

In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

Segregated Account of Ambac Assurance Corporation

**OBJECTION OF FEDERAL NATIONAL MORTGAGE ASSOCIATION TO
REHABILITATOR'S MOTION FOR APPROVAL OF THE PROCESS FOR
SETTLING RMBS REMEDIATION CLAIMS**

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Federal National Mortgage Association (“Fannie Mae”) by and through its attorneys, respectfully submits this objection to the Motion for Approval of the Process for Settling RMBS Remediation Claims filed by the Commissioner of Insurance of the State of Wisconsin (the “Rehabilitator”), as Rehabilitator of the Segregated Account (the “Segregated Account”) of Ambac Assurance Corporation (“Ambac”). For the reasons set forth below, the Court should deny the Rehabilitator’s motion.

OBJECTION

Ambac and/or the Segregated Account filed several lawsuits involving so-called “RMBS Remediation Claims” against mortgage loan originators for alleged breaches of representations and warranties regarding underwriting and the qualities of the loans. (Mot. for Approval of the Process for Settling RMBS Remediation Claims (“Mot.”) ¶¶ 3-4.) Ambac insured the notes securitizing the mortgage loans, and potential recoveries include monetary damages and “put-backs” of the loans to the originators for repurchase. (*Id.* ¶ 3.) The Rehabilitator now seeks the Court’s approval of a clandestine process for settling the RMBS Remediation Claims without public disclosure of the specific dollar amounts or other key terms of the settlement agreements. (*Id.* ¶ 15.) The Rehabilitator’s motion should be denied.

First, the Segregated Account and the Plan of Rehabilitation (the “Plan”) for the Segregated Account violate Wisconsin law and the United States Constitution for the reasons set forth in the appeals currently pending in the Wisconsin Court of Appeals. (*See* Wis. Ct. App., Appeal Nos. 2010 AP 1291, 2011 AP 561, and 2011 AP 2708.) Because the Wisconsin Court of Appeals has exclusive jurisdiction over the determination of whether the Segregated Account and the Plan are constitutional, this Court’s entry of the proposed order approving a process whereby the Rehabilitator can settle RMBS Remediation Claims with minimal disclosure does

not affect Fannie Mae's pending appeals. Moreover, to the extent the Wisconsin Court of Appeals finds the Segregated Account and the Plan unconstitutional, then the Rehabilitator has no authority to file or settle RMBS Remediation Claims on behalf of the Segregated Account and the motion should be denied on this basis alone.

Second, the Rehabilitator's proposed process for settling RMBS Remediation Claims is inconsistent with the strong presumption and public policy in favor of public access to court records, and it furthers the disturbing trend of secrecy in the instant rehabilitation proceeding. *See Krier v. EOG Envtl., Inc.*, 288 Wis.2d 623, 634-35, 707 N.W.2d 915, 921 (Ct. App. 2005) (underscoring the "strong presumption" under Wisconsin law in favor of public access to court records). This presumption of public access is codified in the Wisconsin statutes, which authorize public examination of circuit court records, *see* WIS. STAT. § 59.20(3),¹ and require formal rehabilitation proceedings, like the proceeding here, to be open. *See* WIS. STAT. § 645.24 cmt.² And where a party acts in a fiduciary capacity, such as rehabilitators of insolvent insurers, the public interest in transparency is of special importance.

Indeed, as the Rehabilitator has testified, transparency is fundamental to the operation of insurer rehabilitation proceedings and is the best means of avoiding any suggestion of unfairness or impropriety:

I think my goal has always been transparency, your Honor. Growing up professionally in the legislative arena and with a mother as a Judge, I recognize how important process is and transparency is, and that's been the objective of the website and, you know, really, the multiple filings that we've tried to put out

¹ As relevant here, WIS. STAT. § 59.20(3) provides that "[the] clerk of the circuit court . . . shall open to the examination of any person all . . . papers required to be kept in his or her office and permit any person to examine to take notes and copies of such . . . records, papers or minutes therefrom"

² Unlike court hearings in summary proceedings, if a formal proceeding is commenced, "it is neither possible nor desirable for it to be anything other than completely public. No proceeding so far-reaching and with so much latent capacity for harm to the public should be tolerated without the public having full access to information about it."

there. So I recognize that as Rehabilitator, you know, the policyholders need to have an avenue to understand what's happening to them. I recognize the unique nature of this company, and so as much information as we can get out there we have been getting out there.

(Transcript of Nov. 15, 2010 Confirmation Hearing at 165:9-21.)

Despite his stated preference for transparency, the Rehabilitator seeks to exempt settlements of RMBS Remediation Claims from Wisconsin's statutory presumption of public access because disclosure of settlement amounts or Court approval of individual settlement agreements "would make it more difficult to reach settlements and, as a result, lead to increased litigation costs and lower settlement amounts." (Mot. ¶ 16.) The Wisconsin Court of Appeals considered a similar argument in *Krier* and concluded that the public's right of access outweighs the public interest in encouraging settlement of private litigation. 288 Wis.2d at 629-30, 707 N.W.2d at 919, 920. Thus, even if, as the Rehabilitator contends, settlements of the RMBS Remediation Claims would not be effectuated or would be less favorable to the Segregated Account if their confidentiality was not assured (*id.* ¶¶ 16-17), "the generalized interest in encouraging settlements does not rise to the levels of interests that may outweigh the public's right of access" under Wisconsin law. *Id.* (internal quotations omitted).

Other courts presented with similar situations also have followed this approach. For example, in *Gletzer v. Andersen Worldwide, S.C.*, No. 05-Civ.-0339 (GEL), 2007 WL 273526, at *1 (S.D.N.Y. Jan. 30, 2007), the court rejected the argument that public disclosure of settlement agreements would undercut the settling parties' leverage in negotiating with other parties. As Judge Lynch stated:

This is a wan excuse for impinging on the public's right of access to judicial documents. There is no discernible public interest, or interest of the bankruptcy estates, in preserving Anderson's "leverage" as against other parties who have sued it. Nor has the movant indicated any authority to support its implicit proposition that protecting the bargaining position of the defendant in other,

unrelated cases, is even a proper consideration of a court being asked to approve a settlement in a given case.

Id. Here, the Rehabilitator goes one step further, seeking an order requiring him to merely “inform” the Court *in camera* of the “details of any settlement agreements” (but not the agreements themselves) only upon the Court’s request. Even the customary judicial scrutiny of settlement agreements is dispatched by the Rehabilitator’s unacceptable proposal.

Moreover, the Rehabilitator is simply wrong when he claims that “no constructive purpose would be served” by requiring “individualized approvals by this Court with public disclosure of terms.” (Mot. ¶¶ 16-17.) As the *Krier* court noted, public access to settlement agreements serves “several important interests,” including the promotion of “informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system and the public perception of fairness which can be achieved only by permitting full public view of the proceedings.” *Krier*, 288 Wis.2d at 629-30, 707 N.W.2d at 919, 920 (internal quotations omitted) (adopting the reasoning of *In re Zimmer*, 151 Wis. 2d 122, 134-35, 442 N.W.2d 578 (Ct. App. 1989). Absent such access here, and without knowing the terms of the settlements of the RMBS Remediation Claims, neither interested parties nor the Court will be able to make informed judgments about whether those settlements are in the best interests of the Segregated Account policyholders. Accordingly, the Rehabilitator’s motion should be denied.

CONCLUSION

For the foregoing reasons, Fannie Mae respectfully requests that this Court deny the Rehabilitator's Motion for Approval of the Process for Settling RMBS Remediation Claims, and grant such other and further relief as is just and proper.

Dated: October 1, 2012

Respectfully submitted,

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