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March 1, 2013

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You are hereby notified that the Court has entered the following order:

2011AP2708 Ted Nickel v. Aurelius Capital Management LP (L.C. # 2010CV1576)

Before Higginbotham, Sherman and Reilly, JJ.

At our direction, the parties have submitted jurisdictional memoranda addressing whether the order from which review is being sought on this appeal—namely, an order authorizing the Commissioner of Insurance to take all actions necessary to effectuate a mediation agreement and related contracts made with Ambac Assurance Corporation, Ambac Financial Group, Inc. and the Official Committee of Unsecured Creditors in the Commissioner’s capacity as the Rehabilitator of the Segregated Account under a confirmed plan—is a final and appealable order within the meaning of Wis. STAT. § 808.03 (2011-12). Under that section, the test of finality is whether an order “disposes of the entire matter in litigation as to one or more of the parties.” *Id.*; *see also Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶46, 299 Wis. 2d 723, 728 N.W.2d 670 (holding that a final order should contain language that explicitly dismisses a party or adjudges the entire matter in litigation and states that it is intended to be final for purposes of appeal).

The co-appellants submitted a joint memorandum arguing that the post-confirmation motion for approval of the agreements should be treated as a special proceeding, and that the approval order finally disposed of all issues related to the agreements that were the subject of that proceeding, even if there might be additional post-confirmation proceedings relating to other matters in the future. The co-appellants analogized a rehabilitation proceeding to a probate action, which consists of a series of special proceedings.

The Commissioner's response addressed not only the finality of the order, but also whether the co-appellants have standing to appeal. The Commissioner contends that the appellants are not aggrieved by the circuit court's order approving the mediation agreement and related contracts because they are not parties to any of those contracts.

The co-appellants moved to strike the portion of the Commissioner's memorandum related to standing, or in the alternative, requested permission to file a reply memorandum submitted with their motion. The co-appellants' reply first argues that this court should not address the question of standing here because the issue of their standing to participate in the rehabilitation proceeding as parties is before this court on a companion appeal. If we do reach the question of standing, the co-appellants contend that they are injured by the circuit court's order because it advances the interests of junior claimants above those of senior claimants, contrary to WIS. STAT. § 645.68.

We believe that judicial economy is best served by addressing both the jurisdictional and standing questions together. We therefore deny the co-appellants motion to strike a portion of the Commissioner's memorandum and accept the co-appellants' reply memorandum.

As to jurisdiction, we are persuaded by the appellants' argument that a rehabilitation proceeding is more like a probate action involving a series of special proceedings than the typical civil case that is ended by a single final order. In particular, we note that the usual test regarding whether an order disposes of all matters in litigation between the parties does not squarely apply to a rehabilitation proceeding where there are no plaintiffs and defendants, but rather a subject of the rehabilitation proceeding and various stakeholders whose interests may be affected. We therefore conclude that a rehabilitation proceeding may involve more than one final circuit court order, when new matters are brought before the circuit court following confirmation of the plan. Because the order from which review is sought here appears to be the final order dealing with the issue of whether to approve the mediation agreement, we will accept jurisdiction over the appeal.

Regarding standing, we first note that our acceptance of the co-appellants' theory that the circuit court's approval of the mediation order should be treated as a special proceeding defeats their argument that the same standing issue is currently pending on another appeal. The issue in the other appeal is whether the co-appellants have standing to participate in the initial confirmation proceeding. Since the proceeding before us on this appeal relates to the mediation agreement, the question here is whether the co-appellants are aggrieved by that order. We conclude that they are not.

Only a person aggrieved by a judgment or order may file an appeal from it. *Ford Motor Credit Co. v. Mills*, 142 Wis. 2d 215, 217, 418 N.W.2d 14 (Ct. App. 1987). A person is aggrieved if the judgment bears directly and injuriously upon his or her interests, meaning that the person must be adversely affected in some appreciable manner. *Id.* at 217-18.

As the Commissioner notes, the co-appellants are not parties to the mediation agreement at issue or to any of the related contracts approved by the circuit court. Nor are they direct creditors of Ambac. The co-appellants contention that they are injured by a violation of the priority-of-creditors statute, WIS. STAT. § 645.68 is not persuasive because that statutory provision applies to liquidation proceedings rather than rehabilitation proceedings. In sum, the primary harm alleged by the appellants, that “there are no assurances that [their] insurance policy claims will ever be paid in full” is entirely speculative in nature, and not a direct injury.

Accordingly,

IT IS ORDERED that the motion to strike a portion of the Commissioner’s jurisdictional memorandum is denied, and the co-appellants’ motion to file a reply memorandum on the question of standing is granted.

IT IS FURTHER ORDERED that the appeal is dismissed for lack of standing.

Diane M. Fremgen
Clerk of Court of Appeals

