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,

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Interested Parties.

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

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

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INTRODUCTION

Among the host of issues posed by this unique insurance rehabilitation, CAPCO raises a distinct and quite ordinary question of statutory interpretation: Under the classifications established by Wis. Stat. § 645.68, is a claim under a reinsurance agreement a "Loss Claim" or a "Residual Claim"?

Below, the Wisconsin Office of the Commissioner of Insurance studiously avoided the arguments central to CAPCO's objection, and the circuit court followed suit by approving the Plan's treatment of reinsurance claims without any analysis or explanation. *Rec*.556:32, ¶¶ 94-95; Jt.App.134. The Commissioner continues this strategy on appeal, seeking to finesse rather than address the essential questions.

ARGUMENT

I. BY FAILING TO ADDRESS THE PROPER REVIEW STANDARDS THE COMMISSIONER CONCEDES THAT HIS INTERPRETATION OF WIS. STAT. § 645.68 IS NOT ENTITLED TO DEFERENCE.

The Commissioner fails to properly engage the question of whether his interpretation of Section 645.68 is entitled to any deference. First, his brief muddies the water by attempting to re-frame CAPCO's issue in terms of whether the Commissioner "abused its discretion" in classifying claims arising under reinsurance contracts. *Response Brief* at 7-8. There is no legal basis for an "abuse of discretion" analysis on a question of statutory interpretation, as his brief implicitly acknowledges in discussing the standard of review. *Id.* at 20-22.

Next, the Commissioner simply declares that his interpretation of insurance statutes is "entitled to deference," citing, without analysis or comment, *National Motorists Ass'n v. Commissioner of Ins.*, 2002 WI App 308, ¶¶ 10-13, 259 Wis. 2d 240, 655 N.W.2d 179. *Response Brief* at 21. *National Motorists* held that under certain circumstances the Commissioner's interpretation of a statute is entitled to deference, but that case has virtually nothing to do with whether the statutory interpretation at issue here is entitled to such deference.

In *National Motorists,* the question of statutory interpretation arose in the context of an adversary *agency* proceeding, where the final decision of the Insurance Commissioner was embodied in a written decision by an administrative law judge, and was subject to judicial review under the provisions of Chapter 227. *Id.*, ¶ 7. Similarly, in *ABC for Health, Inc. v. Commissioner of Insurance*, 2002 WI App 2, 250 Wis. 2d 56, 640 N.W.2d 510, the court considered whether deference was due to conclusions of law reached after the Insurance Commissioner had conducted *a contested case hearing*. In contrast, the Ambac rehabilitation does not involve an adversary proceeding conducted by the Commissioner or conclusions of law reflected in a written agency decision. In this rehabilitation matter, the Commissioner is authorized to submit a Plan of Rehabilitation for court approval. His "interpretations of law" are presented not in a written decision but in the briefs submitted by his counsel.

Furthermore, in *National Motorists* the court accorded "great weight" deference only after making specific findings that the four standards

applicable to such deference had been established. *Id.,* ¶¶ 10-12. In *ABC for Health* the court afforded "due weight" deference to one interpretation and *no deference* to others only after considering and applying well-established criteria for determining the appropriate level of deference. *Id.,* ¶¶ 8-10. In the Ambac rehabilitation, neither the Commissioner nor the circuit court has referenced these standards, and there is no meaningful basis in the record on which to apply them. While deference to an agency's interpretation of law is often appropriate, "...statutory interpretation is ordinarily a question of law determined independently by a court...," and the particular basis for any deference to an agency must be established by that court. *Racine Harley-Davidson, Inc. v. Division of Hearings and Appeals*, 2006 WI 86, ¶¶ 11-14, 292 Wis. 2d 549, 717 N.W.2d 184.

The circumstances of this rehabilitation proceeding seem closer to those in *Seider v. Commissioner of Insurance,* 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659, where our supreme court found that the Commissioner's interpretation of a Wisconsin insurance statute, as reflected in an administrative rule, *did not* warrant deference. Independent review was appropriate in those circumstances "because it preserves the ultimate authority of the judiciary to determine questions of law," and because the Court's "first duty is to the legislature, not the agency." *Id.,* ¶ 26.

II. The Commissioner's Selective Application of Wis. Stat. § 600.01(1)(b) Must Be Rejected.

The Commissioner seeks refuge in a statute that states that Chapters 600 through 646 do not apply to reinsurance unless such application is expressly set forth. Ignoring the careful discussion of this statute in CAPCO's initial brief, the Commissioner's counsel applies this principle to the definitions of "insurance" and "policy" contained in Chapter 600, and concludes that a reinsurance contract cannot be a "policy" as that term is used in sec. 645.68. If sec. 645.68, however, does not apply to reinsurance at all, why is it necessary to discuss the definition of "policy"; why not simply contend that sec. 645.68(3) does not apply to reinsurance? The answer, of course, is that if subsection (3) does not apply, then neither does subsection (5), and we are left with a conundrum: What to do with a reinsurance claim in a rehabilitation proceeding?

Equally problematic is § 611.24, Wis. Stat., the statute that authorizes the creation of a segregated account for separate classes of "insurance business." This statute makes no reference to reinsurance, yet the Commissioner is quite comfortable with his authority to find that reinsurance is "insurance business" under this statute and to relegate reinsurance contracts to the Ambac Segregated Account.

CAPCO welcomes a consistent application of sec. 600.01(1)(b), one that places its contract with Ambac outside the reach of both the segregated account and this rehabilitation proceeding. *Rec*.543:2. The Commissioner implicitly rejects that conclusion and, by some undisclosed logic, insists

that he is entitled to apply sec. 600.01(1)(b) to some sections of the law and not to others.

Unless reinsurance contracts are to be excluded altogether from a rehabilitation proceeding, a result this Court may deem to be absurd, then this statute can lead only to one of two conclusions:

> 1. Section 600.01(1)(b) does not guide the placement of a reinsurance claim within the rehabilitation priority of claims statute, and such placement must be resolved based on the plain language of sec. 645.68; or
>
> 2. Section 600.01(1)(b) creates an ambiguity as to the placement of a reinsurance agreement within the rehabilitation priority of claims.

CAPCO's initial brief explains why, under a plain language analysis, a reinsurance claim is a Loss Claim under § 645.68(3), Wis. Stat. It further explains why the same conclusion follows if the statute is deemed ambiguous, since the unusually detailed legislative history of Chapter 645 demonstrates a clear intent that "Loss Claims" encompass claims under a reinsurance agreement. The Commissioner's brief makes no comment on either argument, effectively conceding both. *See, e.g.*, *Raz v. Brown,* 2003 WI 29, ¶ 25, 260 Wis. 2d 614, 660 N.W.2d 647. (Respondent cannot complain if propositions of appellant are taken as confessed when the respondent does not undertake to refute them.)

The Commissioner cites two portions of Chapter 645 that reference reinsurance, sections 645.52(3) and 645.58, contending that these statutes reflect a legislative intent to treat insurance and reinsurance differently.

Both examples, however, concern issues that arise when the business subject to rehabilitation has ceded its risks to another party, where the reinsurance contract is a rehabilitation *asset* that is in need of protection. Nothing about these provisions suggests an intent that reinsurance *claims* be treated differently than insurance claims or explains *how* to treat a reinsurance claim under sec. 645.68.

III. THE COMMISSIONER FAILS TO ESTABLISH THAT CASES FROM FOREIGN JURISDICTIONS APPLY TO THE INTERPRETATION OF A WISCONSIN STATUTE.

The Commissioner continues to string-cite cases from other jurisdictions but offers no response to CAPCO's argument that the principles of statutory construction do not allow for the consideration of foreign precedent and that these cases address different statutes with distinct language and legislative histories.

The Commissioner attempts to disguise this glaring deficiency by presenting three misleading arguments. First, the Commissioner contends:

> Section 645.68 offers no indication of any intent to make such a significant departure from the claim priority schemes followed across the country

Response Brief at 70. Yet chapter 645 was written decades before the cases cited by the Commissioner. Both the plain language at the time the statute was written and its clear legislative history offer every indication of an intent to include reinsurance agreements in the Loss Claims classification.

Next, the Commissioner asserts:

> Nor has the legislature ever stepped in to change OCI's long-standing interpretation of Section 645.68, which classifies reinsurance contract claims as Class 5 claims.

Id. The record provides no support for this supposed "long-standing interpretation," and there is simply no evidence of any written decision that could possibly have come to legislative attention and triggered any legislative response. No decisions are cited. No dates are provided.

Finally, in a terse footnote, the Commissioner curiously contends:

> Wisconsin precedent supports this interpretation.

Id., at 69, fn 4. The single case cited in this footnote was discussed in Section IV of CAPCO's initial brief, which demonstrates why this "precedent," when read together with another case decided that same year, does not support the Commissioner's interpretation.

CONCLUSION

CAPCO respectfully requests that this Court grant the relief requested in its initial brief.

Dated this 8th day of September, 2011.

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STATE OF WISCONSIN
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Petitioners-Respondents,

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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 Reply 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 1,534 words.

Dated this 8th day of September, 2011.

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STATE OF WISCONSIN
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ACCESS TO LOANS FOR LEARNING STUDENT LOAN
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Interested Parties-Co-Appellants,

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CERTIFICATE OF SERVICE

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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 sec. 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: September 8, 2011.

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