



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. Box 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT IV

March 4, 2016

To:

Hon. William D. Johnston
Circuit Court Judge
Lafayette County Courthouse
P.O. Box 40
Darlington, WI 53530

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Jeffrey Simmons
Matthew Lynch
Foley & Lardner LLP
P.O. Box 1497
Madison, WI 53701-1497

Peter C. Blain
R. Timothy Muth
Reinhart Boerner Van Deuren, S.C.
P.O. Box 2965
Milwaukee, WI 53201-2965

Bryan K. Nowicki
Reinhart Boerner Van Deuren, S.C.
P. O. Box 2018
Madison, WI 53701-2018

Emanuel C. Grillo
Eamonn O'Hagan
Goodwin Procter LLP
The New York Times Bldg.
620 Eighth Avenue
New York, NY 10018-1405

Daniel W. Stolper
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

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

2014AP2033

Ted Nickel v. FFI Fund Ltd. (L.C. # 2010CV1576)

Before Higginbotham, Sherman and Reilly, JJ.

FFI Fund Ltd., FYI Ltd., Olifant Fund, Ltd., Axonic Capital LLC, Axonic Credit Opportunities Master Fund LP, and OC 523 Master Fund LTD jointly appeal an order issued by the circuit court pursuant to an ongoing rehabilitation proceeding for the distressed insurance company, Ambac Assurance. After reviewing the record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm on the procedural ground that the appellants lack standing to challenge the order at issue.

A determination as to standing takes into account and balances:

(1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a “personal stake” in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing has been challenged.

Foley-Ciccantelli v. Bishop’s Grove Condo. Ass’n, Inc., 2011 WI 36, ¶5, 333 Wis. 2d 402, 797 N.W.2d 789. “When [as here] no statute, rule, or constitutional provision directly governs the standing analysis, a court determines these three aspects of standing by examining the facts to determine whether an injured interest exists that falls within the ambit of relevant legal principles that judicial policy calls for protecting.” *Id.*, ¶6.

The appellants hold certificates of ownership in senior classes of a pool of securitized residential real estate mortgage loans known as the HarborView transaction. Deutsche Bank National Trust serves as the trustee for the HarborView Mortgage Loan Trust. As trustee, the bank has the responsibility of distributing the principal and interest payments made by the borrowers of the underlying HarborView mortgages to the senior certificate holders and other stakeholders—including Ambac, who issued insurance policies relating to the HarborView transaction that were ultimately placed in a segregated account subject to the rehabilitation plan. The order at issue here affirmed the rehabilitator’s interpretation of a clause in a Pooling and

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Servicing Agreement that requires Deutsche Bank to reimburse Ambac for the principal and interest on claims it has paid on certain junior class certificates before making certain distributions to the senior certificate holders, and further directed Deutsche Bank to continue following that interpretation in administering its duties.

First, we acknowledge that the senior certificate holders have some personal interest in the rehabilitation court's order because it affects the timing and amount of the return on their HarborView investments. However, we note that the certificate holders are not actually parties to the Pooling and Servicing Agreement, and that the court's order is not directed at them. Rather the order is directed toward Deutsche Bank, and concerns the interpretation of a provision that was already in place before the senior certificate holders invested in HarborView.

Next, we are not persuaded that the senior certificate holders would be adversely impacted if they were barred from challenging the rehabilitation court's order. A rehabilitation proceeding is not an adversarial action, and the only formal parties to the current proceeding are the petitioning insurance commissioner and rehabilitator, Ted Nickel, and the subject insurer, Ambac. *See Nickel v. Wells Fargo Bank*, 2013 WI App 129, ¶¶9 n.3, 109, 351 Wis. 2d 539, 841 N.W.2d 482. To the extent that any other interested parties may have a right of limited participation in the rehabilitation proceeding, we note that Deutsche Bank was integrally involved in the initial litigation regarding the approval of the rehabilitation plan. That prior involvement in this matter satisfies us that, as trustee for the HarborView Mortgage Loan Trust, Deutsche Bank is both able and willing to act to protect the interests of the senior certificate holders. The fact that the bank is not pursuing an appeal here merely speaks to its evaluation that the senior certificate holder's position lacks merit.

Finally, and most importantly, the legal principles and judicial policies underlying a rehabilitation proceeding weigh heavily against allowing individual certificate or policy holders to have standing to challenge orders issued by the rehabilitation court following the adoption of a rehabilitation plan. A rehabilitation proceeding is to be treated as a management tool, rather than a legal task, and the rehabilitator should be granted broad authority and flexibility to act without cumbersome procedures. Introductory Comment to WIS. STAT. § 645.32, 1967 WIS. LAWS, ch. 89, § 17; *see also Nickel*, 351 Wis. 2d 539, ¶¶12-14. It would be extremely cumbersome and inefficient to allow individual certificate holders to raise objections to a rehabilitation court's order to the trustee of those certificate holder's investments, when the trustee is wholly capable of raising its own objections, when warranted.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21.(1).

Diane M. Fremgen
Clerk of Court of Appeals