

STATE OF WISCONSIN
SUPREME COURT

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,

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, NUVEEN ASSET MANAGEMENT,
RESTORATION CAPITAL MANAGEMENT LLC AND STONE LION
CAPITAL PARTNERS LP,

Defendants-Co-Appellants-Petitioners.

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,

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, 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.

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,

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"), DEPPA 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,

Interested Party-Respondent,

AURELIS CAPITAL MANAGEMENT LP, BANK OF AMERICA, N.A., CUSTOMER ASSET PROTECTION COMPANY ("CAPCO"), DEUTSCHE BANK NATIONAL TRUST COMPANY, DEUTSCHE BANK TRUST COMPANY AMERICAS, EATON VANCE, 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,
U.S. BANK NATIONAL ASSOCIATION, WELLS FARGO BANK, N.A., WELLS
FARGO BANK, N.A. AS TRUSTEE FOR THE LVM BONDHOLDERS,
WILMINGTON TRUST COMPANY, WILMINGTON TRUST FSB,**

Interested Parties-Appellants,

**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.

**APPEAL FROM THE OCTOBER 24, 2013 CONSOLIDATED RULING OF THE
COURT OF APPEALS, DISTRICT IV
APPEAL NOS. 2010AP1291, 2010AP2022, 2010AP2835, 2011AP561**

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

**John Franke, WI SBN 1017283
Beth Ermatinger Hanan, WI SBN 1026989
GASS WEBER MULLINS LLC
309 North Water Street, 7th Floor
Milwaukee, WI 53202
414-223-3300**

December 23, 2013

INTRODUCTION

The motion by the Office of the Commissioner of Insurance (OCI) to strike Interested Party-Appellant CAPCO's Combined Response to the Petitions for Review seeks to deny this Court useful information about the issues that would remain for decision, if this Court accepts review and reverses. OCI's motion ignores the permissible scope of Responses as provided in Wis. Stat. (Rule) § 809.62(3). CAPCO's Response is not, as the OCI claims, a Petition for Review. It simply sought to alert the Court to an important issue that was not specifically raised by the petitioners but that might well be raised by the petitioners or confronted by the Court if review is granted.

The Response filed by CAPCO fits well within this Court's rules for a response and provides useful information for the Court in its consideration of whether to grant review and the appropriate scope of that review. If review is granted, the response duly preserves CAPCO's ability to submit a limited responsive brief in the event that issues are raised that effect CAPCO's interests. In contrast, granting the OCI's motion to exclude CAPCO would impede the Court's ability to properly consider whether and how to develop the law of insurance company rehabilitation, law which recently was untethered from Wis. Stat. § 645.68. The motion should be denied.

ARGUMENT

The Court's rules on providing responses and petitions for cross review are contained in sec. 809.62(3)(a)-(e), Wis. Stats. Specifically, Rule 809.62(3)(e) provides:

If a response to a petition for review is filed, it may include the following

(e) Any other issues the court may need to decide if a petition is granted, including whether and how they were raised before the court of appeals and whether and how the court of appeals decided the issues.

This is the subsection under which CAPCO submitted its Response.¹ This is a subsection nowhere discussed in OCI's motion to strike.

The OCI suggests that CAPCO should have filed a Petition for Review, to preserve the matter discussed in its Response, but that its Response is too late to serve as a petition. Neither objection has merit.

First, the CAPCO Response is explicitly not a Petition for Review. ~~It does not seek modification of the court of appeals decision. See Wis. Stat. (Rule) 809.62(3m). As CAPCO's Response plainly states, "While the court of appeals decision was adverse to CAPCO in terms of the immediate result, CAPCO did not petition for review because it believes that the court of appeals holding that section 645.68 has no application to a rehabilitation proceeding provides CAPCO with a basis to seek further relief in the trial court." Resp. at 2. Essentially, CAPCO sees a favorable aspect to the court~~

¹ CAPCO's Response contains a typographical error, stating 809.62(3)5, instead of 809.62(3)(e). See Resp. at 1. The text of that subsection is correctly cited.

of appeals ruling,² and thus did not petition for review. While CAPCO is not seeking review, CAPCO is entitled to point out that the review sought by others may lead the court to address an issue of concern to it and the Court is entitled to be made aware of that possibility. While OCI's real purpose may be to preclude CAPCO from further argument on remand to the circuit court, the time and place to assert that view is in the circuit court, and not this Court.³

Second, even, if CAPCO's effort to identify "[a]ny other issues the court may need to decide if a petition is granted" pursuant to Rule 809.62(3)(e) can possibly be deemed to seek review on that issue, CAPCO's ~~December 6 filing was well within the 30 days allowed for a petition for cross-review.~~ *See* Wis. Stat. (Rule) § 809.62(?). This Court has discretionary power to consider an issue that will require modification of the decision of the court of appeals, where a petition for review or cross review has not been filed. *Sulzer v. Diedrich*, 2003 WI 90, ¶ 19 n.4, 263 Wis. 2d 496, 664 N.W. 2d 641. But CAPCO is not asking for modification of the court of appeals decision; it only seeks to apprise this Court of

² The court of appeals declined to reach CAPCO's argument (and the OCI's response) regarding proper priority under sec. 645.68, because the court concluded that the statute does not apply to rehabilitation proceedings. *Nickel v. Depfa*, 2013 WI App 129, ¶ 58 n.8. Instead of applying the statute, the court of appeals concluded that the circuit court applies its discretion as a matter of equity, and here it properly exercised its discretion in approving the rehabilitation plan. *Id.*, ¶¶ 1, 90.

³ Curiously, OCI argues that CAPCO asserts some confusion in the court of appeals decision. Motion to Strike at 3-4. But nowhere in CAPCO's Response is "confusion" mentioned; CAPCO takes this characterization by OCI simply as another misplaced opposition to CAPCO's eventual arguments on remand to the circuit court.

potential remand steps post-review, in conformance with Wis. Stat. (Rule) § 809.62(3)(e).

It is a matter of good practice for a non-petitioning party like CAPCO to file some response, particularly in light of a 2008 Judicial Council Comment which suggests that the Court may find waiver if a respondent later wishes to address other defects in the court of appeals' decision but has failed to submit a response addressing those matters. Wis. Stat. § 809.62(3) Judicial Council Committee cmt. – 2008, *reprinted in* Wis. Sup. Ct. Order 04-08, 2008 WI 108, __ Wis. 2d __.⁴ *See also* Heffernan, ch. 23 at 14-15; Stephens & Lund, *New Rules Clarify Petition and Response Requirements*, 82 Wisconsin Lawyer 25, February, 2009 at *25-26 (explaining that alternative grounds for supporting the court of appeals decision “may be called to the supreme court’s attention in a response to the petition. The Judicial Council advises a respondent to do so or face the *possibility* of waiver.”) (emphasis in original).

Endorsing CAPCO’s approach here is the Judicial Council note that Jan. 1, 2009 changes to the rules on petitions for review “are intended to *facilitate the supreme court’s assessment* of the issues presented for review....” Stephens, *New Rules* at *26 (emphasis added). Implicit in the 2009 amendments was the concept that “a respondent may be deemed to have waived issues or defects that do not go to jurisdiction if they are not called to the attention of the supreme court in a response to the petition.”

⁴ These Judicial Council Committee Comments were not adopted, but they may be consulted for guidance in interpreting and applying Wis. Stat. § 809.62. 2008 WI 108, ¶ 29.

Id. Accordingly, in its Response, CAPCO has called to the Court's attention alternative scenarios that may arise, and may affect CAPCO, depending on whether the Court accepts review and depending on whether the court addresses the applicability of sec. 645.68.

The Commissioner's motion also ignores the principle that when this Court does accept review of one or more issues, the full record below is presented to the Court, and the Court is free to address matters beyond those identified in the parties' petition(s). *Univest Corp v. General Split Corp.*, 148 Wis. 2d 29, 32, 435 N.W.2d 234 (1989). The court may even consider questions raised in a previous proceeding in which no petition was filed. *Id.* A commentator also cited by OCI has noted that if the court of appeals has decided one question and left others undecided, this Court may reverse and remand to the court of appeals for disposition of the unresolved issues. *Heffernan*, ch. 23 at 3. Alternatively, the Court may choose to decide the unresolved issues itself, particularly if they have been fully briefed. *See, State v. Johnson*, 153 Wis. 2d 121, 449 N.W.2d 845 (1990). CAPCO's explication of the effect of possible review and reversal is intended to facilitate the Court's assessment of the issues others have presented for review, making the CAPCO Combined Response entirely proper.


Last, and in a footnote, OCI appears to argue that CAPCO lacks standing to file its Response. Motion at 4 n.2. That argument fails for several reasons. First, the Commissioner never argued in its brief to the court of appeals that CAPCO lacked standing to lodge an appeal. *See*

August 11, 2011 OCI Resp. Br. Second, this Court already has heard an appeal related to the Ambac proceedings and another interested party – the United States. *See in the Matter of the Rehabilitation of: Segregated Account of Ambac Assurance Corp.*, 2012 WI 22, ¶ 6, where the Court acknowledged that there are “scores of parties in interest” in this largest-ever rehabilitation proceeding in Wisconsin. Unlike the United States, CAPCO filed objections in the circuit court to the OCI’s proposed plan of rehabilitation. *Compare Ambac*, 2012 WI 22, ¶ 14. Indeed, the “state rehabilitation court has allowed entities with an interest in the rehabilitation an ongoing right to be heard and apply for relief.” *Ambac*, 2012 WI 22, ¶ 15, citing *In the Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corp.: Nickel v. United States*, 782 F. Supp. 2d 743, 744 (W.D. Wis. 2011). The lack of standing argument goes nowhere.

For all these reasons, the Court should retain the benefit of the information provided by CAPCO in its Combined Response and deny the Commissioner’s motion to strike.

Dated this 23rd day of December, 2013.

Gass Weber Mullins LLC
309 North Water Street,
7th Floor
Milwaukee, WI 53202
414-223-3300



John Franke, SBN 1017283
Beth Ermatinger Hanan, SBN 1026989
Attorneys for Interested Party-
Appellant-Respondent, Customer Asset
Protection Company (“CAPCO”)