COURT OF APPEALS OF WISCONSIN
DISTRICT IV

In the Matter of the Rehabilitation of:
Segregated Account of
Ambac Assurance Corporation,

Ted Nickel, the Wisconsin Commissioner of Insurance,
and the Office of the Commissioner of Insurance
Petitioners-Respondents,

v.

Appeal No. 2011 AP 2708
(Dane County Case No. 2010 CV 1576)

Ambac Assurance Corporation,
Respondent.

Aurelius Capital Management LP,
Fir Tree Inc, King Street Capital Master Funds, Ltd.,
King Street Capital, L.P.,
Monarch Alternative Capital LP,
Stonehill Capital Management LLC,
Federal Home Loan Mortgage Corporation, and
Federal National Mortgage Association,
Interested Parties-Co-Appellants.

COMMISSIONER'S RESPONSE REGARDING THE COURT'S INQUIRY ABOUT ITS APPELLATE JURISDICTION OVER THIS APPEAL

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INTRODUCTION

Initially, Appellants jointly petitioned this Court on November 25, 2011 for permission to appeal the trial court's November 10, 2011 order (the "Order") under Wis. Stat. § 808.03(2) as a non-final interlocutory order. They thereafter sought in the alternative to pursue the appeal as a matter of right under Wis. Stat. § 808.03(1) (by separate notices of appeal dated November 28, November 30 and December 5). By order dated December 16, 2011, this Court sua sponte denied the Appellants' joint petition for leave to pursue the appeal on a permissive basis.

In its next order, dated December 28, 2011, this Court questioned whether it possesses appellate jurisdiction over the non-permissive appeals because the trial court's Order does not contain language indicating finality and did not appear to this Court to be final under Wis. Stat. § 808.03(1). This Court directed the parties to brief the issue.

The respondent Commissioner of Insurance for the State of Wisconsin (the "Commissioner"), as the court-appointed Rehabilitator for the Segregated Account of Ambac Assurance Corporation, respectfully submits that the non-permissive appeals should be dismissed for two related

reasons. First, the trial court's order is not final because it does not "dispose[ ] of the entire matter in litigation as to one or more of the [Appellants]." Wis. Stat. § 808.03(1). The trial court's order merely authorized the Rehabilitator and the Segregated Account to begin performing several executory contracts. Those contracts contain an express reservation of jurisdiction for the rehabilitation court to address any future disputes between the parties to those contracts.

Second, Appellants lack standing to pursue the appeal because they are not parties in the trial court proceeding and are not parties to any of the executory contracts approved by the rehabilitation court's Order. Indeed, they are not even policyholders or direct claimants in the rehabilitation, and are not directly aggrieved by the Order.

PROCEDURAL POSTURE AND FACTS

The subject appeal arises from the largest insurer rehabilitation proceeding in Wisconsin history, commenced by the Commissioner on March 24, 2010. The only formal parties to the proceeding are: (1) the Commissioner, as the petitioner; and (2) the Segregated Account of Ambac Assurance Corporation, the insurer being rehabilitated, as the respondent. Under Wis. Stat. ch. 645, the

Commissioner is responsible for administering the rehabilitation of the Segregated Account and for dealing with the disparate interests of the many thousands of trustees, policyholders, contractual counterparties, beneficial holders of bonds and notes and others asserting any direct or indirect interest pertaining to the Segregated Account or the rehabilitation.

I. APPELLANTS ARE NOT PARTIES, POLICYHOLDERS OR EVEN DIRECT CREDITORS

Appellants' memorandum contains a telling omission: namely, nowhere does it acknowledge the attenuated nature of their interest as to the Segregated Account or the rehabilitation. The so-called "RMBS Holders" are hedge funds, which specialize in purchasing distressed bonds or notes. As reflected in the testimony at the confirmation hearing, these funds engage in "acquiring distressed debt and trying—attempting to maximize its value through various means, including litigation." (R. 563 at 125:21-25.)

Appellants purchased their bonds from various trusts and securitized financing transactions protected in part by financial guaranty policies in the Segregated Account.

The relationship between the bondholders and the trusts are governed by trust indentures. The trusts and their respective trustees, generally are the policyholders with the exclusive right to represent and enforce the rights pursuant to the financial guaranty policies.[1]

Following the week-long evidentiary hearings on confirmation of the Commissioner's Plan of Rehabilitation in November 2010, the trial court made the following Findings of Fact about the RMBS Holders:

Findings of Fact

> 146. Throughout this rehabilitation proceeding, a group of six entities named Aurelius Capital Management LP, Fir Tree Inc., King Street Capital Master Fund, Ltd., King Street Capital, L.P., Monarch Alternative Capital LP and Stonehill Capital Management LLC have referred to themselves collectively as the "RMBS Policyholders." However, the testimony at the Hearing demonstrated that

[1] *See, e.g.,* the position asserted by Wells Fargo Bank, N.A., as trustee, describing how, under the trust indentures, it is "vested with the sole authority to represent and to enforce the rights of the beneficiary bondholders." (R. 17 at 3 n.1.) None of the Appellants have ever disclosed to the Commissioner the specifics of their holdings or made any showing as to how under the respective trust indentures governing their bonds they purport to have any direct interest respecting the Segregated Account or right to assert legal positions in the proceeding. They are beneficial holders of bond interests, analogous to individual shareholders in a large corporation where the corporation, not the individual shareholders, has the standing to pursue monetary claims against third parties such as the Segregated Account.

> none of these entities are "policyholders" of Ambac or the Segregated Account. Their description of themselves as "policyholders" in this proceeding is misleading and inaccurate.
>
> 147. While the six entities identified in the prior finding have offered to provide the Court information under seal regarding their particular holdings (*see generally* 11/15/10 Statements of Counsel at 116-122), they have never offered or provided proof to the Rehabilitator or this Court as to their standing to assert legal positions in regard to any particular RMBS trust(s), despite repeated inquiries by the Rehabilitator. They have declined to identify the provisions of any particular RMBS trust indenture pursuant to which they claim to have standing to assert positions regarding the interests of a policyholder in this proceeding.

The rehabilitation court also made the following Conclusion of Law concerning their lack of standing:

> 9. The group consisting of Aurelius Capital Management LP, Fir Tree Inc., King Street Capital Master Fund, Ltd., King Street Capital, L.P., Monarch Alternative Capital LP and Stonehill Capital Management LLC, who have been referred to themselves in this proceeding as the "RMBS Policyholders," are not policyholders in this proceeding. It is further concluded that those entities have not demonstrated the standing to assert positions or arguments as policyholders in this proceeding. They may be heard as parties-in-interest, but not as policyholders.

(R. 556 at 51, 60.)

Although the above Findings and Conclusion do not directly reference Appellants Federal Home Loan Mortgage Corporation or Federal National Mortgage Association, they too are holders of bonds or other beneficial interests in securitized trusts and are not parties to the rehabilitation proceeding or policyholders. Like the RMBS Holders, they have never attempted to prove standing under specified trust indentures to pursue claims directly in their own right against the Segregated Account.

Notwithstanding the undisputed evidence of record in the rehabilitation proceeding and the trial court's well-supported Findings quoted above, Appellants continue to mischaracterize themselves as "policyholders" of the Segregated Account.[2]

II. NATURE OF THE ORDER ON APPEAL

Appellants' description of the trial court's order also is inaccurate. As reflected in the Commissioner's motion, which gave rise to the Order being appealed, the Order authorized the Commissioner and the Segregated

[2] Appellants' memorandum refers to: "Appellants' and other policyholders' loss claims" (at 7); and the trial court's order was entered "to the detriment of Ambac policyholders, and over their timely objection." (*Id.* at 6; Appellants were the only parties to object.)

Account "to proceed in accordance with several related agreements among the Rehabilitator, the Wisconsin Office of the Commissioner of Insurance ("OCI"), the Segregated Account, Ambac, Ambac's parent company Ambac Financial Group, Inc. ("AFG") and the Official Committee of Unsecured Creditors of AFG (the "Creditors Committee") (collectively the "Parties")." (A-App. 2.) The four contracts are an Expense Sharing and Allocation Agreement, an Amended and Restated Tax Sharing Agreement, Amendment No. 1 to Cooperation Agreement and a Mediation Agreement (copies of each were attached to the Commissioner's Motion (A-App. 2 and Tabs A-D). The agreements are "executory" in the sense that they call for future performance by the signatory parties.[3] The material provisions of those agreements are detailed in the Commissioner's Motion. (A-App. 7-9.) The rehabilitation court retained continuing jurisdiction to address any disputes between the parties to the contracts. (*Id.* at 9.)

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[3] Professor Countryman's classic definition of an executory contract is one which requires future performance on each side by the signatory parties. Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973), cited with approval in H.R. Rep. No. 95-595, at 347 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963.

None of the Appellants are parties to the contracts. Additionally, the order does not finally dispose of the interests of either Ambac or its sole shareholder, AFG, in the Segregated Account rehabilitation proceeding. The general account of Ambac continues to have extensive involvement respecting the rehabilitation and remains subject to the Secured Note and Reinsurance Agreement implemented by the Commissioner to fund the Commissioner's confirmed Rehabilitation Plan for the Segregated Account. Similarly, AFG remains the sole shareholder of Ambac and continues to hold its interests as such under Wis. Stat. § 645.68(11).

The contracts which are the subject of the rehabilitation court's order reflect on their face the continuing nature of the relationships between the Segregated Account and its corporate affiliates, Ambac and AFG. The agreements pertain to their continuing interests relative to taxes, overhead costs and corporate cooperation.[4]

[4] Appellants did not seek a stay of the trial court's authorization in the Order for the Commissioner and Segregated Account to commence performance of the contracts. The parties to those contracts have relied on the absence of a stay to commence performance.

DISCUSSION

I. LEGAL STANDARD FOR "FINALITY"

A circuit court order is appealable as of right only if it is "final." Wis. Stat. § 808.03(1). An order or judgment is "final" only when it "disposes of the entire matter in litigation as to one or more of the parties." *Id.* Contrary to Appellants' suggestion, an order is appealable by right under § 808.03(1) only by an actual "party" in the litigation as to whom the order disposes of the entire case. The test is not satisfied merely because the order arguably disposes of the litigation as to some other entity which is not appealing.

In order to "dispose" of the entire matter in litigation, the "circuit court's decision must contain 'an explicit statement either dismissing the entire matter in litigation as to one or more parties or adjudging the entire matter in litigation as to one or more parties.'" *Kenosha Prof'l Firefighters v. City of Kenosha*, 2009 WI 52, ¶ 23, 317

Wis. 2d 628, 766 N.W.2d 577 (quoting *Tyler v. RiverBank*, 2007 WI 33, ¶ 3, 229 Wis. 2d 751, 728 N.W.2d 686).[5] Generally, where, as here, the circuit court's order does not include language *conclusively disposing of the claims,* it is not "final." *Tyler*, 2007 WI 33, ¶¶ 19, 22; *see also Kenosha Prof'l Firefighters*, 2009 WI 52, ¶ 23 n.15.

"Finality is central to the jurisdiction of the Court of Appeals and to the reorganized court system." Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, ch. 4 at 4 (5th Ed. 2011). As noted elsewhere in that treatise:

> The Wisconsin appellate courts strictly adhere to the concept of finality to carry out legislative policies promoting the integrity of circuit court proceedings, to avoid interruption and to prevent piecemeal appeals, and to reduce the burden on the court of appeals by limiting the number of appeals to one appeal per case. *Wick v. Mueller*, 105 Wis. 2d 191, 200, 313 N.W.2d 799 (1982); *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 395-96, 294 N.W.2d 15 (1980).

Id.

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[5] A matter is not disposed of for purposes of making the decision "final" simply because a circuit court issues a decision analyzing legal issues, resolving questions of law, and deciding the substantive issues presented. *Kenosha Prof'l Firefighters*, 2009 WI 52, ¶ 23 (quoting *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶ 34, 299 Wis. 2d 723, 728 N.W. 2d 670).

II. THE TRIAL COURT'S ORDER DOES NOT SATISFY THE TEST FOR FINALITY

The rehabilitation court's Order is not final as to either the Commissioner or the Segregated Account, the only two formal parties in the proceeding. Nor is it final as to any of the parties to the contracts which the Order authorized the Commissioner and Segregated Account to perform. Finally, the Order does not directly affect—much less "dispose of"—Appellants' attenuated interests as bondholders in trusts whose trustees, acting as policyholders, might in the future submit claims for treatment in the rehabilitation.

The entities pursuing the present appeal have been prior appellants in this proceeding. *See* 2010AP1291 and 2011AP561. Interestingly, each time they have appealed, the Appellants have represented that the rehabilitation court order they were then appealing purportedly disposed of the entire rehabilitation as to them and was therefore final under § 808.03(1). They attempted in the past to interject themselves into the proceeding by coupling their objections to the Commissioner's actions with motions to intervene, which have been denied. (R. 127 at 17 (¶ 9); R. 397 at 9, 20-21; R. 509.)

Even if, *arguendo*, Appellants were in contractual privity with the Segregated Account, and were therefore direct creditors in the rehabilitation, the Order regarding the executory contracts would, at most, potentially affect the amount of resources available to fund claims in the rehabilitation. As submitted by the Commissioner in his Motion and approved by the court in the Order on appeal, the Commissioner believes that the contracts will *increase* the amount of assets available to fund claims over the multi-year continued term of the financial guaranty policies in the Segregated Account.

Neither the Order nor the contracts determine the amount or lawfulness of any claims held by any of the Appellants. Tellingly, Appellants do not suggest that the Order fully determines or disposes of any of their claims (to the extent they prove they have any in the future) respecting the Segregated Account.[6] Given that the trial court's

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[6] As noted above, *supra* at 11, the hook that these entities used in the past to seek review of non-final decisions was to include requests for intervention in their objections to the relief being sought by the Commissioner. In regard to the present Order being appealed, however, none of the Appellants sought to intervene when they objected to the relief sought by the Commissioner below. Thus, in comparison to some of the past appeals taken by these Appellants where they attempted to manufacture finality by virtue of the trial court's denial of their
(footnote continued on following page)

November 10, 2011 Order does not address, much less dispose of their bondholder interests, the Commissioner expects that they will continue to participate below.

The Commissioner agrees with Appellants that insurer rehabilitations, like probate matters, may consist of multiple special proceedings. But it is self-evident that not every order in an action or special proceeding necessarily terminates the matter in litigation as to the parties (or, in this case, non-parties). Wis. Stat. § 808.03(1).

Such is the case here. The rehabilitation court's authorization for the Commissioner and Segregated Account to perform under the executory contracts attached to the Mediation Agreement adjusted, but did not finally dispose of all matters between Ambac, AFG and the Segregated Account. Appellants, who are strangers to those contracts, speculate that the money that might be paid to Ambac or AFG in the future under the contracts, net of the tax savings and other benefits the Segregated Account will receive pursuant to the contracts, could diminish the money available in future

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motion to intervene, intervention was not sought this time and there is nothing final about the trial court's Order as to these Appellants.

years to pay their claims. (Appellants' Mem. at 6-7.) Under Appellants' reasoning, every potential claimant, or, as in their situation, every holder of stock, notes or bonds in a claimant, could serially appeal any claim ever paid to any other claimant, because each payment (or, as here, each agreement to potentially pay under specified conditions in the future) would potentially result in money leaving the Segregated Account that is not being paid to them.

Appellants cite to no precedent permitting a non-party to take multiple appeals under the circumstances at issue here. The rehabilitation court's Order does not directly impact Appellants in any way: it does not approve or disapprove a transaction to which they were parties, *see In re Estate of Olson*, 149 Wis. 2d 213, 217, 440 N.W.2d 792, 793 (Ct. App. 1989) (cited in Appellants' Br. at 9); it does not resolve "all claims brought and made" by Appellants in the proceeding, *see, e.g.*, *In re Estate of Sanders*, 2008 WI 63, ¶¶ 40-41, 310 Wis. 2d 175, 750 N.W.2d 806 (cited in Appellants' Mem. at 8); and it does not establish a plan of distribution for Appellants, *cf. In re Goldstein's Estate*, 91 Wis. 2d 803, 810, 284 N.W.2d 88, 92 (1979) (order finally determining will contest an appealable special proceeding)

(cited in Appellants' Mem. at 8). It merely approves a transaction to which Appellants were not parties, without more.

The present situation is distinguishable from the rehabilitation court order being appealed by Assured Guaranty in Appeal No. 2011-AP-1486 because that order dealt directly and solely with the Assured reinsurance contract and disposed of all issues pertaining to that contract in the rehabilitation. In contrast to the present situation, that order fully disposed of Assured's rights in the rehabilitation pertaining to its reinsurance contract with the Segregated Account.

III. APPELLANTS LACK STANDING

Although the 1977 reorganization of the Wisconsin appellate court system eliminated former Wis. Stat. § 817.10 (1975), which provided that judgments or orders were only reviewable by a "party aggrieved," subsequent case law has made clear that a person or entity needs to be directly aggrieved by a judgment or order to be able to appeal it. *See, e.g., Mut. Serv. Cas. Ins. Co. v. Koenigs*, 110 Wis. 2d 522, 329 N.W.2d 157 (1983). *Accord, Appellate Practice and Procedure in Wisconsin, supra,*

ch. 6 at 2. For a party to be "aggrieved," the order or judgment must bear directly and injuriously upon the interests of the appellant. *Id.* The appellant must be adversely affected in some direct, appreciable manner. *Tierney v. Lacenski*, 114 Wis. 2d 298, 302, 338 N.W.2d 522, 524 (Ct. App. 1983). *See also La Crosse Trust Co. v. Bluske*, 99 Wis. 2d 427, 428-29, 299 N.W.2d 302, 303 (Ct. App. 1980).

Appellants are not directly, appreciably injured by the Order. As noted above, they are not parties in the rehabilitation proceeding or even parties to the contracts approved by the trial court. Indeed, they are not even direct creditors. While the trial court has patiently permitted any and all persons and entities to be heard, that does not mean that each and every one of the literally thousands of persons and entities claiming an interest respecting the rehabilitation should have standing to actively litigate in the proceeding and pursue serial appeals of their denied objections as to each interim step of relief sought by the Commissioner.

The purpose of Chapter 645 is "the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors." Wis. Stat. § 645.01(4). The

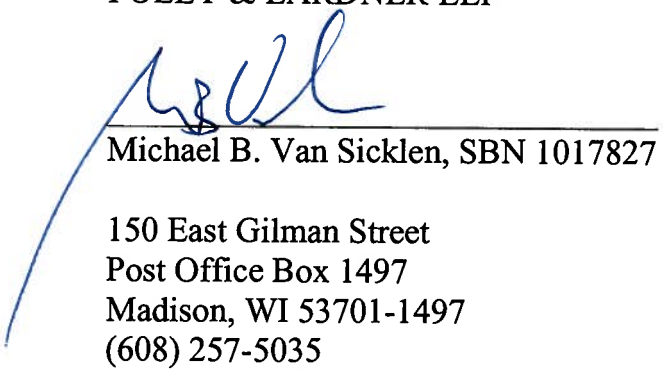
legislative history underlying Chapter 645 reflects the legislative desire that the Commissioner pursue rehabilitations in a prompt, efficient manner, perceiving rehabilitation "as a management rather than as a legal task." Wis. Stat. Ann. § 645.32 cmt. That legislative purpose would be frustrated if every bondholder, noteholder or shareholder of an insured or other party claiming an interest in an insurance rehabilitation proceeding had the right to appeal every order entered in the proceedings as a matter of right under § 808.03(1). The cascade of resulting appeals would paralyze the rehabilitation and undermine the very purpose of Chapter 645, which is to provide OCI and the Rehabilitator with the discretion and tools needed to take an independent look at a troubled insurer and fashion a rehabilitation plan, consistent with Wis. Stat. § 601.01(2), that is fair and equitable and in the best interests of all policyholders, creditors and the public generally.

CONCLUSION

The appeals should be dismissed because the Rehabilitation Court's November 10, 2011 Order was not "final" and appealable by right by these Appellants under Wis. Stat. § 808.03(1).

Dated this 25th day of January, 2012.

FOLEY & LARDNER LLP



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