WISCONSIN COURT OF APPEALS DISTRICT IV

Appeal No. _____

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Appeal from the Circuit Court for Dane County,
The Honorable Richard G. Niess Presiding
Circuit Court Case No. 2010-CV-1576

PETITION FOR LEAVE TO APPEAL ORDER

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Pursuant to Wis. Stat. § 808.03(2), Carlisle/Picatinny Family Housing L.P, Fort Bliss/White Sands Missile Range Housing L.P., Fort Detrick/Walter Reed Army Medical Center Housing LLC, Stewart Hunter Housing LLC, Monterey Bay Military Housing LLC, Monterey Bay Land LLC, Meade Communities LLC, Bragg Communities LLC, Polk Communities LLC, Rucker Communities LLC, Riley Communities LLC, Fort Lee Communities LLC, and Fort Leavenworth Frontier Heritage Communities, II, LLC (collectively, the "Petitioners") file this petition in the alternative[1] with the Court of Appeals, District IV, for leave to appeal the Order entered on October 24, 2016 (the "October 24, 2016 Order" or

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[1] Petitioners have filed a Notice of Appeal from the entirety of the Circuit Court's October 24, 2016 Order, as an appeal of right under Wis. Stat. § 808.03(1)(a). An order is final if it "disposes of the entire matter in litigation as to one or more of the parties." Wis. Stat. § 808.03(1). The Circuit Court's October 24, 2016 Order disposes of the entire case as to the Petitioners, who were not parties to the Circuit Court litigation, whose policies are not in the Segregated Account subject to rehabilitation, and who will not be involved in the case going forward. This Court has recognized that such orders are final with respect to similarly situated parties: "[T]he circuit court's order disposed of the entire matter in litigation between [the] two parties [because] the appellants were not allowed to intervene in the circuit court...[Because of this], there [was] nothing left for the appellants to do in the circuit court, and no reason to parse the order. The litigation between [the] two parties [had] ended. Consequently, the entire order [was] final and appealable as of right." Ex. 6, Order, June 18, 2010, Wisconsin Court of Appeals, Lundsten, Higginbotham, and Sherman, JJ (denying the Rehabilitator's motion to dismiss appeal as of right under Wis. Stat. § 808.03(1) because the appellant was not a party to the lawsuit and the order was therefore final as to that party).

Petitioners file this Petition in the alternative and out of an abundance of caution. If this Court determines that Petitioners are entitled to an appeal as of right, the Court need not consider this Petition.

the "Order"), granting the Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings. *See* Ex. 7.

I. ISSUES FOR REVIEW

This petition presents three issues:

First, did the Circuit Court err by finding and entering a procedurally improper advisory opinion?

Second, did the Circuit Court err by including factual findings in its October 24, 2016 Order that were unsupported by the factual record before the Court without the benefit of discovery or an evidentiary hearing?

Third, did the Circuit Court err by including factual findings regarding the risk of "collateral damage" that are inconsistent with the undisputed facts that exist today?

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. Factual Background

Petitioners are the owners of military housing developments at twelve Army bases across the country. Pursuant to the Military Housing Privatization Initiative, the United States Army has partnered with private development companies in order to develop, construct and maintain

housing at military bases across the country. The Army is a member of each of the Petitioners.

Petitioners took out loans to finance the large scale construction and development of housing at these military projects. *See,* Ex. 1, *In the Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corp.,* Dane County, Wisconsin, Cir. Ct. Case No. 10-CV-1576, Response to the Rehabilitator's Mot. to Confirm and Declare the Nature of These Proceedings, 9/30/16, at Ex. 3, ¶¶ 1-2. Petitioners also purchased bond insurance and a surety bond that guaranteed one year of principal and interest on the loans from Respondent Ambac. *Id.* All of these policies and surety bonds remain in Ambac's "General Account"; they were not placed in the Segregated Account subject to rehabilitation. *See* Ex. 2, *In the Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corp.,* Dane County, Wisconsin, Cir. Ct. Case No. 10-CV-1576, Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings, 7/15/16, ¶ 17 (stating that the Rehabilitator's Motion "concerns policies allocated to the General Account").

Under the terms of the loan documents for each of these military projects (the "MHPI Project Documents"), the provider of the surety bond

(here, Ambac) was required to maintain specific credit ratings. *E.g.,* Ex. 1, Resp. to the Rehabilitator's Mot., 9/30/16, at Ex. 3, ¶ 4; *Id.* at Ex. 4 § 4.17.[2] Ambac's credit ratings were downgraded in 2008, through no fault of Petitioners, causing the surety bonds that Ambac sold to Petitioners to fall below the required ratings. *Id.* at Ex. 3, ¶ 4. Ambac now claims that as a result of its own credit downgrade, it has the right to force Petitioners to replace the surety bond or to cash fund an account in the amount of the surety bond. *Id.* at Ex. 3, ¶ 5. This would require Petitioners in total to place over $200 million into "reserve accounts"; this money would thus be unavailable for use to construct and maintain housing for soldiers and their families for the remaining life of the projects (approximately 30-40 years). Despite that Ambac is now trying to profit from its ratings downgrade, it has not had to pay a single dollar on any of Petitioner's policies.

In fall 2015, Ambac threatened Petitioners, each of which is a policyholder in the General Account, that if they did not cash fund the debt service reserve accounts (resulting in the loss of funds for operations), Ambac would file suit. Petitioners filed suit to protect their rights and

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[2] Citations to MHPI Project Documents are to the governing documents for the Presidio of Monterey Project ("Monterey Project"). Unless otherwise noted, the Project Documents for the other MHPI Projects that are in litigation with Ambac contain either identical or substantially identical provisions.

Ambac also filed suit in other jurisdictions. Petitioners and Ambac currently are involved in litigation pending in six state courts and one federal court (the "MHPI Litigation"). Neither Ambac nor Petitioners are parties to the Rehabilitation Proceedings, and none of the issues pending in the MHPI Litigation are pending before the Circuit Court (which concedes it does not have jurisdiction over these issues). *See* Ex. 3, *In the Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corp.,* Dane County, Wisconsin, Cir. Ct. Case No. 10-CV-1576, Hr'g Tr. at 23:10-23, 10/11/16.

In the MHPI Litigation, Petitioners assert several reasons why Ambac is not entitled to force Petitioners to cash fund the debt service reserve accounts. These include, but are not limited to, the fact that there has been an "Ambac Default" or "Credit Enhancer Default" under the MHPI Project Documents. The occurrence of an Ambac Default or Credit Enhancer Default does ***not*** require Ambac to post any collateral or make any payments under the policies or sureties. However, it does result in the loss of certain consent rights granted to Ambac (including the right to force cash funding of the reserve accounts) if:

> "(c) a court of competent jurisdiction or another competent regulatory authority enters a final

> and nonappealable order, judgment or decree (i) appointing a custodian, trustee, agent or receiver for Ambac or for all or any material portion of its property or (ii) ***authorizing the taking of possession by a custodian, trustee, agent or receiver of Ambac (or taking of possession of all or any material portion of Ambac's property)***."

Ex. 1, Resp. to the Rehabilitator's Mot., 9/30/16 at Ex. 5 (definition of Ambac default) (emphasis added). This unique default trigger language was carefully negotiated by the parties. On its face it applies not only if a custodian takes possession of a material portion of Ambac's property, but also, under (c)(ii), if there is an order "authorizing" a custodian to take possession of a material portion of its property.

The issue of whether a default has occurred under the MHPI Project Documents is not before the Circuit Court, and there is no dispute that this issue must be decided by the Courts in which the MHPI Litigation is pending. Ex. 3, Hr'g Tr. at 4:16-22, 10/11/16. In the MHPI Litigation, Ambac argues that the Rehabilitation Proceedings have not caused an Ambac Default because the entire company was not placed into rehabilitation, but rather the Rehabilitation Proceedings before this Court involve only the Segregated Account. *See e.g.*, Ex. 1, Resp. to the Rehabilitator's Mot., 9/30/16 at Ex. 6, 2-4 (providing Ambac's position that

"the [Rehabilitation] Order did not authorize the taking of a material portion of Ambac's property"). But it fails to explain why an Ambac Default has not occurred under the highly specific (c)(ii) trigger language in the MHPI Project Documents.

In order to improperly influence these sister courts, which have jurisdiction over the disputes between Petitioners and Ambac, the Rehabilitator of the Segregated Account of Ambac sought and obtained an improper advisory opinion from the Circuit Court. Despite the fact that Petitioners' policies had all been allocated to the General Account and had never been the subject of any litigation or ruling in the Circuit Court, and that there was no dispute pending before the parties to the Rehabilitation Proceedings, the Circuit Court issued an order purportedly "clarifying" its prior orders. The Circuit Court indicated that the Order was intended to serve as "Cliff Notes" for other courts in determining whether the rehabilitation of Ambac's Segregated Account triggered an Ambac Default or Credit Enhancer Default in the MHPI Project Documents. *See* Ex. 3, Hr'g Tr. 10/11/16, at 5:7-18. There is no precedent in Wisconsin or elsewhere that supports the entry of such an order. To the contrary, this Order is improper as a matter of law and flies in the face of decades of

jurisprudence expressly forbidding such advisory opinions. *See, e.g. Am. Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 203, 188 N.W.2d 529 (1971) ("Advisory opinions should not be given under the guise of a declaration of rights.").

This appeal is thus necessary to affirm an important and foundational legal principle and to prevent the use of an improper advisory opinion in other courts.

While expressly stating that it was "not in any way attempting to reconsider or revise or amend" any prior orders, the Circuit Court's "clarifications" actually misstate the prior factual record in the Rehabilitation Proceedings. Ex. 3, Hr'g Tr., 10/11/16, at 46:24-47:6. Prior orders expressly recognized that even though the rehabilitation was structured to avoid a full rehabilitation of Ambac, some policies in the General Account may still have triggered "Ambac Defaults" or "Credit Enhancer Defaults," and they could not "craft [an injunction] that would affect and adjoin all of those covenants and triggers." Ex. 1, Resp. to the Rehabilitator's Mot., 9/30/16 at Ex. 2, 71:13-21. Thus, the Rehabilitator and the Circuit Court recognized in 2010 that it was possible, and even

likely, that some of the policies allocated to the General Account may have had defaults triggered by the rehabilitation of the Segregated Account.

The Order also is misleading given the undisputed facts today, which do not support any finding of any risk of "collateral damage" if Petitioners are successful in the MHPI Litigation.[3] Indeed, at a recent deposition, Ambac's corporate representative Cathleen Matanle, who is head of their Risk Department that oversees such policies, was unable to provide even an estimate of the number of policies that contain substantially similar default provisions. Ex. 1, Resp. to the Rehabilitator's Mot., 9/30/16 at Ex. 11, 33:18–34:3 ("Q: How many policies fall within that fourth bucket, which is a transfer of assets? . . . A: I don't know. Q: Do you have an estimate? A: No."). She was unable to identify a ***single specific*** policy in effect today with a default trigger similar to that of the Petitioners, and was further unable to identify a ***single specific*** policy that would result in collateral damage if such a default occurred. *Id.* at Ex. 11, 88:8–90:9.

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[3] The Rehabilitator has argued that if the courts find an Ambac Default or Credit Enhancer Default in the MHPI Litigation, it "could trigger the very defaults and resulting collateral financial damage that the Rehabilitator intended to avoid. . ." Ex. 2, Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings, 7/15/16, at 2.

This improper Order poses a substantial risk of harm to Petitioners, as Ambac has made clear that it will argue the Order is "dispositive" on the merits regarding whether there has been an Ambac Default or Credit Enhancer Default under the MHPI Project Documents. Ex. 1, Resp. to the Rehabilitator's Mot., 9/30/16 at Ex. 1, 6:13-22 ("Ambac will argue to the [Monterey] court . . . that all it needs to do to decide [the Ambac Default] issue is to see that the court in Wisconsin was very concerned about the possibility that provisions like these default provisions here in any contract could destroy the company as a whole, could cause all kinds of ripple damages . . . ."). This is inconsistent with what the Rehabilitator represented to the Circuit Court in seeking this Order, stating that "These issues are to be decided by the courts where the MHPI Cases are pending." Ex. 2, Rehabilitator's Mot. to Confirm and Declare the Nature of These Proceedings, 7/15/16, ¶ 12.

B. Procedural Background

Petitioners are not parties to the Rehabilitation Proceedings, and there is no issue pending before the Circuit Court regarding its prior orders. Nonetheless, on July 15, 2016, the Rehabilitator filed a Motion seeking a declaratory order "clarifying...the nature of these proceedings" and "certain

determinations already made in the Rehabilitation Order, the Confirmation Order, or the decision of the Court of Appeals affirming the Confirmation Order." Ex. 2, Rehabilitator's Mot. to Confirm and Declare the Nature of These Proceedings, 7/15/16, at 2,8. There was admittedly no need for such a "clarifying" order for use in the Rehabilitation Proceedings, and the Rehabilitator's Motion admitted on its face that the purpose of the Order was to affect litigation in other jurisdictions. *Id.* at 2. ("This is not an academic question, but is an issue that has arisen in certain litigation pending in other jurisdictions . . ."); *see also*, Ex. 3, Hr'g Tr., 10/11/16, at 41:1-3 ("We're not pretending that this order isn't being entered for purposes of being considered by these courts. It is."). This is a classic and improper advisory opinion, for use in other courts in which the MHPI Litigation is pending.

On September 30, 2016, the Petitioners filed their Response Opposing the Rehabilitator's Motion to Confirm and Declare the Nature of the Proceedings. Petitioners argued that the Rehabilitator was seeking an impermissible advisory opinion that Ambac's counsel intended to use in litigation pending in the Superior Court of the State of California, County of Monterey, among other places. Ex. 1, Resp. to the Rehabilitator's Mot.,

9/30/16, at 1-2. Petitioners also argued that the Rehabilitator sought new factual findings nearly six years after the fact without discovery or an evidentiary hearing, and that the Order is misleading given that the undisputed evidence today does not show any risk of any harm to Ambac if an Ambac Default is found to have occurred under the specific trigger language in the MHPI Project Documents. *Id.* at 3.

On October 24, 2016, the Circuit Court issued an Order granting the Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings. The Court recognized that it had jurisdiction over the Segregated Account, but not over Ambac generally or over Ambac's General Account. Ex. 3, Hr'g Tr., 10/11/16, at 23:12-13 ("I'm not assuming any jurisdiction over any issue that involves Ambac."). The Circuit Court also recognized that there was no dispute pending before it that required clarification, and instead held that its Order was intended as Cliff Notes for use by other courts that had jurisdiction over the MHPI Litigation. *Id.* at 23:10-23

To be clear, there was ***no*** pending dispute between Ambac and the Petitioners before the Circuit Court. Each of Petitioners' policies are in the General Account, and the Circuit Court, the Rehabilitator and Ambac itself

have each reiterated multiple times that the Rehabilitation Proceedings do not affect Ambac or its General Account. *See, e.g.* Ex. 1, Resp. to the Rehabilitator's Mot., 9/30/16, at Ex. 14 at 1 ("The injunctive relief granted below does not apply to policies or other contracts which remain in the Ambac General Account. The injunctive relief specified below pertains to the Segregated Account, policies, contracts, assets and liabilities allocated to the Segregated Account."); Ex. 4, 10/8/10 Disclosure Statement ("Neither AAC nor its General Account, nor any of the policies, contracts, assets, equity ownership interest and rights or liabilities in the General Account, is in rehabilitation as part of the proceeding or otherwise."); Ex. 5, http://www.ambac.com/investor_qanda.asp ("The rehabilitation pertains solely to the recently established Segregated Account (the Segregated Account), which is a separate insurer from AAC for purposes of rehabilitation. The rehabilitation does not include AAC or its General Account.")

Further, Petitioners are not parties to the Rehabilitation Proceedings. *See*, *In re Ambac Assur. Corp.*, 2013 WI App 129, ¶ 108, 351 Wis. 2d 539, 841 N.W.2d 482. None of the Circuit Court's prior orders have interpreted

the terms of policies in the General Account and thus there were no need for any clarification of prior orders.

III. STANDARD OF REVIEW

The Court of Appeals may grant interlocutory review when it "determines that an appeal will: (a) materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) protect the petitioner from substantial or irreparable injury; or (c) clarify an issue of general importance in the administration of justice." Wis. Stat. § 808.03(2). Courts also consider whether there is "a substantial likelihood that this court will reverse the trial court's nonfinal order." *Cascade Mountain v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997) (*citing State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991)).

An appeals court will review a circuit court's decisions with respect to discretionary jurisdiction for abuse of discretion. *Sawejka v. Morgan*, 56 Wis. 2d 70, 201 N.W.2d 528 (1972) (superseded by 2016 statute as stated in *Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 396 N.W.2d 323 (1986). However, "when [an appellate court] reviews whether a [circuit] court had subject matter jurisdiction, [the appellate court] appl[ies] the de

novo standard of review." *Van Deurzen v. Yamaha Motor Corp. USA*, 2004 WI App. 194 ¶ 9, 276 Wis. 2d 815 823, 688 N.W.2d 777, 781. Finally, the circuit court's findings of fact are reviewed using the "clearly erroneous" standard. *Phelps v. Physicians Ins. Co. of Wisconsin, Inc.*, 2009 WI 74, ¶ 30, 319 Wis. 2d 1, 768 N.W. 2d 615.

IV. ARGUMENT

A. A Permissive Appeal Is Appropriate Because It Will Clarify An Issue Of General Importance In The Administration Of Justice.

Under Wis. Stat. § 808.03(3), this Court may hear an appeal from an interim or non-final order[4] if doing so will "[c]larify an issue of general importance in the administration of justice." This factor is clearly satisfied, because the appeal raises important questions regarding the relationship between courts of different jurisdictions and the limits of the Circuit Court's jurisdiction. Here, the Circuit Court's entry of an improper advisory opinion -- where no dispute was pending before it or between the parties to the Rehabilitation Proceedings -- casts doubt on a foundational principle regarding the role and scope of the judiciary. *See Am. Med.*

[4] As noted above, Petitioners have filed a Notice of Appeal because the Order disposes of the entire case as to the Petitioners.

Servs., Inc., 52 Wis. 2d at 203. Immediate appellate review will thus benefit not only the parties, but other courts and litigants as well.

The Wisconsin Supreme Court has stated that Courts of Appeals should look closely at petitions that present issues that would impact the judicial system as a whole. In *Waters ex rel. Skow v. Pertzborn*, for example, the Wisconsin Supreme Court noted that the Court of Appeals had granted a permissive appeal to a petitioner who asked the Court's opinion on whether a bifurcation of a trial to two different juries threatened the petitioner's right to trial by jury. 2001 WI 62, ¶ 11, 243 Wis. 2d 703, 627 N.W.2d 497.

The Circuit Court's Order and Ambac's intent to use that Order in the MHPI Litigation pending in sister courts poses a great threat to judicial comity and the longstanding judicial practice of refraining from ruling on issues pending only in front of sister courts. It is well established in Wisconsin that the issues of judicial comity and the limits of a court's jurisdiction are foundational to the administration of justice. The Wisconsin Supreme Court has stated that comity "promote[s] justice between individuals, and...produce[s] a friendly intercourse between the sovereignties to which they belong." *Teague v. Bad River Band of Lake*

Superior Tribe of Chippewa Indians, 2000 WI 79, ¶ 36, 236 Wis. 2d 384, 612 N.W.2d 709 (internal quotations omitted). Because of this, "a court should not exercise jurisdiction over subject matter over which another court of competent jurisdiction has commenced to exercise it." *Id.* at 406 (internal quotations omitted); *see also Sheridan v. Sheridan*, 65 Wis. 2d 504, 510, 223 N.W.2d 557 (1975) ("[W]hen an action is pending in the courts of one state, the second state should not interfere.") Furthermore, it is uncontroverted that Wisconsin recognizes that "[a]dvisory opinions should not be given under the guise of a declaration of rights" and that "a judgment declaring rights [that] would not settle the controversy [is] merely an advisory opinion." *See Am. Med. Servs., Inc.*, 52 Wis. 2d at 203.

The Circuit Court's ruling undermines these important principles, and creates ambiguity not only for the parties but for all Wisconsin courts and litigants. The Circuit Court conceded that it was issuing a "clarification" of prior orders in order to influence litigation pending in other courts. Ex. 3, Hr'g Tr., 10/11/16, at 24:18-21 ("If, in fact, there is anything that's before this court that needs to be clarified that may be helpful to the other courts, I can't see a downside to doing it.") As the Rehabilitator conceded at hearing, the sole purpose of the Order was to

influence other courts. *Id.* at 41:1-3 ("We're not pretending that this order isn't being entered for purposes of being considered by these courts. It is.") There is no precedent in Wisconsin or elsewhere for such an Order, and it is a classic example of an impermissible advisory opinion. *See, Am. Med. Servs., Inc.,* 52 Wis. 2d at 203.

The Circuit Court relied on Wis. Stat. § 645.05 for its jurisdiction to enter the Order.[5] *See*, Ex. 3, Hr'g Tr., 10/11/16, at 16:19-17:18. But this misses the point. While the Circuit Court has the jurisdiction provided to it by statute, this does not create an extra-jurisdictional mandate to enter advisory opinions aimed at affecting litigation before other courts. Further, in order for § 645.05 to grant jurisdiction, there must be an "action" pending before the Circuit Court that "might lessen the value of the insurer's assets or prejudice the rights of policyholders. . ." Wis. Stat. § 645.05(k). Here, neither the Circuit Court nor the Rehabilitator identified any such "action," nor could they, as Petitioners are not parties to the Rehabilitation Proceedings and the terms of Petitioners policies in the General Account have never been adjudicated by the Circuit Court.

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[5] The Rehabilitator raised this purported basis for the Circuit Court's jurisdiction for the first time in its reply brief; while Petitioners were not afforded an opportunity to brief the issue, they offered argument as to why this statute does not apply at hearing. Tr. 18:17-23:9.

This presents an important legal question that even the Circuit Court recognized would likely be the subject of appellate review. *See* Ex. 3, Hr'g Tr., 10/11/16, at 16:13-19 (stating that the Petitioners could "take [the matter] up to the court of appeals."). As a matter of public interest this court should clarify that Wis. Stat. § 645.05 does not provide any exception to the prohibition against advisory opinions. *Commerce Bluff One Condo. Ass'n, Inc. v. Dixon*, 2011 WI App. 46, ¶122 n.6, 332 Wis. 2d 357, 798 N.W.2d 264 (rejecting request to clarify trial court's order in a manner that would determine potential future disputes because "[w]e do not give advisory opinions" and clarification would not decide any issue then before the court).

Appellate review is necessary here given that the subject Order is an improper advisory opinion intended to influence proceedings between different parties in sister courts, which is an "issue of general importance in the administration of justice" pursuant to Wis. Stat. § 808.03(b)(3).

B. A Permissive Appeal Is Appropriate Because It Will Protect The Petitioner From Substantial Or Irreparable Injury.

Under Wis. Stat. §808.03(2)(b), this Court may also hear an appeal from an interim or non-final order if such an appeal will "[p]rotect the

petitioner from substantial or irreparable injury." In this case, an immediate appeal of the Circuit Court's October 24, 2016 Order will protect the Petitioners from suffering a substantial, irreparable injury in litigation pending outside this jurisdiction.

The Wisconsin Supreme Court has acknowledged that a threat of "substantial or irreparable injury" to the petitioner is greater when the petitioner would be left with no adequate remedy if its request for an appeal was denied. *See Arneson v. Jezwinski*, 206 Wis. 2d 217, 228, 556 N.W.2d 721 (1996) (holding that interlocutory appeals of qualified immunity denials must be granted because, without an appeal, the petitioner would be "left with no other adequate remedy."). *Id.* at 227. Here, if Petitioners are not allowed an immediate appeal, there is a risk that the MHPI Litigation will be resolved on the merits before the issues on appeal are resolved by this Court.

In addition, the Wisconsin Supreme Court has recognized that there are several advantages of granting petitions that present issues of comity and has "urged the court of appeals to be careful in exercising discretion when reviewing th[ose] cases...[as] granting such appeals will often be necessary to protect the claimant from substantial and irreparable injury."

State ex rel. Hass v. Wisconsin Court of Appeals, 2001 WI 128, ¶ 25, 248 Wis. 2d 634, 636 N.W.2d 707; *see also State v. Jenich*, 94 Wis. 2d 74, 288 N.W.2d 114 (1980) (citing concerns about the expense of unnecessary litigation and the threat to judicial finality when speaking about a petition dealing with double jeopardy). Petitioners in comity cases face the threat of "both unnecessary litigation and the loss of any benefit of the claim...[which] serve[s] to protect defendants from subsequent litigation." *Hass*, 248 Wis. 2d at 644, 645.

While Petitioners do not concede that the Circuit Court's Order is admissible or binding in the ongoing MHPI Litigation outside of this jurisdiction, Ambac has made it clear that it intends to introduce the substance of the Circuit Court's Order and argue that it is "determinative" of the merits in those cases. Petitioners thus face the real possibility that the Order will improperly impact the determination on the merits in those separate lawsuits, regarding whether Petitioners should be forced to set aside over $200 million that will be unavailable to construct and maintain housing for military families in the years to come.

Finally, the Order further prejudices Petitioners because they had no opportunity to participate in the evidentiary proceedings that resulted in the

prior orders that the Circuit Court purported to be "clarifying." Before entering the 2010 and 2011 orders, the Circuit Court heard lengthy testimony where witnesses were subject to cross examination. Because all of Petitioners' policies were allocated to the General Account, and were not the subject of the Court's prior orders, Petitioners had no opportunity to participate in these proceedings. Allowing the Circuit Court to effectively apply these prior orders to Petitioners' policies, without allowing Petitioners the same due process that was afforded to holders of policies in the Segregated Account, could cause great prejudice to Petitioners.

V. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THE APPEAL.

Interlocutory appellate review is also appropriate where an Appellant is likely to succeed on the merits of its petition. *See Webb*, 160 Wis. 2d at 632.

Petitioners are likely to prevail because the Order is a textbook example of an impermissible advisory opinion. State and federal courts across the nation, including Wisconsin courts, recognize the same fundamental principle that courts may never issue advisory opinions or seek to influence litigation pending before other tribunals. *Constand v. Cosby*, 833 F. 3d 405, 411 (3d Cir. 2016) ("Given that Cosby expressly requests us

to provide a basis ***to make an argument to other courts***, he also requests an advisory opinion." (emphasis added)); *Miller v. F.C.C.*, 66 F.3d 1140, 1145 (11th Cir. 1995) ("By asking this court to decide what another court should do in a future case, petitioners are posing a hypothetical question, the answer to which would be an advisory opinion."); *Deep v. Boies*, 493 F. Supp. 2d 88, 90 n.2 (D. Me. 2007) ("Rendering an opinion on the effect of my order on a proceeding before a New York state court would be an impermissible advisory opinion."); *Amgen Inc. v. Sandoz Inc.*, No. CV161276SRCCLW, 2016 WL 3965192, at *6 (D.N.J. July 22, 2016) ("Amgen's cites to pending cases in other courts indicate that it is seeking expansive relief from this Court that would in effect amount to an advisory opinion. The Court declines to engage in such a practice.").

In contravention of Wis. Stat. § 645.05 (2015), the October 24, 2016 Order was entered despite the fact that there was no pending issue before the Circuit Court requiring "clarification" and no pending "action" authorizing a court order. Indeed, it is undisputed that the Order was intended to influence litigation between parties not subject to the Rehabilitation Proceeding, which is currently pending before other courts. *See* Ex. 2, Rehabilitator's Mot. to Confirm and Declare the Nature of These