briefs, the Injunction should be dissolved in its entirety because the Segregated Account is unlawful. As a result, there is no basis for enjoining the Trustee from enforcing its rights under the Trust Policies allocated to that Account.

At a minimum, the Injunction (and corresponding provisions of the Plan) should be modified to protect the Trustee's bargained-for rights. OCI does not appear to challenge—and therefore concedes—that the Injunction impermissibly attempts to bar actions that may be brought in other jurisdictions. Although OCI does contend that retaining control rights for Ambac and stripping the Trustee of its right to set-off is necessary to the rehabilitation, those arguments are misplaced, as demonstrated below.

A. The Trust Investors' Contractual Control Rights Should Be Restored

OCI protests (at 77) that the Trustee has provided no "legal authority" for the proposition that Ambac forfeited its control rights. That is not so. The underlying transactional documents between Ambac and the Trustee make clear that

the control rights belong to the policyholders, and are transferred to Ambac only for so long as a condition of default does not occur. R.319:11-12; 322:133-34. Once a condition of default occurs, as it did here, those rights are forfeited by Ambac according to the express terms of the negotiated contracts and automatically revert to the policyholders. R.319:11-12; 322:133-34; 323:198.

OCI tries to avoid those terms by arguing that a reversion of control rights would "interfere with its normal prerogatives as a proprietor." OCI Br. 77-78. But that does not, and cannot, change the fact that upon a condition of default, those rights *automatically* reverted to the investors—and Ambac had no authority to reclaim them for its own benefit. The Injunction thus impermissibly extends a benefit to Ambac that it never secured when it issued the policies, while stripping investors of the direction and control rights they bargained for when they purchased the certificates.[2]

[2] The inequity of the situation is particularly glaring because it is the Segregated Account, and not all of Ambac, that is purportedly being rehabilitated—yet Ambac seeks to reclaim, for its own benefit, the control rights that belong to the investors whose policies were allocated to the Segregated Account.

OCI's argument (at 78) that "removing control rights would forfeit valuable policyholder benefits, and would result in a less effective exercise of certain other benefits" is as irrelevant as it is unproven. OCI seeks to re-write the parties' contracts, which expressly provide that upon an insurer default, the control rights revert to investors. R.319:11-12; 322:133-34; 323:198. If investors—for whose benefit the reversion occurs—believed their best interests would be served by permitting insurers to maintain control rights after an insurer default, they could—and would—have negotiated contractual terms to that effect.

OCI's attempt (at 78) to disparage investors as speculators out to make a quick buck is puzzling (if not offensive). And OCI's argument that retention of control rights is necessary because Ambac bears the "ultimate risk of loss" is misplaced. *Id.*; R.286:4-5 (¶10). There is no reason to believe that Ambac will be able to fully satisfy all claims—particularly given that Ambac has already defaulted on its first payment of surplus notes. It is the investors, whom OCI disparages, who would absorb those losses and thus are the ones at risk.

B. The Trustee's Set-Off Rights Should Be Preserved

The Plan approved by the Circuit Court impermissibly strips the Trustee of its bargained-for right to have certain payment obligations reduced by the amount of payments Ambac owes the Trust. USB Br. 4-5. OCI resists that conclusion by arguing that the contractually agreed-upon law of New York (which allows set-off rights for premiums) should not apply because it allegedly would violate Wisconsin public policy. OCI Br. 71 (citing Wis. Stat. § 645.56(2)(d)).[3]

OCI's argument ignores, however, the Trustee's entitlement to set off "other payments"—including recoveries, reimbursements, interests, deferred interest and default interest—owed to the Segregated or General Accounts. OCI does not even address those payments, which total millions of dollars on a monthly basis. And nothing in OCI's cited authorities suggests that recovering those amounts would violate public policy. Thus, at a minimum,

[3] To the extent OCI relies on Wisconsin Statute § 645.05(k), it has not shown that, absent the Injunction's divestiture of set-off rights, it would face "[a]ny threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of the policyholders [or] creditors." OCI Br. 71. If anyone would suffer prejudice under those circumstances, it would be the Trusts.

the Injunction should be modified to permit the Trustee to retain its set-off rights as to those amounts.

II. The Circuit Court's Denial Of All Discovery Resulted In The Approval Of A Plan With No Evidentiary Basis

As demonstrated in the opening briefs, the Circuit Court reversibly erred in denying all discovery in the rehabilitation proceedings—particularly given that (i) OCI has expressly disclaimed the "accuracy or completeness" of the underlying statements or calculations, and (ii) the Circuit Court adopted OCI's findings of fact and conclusions of law wholesale. USB Br. 9 (citing J.A.345).

Nonetheless, OCI argues that because Wisconsin Statute § 645.32 and its comments contemplate a "flexible procedure" for rehabilitation proceedings, it was appropriate to deny the parties the discovery afforded them by Wisconsin Statute § 804.01(2)(a). But nothing in § 645.32 or its comments prohibits discovery in rehabilitation proceedings—and as demonstrated in the Trustee's opening brief (at 8), the

majority of jurisdictions have recognized the right to conduct discovery in rehabilitation proceedings.[4]

OCI argues that because it produced documents and responded to ***some*** interrogatory-like requests, the objecting parties suffered no prejudice. OCI Br. 31-32. That argument ignores the reality of the situation. The Circuit Court permitted OCI to release only such information as it chose, and to withhold the backup for its most critical conclusions. Indeed, the documents OCI produced are largely high-level documents related to the Plan and Disclosure Statement. Little to none of the underlying data and documents said to support OCI's conclusions and calculations have been produced. *See* R.556:4-6. Although OCI selectively responded to some (but not all) of the submitted interrogatory-like questions, the substance of their responses was less than meaningful in many instances. *See*, *e.g.*, R.484:3 at 3(a), 29 at 15(b), 33 at 16(a).

[4] Although OCI repeatedly touts the rehabilitation process as being a "flexible procedure," the proceeding here was anything but "flexible." Objecting parties were afforded no meaningful opportunity to test the assertions and statements made by OCI in support of the Plan, *see infra*, at II, and OCI's proposed orders and findings of fact and law were adopted wholesale by the Circuit Court over the repeated objections of the Trustee and other parties. *Compare* R.531 *with* R.568.

The failure to produce those documents not only impaired the parties' efforts to meaningfully evaluate and properly challenge the Plan, but also resulted in the lack of any evidentiary foundation for the Circuit Court's approval of the Plan. Under such circumstances, the Circuit Court's approval of the Plan was reversible error.

CONCLUSION

The Injunction should be dissolved in its entirety or, at a minimum, modified, and the Circuit Court's Order should be reversed.

Dated this 8th day of September, 2011.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 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 1419 words.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

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