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July 23, 2012

BY HAND

Clerk of Court
Wisconsin Court of Appeals
110 East Main Street, Suite 215
Madison, WI 53703

Re: *In the Matter of the Rehabilitation of:*
Segregated Account of Ambac Assurance Corporation
Appeal No.: 2012AP001332 LV

Dear Clerk:

Enclosed for filing are five copies of the Motion of Ambac Assurance Corporation to Dismiss Appeal and Brief in Support of Motion.

By copy of this letter, all parties of record are receiving the Motion by email. Counsel of Record for Fannie Mae are also being serviced with a copy of the Motion by first-class mail.

Thank you.

Very truly yours,

Barbara A. Neider
BAN:rjm
Enclosure
cc: Mr. Rodney W. Carter and Mr. Steven W. Laabs
Mr. David M. Schlecker
Mr. William F. Bauer and Ms. Karen M. Gallagher
Mr. Michael B. Van Sicklen
Honorable William D. Johnston
(All By U.S. Mail)
All Counsel of Record (By Email)

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WISCONSIN COURT OF APPEALS
DISTRICT IV
Case No. 2012AP001332-LV
Dane County Case No. 2010-CV-1576

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,

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 CORPORATION (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.

MOTION OF AMBAC ASSURANCE CORPORATION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION

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MOTION

Ambac Assurance Corporation ("Ambac") hereby moves the court to dismiss the appeal by Federal National Mortgage Association ("Fannie Mae") concerning a June 4, 2012 Order of the Circuit Court for Dane County, the Honorable William D. Johnston, LaFayette County Circuit Court Judge, Presiding by Judicial Assignment. Fannie Mae seeks to appeal an order (the "Surplus Notes Order") which granted a motion filed by the Rehabilitator to approve Ambac's purchase of certain Surplus Notes that had been issued in connection with a 2010 settlement between Ambac and certain financial institutions referred to in these proceedings as the "Bank Group."

Fannie Mae initially filed a Petition for Leave to Appeal the Surplus Notes Order, which Ambac and the Commissioner of Insurance ("Commissioner" or "OCI") have opposed (on the grounds that Fannie Mae's appeal did not meet the requirements for a permissive appeal and because Fannie Mae lacks standing to appeal). By Notice of Appeal

dated July 3, 2012, Fannie Mae filed an appeal of the Surplus Notes Order, this time asserting that it can appeal as of right. Fannie Mae's appeal should be dismissed for two reasons.

First, Fannie Mae lacks standing to pursue an appeal, as Ambac explained in its opposition to Fannie Mae's Petition for Leave to Appeal the Surplus Notes Order. It was not a party in the trial court proceeding, it was not a party to the Call Options at issue, it is not a policyholder or direct claimant in the rehabilitation proceeding related to the Segregated Account ("Rehabilitation Proceeding" or "Rehabilitation"), and it is not even directly aggrieved by the order for which it seeks review. Absent standing, Fannie Mae cannot appeal.

Second, the Surplus Notes Order is not a final order or judgment within the meaning of Wis. Stat. § 808.03(1). The Surplus Notes Order merely authorized the Rehabilitator to approve one of many transactions that will take place during the course of the Rehabilitation. The Rehabilitation has not been resolved as to any party, nor as to Fannie Mae, which is

not a party. Fannie Mae therefore has no right to appeal and this Court lacks jurisdiction to hear the appeal. The appeal therefore must be dismissed.

FACTS AND PROCEDURAL POSTURE

This appeal arises from an order issued in the midst of the largest insurer rehabilitation proceeding in Wisconsin history, commenced by the Commissioner of Insurance ("Commissioner" or "OCI") 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 "Segregated Account"), the insurer being rehabilitated, as the respondent. Under chapter 645 of the Wisconsin Statutes, the Commissioner is responsible for administering the rehabilitation of the Segregated Account in a manner that serves the public interest.

Ambac is a Wisconsin-domiciled stock insurance corporation authorized to transact surety and financial guaranty insurance. (R. 1, Verified Petition for Order of

Rehabilitation ("Verified Petition"), ¶ 2.)[1] Ambac and its subsidiaries provided financial guaranty products and other financial services to clients around the world in both the public and private sectors. (*Id.* ¶ 4.)

Beginning in early 2008, Ambac's financial condition began to deteriorate, and as it did, OCI began to closely monitor Ambac's financial health. (R. 1 (Verified Petition), ¶ 5.) After months of discussions and consideration of different rehabilitation and restructuring options, OCI and its advisors decided to carry out a three-part restructuring and rehabilitation plan. (*Id.*) The first component of the plan was the establishment of the "Segregated Account." Those categories of policies with projected material impairments and/or containing or related to contracts with "triggers," allowing policyholders upon certain specified events to exercise termination or remedial rights or to strip Ambac of all or some of its material rights, were allocated to the

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[1] Citations in the form R. ____ refer to the documents that comprise the record in this appeal.

Segregated Account. (*Id.* ¶¶ 9-10.) Other policies remained in the "General Account." (*Id.* ¶ 12.)

The second component of the plan involved the rehabilitation of the Segregated Account. This was necessary because the policies allocated to the Segregated Account represented Ambac's most troubled exposures. On March 24, 2010, shortly after the Segregated Account was created, OCI petitioned the circuit court for an Order of Rehabilitation of the Segregated Account. OCI made it clear that Ambac, or the General Account, would remain outside of the ambit of the Rehabilitation. (*See* R. 1 (Verified Petition), ¶ 1; R. 11 (Order of Rehabilitation dated March 24, 2010), ¶ 2.) The rehabilitation plan anticipated that payments on Segregated Account policy liabilities would be made through a mix of cash and interest-bearing Surplus Notes. The plan called for the payment in cash of 25% of an allowed claim and the payment in Surplus Notes of 75%. (R. 556 (Decision and Final Order Confirming the Rehabilitator's Plan of

Rehabilitation, With Findings of Fact and Conclusions of Law), ¶ 96.)

The third component of OCI's plan was to support Ambac's efforts to negotiate (at a substantial discount) a global commutation, outside of the Rehabilitation, of Ambac's exposure to the Bank Group with respect to the ABS CDO segment of Ambac's policy portfolio. (R. 1 (Verified Petition), ¶¶ 2, 7, 17.)

The Bank Group and Ambac reached an agreement in principle shortly before March 24, 2010 (the "Bank Group Settlement"), the day OCI filed its petition for rehabilitation of the Segregated Account. (R. 1.) In exchange for commuting approximately $16.7 billion in net par exposure of ABS CDOs, Ambac agreed to transfer to the Bank Group, in aggregate: (i) 2.6 billion in cash; and (ii) $2 billion of newly-issued "Surplus Notes" of Ambac.

Several objectors—but not Fannie Mae—moved to enjoin the Bank Group Settlement (*see* R. 37, 41, 79, 82, 86,

98). Those motions were denied by order dated May 27, 2010. (R. 127.)

As part of the Bank Group Settlement, which was finalized on June 7, 2010, Ambac negotiated Call Options with three of the banks, pursuant to which Ambac had the right to purchase the Surplus Notes issued to those banks at specified prices. (R. 767 (Seventh Affidavit of Roger A. Peterson (Special Deputy Commissioner for the Rehabilitation of the Segregated Account of Ambac Assurance Corporation) in Support of Rehabilitator's Motions for Approval to Commence Making Interim Cash Payments and to Approve Purchase of Surplus Notes ("Peterson Seventh Aff.")), ¶ 16.) Those Call Options in the aggregate gave Ambac the right, at its option, to purchase $939 million of the $2 billion in Surplus Notes at a fraction of their face value. (*Id.* ¶¶ 17-20.)

The first of the Call Options required that it be exercised by June 7, 2012. (*Id.* ¶ 21.) Ambac's board of directors approved pursuing the acquisition of the Surplus

Notes on May 10, 2012. (R. 782 (Affidavit of Rehabilitator's Counsel Jeffrey A. Simmons), Tab C.) Meanwhile, OCI also evaluated the request to purchase the Surplus Notes with the assistance of the Special Deputy Commissioner and outside professional advisors. (R. 767 (Peterson Seventh Aff.), ¶ 23.) OCI concluded that the purchase of the Surplus Notes through the exercise of the Call Options "is in the best interest of the Segregated Account because it resolves Ambac's liability under the Surplus Notes for substantially less than Ambac would ultimately pay if it did not purchase the Surplus Notes."[2] (*Id.* ¶ 30.) The total cost of purchasing the notes was approximately $188 million. In exchange, Ambac's liability to third parties for principal and accrued interest under the Surplus Notes was reduced by approximately $819 million, representing an effective exercise price of $.23 on the dollar. (R. 770 (Eighth Affidavit of Roger A. Peterson

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[2] OCI initially agreed that all three Call Options should be exercised, but revised its position to cover only two of the options for reasons unrelated to Fannie Mae's appeal. (*See* R. 770 (Peterson Eighth Aff.), ¶¶ 2-5.) The Surplus Notes Order approved the exercise of two of the three options. (R. 786.)

(Special Deputy Commissioner for the Rehabilitation of the Segregated Account of Ambac Assurance Corporation) in Support of the Rehabilitator's Amended Motion to Approve Purchase of Surplus Notes ("Peterson Eighth Aff."), ¶ 6.) The Rehabilitator projected that the exercise of the Call Options would result in the Segregated Account policyholders receiving 1.9% to 5.0% more on their claims than if the Call Options were not exercised. (R. 770 (Peterson Eighth Aff.), ¶¶ 7-8.)

On May 15, 2012, OCI granted approval for Ambac to purchase the Surplus Notes. (R. 768 (Affidavit of Regina Frank in Support of the Rehabilitator's Motion to Approve Purchase of Surplus Notes ("Frank Aff."), ¶ 5.)

Neither the Segregated Account, the Rehabilitator nor OCI were parties to the Bank Group Settlement or the Call Option agreements. Accordingly, the Rehabilitator did not believe it was legally required to even seek the Rehabilitation Court's approval of Ambac's exercise of the Call Options. (R. 795 at 32-33.) The Rehabilitator nevertheless exercised

his discretion to make approval by the Rehabilitation Court a condition for granting Ambac approval to proceed with the transactions. (*Id.*)

Tellingly, no policyholders of the Segregated Account opposed the motion to approve the purchase of the Surplus Notes. The motion drew only two objections, one from Fannie Mae and one from a group of entities collectively referred to as "Glenview" (not relevant here). The primary objection Fannie Mae asserted was that the purchase of the Surplus Notes before Fannie Mae and policyholders in the Segregated Account have been paid in full would violate the requirements regarding the order of distribution of claims from the insurer's estate set forth in Wis. Stat. § 645.68. (R. 795 at 61-63.)

On June 4, 2012, after considering the written submissions and hearing testimony and argument, the Rehabilitation Court granted the Rehabilitation's motion to approve the exercise of the Call Options. (R. 795; R. 786.)

ARGUMENT

I. FANNIE MAE DOES NOT HAVE STANDING TO APPEAL THE SURPLUS NOTES ORDER.

The threshold issue that must be addressed is whether Fannie Mae has any legal basis to appeal the Surplus Notes Order. 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); Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 6.2 (5th ed. 2011). 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 (Ct. App. 1983). *See also La Crosse Trust Co. v. Bluske*, 99 Wis. 2d 427, 428-29, 299 N.W.2d 302 (Ct. App. 1980). Fannie Mae does not meet this test.

Fannie Mae has no legal basis on which it may sue and no substantive right that would be abrogated by the exercise of the Call Options. It is not a party to the Rehabilitation. It is not a policyholder. It did not own any of the Surplus Notes

at issue. It was not a party to the Bank Group Settlement, nor was it a party to any of the financial guarantee policies that were issued to protect the Bank Group. It was not a party to any of the Call Options. It is not even directly aggrieved by the Surplus Notes Order. All that Fannie Mae has alleged is speculative future harm on the theory that any money that Ambac pays to someone else could mean less money for Fannie Mae in the future. But the same argument could be made about any substantial payment made to settle the numerous claims that Ambac currently faces. Fannie Mae identifies no specific obligation that Ambac has to it, or even to the Segregated Account, that will not be met as a direct result of Ambac exercising the Call Options.

Fannie Mae's interest, as the beneficial holder of bond interests, is analogous to an individual shareholder in a large corporation, where the corporation, not the individual shareholder, has the standing to pursue claims. Here, the trustees for the bonds held by Fannie Mae, as policyholders,

may assert claims against Ambac. Fannie Mae, however, may not.

While the Rehabilitation Court permitted Fannie Mae to have its say during the hearing on the motion to approve the purchase of the Surplus Notes, that does not mean that Fannie Mae and each and every one of the thousands of persons or entities claiming an interest in the Rehabilitation have standing to actively litigate each interim step in the relief sought by the Rehabilitator and to pursue an appeal when their objections are denied. Fannie Mae cites no precedent permitting a nonparty to take an appeal under circumstances in which a rehabilitation court's order does not directly affect the non-party in any way.

Courts addressing this issue have found that interests such as those which Fannie Mae asserts are too speculative or too remote to confer upon a third party the status of one aggrieved by a rehabilitation court's order. *See Med. Soc'y of N.J. V. Bakke*, 383 N.J. Super. 498, 507-08, 892 A.2d 729, 733-34 (App. Div. 2006) (holding that third parties did not

qualify as persons aggrieved by an insurance commissioner's approval of an insurer's restructuring because their concern that the restructuring would adversely impact their interests was too speculative); *Nader v. Altermatt*, 166 Conn. 43, 59, 347 A.2d 89, 97-98 (1974) (rejecting a policyholder's challenge to an insurance commissioner's approval of an insurer's restructuring because "[m]ere generalizations and fears [of a future adverse impact on policyholders] are not sufficient to establish aggrievement"); *see also Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 511-12, 424 N.W.2d 685 (1988) (stating that the "mere possibility" of future harm is not sufficient to confer the right of a private party to challenge agency actions).

Significantly, not even policyholders, who have a more direct interest than Fannie Mae does, have a right to judicial review in insurance rehabilitation proceedings. Chapter 645 of the Wisconsin Statutes does not grant third parties, such as policyholders or creditors, the right to obtain judicial review of decisions of the Commissioner administering the

rehabilitation of the insurer. The absence of any language granting policyholders or creditors such rights is important because chapter 645 *does* allow judicial review for "any person whose interests are substantially affected" in *other* types of proceedings, such as summary orders issued without hearings. *See* Wis. Stat. § 645.21(4). "Where the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded." 2A Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction § 46:5 (7th ed. 2007).

The Wisconsin Legislature's decision to limit the right to judicial review in chapter 645 reflects the special nature and remedial public purpose of the proceeding. A rehabilitation is not an adversarial proceeding to adjudicate the individual interests of literally thousands of policyholders, but instead is a formal remedial measure to "rehabilitate the business of a domestic insurer." Wis. Stat. § 645.32(1). While the Rehabilitator acts under the supervision of the court, "the court's control should be liberal, not strict, and

should be provided without cumbersome procedures." Wis. Stat. Ann. § 645.32 cmt. As numerous courts have explained, "it is not the function of the courts to reassess the determinations of fact and public policy made by the Rehabilitator." *See, e.g., Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 531 Pa. 598, 609, 614 A.2d 1086, 1091 (1992).

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). Chapter 645 reflects the legislative desire that the Commissioner pursue rehabilitation in a prompt, efficient manner, perceiving rehabilitation "as a management rather than as a legal task." Wis. Stat. Ann. § 645.32 cmt. This purpose would be frustrated if every bondholder, note holder or shareholder of an insured or other party claiming an interest in an insurance rehabilitation had the right to appeal every order entered as part of the Rehabilitator's "management task." The never-ending stream

of appeals would paralyze the rehabilitation process and undermine the very purpose of chapter 645, which is to provide OCI and the Rehabilitator with the discretion and the tools needed to fashion a rehabilitation plan that is fair and equitable and in the best interests of all policyholders, creditors and the public generally. *See* Wis. Stat. § 601.01(2).

Because Fannie Mae is not a party and has not been directly aggrieved by the court's order, it has no right to appeal. Its appeal, therefore, should be dismissed.

II. FANNIE MAE HAS NO RIGHT TO APPEAL BECAUSE THE SURPLUS NOTES ORDER IS NOT A FINAL ORDER.

A. Only Final Orders Are Appealable As Of Right.

Section 808.03(1) of the Wisconsin Statutes allows an appeal as of right from a "final judgment or final order of a circuit court." A final order or judgment 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...." *Id.* To be "final," a judgment or order must dispose of "all ... substantive issues in the litigation, as to one or more of the parties." *Harder v.*

Pfitzinger, 2004 WI 102, ¶ 2, 274 Wis. 2d 324, 682 N.W.2d 398.

"Finality is central to the jurisdiction of the court of appeals." Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin,* § 4.4 (5th ed. 2011). If the judgment or order appealed from is not final, the appellate court has no jurisdiction to hear an appeal pursued as a matter of right. *State v. Knapp*, 2007 WI App 273, 306 Wis. 2d 843, 847, 743 N.W.2d 481. 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 unnecessary interruption and delay in the circuit court proceedings caused by multiple appeals, 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. *See Wick v. Mueller*, 105 Wis. 2d 191, 199-200, 313 N.W.2d 799 (1982); *Heaton v. Indep. Mortuary Corp.*, 97 Wis. 2d 379, 395-96, 294 N.W.2d 15 (1980).

A final judgment or order is distinguished from an interlocutory judgment or intermediate order, neither of which is appealable as of right under Wis. Stat. § 808.03(1): "An interlocutory judgment is similar to a final judgment in that a decision on the merits has been made.... An intermediate order, unlike a final or interlocutory judgment, is not a determination of the action ... *but settles only ancillary matters*." *Shuput v. Lauer*, 109 Wis. 2d 164, 170, 325 N.W.2d 321 (1982) (emphasis added).

Whether a judgment or order is final presents a question of law that the appellate court addresses *de novo*. *Contardi v. Am. Family Mut. Ins. Co.*, 2004 WI App 104, ¶ 4, 273 Wis. 2d 509, 680 N.W.2d 828.

Application of these principles to the Surplus Notes Order demonstrates that it is not a final order.

B. The Surplus Notes Order Is Not A Final Order.

Section 645.35 provides for the manner in which a rehabilitation court may dispose of a rehabilitation proceeding. If the rehabilitator determines that efforts to

rehabilitate the insurer would be futile, "the rehabilitator may petition the court for an order of liquidation." *See* Wis. Stat. § 645.35 (1). Alternatively, the rehabilitator may petition the court for an "order terminating rehabilitation" of the insurer and restoring the insurer "to possession of its property and control of its business." Wis. Stat. § 645.35(2). An order of the Rehabilitation Court granting either of these petitions would dispose of the matter. The Surplus Notes Order does not.

Fannie Mae may argue that the Surplus Notes Order is final because there is nothing more for the Rehabilitation Court to do with respect to the Call Options relating to the Surplus Notes; the Call Option issue has been resolved by issuance of the Surplus Notes Order. But that argument ignores the requirement that a final order dispose of the entire *matter* in litigation, not merely an *issue*. As the supreme court has explained: "Sec. 808.03(1), Stats., speaks of 'final' not in terms of a final resolution of an issue but in terms of a final resolution of the entire matter in litigation." *Heaton*, 97

Wis. 2d at 396-397. The court concluded that the order in *Heaton* did not pass the test of finality because, "[t]he order does not dispose of the entire matter in litigation; it does not resolve the dispute; it does not preclude further hearing; it does not completely settle the rights of the parties.... The circuit court has not decided the merits of the instant case; it has disposed of a single ancillary issue in the case." *Id.*

The same conclusion applies here. The Surplus Notes Order does not resolve the Rehabilitation; it does not preclude further hearings; and it does not completely settle the rights of the parties. It merely resolves an ancillary issue in the Rehabilitation. Fannie Mae's interest in the Rehabilitation was not finally resolved by the Surplus Notes Order. After the Call Options are exercised, Fannie Mae will be in the same position it is now—a bondholder waiting for the Rehabilitation to be finally resolved.[3]

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[3] The Surplus Notes Order does not contain a statement on its face that it is final for purposes of appeal, as the Wisconsin Supreme Court has held that courts are to do in order to signify an order appealable as of right. *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶¶ 4, 45 and 49, 299 Wis. 2d 723, 728 N.W.2d 670.

The situation here is also distinguishable from an appeal by Assured Guaranty (Appeal No. 2011-AP-1486) from a different order of the Rehabilitation Court in this matter. The order at issue in that appeal determined that Assured had violated the injunction issued by the Rehabilitation Court by demanding arbitration in New York to litigate issues relating to the Segregated Account and by withholding amounts due for payment under certain agreements. The Rehabilitation Court ordered that the violations cease on penalty of sanctions. Assured filed both a notice of appeal and, in the alternative, a petition for leave to appeal from the order enforcing the injunction. This court concluded that the order "likely [is] a final order because it appears to resolve a special proceeding within the context of the rehabilitation proceeding." (R. 698.) The court concluded, however, that even if the order were not final, it would grant leave to appeal to clarify whether an arbitration proceeding in New York should or should not be enjoined. *Id.*

The order that Assured appealed dealt solely with a reinsurance contract to which Assured was a party, and disposed of all issues pertaining to Assured in the Rehabilitation. In addition, it arguably was akin to a finding of contempt, which terminates a special proceeding, and therefore is appealable as of right, notwithstanding the continuation of the underlying proceeding. *See Kroll v. Bartell*, 101 Wis. 2d 296, 304 N.W.2d 175 (Ct. App. 1981). Even under those circumstances, this court expressed uncertainty as to whether the order in the Assured appeal was final. (R. 698.)

In contrast to the Assured situation, the Surplus Notes Order did not terminate a special proceeding involving Fannie Mae. It did not approve or disapprove a transaction to which Fannie Mae was a party. *See Olson v. Dunbar*, 149 Wis. 2d 213, 217, 440 N.W.2d 792 (Ct. App. 1998) (dismissal of party's petition to set aside premarital agreement to which she was a party was a final order). It also did not resolve "all claims brought and made" by Fannie Mae in the proceeding

(since Fannie Mae neither brought nor made claims). *See Sanders v. Sanders*, 2008 WI 63, ¶¶ 39-41, 310 Wis. 2d 175, 750 N.W.2d 806 (special proceeding in a probate may dispose of the entire matter in litigation between a party and the estate by dismissing all of the party's claims on the merits). The Surplus Notes Order merely approved a transaction to which Fannie Mae is not a party.

Fannie Mae has also argued in connection with another order in this Rehabilitation that rehabilitation proceedings are similar to federal bankruptcy proceedings, in which interim orders are appealable as of right. In support of that proposition Fannie Mae cited *Ades-Berg Investors v. Breeden*, 439 F.3d 155, 164 (2d Cir. 2006) (*See* Memorandum Regarding Finality of November 10, 2011 Order Entered by the Wisconsin Circuit Court for Dane County Approving Certain Agreements at 11). Fannie Mae's analogy misses the point.

Orders in special proceedings, like bankruptcy proceedings, may be considered final, but only if they meet

the test of finality. The order at issue in *Ades-Berg* was an order approving a settlement between the trustee and certain parties in an adversary proceeding pursuant to section 9019 of the Federal Rules of Bankruptcy Procedure. The court of appeals explained the importance of finality, even in the context of a special proceeding, as follows:

> We have thus recognized that Congress intended to allow for immediate appeal in bankruptcy cases of orders that finally dispose of *discrete disputes within the larger case*.... By "disputes" we do not mean merely competing contentions with respect to separable issues; rather, we apply the same standards of finality that we apply to an appeal under 28 U.S.C. § 1291.... "A bankruptcy court's approval of a settlement order," pursuant to Fed. R. Bankr. P. 9019, "that brings to an end litigation between parties is a final order."

Ades-Berg, 439 F.3d at 160 (emphasis in original; citations omitted).

Applying these principles, the court concluded that the bankruptcy court's approval of the settlement (the "9019 Order") in that case was a final order because it brought an end to a dispute between some of the parties: "The 9019 Order, on its face, conclusively resolved the claims of the settlement class against the settling defendants.... Thus, the 9019 Order would finally dispose of a "discrete dispute": it

would conclusively resolve the adversary action by establishing the settlement amount and extinguishing claims." *Id.*

Here, the Surplus Notes Order did not extinguish Fannie Mae's claims in the Rehabilitation Proceeding. In approving the exercise of the Call Options, the Rehabilitation Court merely resolved competing contentions with respect to a separable issue—which the court in *Ades-Berg* recognized is not sufficient to render an order in a special proceeding a final order. *Id.*

Finally, if the Surplus Notes Order is final, the concept of finality loses all meaning in the context of a rehabilitation proceeding. There is nothing special about the Surplus Notes Order; nothing sets it apart from the many other interim orders that the Rehabilitation Court is asked to address in the course of the proceeding. If the Surplus Notes Order is final, then interested persons may flood the Court with claims that nearly any order issued in a rehabilitation proceeding is appealable as a matter of right. This clearly was not what the

legislature intended when it created a means for the Rehabilitator to manage a rehabilitation in a non-adversarial proceeding supervised by the Rehabilitation Court.

CONCLUSION

For the reasons stated, the Court should dismiss Fannie Mae's Notice of Appeal of the June 4, 2012 Order Granting Rehabilitator's Amended Motion to Approve Purchase of Surplus Notes.

Dated: July 23, 2012.

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CERTIFICATION OF FILING AND SERVICE

I certify that five copies of the attached Motion of Ambac Assurance Corporation to Dismiss Appeal and Brief in Support of Motion were hand delivered to the Clerk of the Court of Appeals on July 23, 2012.

I further certify that, on July 23, 2012, copies of the Motion of Ambac Assurance Corporation to Dismiss Appeal and Brief in Support of Motion were served via first class mail, postage prepaid, upon the persons listed below:

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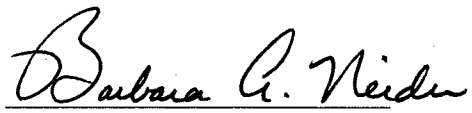

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