COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Appeal No. 2011-AP-1486

IN THE MATTER OF THE REHABILITATION OF:

SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

THEODORE K. NICKEL and OFFICE OF THE COMMISSIONER OF INSURANCE,

Petitioners-Respondents,

AMBAC ASSURANCE CORPORATION,

Interested Party-Respondent,

v.

ACCESS TO LOANS FOR LEARNING STUDENT LOAN CORPORATION, AURELIUS CAPITAL MANAGEMENT LP, BANK OF AMERICA, N.A., CUSTOMER ASSET PROTECTION COMPANY, DEPFA BANK, PLC, DEUTSCHE BANK NATIONAL TRUST COMPANY, DEUTSCHE BANK TRUST COMPANY AMERICAS, EATON VANCE MANAGEMENT, FEDERAL HOME LOAN MORTGAGE CORPORATION, FEDERAL NATIONAL MORTGAGE ASSOCIATION, FIR TREE INC., KING STREET CAPITAL MASTER FUND, LTD., KING STREET CAPITAL, L.P., LLOYDS TSB BANK PLC, MONARCH ALTERNATIVE CAPITAL LP, STONEHILL CAPITAL MANAGEMENT LLC, U.S. BANK NATIONAL ASSOCIATION, WELLS FARGO BANK, N.A., as Trustee for certain LVM bondholders, WILMINGTON TRUST COMPANY and WILMINGTON TRUST FSB,

Interested Parties,

ASSURED GUARANTY CORP. and ASSURED GUARANTY RE LTD.,

Interested Parties-Appellants.

Appeal From The June 14, 2011 Order of
The Dane Court Circuit Court, Case No. 2010-CV-1576,
Honorable William D. Johnston, Presiding by Judicial Assignment

RESPONDENTS' RESPONSE BRIEF AND APPENDIX

SUBMITTED ON BEHALF OF THE OFFICE OF THE WISCONSIN COMMISSIONER OF INSURANCE AND COMMISSIONER THEODORE K. NICKEL, AS THE COURT-APPOINTED REHABILITATOR OF THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

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OCI believes that oral argument may be helpful to this Court, and submits that this Court's opinion likely will not meet the statutory criteria for publication.

INTRODUCTION

This appeal is one of several pending before this Court arising out of the massive insurer rehabilitation proceeding pertaining to the Segregated Account (the "Segregated Account") of Ambac Assurance Corporation ("Ambac"). The Wisconsin Commissioner of Insurance, as the court-appointed rehabilitator (the "Rehabilitator"), is handling the rehabilitation under the specialized procedures in WIS. STAT. ch. 645 governing "delinquency proceedings" of Wisconsin-domiciled insurers like Ambac.[1]

Appellants Assured Guaranty Corp. ("AGC") and Assured Guaranty Re Ltd. ("AGRe") (collectively, "Assured") are parties to two reinsurance contracts, under which Assured committed to reimburse Ambac for a specified percentage of loss claims submitted by policyholders in respect of certain policies that were originally issued by Ambac. Some of those reinsured policy exposures, including the exposure at issue in this appeal, were allocated to the

[1] For information about the underlying rehabilitation proceeding and the other appeals, *see* Rehabilitator's August 9, 2011 response brief in Appeal Nos. 2010AP2835 and 2011AP561, which pertains to the rehabilitation court's order confirming the Rehabilitator's Plan of Rehabilitation for the Segregated Account.

Segregated Account of Ambac upon its formation in March 2010.

The present dispute centers on Assured's liability under one of the two reinsurance contracts, arising from the Rehabilitator's settlement of a particular policy exposure in the Segregated Account. Under the Rehabilitator's direction, the Segregated Account settled the exposure by paying the policyholder a mix of cash and surplus notes issued by the Segregated Account. Assured honored its reinsurance contract with respect to its share of the settlement payment made in cash, but refused to pay its share of the settlement payment made in surplus notes.

Instead of bringing its concerns to the rehabilitation court for determination—as required by the Injunction entered by the rehabilitation court—Assured filed a lawsuit in a New York state court to compel arbitration on the issue. The Rehabilitator responded by moving to enforce the Injunction in the rehabilitation court.

Following extensive briefing and oral argument, the rehabilitation court issued the June 14, 2011 Order (the "Order"), holding that Assured's actions violated the court's Injunction and the applicable provisions of the reinsurance

contracts, and ordering Assured to comply with the Injunction. (*See* R.656:1-6 (Findings ¶¶ 1-9, Conclusions ¶¶ 10-17), R-App. 1-6.)[2]

Assured's challenges to the Order are unpersuasive. *First*, Assured incorrectly asserts that "[a]ll issues raised in this appeal are . . . subject to *de novo* review." (Assured Br. at 19.) Because the Order turns on the rehabilitation court's interpretation of *its own* Injunction, that decision is reviewed under the highly deferential "erroneous exercise of discretion" standard.

Second, the rehabilitation court's interpretation of its own Injunction is supported by the plain language of the Injunction. Specifically, Paragraph 1 of the Injunction enjoins any person from commencing legal challenges against Ambac outside the rehabilitation court "in respect of the Segregated Account or policies . . . allocated to the Segregated Account." (R.9 (¶ 1), A-App. 62.) On its face, this paragraph prohibited Assured from suing Ambac in New York to compel arbitration regarding its obligations as reinsurer concerning a policy in the Segregated Account.

[2] Cites to "R-App." are to Respondents' Appendix attached to this brief.

Assured also violated Paragraph 7 of the Injunction, which enjoins any person from "withholding payments . . . owed to . . . the Ambac General Account under or in connection with policies . . . allocated to the Segregated Account." (*Id.* (¶ 7), A-App. 65.) On its face, this paragraph prohibited Assured from withholding payments owed under the reinsurance contracts "in connection with" a policy allocated to the Segregated Account.

Third, unable to reconcile its position with the plain language of the Injunction, Assured raises a number of estoppel arguments. However, none of the positions taken by the Rehabilitator are inconsistent with the Injunction.

Fourth, Assured's argument that it did not owe the disputed amount disregards the plain language of the reinsurance contracts. Both the Insolvency Clause and the definition of "Loss" in the reinsurance contracts expressly bar Assured from withholding the disputed amount.

Fifth, the arbitration clause in the reinsurance contracts is inapplicable because it contains an express exception where, as here, the insurer is subject to a Chapter 645 rehabilitation proceeding.

Finally, AGRe's contention that the rehabilitation court lacked personal jurisdiction over it should be rejected.

COUNTER-STATEMENT OF ISSUES

1. Does Paragraph 1 of the Injunction enjoin Assured from litigating disputes outside the rehabilitation court about its payment obligations on policies in the Segregated Account?

> The rehabilitation court answered: Yes. (R.656:3-4 (¶¶ 11-12), R-App. 3-4.)

2. Does Paragraph 7 of the Injunction enjoin Assured from withholding payments owed in connection with policies in the Segregated Account?

> The rehabilitation court answered: Yes. (R.656:4 (¶¶ 13-14), R-App. 4.)

3. Do the Insolvency Clause and the definition of "[l]oss" in the reinsurance contracts require Assured to make full payments even though the Segregated Account paid a portion of the reinsured obligation with surplus notes?

> The rehabilitation court answered: Yes. (R.656:4-5 (¶¶ 15-16), R-App. 4-5.)

4. Do the reinsurance contracts bar Assured from arbitrating these disputes outside the rehabilitation court in view of the Chapter 645 rehabilitation proceeding pending against the Segregated Account?

The rehabilitation court answered: Yes. (R.656:4-5 (¶ 15), R-App. 4-5.)

5. Did the rehabilitation court have personal jurisdiction over AGRe?

The rehabilitation court answered: Yes. (R.656:1-6 (granting motion as to AGRe), R-App. 1-6.)

COUNTER-STATEMENT OF THE CASE

On appeal, Assured does not directly challenge any of the findings of fact in the Order. (R.656:1-3 (Findings ¶¶ 1-9), R-App. 1-3.) The facts are discussed further below.

A. The Reinsurance Contracts

Assured acts as reinsurer under two "ceded" reinsurance contracts[3] with Ambac: (1) an April 1, 2003 Second Amended and Restated Surplus Share Reinsurance Agreement between AGC and Ambac (the "AGC Contract," R.619 (Ex. 2), R-App. 44-65); and (2) a November 24, 2004 Facultative Reinsurance Agreement between AGRe, Ambac

[3] The Segregated Account has an interest in two basic types of reinsurance contracts: (1) "ceded" contracts, under which the other party, in return for a ceding commission, agrees to pay specified percentages of losses incurred with respect to policy liabilities in the Segregated Account (*see* R.647:2 (¶ 6), R-App. 9); and (2) "assumed" contracts, under which Ambac agreed to indemnify a third-party for a portion of the risks the third-party assumed in specified transactions. The reinsurance contracts discussed at pages 57-70 of the Rehabilitator's August 9, 2011 response brief (*see* footnote 1, *supra*) are the "assumed" type.

and Ambac Assurance UK Limited (the "AGRe Contract," R.619 (Ex. 3), R-App. 67-85). The material provisions of the two contracts are identical.

Under the contracts, Assured is "liable for its proportionate share of the risk associated with each [reinsured] Policy, including all Losses arising under the Policies . . . ." (R.619 (Ex. 3 (art. 5), R-App. 72.)

Both contracts define "Loss" as "the amount of liability paid or to be paid by the Company with respect to claims, losses, [or] liabilities . . . including, without limit, any settlements or compromises[.]" (R.619 (Ex. 2 (art. 5), R-App. 50; Ex. 3 (art. 4), R-App. 70-71).)

Both contracts also contain an Insolvency Clause, which states:

> In the event of the insolvency of the Company or of Proceedings . . . against the Company pursuant to Chapter 645 of the Wisconsin Insurance Code . . . the reinsurance under this Agreement shall be payable to the Company (or its manager) or to its liquidator, receiver or statutory successor, on the basis of the liability of the Company under Policies reinsured *without diminution* because of the insolvency of or Proceedings against the Company, or because the liquidator, receiver or statutory successor of the Company *has failed to pay all or any part of a claim*.

(*See* R.619 (Ex. 2 (art. 15), R-App. 57-58; Ex. 3 (art. 14), R-App. 77-78) (emphasis added).)

The contracts also include identical provisions that preclude arbitration "in the event of the Company being subject to [Chapter 645 insurer delinquency] Proceedings." (R.619 (Ex. 2 (art. 16), R-App. 58; Ex. 3 (art. 15), R-App. 78).)

B. The Rehabilitation Proceeding

The Commissioner initiated the rehabilitation of Ambac's Segregated Account on March 24, 2010 by filing a Verified Petition and a Motion for Temporary Injunctive Relief in the Dane County Circuit Court, where the case was assigned to Judge William D. Johnston.[4] (*See* R.1, A-App. 1.) The Petition noted that the Plan of Rehabilitation would call for the payment of policy obligations "in the form of a cash/note split, with a percentage of the claim paid in cash

[4] Because of the specialized and complex nature of insurer delinquency proceedings, all Chapter 645 cases have been assigned to Judge Johnston for 20-plus years, a practice that has been reduced to a standing order. (R.3:2-3 (¶ 6).) Consequently, Judge Johnston has developed substantial expertise overseeing these specialized, sometimes decades-long insurer proceedings. (*See, e.g.*, R.561 at 157:21-158:21 (Northwestern National); R.471 at 85:9-11 (Reliable Life); R.271 at 21:23-22:3 (American Star); *Matter of the Liquidation of Am. Eagle Ins. Co.*, 2005 WI App 177, 286 Wis. 2d 689, 704 N.W.2d 44.)

and the remainder paid in interest-bearing surplus notes." (R.1 (¶ 12(c)), A-App. 9-10.)

The Rehabilitator obtained an injunction (the "Injunction") under WIS. STAT. § 645.05 to protect the claims-paying resources of the Segregated Account held by Ambac and to ensure the orderly administration of the rehabilitation proceeding. (R.9, A-App. 61-76.) The Injunction noted that any party could file objections to, or seek modification of, the Injunction within 90 days (*i.e.*, by June 22, 2010). (*Id.* (¶ 12), A-App. 73-74.) Assured was properly served with notice of the rehabilitation and the Injunction in March 2010, and it has been informed regarding developments in this proceeding since its commencement. (R.656 (¶ 9); R-App. 3.)

On June 21, AGC and AGRe sent the Rehabilitator their draft objections to the Injunction. Those draft objections noted that:

> *Since the Segregated Account includes some policies that are reinsured by the Assured Guaranty Entities, the Assured Guaranty Entities require confirmation that the exercise of their contractual rights under the reinsurance policies is not enjoined*. To comply with the limited 90-day objection rights set forth in the Injunction, *the Assured*

> *Guaranty Entities are required to raise these issues now*.

(R.647 (Ex. B at 2), R-App. 16 (emphasis added).)

Based on a negotiated agreement with the Rehabilitator related to a different issue, Assured chose not to file its objections regarding the scope of the Injunction. (*See* R.647:2-4 (¶¶ 8-10), R-App. 10.)

AGC appeared in this rehabilitation proceeding at a hearing to approve a settlement between the Segregated Account and AGC, among other parties, in which AGC received a settlement payment in the form of $65 million in cash and $50 million in surplus notes.[5] (R.270:8, 22.)

The Rehabilitator filed his proposed Plan of Rehabilitation on October 8, 2010, with notice to Assured. As discussed in the first-day Petition, the proposed Plan called for payment of Segregated Account policy claims in a mix of cash and notes and stated that:

> "Such payment of Cash and the issuance of Surplus Notes . . . shall constitute *full and complete payment* and settlement of such Policy Claim." (R.371:17 (§ 4.04(c)) (emphasis added).)

[5] The settlement was unrelated to Assured's role as reinsurer of certain Segregated Account liabilities.

> "Notwithstanding . . . the satisfaction of Permitted Policy Claims with Surplus Notes in lieu of Cash, [Ambac] shall be entitled to recover the full amount all recoveries, reimbursements and other payments[.]" (R.371:19 (§ 4.04(g)).)

On January 24, 2011, the rehabilitation court confirmed the Plan, including the above-quoted provisions, by final order. (R.556.) In the Plan confirmation order, the rehabilitation court held that the "satisfaction of permitted policy claims" through a 25% cash/75% notes split was "substantially fair and equitable to policyholders." (R.556:54 (Conclusions ¶ 4).)

Under the Plan, the Segregated Account makes a portion of claims payments in cash and the remaining portion in surplus notes. The Plan also permits the Rehabilitator to reach settlements with policyholders that are payable with cash and surplus notes.

The Rehabilitator worked with Assured to formulate the Ceded Reinsurance Guidelines for handling reinsured loss claims under the Plan. Those guidelines were filed with the rehabilitation court on March 18, 2011. (R.615.)

Assured lodged no objections in the rehabilitation court to any terms of the Injunction or the Plan, including the

above-quoted payment provisions in Section 4.04 of the Plan. Nor did Assured appeal the rehabilitation court's Plan confirmation order.

C. The Present Dispute

On March 14, 2011, the Rehabilitator reached a settlement (the "Northstar settlement") with the holder and beneficiaries of a Segregated Account policy (the "Northstar policy"), whereby the Segregated Account's exposure on the policy was commuted in exchange for a one-time payment by the Segregated Account of $7 million: $4 million in cash and $3 million in surplus notes issued by the Segregated Account. Assured reinsured the Northstar policy under the AGC Contract and therefore was liable for a 6.66667% share of the $7 million settlement, which amounted to $466,667.

On March 22, AGC stated that it would pay that portion of its share of the Northstar settlement that the Segregated Account paid in cash (*i.e.*, 6.66667% of $4 million, or $266,667), but would not pay its share of the settlement that was paid through the surplus notes issued by the Segregated Account (*i.e.*, 6.66667% of $3 million, or $200,000). (R.619 (Ex. 5), R-App. 90-91.) AGC took the position that it did not consider the issuance of surplus notes

to give rise to a reinsured "Loss" within the meaning of the AGC Contract, and therefore AGC would not reimburse any portion of the Northstar settlement that was paid in surplus notes unless and until the Segregated Account actually made cash payments on those notes. (*Id*.)

AGC then paid the cash portion ($266,667) of its share of the Northstar settlement to Ambac. (*Id.* at 1.)

On March 31, the Rehabilitator's counsel sent a letter to AGC, noting that AGC was responsible for its full proportionate share of the loss incurred in the Northstar settlement, and requesting AGC to pay the outstanding $200,000 with respect to the portion of the settlement paid in surplus notes. (R.619 (Ex. 6), R-App. 93-94.)

Assured refused to do so. Instead, on April 7, AGC sent a letter demanding arbitration over the disputed claim. (R.619 (Ex. 7), R-App. 96.) AGRe sent a similar letter, noting that it too was demanding arbitration regarding the issue of whether a reinsurer is obligated to pay its proportionate share of Segregated Account commutation payments made in surplus notes, even though AGRe did not have a current dispute regarding that issue (because the

Northstar policy was reinsured by AGC, not AGRe). (R.619 (Ex. 8), R-App. 98.)

Without waiting for a response to their arbitration demand letters, AGC and AGRe commenced a lawsuit the next day in New York state court to compel arbitration. (*See generally* R.619 (Ex. 1), R-App. 31-42.)

D. The Significance Of The Present Dispute To The Segregated Account And The Rehabilitation As A Whole

Numerous exposures in the Segregated Account are partially reinsured through contracts between Ambac and third-party reinsurers, including Assured. Recoveries on these reinsurance contracts add to the claims-paying resources available to fund the Segregated Account rehabilitation Plan under the Secured Note and the Aggregate Excess of Loss Reinsurance Agreement between Ambac and the Segregated Account.[6]

E. The Rehabilitation Court's Enforcement Of The Injunction

On April 18, 2011, the Rehabilitator filed a motion to enforce the Injunction against Assured in the rehabilitation

[6] *See* Rehabilitator's August 9, 2011 response brief in Appeal Nos. 2010AP2835 and 2011AP561, for a discussion of the arrangements for funding the rehabilitation.

court. (R.617-18.) The Rehabilitator chose not to seek a contempt citation or any other sanction against Assured for its violation of the Injunction. (*See id*.)

AGC and AGRe stayed their New York state court action pending the resolution of the Rehabilitator's motion in the rehabilitation court.

In conjunction with their briefs below, both the Rehabilitator and Assured submitted proposed forms of orders to the rehabilitation court. (*See* R.672-73, R.674-75.) After a half-day hearing on the Rehabilitator's motion (*see* R.668), and supplemental briefing, the rehabilitation court issued its June 14, 2011 Order, granting the Rehabilitator's motion to enforce the Injunction.

Assured complied with the Order by dismissing the New York action, and paying the disputed $200,000, AGC's share of the Northstar settlement amount that was attributable to surplus notes.

ARGUMENT

I. THE REHABILITATION COURT'S INTERPRETATION OF ITS OWN INJUNCTION IS SUBJECT TO THE HIGHLY DEFERENTIAL "ERRONEOUS EXERCISE OF DISCRETION" STANDARD OF REVIEW

Assured incorrectly asserts that the standard of review is *de novo*. (Assured Br. at 19.) In fact, a more deferential test applies because the Order being appealed involves the rehabilitation court's interpretation of *its own* Injunction. It is well settled that "[t]he trial court's decision to grant an injunction is a discretionary one and the scope of the injunction is also within the trial court's discretion." *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 15, 539 N.W.2d 916, 921 (Ct. App. 1995).

This Court's review of such discretionary decisions is "highly deferential":

> Discretionary determinations are not tested on appeal by our sense of what might be a "right" or "wrong" decision in the case. Rather, the determination will stand "unless it can be said that *no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion*."

Olivarez v. Unitrin Prop. & Cas. Ins. Co., 2006 WI App 189, ¶ 16, 296 Wis. 2d 337, 723 N.W.2d 131 (emphasis added, citations omitted). *See also Schering Corp v. Ill. Antibiotics Co.*, 62 F.3d 903, 908 (7th Cir. 1995) (Posner, C.J.) ("When

the district judge who is being asked to interpret an injunction is the same judge who entered it and is thus familiar with its history, . . . we should give particularly heavy weight to the district court's interpretation.").

Likewise, as explained in the insurer rehabilitation context involved here:

> To further the rehabilitation scheme, courts may impose injunctions prohibiting commencement or prosecution of litigation against an insolvent insurer while rehabilitation efforts are underway. *Trial courts have considerable discretion concerning the scope of any such injunctions, including whether an injunction should be modified, and we will only disturb such a determination if the court abused its discretion.*

In re Rehabilitation of Frontier Ins. Co., 870 N.Y.S.2d 144, 146 (N.Y. App. Div. 2008) (emphasis added, citations omitted).

II. ASSURED FAILS TO SHOW THAT THE REHABILITATION COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN INTERPRETING ITS OWN INJUNCTION

Assured falls far short of demonstrating that the rehabilitation court erroneously exercised its discretion in giving effect to the plain language of its own Injunction to enjoin Assured from: (a) compelling arbitration to decide an issue concerning the Segregated Account and a specific

policy (the Northstar policy) allocated to the Segregated Account; and (b) withholding a payment that is part of the claims-paying resources necessary to fund the rehabilitation.

A. The Rehabilitation Court's Interpretation Of Paragraph 1 Of The Injunction Was A Proper Exercise Of Its Discretion

Paragraph 1 of the Injunction provides:

> All persons and entities are enjoined and restrained from commencing or prosecuting any actions, claims, lawsuits or other formal legal proceedings . . . against Ambac . . . in respect of the Segregated Account or policies . . . allocated to the Segregated Account. . . . This Court has exclusive jurisdiction over any such actions, claims or lawsuits.

(R.656:3-4 (¶ 11), R-App. 3-4.)

Interpreting this language in its Order, the rehabilitation court held that:

> Demands for, and petitions to compel, arbitration constitute legal proceedings outside this Court.
>
> By demanding arbitration and filing a petition to compel arbitration in another forum to litigate issues *in respect of the Segregated Account and policies allocated to the Segregated Account*, Assured has violated paragraph 1 of the Injunction. Further prosecution of such proceedings will result in a continuing violation of the Injunction.

(R.656:3-4 (¶¶ 11-12), R-App. 3-4 (emphasis added).)

1. Assured disregards the plain language of the Injunction

Assured argues that because the reinsurance contracts were not allocated to the Segregated Account, the "dispute is one in respect of a contract allocated to Ambac's General Account." (Assured Br. at 29.) However, Assured fails to address the plain language of the Injunction.

First, Paragraph 1 enjoins actions "in respect of the Segregated Account . . . ." The phrase "in respect of" means "with respect to" or "concerning." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 997 (10th ed. 1997). The present dispute concerns the scope of Assured's obligations when payments by the Segregated Account are partially made in the form of surplus notes, in respect of policies in the Segregated Account. Moreover, the effect of Assured's refusal to pay reinsurance claims on such policies adversely impacts the claims paying resources of the Segregated Account. Thus, as the rehabilitation court found, the dispute is one "in respect of the Segregated Account."

Second, the present dispute concerns a "polic[y] . . . allocated to the Segregated Account." Although the AGC Contract was not allocated to the Segregated Account, AGC's

payment obligations under that contract stem from the settlement of the Northstar policy in the Segregated Account. Thus, the present dispute is "in respect of" a "polic[y] . . . allocated to the Segregated Account."

Third, Assured notes that the Injunction states that it "does not apply to policies or other contracts which remain in the Ambac General Account." (Assured Br. at 29.) But, the very next sentence states that the Injunction does "pertain[] to the Segregated Account" and "policies . . . allocated to the Segregated Account." (R.9:1, A-App. 61.) As explained above, because the present dispute concerns the Segregated Account and AGC's reinsurance obligations relating to the Northstar policy in the Segregated Account, it falls within the scope of the Injunction.

2. Assured's other arguments also are without merit

Unable to distinguish the plain language of the Injunction, Assured makes a number of collateral arguments.

a. The rule of construction—that injunctions should be construed narrowly—is not applicable here

Assured argues that the rehabilitation court's interpretation of its own Injunction violates the rule that

injunctions generally should be construed narrowly. (Assured Br. at 30-31; *see also id.* at 41-42.) Assured's argument is unpersuasive.

First, the cited rule of construction—which applies to "omissions or ambiguities" in injunctions (*id*. at 31)—is inapplicable because there are no "omissions or ambiguities" in Paragraph 1 of the Injunction. There is nothing ambiguous about the phrases "in respect of the Segregated Account" or "in respect of policies . . . allocated to the Segregated Account." (R.9 (¶ 1), A-App. 62.) Those phrases are written in broad terms because the success of the rehabilitation requires the existence of a single, comprehensive rehabilitation court forum for resolving all disputes concerning the Segregated Account. Chapter 645 explicitly recognizes the importance of broad injunctive relief. WIS. STAT. § 645.05(1)(k).

United States District Judge Crabb (W.D. Wis.) acknowledged the importance of the Injunction in centralizing all litigation pertaining to the Segregated Account in the rehabilitation court. In rejecting the IRS's attempt to remove its dispute with the Rehabilitator to federal court, Judge Crabb noted that:

> In many respects, the state rehabilitation proceedings and the supplemental injunction are similar to federal bankruptcy proceedings and the automatic stay that goes into effect in bankruptcy. Insurance companies are barred from using bankruptcy to reorganize; their only remedy is a state court rehabilitation proceeding. As in bankruptcy, *the efficacy of a rehabilitation proceeding is dependent upon the court's ability to stay actions by creditors that will interfere with the court's ability to manage the proceeding. When a claimant is affected by the stay, the claimant challenges the effect in the bankruptcy court and if the result is unfavorable, it appeals. The claimant does not file a separate proceeding in a separate court to determine whether the stay should apply*, as the United States has done in this case.

In the Matter of the Rehabilitation of Segregated Acct. of Ambac Assurance Corp., No. 10-cv-778-bbc, 2011 WL 956855, at *9 (W.D. Wis. Jan. 14, 2011) ("*In re Segregated Acct.*") (emphasis added).

Second, the rule of construction that injunctions should be construed narrowly is inapplicable here because the Rehabilitator did not seek any sanction against Assured based on its non-compliance with the Injunction.

Assured cites three authorities for its purported rule of construction, but misleadingly omits the stated rationale for the rule in each authority. For example, Assured quotes a

federal practice treatise for the proposition that injunctions are governed by the rule that:

> all omissions or ambiguities . . . will be resolved in favor of [the enjoined party].

(Assured Br. at 31.) In fact, what the treatise actually says is:

> all omissions or ambiguities in the order will be resolved in favor of *any person charged with contempt*.

11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 2955 (2d ed. 1995) (emphasis added).

Likewise, Assured cites two cases that discuss the same rule of construction, but selectively omits the key language (added here in italics, in the excerpts below), which explains the rationale for the rule. (*Compare* Assured Br. at 30-31, 41 *with Wis. Cent. R.R. Co. v. Smith*, 52 Wis. 140, 143, 8 N.W. 613, 614 (1881) ("*Disobedience to a lawful injunction is a penal offense, and punishable as such*. Hence an injunction order must, *like penal or criminal statutes*, be construed strictly in favor of the person charged with violating it.") (emphasis added); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) ("*Since an injunctive order prohibits conduct under threat of judicial punishment*, basic fairness requires

that those enjoined receive explicit notice of precisely what conduct is outlawed.") (emphasis added).

The reason Assured omits the rationale for the cited rule of construction is because that rationale does not apply in this case: the Rehabilitator did not seek or obtain a contempt citation or any other sanction against Assured based on its non-compliance with the Injunction.

Thus, even if Assured's actions in refusing to honor its contractual obligations were based on a mistaken belief regarding the scope of the Injunction, this is a "no harm, no foul" situation. Assured has not been prejudiced in *any* way by the timing or substance of the Order requiring it to comply with the Injunction.

b. The Rehabilitator's statements are consistent with Paragraph 1 of the Injunction

Assured asserts that the Injunction should not be read to mean what it plainly says because the Rehabilitator allegedly has taken inconsistent positions at a hearing, in a court filing and in two emails with Assured's counsel regarding the scope of those provisions. However, the statements cited by Assured do not contradict the plain language of the Injunction.

First, Assured cites to the Rehabilitator's statements at the first-day hearing, which made a distinction between "policyholders in the general account[,]" on the one hand, and "policies and issues which have been allocated to the segregated account[,]" which were subject to the Injunction. (Assured Br. at 32.) However, this discussion does not support Assured's position.

No one disputes that the Rehabilitator took a surgical approach to the rehabilitation of Ambac. *See In re Segregated Acct.*, 2011 WL 956855, at *6 ("Although the segregated account is deemed to be a separate insurer for purpose[s] of rehabilitation, it is not actually a separate corporation from Ambac. Indeed, the whole point of the rehabilitation is to rehabilitate Ambac Assurance Corporation."). But, the Injunction is written broadly to ensure an orderly rehabilitation process before a single rehabilitation court, and to ensure that entities such as Assured do not withhold payments "under or in connection with" policies allocated to the Segregated Account, which are needed to fund the Rehabilitation Plan.

Second, Assured asserts that the Rehabilitator's articulated reasons for seeking the Injunction did not cover

the situation presented here. (Assured Br. at 33-34.)

However, in the first-day filing, the Rehabilitator noted that:

> . . . Chapter 645 expressly allows the Commissioner to seek injunctions against
>
> any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding.
>
> Wis. Stat. § 645.05[(1)](k).

(R.7:5, A-App. 40.)

Consistent with this broad scope of relief, the Rehabilitator advanced the following rationale (among others) for the Injunction:

> Standard first-day orders such as injunctions . . . against interference with the Rehabilitator, and others are routine and necessary to obtain some of the *key benefits of rehabilitation proceedings*: *order, equity, and preservation of assets*. They are all expressly authorized by Wis. Stat. § 645.05(1), and they are all especially necessary in a rehabilitation with such a high degree of complexity and high financial stakes for policyholders.

(R.7:11, A-App. 46 (emphasis added).)

Third, Assured asserts that, in emails dated June 15, 2010 and November 6, 2010, the Rehabilitator "expressly confirmed" that the contracts "were outside the reach of the Injunction." (Assured Br. at 34-35.)

However, in the November 6 email, the Rehabilitator's counsel put Assured on notice that any arguments Assured might wish to advance under the Insolvency Clause or in regard to disputes related to reinsured liabilities on policies in the Segregated Account needed to be brought in the rehabilitation court:

> Generally we agree with your summary, but there is *one caveat*. The additional rights your client has under the insolvency clause (right to notice and interpose a defense) necessarily must be exercised in the rehabilitation court, as that is where the underlying policy liability is located. Again, . . . general disagreements will remain subject to arbitration (consistent with the contract), but *disputes relative to claim liabilities* (*if the claims are in the Segregated Account*) *will need to be handled in the Rehab Court*. Let me know if you have any questions.

(R.626 (Ex. D), A-App. 236 (emphasis added).)

With respect to the June 15 email, Assured takes the Rehabilitator's answer to a *different* question out of context, and bases its argument on that distortion of the factual record. Specifically, on June 11, Assured's counsel requested a phone conference with the Rehabilitator's counsel to discuss Assured's desire to initiate "[a]rbitration of a current dispute with respect to the *calculation of ceding commissions* pursuant to some of the Ambac/Assured reinsurance

arrangements."[7] (R.626:3 (¶ 7), A-App. 181; *id*. (Ex. D), A-App. 243-44 (emphasis added).)

In response to Assured's *specific* question about that *specific* issue—which has nothing to do with the present dispute or the Segregated Account—the Rehabilitator's counsel wrote the June 15 email, which said that the Injunction "does not apply to enjoin any actions that Assurance Guaranty or its affiliates may take under the reinsurance agreements (including . . . demanding arbitration in accordance with the terms of the agreement)." (Assured Br. at 34; *see id.* at 14, 52-53.)

Although the Rehabilitator's counsel used general language in the June 15 email, the question that was being answered was the only question that Assured asked (*i.e.*, the arbitrability of the ceding commission dispute).

Moreover, on November 4, 2010, Assured's counsel sent the Rehabilitator's counsel an email, which attached the June 15 email, and asked the Rehabilitator's counsel to "confirm that the Plan of Rehabilitation . . . does not conflict

[7] The "ceding commission" is the amount that Ambac withholds from the reinsurance premium that Ambac pays to Assured under the reinsurance agreements for the exposure ceded to Assured.

with the statements in the first paragraph of that [June 15] email." (R.626 (Ex. D), A-App. 240-41.) In the November 6 email quoted above, the Rehabilitator's counsel clarified for Assured that "*disputes relative to claim liabilities* (*if the claims are in the Segregated Account*) *will need to be handled in the Rehab Court*." (R.626 (Ex. D), A-App. 236 (emphasis added).)

Assured professes not to have understood what the Rehabilitator was saying. (Assured Br. at 35, 37-38.) But, Assured never followed up with any further questions about the exclusive nature of the rehabilitation court's jurisdiction over the present type of disputes. Instead, Assured subsequently prepared an objection to the scope of the Injunction and submitted it to the Rehabilitator's counsel *after* the June 15th email. As discussed below, *infra* at 31-32, the subsequent Assured objection—which it elected never to file—did not argue that the emails from the Rehabilitator's counsel were inconsistent in any respect with the plain language of the Injunction or the Rehabilitator's arguments to the rehabilitation court giving rise to entry of the Order now on appeal.

The key point is that Assured *never* asked the Rehabilitator the specific questions that are at issue in the present dispute: whether the Injunction enjoined Assured from withholding payments due Ambac based on the fact that surplus notes issued to a Segregated Account policyholder had yet to be paid, or whether the Injunction enjoined Assured from arbitrating that issue in a different forum. If Assured had asked either of *those* specific questions, the Rehabilitator would have responded in the same way that he did in the motion to enforce the Injunction.

c. Equitable estoppel is not applicable here

Assured argues (at 35-38) that, based on the June 15 and November 6 emails, the Rehabilitator is equitably estopped from asserting that the Injunction prohibits the arbitration of the present disputes. However, Assured fails to satisfy any of the required elements for equitable estoppel.

Equitable estoppel requires: (1) action or non-action, on the part of one against whom estoppel is asserted, (2) which induces reasonable reliance thereon by the other, either in action or non-action, and (3) which is to his detriment. *Milas v. Labor Ass'n of Wis., Inc.*, 214 Wis. 2d 1,

11, 571 N.W.2d 656, 660 (1997). The party asserting equitable estoppel must prove it by "clear, satisfactory, and convincing" evidence. *Variance, Inc. v. Losinske*, 71 Wis. 2d 31, 39, 237 N.W.2d 22, 26 (1976).

First, because Assured never asked the Rehabilitator the questions that are the subject of the present dispute, the Rehabilitator's answer to a different question in the June 15 email does not constitute an "action or non-action" that can form the predicate for an estoppel defense.

Likewise, the November 6 email does not constitute an "action or non-action" as to issues in the present dispute, as the Rehabilitator clarified that disputes relating to claim liabilities that were allocated to the Segregated Account must be litigated in the rehabilitation court.

Second, the emails did not "induce[] reasonable reliance" by Assured. *Milas*, 214 Wis. 2d at 11, 571 N.W.2d at 660. Specifically, on June 21, 2010, Assured sent the Rehabilitator's counsel proposed objections to the Injunction that AGC and AGRe said they intended to file. Those objections show that, even with the June 15 email in hand, Assured and its counsel believed that, with respect to underlying policies that were allocated to the Segregated

Account, and for which Assured provided reinsurance, Assured "require[d] confirmation [from the rehabilitation court] that the exercise of their contractual rights under the reinsurance policies is not enjoined." (R.647 (Ex. B at 2), R-App. 16.)

The reason Assured did not file its objections was not because it relied on the June 15 email. Instead, as reflected in the June 22 letter agreement, Assured agreed to drop its objections to the Injunction in regard to the AGC and AGRe Contracts, if the Rehabilitator would execute a letter agreement, which extended the deadline in regard to a narrow statutory offset issue pertaining to two "assumed" reinsurance contracts (different than the ceded contracts involved here), in which Ambac (not Assured) was acting as the reinsurer. (R.647:3 (¶¶ 8-10) & Ex. C (June 22, 2010 Letter Agreement), R-App. 10, 25-27.)

Third, Assured fails to show any "detriment," which in this context is "equated with 'prejudice,' and commonly understood to mean 'injury or damage.'" *Milas*, 214 Wis. 2d at 13, 571 N.W.2d at 661. Assured argues that, but for the June 15 and November 6 emails, Assured could have filed objections to the Injunction or the Plan to clarify its rights in

2010. (Assured Br. at 36.) However, as explained above, Assured chose not to file objections for reasons unrelated to the emails, and it has not been prejudiced in any way by the timing or content of the Order. The Order was entered only after Assured had a full opportunity to argue its position in the rehabilitation court, including the opportunity to argue that the Injunction did not or should not apply to the present dispute.

B. The Rehabilitation Court's Interpretation Of Paragraph 7 Of The Injunction Was A Proper Exercise Of Its Discretion

Paragraph 7 of the Injunction enjoins any person from "withholding payments . . . owed to . . . the Ambac General Account under or in connection with policies . . . allocated to the Segregated Account." (R.9 (¶ 7), A-App. 65.)

In its Order, the rehabilitation court held that AGC had violated this paragraph:

> Reinsurance agreements with Ambac that cover Segregated Account policy exposures or liabilities constitute agreements to pay Ambac in connection with policies allocated to the Segregated Account.

> By withholding amounts owed under the Agreements for payments made in surplus notes on the Northstar Settlement, AGC has violated paragraph 7 of the Injunction.

(R.656:4 (¶¶ 13-14), R-App. 4.)

1. Assured disregards the plain language of the Injunction

Assured makes two textual arguments. *First*, Assured contends that the payment amounts that it is refusing to pay are not "owed" to Ambac because the surplus notes are not equivalent to cash "payments." (Assured Br. at 38-39.) However, this assertion is contradicted by language in the reinsurance contracts—*see* Section III *infra* (discussing Insolvency Clause and definition of "Loss")—and by the Plan of Rehabilitation, which establishes that a payment effected by a combination of cash and surplus notes "constitutes full and complete payment and settlement of [a] Policy Claim," "regardless of the existence of any provision in [a] Policy or any other underlying instrument(s) or contract(s) that would require, or that contemplates, the discharge of the obligations of the Segregated Account through the payment of Cash." (R.567:17-19 (§§ 4.04(c), (d)).)

Second, Assured argues that Paragraph 7 does not apply because "[a]ny payments owed to Ambac would be

owed *under* the Reinsurance Agreements, which have not been allocated to the Segregated Account." (Assured Br. at 39 (emphasis added).) However, Paragraph 7 enjoins the withholding of payments "under *or* in connection with" policies allocated to the Segregated Account. The use of the disjunctive "or" shows that the phrase "in connection with policies" has a different meaning than the phrase "under . . . policies[.]" The amount that Assured refused to pay was owed "in connection with" a policy allocated to the Segregated Account.

By contrast, under Assured's interpretation, the phrases "under . . . policies" and "in connection with policies" would have the same meaning, which is contrary to standard principles of interpretation. *See* 2A Norman J. Singer & J.D. Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007).

2. Assured disregards the broad remedial purposes of Chapter 645

The rehabilitation court's interpretation of Paragraph 7 also is consistent with the broad remedial purposes of Chapter 645. The Rehabilitator's first-day filings emphasize the broad scope of injunctive relief permitted under WIS. STAT.

§ 645.05(1)(k) (*see* R.7:5, A-App. 40), and the fact that the injunction was aimed at preventing interference with the Rehabilitator and obtaining "order, equity and [the] preservation of assets." (R.7:11, A-App. 46.)

Assured's actions implicate the considerations identified in the Rehabilitator's first-day filings and in WIS. STAT. § 645.05(1)(k): absent the Injunction, Assured's actions of suing in New York and withholding payments in violation of the Injunction would have lessened the amount available to fund the rehabilitation Plan and interfered with the orderly administration of this proceeding.

III. THE REHABILITATION COURT CORRECTLY HELD THAT THE REINSURANCE CONTRACTS DO NOT PERMIT ASSURED TO WITHHOLD PAYMENTS

Moreover, even if the plain language of the Injunction did not apply, the reinsurance contracts themselves required Assured to pay the amounts owed and to raise any disputes in the rehabilitation court.

Assured's position—that the reinsurance contracts do not require it to pay any amounts in respect of the surplus notes until cash payments are made on those notes—is contrary to the language of the reinsurance contracts and the

Plan confirmation order, and should be rejected as a matter of law.

A. Assured's Procedural Objections Should Be Rejected

Assured first argues that the rehabilitation court should not have addressed the scope of the reinsurance contracts in the Order because rehabilitation proceedings are not adversarial proceedings. (Assured Br. at 42-44.) However, Assured itself acknowledges that the interpretation of the contracts is relevant to the issue of whether Assured violated Paragraph 7 of the Injunction. In Assured's own words:

> Whether the Assured Reinsurers "owe" such amounts [within the meaning of Paragraph 7] raises a question as to the Assured Reinsurers' and Ambac's rights and obligations under the Reinsurance Agreements.

(Assured Br. at 38-39.) Thus, the rehabilitation court properly considered the meaning and scope of the contracts in the context of the Rehabilitator's motion to enforce the Injunction.

Next, Assured argues that, in considering the contracts, the rehabilitation court denied Assured "the procedures that ordinarily attend litigation" and therefore, due process. (Assured Br. at 44-45.) However, as Assured acknowledges,

due process requires only "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted).

In this case, Assured had a full and fair opportunity to be heard:

- on May 9, 2011, Assured filed a 57-page opposition brief (R.630), two affidavits (R.626-27), and its own proposed findings of fact and conclusions of law (R.675),[8] in response to the Rehabilitator's motion to enforce the Injunction;

- on May 20, 2011, Assured filed a seven-page supplemental brief (R.641), and two additional affidavits (R.642-43), in opposition to the Rehabilitator's motion;

- on May 25, 2011, Assured attended the hearing on the Rehabilitator's motion, and presented its arguments (R.668);

- on June 7, 2011, Assured filed a 12-page response to the Rehabilitator's post-hearing supplemental brief (R.650), along with three additional affidavits (R.651-53).

[8] Assured complains (at 19) that the rehabilitation court adopted the Rehabilitator's proposed order, rather than Assured's proposed order. But it is well settled that: "[A]n unambiguous written judgment, prepared by one of the attorneys and then signed and entered by the court, clearly expressed the court's intent; we did not attach any significance to the fact that the judge did not draft it." *Cashin v. Cashin*, 2004 WI App 92, ¶ 13, 273 Wis. 2d 754, 681 N.W.2d 255; *see also Karp v. Coolview of Wis., Inc.*, 25 Wis. 2d 299, 301, 130 N.W.2d 790, 791 (1964).

Assured points to no facts in dispute relating to the Rehabilitator's motion, no credibility determinations to be made, and no relevant documents that it did not have the opportunity to present to the rehabilitation court. Thus, Assured's due process challenge is baseless.

B. The Insolvency Clause Forecloses Assured's Argument That It Was Not Required To Pay Its Share Of The Northstar Settlement Attributable To Surplus Notes

The reinsurance contracts contain the following Insolvency Clause, which closely tracks Paragraph 7 of the Injunction:

> In the event of the insolvency of the Company or of Proceedings (as defined below) against the Company pursuant to Chapter 645 of the Wisconsin Insurance Code (hereinafter "Proceedings"), *the reinsurance under this Agreement shall be payable to the Company* (*or its manager*) *or to its liquidator, receiver or statutory successor*, on the basis of *the liability of the Company under Policies reinsured without diminution* because of the insolvency of or Proceedings against the Company, or *because the liquidator, receiver or statutory successor of the Company*[9] *has failed to pay all or any part of a claim.*

[9] Under Chapter 645, a rehabilitator is the same as a receiver, and is the statutory successor to the company. *See* WIS. STAT. §§ 645.03(h) and 645.33(2).

(R.619 (Ex. 2 (art. 15), R-App. 57-58; Ex. 3 (art. 14), R-App. 77-78) (emphasis added).) Thus, the Insolvency Clause requires Assured to satisfy its obligations based on the "liability" of Ambac (*i.e.*, "without diminution"), even if the Rehabilitator "has failed to pay all or any part of a claim."

Using the Northstar policy as an example, the full "liability" that Assured is required to pay is 6.66667% of the $7 million Northstar settlement, or $466,667. The Rehabilitator's payment of cash and notes in a commutation transaction effectively accelerates and discharges all future liability arising from this policy. Thus, the Insolvency Clause requires Assured to honor its obligation *in full*, even if there has only been partial cash payment of a claim.

Given the clarity of the Insolvency Clause in the contracts, Assured argues that: (1) because the reinsurance contracts identify "Ambac" as the "Company," the Insolvency Clause is inapplicable because Ambac's Segregated Account is in rehabilitation rather than Ambac as a whole; and (2) the Insolvency Clause does not apply to policy settlements. (Assured Br. at 57-59; *id.* at 45-53.) Assured's arguments are unpersuasive.

1. Assured's position is contrary to the plain language and purpose of the Insolvency Clause

Assured argues that the Insolvency Clause is inapplicable because it relates to Chapter 645 proceedings against "the Company" (which it defines as "Ambac"), and not against Commissioner-approved subsets of Ambac such as its Segregated Account. (Assured Br. at 57-59.)

First, Assured's position is contrary to the plain language of the contracts. Assured focuses on the definition of the word "Company" alone, but the relevant language in the Insolvency Clause is the phrase "*Proceedings* against the Company *pursuant to Chapter 645 of the Wisconsin Insurance Code*." (R.619 (Ex. 2 (art. 15), R-App. 57-58; Ex. 3 (art. 14), R-App. 77-78) (emphasis added).)

Chapter 645 governs insurer rehabilitation and liquidation proceedings. Section 645.03(1)(f) defines "insurer" for purposes of Chapter 645. WIS. STAT. § 645.03(1)(f). Section 611.24(e) provides that a segregated account created by a company "shall be deemed an insurer within the meaning of s. 645.03(1)(f)." WIS. STAT. § 611.24(e). Thus, the reference to "proceedings . . . pursuant to Chapter 645" in the Insolvency Clause of the reinsurance

contracts encompasses proceedings against the Company itself, as well as segregated accounts of the Company, which are both treated as "insurers" under Chapter 645. As Judge Crabb explained:

> *Although the segregated account is deemed to be a separate insurer for purposes of rehabilitation, it is not actually a separate corporation from Ambac. Indeed, the whole point of the rehabilitation is to rehabilitate Ambac Assurance Corporation.* . . . Allowing the United States to proceed against Ambac or any of the affiliates and subsidiaries [outside the Rehabilitation Court] would amount to *pulling out the linchpin that secures the entire enterprise*.

In re Segregated Acct., 2011 WL 956855, at *6 (emphasis added).

Moreover, the reason the reinsurance contracts define "Company" to mean "Ambac" is because Ambac is the party being reinsured. But, as Assured acknowledges, its obligations under the reinsurance contracts is tied to the specific Ambac *policies* in the Segregated Account it is reinsuring:

> In 2003, [AGC] and Ambac entered into [the AGC Contract], under which [AGC] *agreed to reinsure a portion of certain insurance policies* issued by Ambac.

(Assured Br. at 8 (emphasis added).) Because the policy exposures at issue now reside in the Segregated Account, and because Chapter 645 proceedings against that "corporation *within* a corporation," WIS. STAT. ANN. § 611.24 cmt. (emphasis added), are underway as permitted by Chapter 645, a plain reading of the Insolvency Clause in the context of Chapter 645 encompasses this dispute. Or, stated another way, as to Assured-reinsured policies that are in the Segregated Account (such as the Northstar policy), the Segregated Account *is* the "Company" for purposes of the reinsurance contracts, including the Insolvency Clause.

Second, Assured's interpretation is contrary to the purpose of the Insolvency Clause. Its purpose is to prevent Assured from breaching its obligation to reinsure "without diminution" exposures on policies based on the initiation of a delinquency proceeding in which Ambac or one of its accounts may be directed by the Rehabilitator not to pay claims or other liabilities entirely in cash. That purpose is the same irrespective of the precise structure of the Chapter 645 proceeding.

As the rehabilitation court correctly held,

> [u]nder the specific terms of the Agreements' insolvency and arbitration clauses, this rehabilitation constitutes "Proceedings . . . pursuant to Chapter 645 of the Wisconsin Insurance Code" against the part of Ambac's business (the Segregated Account) from which the present dispute arises. The insolvency clauses require Assured to make reinsurance payments "without diminution" on account of these proceedings or because the Rehabilitator "has failed to pay all or any part of a claim."

(R.656:4-5 (¶ 15), R-App. 4-5.)

2. Assured's argument that the Insolvency Clause does not apply to policy settlements is meritless

Assured makes a new argument on appeal that it never presented below: namely, that the Insolvency Clause applies only to policy claims that have been submitted, and not policy settlements such as the Northstar settlement. (Assured Br. at 58.) Assured is grasping at straws.

The Insolvency Clause provides that the "reinsurance . . . shall be payable to the Company . . . on the basis of the *liability* of the Company under Policies reinsured without diminution . . . ." (R.619 (Ex. 2 (art. 15), R-App. 57-58; Ex. 3 (art. 14), R-App. 77-78) (emphasis added).) Under the definition of "Loss," the "amount of liability paid or to be paid by the Company" includes amounts paid with respect to

"any settlements or compromises of disputed claims, arising under any Policy." (R.619 (Ex. 2 (art. 5), R-App. 50; Ex. 3 (art. 4), R-App. 70-71).) Such settlements are binding on Assured: "Settlement of any Loss made by the Company . . . whether under strict Policy conditions or by way of compromise, *shall be unconditionally binding upon the Reinsurer in proportion to its participation*." (*Id*. (Ex. 2 (art. 11.B), R-App. 56; Ex. 3 (art. 10.B), R-App. 76) (emphasis added).)

C. The Definition Of "Loss" Forecloses Assured's Attempt To Avoid Its Obligations Related To Liabilities Discharged Through The Issuance Of Surplus Notes

As noted above, under the contracts, Assured is liable for its proportionate share of "Losses" arising under the Policies. "Loss" is defined to mean:

> the amount of liability *paid or to be paid* by the Company with respect to claims, losses, [or] liabilities . . . including, without limitation, any settlements or compromises of disputed claims arising under any Policy . . . .

(R.619 (Ex. 2 (art. 5), R-App. 50; Ex. 3 (art. 4), R-App. 70-71) (emphasis added).)

Assured argues that the portion of the Northstar settlement that was paid in surplus notes is not a "Loss" under

the AGC Contract for which AGC is liable for its proportionate share. This position is incorrect, for at least two reasons.

First, Assured's position is at odds with the court-confirmed Plan, which Assured never challenged. As explained above, the Plan establishes that distribution of a combination of cash and surplus notes "constitutes full and complete payment and settlement of [a] Policy Claim," "regardless of the existence of any provision in [a] Policy or any other underlying instrument(s) or contract(s) that would require, or that contemplates, the discharge of the obligations of the Segregated Account through the payment of Cash." Plan §§ 4.04(c), (d). Therefore, an obligation paid in surplus notes is a claim that is "paid," regardless of any contractual provisions or interpretations to the contrary.

Despite having full notice and an opportunity to raise any concerns it had regarding this Plan language, Assured did not object to it at the Plan confirmation hearings. Assured is therefore barred from raising this post-confirmation challenge to Section 4.04 of the Plan.

Second, Assured argues that, because the timing of when the surplus notes will be paid is unclear, Assured should

be permitted to avoid its payment obligation until the surplus notes are actually paid in cash. (Assured Br. at 59-60.) However, this position conflicts both with the Insolvency Clause discussed above and with the definition of "Loss" in the contracts, which requires Assured to satisfy its obligations with respect to liabilities "paid *or to be paid*."

The surplus notes issued under the Northstar settlement are an express promise to make future cash payments. Assured's contention—that it has no reinsurance liability unless and until surplus notes are paid in cash—would render the "to be paid" language of the reinsurance contracts meaningless, in contravention of black-letter law regarding contract construction. *See, e.g., Columbus Park Corp. v. Dep't of Housing Preserv. & Dev.*, 598 N.E.2d 702, 708 (N.Y. 1992) ("[A] construction which makes a contract provision meaningless is contrary to basic principles of contract interpretation[.]").

IV. THE REHABILITATION COURT CORRECTLY HELD THAT ASSURED WAS BARRED FROM SUING TO COMPEL ARBITRATION OF THE PRESENT DISPUTE

Assured argues that it should be entitled to arbitrate the present dispute based on: (1) the language of the arbitration clause in the reinsurance contracts; (2) the judicial estoppel

doctrine; and (3) the presumption that arbitration clauses should be broadly construed. (Assured Br. at 43-54.)

First, the arbitration clause in the reinsurance contracts contains an exception that renders the clause inapplicable in situations where "the Company is subject to Proceedings [under Chapter 645 of the Wisconsin Statutes]." (R.619 (Ex. 2 (art. 16), R-App. 58; Ex. 3 (art. 15), R-App. 78).) As the rehabilitation court held (R.656:4-5 (¶ 15), R-App. 4-5), and as discussed above, the Chapter 645 "Proceedings" exception in the arbitration clause encompasses proceedings against Ambac as a whole, and subsets of Ambac, as expressly permitted in Chapter 645. Therefore, the arbitration clause, on its face, does not apply.

Assured's argument—which again starts and ends with the meaning of the single word "Company"—highlights how superficial Assured's position is. The reason there is a Chapter 645 exception to the arbitration clause is because it would be inappropriate to commence arbitration regarding reinsured liabilities that are already subject to the jurisdiction of a rehabilitation court. Again, there is no rational basis (and Assured articulates none) why the parties would agree that the initiation of a Chapter 645 proceeding against Ambac as a

whole would nullify the arbitration clause, but that the initiation of a Chapter 645 proceeding against a portion of Ambac (concerning the same exact reinsured policy that is the subject of the dispute) would not.

Second, Assured's judicial estoppel argument fails because the Rehabilitator, as discussed above, has not taken "clearly inconsistent" positions.

Finally, Assured cannot escape the Chapter 645 proceeding exception to the arbitration clause by citing cases that apply arbitration clauses broadly. (Assured Br. at 53-54.) Even if the arbitration clause did not include an exception for Chapter 645 proceedings, Chapter 645 itself makes clear that:

> An arbitration provision of any contract with an insurer that is subject to a delinquency proceeding under subch. III is not enforceable unless the receiver elects to accept arbitration. Only the court that has jurisdiction of the delinquency proceeding may entertain, hear or determine any matter that otherwise would be subject to an arbitration provision.

WIS. STAT. § 645.04(3); *see also Appleton Papers, Inc. v. Home Indem. Co.*, 2000 WI App 104, ¶ 44, 235 Wis. 2d 39, 612 N.W.2d 760 ("A provision that a contract of insurance shall be governed by the law of a given state is void where

. . . [it] would, if given force, evade statutory provisions declaring a rule of public policy[.]")

V. THE REHABILITATION COURT HAD PERSONAL JURISDICTION OVER AGRe

While AGC concedes that the rehabilitation court had personal jurisdiction over it, AGRe contests jurisdiction on three grounds: (1) the Wisconsin jurisdictional statutes do not provide a basis for personal jurisdiction; (2) AGRe is a Bermudan entity that lacks sufficient jurisdictional contacts with Wisconsin; and (3) AGRe was not served with a summons to accompany the motion to enforce the Injunction. (Assured Br. at 20-28.)

As a threshold matter, the prominence of AGRe's jurisdictional arguments in the opening brief is surprising given the marginal practical impact of the issue. The reinsurer for the Northstar policy was AGC (not AGRe), and it was AGC that refused to pay its share of the Northstar settlement until the rehabilitation court ordered it to do so. The only reason AGRe is involved at all is because it joined AGC in suing to compel arbitration in New York, seeking a declaratory ruling regarding its uncertain future obligations, if any, relating to claims and settlements that the Rehabilitator

might fund in part with surplus notes issued by the Segregated Account. (*See* R.619 (Ex. 1), R-App. 31.) As a result, the Rehabilitator's motion to enforce the Injunction was filed against both AGC and AGRe.

The Order finding that AGC violated the Injunction by suing to compel arbitration and refusing to pay in full the amounts it owed has preclusive effect on any future challenges on the same grounds by AGRe. Therefore, it is unclear what mileage AGRe hopes to gain by pursuing its jurisdictional defense.

In any event, the rehabilitation court had personal jurisdiction over AGRe. Specifically, "in the highly regulated area of insurance," and in particular, the context of comprehensive insurer delinquency proceedings, "the minimum contacts requirements of *International Shoe* can be met through a single isolated contract," *Matter of All-Star Ins. Corp.*, 110 Wis. 2d 72, 80, 327 N.W.2d 648, 652 (1983), because that contractual relationship makes it reasonably foreseeable that the obligor will be haled into a court of the insurer's domicile if delinquency proceedings are necessary. *See, e.g.*, *Lawrence v. Ill. Life & Health Guar. Ass'n*, 688

N.E.2d 675, 678-79 (Ill. App. Ct. 1997); *Comm'r of Ins. v. Arcilio*, 561 N.W.2d 412, 422 (Mich. Ct. App. 1997).

These requirements are present here: the dispute arises out of a promise made by AGRe to reinsure a portion of the losses on Ambac's policies; and Ambac has always been domiciled in Wisconsin.

A. The Long-Arm Statute Provides A Substantive Basis For Exercising Personal Jurisdiction Over AGRe

The Wisconsin long-arm statute, WIS. STAT. § 801.05, is "liberally construed in favor of exercising jurisdiction." *Dietrich v. Wis. Patients Comp. Fund*, 169 Wis. 2d 471, 478, 485 N.W.2d 614, 617 (Ct. App. 1992). The long-arm statute authorizes the exercise of jurisdiction under special jurisdictional statutes, WIS. STAT. § 801.05(2), such as WIS. STAT. § 645.04. *See All-Star Ins. Corp.*, 110 Wis. 2d at 77, 327 N.W.2d at 650. Section 645.04, which is also to be "liberally construed" to "exten[d] . . . the scope of personal jurisdiction over debtors of the insurer outside this state,"[10] establishes the rehabilitation court's jurisdiction over "a reinsurer who has at any time written a policy of reinsurance

[10] WIS. STAT. § 645.01(3) & (4)(e).

for an insurer against which a rehabilitation or liquidation order is in effect when the action is commenced." WIS. STAT. § 645.04(5)(b).

Moreover, § 801.05(10) authorizes personal jurisdiction in any dispute that:

> arises out of a promise made anywhere to the plaintiff or some 3rd party by the defendant to insure upon or against the happening of an event and in addition . . . [t]he person insured was a resident of this state when the event out of which the cause of action is claimed to arise occurred.

WIS. STAT. § 801.05(10).

B. The Exercise Of Personal Jurisdiction Over AGRe Satisfies Due Process

In arguing that the exercise of personal jurisdiction over it would violate due process, AGRe ignores the key jurisdictional fact here: AGRe, a company "involved in the highly regulated insurance business," entered into the reinsurance contract at issue here with a Wisconsin-domiciled business subject to this state's regulation, including its delinquency procedures. *All-Star Ins. Corp.*, 110 Wis. 2d at 83, 327 N.W.2d at 654.

As noted in the first sentence of the AGRe Contract, Ambac is a Wisconsin-domiciled insurer, and therefore is

subject to comprehensive regulation by this State. That fact alone suffices to show minimum contacts in a dispute with the regulatory authority regarding that contract, particularly when jurisdiction is exercised by a court overseeing a delinquency proceeding. *All-Star Ins. Corp.*, 110 Wis. 2d at 80, 327 N.W.2d at 652. *See also Lawrence*, 688 N.E.2d at 678-79 ("Because [the policyholder] deliberately reached beyond Illinois' borders and purchased insurance from a California-based insurance company, he purposefully availed himself of the protection of California law regarding insolvent insurers.") (citation omitted); *Arcilio*, 561 N.W.2d at 422 (finding personal jurisdiction to enforce injunction against out-of-state residents solely because they entered into a contract with "an insurance company domiciled in Michigan and subject to Michigan law regarding insurer insolvency, rehabilitation, and liquidation," even though the company was headquartered in Canada).

AGRe attempts to distinguish *All-Star* by noting factual differences relating to the extent of the *insurer*'s activities in Wisconsin. (Assured Br. at 27-28.) But, the insurer in *All-Star* was not the party challenging jurisdiction, and the decision did not rest on how much activity the

Wisconsin-domiciled insurer conducted in this state. Instead, *All-Star* rested on the fact that the parties challenging jurisdiction had contracted with a Wisconsin-domiciled insurer subject to this State's delinquency procedures:

> In conclusion, we believe that it is fair and reasonable to exercise jurisdiction over the defendants. The litigation is connected to the forum because it involves the liquidation of a Wisconsin insurer. The defendants are linked to Wisconsin by virtue of their contracts with All-Star and their actions incident to the contracts. Wisconsin has a manifest interest in providing an efficient and inexpensive forum in which to liquidate domestic insurance companies in order to protect its citizens. Finally, the burden on the defendants to defend in Wisconsin is not unreasonable. Therefore we hold that the defendants are amenable to the jurisdiction of the Wisconsin courts in these actions based on their agency contracts with All-Star.

All-Star Ins. Corp., 110 Wis. 2d at 85, 327 N.W.3d at 654-55.

The touchstone of the due process analysis is not the objecting party's physical presence in the forum state, but, rather, "foreseeability"; that is, whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *Accord Heritage House Restaurants, Inc. v. Cont'l Funding Group, Inc.*, 906 F.2d 276, 283 (7th Cir.

1990). Given that the Insolvency Clause in the AGRe Contract expressly discusses the effect of Chapter 645 proceedings on AGRe's reinsurance obligations, it obviously was foreseeable that AGRe would be haled into the rehabilitation court.

C. The Rehabilitator Is Not Required To Serve AGRe With A Summons On A Motion To Enforce A Preexisting, Properly Noticed Court Order

AGRe argues that personal jurisdiction is lacking because the Rehabilitator's motion to enforce the Injunction was not accompanied by a summons. (Assured Br. at 21-24.)

However, the statutes requiring summonses do so in connection with a separate, discrete "action" against a "defendant," to be followed by an answer and trial. *See, e.g.*, WIS. STAT. § 645.04(5) (describing service of a summons as necessary in an "action brought by the receiver"); WIS. STAT. § 801.09 (requiring summons to direct "defendant" to serve an "answer" within relevant statutory time period); WIS. STAT. § 801.095 (providing summons language pertaining to answers, default judgments, and other traditional indicia of a separate action).

By contrast, the Rehabilitator's motion was not a complaint in a separate or ancillary action against AGRe, but rather a motion to enforce a preexisting order (the Injunction) entered by the rehabilitation court with notice to AGRe.

While such motions may be uncommon in routine civil litigation and therefore not contemplated by the generic rules that govern it, they do arise in the analogous bankruptcy context. As Judge Crabb noted earlier in this proceeding (when it was briefly removed by the IRS), from an administrative case-management standpoint, this proceeding and the Injunction Order are

> [i]n many respects . . . similar to federal bankruptcy proceedings and the automatic stay that goes into effect in bankruptcy. . . . As in bankruptcy, the efficacy of a rehabilitation proceeding is dependent upon the court's ability to stay actions by creditors that will interfere with the court's ability to manage the proceeding.

In re Segregated Acct., 2011 WL 956855, at *9. In bankruptcy, motions to enforce the automatic stay are treated as contested matters initiated by motion, not independent adversary proceedings commenced by a summons and complaint. *Compare* Fed. R. Bankr. P. 9020, 9014(a) *with* Fed. R. Bankr. P. 7001. Such a practice fits with the purposes

of Chapter 645, which emphasize practical flexibility over legal formality, *see* WIS. STAT. ANN. § 645.32 cmt., and seek to "exten[d]," rather than narrow, the "scope of personal jurisdiction over debtors of the insurer outside this state," WIS. STAT. § 645.01(4)(e).

Finally, Assured's discussion of the Rehabilitator's attempt to effect service of a summons and the motion upon AGRe directly—which the Rehabilitator undertook in an attempt to narrow the present dispute—highlights why a summons is not required when a rehabilitation court is asked to enforce its own Injunction. (Assured Br. at 23-24.) For example, Assured asserts that the summons did not have a "file stamp indicating the case number," but the case number for the rehabilitation proceeding has remained the same since it was initiated and served on AGRe in March 2010. Likewise, Assured argues that the summons was "unauthenticated," and did not state "the names and addresses of the parties to the action," but, again, the point of including such information in the summons is to alert someone who is *new to an action* about the initiation of the action.

AGRe is not such an entity. AGRe had full knowledge of the Injunction, its counsel engaged the Rehabilitator's

counsel in discussions about the scope of the Injunction and, on June 21, 2010, AGRe (and AGC) sent the Rehabilitator a draft of their objections to the Injunction, which they intended to file the next day, on the deadline for filing such objections. (R.647 (Ex. B), R-App. 15.)

CONCLUSION

For the reasons stated above, the rehabilitation court's June 14, 2011 Order should be affirmed.

Dated this 12th day of October, 2011.

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CERTIFICATION AS TO FORM AND LENGTH OF BRIEF AND APPENDIX

I certify under Wis. Stat. § 809.19(8)(d) that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c). The brief was produced using proportional serif font with minimum printing resolution of 200 dots per inch, 13 point body text and quotes, 11 point for footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. Consistent with § 809.19(8)(c)1., those portions of the brief described in § 809.19(1)(d), (e) and (f) contain 10,818 words.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19.(2)(a) and that contains, at a minimum: (1) a table of contents; and (2) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that this appeal is not taken from a circuit court order or judgment entered in a judicial review of an administrative decision and no part of the record is required by law to be confidential.

Dated this 12th day of October, 2011.

FOLEY & LARDNER LLP

/s/ Michael B. Van Sicklen

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted a separate electronic copy of this brief and appendix, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

The electronic brief and appendix are identical in content and format to the printed form of the brief and appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

Dated this 12th day of October, 2011.

FOLEY & LARDNER LLP

/s/ Michael B. Van Sicklen

Michael B. Van Sicklen

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2011, I caused three true and correct copies of the Respondents' Response Brief to be served by first-class mail, postage prepaid, upon the persons listed below:

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All other counsel who have entered an appearance in the underlying rehabilitation proceeding have been served today electronically (via email).

Dated this 12th day of October, 2011.

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