COURT OF APPEALS OF WISCONSIN
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,

Interested Party-Respondent,

Dane County Case No. 10 CV 1576

Appeal No. 2011 AP 2708

v.

Aurelius Capital Management LP, Fir Tree Inc., King Street Capital Master Funds, Ltd., King Street Capital, L.P., Monarch Alternative Capital LP, and Stonehill Capital Management LLC (collectively the "RMBS Holders"),

Interested Parties-Petitioners-Appellants,

Federal Home Loan Mortgage Corporation ("Freddie Mac"), and Federal National Mortgage Association ("Fannie Mae"),

Interested Parties-Petitioners-Co-Appellants,

Access To Loans for Learning Student Loan Corporation, Assured Guaranty

Corporation, Bank of America, N.A., Bank of New York Mellon, Bank Insureds, Countrywide Home Loans Servicing L.P., Consumer Asset Protection Company ("CAPCO"), Depfa Bank, Plc., Deutsche Bank National Trust Company, Deutsche Bank Trust Company Americas, Eaton Vance Management, Goldman Sachs & Co., Inc., HSBC Bank USA National Association, LVM Bondholders, Knowledgeworks Foundation, Lloyds TSB Bank plc, Nuveen Asset Management, One State Street LLC., PNC Bank, Restoration Capital Management LLC., Stone Lion Capital Partners LP., Treasurer of the State of Ohio, United States of America, U.S. Bank National Association, Wells Fargo Bank, N.A., Wells Fargo Bank, N.A. as Trustee for the LVM Bondholders, Wells Fargo Bank as Trustee for RMBS Certificate Holders, Wilmington Trust Company, and Wilmington Trust FSB,

Interested Parties.

MEMORANDUM REGARDING FINALITY OF NOVEMBER 10, 2011 ORDER ENTERED BY THE WISCONSIN CIRCUIT COURT FOR DANE COUNTY APPROVING CERTAIN AGREEMENTS

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Aurelius Capital Management, LP, Fir Tree, Inc., King Street Capital, L.P., King Street Capital Master Fund, Ltd., Monarch Alternative Capital LP, and Stonehill Capital Management LLC (collectively, the "RMBS Holders"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal National Mortgage Association ("Fannie Mae," and together with the RMBS Holders and Freddie Mac, the "Appellants"), by their attorneys, submit this memorandum in response to this Court's December 28, 2011 Order directing Appellants to address whether the order (the "Order") entered on November 10, 2011 is final and appealable. The Order granted the Motion to Authorize the Rehabilitator and the Segregated Account to Proceed With Specified Agreements With Ambac Assurance Corporation and Ambac Financial Group, Inc. and its Official Committee of Unsecured Creditors (the "Motion"), filed by the Commissioner of Insurance of the State of Wisconsin, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation (the "Rehabilitator").

For the reasons set forth herein, the Order is a final order appealable as of right pursuant to Wis. Stat. § 808.03(1).

BACKGROUND

Rehabilitation Proceedings. On March 24, 2010, the Wisconsin Office of the Commissioner of Insurance ("OCI") petitioned the Circuit Court for entry of an Order of Rehabilitation for the Segregated Account of Ambac Assurance Corporation ("Ambac"). On October 8, 2010, the Wisconsin Commissioner of Insurance, as rehabilitator of the Segregated Account, filed a proposed Plan of Rehabilitation for the Segregated Account. On January 24, 2011, the Circuit Court issued its Decision and Final Order Confirming the Rehabilitator's Plan of Rehabilitation, with Findings of Fact and Conclusions of Law (the "Confirmation Order"). Interested parties, including the Appellants, timely filed Notices of Appeal of the Confirmation Order on or before March 10, 2011. Those appeals remain pending. The Circuit Court has continued to decide certain post-judgment matters and special proceedings, including the Order here under review.

AFG Bankruptcy Proceedings. On November 8, 2010, Ambac Financial Group, Inc. ("AFG") (the parent corporation of Ambac) filed a petition for bankruptcy relief in the Bankruptcy Court for the United States District Court for the Southern District of New York. On September 21,

2011, AFG filed its First Amended Plan of Reorganization. On the same day, AFG entered into an agreement, titled the Mediation Agreement, with the Rehabilitator, the Segregated Account, Ambac, OCI, and the Official Committee of Unsecured Creditors of AFG (together with AFG, the "Parties"). Pursuant to the Mediation Agreement, the Parties agreed that certain of them would enter into three related contracts: an Expense Sharing and Cost Allocation Agreement, an Amended and Restated Tax Sharing Agreement, and Amendment No. 1 to Cooperation Agreement (together with the Mediation Agreement, the "AFG Agreements"). AFG filed these related contracts in its Chapter 11 case on September 27, 2011 and October 4, 2011. Copies of these contracts and the Mediation Agreement were attached to the Rehabilitator's Motion. (*See* App.1-171).[1]

The AFG Agreements direct Ambac to pay its parent, AFG, millions of dollars that could otherwise be used to satisfy higher-priority policy claims. The AFG Agreements provide that Ambac will pay AFG: (1) potentially millions of dollars according to a "tolling schedule," for use

[1] References to "App. __" refer to the pages in the Appendix that is filed with this Memorandum. This Appendix is being provided as a convenience to the Court, and contains the same materials that were included in the Appendix filed in support of the November 25, 2011 Petition for Leave to Appeal the Order. All parties are referred to that Appendix for the referenced materials.

of net operating losses (*see* Mediation Agreement at ¶¶ 2.e, 2.f and Appendix A, App.16-17, 32); (2) up to $5 million for AFG's operating expenses for each of the next five years (*see id.* at ¶ 3.a, App.21); (3) 85% of litigation fees and expenses incurred by AFG in a dispute with the IRS (subject to a $2 million credit) (*see id.* at ¶ 4, App.21-22); (4) a $30 million "Cash Grant" (*see id.* at ¶ 6, App.24-25); and (5) $350 million of junior surplus notes directly from the Segregated Account (*see id.* at ¶ 8, App.25). In addition, the AFG Agreements require Ambac to transfer to AFG "more than an insignificant amount of an active trade or business," thus conveying to the parent assets of the insurance company that could otherwise be used to benefit Ambac and its claimants, subject to OCI's discretionary approval. (*See id.* ¶ 10, App.26.) The AFG Agreements thus require Ambac to pay its bankrupt parent at least tens of millions of dollars.

Post-Rehabilitation Confirmation Proceedings. The Mediation Agreement and the related contracts were subject to several conditions, including the approval of the Circuit Court. On October 21, 2011, the Rehabilitator filed his Motion with the Circuit Court, seeking approval of the AFG Agreements. (App.1-12.) The RMBS Holders timely filed an objection to the Motion (the "Objection"). (App.174-178.) Freddie Mac,

Fannie Mae, and four Eaton Vance entities (other insureds) joined the Objection. (App.179-184.)

On November 10, 2011, the Circuit Court held a hearing on the Motion. The Circuit Court granted the Motion and entered the Order. (App.185-186.)

The Circuit Court's Order finally approved the AFG Agreements. Although there may be further post-judgment or special proceedings in connection with the Segregated Account rehabilitation, no additional proceedings are contemplated regarding the AFG Agreements.

Appellate Court Proceedings. On November 25, 2011, Appellants filed a Petition for Leave to Appeal the Order. Appellants filed Notices of Appeal of the Order on November 28, 30, and December 5, 2011. In their Petition for Leave to Appeal, Appellants advised the Court that they believed the Order was appealable as of right, but in the event that the Court concluded it was not, the Court could review it pursuant to the Petition for Leave to Appeal. On December 16, 2011, this Court denied the petition. On December 28, 2011, this Court entered an order directing Appellants and respondents to file memoranda regarding the finality of the Order. This filing is made pursuant to that order of December 28, 2011.

ARGUMENT

I. The Order Disposes Of The Litigation As To Ambac Financial Group And Its Creditors' Committee.

The Order entered by the Wisconsin Circuit Court approving the AFG Agreements is a final order and is appealable as of right under Wis. Stat. § 808.03. A judgment or order is final for purposes of appeal if it "disposes of the entire matter in litigation as to one or more of the parties." Wis. Stat. § 808.03(1).

In this case, disputes existed among the Parties with respect to their rights and claims to approximately $708 million of federal income tax refunds and billions of dollars of past and future net operating losses, among other things. The AFG Agreements memorialized the Parties' resolution of their disputes and provided unconditional, full, and complete releases between AFG and the Creditors' Committee, on the one hand, and OCI, the Rehabilitator, Ambac, and the Segregated Account, on the other hand. (*See* Mediation Agreement at ¶ 9, App.25-26.) The Parties to those Agreements resolved their disputes to the detriment of Ambac policyholders, and over their timely objection. The Parties required approval of the AFG Agreements by the Wisconsin Circuit Court because Wis. Stat. § 645.33(2) requires court approval for the Rehabilitator's

actions. The Circuit Court's Order approved the AFG Agreements and disposed of the claims among the Parties.

All that now remains is for the AFG Agreements to be implemented. The AFG Agreements direct and authorize Ambac to pay its shareholder AFG millions of dollars, while Appellants' and other policyholders' loss claims, which hold a higher priority under Wis. Stat. § 645.68, remain unpaid. No further proceedings will be held in the Circuit Court to address the AFG Agreements, as the Order has disposed of the entire matter. Unless reviewed at this time, there will be no further opportunity to review the Order, and the assets of the estate will be transferred to AFG to the detriment of Ambac claimants holding higher priority claims.[2]

II. Multiple Final Orders May Be Entered In Insurance Delinquency Proceedings.

Very few appellate cases interpret Chapter 645 of the Wisconsin Statutes, the "Insurers Rehabilitation and Liquidation Act" (the "Act"). The Chapter sets forth a statutory scheme whereby the Wisconsin Commissioner of Insurance can engage in either summary or formal

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[2] The Order declares that payments to Ambac's shareholder will be given the priority of administrative expense claims – that is, the highest priority, ahead of policyholder loss claims – in any future delinquency proceeding involving Ambac. Appellants seek review of that Order to protect their rights against this unlawful action.

proceedings to achieve the purposes of the Act. Formal proceedings can take the form of either rehabilitation or liquidation proceedings (Wis. Stat. § 645.31-77). Such proceedings do not take the form of traditional civil actions, though Wisconsin's Civil Procedure rules (Wis. Stat. Chs. 801-847), including rules regarding appeals (Wis. Stat. Ch. 808) and appellate procedure (Wis. Stat. Ch. 809), apply. *See* Wis. Stat. § 801.01.

Despite the lack of precedent regarding insurer delinquency proceedings, cases in analogous contexts provide a basis for this Court to conclude that multiple final orders, each appealable as of right, may be entered in rehabilitation proceedings. Thus, although the Circuit Court has already entered a final order confirming the rehabilitation plan that is under review in this Court, its later orders on post-judgment matters or in special proceedings are also subject to appellate review.

First, this proceeding may be compared to probate proceedings. The Wisconsin Supreme Court has held that "probate of an estate is a series of special proceedings, which are terminated with a series of orders that are final for the purposes of an appeal." *In re Estate of Sanders*, 2008 WI 63, ¶ 26, 310 Wis.2d 175, 750 N.W.2d 806 (citing *Estate of Goldstein v. Goldstein*, 91 Wis.2d 803, 810, 284 N.W.2d 88 (1979)). Each "special

proceeding" within a single probate of an estate may dispose of a discrete issue relating to that probate, *i.e.*, an entire "matter in litigation," with respect to certain parties. *Id.* at ¶ 28; *see also* Wis. Stat. § 808.03(1). The Supreme Court explained that "probate can result in a series of potentially final orders," and "[a] final order in a special proceeding, … is one which determines and disposes finally of the proceeding [*i.e.*, it disposes of a discrete "matter in litigation"]– one which, so long as it stands, precludes any further steps therein." *Id.* at ¶¶ 26-27 (citations omitted); *Olson v. Dunbar*, 149 Wis. 2d 213, 440 N.W.2d 792, 793 (Ct. App. 1989) (finding that the disposition of a petition addressing a discrete issue "within the confines of the larger probate proceeding" satisfies the "statutory requirement of disposing of the 'entire matter in litigation as to one or more of the parties'. . .").

Similar to probate cases, insurance delinquency proceedings can be viewed as composed of multiple special proceedings – something this Court recognized in its August 2, 2011 Order in Appeal No. 2011 AP 1486, *Ted Nickel v. Assured Guaranty Re Ltd.*, arising from these same rehabilitation proceedings. In that appeal, the appellant challenged the Circuit Court's order enforcing a prior injunction and construing the appellant's

reinsurance obligation. This Court stated "that the order for which review is sought is likely a final and appealable document because it appears to resolve a special proceeding within the context of the rehabilitation proceeding." *Nickel v. Assured Guaranty Re Ltd.*, Order at 5, (August 2, 2011, Appeal No. 2011 AP 1486). In this instance, the Order likewise resolves a discrete "matter in litigation" as part of the series of special proceedings that comprise this rehabilitation. The Order approves the AFG Agreements which finally and fully resolve the disputes among the Parties, yet adversely affected the Appellants, and there is no expectation that any further orders will be entered in the Circuit Court regarding those disputes. Were it otherwise, post-judgment orders disposing of discrete matters would evade appellate review.

Second, federal bankruptcy law, which is often instructive when a court is adjudicating state insurer delinquency proceedings,[3] supports treating the Order as final. For purposes of finality, in federal bankruptcy

[3] Federal bankruptcy law is frequently relied on by state courts interpreting state statutes governing insurance rehabilitation and dissolution proceedings. *See, e.g.*, *Pine Top Ins. Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 969 F.2d 321, 324 (7th Cir. 1992) (looking to bankruptcy law regarding voidable preference doctrine is customary when interpreting a voidable preference dispute under state insurance law); *Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1203 (Pa. 2009) (using bankruptcy law for guidance in interpreting ambiguous state insurance insolvency law is commonly accepted); *see also* Wis. Stat. Ann. ch. 645 cmt. c. 89, § 17 (1967) ("The influence of the Federal Bankruptcy Act [11 U.S.C.A.] is quite apparent in the sections dealing with liquidation.")

cases, courts have viewed contested matters and adversary proceedings as special proceedings and the relevant "judicial unit." *See In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) (discussing history and policy behind flexible finality in bankruptcy proceedings); *see also* 1-5 Collier Bankruptcy Manual 5.08 (3d ed. rev.) (discussing appeals of final and interlocutory orders of bankruptcy courts). Court orders approving settlements pursuant to Federal Rule of Bankruptcy Procedure 9019 are just one such example of orders in special proceedings that are final orders appealable as of right. *See Ades-Berg Investors v. Breeden (In re The Bennett Funding Group, Inc.)*, 439 F.3d 155, 164 (2d Cir. 2006) (holding that "[o]nce the Bankruptcy Court issued the 9019 Order there was simply nothing further to be done in the Bankruptcy Court, and the case was ripe for appeal despite the pending approvals of other courts.").

In this case, there are no further proceedings to be held in the Circuit Court regarding the collection of agreements approved in the Order. There is nothing further to be done in the Circuit Court to decide the disputes between the Parties. The Order approves the AFG Agreements which release any and all claims among the Parties. Moreover, the Mediation Agreement itself contemplates and requires that the Order approving it is a

final, non-appealable order before the agreements and related transactions can close. (*See* Mediation Agreement at ¶ 11, App.26.)

III. The Appellate Court Should Interpret Its Jurisdiction To Preserve The Right Of Appeal.

We recognize that in *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶4, 299 Wis. 2d 723, 727, 728 N.W.2d 670, 673, the Wisconsin Supreme Court stated that, commencing September 1, 2007, trial court documents are required to contain a statement on its face that it is final for the purpose of appeal under Wis. Stat. § 808.03(1). The purpose of this direction is to provide clarity to litigants as to the whether a judgment or order is final. However, the lack of such a statement does not prevent a conclusion that an order is final and appealable as of right – the decisive issue remains whether the order disposes of the entire matter in litigation as to one or more of the parties and "appellate courts should liberally construe ambiguities to preserve the right of appeal." *Id.* ¶¶ 4, 46; *see also Black v. City of Kenosha Housing Authority*, 2010 WI App 19, ¶ 3, 323 Wis. 2d 279, 779 N.W.2d 725 (unpublished) (rejecting an absolute rule that "an appeal cannot be filed from a judgment or order that disposes of an entire matter in litigation but does not include the statement that it is final for purposes of appeal.").

Here, if the Court decides that the Order is not final for purposes of Wis. Stat. § 808.03, the Appellants will lose their right to appeal the Circuit Court's action. If the Order is not deemed final, there is no expected future order with respect to the disputes resolved by the AFG Agreements that would generate a further final order that could ever be appealed. Declining to find jurisdiction at this time would preclude review and insulate the Circuit Court's improper action from review.

CONCLUSION

The Appellants respectfully submit that for the reasons set forth herein, the Circuit Court's November 10, 2011 Order is final and appealable as of right under Wis. Stat. § 808.03.

Dated this 11th day of January, 2012.

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