

December 17, 2013

Via Hand Delivery

Diane M. Fremgen
Clerk of Supreme Court of Wisconsin
110 East Main Street, Suite 215
Madison, Wisconsin 53703

Re: In the Matter of the Rehabilitation of the Segregated Account
of Ambac Assurance Corporation; Appeal Nos. 2010AP1291,
2010AP2022, 2010AP2835, 2011AP561

Dear Ms. Fremgen

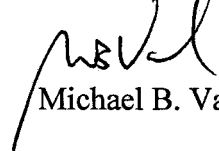
Enclosed are the original and nine copies of the Commissioner's Motion to Strike
"Response" by Customer Asset Protection Company to Petitions for Review in the above-referenced
appeals.

By copy of this letter, counsel of record are being served with the motion to strike.

Thank you for your attention to this matter.

Very truly yours,

FOLEY & LARDNER LLP



Michael B. Van Sicklen

Enclosures

cc: John Franke and Beth Ermatinger Hanan (with enclosure) (via first-class mail)
Jeffrey O. Davis (with enclosure) (via first-class mail)
Stephen L. Morgan and Jennifer M. Krueger (with enclosure) (via first-class mail)
Paul E. Benson, Paul A. Lucey and Nathan L. Moenck (with enclosure) (via first-class mail)
All Other Counsel of Record (with attachment) (via email)

STATE OF WISCONSIN
SUPREME COURT

Appeal Nos. 2010AP1291, 2010AP2022, 2010AP2835, 2011AP561

**COMMISSIONER'S MOTION TO STRIKE "RESPONSE" BY
CUSTOMER ASSET PROTECTION COMPANY ("CAPCO")
TO PETITIONS FOR REVIEW**

Appeal From the
October 24, 2013 Consolidated Ruling of the Court of Appeals, District IV

No. 2010AP1291

In the Matter of the Rehabilitation of:
Segregated Account of Ambac Assurance Corporation:

Ted Nickel and Office of the Commissioner of Insurance,

Plaintiffs-Respondents,

Ambac Assurance Corporation,

Interested Party-Respondent,

v.

Wells Fargo Bank/Trustee of Bondholders, Bank of New York
Mellon and Deutsche Bank National Trust Company,

Defendants,

Federal Home Loan Mortgage Corporation,

Defendant-Petitioner-Co-Appellant,

Aurelius Capital Management LP, Fir Tree Inc., King Street
Capital Master Fund, Ltd., King Street Capital, L.P.,
Monarch Alternative Capital LP and Stonehill Capital
Management LLC,

Defendants-Petitioners-Appellants,

Eaton Vance Management,

Defendants-Co-Appellants-Petitioner,

Nuveen Asset Management,

Restoration Capital Management LLC and Stone Lion Capital
Partners LP,

Defendants-Co-Appellants.

No. 2010AP2022

In the Matter of the Rehabilitation of:
Segregated Account of Ambac Assurance Corporation:

Ted Nickel and Office of the Commissioner of Insurance,

Plaintiffs-Respondents,

Ambac Assurance Corporation,

Interested Party-Respondent,

v.

Wells Fargo Bank/Trustee of Bondholders,

Defendant-Co-Appellant,

Bank of New York Mellon, Deutsche Bank National Trust
Company, Federal Home Loan Mortgage Corporation, Aurelis
Capital Management LP, Fir Tree Inc., King Street Capital
Master Fund, Ltd., King Street Capital, L.P., Monarch
Alternative Capital LP, Nuveen Asset Management,
Restoration Capital Management LLC, Stone Lion Capital
Partners LP and Stonehill Capital Management LLC,

Defendants,

Eaton Vance Management,

Defendant-Appellant-Petitioner.

No. 2010AP2835

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,

One State Street LLC,

Interested Party-Appellant,

Access To Loans for Learning Student Loan Corporation,
Aurelis Capital Management LP, Bank of New York Mellon,
Customer Asset Protection Company (“CAPCO”), Depfa Bank,
plc, Deutsche Bank National Trust Company, Eaton Vance
Management, Federal Home Loan Mortgage Corporation, Fir
Tree Inc., King Street Capital Master Fund, Ltd., King
Street Capital, L.P., Lloyds TSB Bank plc, Monarch
Alternative Capital LP, Nuveen Asset Management,
Restoration Capital Management LLC, Stone Lion Capital
Partners LP, Stonehill Capital Management LLC, Wells Fargo
Bank/Trustee of Bondholders, Wilmington Trust Company and
Wilmington Trust FSB,

Interested Parties.

No. 2011AP561

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,

Aurelis Capital Management LP, Bank of America, N.A.,
Customer Asset Protection Company (“CAPCO”), Federal Home Loan Mortgage
Corporation (“Freddie Mac”), Federal National Mortgage
Association (“Fannie Mae”), Fir Tree Inc., King Street
Capital Master Fund, Ltd., King Street Capital, L.P.,
Monarch Alternative Capital LP, Stonehill Capital
Management LLC, Wilmington Trust Company, Wilmington
Trust FSB,

Interested Parties-Appellants,

Deutsche Bank National Trust Company, Deutsche Bank Trust Company
Americas, Eaton Vance, U. S. Bank National Association,
Wells Fargo Bank, N.A., Wells Fargo Bank, N.A. as Trustee for
the LVM Bondholders,

Interested Parties-Appellants-Petitioners,

Access To Loans for Learning Student Loan Corporation,
Assured Guaranty Corporation, Bank of New York Mellon,
Countrywide Home Loans Servicing L.P., Depfa Bank, plc,
Goldman Sachs & Co., Inc., HSBC Bank USA, National
Association, Knowledgeworks Foundation, Lloyds TSB Bank
plc, One State Street LLC, Nuveen Asset Management, PNC
Bank, Restoration Capital Management LLC, Stone Lion
Capital Partners LP and Treasurer of the State of Ohio,
United States of America,

Interested Parties.

INTRODUCTION

On Friday, December 6, 2013, an entity named Customer Asset Protection Company (“CAPCO”) filed what it styles as a “Response” to the two timely Petitions for Review¹ filed with this Court on November 22, 2013 with respect to a Court of Appeals decision on October 24, 2013. In that decision, the Court of Appeals ruled in favor of the Wisconsin Commissioner of Insurance, as the court-appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation (the “Commissioner”) (the Plaintiff-Respondent), on all issues raised in the four consolidated appeals (Appeal Nos. 2010AP1291; 2010AP2022; 2010AP2835; and 2011AP561).

CAPCO was among a large number of interested-party appellants in Appeal No. 2011AP561 who challenged the trial court’s January 24, 2011 Order Confirming the Commissioner’s Plan of Rehabilitation. The Court of Appeals affirmed the confirmation over CAPCO’s objection and squarely rejected CAPCO’s argument that Articles 1.28 and 2.03 of the Commissioner’s Plan of Rehabilitation (“Plan”) improperly classified CAPCO’s reinsurance contract claim as a “general claim” rather than a more senior “policy claim.” *See* Court of Appeals’ Decision at ¶ 49 n.7.

¹ There were two timely Petitions: one by a fund known as Eaton Vance and its trustee, and the second by two trustee banks, Deutsche Bank and U.S. Bank.

See also Plan at Appendix to Deutsche Bank’s Petition for Review before the Court at Pet. App. 189, 195.

Although styled as a “Response” to the Petitions filed by other parties, CAPCO’s submission is in substance an improper and untimely Petition for Review. The Commissioner hereby moves the Court in accordance with Rule 809.14 to strike or otherwise reject CAPCO’s filing and order that CAPCO may not participate in any further proceedings before the Court in this case.

**REASONS FOR STRIKING OR OTHERWISE REJECTING
CAPCO’S “RESPONSE”**

In its appeal to the Court of Appeals in 2011AP561 (the only appeal CAPCO participated in), CAPCO argued that the trial court erred in confirming the Rehabilitator’s Plan because Articles 1.28 and 2.03 of the Plan classify reinsurance contract claims such as CAPCO’s contingent reinsurance contract claim as a “general claim” rather than as a more senior “policy claim.” The Court of Appeals rejected CAPCO’s arguments on appeal and affirmed the trial court’s confirmation order, holding at ¶ 49 n.7 that the claim-priority structure set forth in the Plan was a proper exercise of the Commissioner’s authority. Plan provision 1.28 defines “general claims” as, among other things, “any Claim submitted under a reinsurance agreement allocated to the Segregated Account” and Article 2.03 makes

“general claims” subordinate to “policy claims.” (Deutsche Pet. App. at 189, 195.)

In its “Response,” CAPCO argues that ¶ 58 n.8 of the Court of Appeals decision creates ambiguity as to whether the Plan claim-priority provision means what it says. CAPCO’s claim of being confused by ¶ 58 n.8 is rebutted by the Court of Appeals’ explicit holding at ¶ 49 n.7. There, the Court of Appeals held that its conclusion at ¶ 58 n.8 that the claim-priority statute in Chapter 645, Wis. Stat. § 645.68, applies only to liquidation proceedings “does not negate the priority scheme set forth under the “Plan.” *Id.* In its self-styled “Response” submission to this Court, CAPCO ignores the above-referenced provisions of the Court of Appeals’ decision which clearly affirmed the trial court’s confirmation order and approved the Commissioner’s claim-priority structure under which CAPCO’s reinsurance contract claims are subordinate to those of policyholder-level claims.

If CAPCO thought that the Court of Appeals’ decision was ambiguous or incorrect in any respect as to the CAPCO subordinate claim position (notwithstanding the clear language of ¶ 49 n.7), CAPCO had two choices: first, it could have moved the Court of Appeals within 20 days of the date of its decision for clarification or reconsideration under Rule 809.24; or, second, it could have petitioned this Court for review under Rule 809.62 in a petition in proper form filed no later than

November 25, 2013. CAPCO did neither. Instead, it is attempting to end-run these statutory requirements by styling its untimely filing as a “Response” and indicating an intent to submit briefing on an issue that was not raised in the other parties’ timely petitions.²

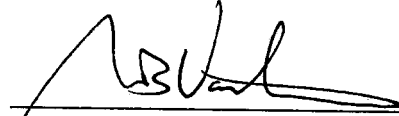
The Commissioner objects to CAPCO’s untimely collateral attack on that portion of the Court of Appeals’ decision at ¶ 49 n.7 that explicitly affirmed the claim-priority structure of the Commissioner’s Plan. The Commissioner submits that this Court should not consider CAPCO’s “Response” and should not permit CAPCO to participate in any further briefing should the Court accept review of any of the issues raised in the timely petitions.

WHEREFORE, the Commissioner respectfully requests that the Court issue an order striking or otherwise disregarding CAPCO’s “Response,” and declaring that CAPCO shall not be permitted to participate in any further proceedings before the Court with respect to the Court of Appeals decision.

² CAPCO does not assert that it is a “party,” nor could it, and it does not challenge or even mention the trial court’s holding or the Court of Appeals’ holding that it was not a “party” to this proceeding. *See* Court of Appeals’ Decision at ¶ 108. Having failed to preserve any challenge to the determinations below that it is not a “party,” CAPCO should not be permitted to pursue its untimely collateral attack in this Court on the Court of Appeals’ unqualified affirmance of the rehabilitation court’s approval of the claim-priority provisions of the Commissioner’s Plan.

Dated this 17th day of December, 2013.

FOLEY & LARDNER LLP



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