
In the Matter of the Rehabilitation of:

Case No. 10CV1576

Segregated Account of Ambac Assurance Corporation

ORDER GRANTING REHABILITATOR'S MOTION TO
CONFIRM AND DECLARE THE NATURE OF THESE PROCEEDINGS

This matter came before the Court on the Motion (the "Motion") of the Court-appointed Rehabilitator (the "Rehabilitator") of the Segregated Account of Ambac Assurance Corporation (the "Segregated Account") for a declaratory order clarifying the nature of these rehabilitation proceedings (the "Proceedings"). As set forth in the Motion, the Rehabilitator has requested this declaration to provide such clarification in connection with certain litigation pending in other jurisdictions in which parties adverse to Ambac Assurance Corporation ("Ambac" or the "General Account") have made arguments characterizing the Court's March 24, 2010 Order of Rehabilitation (the "Rehabilitation Order"), the Court's January 21, 2011 Order Confirming the Rehabilitator's Plan of Rehabilitation (the "Confirmation Order"), as affirmed by the Wisconsin Court of Appeals, 2013 WI App 129, 351 Wis. 2d 539, 841 N.W.2d 482, or the Proceedings generally.

This Court does not seek to decide the merits of disputes involving the General Account that are pending in other courts. As the Rehabilitation Order explains, "[t]his proceeding pertains solely to the Segregated Account . . . and does not pertain to policies, contracts, assets, equity ownership interests, and liabilities remaining in Ambac's General Account." Rehabilitation Order ¶ 2. Nonetheless, as described in greater detail at Paragraphs 80-84 of the Confirmation Order, the Wisconsin Office of the Commissioner of Insurance ("OCI") has an

interest in and continues to monitor developments in the General Account. OCI's authority to do so rests on "OCI's regulatory authority and as a contractual party under the Secured Note and Reinsurance Agreement subject to the Rehabilitator's authority to oversee and enforce contractual obligations." Confirmation Order ¶ 84. OCI's continued oversight of the General Account is appropriate in light of the unique structure of this rehabilitation and the capitalization of the Segregated Account, which are discussed in greater detail below. *See* Confirmation Order ¶ 82.

Accordingly, OCI has an interest in ensuring that Ambac (*i.e.*, the General Account) does not lose legal rights due to a misunderstanding or mischaracterization of these Proceedings. Because OCI is concerned that this could occur, to the detriment of both Ambac and the Segregated Account, OCI has asked this Court to clarify the nature of these Proceedings and the regulatory choices that they reflect in the hope that such clarification would be helpful to sister courts that must decide the legal ramifications of these Proceedings for the General Account.

Based on this Court's review of the Motion and all submissions by all parties-in-interest relating thereto, and for good cause shown, the Rehabilitator's Motion is hereby GRANTED and the Court hereby makes the following Findings of Fact and Conclusions of Law in support of this Order, which shall not be construed as amending or varying this Court's prior orders.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. These Proceedings are for the rehabilitation of a Wisconsin-domiciled insurer under Chapter 645 of the Wisconsin Statutes. The subject of these Proceedings is a segregated account established under Wis. Stat. § 611.24. *See* Rehabilitation Order ¶ 2.
2. As background, Wisconsin law allows an insurer to establish a segregated

account “for any part of its business” with the approval of the Commissioner of Insurance (the “Commissioner”). Wis. Stat. § 611.24(2). A segregated account is treated as a separate insurer for purposes of entering into rehabilitation proceedings under Chapter 645. *See* Wis. Stat. § 611.24(3)(e).

3. Here, the Commissioner approved Ambac’s creation of the Segregated Account on March 24, 2010. Before that, OCI and Ambac had conducted an extensive review of Ambac’s policies to determine which should be allocated to the Segregated Account and which should remain in the General Account. *See* Confirmation Order ¶¶ 64-69. As the Court of Appeals explained, “[a]fter completing this assessment, the commissioner approved the allocation of approximately 1000 policies with material projected losses, structural problems, and contractual triggers to the segregated account and left the remaining 14,000 healthy, performing policies in the general account.” 2013 WI App 129 at ¶ 37.

4. The Commissioner then commenced these Proceedings to rehabilitate the Segregated Account on March 24, 2010, the same day the Segregated Account was created.

OCI’s Decision to Limit Rehabilitation to the Segregated Account

5. Paragraphs 49-63 of the Confirmation Order describe OCI’s examination of Ambac in late 2009 and early 2010, and its consideration of various regulatory options to address the significant risks facing Ambac and its policyholders. These portions of the Confirmation Order explain OCI’s decision to limit this rehabilitation to the Segregated Account, as opposed to all of Ambac, and what OCI sought to achieve by proceeding in this more limited fashion.

6. In the course of its investigation of Ambac, OCI became aware that many of Ambac’s contracts contain language, referred to as “triggers,” providing that placing Ambac

into rehabilitation or liquidation proceedings would constitute a default. Confirmation Order ¶¶ 51-52. OCI concluded that a full rehabilitation of all of Ambac “could have triggered costly defaults” in many of these contracts, which would cause “substantial losses” that have been referred to as “collateral damage” in these Proceedings. *Id.* ¶ 51.

7. Thus, OCI sought an approach that could address Ambac’s acute financial challenges “in a manner that would not trigger covenants and cause defaults in thousands of Ambac policies.” *Id.* ¶ 54. OCI therefore adopted what it has called a surgical approach of rehabilitating only a segregated account of Ambac, as opposed to Ambac as a whole, which OCI concluded would provide the most beneficial outcome for all policyholders. *See* Confirmation Order ¶ 60.

8. OCI chose to limit the rehabilitation to the Segregated Account, and not to place Ambac into rehabilitation, in order to avoid causing defaults under Ambac contracts containing triggers linked to the commencement of rehabilitation proceedings against Ambac or to other measures that typically accompany rehabilitation proceedings.

9. Accordingly, the Rehabilitation Order entered by this Court took certain actions with respect to the Segregated Account, but not the rest of Ambac. Paragraph 2 of the Rehabilitation Order placed the “Segregated Account” in rehabilitation and explained, “[t]his proceeding pertains solely to the Segregated Account and to the policies, contracts, rights, assets, equity ownership interests, and liabilities allocated to it in accordance with Wis. Stat § 611.24, and does not pertain to the policies, contracts, assets, equity ownership interests, and liabilities remaining in Ambac’s General Account.” In Paragraph 3, the Commissioner was appointed as “Rehabilitator of the Segregated Account,” but not of Ambac. Paragraph 6 of the Rehabilitation Order provides that the Rehabilitator “shall take possession of the assets of the

Segregated Account,” and refers to the Rehabilitator “managing the affairs of the Segregated Account.” These provisions do not refer to taking possession of the assets of Ambac or managing the affairs of Ambac.

10. Given the precautions that OCI took to limit these Proceedings to the Segregated Account, and its reasons for avoiding a rehabilitation of Ambac as a whole, it would run counter to OCI’s stated purpose in adopting this measured approach to rehabilitation if the existence of these Proceedings is nonetheless deemed to trigger contractual defaults linked to the commencement of a rehabilitation of Ambac, the entry of an order of relief against Ambac by this Court, or other measures adjunct to such a rehabilitation, such as the appointment of a rehabilitator for Ambac, the taking possession of Ambac’s assets, and the appointment of an official to manage the affairs of Ambac.

Formation and Capitalization of the Segregated Account

11. As explained in Paragraphs 70-76 of the Confirmation Order, OCI’s targeted rehabilitation approach also shaped the capital structure created for the Segregated Account. OCI was aware that many of Ambac’s contracts “contained provisions restricting Ambac’s transfer of assets away from the General Account.” Confirmation Order ¶ 70. Based on these contractual provisions, OCI was concerned that providing capital for the Segregated Account through a material transfer of assets from Ambac “would have created massive litigation as well as substantial loss to Ambac.” *Id.* ¶ 70.

12. Therefore, OCI opted to capitalize the Segregated Account in a matter that avoided “allocating hard assets directly to the Segregated Account at its establishment.” *Id.* ¶ 71. OCI decided to leave the bulk of the insurer and its assets outside of rehabilitation “due to the existence of the triggers in transactions insured by Ambac relating to delinquency

proceedings and assets transfers.” *Id.* ¶ 61.

13. Instead of transferring assets from Ambac to the Segregated Account, OCI elected to provide the Segregated Account two newly-created instruments issued by the General Account: a \$2 billion Secured Note and an Excess-of-Loss Reinsurance Agreement. Confirmation Order ¶ 71. These instruments would allow the Segregated Account to draw funds from Ambac if necessary later in the Proceedings to pay policy claims and other expenses permitted under a Court-approved Plan of Rehabilitation. *Id.*

14. OCI decided to capitalize the Segregated Account in this fashion because it enabled the Segregated Account to have adequate capital without tripping contractual “triggers” that could have applied as a consequence of an asset transfer. In other words, OCI’s objective was to capitalize the Segregated Account in a way that would provide adequate funding going forward from the assets of the General Account, but *not* through a transfer of assets from Ambac that could trigger the adverse provisions contained in numerous Ambac contracts.

15. In affirming the adequacy of this capital structure, the Court of Appeals took note of OCI’s objectives in capitalizing the Segregated Account with the Secured Note and Excess-of-Loss Reinsurance Agreement: “The purpose of doing so was to isolate the claims-paying resources in the general account from the liabilities in the segregated account in order to avoid various contractual default triggers.” 2013 WI App 129 at ¶ 38. Further, “it was imperative that Ambac’s claims-paying resources remain in the General Account’ because they would be ‘subject to acceleration, early termination and other triggers’ if Ambac directly capitalized the segregated account with assets from the general account.” 2013 WI App 129 at ¶ 43 (quoting the Rehabilitator’s appeal brief).

16. Indeed, the Court of Appeals rejected an argument that the Plan of Rehabilitation

constituted a transfer of assets without fair consideration,¹ explaining:

In any event, as we have already explained, the commissioner had sound reasons for keeping the assets attributable to the segregated account in the general account. *It was imperative, according to the commissioner, that all assets remain in the general account* because transferring the assets to the segregated account would have triggered acceleration and early termination provisions, causing massive losses that would have made it substantially more difficult if not impossible to save Ambac from insolvency. The commissioner should pursue rehabilitation as opposed to liquidation whenever possible and structuring the plan in a way that likely would have prevented the commissioner from pursuing rehabilitation would not be in keeping with that general principle.

2013 WI App 129 at ¶ 82 (emphasis added).

17. Given these considerations, it would run counter to OCI's stated purpose of capitalizing the Segregated Account in a manner that avoided triggering contractual defaults and causing collateral damage if Ambac's issuance of the Secured Note and Excess-of-Loss Reinsurance Agreement were deemed to constitute a transfer of assets from Ambac to the Segregated Account or the appointment of a receiver for Ambac's assets.

WHEREFORE, IT IS HEREBY ORDERED that the Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings is GRANTED

Dated: _____

BY THE COURT

¹ The appellants were contending that the Plan involved a transfer of assets from the Segregated Account to the General Account, which is the opposite of what Ambac's counterparties are now claiming in other litigation.