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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016AP002169

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

Sean Dilweg and Office of the Commissioner of Insurance,

Plaintiff-Respondents,

v.

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,

Interested Parties-Appellants.

Appeal from the October 24, 2016 Order of
the Dane County Circuit Court, Case No. 10CV1576
Honorable Richard G. Niess, Presiding

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT, OFFICE OF THE COMMISSIONER OF INSURANCE OF WISCONSIN AS THE REHABILITATOR OF THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

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of Ambac Assurance Corp.

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I. INTRODUCTION

The false premise of this appeal is the Appellants' (the "MHPI Projects") argument that there was no controversy before the Rehabilitation Court; thus, according to the MHPI Projects, the court below issued an advisory opinion. There was indeed a controversy – and ***it was of the Appellants' own making***. In multiple cases in other jurisdictions in which appellants are plaintiffs, they misrepresented to those courts that Ambac Assurance Corp., or a material portion of its assets, is in rehabilitation, rather than the fact that only the Segregated Account is in rehabilitation. They misrepresented the nature of these proceedings to gain an advantage in litigation before those foreign courts and impose liability on Ambac by stripping it of policy rights.

The reason the MHPI Projects' misrepresentations concerned the Rehabilitator, and the Rehabilitation Court, was the potential for courts in other jurisdictions to mistakenly impose liability on Ambac and thereby threaten to deplete the claims-paying resources of the General Account. The Rehabilitation Court thus exercised its statutory authority over the rehabilitation proceedings to issue a single summary order that "clarified the nature of these proceedings" and set

the record straight that neither Ambac nor its assets are in rehabilitation.

The Rehabilitation Court had clear authority to issue a clarifying order. The court made no new factual findings and rendered no new legal holdings; it simply entered an order that summarized the rehabilitation proceedings and various orders from it, which was made necessary only by the MHPI Projects' misrepresentations to other courts. As a result, the Appellants' arguments on appeal are without merit, and the Rehabilitation Court's order should be affirmed in its entirety.

II. STATEMENT OF THE CASE

A. Factual Background

The misrepresentations that gave rise to the motion before the Rehabilitation Court that is the subject of this appeal are as follows. In their Complaint against Ambac in *Monterey Bay Military Housing, LLC and Monterey Bay Land, LLC v. Ambac Assurance Corp.*, Case No. 15cv599 (Monterey County, Cal. Sup. Ct.), the plaintiffs alleged that "on March 24, 2010, pursuant to a court order, Ambac *entered into rehabilitation proceedings in Wisconsin*." (Supp.

App. 101; R.1019) (emphasis added).[1] Later in that case the plaintiffs also stated in response to interrogatories: "as a result of the Wisconsin Proceedings, *Ambac* has entered rehabilitation." They persisted with that position by writing in those same responses that, "the Wisconsin Commissioner of Insurance was appointed as a custodian, trustee, agent or receiver *for Ambac* and/or for all or a material portion of Ambac's assets, and … was authorized to take possession *of Ambac* and/or all or a material portion of Ambac's assets." (Supp. App. 112-113; R.1019) (emphasis added).[2] Those representations are not true.

This case involves the rehabilitation of the ***Segregated Account*** of Ambac. Under Wisconsin law, the Segregated Account is a separate insurer, subject to the control of the Rehabilitator and oversight by the Rehabilitation Court. *See* WIS. STAT. § 611.24(3)(e). The court's jurisdiction

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[1] Record citations are to both the circuit court record ("R.") and cross-referenced where applicable to either Appellants' Appendix ("App.") or the Rehabilitator's Supplemental Appendix ("Supp. App."). The Affidavit of Jeffrey A. Simmons dated October 10, 2016 ("Simmons Aff.") was submitted in support of the Rehabilitator's motion and is found in the record at R.1019 and Supp. App. 0101. Exhibit A to the Simmons Aff. is the Monterey County Complaint referenced at ¶ 24 (emphasis added).

The 13 Appellants are hereinafter referred to as "Appellants" or the "MHPI Projects."

[2] Simmons Aff., Ex. B, pp. 2-3.

accordingly extends to issuing orders to address potential "prejudice [in] … the administration of the proceeding." *See* WIS. STAT. § 645.05(1)(k). The court below exercised that authority here to avoid prejudice to the proceedings and remedy the Appellants' misrepresentations.

Because this matter has been the subject of several appeals, we set forth the general background facts and those necessary for an understanding of the issues in this appeal. The first order of business, however, is to identify for Appellants, and reiterate to this Court, the parties to this case. To begin, the only "party" is the Segregated Account of Ambac Assurance Corp. The Respondent, the Office of the Commissioner of Insurance, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation ("OCI" or the "Rehabilitator"), is the designated statutory representative of the Segregated Account with authority to conduct its affairs during the rehabilitation proceeding. "Interested parties" are those policy holders with insurance policies or surety bonds allocated to the Segregated Account. Everyone else is an "other interested party."

As this Court is aware, the Commissioner of Insurance approved Ambac's creation of a segregated account on March

24, 2010 (the "Segregated Account") and commenced proceedings on the same day to rehabilitate the Segregated Account. (R.1).[3] As this Court explained, "the [C]ommissioner approved the allocation of approximately 1,000 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.'" *Nickel v. Wells Fargo*, 2013 WI App 129, ¶37, 351 Wis. 2d 539, 841 N.W.2d 482.

OCI carefully considered the most effective method for addressing the significant risks facing Ambac and its policyholders. (Supp. App. 25-29; R. 556).[4] In particular, during its investigation of Ambac, OCI discovered that many of Ambac's contracts contained language, referred to as "triggers," that provided that subjecting Ambac or its assets to rehabilitation or liquidation proceedings would constitute default. (Supp. App. 25-26; R. 556).[5] OCI concluded that a full rehabilitation of Ambac "could have triggered costly defaults" in many of these contracts, which would cause

[3] Verified Petition for Rehabilitation, March 24, 2010, ¶ 9.
[4] Decision and Final Order Confirming the Rehabilitator's Plan of Rehabilitation, with Findings of Facts and Contentions of Law (the "Confirmation Order"), ¶¶ 49-63.
[5] Confirmation Order, ¶¶ 51-52.

"substantial losses" and "collateral damage" to Ambac and its policyholders. (Supp. App. 25-26).[6] OCI therefore adopted a "surgical approach" by rehabilitating only a segregated account, as opposed to Ambac as a whole, which OCI concluded would provide the most beneficial outcome for all policyholders. (Supp. App. 29; R. 556).[7] *See Nickel*, 2013 WI App 129, ¶36.

In keeping with OCI's limited approach to rehabilitating the Segregated Account and not all of Ambac, the Rehabilitation Court's order approving the rehabilitation proceedings (the "Rehabilitation Order"), stated that "[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." (Supp. App. 1; R. 11).[8]

Although only the Segregated Account is in rehabilitation, OCI maintains an interest in and continues to monitor developments in the General Account. In particular, the Segregated Account was, at inception, capitalized through two instruments issued by the General Account: a Secured

[6] Confirmation Order, ¶ 51.
[7] Confirmation Order, ¶ 60.
[8] Order for Rehabilitation, Mar. 24, 2010, ¶ 2.

Note and a Reinsurance Agreement. (Supp. App. 32-34; R. 556).[9] OCI therefore derives its authority to monitor the General Account from "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." (Supp. App. 36; R. 556).[10]

The Appellants here are currently maintaining seven different cases against Ambac (the General Account) in other jurisdictions related to residential housing development projects implemented pursuant to the Military Housing Privatization Initiative created under the National Defense Authorization Act of 1996. (R. 1017).[11] These matters are referred to as the "MHPI Cases." The common issue in those cases will turn on whether or not Ambac is in "default" under the terms of certain financial guaranty insurance policies and surety bonds.

In the MHPI Cases, the developers of the Projects ("Developers") entered into loan agreements with lenders to borrow the money needed to construct, rehabilitate, furnish,

[9] Confirmation Order, ¶¶ 70-76.
[10] Confirmation Order, ¶ 84.
[11] Response to the Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings ("MHPI Owners' Response"), p. 5, n.4.

and equip U.S. military housing at several military installations across the country. (*E.g.*, Supp. App. 96-97; R. 1019).[12] Ambac then issued financial guaranty insurance policies, required by the lenders, to guarantee the payment of principal and interest of the loans, in the event of certain circumstances and conditions. (Supp. App. 96-97; R. 1019).[13] Ambac also issued a surety bond that guaranteed payments of amounts that would otherwise be payable from each of the Project's debt service reserve funds (the "Surety Bonds"). (Supp. App. 97; R. 1019).[14]

Ambac has attempted to exercise certain contractual rights to protect its exposure in connection with the financial guaranty insurance policies by requiring the Developers to either replace Ambac's Surety Bonds or to fund the Projects' reserve funds with the required amounts of cash. (Supp. App. 97; R. 1019).[15] The Developers have responded that Ambac lacks standing to enforce the Developers' obligation to replace Ambac or to fund the reserve because an "Ambac Default" has occurred by Ambac entering into rehabilitation,

[12] Simmons Aff., Ex. A, ¶ 1-3.
[13] Simmons Aff., Ex. A, ¶ 3.
[14] Simmons Aff., Ex. A, ¶ 3.
[15] Simmons Aff., Ex. A, ¶ 5.

which would mean that Ambac can no longer exercise those and other material rights and necessarily no longer has standing to pursue claims in the MHPI Cases. (Supp. App. 103; R. 1019).[16]

For example, one of the transaction documents for the MHPI Loans defines an "Ambac Default" as follows:

> "Ambac Default" means . . . (b) Ambac (i) files any petition or commences any case or proceeding under any provisions of any federal or state law relating to insolvency, bankruptcy, rehabilitation, liquidation or reorganization, (ii) makes a general assignment for the benefit of its creditors or (iii) has an order for relief entered against it under any federal or state law relating to insolvency, bankruptcy, rehabilitation liquidation or reorganization that is final and nonappealable; or (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 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 possession of all or any material portion of Ambac's property) . . . .

R. 1011.[17]

In the course of litigation in these other cases, the Appellants have alleged that an "Ambac Default" has

[16] Simmons Aff., Ex. A, ¶ 29.
[17] Rehabilitator's Notice of Motion and Motion to Confirm and Declare the Nature of These Proceedings, July 15, 2016 ("Motion to Confirm"), Ex. E, p. 2.

occurred based on the institution of this rehabilitation proceeding, even though only the Segregated Account, not Ambac (General Account), is in rehabilitation. (Supp. App. 103; R. 1019).[18] In particular, one of the complaints states that the March 24, 2010 Rehabilitation Order appointed a custodian, trustee, agent or receiver for Ambac and that Ambac has an order for relief entered against it relating to rehabilitation. (Supp. App. 102-103; R. 1019).[19] Thus, despite OCI's deliberate and careful plan to place only the Segregated Account into rehabilitation and to allow the General Account to remain outside rehabilitation, appellants have misrepresented to other tribunals that Ambac is currently in rehabilitation. (Supp. App. 25-29; R. 11, 556).[20]

B. Procedural Posture and Facts

On July 15, 2016, the Rehabilitator filed a Notice of Motion and Motion to Confirm and Declare the Nature of These Proceedings (the "Motion") to remedy the misrepresentations made to other courts by parties suing Ambac. (Supp. App. 80-92; R. 1011).[21] The Rehabilitator

[18] Simmons Aff., Ex. A, ¶ 29.
[19] Simmons Aff., Ex. A, ¶ 28.
[20] Rehabilitation Order ¶ 2; Confirmation Order, ¶¶ 49-61.
[21] Motion to Confirm.

also provided a proposed order for the court's review. (*Id*.) The Rehabilitation Court set the matter for hearing.

At the hearing on the Motion, the court immediately determined that it had jurisdiction to clarify prior orders in the pending proceedings:

> First of all, *I don't have any doubt that I have the authority to grant an order that would clarify the proceedings in this matter.* I don't believe that is either an advisory ruling and I think it's specifically contemplated by the statute under Section 645.05(1)(k), if none of the others.
>
> Secondly, I don't think it impedes or transgresses the jurisdiction of any other court to decide whatever issues are in front of the other court because I don't intend to decide any issues before the other court, only declare, if it turns out to be prudent, the nature of these proceedings and what has happened here. I don't think there's a whole lot, frankly, in what has been proposed by the rehabilitator that doesn't state the record accurately.

(App. 011) (emphasis added).[22] The court concluded that it was not issuing an advisory opinion and had jurisdiction to enter the requested order:

> I've read your briefs. I reject the arguments [that the court does not have jurisdiction to enter the order]. They're preserved for appeal. If you want to take it up to the Court of

[22] Motion Hearing transcript included with Appellants' Appendix ("App.") (Oct. 11, 2016), p. 4.

> Appeals, I'm satisfied that clarifying a prior order from this Court is not an advisory opinion if I'm not deciding new issues and if I'm just clarifying what – something that needs to be clarified.

(App. 023).[23] The court then explained that the order was necessary to protect the rehabilitation proceedings:

> And I think the statute, which is broadly written to give this Court supervisory authority and to give the rehabilitator broad discretion specifically contemplates orders that are deemed necessary and proper to prevent any other threatened or contemplated action that may . . . less the value of the insurer's assets or prejudice the administration of the proceedings. . . . I don't want because of ignorance of what has gone on here, because of lack of clarity from this Court that contributes to a lack of understanding in other courts for some court to innocently do something that pulls the thread of the fabric of this rehabilitation and unravels the whole thing . . . .

(App. 023-24).[24]

The parties then addressed the specific language of the Rehabilitator's proposed order, focusing on two paragraphs in particular: Paragraph 10 and Paragraph 17. (App. 022-23, 031-60).[25] Appellants acknowledged that these were the only two paragraphs of the proposed order to which they

[23] Tr. of Oct. 11, 2016 hrg., p. 16.
[24] Tr. of Oct. 11, 2016 hrg., p. 16-17.
[25] Tr. of Oct. 11, 2016 hrg., pp. 15-16, 24-53.

objected.[26] Paragraph 10, as initially proposed, provided as follows:

> 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.

(Supp. App. 144-145; R. 1021).[27] The Rehabilitator's proposed Paragraph 17, in turn, read as follows:

> 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.

(Supp. App. 147; R. 1021).[28]

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[26] Tr. of Oct. 11, 2016 hrg., pp. 8-9.

[27] Proposed Order Granting Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings ("Track Changes Version") (the "Proposed Order"), ¶ 10.

[28] Proposed Order ¶ 17.

The MHPI Projects argued to the Rehabilitation Court that paragraphs 10 and 17 were not accurate statements, for example, because they did not reflect the current state of facts. (App. 015-17). However, the MHPI Projects admitted that the paragraphs represented an accurate statement of OCI's intent or purpose in structuring the rehabilitation plan as it did. (*E.g.*, App. 016-17, 20, 51-51, 56).[29] The court then adjourned the hearing to give the parties an opportunity to draft a stipulated order.

After the hearing, the Rehabilitator submitted a revised proposed order that it believed was consistent with the parties' and the court's statements at the hearing. (Supp. App. 129-147; R. 1021). The MHPI Projects again objected to the proposed order, but the court signed and entered the order, and further explained in a cover letter that "[the court] adopted the Rehabilitator's draft . . . principally because it is clearly supported by the Court of Appeals decision in this case, 351 Wis. 2d 539, 558, 572-73, 587-588, 590-591." (Supp. App. 148; R. 1024).[30] The order clarified the

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[29] Mot. Hrg. Tr., pp. 9-10, 13, 43-44, 49.

[30] Order Granting Rehabilitator's Motion to Confirm and Declare the Nature of These Proceedings; accompanying cover letter dated October 24, 2016.

proceedings, and in particular, made the following rulings in Paragraphs 10 and 17:

> 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 a rehabilitation if the existence of these Proceedings is considered to be the commencement of a rehabilitation of Ambac, the entry of an order of relief against Ambac by this Court, the appointment of a rehabilitator for Ambac, the taking possession of Ambac's assets, or the appointment of an official to manage the affairs of Ambac.
>
> . . . .
>
> 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 considered to constitute a transfer of assets from Ambac to the Segregated Account or the appointment of a receiver for Ambac's assets.

(App. 005, 007).[31]

On November 7, 2016, the MHPI Projects simultaneously filed a Notice of Appeal and a Petition for Leave to Appeal the Order. This Court denied the Petition as unnecessary and concluded that the Rehabilitation Court's

[31] Order Granting Rehabilitator's Motion, ¶¶ 10, 17.

October 24, 2016 Order was final for purposes of appeal.[32] The MHPI Projects filed their "Opening Brief" on January 17, 2017 ("Op. Br."). For the reasons set forth in this response, the Rehabilitator respectfully requests that the Rehabilitation Court's Order be affirmed.

III. STANDARD OF REVIEW

The Rehabilitation Court's decision to review its own orders is subject to review for an erroneous exercise of discretion. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, LLC*, 2004 WI App. 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. The court's factual findings are reviewed for clear error. *Phelps v. Physicians. Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶34, 319 Wis. 2d 1, 768 N.W.2d 615. Although the MHPI Projects raise three issues on appeal, they only cite a standard of review for their challenge to the circuit court's jurisdiction. At the same time, the MHPI Projects lead the Court to believe that the standard of review is the same for all issues; in their statement of issues, the MHPI Projects frame the question in each case in terms of whether the circuit court "erred." (Op. Br. p 4). In so doing, the MHPI Projects wrongly imply that this Court

[32] Court of Appeals Opinion and Order dated Dec. 9, 2016.

should review each issue *de novo*. The standard however is clear: a circuit court's discretionary decision to review its own orders is subject to an abuse of discretion standard on appeal. *Koepsell's Olde Popcorn Wagons*, 2004 WI App. 129 ¶6.

The Court of Appeals generally searches for reasons to sustain the circuit court's discretionary decisions. *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). "A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Hefty v. Strickhouser*, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820 (quoting *Johnson v. Allis Chalmers Corp*., 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991)). There was nothing unreasonable about how the Rehabilitation Court here decided the Rehabilitator's motion.

IV. ARGUMENTS

A. The Circuit Court Had Clear Authority Under its Statutory and Common Law Jurisdiction to Enter A Clarifying Order; It Was Not an Advisory Opinion.

1. The Court Had Statutory Authority to Issue the Clarification Order.

The false premise of this appeal is apparent in the MHPI Projects' opening argument. They baldly state: "It is undisputed that there was no controversy pending before the Circuit Court …." (Op. Br. p. 12). The controversy that the Rehabilitator placed squarely before the court below, however, was the MHPI Projects' misrepresentations to courts in other states. Given that the MHPI Projects in fact misrepresented the nature of this case, the Rehabilitation Court had jurisdiction to enter the Order as a remedy on several independent grounds: pursuant to statute, the terms of the Confirmation Order, and the court's inherent authority. The Order at issue is not an impermissible "advisory opinion." Rather, it was a permissible remedy made necessary by MHPI Projects' own misstatements.

In an insurance rehabilitation proceeding, the Rehabilitation Court has broad authority to issue such "orders as are deemed necessary and proper to prevent: (k) Any other

threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding." WIS. STAT. § 645.05(1)(k). Here, the court held that it had statutory authority to issue the Order to maintain the integrity of the administration of the rehabilitation proceedings. The basis for its holding was a threat to the resources needed to fund the Segregated Account.

In particular, the Rehabilitation Court made a specific finding that mischaracterizations in other courts regarding the rehabilitation action may "jeopardize the administration of the segregated account rehabilitation and cause mischief throughout these proceedings." (App. 012). The court then elaborated on how entering a clarifying order would promote the effective administration of the rehabilitation proceedings:

> [I]f we can clarify a few things that are, in fact, supported fully by the record, *that would avoid any threatened threats or actions that might prejudice the administration of the proceedings.* I don't want because of ignorance of what has gone on here, because of lack of clarity from this Court that contributes to a lack of understanding in other courts for some court to innocently do something that pulls the thread of the fabric of this rehabilitation and unravels the whole thing.

(App. 024) (emphasis added). The court's finding on this point was supported by the record and has gone unchallenged by the MHPI Projects.

Indeed, at the motion hearing, counsel for the MHPI Projects agreed with the court's observation that, *if* there were a misunderstanding in the other courts as to what the circuit court in this matter had ordered, it would be to "everybody's advantage to have it clarified." (App. 022).[33] The Rehabilitation Court's above-stated concerns bring this matter squarely within the court's statutory authority of §645.05(1)(k).

2. The Court Had Authority to Issue a Clarifying Order Pursuant to the Confirmation Order.

The MHPI Projects next argue that the court had no authority to issue the Order because there was "no pending 'action' authorizing a court order." (Op. Br. p. 13). Here again, the MHPI Projects are demonstrably wrong. The entire rehabilitation proceeding is an "action" that is and has been pending since March of 2010.

[33] "THE COURT: Well, but if there is, in fact, mischaracterization or misunderstanding in the other courts as to what has been ordered in this Court, isn't it to everybody's advantage to have it clarified?

MR. WILLIAN: Well, yes, but you're presupposing that there's confusion." (App. 022, ln. 2-8).

The Rehabilitation Court had the foresight to recognize that the rehabilitation proceedings would be a lengthy, complicated proceeding involving many interested parties. As a result, to further the efficient administration of the matter, the court took affirmative steps to ensure that it would keep jurisdiction over any and all issues relating to the ongoing rehabilitation proceedings as they might occur. To that end, in the Plan Confirmation Order dated January 21, 2011, the Rehabilitation Court expressly "retain[ed] continuing exclusive jurisdiction and venue over this rehabilitation proceeding and all matters pertaining to, or arising from, implementation of the Plan or the terms of this Order . . . ." (Confirmation Order, ¶11). This Court affirmed the Confirmation Order. *Nickel*, 2013 WI App 129.

The subject matter of the Order certainly falls within the rehabilitation proceeding and pertains to "the terms of [the Confirmation] Order." Indeed, virtually every paragraph of the Order cites and/or quotes the Confirmation Order or other prior decisions and orders in this case. Thus, under the Confirmation Order, the court had the authority to consider the Rehabilitator's motion and issue an appropriate order related thereto.

The MHPI Projects' argument to the contrary is premised entirely on a flawed, and unfounded, assumption that a rehabilitation proceeding is a traditional civil action and is constrained by the same strictures in determining the court's jurisdiction. As this Court has recognized on multiple occasions, however, certain rules governing civil actions do not "squarely apply" to rehabilitation proceedings because the two types of actions differ substantially with regard to their respective structures.[34] In rehabilitation proceedings, unlike in a civil action, "there are no plaintiffs and defendants, but rather a subject of the rehabilitation proceeding and various stakeholders whose interests may be affected."[35]

Similarly, this Court concluded in a published decision that "the legislature intended for rehabilitation proceedings such as this to be informal and 'provided without cumbersome procedures.'" *Nickel*, 2013 WI App. 129, ¶27. Given the very nature of rehabilitation proceedings, the Rehabilitation Court's continuing jurisdiction over the rehabilitation proceedings – and its authority to issue a clarifying order where it deems appropriate – is not narrowly

[34] *See* March 1, 2013 Order, ¶6 (concluding that an order was final for purposes of appeal without regard to whether the order disposed of all matters in litigation between the parties).
[35] March 1, 2013 Order, ¶6.

circumscribed by whether there is a "dispute" between "parties." To the contrary, the court has broad authority to issue orders necessary to effectuate the administration of the proceedings. WIS. STAT. § 645.05(1)(k). This includes the authority to issue orders providing guidance regarding the proceedings to any other interested parties. The MHPI Projects cite no authority to support their argument that, in a pending rehabilitation proceeding, the circuit court should be precluded from administering important matters related to the proceeding unless traditional civil-action requirements of justiciability are met.

3. The Court Had Authority to Issue a Clarifying Order Pursuant to Its Inherent Authority.

Next, the MHPI Projects' jurisdictional argument is without merit because Wisconsin courts always have had the power to clarify, amend, or reconsider their own prior rulings in pending cases. *See, e.g.*, *State v. Johnson*, 2014 WI 16, ¶1, 353 Wis. 2d 119, 846 N.W.2d 1 (granting motion for reconsideration in order to clarify the nature of the supreme court's prior decision in the case); *Kontowicz v. Am. Standard Ins. Co.*, 2006 WI 90, ¶3, 293 Wis. 2d 262, 718 N.W.2d 111

(amending order in previous decision "in the interest of clarifying our opinion to facilitate its application").

In *State v. Johnson*, the court clarified a prior *per curium* order that had "left the parties and the circuit court without sufficient guidance or ability to proceed consistent with precedent …." 353 Wis. 2d 119, ¶2. The case raised an evidentiary issue but the Supreme Court deadlocked, leaving both sides with a question as to whether the *per curium* order had modified or over turned precedent. The Court found that it was "compelled" to clarify so that the circuit court, on remand, could apply the proper evidentiary standard. *Id*. The Rehabilitation Court found here that Appellants' misrepresentations to other courts justified clarifying its prior orders in the rehabilitation, demonstrating that the Order was grounded in the record and necessary as a clarification, not advisory.

4. The Order Was Therefore Not an Impermissible "Advisory Opinion."

Notwithstanding the foregoing, the MHPI Projects claim that the Order was an improper "advisory opinion." They do not explain that argument other than to again claim

there was no dispute before the Rehabilitation Court. The MHPI Projects are again legally and factually wrong.

Although the MHPI Projects recite the general maxim that courts may not issue "advisory opinions," the MHPI Projects do not actually define what an advisory opinion is under Wisconsin law or how the Rehabilitation Court's order meets that definition. This is the definition under Wisconsin law: "An advisory opinion is an opinion that '... may be rendered by a court at the request of the government or an interested party indicating how the court would rule on a matter should adversary litigation develop. An advisory opinion is thus an interpretation of the law without binding effect.'" *State v. Field*, 118 Wis. 2d 269, 288, 347 N.W.2d 365 (1984) (quoting Black's Law Dictionary at 50 (5th ed. 1979)). An impermissible advisory opinion, therefore, seeks a decision on the merits where a dispute does not exist. As a matter of fact, the Rehabilitation Court here ruled, in essence, that Ambac is *not* in rehabilitation, that it did not enter "an order of relief against Ambac," there has been no "taking possession of Ambac's assets," and no "appointment of an official to manage the affairs of Ambac." This ruling addressed an issue that the MHPI Projects dispute and that is

clearly within the scope of the Rehabilitation Court's authority.

The cases that the MHPI Projects cite provide no support for their argument. *See Constand v. Cosby*, 833 F.3d 405 (3d Cir. 2016) (appellate issue of resealing documents was moot); *American Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 203, 188 N.W.2d 529 (1971) (refusing to issue declaratory judgment where doing so would not resolve controversy between the parties); *Miller v. F.C.C.*, 66 F.3d 1140, 1145 (11th Cir. 1995) (refusing to issue declaratory judgment where petitioners effectively asked the court "whether, at some future date, a candidate may bring a breach of contract action in state court"); *Deep v. Boies*, 493 F. Supp. 2d 88, 90 & n.2 (D. Me. 2007) (district court refused to tell state court what *res judicata* effect district court's order might have); *Amgen v. Sandoz, Inc.*, No. 16-CV-1276, 2016 WL 3965192, at *6 (D.N.J. July 22, 2016) (refusing to issue declaratory judgment where issue before the court was moot).

For example, in *Constand v. Cosby*, the court held an appeal of a district court order to unseal documents was moot. There was no longer a case or controversy over confidentiality because the previously sealed information was

in the public domain; the appellate court held that it was powerless to order an effective remedy. 833 F.3d at 409-12. In contrast, there is a ripe controversy in the instant case – MHPI Projects' misrepresentations and the potential for liability mistakenly imposed on Ambac, by virtue of a misapplication by other courts of the definition of "Ambac Default," required the remedy of the Rehabilitation Court's Order.

The Rehabilitation Court did not indicate how it would rule on a matter not before it, nor did it endeavor to instruct a different court how to rule on a matter. Indeed, the Order expressly stated the opposite: "This Court does not seek to decide the merits of disputes involving the General Account that are pending in other courts."[36] The court clarified the identity of the party that was subject to rehabilitation; there was no "advisory" aspect to its ruling.

It is noteworthy that, in arguing to the contrary, the MHPI Projects do not identify a single word of the court's actual Order that either stated how the court would rule on a matter not before it or attempted to tell another court how to

[36] App. 001

rule on an issue. They simply proclaim it to be so. In fact, the record shows that the opposite was true.

> My feeling is that if there is any good that can come from this Court essentially boiling down or presenting a Cliff Notes version of what, in fact, has happened in this court that can assist the courts in other jurisdictions for whatever purpose they see fit, ***not for me to tell them how to use it, but just to simply provide an order that encapsulates what's gone on in this many, many years long litigation, very complex, many document litigation***, but just encapsulates certain facts that are, in fact, what happened here, I don't know that there's any downside to that.

(App. 022) (emphasis added). The MHPI Projects imply that this explanation was merely a pretext to do Ambac's bidding. Their argument, and the obvious implication, has no basis in fact.

In sum, the MHPI Projects have utterly failed to carry their burden of demonstrating that any portion of the Rehabilitation Court's Order constituted an impermissible advisory opinion or was otherwise an abuse of discretion. The Rehabilitation Court simply clarified its prior orders to minimize the potential impact of MHPI Projects' misrepresentations. The MHPI Projects' arguments, to the contrary, must be rejected.

B. The MHPI Projects' Arguments Fail Because the MHPI Projects Failed to Clearly Explain Which Factual Findings They Are Challenging.

1. MHPI Projects Did Not Identify Any Unsupported Findings of Fact.

In both their second and third issues for review, the MHPI Projects claim that the Rehabilitation Court "included factual findings in its [Order] that were unsupported by the factual record." In order to obtain a reversal on these grounds, the MHPI Projects "have the burden of challenging ***specific*** findings of fact and conclusions of law." *Nickel*, 351 Wis. 2d 539, ¶29 (emphasis added). To meet this burden, the MHPI Projects must "take issue with specific findings and then explain why those findings were clearly erroneous." *Id.* They have failed to meet this formidable burden. This failure is fatal to their appeal.

Although the MHPI Projects devoted two separate issues to challenging certain factual findings, they did not even identify the allegedly erroneous paragraphs of the court's Order until the very last paragraph of their brief. Further, the MHPI Projects do not explain why any of the court's 17 "Findings of Fact and Conclusions of Law" are supposedly incorrect. A party cannot carry its burden of

establishing that factual findings were clearly erroneous by merely alleging certain facts were wrong but not actually explaining why they are wrong and why such alleged error matters. *See Nickel,* 351 Wis. 2d 539, ¶29*; see also Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 130-31, 362 N.W.2d 118 (1985) (failure to properly instruct that was not prejudicial would not result in a new trial).

This Court rejected similarly undeveloped factual arguments in a prior appeal in this very case. In *Nickel*, the Court was faced with appellants who had argued "in conclusory fashion that the circuit court adopted the commissioner's proposed findings 'even where they were conclusory, unsupported by, or contrary to[] the evidentiary record." 351 Wis. 2d 539, ¶29. The Court concluded that such an argument was insufficient. The Court held that, "[b]ecause the interested parties do not explain in any detail which findings were erroneous and why those findings were erroneous, we conclude that they have not met their burden to prove that the court's findings were clearly erroneous." *Id*.

The MHPI Projects' failure to clearly take issue with specific findings of fact and explain why those specific findings were clearly erroneous dooms their appeal. It is not

the Rehabilitator's or this Court's obligation to develop the MHPI Projects' arguments for them or explain how an error would affect the outcome. *See Techworks, LLC v. Wille*, 2009 WI App 101, ¶27, 318 Wis. 2d 488, 770 N.W.2d 727 ("Neither that main brief nor [the appellant's] reply brief set out any legal principles that it contends govern those claims, and do not cite any cases in support of any legal theory. [Appellant] apparently expects this court to do its work for it. That we will not do; we will not address arguments that are not developed."); *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (court will not address issues inadequately briefed or issues raised but not further argued). The MHPI Projects' failure to carry their burden on appeal by demonstrating clear error, is sufficient grounds to affirm the Rehabilitation Court's Order.

2. No Evidentiary Hearing Was Necessary.

The MHPI Projects claim that they were wrongly deprived of an evidentiary hearing before the Rehabilitation Court issued its order. The MHPI Projects are wrong. No evidentiary hearing was necessary here because the court did not make any new factual findings. Indeed, all of the facts included in the Order were facts that already had been

established in earlier rehabilitation proceedings. To that end, nearly all of the 17 court's factual findings contained citations to the court record.[37]

Additionally, the very text of the court's order eliminated any legitimate concern that the court was making any new factual findings whatsoever. In explaining that its order was not intended to blaze a new trail, the court stated that its findings of fact and conclusions of law "***shall not be construed as amending or varying this Court's prior orders***."[38] (Emphasis added.) The MHPI Projects cannot show that any of the court's findings were clearly erroneous when the court itself stated that its Order was not to be construed as making any new factual findings.

The MHPI Projects further failed to move for an evidentiary hearing.[39] If the Rehabilitator's motion raised a disputed issue of material fact, the MHPI Projects had the obligation to identify such a dispute for the Rehabilitation Court first and give Judge Niess a chance to consider their request for a hearing. Their failure to do so cannot be

[37] *See generally* App. 001-007.
[38] App. 002 (emphasis added).
[39] They merely made passing references to the fact that *the Rehabilitator* had not requested any evidentiary hearing. *E.g.* R. 1017, p. 14 (MHPI Owners' Response).

remedied by raising the issue for the first time on appeal. *See State v. Ndina*, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to timely raise an argument in the circuit court forfeits the argument on appeal).

3. The Factual Findings Accurately State the Rehabilitator's Intent.

The MHPI Projects attempted to challenge the wording in paragraphs 10 and 17 of the Rehabilitator's proposed order. This effort must fail because both statements are true.

Both paragraphs reiterated prior findings about the Rehabilitator's "stated purpose" in the structure of the Rehabilitation Plan. Paragraph 10 of the signed Order provides that it "would run counter to OCI's stated purpose in adopting this measured approach to rehabilitation" if the rehabilitation were to be considered a rehabilitation of *Ambac* or the taking of other action by the court or Rehabilitator against *Ambac*. (App. 005 ¶10).[40] Paragraph 17, similarly, stated that "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

[40] At the hearing, the circuit court expressed some concerns as to the clarity of paragraph 10. As such, the Rehabilitator revised paragraph 10 of the proposed order after the hearing, and the Court signed the Rehabilitator's proposed order as amended.

if Ambac's [capitalization approach] were considered to constitute a transfer of assets from Ambac to the Segregated Account or the appointment of a receiver for Ambac's assets."[41]

In both cases, the findings are not determinations of the legal effect of the rehabilitation on the MHPI Projects' specific policies. Instead, the court made a clear statement of fact as to the Rehabilitator's *intent*, or "stated purpose," in structuring the rehabilitation as it did. The Rehabilitation Court recognized that it is theoretically possible that the facts which led to the Rehabilitator's stated purpose might no longer reflect the status of the facts today,[42] though even if true, the practical, functional structure of the Rehabilitation would be the same. But the court also recognized that the subsequent course of events did not change the Rehabilitator's previously stated purpose.[43]

At the motion hearing, even the MHPI Projects admitted several times that the proposed findings were an accurate statement of the Rehabilitator's *intent*. In other words, the MHPI Projects admitted that the statements were,

[41] App. 007 ¶ 17.
[42] App. 016.
[43] App. 016-17.

in fact, true. For example, the MHPI Projects admitted that it was "OCI's stated purpose at the time of capitalizing a segregated account to avoid triggering contractual defaults and causing collateral damage."[44]

When further asked whether the MHPI Projects believed that OCI's stated purpose changed since creating the Rehabilitation Plan or whether subsequent events changed, the MHPI Projects responded *only* that "[e]vents have substantially changed." (App. 017). The MHPI Projects later admitted that the facts set forth in proposed paragraph 17 "probably was the purpose." (App. 020). (*See also* App. 050-51 (admitting that avoiding "the appointment of a rehabilitator for Ambac, … the taking possession of Ambac's assets, …, or the appointment of an official to manage the affairs of Ambac" "may have been a purpose" of the rehabilitation)).

MHPI Projects' arguments over the wording of the Order are thus contrived. The MHPI Projects cannot argue reasonably that the Rehabilitator *intended* to institute a full rehabilitation *of Ambac* and trigger Ambac defaults. (*Cf.*

[44] App. 016 (agreeing that the quoted statement was historically a fact "five years ago").

App. 005 ¶10). Nor can appellants justifiably argue that the Rehabilitator *intended* to trigger contractual defaults, cause collateral damage, transfer assets from Ambac to the Segregated Account, or appoint a receiver for Ambac's assets. (*Cf.* App. 007 ¶17). OCI's intent in structuring the rehabilitation as it did is – and was – amply supported by the existing record. The Rehabilitation Court merely confirmed this in the Order.

In this context, it is actually the MHPI Projects who misconstrue the Order by arguing that the Order does not merely state the Rehabilitator's intent but does, in fact, endeavor to determine the legal effect of the rehabilitation on the MHPI Projects' specific policies. In particular, the MHPI Projects falsely claim that "the Order contained factual findings…that the rehabilitation of Ambac's Segregated Account *did not trigger an Ambac default* under the MHPI Projects' unique language." (Op. Br. at 8-9) (emphasis added). The wording of paragraphs 10 and 17 however demonstrates that the Order does no such thing.

The plain language of the Order is also perfectly consistent with previously determined facts that the Rehabilitator's intent was to initiate a rehabilitation of *only*

the Segregated Account and capitalize the Segregated Account without transferring assets from the General Account. These facts are well supported. Indeed, this Court reiterated those facts several times in the *Nickel* opinion. *See Nickel*, 351 Wis. 2d 539, ¶73 ("[T]he creation of the segregated account and the decision to pursue a targeted rehabilitation is in the best interests of segregated account policyholders because it protects Ambac's claims-paying resources from the contractual default triggers that likely would have resulted in Ambac's financial collapse."); *see also id.*, ¶¶35, 40, 43, 82. This contrived dispute over the court's choice of wording paragraph 10 and 17 of the Order is no basis to reverse the Rehabilitation Court's well considered exercise of discretion.

4. The Findings of Fact Were Not Erroneous Merely Because They Referred to Triggers Found in the MHPI Projects' Policies.

Finally, the MHPI Projects complain that the Order improperly referred to specific triggers found in the MHPI Projects' policies because there is no evidence that, in creating the Rehabilitation Plan, the Rehabilitator expressly considered those specific triggers. In essence, the MHPI

Projects contend that there is no evidence that OCI intended to avoid triggering a default in the appellants' specific policies. That argument is irrelevant.

The Rehabilitator's stated intent was to avoid triggering defaults in Ambac policies generally.[45] Accordingly, it was certainly one of OCI's goals to avoid all contractual triggers or as many as possible. (*See* Confirmation Order at 19, ¶54) ("OCI sought an approach that would address up to 40 years of potential policy liabilities ***in a manner that would not trigger covenants and cause defaults in the thousands of Ambac policies….***") (emphasis added). Whether the Commissioner specifically considered MHPI Projects' policies is irrelevant to the intent behind or the effect of the rehabilitation.

It is also irrelevant that a number of other policies with alleged default triggers have expired. It cannot be disputed that the MHPI Projects' policies – as well as many others -

[45] The appellants make much of the fact that the Commissioner acknowledged that it "may" not have been possible to avoid all default triggers. (Op. Br., pp. 15-16). But they continue to mischaracterize the Commissioner's testimony; at hearing in 2010, the Commissioner was explaining it would be difficult to craft an effective injunction if <u>all</u> Ambac policies were subject to rehabilitation. As a result, the Commissioner chose to limit the rehabilitation to the Segregated Account in order to avoid triggering defaults in those policies allocated to the General Account.

are still in place. Misrepresentations like the ones MHPI Projects made here, therefore, pose a threat to the claims paying resources of the General Account; the only disagreement would be the magnitude of the threat. But, again, this is irrelevant to the issue of how the Rehabilitation was structured and the effects thereof. Policies allocated to the Segregated Account were intended to be protected by the injunction and those left in the General Account were, effectively, protected by the way in which the Rehabilitation was structured. The Rehabilitation Court's order made that clear. It should be affirmed.

V. CONCLUSION

For the foregoing reasons, the Rehabilitator respectfully requests that this Court affirm the Rehabilitation Court's Order in its entirely.

Dated this 14th day of February, 2017.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Response Brief conforms to the Rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This Response Brief contains 7,716 words, as counted by our word processor.

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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

I have submitted an electronic copy of this Response Brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic Response Brief is identical in content and format to the printed form of the Response Brief.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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