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DISTRICT IV

March 7, 2013

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

2012AP1332-LV

Ted Nickel v. Fannie Mae (L.C. # 2010CV1576)

Before Higginbotham, Sherman and Reilly, JJ.

The Federal National Mortgage Association (Fannie Mae) petitions for leave to appeal a post-confirmation plan order that granted the insurance commissioner's motion to approve Ambac's purchase of \$789 million in principal amount bank settlement notes for an aggregate cash price of approximately \$188 million. Fannie Mae contends that the order is final and appealable in its own right and has filed an accompanying notice of appeal, but brings this alternative petition in what it terms a precautionary measure.

Because the finality of the circuit court order is at issue on a separate motion to dismiss the notice of appeal brought by the insurance commissioner, which has not yet been fully briefed, we will assume without deciding for the purpose of this motion that the circuit court's order is not final.

This court has discretion to review an order not appealable as of right when an appeal would materially advance the termination of the litigation or clarify further proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice. WIS. STAT. § 808.03(2) (2011-12).¹ Interlocutory review is disfavored, however, and we will not grant leave to appeal absent compelling circumstances. *State v. Borowski*, 164 Wis. 2d 730, 735, 476 N.W.2d 316 (Ct. App. 1991); *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268, 569 N.W.2d 45 (Ct. App. 1997). The petitioner must demonstrate both that there is a substantial likelihood of success on appeal, and that immediate review is a necessity. *Id.* at 268 n.2; *State v. Salmon*, 163 Wis. 2d 369, 374-75, 471 N.W.2d 286 (Ct. App. 1991). Having considered the arguments of both the petitioner and the respondent, we conclude that there are no sufficiently compelling reasons to warrant interlocutory review in this case.

Fannie Mae's primary challenge to the approval of the purchase of the bank settlement notes is that it violates the statutory provision on priority of creditors set forth in WIS. STAT. § 645.68. That provision, however, ostensibly applies to liquidation proceedings, not rehabilitation proceedings. We understand that one of the issues in the pending appeals relating

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

to the confirmation plan is that this entire matter should have been treated as a liquidation rather than a rehabilitation. However, it is precisely because that issue should be answered in the already-pending appeals that we see no compelling need to grant interlocutory review in this case. If the court erred in treating the matter as a rehabilitation proceeding, the confirmation plan would presumably be vacated and this appeal would be moot. If this matter was properly handled as a rehabilitation proceeding, the priority-of-creditors provision did not apply.

Therefore,

IT IS ORDERED that the petition for leave to appeal is denied.

IT IS FURTHER ORDERED that the time for Fannie Mae to respond to the insurance commissioner's pending motion to dismiss for lack of jurisdiction and/or lack of standing is extended to March 25, 2013.

Diane M. Fremgen
Clerk of Court of Appeals