

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

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

Ted Nickel and the Office of the
Commissioner of Insurance,
Petitioners-Respondents,
Ambac Assurance,
Interested Party-Respondent,

Appeal No. 2014AP002033

v.

FFI Fund Ltd., FYI Ltd., Olifant
Fund, Ltd., Axonic Capital LLC,
Axonic Credit Opportunities Master
Fund LP and OC 523 Master Fund
LTD,
Interested Parties-Appellants.

On Appeal from the Order of the Dane County Circuit Court
Case No. 2010CV001576
The Honorable William D. Johnston, Presiding

APPELLANTS' MOTION FOR RECONSIDERATION

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Pursuant to Rule 809.24, Appellants, FFI Fund Ltd., FYI Ltd., Olifant Fund, Ltd.,¹ (collectively, “Senior Certificate Holders” or “Appellants”), move this Court for reconsideration of its Opinion and Order, dated March 4, 2016 (the “Opinion”), which denied standing to the Appellants for the purpose of appellate review of the Dane County Circuit Court’s order granting declaratory and injunctive relief directly adverse to the Senior Certificate Holders in the Ambac Rehabilitation proceeding. The Court’s Opinion incorrectly allows the Rehabilitator of the Segregated Account of Ambac Assurance Corporation (the “Rehabilitator”) to prevail by motion in a contract interpretation dispute in those rehabilitation proceedings, but then precludes any appellate review for the only parties adversely affected by the result.

Appellants seek reconsideration because this Court has misconstrued the original motion of the Rehabilitator and the role of Deutsche Bank. (R. 885, A-App. 110). That motion did not resolve some dispute between Deutsche Bank and the Rehabilitator. Instead, the Rehabilitator exploited the rehabilitation proceeding to bind all persons with a declaration and an injunction enforcing the Rehabilitator’s interpretation of the interest waterfall of the Pooling and Servicing Agreement, whether or not such persons were parties to the rehabilitation proceedings. Indeed, if that were not the goal, there would have been no need (i) to file the motion in the first instance or (ii) for Deutsche Bank, the Trustee, to issue a notice to all Senior Certificate Holders, dated June 9, 2014 (the “Notice”), as part of that motion (R. 906 at 24, A-App. 888), expressly stating that “any

¹ Axonic Capital LLC, Axonic Credit Opportunities Master Fund LP and OC 523 Master Fund LTD do not join in this Motion.

holder of Securities who disagrees with the relief sought in the Motion must pursue any objection independently of the Trustee.”

A summary review of the record for this appeal demonstrates that the Appellants have standing here.

This Court cites to the three-part test in *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n., Inc.*, 2011 WI 36, ¶ 5, 333 Wis. 2d 402, 797 N.W.2d 789 (2011) as the appropriate standard. The Appellants satisfy every element of this test. In the first instance, this Court acknowledges in the Opinion that as holders of the Senior Certificates, the Senior Certificate Holders have a “personal stake” in the controversy. (*See* Opinion at 2.)

Secondly, a cursory review of the record also demonstrates that “the interest of the party whose standing is challenged will be injured,” has in fact occurred. The Senior Certificate Holders’ correspondence disputing the Rehabilitator’s and the Trustee’s agreed interpretation of the waterfall under the Pooling and Servicing Agreement prompted the Rehabilitator’s motion, as he represented in paragraphs 14 and 15 of his motion. (R. 885, A-App. 110). The sole purpose of the motion was to achieve a declaration that the Rehabilitator's interpretation was right, and Appellants' wrong.

Regarding that motion, Deutsche Bank had no economic or other interest in the conflicting claims to this stream of payments. Deutsche Bank disclaimed any intent to protect the interests of the Senior Certificate Holders and instead, directed them to independently protect their rights by appearing at the hearing on

the motion.² Therefore, this Court's conclusion that the Circuit Court's actions were "not directed at" the Senior Certificate Holders misses the fact that the sole purpose of the motion was to address a dispute between the Rehabilitator and the Senior Certificate Holders. It defies logic to say that an injunction telling Deutsche Bank not to pay certain funds to Appellants is not directed at them.

Finally, well-settled law establishes a judicial policy requiring protection of persons whose interests are prejudiced by injunctive or declaratory relief. Wisconsin law affords all persons, including the Senior Certificate Holders here, express protection with respect to injunctive and declaratory relief, regardless of the fact that such relief is sought in a rehabilitation proceeding. Wisconsin Statutes section 645.05(1) dealing with rehabilitation makes the Rehabilitator's right to request such relief subject to the relevant sections of chapter 813 requiring procedural protections for persons that may be affected by any restraining orders or temporary or permanent injunctions. Additionally, the Uniform Declaratory Judgment Act provides "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration may prejudice the right of persons not party to the proceeding." Wis. Stat. § 806.04(11). There is no carve-out or exception for rehabilitation proceedings. Section 806.04 affirmatively grants standing to

² The Court suggests that, as a participant in the rehabilitation proceedings, Deutsche Bank was "willing and able to act to protect the interests of the senior certificate holders." Nothing could be further from the truth. Deutsche Bank not only abdicated that responsibility in the Notice, but received an indemnity from the Rehabilitator in section 8.02 of the Plan of Rehabilitation (R. 890, A.App. 340) placing it in direct conflict with the interests of the Senior Certificate Holders.

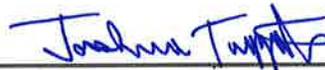
Appellants because they "claim an interest which would be affected by the declaration."

This Court asserts that it would be "cumbersome and inefficient" to grant standing to litigate these disputes in the Rehabilitation proceeding. The Rehabilitator, himself, created any such inefficiency by choosing to file his motion in that forum. He could just as easily have filed a separate judicial proceeding in a court of general jurisdiction. If his dispute with Appellants is not the kind of dispute which should be heard by the Rehabilitation court, then this Court should remand the action to the Circuit Court with directions that the Rehabilitator seek relief elsewhere. But if the case can be brought, then Wisconsin law requires that affected parties like Appellants be afforded standing.

WHEREFORE, Appellants pray for an order granting this motion for reconsideration and reversing and remanding the Circuit Court's order and for such other and further relief as may be just and proper.

Dated this 24th day of March, 2016.

Respectfully submitted,



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