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July 20, 2012

HAND DELIVERED
Diane M. Fremgen, Clerk
Wisconsin Court of Appeals
110 East Main Street, Suite 215
Madison, WI 53703

Re: In the Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation
Appeal No. 2012AP1332LV

Dear Ms. Fremgen:

Enclosed for filing are five copies of The Office of the Commissioner of Insurance and Commissioner Theodore K. Nickel's Motion to Dismiss Fannie Mae's Appeal and Memorandum in Support of the motion.

By copy of this letter all parties of record are receiving the Response by e-mail. Counsel of record for Fannie Mae are also being served with a copy of the Response by first-class mail.

Thank you.

Sincerely,

COYNE, SCHULTZ, BECKER & BAUER, S.C.

Karen M. Gallagher

KMG:ne
Enclosures

cc: Attorney Rodney W. Carter (w/enclosures, via e-mail and first-class mail)
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COURT OF APPEALS OF WISCONSIN
DISTRICT IV
Appeal No. 2012AP1332-LV
Dane County Case No. 2010CV1576

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 Corporation,

Interested Party-Respondent,

v.

Federal National Mortgage Association (Fannie Mae),

Interested Party-Petitioner-Appellant,

Wells Fargo Bank/Trustee of Bondholders, Aurelius Capital Management LP, Fir Tree Inc., King Street Capital Management LP, Monarch Alternative Capital LP, Stonehill Capital Management LLC, RMBS Policyholders, Eaton Vance Management, Nuveen Asset Management, Restoration Capital Management LLC, Stone Lion Capital Partners LP, LVM Bondholders, The Bank of New York Mellon, Federal Home Loan Mortgage Company (Freddie Mac), Wells Fargo Bank/Trustee of RMBS Certificate Holders, HSBC Bank, USA, National Association, Deutsche Bank National Trust Company, Deutsche Bank Trust Company Americas, US Bank National Association, Bank Insureds, Bank of America NA, Depfa Bank, PLC, Assured Guaranty Corporation and Goldman Sachs & Co., Inc., Knowledgeworks Foundation and Treasurer of the State of Ohio, One State Street LLC, PNC Bank, NA, All Student Loan and Lloyds TSB Bank PLC, Customer Asset Protection Company, Wilmington Trust Company and Wilmington Trust FSB, GCM Opportunity Fund LP, Glenview Capital Partners LP, Glenview Institutional Partners LP, Glenview Capital Masters Fund Ltd., Glenview Capital Opportunity Fund LP, and Glenview Offshore Opportunity Master Fund Ltd.,

Interested Parties.

THE OFFICE OF THE COMMISSIONER OF INSURANCE AND COMMISSIONER THEODORE K. NICKEL'S MOTION TO DISMISS FANNIE MAE'S APPEAL AND MEMORANDUM IN SUPPORT OF MOTION

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MOTION

The Wisconsin Office of the Commissioner of Insurance, as regulator of Ambac Assurance Corporation ("Ambac"), and Theodore K. Nickel, the Commissioner of Insurance of the State of Wisconsin, as the court-appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation , hereby move pursuant to Wis. Stat. § 809.14 to dismiss the appeal filed by the Federal National Mortgage Association ("Fannie Mae") on July 5, 2012. Grounds for this motion are:

(1) that the Order appealed from is not a final order because it did not dispose of "the entire matter in litigation ...," and

(2) that Fannie Mae is not a party with standing to appeal,

and accordingly the Order cannot be appealed as of right under Wis. Stat. § 808.03(1).

The order of the Rehabilitation Court that Fannie Mae purports to appeal – the June 4, 2012 Order Granting Rehabilitator's Amended Motion to Approve Purchase of Surplus Notes (the "Surplus Notes Order") – is a non-final, interlocutory order and thus not appealable as of right.

Additionally, for the reasons described below, Fannie Mae does not have standing to appeal the Surplus Notes Order.

Accordingly, Fannie Mae's attempted appeal as of right should be dismissed for two reasons. First, the Surplus Notes Order is not final because it does not dispose of "the entire matter in litigation ...," Wis. Stat. § 808.03(1). Second, Fannie Mae is not a party with standing and thus the Surplus Notes Order does not terminate Fannie Mae's interests in the Rehabilitation.

PROCEDURAL POSTURE AND FACTS

The instant appeal arises out of a single motion and order in the midst of the largest insurer rehabilitation proceeding in Wisconsin history. (R. 769, Notice of Amended Motion and Amended Motion to Approve Purchase of Surplus Notes; R. 786, Surplus Notes Order)[1]. On March 24, 2010, OCI approved Ambac's establishment of the Segregated Account. (R. 1, Verified Petition for Order of Rehabilitation, ¶ 8.a.). OCI then petitioned the Dane County Circuit Court for rehabilitation of the Segregated Account

[1] Citations in the form "R.___" refer to the documents that have been transmitted to the Court of Appeals at various times related to all of the pending or completed appeals arising out of the same trial court case, Dane County Case No. 10-CV-1576. Along with the record number, the title of each document cited is included with the first reference to it.

under Chapter 645 of the Wisconsin Statutes. (R. 1, Verified Petition for Order of Rehabilitation). The circuit court granted the petition and appointed the Commissioner of Insurance as Rehabilitator of the Segregated Account. (R. 11, Order for Rehabilitation, ¶ 3).

The only formal parties to the proceeding are: (1) The Commissioner, as the petitioner; and (2) the Segregated Account, the insurer being rehabilitated, as the Respondent. (R. 1). Under Chapter 645 and the Order for Rehabilitation, the Commissioner, as the Rehabilitator, has all of the powers and authority granted in the statutes and is responsible for administering the rehabilitation of the Segregated Account and for dealing with the disparate interests of the multitude 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. (See R. 11, ¶ 4).

In June 2010, Ambac and 14 bank counterparties entered into a multi-billion dollar settlement with respect to certain collateralized debt obligations ("CDOs") (the "Bank Group Settlement"). (See R. 767, Seventh Affidavit of Roger Peterson, ¶ 16). The Bank Group Settlement provided for

Ambac to pay $2.6 billion of the total consideration in cash and the balance to be satisfied by the issuance and delivery of surplus notes in the face amount of $2 billion. (R. 795, Transcript of June 4, 2012 hearing, pp. 20-21). The Bank Group Settlement extinguished any contractual obligations Ambac had to those bank counterparties with respect to the CDOs identified therein, and did not pertain to policies that were allocated to the Segregated Account. (See R. 767, ¶ 16).

Concurrent with consummation of the Bank Group Settlement, Ambac obtained call options from three of the 14 bank counterparties, granting Ambac the right to re-purchase certain of the issued surplus notes in accordance with specific terms and conditions (the "Surplus Notes"). (R. 767, ¶ 16). The call option with the earliest expiration date had a deadline for exercise of June 7, 2012. Due to certain "most favored nation" provisions in the other call option agreements, the value of exercising the options was deemed to be greater by doing so on or before June 7, 2012. (R. 767, ¶ 31).

Following an independent analysis and review of the financial costs and benefits inherent in Ambac's proposal to exercise the call options, the Rehabilitator and OCI concluded

that exercising two of the three call options ("Options A and C") would benefit the Segregated Account in terms of an increased percentage of claim recoveries and an increased dollar amount of funds available for claim recoveries. (R. 767, ¶ 30; R. 770, Eighth Affidavit of Roger Peterson, ¶¶ 2, 8). The Rehabilitator concluded that second only to the Bank Group Settlement, the exercise of Options A and C may represent the single largest and most beneficial financial opportunity for Segregated Account policyholders. (R. 795, Transcript of June 4, 2012 hearing, p. 24).

Although the Segregated Account, the Rehabilitator, and OCI were not parties to the Bank Group Settlement or the call option agreements, Ambac was required to obtain approval from OCI and the Rehabilitator prior to exercising the call options. (R. 768, Affidavit of Regina Frank, ¶ 5). Because exercising Options A and C involved a significant use of resources, and because the Bank Group Settlement was previously contested (and the subject of pending appeals), the Rehabilitator exercised his discretion in seeking approval from the Rehabilitation Court as a condition for granting Ambac approval to exercise Options A and C. (R. 768, ¶ 5).

On May 23, 2012, the Rehabilitator submitted an Amended Motion to Approve Purchase of Surplus Notes to the Rehabilitation Court (the "Amended Motion"), supported by the Eighth Affidavit of Special Deputy Commissioner Roger A. Peterson. (R. 769; R.770).

On May 31, 2012, Fannie Mae filed an objection to the Amended Motion. (R. 778, Objection of Federal National Mortgage Association). Significantly, no policyholders objected to the Amended Motion. A hearing was held by the Rehabilitation Court on June 4, 2012. (See R. 795). At the hearing Fannie Mae was represented by counsel and was allowed to present argument opposing the exercise of Options A and C. (R. 795, pp. 4, 59-63). The Rehabilitation Court granted the Amended Motion. (R. 786).

On June 18, 2012, Fannie Mae filed in this Court a Petition for Leave to Appeal the June 4, 2012 Surplus Notes Order. (See Appeal No. 2012AP1332-LV). The Commissioner filed a response in opposition to Fannie Mae's Petition on July 2, 2012. A decision on the Petition remains pending. Without awaiting that decision, however, on July 3, 2012, Fannie Mae filed a Notice of Appeal, taking the errant position that under Wis. Stat. § 808.03(1) the Surplus Notes

Order was a final order that it can appeal as of right. For all of the reasons below, Fannie Mae's attempted appeal should be dismissed.

ARGUMENT

I. LEGAL STANDARD FOR "FINALITY"

Whether a judgment or order constitutes a final order or judgment for the purposes of appeal is a question of law subject to independent appellate review. *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶ 14, 299 Wis. 2d 723, 728 N.W.2d 670.

Wisconsin statute § 808.03(1) provides:

> A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding ...

Wis. Stat. § 808.03(1).

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.*

Moreover, 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 (quoted source omitted).

A matter is not disposed of for purposes of making the decision "final" merely because a circuit court issues a decision analyzing legal issues, resolving questions of law, and deciding the substantive issues presented. *Id.* (cited source omitted). Generally, where a circuit court's order does not include language conclusively disposing of the claims, it is not a "final" order.

> To dispose of an entire matter in litigation, a court must make an explicit statement of finality. A court disposes of the entire matter in litigation in one of two ways: (1) by explicitly dismissing the entire matter in litigation as to one or more parties or (2) by explicitly adjudging the entire matter in litigation as to one or more parties. To define "dispose" in the negative, a court merely addressing, or deciding, substantive issues is not enough to qualify as disposing of them.

Tyler v. RiverBank, 2007 WI 33, ¶ 17, 229 Wis. 2d 751, 728 N.W.2d 686; *see also, Kenosha Prof'l Firefighters*, 2009 WI

52, ¶ 23 n.15.; *Wambolt*, 2007 WI 35, ¶¶ 4, 43-45 (discussing the requirement that an appealable order contain a statement that it is final for purposes of appeal). Notably, the Surplus Notes Order does not contain any statement that it is final for the purposes of an appeal. *See Wambolt*, 2007 WI 35, ¶ 45.

"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 further noted within 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.

Id. (internal citations omitted).

Contrary to the implication of Fannie Mae's Notice of Appeal, the Surplus Notes Order did not dispose of the entire matter in litigation as to the parties. The Rehabilitation continues. Accordingly, Fannie Mae may not appeal as of right, and the appeal should be dismissed.

II. THE SURPLUS NOTES ORDER DOES NOT SATISFY THE TEST FOR FINALITY

The two parties to the Rehabilitation are the Commissioner, as petitioner, and the Segregated Account, as respondent. The Surplus Notes Order does not conclude the Rehabilitation proceedings as to either of these parties.

In a Chapter 645 rehabilitation proceeding, there are only two orders final as to the parties. The first is the order confirming the Plan of Rehabilitation, which in the case at bar was entered by the Rehabilitation Court on January 24, 2011 (R. 556, Decision and Final Order Confirming The Rehabilitator's Plan of Rehabilitation), and which is already the subject of at least one of the pending appeals that has been fully briefed. (See, e.g. 2011AP561). The second final order as to the parties is that which is entered at the termination of the rehabilitation.

Under Chapter 645, the rehabilitation is terminated upon the occurrence of one of two events – liquidation or a return of control to the company. Wisconsin statute § 645.35 provides:

> TRANSFORMATION TO LIQUIDATION. Whenever the rehabilitator believes that further attempts to rehabilitate an insurer would substantially increase the risk of loss to creditors,

> policyholders, or the public, or would be futile, the rehabilitator may petition the court for an order of liquidation. ...
>
> ORDER TO RETURN TO COMPANY. The rehabilitator may at any time petition the court for an order terminating rehabilitation of an insurer. If the court finds that rehabilitation has been accomplished and that grounds for rehabilitation under s. 645.31 no longer exist, it shall order that the insurer be restored to possession of its property and the control of its business. The court may also make that finding and issue that order at any time upon its own motion.

Wis. Stat. § 645.35(1) and (2). Neither of these events has occurred or is expected to occur imminently.

The rehabilitation process may consist of any number of motions, hearings, and resultant orders from the circuit court. By definition, then, not every order deciding a motion terminates the action as to the parties (much less the non-parties).

Fannie Mae's interest in the Rehabilitation (which is addressed below in the standing section) is attenuated; it is a bondholder with a beneficial interest in a trust, whose trustee acting as a policyholder, may in the future submit claims for treatment in the Rehabilitation. Even if, for the sake of argument, Fannie Mae is considered to be in contractual privity as a policyholder of the Segregated Account, and thus

a direct claimant in the Rehabilitation, the Surplus Notes Order would not dispose of the action as to Fannie Mae. Fannie Mae would still have to submit its purported claim for treatment in the Rehabilitation. Additionally, Fannie Mae was not a party to the Bank Group Settlement and it did not hold any of the Surplus Notes subject to the call options.

Further highlighting the interlocutory nature of the Surplus Notes Order, the only effect the Surplus Notes Order has had on Fannie Mae (or any other interested party) is to augment the pool of resources available to fund claims submitted for treatment in the Rehabilitation; the evidence in the record is ***undisputed*** that those ***resources have been increased*** by the purchase of the Surplus Notes.

Fannie Mae's potential claim (to the extent such may be proved in the future) has not been foreclosed by the Surplus Notes Order, nor is it likely that Fannie Mae's ongoing participation in the Rehabilitation has been concluded.

Given the flexible and informal approach to managing the operations of a rehabilitation, the day-to-day interlocutory decisions that are part and parcel of the management and supervision over the Segregated Account should not be

deemed "final" orders that can divert or halt the ongoing work by the Rehabilitator, as approved by the Rehabilitation Court. Accordingly, Fannie Mae's appeal under Wis. Stat. § 808.03(1) should be dismissed.

III. FANNIE MAE LACKS STANDING.

A. Fannie Mae is not a party.

In seeking an appeal as of right under Wis. Stat. § 808.03(1), Fannie Mae is presenting itself as a party to the action. Contrary to its self-designation, however, Fannie Mae is not a party to the Rehabilitation proceeding and is not even a policyholder of the Segregated Account. (*See, e.g.* reference in Docketing Statement in "Nature of Action" to "... Fannie Mae and other segregated account *policyholders*" (emphasis added)). Fannie Mae has offered no evidence establishing that it is in privity with Ambac through a financial guaranty insurance policy.

Indeed, Fannie Mae's status is more remote than that of a policyholder; Fannie Mae is a beneficial holder of bonds in one or more trusts and securitized financing transactions insured in part by the financial guaranty policies allocated to the Segregated Account. Fannie Mae's relationship to the trust in which it holds bonds is governed by an indenture of

trust. It is the trust through its duly-appointed trustee – which Fannie Mae conspicuously fails to mention, let alone identify – that is the actual policyholder with rights and obligations to represent the trust and assert its rights under the financial guaranty policies.

Moreover, Fannie Mae has not satisfied the criteria for intervention in the circuit court. Without a showing of an interest that is not adequately represented by the Rehabilitator, Fannie Mae cannot be a party to the action and thus does not have standing to appeal.

The purpose of Chapter 645, including the rehabilitation provisions, 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). These are the goals of the Rehabilitator as the person appointed by the court to supervise and manage the Rehabilitation. Fannie Mae's interest is among the many protected and considered by the Rehabilitator in the Rehabilitation proceeding. The Commissioner in serving as Rehabilitator has the very purpose of protecting Fannie Mae's interests – along with all

of "the interests of insureds, creditors, and the public generally." *Id.*

B. Fannie Mae is not aggrieved by the Surplus Notes Order.

Even if Fannie Mae could establish itself as a "party" to the rehabilitation, it does not have standing to appeal because it was not aggrieved by the Surplus Notes Order. It is a fundamental and time-honored principle that to have standing to appeal, a party must be "aggrieved" by a judgment or order. Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, Ch. 6, § 6.2 at p.2 (5th Ed. 2011). The right to appeal is limited to those parties aggrieved in some appreciable manner by a final judgment or order. *See Koller v. Liberty Mut. Ins. Co.*, 190 Wis. 2d 264, 266, 526 N.W.2d 799 (Ct. App. 1994). As explained further by the author of the treatise:

> in order for a person to appeal, the order or judgment must bear directly and injuriously upon the interests of the appellant; the appellant must be adversely affected in some appreciable manner.

Heffernan, *Appellate Practice,* § 6.2, *citing Tierney v. Lacenski*, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983).

Contrary to Fannie Mae's position otherwise, the Surplus Notes Order does not "bear directly or injuriously" upon Fannie Mae's interest. Indeed, as set forth in the Amended Motion and the Seventh Affidavit of the Special Deputy Rehabilitator Roger Peterson, approving the purchase of the Surplus Notes pursuant to Options A and C "will increase the projected total claim recoveries for Segregated Account policyholders under all reasonable economic scenarios projected by the Rehabilitator." (R. 767, ¶ 30; R. 769).

In other words, the Rehabilitation Court's approval of the Surplus Notes Order made "additional funds available to pay the claims of Segregated Account policyholders, and ... increase the projected recovery to Segregated Account policyholders..." (R. 767, ¶ 30). This result is not injurious to Fannie Mae.

Fannie Mae's contention that its interests pursuant to a financial guaranty policy are impaired by the Surplus Notes Order is confined to its narrow self-interest. This attempt to second-guess the economic evaluation of the Rehabilitator demonstrates the wisdom and necessity of vesting the Rehabilitator with broad discretion to develop and direct the

Plan of Rehabilitation, so as to maintain a fair and impartial implementation of the rehabilitation process with due consideration for balancing the respective rights and best interests of policyholders, creditors, and the general public.

The legislature did not intend the rehabilitation procedure to allow a multitude of trustees, counterparties, bondholders and others creditors with any purported interest to appeal every non-final order as of right. Rather, the legislature designed the rehabilitation process to allow the Rehabilitator to exercise broad discretion and flexibility in managing the rehabilitation. As explained in the legislative Comments:

> [Chapter 645] is designed to make rehabilitation a very flexible procedure. It is essential that it be regarded as a *management rather than as a legal task.* Though it is called a formal proceeding because it begins with a formal petition to a court and a hearing, thereafter it should be essentially informal in operation. The order is formulated to emphasize flexibility and informality, and *the rehabilitator is given broad powers.* He must act under the supervision of the court, of course, but the *court's control should be liberal, not strict, and should be provided without cumbersome procedures.*

WIS. STAT. ANN. § 645.32 cmt. (1967)(emphasis added).

CONCLUSION

Fannie Mae's appeal should be dismissed because under Wis. Stat. § 808.03(1), the June 4, 2012 Surplus Notes Order was not a final order and is not appealable as of right by a non-party to the action.

Dated this 30th day of July, 2012.

COYNE, SCHULTZ, BECKER & BAUER, S.C.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that 5 copies of this Motion to Dismiss Fannie Mae's Appeal and supporting Brief were hand-delivered to the Clerk of the Court of Appeals on July 20, 2012.

I further certify that three copies were served via first class mail to each of the following:

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Dated this 20th day of July, 2012.

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